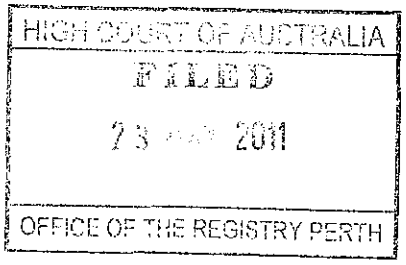
IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S137 OF 2011

BETWEEN:



10 **JIHAD MAHMUD** Applicant

AND

THE QUEEN Respondent

20

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Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Basis of intervention

2. The Attorney General for Western Australia intervenes in these proceedings 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: Applicable constitutional provisions, statutes and regulations

10 4. Western Australia adopts the table of relevant legislative provisions set out in the Applicant's submissions.

Part V: Submissions

5. Western Australia adopts the submissions of the Attorney General for New South Wales and makes the following supplementary submissions.

Contentions of the Attorney General for Western Australia

6. Western Australia contends that Division 1A of Part 4 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the CSP Act"):

(a) is a valid law of New South Wales which does not infringe the limitation on State legislative power identified in *Kable v. Director*
20 *of Public Prosecutions (NSW)*;[1] and

(b) is not in the nature of a bill of attainder or a bill of pains and penalties.

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[1] (1996) 189 CLR 51.

An examination of the principle in Kable

7. The limitation on State legislative power identified in *Kable*[2] finds its source in ss. 73 and 77(iii) of the Constitution, in the manner explained in *Forge v ASIC*.[3] That source, "founded on the text of the Constitution",[4] is the constitutional concept of a "Supreme Court" from which an appeal lies to this Court under s. 73 of the Constitution and a "court of a State" in which the Commonwealth Parliament may vest federal jurisdiction under s. 77(iii) of the Constitution. As the plurality noted in *Forge v. ASIC*:[5]

> "Because Ch III requires that there be a body fitting the description 'the Supreme Court of a State', it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description. ... the relevant principle is one which hinges upon maintenance of the defining characteristics of a 'court', or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to 'institutional integrity' alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies."

8. One of the defining characteristics of a court is that it be and appear to be an independent and impartial tribunal.[6] In relation to State courts other than Supreme Courts the principle was expressed in the following terms in *K-Generation Pty Ltd v Liquor Licensing Court*:[7]

> "However, consistently with Ch III, the States may not establish a 'court of a State' within the constitutional description and deprive it, whether when established or subsequently, of those minimum characteristics of the institutional independence and impartiality identified in the decisions of this Court."

9. Put another way, a provision may not alter the character of a State court in a manner inconsistent with the exercise of federal jurisdiction by authorising

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2 (1996) 189 CLR 51.

3 (2006) 228 CLR 45.

4 *Forge v. ASIC* (2006) 228 CLR 45 at 67 [41] per Gleeson CJ with whom Callinan J agreed at 136 [238].

5 (2006) 228 CLR 45 at 76 [63] per Gummow, Hayne and Crennan JJ; to similar effect see Gleeson CJ at 67 [41] (Callinan J concurring at 136 [238]).

6 *North Australian Aboriginal Legal Aid Service Inc v. Bradley* (2004) 218 CLR 146 at 163 [29] per McHugh, Gummow, Kirby, Callinan and Heydon JJ; *Forge v. ASIC* (2006) 228 CLR 45 at 76 [64] per Gummow, Hayne and Crennan JJ; *Gypsy Jokers Motorcycle Club Inc v. Commissioner of Police* (2008) 232 CLR 532 at 552-553 [10] per Gummow, Hayne, Heydon and Kiefel JJ; *International Finance Trust v. New South Wales Crime Commission* (2009) 240 CLR 319 at 55 [56] per French CJ; at 366-367 [97] per Gummow and Bell JJ; *South Australia v. Totani* (2010) 85 ALJR 19 at 44 [72] per French CJ; at 112 [428] per Crennan and Bell JJ.

7 (2009) 237 CLR 501 at 544 [153] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ (French CJ concurring at 532 [99]).

the State court to engage in activity which is repugnant to the judicial process in a fundamental degree.[8]

10. The impossibility of making an exhaustive statement of the minimum characteristics of an independent and impartial tribunal has been acknowledged.[9] It has also been held that the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes.[10] Minimum standards of judicial independence are not developed in a vacuum. They take account of considerations of history, and of the exigencies of government.[11]

10 11. A court will be deprived of its character as an independent and impartial tribunal if it is required to act at the behest of the executive by treating a decision of the executive as if it were a decision of the court. [12] In their joint judgment in *Gypsy Jokers Motorcycle Club Inc v. Commissioner of Police*[13] Gummow, Hayne, Heydon and Kiefel JJ said:

> "As a general proposition, it may be accepted that legislation which purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction would be apt impermissibly to impair the character of the courts as independent and impartial tribunals."

12. There is, however, a distinction between:

20 (a) a statutory provision which confers upon a court a power with a duty to exercise the power if the court decides that the conditions attached to the power are satisfied; and

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8 *International Finance Trust Co Ltd v. NSW Crime Commission* (2009) 240 CLR 319 at 367 [98] per Gummow and Bell JJ; at 378 [136] per Hayne, Crennan and Kiefel JJ; at 379 [140] per Heydon J (adopting the language of Gummow J in *Kable v. DPP* (1996) 189 CLR 51 at 132); to similar effect see French CJ at 354-355 [55]-[56].

9 *Forge v. ASIC* (2006) 228 CLR 45 at 76 [64] per Gummow, Hayne and Crennan JJ; *Gypsy Jokers Motorcycle Club Inc v. Commissioner of Police* (2008) 232 CLR 532 at 552 [10] per Gummow, Hayne, Heydon and Kiefel JJ.

10 *Fardon v. Attorney General (Qld)* (2004) 223 CLR 575 at 618 [104] per Gummow J; *South Australia v. Totani* (2010) 85 ALJR 19 at 42 [69] per French CJ; at 65 [207] per Hayne J.

11 *Forge v. ASIC* (2006) 228 CLR 45 at 68 [42] per Gummow, Hayne and Crennan JJ

12 See, for example, *Fardon v. Attorney General (Qld)* (2004) 223 CLR 575 at 655 [219] per Callinan and Heydon JJ; *Forge v. ASIC* (2006) 228 CLR 45 at 76 [63] per Gummow, Hayne and Crennan JJ; *Thomas v. Mowbray* (2007) 233 CLR 307 at 335 [30] per Gleeson CJ; at 508 [599] per Callinan J; at 526 [651] per Heydon J; *Gypsy Jokers Motorcycle Club Inc v. Commissioner of Police* (2008) 232 CLR 532 at 560 [39] per Gummow, Hayne, Heydon and Kiefel JJ; *International Finance Trust v. New South Wales Crime Commission* (2009) 240 CLR 319 at 355 [56] per French CJ; at 360 [77] and 366-367 [97]-[98] per Gummow and Bell JJ; *South Australia v. Totani* (2010) 85 ALJR 19 at 43-44 [71] per French CJ; at 54 [142] and 55 [149] per Gummow J; at 112 [428] and 114 [436] per Crennan and Bell JJ; at 121 [479] – [480] per Kiefel J.

13 (2008) 234 CLR 532 at 560 [39].

(b) a legislative direction to a court as to the manner and outcome of the exercise of the court's power.[14]

13. It is not uncommon for legislation to provide that, if in proceedings before a court specified matters are established, a particular consequence will follow or that a particular order must be made.[15] This may include provision for mandatory penalties or minimum penalties to be imposed by a court convicting an offender. Examples include:

(a) minimum mandatory penalties in Western Australia for assaulting a public officer;[16]

10 (b) a mandatory "additional penalty", equal to 10 times the prescribed value of fish which are the subject of certain fishing offences in Western Australia;[17]

(c) a minimum mandatory penalty of at least 12 months imprisonment for certain repeat burglary offences in Western Australia;[18]

(d) mandatory disqualification of the driver's licence of a person convicted of driving under the influence in Western Australia;[19]

(e) minimum mandatory penalties of imprisonment for certain offences concerning fire in a country areas in Victoria;[20]

(f) mandatory minimum terms of imprisonment and non-parole periods
20 for persons convicted of certain "people smuggling" and other migration offences.[21]

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14 *International Finance Trust v. New South Wales Crime Commission* (2009) 240 CLR 319 at 360 [77] per Gummow and Bell JJ; *Chu Kheng Lim v. Minister for Immigration* (1992) 176 CLR 1 at 36-37 per Brennan, Deane and Dawson JJ; at 53 per Gaudron J; *South Australia v. Totani* (2010) 85 ALJR 19 at 43-44 [71] per French CJ; at 52-53 [133] per Gummow J; at 94 [339] per Heydon J; at 110 [420] per Crennan and Bell JJ.

15 *Olbers Co Ltd v. The Commonwealth* 2004) 143 FCR 449 at 459 [29] per Black CJ, Emmett and Selway JJ. Special leave to appeal to the High Court was refused: *Olbers Co Ltd v. The Commonwealth* [2005] HCA Trans 228 (22 April 2005).

16 Section 318 of the *Criminal Code* (WA).

17 Section 222 of the *Fish Resources Management Act 1994* (WA).

18 Section 401(4) of the *Criminal Code* (WA).

19 Section 63 of the *Road Traffic Act 1974* (WA).

20 Sections 39A and 39C of the *Country Fire Authority Act 1958* (Vic).

21 Section 236B of the *Migration Act 1958* (Cth).

14. It has also been common for Australian statutes to provide for mandatory sentences of life imprisonment, and prescribed or minimum non-parole periods, for persons convicted of murder. At common law, death was the mandatory punishment for most felonies subject to the prisoner claiming the benefit of clergy.[22]

15. Consistently with the above legislative practice, it is within the competence of Parliament to impose a duty that deprives the Courts of a range of discretionary powers that would otherwise be available.[23]

16. The question to be addressed in considering whether Division 1A of Part 4 of the CSP Act infringes the *Kable* principle is whether the activity of setting a non-parole period in the manner required by that Division so alters the character of the sentencing Court and, in the case of the Court of Appeal, the Supreme Court that they would cease to meet the constitutional description of a "court of a State".[24]

Sentencing and the judicial process

17. The imposition of a penalty consequent upon a conviction of an offender for an offence through the sentencing process is a judicial function.[25] In *Leeth v. Commonwealth*[26] Mason CJ, Dawson and McHugh JJ observed:

> "[t]he sentencing of offenders, including in modern times the fixing of minimum terms of imprisonment, is as clear an example of the exercise of judicial power as is possible."

18. It is a fundamental principle that a court must exercise the power to impose a sentence on a convicted offender in accordance with the judicial process.[27]

19. The starting point for the imposition of a sentence upon an offender is an examination of the applicable statutory provisions.[28] In particular, the

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22 *R v. Rear* [1965] 2 ALL ER 268 at 268 per Glyn-Jones J.

23 *Palling v. Corfield* (1970) 123 CLR 52 at 58 per Barwick CJ; at 68 per Walsh J.

24 This was the approach recently taken in *Kirk v. Industrial Relations Court of NSW* (2010) 239 CLR 531 at 580 [96] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

25 *South Australia v. Totani* (2010) 85 ALJR 19 at 46 [82] per French CJ; *Chu Kheng Lim v. Minister for Immigration* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ; *Nicholas v. The Queen* (1998) 193 CLR 173 at 186-187 [16] per Brennan CJ; *Palling v. Corfield* (1970) 123 CLR 52 at 58 per Barwick CJ.

26 (1992) 174 CLR 455 at 470.

27 *Leeth v. Commonwealth* (1992) 174 CLR 455 at 470 per Mason CJ, Dawson and McHugh JJ; and *Nicholas* v. *The Queen* (1998) 193 CLR 173 at 209 [73] per Gaudron J.

28 See *Fraser Henleins v. Cody* (1945) 70 CLR 100 at 119-120 per Latham CJ.

statutory penalty for the offence (including mandatory, minimum and maximum penalties) the sentencing principles to be applied and, where the court's order determines parole eligibility, the principles relating to parole (including parole eligibility and the imposition of non-parole periods).

20. In the ordinary course of events, a court has a discretion as to the extent of the punishment to be imposed on an offender. However, the discretion is not at large but is constrained by the statutory regime governing the sentencing process. In *Markarian v. The Queen*[29] the plurality acknowledged that:

> "Express legislative provisions apart, neither principle, nor any of the grounds of appellate review, dictates the particular path that a sentencer, passing sentence in a case *where the penalty is not fixed by statute*, must follow in reasoning as to the conclusion that the sentence to be imposed should be fixed as it is. The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence. And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies." (emphasis added)

The imposition of a non-parole period

21. In Australia there is a long history of the grant of parole of offenders involving an exercise of judicial, executive and legislative power in combination. A brief history of parole in each Australian jurisdiction is set out in Annexure "1" to these submissions. It can be seen from that overview that it is not uncommon for Parliament to prescribe what the non-parole period will be or provide for the proportion of the head sentence which the parole period must represent:

(a) In some cases it is left for the sentencing court to fix a non-parole period when sentencing a convicted offender to imprisonment, as currently occurs for federal offences under the *Crimes Act 1914* (Cth). In those cases the legislature may set limits on the exercise of the discretion to fix a non-parole period;[30]

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29 (2005) 228 CLR 357 at 371 [27] per Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ.

30 See, for example, s. 19AB of the *Crimes Act 1914* (Cth).

(b) In other cases the proportion of the term of imprisonment which must be served in custody may be prescribed by statute, as occurred in Western Australia prior to 1995;

(c) In almost all cases the determination of whether a person eligible for parole is in fact released from custody (and therefore the determination of the actual period of custody) is made by an exercise of executive authority, such as a decision of a parole board to grant or cancel parole; and

(d) The actual imposition of the penalty may be affected by executive decisions as to enforcement of the court orders imposing penalties and the exercise of the royal prerogative of mercy.

22. The imposition of a non-parole period by the sentencing judge forms part and parcel of the sentence imposed on a convicted offender. Whilst release on parole is a release from detention, it is clear that "[t]he sentence stands and during its term the prisoner is simply released upon conditional parole."[31] Parole does not interfere with or otherwise alter the head sentence imposed on the offender.

23. In determining a non-parole period, the court must decide the period which the offender must serve in prison as punishment for the offence for which he or she has been convicted.[32]

24. In *PNJ v. The Queen*[33] the applicant was convicted of murder which carried a mandatory sentence of life imprisonment. The mandatory minimum non-parole period was fixed by statute as a period of 20 years in the absence of "special reasons".[34] The mandatory minimum non-parole period prescribed represented the non-parole period for an offence "at the lower end of the

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31 *Power v. The Queen* (1974) 131 CLR 623 at 628 per Barwick CJ, Menzies, Stephen and Mason JJ.

32 *Hili v. The Queen* (2010) 85 ALJR 195 at 204 [41] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *PNJ v. The Queen* (2009) 83 ALJR 384 at 387 [11] per the Court; *Bugmy v. The Queen* (1990) 169 CLR 525 at 538 per Dawson, Toohey and Gaudron JJ.

33 (2009) 83 ALJR 384.

34 Section 32(5)(ab) and s. 32A(2)(b) of the *Criminal Law (Sentencing Act) 1988* (SA).

range of objective seriousness for offences to which the mandatory minimum non-parole period applies".[35] The Court stated:

> "It may greatly be doubted that the punishment imposed on an offender is sufficiently described by identifying only the term which the court fixes as the least period of actual incarceration that must be served. Rather, the punishment imposed on an offender will be better identified, at least for most purposes, as both the head sentence (here life imprisonment) and the non-parole period that is fixed, for it is always necessary to recognise that an offender may be required to serve the whole of the head sentence that is imposed."[36]

25. Whereas statutory maximum penalties imposed in relation to a particular offence reflect the seriousness with which the Parliament regards particular offences, statutory standard non–parole periods reflect Parliament's intention as to the minimum periods of actual imprisonment which are appropriate for the relevant offences.[37]

The exercise of judicial power, obedience to the statute and discretion

26. It is not antithetical to the exercise of judicial power for the Courts to obey the command of a statute in terms of the sanction to be imposed. Giving effect to the will of Parliament involves the exercise of judicial power. In *Nicholas v. The Queen*[38] the Court said:

> "It is for Parliament to prescribe the law to be applied by a court and, if the law is otherwise valid, the court's opinion as to the justice, propriety or utility of the law is immaterial. Integrity is the fidelity to legal duty, not a refusal to accept as binding a law which the court takes to be contrary to its opinion as to the proper balance to be struck between two competing interests. To hold that a court's opinion as to the effect of a law on the public perception of the court is a criterion of the constitutional validity of the law would be to assert an uncontrolled and uncontrollable power of judicial veto over the exercise of legislative power. It is the faithful adherence of the courts to the laws enacted by the Parliament, however undesirable the courts may think them to be, which is the guarantee of public confidence in the integrity of the judicial process and the protection of the courts' repute as the administrator of criminal justice."

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35 Section 32A(1) of the *Criminal Law (Sentencing Act) 1988* (SA).
36 (2009) 83 ALJR 384 at 387 [11].
37 *R v. Way* (2004) 60 NSWLR 168 at 182 [53] per the Court.
38 (1998) 193 CLR 173 at 197 [37] per Brennan CJ.

27. In *Palling v. Corfield*[39] this Court held valid a Commonwealth provision imposing a mandatory penalty of imprisonment for a person convicted of a conscription offence. Barwick CJ stated that it was "beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences which it creates" and that "[i]f the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded".[40] Other members of the Court took a similar view.[41] The Applicant now seeks leave to challenge the correctness of the decision in *Palling v. Corfield* (1970) 123 CLR 52.[42]

10 28. The Applicant has not addressed any of the four matters referred to in *John v. Federal Commissioner of Taxation*[43] which might justify this Court in reviewing and departing from the decision in *Palling v. Corfield.*[44] Accordingly, the Applicant should not be granted leave to challenge the correctness of that decision.[45]

29. In *Wynbyne v. Marshall*[46] the Supreme Court of the Northern Territory upheld the power of the legislature to require a court to impose a mandatory sentence.[47] For the court to impose on an offender "the only sentence that the law permits cannot be an abuse of process".[48] However, if a mandatory penalty is intended then the legislation must be clear and unambiguous.[49]

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39 (1970) 123 CLR 52 at 58.
40 (1970) 123 CLR 52 at 58.
41 (1970) 123 CLR 52 at 62-63 per McTiernan J; at 64-65 per Menzies J; at 67 per Owen J; at 68-69 per Walsh J.
42 Paragraph 46 of the Applicant's submissions.
43 (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ. See also *Evda Nominees Pty Ltd v. Victoria* (1984) 154 CLR 311 at 316 per Gibbs CJ, Mason, Murphy, Wilson, Brennan and Dawson JJ and *Jones v. The Commonwealth* (1987) 61 ALJR 348 at 349 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.
44 (1970) 123 CLR 52.
45 *Puttick v. Tenon Pty Ltd* (2008) 238 CLR 265 at 278 -281[35]-[42] per Heydon and Crennan JJ.
46 (1997) 117 NTLR 97.
47 (1997) 117 NTLR 97 at 99-100 per Martin CJ. Special leave to appeal to the High Court was refused: *Wynbyne v. Marshall* [1998] HCA Trans 191 (21 May 1998).
48 *PNJ v. The Queen* (2009) 83 ALJR 384 at 389 [22] per the Court.
49 *Sillery v. The Queen* (1981) 180 CLR 353 at 355 per Gibbs CJ (Aickin J agreeing); at 360 per Murphy J.

30. Similarly, provisions for the mandatory confiscation or forfeiture of property under the *Customs Act 1901* (Cth)[50] and the *Fisheries Management Act 1991* (Cth)[51] have been upheld as valid.

31. If a statutory provision does remove a court's discretion then it merely imposes a limit on the Court's power.[52] Provisions requiring the imposition of mandatory penalties or minimum mandatory penalties, and which limit or remove entirely the capacity of a sentencing court to determine when a person becomes eligible for parole, have a long history and are not incompatible with the defining characteristics of a court.

10 ***Division 1A of Part 4 of the CSP Act does not contravene the Kable principle***

32. The first step in the making of an assessment of the validity of any given law is one of statutory construction and a construction is to be selected which would avoid rather than lead to a conclusion of constitutional invalidity.[53]

33. On no view of the construction of the Division 1A of Part 4 of the CSP Act does that Division offend the *Kable* principle. In particular:

(a) the task of imposing a sentence rests with the court;

(b) whilst Parliament has identified the considerations relevant to sentence, including aggravating and mitigating factors, it is for the court to decide whether those circumstances exist and how they are
20 to be weighed in the balance; and

(c) the court retains a wide discretion in fixing the non-parole period, notwithstanding that a standard non-parole period is prescribed in the CSP Act.

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50 *Burton v. Honan* (1952) 86 CLR 169. See also *Silbert v. DPP* (2004) 217 CLR 181 at 186-187 [12]-[13] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

51 *Olbers Co Ltd v. The Commonwealth* (2004) 143 FCR 449 at 459 [29] per Black CJ, Emmett and Selway JJ. See also *Olbers Co Ltd v. Commonwealth (No.4)* (2004) 136 FCR 67 at 92-93 [89]-[92] per French J.

52 *Director of Public Prosecutions (WA) v. Hafner* (2004) 28 WAR 486 at 492 [34] per Pullin J.

53 *Gypsy Jokers Motorcycle Club Inc v. Commissioner of Police* (2008) 234 CLR 532 at 553 [11] per Gummow, Hayne, Heydon and Kiefel JJ; *K-Generation Pty Ltd v. Liquor Licensing Court* (2009) 231 CLR 501 at 519 [46] per French CJ citing *Federal Commissioner of Taxation v. Munro* (1926) 38 CLR 153 at 180.

34. In *Hili v. The Queen*[54] the plurality concluded that there neither is, nor should be, a *judicially determined* norm or starting point (whether expressed as a percentage of the head sentence, or otherwise) for the period of imprisonment that a federal offender should actually serve in prison before release on a recognisance release order. However, this may be distinguished from the present case in which the standard non-parole period to be served is prescribed by a statute conferring a discretion on the sentencing judge to impose a non-parole period that is longer or shorter than the prescribed standard non-parole period.

35. Equal justice has been said to require identity of outcome in identical cases and different outcomes in different cases.[55] In *Wong v. The Queen*[56] Gaudron, Gummow and Hayne JJ were of the view that the publication of guidelines by the Court of Appeal absent a statutory power to do so masked the task of identifying the relevant differences. However, by way of contrast s. 54B(2) of the CSP Act promotes equal justice by giving the sentencing judge a discretion to impose a non-parole period which is longer or shorter than the prescribed standard non-parole period for the reasons set out in s. 21A of the CSP Act (reasons which allow for the identification of differences in cases). Accordingly, Division 1A of Part 4 of the CSP Act cannot be impugned on the basis that there is no equality of justice.

36. Each Australian jurisdiction has legislation relating to the sentencing of offenders and, in particular, the parole of offenders. There is nothing unusual in requiring a court to determine an offender's eligibility for parole or to set a minimum non-parole period for a particular offender even in circumstances where the executive bears the ultimate responsibility for deciding whether in fact the offender will be released from detention on parole or by way of the exercise of the royal prerogative of mercy. That is not incompatible with the maintenance of the independence and integrity of the court's processes.

37. Division 1A of Part 4 of the CSP Act does not operate to remove from a court the judicial function of punishing an offender who has been convicted

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54 (2010) 85 ALJR 195 at 205 [44].

55 *Wong v. The Queen* (2001) 207 CLR 584 at 608 [65] per Gaudron, Gummow and Hayne JJ. See also *Leeth v. Commonwealth* (1992) 174 CLR 455 at 502 per Gaudron J.

56 (2001) 207 CLR 584 at 608 [65] per Gaudron, Gummow and Hayne JJ.

of committing an offence or offences set out in the Table to that Division. It is the sentencing judge who must select the punishment for the offender and, if the offender is to be imprisoned, it is the sentencing judge who must determine the non-parole period to which the offender is to be subject.

38. The Court is required to act judicially and it is not a mere instrument of executive policy in performing these tasks. The integrity of the Court is not impaired. The Court still retains those defining characteristics which mark a court apart from other decision-making bodies.

39. In *R v. Way*[57] the New South Wales Court of Criminal Appeal held that when sentencing an offender for an offence identified in the Table to Division 1A of Part 4 of the CSP Act, a sentencing judge must ask and answer the question "are there reasons for not imposing the standard non-parole period?" The Court added that the question would be answered by considering two matters. First, the objective seriousness of the offence (so as to determine whether it answers the description of one that falls into the mid-range of seriousness for an offence of the relevant kind). Secondly, the matters referred to in s. 21A(1)-(3) of the CSP Act[58] which are outlined in paragraph 33 above.

40. Division 1A of Part 4 of the CSP Act simply calls for an exercise of discretionary judgment within a wider context of legislative prescription.[59] The task conferred on the sentencing judge by that Division involves "the ascertainment of facts as they are and as they bear on the right or liability in issue and the identification of the applicable law, followed by an application of that law to those facts."[60]

41. This Court has never expressed reservations about the power of Parliaments to provide for a mandatory or maximum penalty for offences in relation to which a person is convicted.[61] Nor has this Court expressed reservations

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57 (2004) 60 NSWLR 168 at 191 [117]. Special leave to appeal to the High Court was refused: *Way v. The Queen* [2005] HCA Trans 147 (11 March 2005).

58 (2004) 60 NSWLR 168 at 191 [118].

59 *Leach v. The Queen* (2007) 230 CLR 1 at 11 [18] per Gleeson CJ.

60 *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 496 per Gaudron J.

61 See, for example, *Leach v. The Queen* (2007) 230 CLR 1; *Palling v. Corfield* (1970) 123 CLR 52 at 58 per Barwick CJ, at 64-65 per Menzies J; at 67 per Owen J; at 68 per Walsh J; *Fraser Henleins v. Cody* (1945) 70 CLR 100 at 119-120 per Latham CJ.

about the determination by the courts of minimum non-parole periods for convicted offenders.[62]

42. If the Legislature itself may validly determine what the penalty and non-parole period can be, then it must also be able to take the lesser step of confining the discretion given to the court in imposing a penalty and setting a non-parole period.

Bill of Attainder and Bill of Pains and Penalties

43. Division 1A of Part 4 of the CSP Act is not in the nature of "a legislative enactment which inflicts punishment without a judicial trial."[63] This is because that Division does not operate independently of a judicial determination of criminal liability.[64] In particular, s. 54B of the CSP Act applies only when a court is imposing a sentence of imprisonment for an offence or offences in relation to which a person has been convicted in or by a Court.[65]

Dated the 23rd day of May 2011.

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62 See, for example, *Hili v. The Queen* (2010) 85 ALJR 195; *PNJ v. The Queen* (2009) 83 ALJR 384; *Baker v. The Queen* (2004) 223 CLR 513; *Leeth v. The Commonwealth* (1992) 174 CLR 455; *Power v. The Queen* (1974) 131 CLR 623.

63 *Polyukovich v. The Commonwealth* (1990) 172 CLR 501 at 535 per Mason CJ.

64 See also *International Finance Trust v. New South Wales Crime Commission* (2009) 240 CLR 319 at 367 [99] per Gummow and Bell JJ (French CJ agreeing at 356 [60]); and 389 [167] per Hayne, Crennan and Kiefel JJ.

65 Section 54B(1) of the CSP Act.