IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M162 of 2018

BETWEEN:

**CRAIG WILLIAM JOHN MINOGUE**
Plaintiff

and

10

**STATE OF VICTORIA**
Respondent

# ANNOTATED SUBMISSIONS OF THE STATE OF VICTORIA




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| Filed on behalf of: | Attorney-General for the State of Victoria |
| Prepared by: | |
| Marlo Baragwanath | DX 300077 |
| Victorian Government Solicitor | Tel No: (03) 8684 0444 |
| Level 25, 121 Exhibition Street | Fax No: (03) 8684 0449 |
| Melbourne VIC 3000 | Direct tel: (03) 8684 0257 |
| | Contact: Anesti Petridis (1855204) |

## PART I: CERTIFICATION

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

## PART II: ISSUES

2. The threshold issue in this proceeding is whether s 74AB and, if it arises for decision, s 74AAA of the *Corrections Act 1986* (Vic) (the **Act**) have the effect, as the Plaintiff contends, of extending the minimum term of imprisonment before the Plaintiff is eligible for parole and of imposing on the Plaintiff additional or different punishment to the punishment imposed by the Supreme Court of Victoria at the time of sentencing. That issue is raised as the basic premise of at least three of the four grounds on which the Plaintiff seeks to impugn the validity of the provisions. The Defendant (the **State**) contends that the decisions of this Court in *Crump v New South Wales*[1] and *Knight v Victoria*[2] compel the conclusion that s 74AB and, if it arises for decision, s 74AAA did not alter the Plaintiff's sentence or impose additional punishment, but "merely altered the conditions to be met before the plaintiff could be released on parole".[3] The State further contends that those decisions should not be re-opened.

3. Alternatively, if the Court were to conclude that the substantive operation and practical effect of s 74AB and, if it arises for decision, s 74AAA are to alter the minimum term imposed by the Plaintiff's sentence and impose additional punishment, the State's contentions on the remaining issues raised by the Plaintiff are as follows:

   3.1. First, the Victorian Parliament can validly exercise State judicial power of that nature.

   3.2. Secondly, the legislative power of the Victorian Parliament is not constrained by reference to the prohibition on the imposition of punishment or treatment of the kind in Art 7 of the *International Covenant on Civil and Political Rights* (the **ICCPR**) or the *Bill of Rights 1688*.[4] It is therefore not necessary to determine whether ss 74AB and 74AAA impose punishment that is "cruel, inhuman or degrading" or "cruel and unusual" in nature.

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1 (2012) 247 CLR 1 (***Crump***).

2 (2017) 261 CLR 306 (***Knight***).

3 *Crump* (2012) 247 CLR 1 at 29 [72] (Heydon J); see also at 26-27 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

4 1 William and Mary ss. II c. II (***Bill of Rights***), as applied by the *Imperial Acts Application Act 1980* (Vic).

3.3. Thirdly, the proposition that the rule of law is an assumption on which the *Constitution* is based does not mean that any precept that could be described as an aspect of the rule of law is a constitutional implication capable of operating as a substantive restriction on legislative power. In any event, the particular aspects of the rule of law on which the Plaintiff relies would not result in the invalidity of ss 74AB and 74AAA.

3.4. Fourthly, ss 74AB and 74AAA would not be rendered invalid by reason of s 118 of the *Constitution* because that section requires only that the judicial proceedings of one State be given full faith and credit in each other State.

10 3.5. Fifthly, the validity of s 74AAA does not arise for decision because its application to the Plaintiff depends on, amongst other things, the Parole Board being satisfied of matters about which it has not made, nor been asked to make, a decision: **SCB 27 [18.3(c)]**; and because s 74AB is valid, and it is therefore unnecessary to determine the validity of s 74AAA. However, if the validity of s 74AAA arises for decision, it is valid for the same reasons as s 74AB. For simplicity, these submissions address both provisions.

## PART III: SECTION 78B NOTICES

4. The Plaintiff has given notice under s 78B of the *Judiciary Act 1903* (Cth). The State does not consider that any further notice is required.

20 ## PART IV: MATERIAL FACTS

5. The material facts are set out in the Special Case. In addition to the facts summarised in the Plaintiff's Submissions at paragraphs 9-17, the following additional facts stated in the Special Case should be noted:

5.1. On 6 February 2017, at the Plaintiff's request, the Board determined to take no further action in relation to the parole application submitted by the Plaintiff on 3 October 2016, pending the determination of proceeding No M2 of 2017 in this Court, *Minogue v Victoria*: **SCB 43 [17], 45 [25]**.

5.2. On 14 December 2018, the Plaintiff requested that the Board keep the parole application made by him on 3 October 2016 on hold pending the determination of
30 these proceedings: **SCB 49 [33]**.

5.3. As at the date of the Special Case: the Parole Suitability Assessment requested by the Board on 20 October 2016 has not been completed; the Board has not been asked to make, and has not made, any determination as to whether it is satisfied of the matters set out in s 74AAA(1)(c); and the Board has not asked the Secretary to prepare a report on the matters in ss 74AAA(5)(a) or 74AB(3)(a): **SCB 49 [35]**.

## PART V: ARGUMENT

### A. The Plaintiff's submissions are inconsistent with previous authority

6. The Plaintiff's submissions cannot be reconciled with this Court's decisions in *Crump* and *Knight*. The legislative provisions the subject of challenge in those cases were relevantly identical to ss 74AB and 74AAA of the Act.[5] The provision in issue in *Crump* applied to the "small population" of prisoners who were "serious offenders the subject of non-release recommendations".[6] The legislation in issue in *Knight* applied to one named prisoner, Mr Julian Knight.[7]

7. In *Crump*, the plaintiff contended that the relevant provision was invalid because it had the effect of varying or otherwise altering a judgment, decree, order or sentence of the Supreme Court of New South Wales in a "matter" within the meaning of s 73 of the *Constitution*.[8] In *Knight*, one of the plaintiff's contentions was that the relevant provision interfered with the sentence imposed on him in a manner that was contrary to Ch III of the *Constitution*.[9] In each case, the plaintiff's challenge failed.

8. The Court held in both *Crump* and *Knight* that the section in issue did not, in its "legal form [or] in its substantial practical operation", interfere with, set aside, alter or vary the sentence imposed by the Supreme Court.[10] Several premises underlay those holdings:

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5 Section 74AB of the Act was modelled on the provision upheld in *Knight*: see Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 25 July 2018, 3277; the provision upheld in *Knight* was modelled on the provision upheld in *Crump*: *Knight* (2017) 261 CLR 306 at 321 [19] (the Court).

6 *Crump* (2012) 247 CLR 1 at 19 [34] (French CJ) and 25 [54] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), reciting s 154A of the *Crimes (Administration of Sentences) Act 1999* (NSW).

7 *Knight* (2017) 261 CLR 306 at 320-321 [18] (the Court), reciting s 74AA of the Act. The Court held that the fact that s 74AA of the Act had "an operation more specific than s 154A of the [*Crimes (Administration of Sentences) Act 1999* (NSW) was] a distinction without a difference": at 323 [25].

8 *Crump* (2012) 247 CLR 1 at 30 (Question 1 of the Special Case); see also at 18 [32] (French CJ) and 25-26 [56] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

9 *Knight* (2017) 261 CLR 306 at 317 [5], 322 [23] (the Court) and 326 (Question (a) of the Special Case).

10 *Knight* (2017) 261 CLR 306 at 317 [6]; see also at 323 [25] (the Court); *Crump* (2012) 247 CLR 1 at 26-27 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

8.1. The sentencing, or re-sentencing, of a prisoner involves an exercise of judicial power.[11] Upon passing that sentence, the judicial power is exhausted.[12]

8.2. The time at which a prisoner will become eligible for release on parole is not a part of the sentencing, or re-sentencing, determination made by the Court, but is rather a consequence of that determination.[13] In other words, the fixing of a minimum term as part of a sentencing determination says nothing about whether or not a prisoner will be released on parole at the expiration of that minimum term.[14] Rather, the fixing of a minimum term constitutes "a factum by reference to which the parole system ... operate[s]".[15]

10 8.3. In general terms, once a prisoner has been sentenced, the responsibility for the future of that prisoner passes to the executive branch of the State.[16]

8.4. Both the statutory scheme and the administrative policies and practices applicable to the exercise by a parole authority of the executive function of determining whether to release a prisoner on parole may validly change from time to time.[17]

8.5. By imposing "strict limiting conditions upon the exercise of the executive power to release" the plaintiffs in *Crump* and *Knight*, the provisions in issue "may be said to have altered a statutory consequence" of their sentences, but "did not alter [their] legal effect".[18]

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11 *Crump* (2012) 247 CLR 1 at 16 [27] (French CJ) and 21 [41]-[42] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

12 *Crump* (2012) 247 CLR 1 at 21 [41] and 26 [58] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), quoting respectively *Baker v The Queen* (2004) 223 CLR 513 (***Baker***) at 528 [29] (McHugh, Gummow, Hayne and Heydon JJ) and *Elliott v The Queen* (2007) 234 CLR 38 (***Elliott***) at 41-42 [5] (the Court).

13 *Crump* (2012) 247 CLR 1 at 12 [14], and more generally at 20 [37] (French CJ), referring to *R v Shrestha* (1991) 173 CLR 48 at 72-73 (Deane, Dawson and Toohey JJ). See also *Knight* (2017) 261 CLR 306 at 323 [28] (the Court).

14 *Knight* (2017) 261 CLR 306 at 323 [27] (the Court).

15 *Crump* (2012) 247 CLR 1 at 26 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), referring to *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 378 (Kitto J) and *Baker* (2004) 223 CLR 513 at 532 [43] (McHugh, Gummow, Hayne and Heydon JJ).

16 *Crump* (2012) 247 CLR 1 at 17 [28] (French CJ), referring to *Elliott* (2007) 234 CLR 38 at 42 [5] (the Court).

17 *Crump* (2012) 247 CLR 1 at 17 [28], 19 [36] (French CJ), 26 [59] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) and 29 [71]-[72] (Heydon J). See also *Baker* (2004) 223 CLR 513 at 520 [7] (Gleeson CJ); *Minogue v Victoria* (2018) 92 ALJR 668 (***Minogue***) at 675 [20] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ) and 687 [107] (Gordon J).

18 *Crump* (2012) 247 CLR 1 at 19 [35] (French CJ), see also at 19 [36] (French CJ), 26-27 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) and 29 [72], [74] (Heydon J). See more generally *Knight* (2017) 261 CLR 306 at 323-324 [28]-[29] (the Court).

9. Despite the Plaintiff's submission that he "accept[s] the central premise of the decisions in both *Crump* and *Knight*, namely that provisions in the form of ss 74AAA and 74AB do not directly alter or interfere with the sentence of imprisonment",[19] at least three of the four grounds of invalidity advanced by the Plaintiff proceed on the premise that the substantive operation and practical effect of the provisions is to alter the sentence imposed on him by the Supreme Court by legislatively imposing punishment that is additional, in quantitative and qualitative terms, to that imposed by the Court.[20]

10. That premise is directly inconsistent with the Court's conclusions in *Crump* and *Knight*.[21] It is not to the point that the arguments raised by the Plaintiff are put in different terms to the arguments raised in *Crump* and *Knight*.[22] In law and in substance, ss 74AB and 74AAA of the Act, like the provisions in issue in *Crump* and *Knight*, do "nothing to contradict the minimum term that was fixed", do not make the Plaintiff's sentence "'more punitive or burdensome to liberty'", do "not replace a judicial judgment with a legislative judgment" and, indeed, do "not intersect at all with the exercise of judicial power that has occurred".[23]

## B. *Crump* and *Knight* should not be re-opened

11. If the Court considers that the decisions in *Crump* and *Knight* stand in the way of acceptance of the Plaintiff's arguments, the Plaintiff seeks leave to reopen those decisions. The State respectfully submits that the "strongly conservative cautionary principle" against overruling earlier decisions has not been displaced in the present case.[24]

12. First, contrary to the Plaintiff's submissions, *Crump* and *Knight* rested on principles "carefully worked out" in a number of cases.[25] Since at least *Power v The Queen*,[26] this

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19 Plaintiff's Submissions, paragraph 65.

20 See generally Plaintiff's Submissions, paragraphs 4, 5(a), 25, 33-34, 38-39, 41-42, 46, 55, 64.

21 *Knight* (2017) 261 CLR 306 at 317 [6] and 323 [25] (the Court); see also *Crump* (2012) 247 CLR 1 at 18-19 [34], 20 [38] (French CJ), 26-27 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) and 28 [70]-[71] (Heydon J).

22 Compare Plaintiff's Submissions, paragraph 66.

23 *Knight* (2017) 261 CLR 306 at 323-324 [29] (the Court) (references omitted).

24 *Attwells v Jackson Lalic Lawyers Pty Limited* (2016) 259 CLR 1 at 19 [28] (French CJ, Kiefel, Bell, Gageler and Keane JJ), endorsing *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 352 [70] (French CJ); see also *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 (***John***) at 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

25 *John* (1989) 166 CLR 417 at 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

Court has recognised what French CJ later termed the "clear distinction between the judicial function exercised by a judge in sentencing, and the administrative function exercised by a parole authority".[27] Since at least *Baker*, this Court has accepted that legislation altering the circumstances in which the executive may exercise its powers of mercy (including by way of release on licence or parole) with respect to a prisoner after that prisoner has been sentenced will "in no sense (whether as a matter of substance or as a matter of form) … make that sentence … more punitive or burdensome to liberty".[28] Both propositions were central to the Court's reasoning in *Crump* and *Knight*.[29]

13. Secondly, there were no material "difference[s] between the reasons of the justices constituting the majority"[30] in *Crump*: the three judgments reached the same conclusion for very similar reasons. In *Knight*, the Court delivered a unanimous judgment, in which it declined to reopen and overrule *Crump*.[31]

14. Thirdly, it cannot be said that the "decisions ha[ve] achieved no useful result".[32] The decisions respect the legislative competence of State Parliaments to make "special, and different, provision" for the "exceptional cases" where prisoners have committed crimes so heinous that Parliament has adjudged it appropriate to impose restrictive conditions on their eligibility for parole.[33]

15. Fourthly, the decisions have been "independently acted on in a manner which militat[es] against reconsideration".[34] In 2018, the Western Australian Parliament passed the *Sentence Administration Amendment (Multiple Murderers) Act 2018* (WA). In the debate accompanying the passage of the Bill for that Act, the Attorney-General relied on *Crump*

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26 (1974) 131 CLR 623 at 627, where Barwick CJ, Menzies, Stephen and Mason JJ described the separation of the functions of the trial judge and the parole board as "a clearly expressed policy of the legislation".

27 *Crump* (2012) 247 CLR 1 at 16 [28] (French CJ); and see, for example, *Bugmy v The Queen* (1990) 169 CLR 525 (***Bugmy***) at 534 and 536 (Dawson, Toohey and Gaudron JJ); *Leeth v The Commonwealth* (1992) 174 CLR 455 at 471-472, 476 (Brennan J) and 490-491 (Deane and Toohey JJ, dissenting); *Baker* (2004) 223 CLR 513 at 528 [29] (McHugh, Gummow, Hayne and Heydon JJ); *Elliott* (2007) 234 CLR 38 at 41-42 [5] (the Court). See more generally Ian Callinan AC, *Review of the Parole System in Victoria* (2013) 22: "the power to grant parole is and has always been regarded as an Executive function".

28 *Baker* (2004) 223 CLR 513 at 528 [29] (McHugh, Gummow, Hayne and Heydon JJ).

29 See *Crump* (2012) 247 CLR 1 at 12 [14], 16-17 [27]-[29], 18-20 [34]-[37] (French CJ), 26-27 [58]-[60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) and 28-30 [70]-[72], [74] (Heydon J); *Knight* (2017) 261 CLR 306 at 317 [6] and 323-324 [25], [27]-[29] (the Court).

30 *John* (1989) 166 CLR 417 at 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

31 *Knight* (2017) 261 CLR 306 at 322-323 [24]-[25] (the Court).

32 *John* (1989) 166 CLR 417 at 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

33 *Baker* (2004) 223 CLR 513 at 521 [8] (Gleeson CJ).

34 *John* (1989) 166 CLR 417 at 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

and *Knight* in support of the validity of the proposed Act.[35] In addition, both *Crump* and *Knight* have been invoked in the reasoning of State Supreme Courts and Courts of Appeal[36] and have been cited with approval by this Court.[37]

## C. Exercise of judicial power by a State Parliament

16. The Plaintiff's primary submission is that the enactment of ss 74AB and 74AAA of the Act constitutes an impermissible exercise by the Victorian Parliament of the judicial power to impose punishment consequent on a finding of criminal guilt. Although the submission is put in slightly different terms to the submissions rejected in *Crump* and *Knight*,[38] the Plaintiff's submission is no different in substance. As noted above, the
10 underlying premise is that the provisions have altered the sentence imposed by the Supreme Court. For the reasons given in paragraphs 6-10 above, that premise is inconsistent with *Crump* and *Knight* and is erroneous. The enactment of ss 74AB and 74AAA did not involve the imposition of punishment or an exercise of judicial power.

No legislative extension of the minimum term

17. This Court has consistently recognised that the parole system is subject to legislative and administrative change from time to time.[39] Perhaps for that reason, the Plaintiff's contention appears to be that the conditions imposed by ss 74AB and 74AAA are so

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35 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 November 2018, 7868, 7873.

36 As to *Crump*, see, for example, *R v SCZ* [2018] QCA 81 at [36] fn 13 (Davis J, Morrison and Philippides JJA agreeing); *Defrutos v The Queen* [2016] VSCA 241 at [16] fn 10 (the Court); *Jacka v Australian Capital Territory* (2014) 180 ACTR 207 at 215 [55]-[56] (Gilmour J, Penfold J and Walmsley AJ agreeing); *Attorney-General v Lawrence* [2014] 2 Qd R 504 at 525 [29] (the Court); *Lodhi v Attorney-General (NSW)* (2013) 241 A Crim R 477 at 490 [63] (Basten JA, Bathurst CJ and Beazley P agreeing); *Lewis v Department of Justice* (2013) 280 FLR 118 at 159 [245], 181-182 [380]-[392] (Refshauge ACJ). As to *Knight*, see, for example, *R v Devries* [2018] SASCFC 101 at [13] fn 3 (Hinton J, dissenting); *R v Peet* [2018] SASCFC 91 at [70] fn 11 (the Court); *R v Yavuz* (2018) 130 SASR 231 at 254 [101] fn 32 (the Court); *R v Williams* [2018] SASCFC 14 at [67] fn 36 (Hinton J, Blue and Stanley JJ agreeing).

37 As to *Crump*, see, for example, *Minogue* (2018) 92 ALJR 668 at 674 [17], 675 [20], 676 [26] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ) and 687 [107] (Gordon J); *Re Day (No 2)* (2017) 91 ALJR 518 at 529 [54] (Kiefel CJ, Bell and Edelman JJ) and 547 [192] (Keane J); *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1 at 40 [110] (Gordon J); *Pollentine v Bleijie* (2014) 253 CLR 629 at 656 [71] (Gageler J). As to *Knight*, see *Minogue* (2018) 92 ALJR 668 at 674 [17], 676 [26] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ) and 686 [104] (Gordon J).

38 In that the Plaintiff submits that the substantive operation or practical effect of the provisions is to extend the minimum term which was fixed by the Supreme Court and to transform the qualitative nature of the sentence imposed into one of cruel, inhuman or degrading treatment or punishment.

39 *Baker* (2004) 223 CLR 513 at 520 [7] (Gleeson CJ); *Crump* (2012) 247 CLR 1 at 16-17 [28], 19 [36], 20 [37] (French CJ), 26 [59]-[60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) and 28-29 [70]-[72] (Heydon J); *Minogue* (2018) 92 ALJR 668 at 675 [20] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ) and 687 [107] (Gordon J).

stringent that they must be regarded, as a matter of substance, not as provisions that impose conditions for a grant of parole, but as directed to the Plaintiff's underlying eligibility for parole "before the executive power of the Board to release him on parole is enlivened".[40] The Plaintiff thus uses the concept of "eligibility" for parole to refer to the expiry of the minimum term.

18. In support of that submission, the Plaintiff relies on the observation made by the plurality in *Minogue* that the consequence of the application of the provisions in question in that proceeding "is effectively to deny [the Plaintiff] an opportunity for parole".[41] That observation was made in the context of the application, to s 74AAA of the Act, of the principle of construction stated in *Smith v Corrective Services Commission (NSW)* that statutes affecting a person's liberty should be strictly construed.[42] There is no doubt that s 74AAA, as it stood then and as it is now in force, affects the liberty of those to whom it applies. However, that is because s 74AAA affects the conditions that must be satisfied before a grant of parole may be made. Their Honours' observation in *Minogue* is properly understood as a statement about the effect of s 74AAA on the opportunity for the Plaintiff to be released on parole, not about the Plaintiff's eligibility for parole.

19. The Plaintiff also relies on certain extrinsic materials in support of the proposition that the purpose of the provisions is to render the Plaintiff ineligible for parole.[43] However, the identification of statutory purpose is arrived at by the ordinary process of statutory construction.[44] That process must begin with the statutory text, having regard to its context and purpose.[45] It is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction.[46]

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40 Plaintiff's Submissions, paragraph 38.

41 Plaintiff's Submissions, paragraph 34, referring to *Minogue* (2018) 92 ALJR 668 at 678 [47] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

42 (1980) 147 CLR 134 at 139 (the Court).

43 Plaintiff's Submissions, paragraphs 35-36.

44 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), referring to *Monis v The Queen* (2013) 249 CLR 92 at 147 [125] (Hayne J) and 205 [317] (Crennan, Kiefel and Bell JJ).

45 See, for example, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71] (McHugh, Gummow, Kirby and Hayne JJ).

46 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 265 [33] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

20. Both ss 74AAA(5) and 74AB(3) are expressed in terms that state conditions, of which the Parole Board must be satisfied, before the Board may make an order for parole under ss 74 or 78. The Board's power to grant parole is enlivened by the expiration of the minimum term: see ss 74(1) and 78(1); but that power is constrained by ss 74AAA(3) and 74AB(1) (which preclude the Board from granting parole unless an application has been made by or on behalf of the Plaintiff under those sections) and by the conditions stated in ss 74AAA(5) and 74AB(3). Neither section is expressed in terms that purport to alter the minimum term of imprisonment imposed as part of the Plaintiff's sentence or to affect his eligibility for parole.

10 21. The purpose of the provisions that is evident from their text – to impose conditions applicable to the grant of parole – is confirmed by the express statement of statutory purpose in s 1 of the *Corrections Amendment (Parole) Act 2018* (Vic) (the **Amending Act**), which substituted s 74AAA and introduced s 74AB into the Act. Section 1 provides that the purpose of the Amending Act is to amend the Act "in relation to the conditions for making a parole order for certain prisoners convicted of the murder of a police officer, including the prisoner Craig Minogue". Contrary to paragraph 35 of the Plaintiff's Submissions, statements as to legislative intention made by Ministers in Parliament, in explanatory memoranda or, as in this case, in statements of compatibility, cannot displace the clear meaning of the statutory text and that express statement of
20 purpose.[47]

No increase in the burden of the Plaintiff's sentence

22. Further, contrary to the Plaintiff's submissions, the legislative alteration of the conditions that must be satisfied before a grant of parole can be made does not alter the "qualitative nature" of the Plaintiff's sentence.[48] It may be accepted, as the Plaintiff contends,[49] that the fixing of a minimum term by a court forms part of the sentence, and therefore part of the punishment, imposed on an offender in the exercise of judicial power. However, as this Court stated in *PNJ v The Queen*, the punishment imposed on an offender is not sufficiently described by identifying only the minimum term fixed by the court, "for it is

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47 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 264-265 [31] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); see also *Unions NSW v New South Wales* (2019) 93 ALJR 166 at 184 [79] (Gageler J).

48 Plaintiff's Submissions, paragraphs 39-41.

49 Plaintiff's Submissions, paragraphs 19 and 21.

always necessary to recognise that an offender may be required to serve the whole of the head sentence that is imposed".[50]

23. The sentence imposed on the Plaintiff was, and remains, one of life imprisonment.[51] The fixing of the minimum term "said nothing about whether or not [the Plaintiff] would be released on parole at the expiration of that minimum term".[52] It was "not the function of [the minimum term] to give the [P]laintiff a prospect of release of any particular magnitude".[53] Accordingly, by making it more difficult for the Plaintiff to obtain a parole order after the expiration of the minimum term, the provisions do not make the sentence of life imprisonment "more punitive or burdensome to liberty".[54]

10 24. Further, given that the power to release a prisoner on parole is conferred by the Act and that a prisoner has no right or entitlement to release on parole at the expiry of the minimum term,[55] the legislative restriction of the conditions that must be satisfied before that power may be exercised, even to the point of abolition of the power,[56] does not involve the imposition of additional punishment.[57] As discussed further in paragraphs 30-34 below, whether or not it is apt to describe the Plaintiff's imprisonment as "cruel, inhuman or degrading" does not alter the analysis.

The Victorian Parliament can validly exercise judicial power

25. It is therefore unnecessary to address the constitutional issues raised by the remaining propositions involved in the Plaintiff's primary submission.[58] Nevertheless, even if
20 ss 74AB and 74AAA were regarded as a form of legislative punishment, the Plaintiff's submission rests on two further propositions: first, that the imposition of punishment

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50 (2009) 83 ALJR 384 at 387 [11] (the Court), referred to with approval in *Minogue* (2018) 92 ALJR 668 at 674 [17] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

51 *Bugmy* (1990) 169 CLR 525 at 537 (Dawson, Toohey and Gaudron JJ).

52 *Knight* (2017) 261 CLR 306 at 323 [27] (the Court).

53 *Crump* (2012) 247 CLR 1 at 29 [73] (Heydon J).

54 *Baker* (2004) 223 CLR 513 at 528 [29] (McHugh, Gummow, Hayne and Heydon JJ), referred to with approval in *Knight* (2017) 261 CLR 306 at 324 [29] (the Court).

55 *Crump* (2012) 247 CLR 1 at 26-27 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Knight* (2017) 261 CLR 306 at 323 [27] (the Court); *Minogue* (2018) 92 ALJR 668 at 674 [17] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

56 *Crump* (2012) 247 CLR 1 at 19 [36] (French CJ).

57 Compare *Duncan v New South Wales* (2015) 255 CLR 388 at 407 [41], 409-410 [49]-[50] (the Court).

58 Compare *Crump* (2012) 247 CLR 1 at 18 [34] (French CJ); *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159 at 171 [28] (McHugh, Gummow, Hayne and Heydon JJ); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 473-474 [250]-[252] (Gummow and Hayne JJ); *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 (Dixon CJ); *Attorney-General (NSW) v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 590 (Higgins J).

consequent on a finding of criminal guilt is an exclusively judicial function; and secondly, that the Victorian Parliament cannot validly exercise judicial power because such an exercise would be incapable of supervision by the Supreme Court of Victoria, and by this Court in the course of an appeal pursuant to s 73 of the *Constitution*, and would therefore stand outside the integrated judicial system created by Ch III of the *Constitution*.

26. The first of those propositions is authoritatively established by *Chu Kheng Lim v Minister for Immigration.*[59] However, even if the enactment of ss 74AB and 74AAA were regarded as an exercise of judicial power by the Victorian Parliament, the provisions would nonetheless be valid. The exercise of State judicial power by a State Parliament is not, without more, contrary to Ch III of the *Constitution.*

27. As this Court has consistently held, there is no separation of powers at the State level.[60] The second proposition for which the Plaintiff contends would, however, entrench a separation of judicial power at the State level as complete and as rigid as that which obtains at the federal level. There is no foundation for such a radical departure from settled constitutional doctrine.

28. The Plaintiff's contention relies on the "integrated national court system"[61] and the place of this Court at the apex of that system, exercising the appellate jurisdiction conferred by s 73 of the *Constitution*. The exercise of State judicial power is integrated into that system by s 73 only to the extent that s 73 secures the appellate jurisdiction of this Court to hear appeals from the "judgments, decrees, orders and sentences" of State Supreme Courts. The positive prescription of appellate jurisdiction in s 73 does not entail a corresponding negative prescription that State judicial power can only be exercised by State Supreme Courts or other State courts which are subject to the supervision of a State Supreme Court. Contrary to the Plaintiff's submission, the exercise of judicial power by a State Parliament would not "create islands of power immune from supervision and

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59 (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ); see also *Duncan v New South Wales* (2015) 255 CLR 388 at 407 [41] (the Court).

60 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (***Kable***) at 66-68 (Brennan CJ), 80-81 (Dawson J), 92-94 (Toohey J), 103-104 (Gaudron J), 109-110 (McHugh J) and 137 (Gummow J); *Mann v Carnell* (1999) 201 CLR 1 at 26 [78] (McHugh J); *Wainohu v New South Wales* (2011) 243 CLR 181 at 212 [52] (French CJ and Kiefel J); *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 (***Condon***) at 90 [125] (Hayne, Crennan, Kiefel and Bell JJ).

61 See, for example, *Kable* (1996) 189 CLR 51 at 138 (Gummow J); see also *Rizeq v Western Australia* (2017) 262 CLR 1 at 12 [5] (Kiefel CJ) and 22 [49] (Bell, Gageler, Keane, Nettle and Gordon JJ).

restraint".[62] The High Court's position at the apex of the integrated national court system is relevantly recognised by its ability to review State legislation for constitutional validity.

29. Nor does *Kirk*,[63] on which the Plaintiff relies, require such a conclusion. *Kirk* was concerned with the maintenance of a defining characteristic of State Supreme Courts, namely the supervisory jurisdiction over inferior courts and tribunals as "the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power".[64] An exercise of judicial power by a State Parliament would not, of itself, deprive the Supreme Court or other State courts of a defining characteristic. One reason why that is so is that State Parliaments have the recognised ability to exercise powers which, if exercised by a court, would be characterised as judicial in nature.[65] The principle which protects the institutional integrity of State Supreme Courts as a suitable repository of federal jurisdiction, as applied in *Kirk*, does not imply into the Constitutions of the States the separation of judicial power mandated by Ch III of the Commonwealth *Constitution*.[66]

## D. Cruel, inhuman or degrading treatment or punishment

30. The Plaintiff's second ground depends on several propositions: first, that ss 74AB and 74AAA of the Act "have the effect of converting the Plaintiff's imprisonment into detention that amounts to 'cruel, inhuman and degrading treatment or punishment' …"; secondly, that the Supreme Court, "as a court capable of exercising federal jurisdiction, [cannot] validly be authorised or required to impose a sentence" of that kind; and thirdly, that the Parliament cannot "do indirectly what the Court could not do directly".[67]

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62 *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531 (***Kirk***) at 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

63 (2010) 239 CLR 531.

64 (2010) 239 CLR 531 at 580-581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

65 See, for example, *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 167 (the Court), discussing the power of State Parliaments to punish for contempt; *Kable* (1996) 189 CLR 51 at 64 (Brennan CJ), referring to private Acts of Parliament; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 175-176 [15] (Gleeson CJ), referring to the statutory power of the Queensland and South Australian Parliaments to wind up particular companies; *PGA v The Queen* (2012) 245 CLR 355 at 378 [47] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), referring to private legislation for the dissolution of marriage.

66 *Condon* (2013) 252 CLR 38 at 89-90 [124]-[125] (Hayne, Crennan, Kiefel and Bell JJ); *Pollentine v Bleijie* (2014) 253 CLR 629 at 649 [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

67 Plaintiff's Submissions, paragraphs 55-56.

31. The first of those propositions is based on the same premise as the Plaintiff's first ground: that ss 74AB and 74AAA alter the Plaintiff's sentence and involve legislative punishment. For the reasons given in paragraphs 6-10 above, the provisions do no more than alter the conditions applicable to a grant of parole in favour of the Plaintiff. Consequently, it is unnecessary to consider whether restricting the grant of parole to the circumstances stated in ss 74AB and 74AAA constitutes "cruel, inhuman or degrading treatment or punishment" within the meaning of Art 7 of the ICCPR or the 10th article of the *Bill of Rights 1688*, nor the larger constitutional consequences that are said by the Plaintiff to flow from that.[68]

10 32. In any event, whether a legislative provision may be accurately characterised as imposing "cruel, inhuman or degrading" treatment or punishment has no constitutional significance. The Plaintiff's second proposition attempts to give that concept constitutional significance by invoking the "institutional integrity" principle. The submission is misconceived. Sections 74AB and 74AAA are not directed to the Supreme Court or to any other Victorian court. They do not require or authorise the Supreme Court to impose a sentence that is cruel, inhuman or degrading. It is unnecessary and inappropriate to seek to determine a hypothetical question of constitutional validity, even more so as a step in the reasoning toward a much larger proposition.

33. The larger proposition, being the third proposition referred to in paragraph 30 above,
20 does not logically follow: in short, the Plaintiff submits that what a State court cannot do, a State Parliament cannot do. However, the constitutional role of a State Parliament is, of course, fundamentally different from the role of a State court. The exercise of legislative power by a State Parliament, even if it might constitute an exercise of judicial power, is not equivalent to the exercise of judicial power by a State court and not constrained in the same ways. The enactment of ss 74AB and 74AAA is therefore not a "circuitous device" of the kind referred by Dixon J in the *Bank Nationalisation Case*, designed to enable the Parliament to do indirectly what it could not do directly.[69]

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68 See the authorities referred to in fn 58 above.

69 Plaintiff's Submissions, paragraph 56, referring to *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349 (Dixon J). There is, in any event, no principle that Parliament can never do indirectly what it cannot do directly. The true principle is that "it is not permissible to do indirectly what is prohibited directly": *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516 at 522 (Mason CJ, Gaudron and McHugh JJ); *Re Pacific Coal; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 360 [29] (Gleeson CJ).

34. Subject to the *Constitution*, State Parliaments have a power to legislate that "is as ample and plenary as the power possessed by the Imperial Parliament itself".[70] State legislative power is not constrained by Art 7 or any other of the human rights set out in the ICCPR,[71] unless and until incorporated into Australian law, or by the provisions of the *Bill of Rights 1688* (which, as applied in Victoria by ss 3 and 8 of the *Imperial Acts Application Act 1980* (Vic), is an ordinary statute susceptible to implied amendment by a later Act).[72] In particular, in relation to legislative power over the parole system, as French CJ said in *Crump*, "[t]he power of the executive government of a State to order a prisoner's release on licence or parole or in the exercise of the prerogative may be broadened or constrained or even abolished by the legislature of the State".[73] Indeed, until the introduction of s 18A of the *Penalties and Sentences Act 1985* (Vic), the legislature provided for a mandatory sentence of life imprisonment for murder, with no provision for a minimum term.[74] Release on licence was entirely a matter for the executive Government in the exercise of the prerogative of mercy.[75]

## E. The rule of law

35. The Plaintiff's arguments that ss 74AB and 74AAA are inconsistent with the rule of law, and are therefore constitutionally infirm, should be rejected. The rule of law does not, in and of itself, operate as a limitation on State legislative power. Even if it did, a constitutional implication based on the rule of law would not result in the invalidity of the provisions.

36. In respect of the first point, the Plaintiff's submissions elide constitutional assumptions with constitutional implications: to say that the rule of law is an assumption on which the *Constitution* was framed does not mean that it is an implication that limits legislative

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70 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10 (the Court); *Duncan v New South Wales* (2015) 255 CLR 388 at 406 [37] (the Court).

71 *Tajjour v New South Wales* (2014) 254 CLR 508 at 554 [48] (French CJ), 567 [96]-[98] (Hayne J) and 606 [249] (Keane J), rejecting a submission that the ICCPR operates as a constraint on the power of a State to enact contrary legislation.

72 See also *Living Word Outreach Inc v Deputy Sheriff of Victoria* [2014] VSC 454 at [49]-[51] (McMillan J); *Waddington v Victoria* [2018] VSC 746 at [32]-[34] (McDonald J).

73 *Crump* (2012) 247 CLR 1 at 19 [36] (French CJ).

74 *Bugmy* (1990) 169 CLR 525 at 526-527 (Mason CJ and McHugh J).

75 *Bugmy* (1990) 169 CLR 525 at 534 (Dawson, Toohey and Gaudron JJ).

power. As explained by Mason CJ in *Australian Capital Television Pty Ltd v The Commonwealth*, there is a:[76]

> ... critical difference between an implication and an unexpressed assumption upon which the framers proceeded in drafting the Constitution. The former is a term or concept which inheres in the instrument and as such operates as part of the instrument, whereas an assumption stands outside the instrument.

37. It is uncontroversial that "the rule of law forms an assumption" on which the *Constitution* was framed.[77] It is also uncontroversial that some aspects of the rule of law are given "practical effect" by Ch III of the *Constitution*,[78] including through the principle, accepted as axiomatic in Australia,[79] of judicial review of the constitutional validity of legislation and through the "entrenched minimum provision of judicial review" of Commonwealth executive action under s 75(v) of the *Constitution*.[80] By reason of Ch III of the *Constitution*, some aspects of the rule of law may also be said to have been given effect at the State level.[81]

38. The statement of Dixon J regarding the rule of law in *Australian Communist Party v The Commonwealth* conveyed no more than that the Commonwealth's incidental power in s 51(xxxix) of the *Constitution* could not be construed to authorise a law which made the conclusion of the legislature "the measure of the operation of its own power."[82] As Callinan J observed in *Western Australia v Ward*, Dixon J's statement "meant no more than that the Parliament could not decide the limits of its constitutional power. ... Fairly

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76 (1992) 177 CLR 106 (***ACTV***) at 135 (Mason CJ), referring to *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 81 (Dixon J). See also *McGinty v Western Australia* (1996) 186 CLR 140 at 231-232 (McHugh J): "Underlying or overarching doctrines may explain or illuminate the meaning of the text or structure of the Constitution but such doctrines are not independent sources of the powers, authorities, immunities and obligations conferred by the Constitution."

77 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 (Dixon J).

78 See, for example, *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 (***APLA***) at 351-352 [30] (Gleeson CJ and Heydon J); *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [61] (Gummow and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1 at 62-63 [131] (Gummow J), 91 [233] (Hayne J) and 156 [423] (Crennan and Bell JJ); *Momcilovic v The Queen* (2011) 245 CLR 1 at 224 [593] (Crennan and Kiefel JJ).

79 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 262-263 (Fullagar J); *New South Wales v Kable* (2013) 252 CLR 118 at 137-138 [50] (Gageler J).

80 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513-514 [103]-[104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), see also at 482 [5] (Gleeson CJ); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 95 [126] (Gageler J); *Graham v Minister for Immigration and Border Protection* (2017) 91 ALJR 890 (***Graham***) at 901-902 [40]-[44] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

81 See, for example, *Kable* (1996) 189 CLR 51 at 111 (McHugh J) and 139 (Gummow J); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne and Crennan JJ); *Kirk* (2010) 239 CLR 531 at 580-581 [98]-[99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

82 (1951) 83 CLR 1 at 193 (Dixon J).

interpreted, it provides no support for the notion that judges are empowered to strike down legislation on the basis that it infringes some unwritten aspect of the rule of law".[83]

39. Furthermore, the rule of law could not be recognised as a constitutional implication, such that it has "immediate normative operation" as a limitation on State legislative power.[84]

39.1. As demonstrated by the Plaintiff's submissions, one immediate difficulty is that of "identify[ing], with reasonable precision, the suggested implication".[85] That is unsurprising: the content of the rule of law has been variously described as "protean",[86] "ill-defined and contentious",[87] and "hotly disputed".[88]

39.2. The Plaintiff appears to rely on one or both of Raz's account of "thin" rule of law, and Lord Bingham's eight "sub-rules", without specifying which aspects of those accounts, and which formulations of those aspects, would be operative.[89]

39.3. Even if the "intractable" debate as to the content of the rule of law could be resolved,[90] the Plaintiff has not identified any basis in the terms or structure of the *Constitution* for an implication of the kind contemplated.[91] Assuming that any implication could be said to derive from the structure of the *Constitution*, before the implication could limit State legislative power the implication must be shown to be, "as a matter of logical or practical necessity, implicit in the federal structure within which State Parliaments legislate".[92]

Each of those matters stands in the way of recognising the rule of law as a constitutional implication that operates as a substantive limitation on State legislative power.

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83 (2002) 213 CLR 1 at 392 [963] fn 1091.

84 *Re Minister for Immigration; Ex parte Lam* (2003) 214 CLR 1 at 23 [72] (McHugh and Gummow JJ).

85 Compare *APLA* (2005) 224 CLR 322 at 352 [32] (Gleeson CJ and Heydon J).

86 See, for example, Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (2017) 5; Justice John Basten, "Human Rights and the Rule of Law" (2009) 11 *Newcastle Law Review* 31, 33. See also Kenneth Hayne AC QC, "The Rule of Law", in Cheryl Saunders and Adrienne Stone, *The Oxford Handbook of the Australian Constitution* (2018), at 167-168: "No single definition or description of the notion of 'the rule of law' is now seen as commanding general acceptance."

87 Jeffrey Goldsworthy, Foreword to *The Rule of Law and the Australian Constitution* (2017) v.

88 *Graham* (2017) 91 ALJR 890 at 909 [82] (Edelman J).

89 Plaintiff's Submissions, paragraph 60.

90 Lisa Burton Crawford, The *Rule of Law and the Australian Constitution* (2017) 11.

91 Compare *ACTV* (1992) 177 CLR 106 at 133-135 (Mason CJ); *McGinty v Western Australia* (1996) 186 CLR 140 at 168 (Brennan CJ); *McCloy v New South Wales* (2015) 257 CLR 178 at 222 [100] (Gageler J).

92 *Durham Holdings v New South Wales* (2001) 205 CLR 399 at 410 [14] (Gaudron, McHugh, Gummow and Hayne JJ) (references omitted); and see, in relation to federal limitations, *ACTV* (1992) 177 CLR 106 at 135 (Mason CJ).

40. In addition, the implication for which the Plaintiff contends would be inconsistent with previous authority of this Court rejecting substantive limitations of a kind that could be said to derive from a conception of the rule of law, such as the prohibition on retrospective criminal laws[93] or the acquisition of property by a State other than on just terms.[94] It would also risk diminishing a different, and fundamental, aspect of the rule of law in Australia: that is, the adherence by the courts to their duty to apply the law as enacted by Parliament within its legislative competence.[95] As Brennan J said in *Nicholas v The Queen*:[96]

> 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.

41. International jurisprudence does not take matters any further. Decisions of the Supreme Court of Canada acknowledge that the rule of law is an unwritten principle of the Canadian *Constitution Act 1982*,[97] but reject the notion that particular aspects of the rule of law can be used as a basis for invalidating legislation based on the principle.[98] Similarly, recent decisions of the Supreme Court of the United Kingdom acknowledge the fundamental importance of both the rule of law and the principle of parliamentary sovereignty in the United Kingdom constitution, and do not afford the former principle any substantive force capable of invalidating an Act of Parliament.[99]

42. In any case, a constitutional implication based on the rule of law would not result in the invalidity of ss 74AB and 74AAA, in circumstances where the existing legal framework provides a complete answer to the Plaintiff's complaints.

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93 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501.

94 *Durham Holdings v New South Wales* (2001) 205 CLR 399.

95 *Nicholas v The Queen* (1998) 193 CLR 173 at 197 [38].

96 (1998) 193 CLR 173 at 197 [37]; see also *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 262 (Fullagar J); *British Columbia v Imperial Tobacco Canada Ltd* [2005] 2 SCR 473 at 500-501 [66] (Major J, delivering the judgment of the Court).

97 See, for example, *Re Manitoba Language Rights* [1985] 1 SCR 721; *Re Secession of Quebec* [1998] 2 SCR 217. It may also be noted that, in *Re Manitoba Language Rights*, the principle of the rule of law was invoked to give temporary force to invalid legislation, a course which would not be open in Australia: *Ha v New South Wales* (1997) 189 CLR 465 at 503-504 (Brennan CJ, McHugh, Gummow and Kirby JJ).

98 *British Columbia v Imperial Tobacco Canada Ltd* [2005] 2 SCR 473 at 497-501 [59]-[68] (Major J, delivering the judgment of the Court).

99 *R (Jackson) v Attorney-General* [2006] 1 AC 262 at 274 [9] (Lord Bingham), 302-303 [102] (Lord Steyn), 303 [104], 304 [107] (Lord Hope) and 318 [159] (Baroness Hale); *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61 at [42]-[43] (Lord Neuberger, Lady Hale, and Lords Mance, Kerr, Clarke, Wilson, Sumption and Hodge).

43. First, the Plaintiff submits that the provisions "place him outside the general operation of the … sentencing law … without 'a rational and relevant basis for the discriminatory treatment' … justifying the 'extraordinary degree of disproportionality' of that discriminatory treatment".[100]

43.1. That submission is inconsistent with *Crump* and *Knight*, which (as noted in paragraphs 6-10 above) respectively upheld analogous legislative provisions directed at a small group of individuals and a named individual.

43.2. As a matter of legislative power, the Victorian Parliament was entitled to take the view that those convicted of the murder of a police officer "should be subject to a special regime".[101] In enacting s 74AAA of the Act, Parliament did not act in a way that was "arbitrary": it selected a criterion that it considered reflected "the most serious example of the most serious crime".[102] "Choices of that kind … are generally within legislative competence".[103]

43.3. The fact that s 74AB specifically named the Plaintiff does not affect that conclusion, in circumstances where the criterion by which the Plaintiff was chosen was not arbitrary and where the "party-specific nature of [the Act is not] indicative of the tendency of that legislation to interfere with an exercise of judicial power".[104]

43.4. Similarly, the conclusion is not affected by any suggestion that it is unfair that "some other offenders of a most serious kind [may receive] more favourable treatment".[105]

44. Secondly, the Plaintiff submits that the provisions are "calculated to destroy the expectation on which the Plaintiff relied" throughout his sentence, namely that he might be released if he could demonstrate his rehabilitation to parole authorities.[106]

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100 Plaintiff's Submissions, paragraph 62 (emphasis removed).

101 *Baker* (2004) 223 CLR 513 at 521 [8] (Gleeson CJ); see also Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 July 2018, 2238.

102 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 July 2018, 2238.

103 *Baker* (2004) 223 CLR 513 at 522 [8] (Gleeson CJ).

104 *Knight* (2017) 261 CLR 306 at 323 [26] (the Court).

105 *Baker* (2004) 223 CLR 513 at 522 [9]; see also at 522 [8]; compare Plaintiff's Submissions, paragraphs 13 and 62.

106 Plaintiff's Submissions, paragraph 62.

44.1. But, as was held in *Crump*, *Knight* and *Minogue*, "[t]here is no right or entitlement to release on parole at the expiration of a minimum term determined at sentencing".[107]

44.2. Moreover, the Plaintiff was only ever entitled to have his application for parole decided in accordance with the law as it stood from time to time: he had "no right or entitlement that [the general] regime should continue to apply to him".[108]

## F. Section 118 of the *Constitution*

45. The Plaintiff's fourth ground is that the effect of the provisions is to "add additional punishment to the sentence imposed by Vincent J", in a way that fails to give full faith and credit to the sentence imposed by the Supreme Court of Victoria.[109] For the reasons set out in paragraphs 6-10 above, the Plaintiff's arguments fail at the first step, because the enactment of the provisions did not involve any alteration of, or interference with, the sentence imposed on the Plaintiff.

46. Even if that difficulty could be overcome, s 118 has not previously been applied in a way that would assist the Plaintiff. The little that was said about s 118 during the Convention Debates, and in Quick and Garran's commentary, suggests that the purpose of the provision was to ensure "inter-state official and judicial reciprocity".[110] The subsequent case law has focused on the provision's application to interstate legislation[111] and, perhaps to a lesser degree, interstate judgments.[112] Although some judgments in this court leave open the possibility that s 118 could have an intra-state operation,[113] the State

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107 *Minogue* (2018) 92 ALJR 668 at 674 [17] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ), citing *Crump* (2012) 247 CLR 1 at 26-27 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Knight* (2017) 261 CLR 306 at 323 [27] (the Court).

108 *Crump* (2012) 247 CLR 1 at 28-29 [70]-[71] (Heydon J).

109 Plaintiff's Submissions, paragraph 64.

110 See Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) § 465 ("Full Faith and Credit"); *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 1005 (Edmund Barton). See more generally *Breavington v Godleman* (1988) 169 CLR 41 at 133 (Deane J).

111 See, for example, *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565; *Breavington v Godleman* (1988) 169 CLR 41; *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1; *Stevens v Head* (1993) 176 CLR 433; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; *Sweedman v Transport Accident Commission* (2006) 226 CLR 362.

112 See, for example, *Harris v Harris* [1947] VLR 44; *G v G* (1986) 64 ALR 273; *Rowe v Silverstein* [1996] 1 VR 509; *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 452 [124] (Kirby J); *Re DEF* (2005) 192 FLR 92.

113 See, for example, *Breavington v Godleman* (1988) 169 CLR 41 at 96, where Wilson and Gaudron JJ said that s 118 could not "be confined so as merely to require the acknowledgment of the operative effect of a State law within the territory of that State".

has not been able to identify, and the Plaintiff has not cited, any case in which s 118 has been held to have such operation. Accordingly, an extension of the jurisprudence would be required for the Plaintiff to succeed on this argument.

### G. Validity of s 74AAA does not arise for decision

47. The application of s 74AAA to the Plaintiff depends on, amongst other things, the Parole Board being satisfied of the matters set out in s 74AAA(1)(c), which relate to the mental state of the prisoner at the time of the conduct that resulted in the police officer's death.[114] The Board has not made, and has not yet been asked to make, a decision as to whether it is satisfied of those matters in relation to the Plaintiff: **SCB 27 [18.3(c)]**. It follows that the question of the validity of s 74AAA is premature and should not answered.[115] Alternatively, if s 74AB is valid, it is unnecessary to determine the validity of s 74AAA. However, if the validity of s 74AAA does arise for decision, s 74AAA is valid for the reasons advanced above.

### H. Conclusion

48. The State submits that questions (a) and (b) in the Special Case should be answered: "no"; question (c) in the Special Case should be answered: "does not arise"; and question (d) in the Special Case should be answered: "The Plaintiff": **SCB 52 [45]**.

## PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

49. The State estimates that it will require approximately 2 hours for oral submissions.

**Dated**: 26 March 2019

**PETER HANKS**
*Owen Dixon Chambers West*
*T: 03 9225 8815*
*E: peter.hanks@vicbar.com.au*

**ALISTAIR POUND**
*Castan Chambers*
*T: 03 9225 8249*
*E: alistair.pound@vicbar.com.au*

**SARAH ZELEZNIKOW**
*Castan Chambers*
*T: 03 9225 6436*
*E: sarahz@vicbar.com.au*

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114 In considering that question, the Board must have regard only to certain specified information: the evidence led at trial, the judgment, the reasons for sentence, any reasons in connection with the fixing of a non-parole period and any judgment on appeal: s 74AAA(2) of the Act.

115 *Knight* (2017) 261 CLR 306 at 317 [6] (the Court).