IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S137 of 2011

BETWEEN:

JIHAD MAHMUD
Applicant

and

THE QUEEN
Respondent

HIGH COURT OF AUSTRALIA
FILED
23 MAY 2011
THE REGISTRY SYDNEY

WRITTEN SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

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Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Basis of Intervention

2. The Attorney-General for the State of South Australia intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Respondent.

Part III: Why leave to intervene should be granted

3. Not applicable.

Part IV: Constitutional and legislative provisions

4. The Attorney-General for the State of South Australia accepts the Applicant's statement of applicable constitutional provisions, statutes and regulations.

Part V: Submissions

5. In summary, South Australia contends:

   i. Properly construed Division 1A of Part 4 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the Act") provides a further yardstick to sentencing judges to which they are to have regard in determining the appropriate non-parole period for an offence in relation to which there exists a standard non-parole period.

   ii Division 1A Part 4 of the Act could be validly enacted by the Commonwealth Parliament. It follows, therefore, that a challenge on *Kable*[1] grounds cannot succeed.

   South Australia makes no submission as to the appropriateness of the sentence imposed either at first instance or by the Court of Criminal Appeal.

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1 *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51.

The Construction of the Impugned Legislation

The mischief addressed

6. Before an assessment can be made of the constitutional validity of Division 1A of Part 4 of the Act, it is necessary to understand its operation and effect.

7. Division 1A of Part 4 of the Act was inserted by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW). Upon coming into operation that Division and related amendments were to apply to offences committed on or after 1 February 2003.

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8. In his second reading speech the New South Wales Attorney-General indicated that the intention was to implement a new sentencing scheme to provide guidance and structure in the exercise by judges of the sentencing discretion, thereby promoting consistency, transparency, and public understanding of the sentencing process.[2] The means by which this was to be achieved was through the introduction of standard non-parole periods for certain offences, those non-parole periods representing the non-parole period for an offence in the middle of the range of objective seriousness.[3] The Attorney-General also stated that the intention was not to introduce mandatory sentencing but was to preserve judicial discretion so as to adequately cater for the
20 individualized circumstances of each case.[4]

Setting a non-parole period for an offence in relation to which there exists a standard non parole period

9. Section 44 of the Act was also amended. The amendment had the effect of implementing a different process to the determination of the appropriate sentence in a given case. Where its predecessor required that the head sentence be fixed first, s44(1) as amended now required that a sentencing judge first fix the non-parole period.[5]

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2 Parliament of New South Wales, Legislative Assembly, *Hansard*, 23 October 2002 at 5813.
3 Parliament of New South Wales, Legislative Assembly, *Hansard*, 23 October 2002 at 5817; *Crimes (Sentencing Procedure) Act 1999* (NSW), s54A(2).
4 Parliament of New South Wales, Legislative Assembly, *Hansard*, 23 October 2002 at 5813.
5 Parliament of New South Wales, Legislative Assembly, *Hansard*, 23 October 2002 at 5816; *Crimes (Sentencing Procedure) Act 1999* (NSW), s44(1).

10. In this case neither the sentencing judge nor the Court of Criminal Appeal imposed an aggregate sentence.[6] Consequently they were obliged to impose a separate sentence (including a separate non-parole period) in relation to each offence.[7]

11. Section 44(1) refers to the non-parole period as "the minimum period for which the offender must be kept in detention in relation to the offence". That section must be read with ss3A and 5 of the Act. Together these sections accommodate the application of common law principles of sentencing.[8] Further the words contained in parentheses in s44(1) and quoted above resonate with the decisions of this Court in *Power v The Queen,*[9] *Deakin v The Queen*[10] and *Bugmy v The Queen*[11] as to the purpose of, and approach to the determination of, a non-parole period. *Prima facie* the principles identified in those decisions are therefore applicable.

12. Section 44(1) is subject to s54B. Section 54B(1) provides:

> This section applies when a court imposes a sentence of imprisonment for an offence, or an aggregate sentence of imprisonment with respect to one or more offences, set out in the Table to this Division.

"Sentence" is defined in s3 as "the penalty imposed for an offence" when used as a noun. It thus includes the non-parole period. In this case the offences to which the Applicant pleaded guilty were contained in s25(2) of the *Drug (Misuse and Trafficking) Act 1985* (NSW) and s51D(2) of the *Firearms Act 1996* (NSW). Both feature in the relevant Table. Thus Division 1A of Part 4 applied to the Applicant.

13. Section 54A(1) makes clear that for the purposes of Division 1A the Table sets out the standard non-parole periods for those offences that it lists. Here the offences to which the applicant pleaded guilty attract standard non-parole periods of 15 and 10 years respectively.

14. Section 54B(2) provides:

> When determining the sentence for the offence (not being an aggregate sentence), the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period.

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6 *Crimes (Sentencing Procedure) Act 1999* (NSW), s53A.
7 *Crimes (Sentencing Procedure) Act 1999* (NSW), s53(1).
8 In the same way as ss16A(1)&(2) of the *Crimes Act 1914* (Cth) do, as explained in *Hili v The Queen* [2010] HCA 45; (2010) 85 ALJR 195 at [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
9 *Power v The Queen* [1974] HCA 26; (1974) 131 CLR 623 at 628, 629 (Barwick CJ, Menzies, Stephen and Mason JJ);
10 *Deakin v The Queen* [1984] HCA 31; (1984) 58 ALJR 367.
11 *Bugmy v The Queen* [1990] HCA 18; (1990) 169 CLR 525 at 531 (Mason CJ and McHugh J), 536, 538 (Dawson, Toohey and Gaudron JJ).

The words "is to" convey a mandatory direction. That direction is qualified. It need not be complied with if the court "determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period". In fact, having regard to what the standard non-parole period represents, the direction is in effect not a direction to impose the standard non-parole period but a direction to impose the appropriate non-parole period having regard to the standard and what it represents.

15. As to what the standard non-parole period represents, s54A(2) provides:

> For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the middle of the range of objective seriousness for offences in the Table to this division.

16. The reference to a range of objective seriousness reflects an assumption grounded in ordinal proportionality.[12] That is, all examples of a particular offence can be arranged on a continuum according to their objective seriousness. The Act is silent as to what factors make up the objective seriousness of an offence.

17. Section 54B(3) provides:

> The reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are only those referred to in s21A.

Section 21A(1)(a), (b) and (c) provides that in determining the appropriate sentence for an offence a court is to have regard to the aggravating and mitigating factors therein identified, to the extent that they are relevant, and "any other objective or subjective factor that affects the relative seriousness of the offence".

18. Further, s21A(1) also provides that the matters referred to "are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law". Section 21A thus permits a sentencing court to take into account all relevant factors just as the common law does.[13]

19. It follows then that the standard non-parole period can never be automatically applicable to a given case as it does not account for subjective factors that affect the

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12 In the same way as a maximum penalty operates; *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357 at [30]-[31] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

13 Such conclusion was also reached by the NSW Court of Criminal Appeal in *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168 at [56]-[57] (The Court). As to what factors must be taken into account at common law see also *The Queen v Shrestha* [1991] HCA 26; (1991) 173 CLR 48 at 68-69 (Deane, Dawson and Toohey JJ).This supports the contention made at [11] herein that the Act accommodates the common law principles applicable to the determination of an appropriate non-parole period.

relative seriousness of an offence or other factors otherwise relevant. The minimum period for which an offender must be kept in detention in relation to an offence requires consideration of all relevant factors. Division 1A of Part 4 does not provide to the contrary and s21A permits as much.

20. The question then arises as to the work that the standard non-parole period does perform. The combination of the direction to first determine the appropriate non-parole period (s44(1)) and in doing so only depart from the standard non-parole period if there are reasons that demand the imposition of a longer or shorter non-parole period (s54B(2)), compels the sentencing court to have regard to the standard non-parole period and what it represents in the course of determining the appropriate non-parole period. This requires an understanding of what the standard non-parole period represents in order that the comparative exercise that it implicitly requires may be meaningfully undertaken.

> [76] Unless some understanding is reached as to what is a midrange offence, we are unable to see how any meaningful comparison can be made between the offence at hand, and the offence for which the standard non-parole period is prescribed. Difficult and imprecise it might be, but the reference point identified in s54A has to be kept in mind if the sentencing exercise is to comply with the legislative intention expressed in the Division.
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> [77] We do not however consider that the exercise which is required will differ, to any material extent, from that which has always been necessary in evaluating the objective seriousness of a subject offence. Judges are well accustomed to considering and stating that a particular case falls into the worst category, or into the category of offences at a lower level of objective seriousness: see *Ibbs v The Queen; Baumer v The Queen*, and *R v Moon*.
>
> [78] Such expressions are commonly seen, for example, in sentences for drug offenders, where the scale of the operation, and the role played by the offender as a courier, or warehouseman, or middle man, or principal, have been factors taken into account.
>
> [79] While it may not be the case that particular attention has been given to the precise process of reasoning involved in this kind of assessment, it would appear to us to depend upon a combination of sentencing experience, which is based upon the range of instances which go to make up cases of the relevant kind that come before the courts, combined with an understanding of the facts which are necessary elements of the offence, as well as those which are concerned with its consequences, and the reasons for its commission.[14] *(Footnotes omitted)*

In this way the standard non-parole period is a benchmark or yardstick having regard to which the appropriate non-parole period is to be determined. In this regard the Attorney-General was, with respect, correct in his contention that:

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[14] *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168 at [76]-[79] (The Court); See also *R v AJP* [2004] NSWCCA 434; (2004) 150 A Crim R 575 at [13] (Simpson J).

> The standard non-parole period provides a reference point or benchmark within the sentencing spectrum for offences that are above or below the middle of the range of objective seriousness for such an offence.[15]

21. No reason arises to construe s54B(2) as permitting a departure from the standard non-parole period only where "the objective seriousness of the individual offence is either lesser or greater than that of an offence in the middle range of seriousness".[16] Section 54B(2) and (3) do not restrict the sentencing court to having regard to only those factors in s21A relevant to an assessment of the objective seriousness of the particular offending. It does not require that a sentencing court engage in a two staged process.[17]

    21.1 That said the two staged process suggested by the Court of Criminal Appeal in *R v Way*[18] would not offend the instinctive synthesis approach to sentencing.[19] This is because at the first stage the court is not concerned with identifying the appropriate sentence by reference to objective factors subsequently to be adjusted having regard to subjective factors. Rather the court is merely determining whether or not there are reasons for not imposing the standard non-parole period. If there are reasons for not imposing the standard, the second stage is undertaken in a manner consistent with the approach of the instinctive synthesizer.

    21.2 South Australia contends, however, that once a sentencing court appreciates what the standard non-parole period represents, there is no need to undertake the first step as the outcome which it is intended to address is necessarily resolved in undertaking the second step. That is, sentencing in the normal way, having regard to the standard non-parole period and what it represents, will identify the reasons for not imposing the standard non-parole period. It is then a matter of ensuring that the court's remarks on sentencing reveal the reasons for departing from the standard non-parole period.[20]

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15 Parliament of New South Wales, Legislative Assembly, *Hansard*, 23 October 2002 at 5816.
16 *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168 at [66] (The Court).
17 Contra *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168 at [117]-[118] (The Court); *MLP v R* [2006] NSWCCA 271; 164 A Crim R 93.
18 *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168 at [117]-[122] (The Court).
19 *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357 at 374, [37], 375, [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ), 377-380, [51]-[56] (McHugh J); *Wong v The Queen* [2001] HCA 4; (2001) 207 CLR 584 at 611-612, [74]-[76] (Gaudron, Gummow and Hayne JJ); *AB v The Queen* [1999] HCA 46; (1999) 198 CLR 111 at 120-123, [13]-[19] (McHugh J), 156, [115] (Hayne J).
20 *Crimes (Sentencing Procedure) Act 1999* (NSW), s54B(4).

22. South Australia agrees with the respondent that the standard operates as a reference point in much the same way as the maximum penalty.[21] Just as the maximum penalty invites comparison between the current case and the worst possible case, and represents the seriousness with which Parliament treats such offending, so too do the standard non-parole periods invite comparison between an offence in the middle range of objective seriousness, and the current offence.

23. As a yardstick the relevance of the standard non-parole period extends beyond sentencing for offences that fall within the mid-range of objective seriousness.

> The reference point has, in this sense, an important role to play in ensuring consistency in sentencing. Because the standard non-parole period will be imposed, subject to s 21A, for matters within the mid range, it will act as a guide for cases that are outside the mid range.[22]

In this connection the yardstick works in the same manner as the use made of other sentences for similar offending. In this way consistency is promoted.[23]

24. Contrary to the Applicant's submission at [24], it does not follow that the offender is being sentenced contrary to the principle in *R v De Simoni*[24] by reference to a "phantom offence". In *R v De Simoni*, the Court considered the use that could be made of circumstances of aggravation warranting a conviction for a more serious offence. In that context, the Court held that an offender may not be punished for an offence of which they have not been convicted. That is not this case.

25. The approach to the determination of the appropriate non-parole period where an offence is one to which a standard non-parole period applies remains as identified by this Court in *Power v The Queen,*[25] *Deakin v The Queen*[26] and *Bugmy v The Queen*[27]

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21 Respondent's written submissions, *Muldrock v The Queen* S121 of 2011 at [6.12]. This accords with the NSW Court of Criminal Appeal's conclusion in *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168 at [50]-[53]. As to the use to be made of the maximum penalty see *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357 at [30]-[31] (Gleeson CJ, Gummow, Hayne and Callinan JJ); *Baumer v The Queen* [1988] HCA 67; (1988) 166 CLR 51 at 57 (Mason CJ, Wilson, Deane, Dawson and Gaudron JJ); *R v Tait & Barley* (1979) 46 FLR 356 at 398; 24 ALR 473 at 484 (Brennan, Deane and Gallop JJ).

22 *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168 at [123] (The Court).

23 *Hili v The Queen* [2010] HCA 45; (2010) 85 ALJR 195 at [54] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

24 *R v De Simoni* [1981] HCA 31; (1981) 147 CLR 383.

25 *Power v The Queen* [1974] HCA 26; (1974) 131 CLR 623 at 628, 629 (Barwick CJ, Menzies, Stephen and Mason JJ);

26 *Deakin v The Queen* [1984] HCA 31; (1984) 58 ALJR 367.

27 *Bugmy v The Queen* [1990] HCA 18; (1990) 169 CLR 525 at 531 (Mason CJ and McHugh J), 536, 538 (Dawson, Toohey and Gaudron JJ).

save that the court now has the benefit of a second yardstick.[28] The maximum sentence remains an important yardstick for fixing of the balance of the sentence.

26. In setting a non-parole period, the considerations which a sentencing judge will take into account will be the same as those applicable to the setting of a head sentence. However, the weight to be attached to those factors and the way in which they are relevant will differ due to the different purposes underpinning each function.[29]

Applicant's Argument as to Invalidity

27. The Applicant's argument appears to conflate the principles applicable in determining whether a law impermissibly usurps or interferes with the exercise of federal judicial power by a Ch III court and those encapsulated in what has become known as the *Kable* doctrine. Here Division 1A of Part 4 of the Act applies in relation to the sentencing by State courts of offenders who have committed State offences. In other words it concerns the exercise of the judicial power of New South Wales. It follows that the applicable constitutional principles are those relevant to the *Kable* doctrine.

28. That said:

> ... *Kable* took as a starting point the principles applicable by courts created by the Parliament under s71 and to the exercise by them of the judicial power of the Commonwealth under Ch III. If the law in question here had been a law of the Commonwealth and it would not have offended those principles, then an occasion for the application of *Kable* does not arise.[30]

29. Thus consideration of whether the impugned legislation could have been enacted by the Commonwealth Parliament is a useful starting point. If the legislation could have been validly enacted by the Commonwealth Parliament as applicable to the exercise of federal judicial power, it is unnecessary to consider the *Kable* doctrine.[31]

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28 There is nothing to suggest in Division 1A that the statutory maximum ceases to provide a reference point; *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168 at [53].

29 *Bugmy v The Queen* [1990] HCA 18; (1990) 169 CLR 525 at 531 (Mason CJ and McHugh J).

30 *HA Bacharach Pty Ltd v Queensland* [1998] HCA 54; (1998) 195 CLR 547 at [14] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

31 *HA Bacharach Pty Ltd v Queensland* [1998] HCA 54; (1998) 195 CLR 547 at [14] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Silbert v Director of Public Prosecutions (WA)* [2004] HCA 9; (2004) 217 CLR 181 at [10] (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ).

Impermissibly interfering with the exercise of federal judicial power

30. In *Chu Kheng Lim v Minister for Immigration*, Brennan, Deane and Dawson JJ said:

> The Constitution is structured upon, and incorporates, the doctrine of the separation of judicial from executive and legislative powers. Chapter III gives effect to that doctrine in so far as the vesting of judicial power is concerned. Its provisions constitute "an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested ...No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the Provisions of Chap. III". Thus it is well settled that the grants of legislative power contained in s 51 of the Constitution, which are expressly "subject to" the provisions of the Constitution as a whole, do no permit the conferral upon any organ of the Executive Government of any part of the judicial power of the Commonwealth. Nor do those grants of legislative power extend to the making of a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.[32] *(Footnotes omitted)*

31. An oft cited statement as to the content of judicial power is that contained in the judgment of Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd.*[33] His Honour said:

> Thus a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist. It is right, I think, to conclude from the cases on the subject that a power which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified.[34]

32. In *Chu Kheng Lim v Minister for Immigration*, Brennan, Deane and Dawson JJ noted:

> There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgement and punishment of criminal guilt under a law of the Commonwealth. That function appertains exclusively to and "could not be excluded from" the judicial power of the Commonwealth.[35] *(Footnotes omitted)*

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32 *Chu Kheng Lim v Minister for Immigration* [1992] HCA 64; (1992) 176 CLR 1 at 26-27 (Brennan, Deane and Dawson JJ).

33 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [1970] HCA 8; (1970) 123 CLR 361; See also *Fencott v Muller* [1983] HCA 12; (1983) 152 CLR 570 at 608 (Mason, Murphy, Brennan and Deane JJ); *Huddart Parker & Co Pty Ltd v Moorehead* [1909] HCA 36; (1909) 8 CLR 330 at 357 (Griffith CJ).

34 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [1970] HCA 8; (1970) 123 CLR 361 at 374-5.

35 *Chu Kheng Lim v Minister for Immigration* [1992] HCA 64; (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ); *Polyukhovich v The Commonwealth* [1991] HCA 32; (1991) 72 CLR

33. There are a variety of judicial formulations of the test to be applied in determining whether or not legislation usurps or impermissibly interferes with the exercise of judicial power. In *Thomas v Mowbray* it was said a law requiring a court "to depart to a significant degree from the methods and standards which have characterized judicial activities" would be invalid.[36] In *R v Humby ; Ex Parte Rooney* it was said legislation would be invalid if it "constituted a marked interference with the judicial process and circumscribed the judicial function and the discretions incidental to it".[37] And in *Chu Kheng Lim*, a law which requires or authorizes a court to "exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power" would be invalid.[38]

34. In *Nicholas* a more specific test was identified concerning legislation that modified the law of evidence and procedure. For Brennan CJ "[a] law that purports to direct the manner in which judicial power should be exercised is constitutionally invalid. However, a law which merely prescribes a court's practice or procedure does not direct the exercise of the judicial power in finding facts, applying law or exercising an available discretion".[39] This a law of evidence did not do. For Gummow J the essential question was whether the impugned provision was "such an interference with the governance of the trial and a distortion of its predominant characteristics as to involve the trial court in the determination of the criminal guilt of the accused other than by the exercise of the judicial power of the Commonwealth".[40] This would occur where the legislation deemed to exist or to have been proved any ultimate fact being an element of the offence.[41] For Gaudron J:

> In my view, consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair

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501 at 608-9 (Deane J); *Waterside Workers' Federation of Australia v J W Alexander Ltd* [1918] HCA 56; (1918) 25 CLR 434 at 444 (Griffith CJ).

36 *Thomas v Mowbray* [2007] HCA 33; (2007) 233 CLR 307 at [111] (Gummow and Crennan JJ), [600] (Callinan J), [651] (Heydon J).

37 *R v Humby; Ex parte Rooney* [1973] HCA 63; (1973) 129 CLR 231 at 250 (Mason J).

38 *Chu Kheng Lim v Minister for Immigration* [1992] HCA 64; (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ); *Nicholas v The Queen* [1998] HCA 9; (1998) 193 CLR 73 at [73] (Gaudron J).

39 *Nicholas v The Queen* [1998] HCA 9; (1998) 193 CLR 173 at [20] (Brennan CJ) (footnotes omitted).

40 *Nicholas v The Queen* [1998] HCA 9; (1998) 193 CLR 173 at [145] (Gummow J).

41 *Nicholas v The Queen* [1998] HCA 9; (1998) 193 CLR 173 at [156], [162] (Gummow J), [252] (Kirby J).

> trial according to law. It means, moreover, that a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute.[42]

35. It is clear that it would be invalid for a law of the Commonwealth to usurp the exercise of judicial power by prejudging the guilt of a particular individual. However, that is not to say that a law of the Commonwealth cannot influence or constrain the exercise of federal judicial power in the determination of the appropriate penalty upon guilt being established in the normal way:

> But to speak of judicial power in this context is to speak of the function of a court rather than the law which a court is to apply in the exercise of its function. Of course, legislation may amount to a usurpation of judicial power, particularly in a criminal case, if it prejudges an issue with respect to a particular individual and requires a court to exercise its function accordingly. It is upon this principle that bills of attainder may offend against the separation of judicial power. But a law of general application which seeks in some respect to govern the exercise of a jurisdiction which it confers does not trespass upon the judicial function.[43] *(Footnotes omitted)*

The Constitutional Validity of Division 1A, Part 4 of the *Crimes (Sentencing Procedure) Act 1999* (NSW)

36. For the reasons advanced above at [14]-[23] when a court turns to consider the imposition of a non-parole period in a case that attracts a standard non-parole period the relevant exercise of judicial power requires the court to take into account all relevant factors, including the standard non-parole period and what it represents, in determining the minimum period for which the offender must be kept in detention.[44]

37. In setting a non-parole period the considerations which a court will take into account will be the same as those applicable to the setting of the head sentence, however, the weight to be attached to these factors and the way in which they are relevant will differ due to the different purposes underpinning each function.[45]

38. In *R v Kear* Wells J described generally the function that is the exercise of judicial power in sentencing in the following terms:

> Where, then, do we stand? The sentencing judge is presented with a choice of purposes, a range of powers, and the duty to exercise the discretions reposed in him in a fair,

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42 *Nicholas v The Queen* [1998] HCA 9; (1998) 193 CLR 173 at [74] (Gaudron J).

43 *Leeth v The Commonwealth* [1992] HCA 29; (1992) 174 CLR 455 at 469-470 (Mason CJ, Dawson and McHugh JJ); *APLA Pty Ltd v Legal Services Commission (NSW)* [2005] HCA 44; (2005) 224 CLR 322 at [233] (Gummow J).

44 *Crimes (Sentencing Procedure) Act 1999* (NSW), s44(1).

45 *Bugmy v The Queen* [1990] HCA 18; (1990) 169 CLR 525 at 531 (Mason CJ and McHugh J).

> impartial, and judicial manner. He must not act arbitrarily, or in accordance with aims and precepts not countenanced by the law.
>
> He must first obtain a good grasp of the facts of the crime and of such details relating to the prisoner's history, character, and mentality as appear relevant and helpful. He must consider, where pertinent, pre-sentence, police, medical, psychiatric, and all other, reports tendered by defence or Crown. He must keep prominently before him the victim, the harm and pain suffered, the loss incurred. He must remember those affected by the victim's experiences. He must have regard to other potential victims and other potential criminals. He must weigh every relevant circumstance, and endeavour to reconcile purposes which, in certain circumstances, are not really reconcilable if taken to their ultimate conclusions in logic. He must bear in mind the interrelation of those purposes; imprisonment may not only deter, but help to reform; a sentence aimed at visiting retribution is likely also to deter; an order designed to rehabilitate may, in the right sort of case, protect the community better than one designed simply to deter or to visit retribution. He must, in short, protect the community by and through the orders he makes, as far as may be with justice to all and, where it can be extended, with mercy.[46]

39. Here the impugned Act does not interfere with the court's independent determination of the relevant facts nor the process by which those facts are discovered. It does not prescribe factors that must be taken into account irrespective of their relevance, nor what weight is to be given to relevant factors. It does not prescribe the penalty that must be imposed. It does not prohibit the court from applying the principles of proportionality, parity and totality.

40. That is not to concede that a law of the Commonwealth could not permissibly touch upon these matters. It is merely to highlight that the Act in question does not touch upon them at all. There is no "departure to a significant degree from the methods and standards which have characterized judicial activities"[47] nor any "marked interference with the judicial process ... and the discretions incidental to it".[48] And it cannot be said that there is any loss of impartiality or independence such that the court is required or authorized to act "in a manner which is inconsistent with the essential character of a court or with the nature of judicial power".[49]

41. The insertion of an additional yardstick does not have the consequence that a defendant is sentenced for something that he or she has not done, or on a basis that does not reflect what they have done. Further, it does not have the consequence that

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46 *R v Kear* (1977) 75 LSJS 311 at 314-5 (Wells J).

47 *Thomas v Mowbray* [2007] HCA 33; (2007) 233 CLR 307 at [111] (Gummow and Crennan JJ), [600] (Callinan J), [651] (Heydon J).

48 *R v Humby; Ex parte Rooney* [1973] HCA 63; (1973) 129 CLR 231 at 250 (Mason J).

49 *Chu Kheng Lim v Minister for Immigration* [1992] HCA 64; (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ); *Nicholas v The Queen* [1998] HCA 9; (1998) 193 CLR 73 at [73] (Gaudron J).

a defendant is sentenced on a basis at odds with who they in fact are.[50] The long established use of the maximum penalty set for an offence demonstrates as much.

42. Whilst the Act does require the court take into account the new yardstick, it does not direct the outcome of doing so. Further, the yardstick is of general application and thus does not prevent like cases being treated alike.[51]

43. It is open to the legislature to remove discretion and oblige a court to impose a particular penalty if a particular offence is committed. In *Fraser Henleins Pty Ltd v Cody*, Latham CJ said:

> It has never been suggested that the sphere of judicial power is invaded when Parliament provides for a maximum or minimum penalty for offences which are duly proved in courts of law.[52]

44. In *Palling v Corfield*,[53] the applicant argued that s49(2) of the *National Service Act 1951* (Cth) was invalid because it required a court to impose a mandatory term of imprisonment for seven days. The High Court rejected the argument. Barwick CJ said:

> It is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences which it creates. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose and, in my opinion, it may lay an unqualified duty on the court to impose that penalty. The exercise of the judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act. If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded: nor, in my opinion, is there any judicial power or discretion not to carry out the terms of the statute. Ordinarily the court with the duty of imposing punishment has a discretion as to the extent of the punishment to be imposed; and sometimes a discretion whether any punishment at all should be imposed. It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime. But whether or not such a discretion shall be given to the court in relation to a statutory offence is for the decision of the Parliament. It cannot be denied that there are circumstances which may warrant the imposition on the court of a duty to impose specific punishment. If Parliament chooses to deny the court such a discretion, and to impose such a duty, as I have mentioned the court must obey the statute in this respect assuming its validity in other respects. It is not, in my opinion, a breach of the Constitution not to confide any discretion to the court as to the penalty to be imposed.[54]

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50 *Polyukhovich v The Commonwealth* [1991] HCA 32; (1991) 172 CLR 501 at 704 (Gaudron J).

51 *Hili v The Queen* [2010] HCA 45; (2010) 85 ALJR 195 at [49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). Here there is no hint of discriminatory treatment; *Cameron v The Queen* [2002] HCA 6; (2002) 209 CLR 339 at [44] (McHugh J).

52 *Fraser Henleins Pty Ltd v Cody* [1945] HCA 49; (1945) 70 CLR 100 at 119-120 (Latham CJ).

53 *Palling v Corfield* [1970] HCA 53; (1970) 123 CLR 52.

54 *Palling v Corfield* [1970] HCA 53; (1970) 123 CLR 52 at 58 (Barwick CJ). Other members of the Court agreed on this point: at 64-64 (Menzies J); at 65 (Windeyer J); at 67 (Owen J); at

45. *A fortiori*, the impugned legislation, which retains a complex adjudicative function, and a broad sentencing discretion, but merely provides benchmark non-parole periods, could, contrary to the Applicant's submission at [30], have been enacted by Commonwealth Parliament and imposed in relation to federal judicial power.

46. Nothing that was said in *International Finance Trust Company Limited v NSW Crime Commission*[55] affects the correctness of *Palling v Corfield*. Indeed, in *International Finance Trust Company Limited v NSW Crime Commission*, French CJ provided that:

> The separation of legislative, executive and judicial powers reflected in the structure of Chs I, II and III of the Constitution does not prevent the Commonwealth Parliament from passing a law which has the effect of requiring a court exercising federal jurisdiction to make specified orders if certain conditions are met.[56]

47. Here the Act does not interfere with a court's independent determination of the sentence. The legislation does not prejudge or predetermine the sentence to be imposed on a particular individual. It is not, therefore, a Bill of Attainder.[57] Nor as stated does the Act prescribe the outcome of the exercise by the court of its discretion.[58] Section 54B(2) and the broad scope of s21A ensures that is not the case.

48. The Act requires the ascertainment of facts by the sentencing judge as to a number of matters, including the facts relevant to an assessment of the relative objective seriousness of the offence; the presence or absence of any aggravating factors listed in s21A(2); the presence or absence of any mitigating factors listed in s21A(3); and any other objective or subjective factor that affects the relative seriousness of the offence, or any matters that are required or permitted to be taken into account by the court under any Act or rule of law: s21A(1).

49. It is for the court to determine the seriousness of the offence and where on the continuum of seriousness the particular offending lies. It is for the court to determine the appropriate non-parole period having regard to all relevant factors including the

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68 (Walsh J); at 70 (Gibbs CJ). That reasoning was applied in *Wynbyne v Marshall* (1997) 177 NTR 11.

55 *International Finance Trust Company Limited v NSW Crime Commission* [2009] HCA 49; (2009) 240 CLR 319.

56 *International Finance Trust Company Limited v NSW Crime Commission* [2009] HCA 49; (2009) 240 CLR 319 at [49] (French CJ). See also *South Australia v Totani* [2010] HCA 39; (2010) 85 ALJR 19 at [71] (French CJ), [133] (Gummow J), [339] (Heydon J), [427] (Crennan and Bell JJ).

57 *Liyanage v The Queen* [1967] 1 AC 259.

58 *Leeth v Commonwealth* [1992] HCA 29; (1992) 174 CLR 455 at 469-470 (Mason CJ, Dawson and McHugh JJ).

standard non-parole period. The exercise of judicial power is not usurped nor impermissibly interfered with.

Division 1A of Part 4 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) does not offend the *Kable* doctrine

50. As Division 1A of Part 4 of the Act would be a valid law of the Commonwealth if enacted, there is no need to consider the application of the *Kable* doctrine. That said provisions imposing minimum or mandatory penalties have elsewhere been held not to offend the doctrine.[59]

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59 *R v Ironside* [2009] SASC 151; (2009) 104 SASR 54; *Lloyd v Snooks* [1999] TASSC 117; (1999) 9 Tas R 41.