IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No. M162 of 2018

BETWEEN: **CRAIG WILLIAM JOHN MINOGUE**

Plaintiff

and

10 **STATE OF VICTORIA**

Defendant

SUBMISSIONS OF THE INTERNATIONAL COMMISSION OF JURISTS (VICTORIA)

20 **SEEKING LEAVE TO INTERVENE AS AMICUS CURIAE**

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Part I: Certification

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

Part II: Basis for seeking leave to be heard

2. The International Commission of Jurists Victoria ('ICJV') seeks leave to be heard as *amicus curiae* in support of the plaintiff. The ICJV seeks to address the issue raised in paragraphs [58]-[64] of the Plaintiff's Submissions, as to whether the *Commonwealth Constitution* contains a guarantee of the rule of law and, if so, whether the rule of law can be a criterion of legislative validity. The ICJV seeks to make submissions drawing on comparative constitutional jurisprudence on the rule of law, as well as on relevant international law.

Part III: Reasons why leave should be granted

3. There are three reasons why the ICJV's application to intervene as an *amicus* should be granted.

4. First, the ICJV is an authority on the subject of rule of law, as well as on international and comparative law. It is an organisation of judges and lawyers which holds as its primary objective the protection of the rule of law, the proper administration of justice and the independence of the judiciary. The Constitution of the ICJV states in clause 4.1 that its purposes are:

> *(1) to support and advance the Rule of Law and human rights on the basis of the principles set out in the preamble to the [global] Statute;*
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> *(2) to advance the independence of the judiciary and the legal profession and the administration of justice in full compliance with standards of international law;*
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> *(3) to promote the global adoption and implementation of international human rights standards and other legal rules and principles that advance human rights and the Rule of Law;*
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> *(4) to promote the establishment and enforcement of a legal system which protects individuals and groups against violations of their human rights;*
>
> *(5) to promote understanding of and compliance with the Rule of Law and human rights and provide assistance to those to whom the Rule of Law and human rights are denied.*

5. Second, the ICJV's submissions, by drawing the Court's attention to relevant comparative and international material, deal with matters not directly addressed in

the Plaintiff's submissions, or address similar matters from a different perspective. They therefore assist the court in a way it would not otherwise be assisted.[1]

6. Third, the ICJV's participation is likely to result in a more balanced and thorough consideration of the rule of law issue. In *Minogue v Victoria* ('*Minogue No 1*'),[2] the Court received submissions about that issue from four Attorneys-General acting as interveners (Western Australia, South Australia, Queensland and New South Wales), each of whom argued against the proposition that the rule of law was guaranteed by the Constitution. It might be expected that there will be similar interventions in this proceeding. Further, the submissions in *Minogue No 1* did not deal, at least in any detail, with comparative or international material.

Part IV: Submissions

7. These submissions detail comparative and international jurisprudence addressing the principle of the rule of law as an implication or concomitant of constitutionalism, and the content and effect that courts in jurisdictions outside Australia have given to the rule of law as a constitutional principle. In view of that comparative and international jurisprudence, ICJV submits that ss 74AB and 74AAA of the *Corrections Act 1984* (Vic) ('*Corrections Act*') violate the rule of law and are therefore invalid.

8. The submissions deal chiefly with jurisprudence from Canada, the United Kingdom and India. They also discuss some international material. In the submission of the ICJV – and accepting, of course, that the decisions are situated within and shaped by their own legal and constitutional contexts – it is of benefit to consider how courts in jurisdictions with legal traditions and values not dissimilar to those of Australia have dealt with the rule of law in constitutional settings.

The rule of law and constitutionalism

Canada

9. In Canada, the rule of law has been held to be a foundational constitutional principle. The common heritage and legal values of the Australian and Canadian legal systems make examination of Canadian rule of law jurisprudence instructive.

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1 *Levy v State of Victoria* (1997) 189 CLR 579 at 604. See also *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 312; *Roadshow Films v iiNet Ltd* (2011) 248 CLR 37 at [6].

2 (2018) 92 ALJR 668.

And, like Australia, Canada's constitution is written and contained in a single document which contains no specific provision protecting the rule of law or giving that phrase particular meaning.

10. The key cases establishing the status of the rule of law in Canadian constitutionalism are *Reference re: Manitoba Language Rights* ('*Manitoba Language Rights*)[3] and *Reference re: Secession of Quebec* ('*Quebec Secession*').[4]

11. In *Manitoba Language Rights*, the Supreme Court of Canada held that unilingual enactments of the Manitoba legislature were invalid, because they breached the constitutional requirement[5] that both English and French be used in the Acts of Manitoba.[6] The Court recognised, however, that a simple declaration of invalidity would mean the legal order which had purportedly regulated the Province since 1890 would be destroyed, and that this '*would, without more, undermine the principle of the rule of law*'.[7] The rule of law, the Court stated, '*requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order.*'[8] To preserve the rule of law and the constitutional order, the Court found that it had power to declare the laws in question temporarily valid, while the legislature enacted legislation which complied with the Constitution.[9]

12. The Supreme Court found both textual and implicit support for its finding that '*the Constitutional status of the rule of law is beyond question*'. First, that the rule of law was a principle upon which Canada was founded was reflected in the preambles of both the *Constitution Act 1982* and the *Constitution Act 1867*.[10] In addition, however, the Court stated that the principle of the rule of law is implicit in the very nature of a constitution:

> *The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a*

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3 [1985] 1 SCR 721.
4 [1998] 2 SCR 217.
5 In s 23 of the *Manitoba Act 1870*.
6 [1985] 1 SCR 721 at 747.
7 [1985] 1 SCR 721 at 747.
8 [1985] 1 SCR 721 at 749.
9 [1985] 1 SCR 721 at 758.
10 [1985] 1 SCR 721 at 750.

> *society of legal order and normative structure: one governed by rule of law. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution.*[11]

13. In *Quebec Secession*, the Supreme Court of Canada affirmed and applied the principle of the rule of law. There, the Court was asked to determine whether, and if so how, the province of Quebec could secede lawfully from Canada. It was required to construe the limits of its own power and that of the provinces with respect to a situation not accounted for by the written text of the Constitution.

14. In dealing with this issue, the Supreme Court identified 'constitutionalism and the rule of law' as one of four foundational principles or assumptions of the Canadian Constitution (along with democracy, federalism and protection of minorities).[12] It affirmed the meaning of the rule of law outlined in *Manitoba Language Rights*, but went further, discussing the distinct but related notions of the rule of law and constitutionalism. Constitutionalism '*requires that all government action comply with the Constitution*'.[13] The rule of law, as expressed in the Constitution, had three elements: first, '*that the law is supreme over the acts of both government and private persons and thereby preclusive of the influence of arbitrary power*'; second, that explained in *Manitoba Language Rights* (an '*actual order of positive laws*'); and third, that '*the exercise of all public power must find its ultimate source in a legal rule*'.[14]

15. Both constitutionalism and the rule of law in Canada find their root in the supremacy of the Constitution. Public power is exercised legitimately only when it is created by and limited by law. The branches of government '*may not transgress [Constitutional] provisions: indeed their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.*'[15] The principle that all government action must comply with the law ultimately bolstered the Court's finding that Quebec could not unilaterally secede from Canada.

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11 [1985] 1 SCR 721 at 750-751.
12 [1998] 2 SCR 217 at 240.
13 [1998] 2 SCR 217 at 258. This requirement was sourced in s 52(1) of the *Constitution Act 1982*, which provides that '*the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect*'.
14 [1998] 2 SCR 217 at 258.
15 [1998] 2 SCR 217 at 258.

16. The Supreme Court in *Quebec Secession* described the foundational principles it identified as principles that '*inform and sustain the constitutional text*',[16] and cautioned against taking '*unwritten norm[s] ... as an invitation to dispense with the written text of the Constitution.*'[17] It went on, though, to recognise that the fundamental and organising constitutional principles might, in certain circumstances, give rise to substantive legal obligations, which constitute substantive limitations on government action.[18]

17. In subsequent cases the Canadian courts have grappled with what those circumstances might be. Thus in *British Columbia (Attorney-General) v Christie* ('*Christie*'), the Supreme Court held, after reviewing the constitutional text and the jurisprudence and history of the concept of a right to a lawyer, that there was no broad general right to legal counsel as an aspect of, or precondition to, the rule of law.[19] In *Canadian Bar Association v British Columbia* ('*Canadian Bar Association*'),[20] the claim was that the legal aid system in British Columbia was so inadequate as to offend the Constitution of Canada, for reasons including that it was inconsistent with the rule of law. The Court of Appeal for British Columbia held that, though *Quebec Secession* had confirmed that unwritten constitutional principles may give rise to substantive legal obligations or legal remedy, *Christie* foreclosed the sort of broad-based systemic claim to greater legal services based on unwritten principles that was before it.[21]

18. In other cases the Supreme Court of Canada adopted a structure-focused conception of the rule of law. For example, in *British Columbia v Imperial Tobacco* ('*Imperial Tobacco*') it suggested that the rule of law, as enunciated in *Manitoba Language Rights* and *Quebec Secession*, requires compliance with '*legislated requirements as to manner and form (ie, the procedures by which legislation is to be enacted,*

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16 [1998] 2 SCR 217 at 247.
17 [1998] 2 SCR 217 at 249.
18 [1998] 2 SCR 217 at 249.
19 [2007] 1 SCR 873 at 883-4 [23]-[26]. The rejected argument in *Christie* was that a law imposing a 7 per cent tax on legal services, ostensibly to fund legal aid, was unconstitutional on the basis, inter alia, that it infringed '*the right to have a lawyer in cases before courts and tribunals dealing with rights and obligations [which is] constitutionally protected, either as an aspect of the rule of law, or a precondition to it*' (at 882 [18]).
20 [2008] BCCA 92; (2008) 290 DLR (4th) 617.
21 [2008] BCCA 92; (2008) 290 DLR (4th) 617 at [44]-[45].

amended and repealed)'.[22] The Court rejected a proposed broader understanding of the rule of law, which would have required that legislation be prospective and general in character, not confer special privileges on the government (except where necessary for effective governance), and ensure a fair civil trial. Such an understanding, the Court stated, would conflict with other constitutional principles of democracy and constitutionalism. The rule of law '*requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text*'.[23]

19. Similarly, in *Babcock v Canada (Attorney General)* ('*Babcock*') the Supreme Court, whilst affirming the possibility that unwritten constitutional principles are capable of limiting government action, noted that the principle of the rule of law had to be balanced against that of parliamentary sovereignty.[24] The impugned legislation, which permitted the government to object to disclosure of certain documents, was not invalid. As in *Imperial Tobacco*, the Court emphasised the structural requirements of the rule of law: '*[i]t is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government*'.[25]

20. Canadian courts, then, continue to accept that unwritten constitutional principles – of which the rule of law is one – are capable of limiting government action. They have invoked the rule of law to deal with cases requiring them to address fundamental questions about the country's legal order. But they shy away from understanding the rule of law, for example, to mandate that all legislation must meet certain criteria (such as prospectivity), or to give rise to a right to legal counsel.

The United Kingdom

21. The large differences between Australia and the United Kingdom's constitutional arrangements do not need rehearsing here. But the common heritage and legal

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22 [2005] 2 SCR 473 at 498 [60].
23 [2005] 2 SCR 473 at 501 [67].
24 [2003] 3 SCR 3 at 29 [56].
25 [2003] 3 SCR 3 at 20 [57].

values of the systems make examination of United Kingdom jurisprudence dealing with the rule of law instructive.

22. As is noted in the Plaintiff's Submissions at n 73, in *R (Jackson) v Attorney-General*[26] Lord Hope stated that the rule of law, rather than parliamentary sovereignty, was the '*ultimate controlling factor upon which our constitution is based*'.[27] That case, in which the House of Lords held that the *Parliament Act 1949* was validly enacted in accordance with the principles of the *Parliament Act 1911*, contains other statements about the place of rule of law in the United Kingdom's constitution. Lord Steyn, in suggesting that even a sovereign Parliament may be unable to abolish a '*constitutional fundamental*' like judicial review,[28] effectively asserted for the courts a power to police unwritten rule of law boundaries. To similar effect, Lady Hale observed that '*[t]he courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny*'.[29]

23. More recently, in *R (on the application of Miller) v Secretary of State for Exiting the European Union*,[30] the majority of the Supreme Court appeared to favour a more 'structural' conception of the rule of law. The emphasis there was on parliamentary sovereignty, with judges' role in protecting the rule of law – the '*constitutional remit of the judiciary*'[31] – being to '*impartially identify and apply the law in every case brought before the courts*'.[32] The Supreme Court here echoed the understanding of judges' role under the rule of law described by the Supreme Court of Canada in *Imperial Tobacco* (at paragraph [18] above).

24. *R (Jackson)* and *R (on the application of Miller)* demonstrate that that the rule of law in the United Kingdom is fundamental to and inherent in constitutionalism. *R*

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26 [2006] 1 AC 262.
27 [2006] 1 AC 262 at 304 [107].
28 [2006] 1 AC 262 at 302 [102].
29 [2006] 1 AC 262 at 318 [159].
30 [2018] AC 61.
31 [2018] AC 61 at 166 [151] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge).
32 [2018] AC 61 at 138 [42] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge).

(Jackson) points, further, to a willingness by members of the House of Lords to contemplate using the rule of law to limit the exercise of parliamentary power.

25. Other cases decided by courts in the United Kingdom have given further content to the requirements of the rule of law. In *R (on the application of Cart) v Upper Tribunal*, Laws LJ attributed the following meaning to the rule of law for the purposes of the case:

> *[S]tatute law has to be mediated by an authoritative judicial source, independent both of the legislature which made the statute, the executive government which (in the usual case) procured its making, and the public body by which the statute is administered.*[33]

26. The issue before the court in *R (on the application of Cart)* was whether an ordinary tribunal or agency of limited jurisdiction could be made immune from judicial review simply by being designated, by its empowering statute, a 'superior court of record'.[34] In holding that a tribunal or agency could not so be made immune, Laws LJ (Owen J agreeing) observed that judicial review is '*a principal engine of the rule of law*',[35] and stated that the need for an authoritative judicial source could not be dispensed with by Parliament.[36] Although Laws LJ characterised this decision as an '*affirmation*' of parliamentary sovereignty,[37] it is at least arguably a concrete application of a particular rule of law principle to limit Parliament's ability effectively to enact certain legislation.[38]

27. The Plaintiff's Submissions at [61] point to the recognition of a further aspect of the rule of law as part of British constitutional principle – predictability of application – by Lord Diplock in *Black-Clawson International Ltd v Papierwerke*

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33 [2010] 1 All ER 908 at 922 [36].

34 The provisions were the *Special Immigration Appeals Tribunal Act 1997* (UK) s 1(3) (regarding the Special Immigration Appeals Commission); and the *Tribunals, Courts and Enforcement Act 2007* (UK) s 3(5) (regarding the Upper Tribunal).

35 [2010] 1 All ER 908 at 921 [34].

36 [2010] 1 All ER 908 at 922 [36].

37 [2010] 1 All ER 908 at 922 [38].

38 An appeal of this decision was dismissed, with Sedley LJ (Richards LJ and Sir Scott Baker agreeing) agreeing with much of the discussion by Laws LJ, and noting that '*the supervisory jurisdiction of the High Court, well known to Parliament as one of the great historical artefacts of the common law, runs to statutory tribunals both in their old and in their new incarnation unless ousted by the plainest possible statutory language*': *R (on the application of Cart) v Upper Tribunal* [2010] 4 All ER 714 at 720 [20].

Waldhof-Aschaffenburg AG.[39] Further principles said to be 'constitutional' in the United Kingdom include the prohibition on the use of evidence obtained by the infliction of torture – in substance, a rule of law requirement – which Lord Bingham stated is '*more aptly categorised as a constitutional principle than as a rule of evidence*'.[40] In *R v Secretary of State for the Home Department, Ex parte Simms*,[41] the House of Lords, while applying the principle of legality to hold ultra vires a policy which generally prohibited journalists and authors from visiting prisoners, also asserted the strength of the right of freedom of expression as an aspect of the rule of law. As Lord Steyn (Lord Browne-Wilkinson and Lord Hoffmann agreeing) stated, '*[t]he starting point is the right of freedom of expression*'; '*[i]n a democracy it is the primary right: without it an effective rule of law is not possible*'.[42]

28. Judges in the United Kingdom have, then, recognised the rule of law as integral to British constitutionalism (*R (Jackson)*). British courts have given the principle of the rule of law content, by holding (*R (on the application of Cart)*) or suggesting (*R (Jackson)*) in different contexts that judicial review could not be ousted, and by relating to the rule of law principles of predictability of application (*Black-Clauson*) and freedom of expression (*Ex parte Simms*). Courts have also, at times – as in Canada – emphasised a structural understanding of the rule of law's requirements (*R (on the application of Miller)*).

India

29. It is instructive now to turn briefly to India. In *Kesavananda Bharati v Kerala* (noted in the Plaintiff's Submissions at n 73), Khanna J of the Supreme Court of India stated that:

> *Our Constitution postulates Rule of Law in the sense of supremacy of the Constitution and the laws as opposed to arbitrariness. The vesting of power of exclusion of judicial review in a legislature, including State legislature, contemplated by [the impugned provision], in my opinion strikes at the basic structure of the Constitution.*[43]

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39 [1975] AC 591 at 638 (dissenting in the result): '*The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.*'

40 *A (FC) v Secretary of State for the Home Department* [2006] 2 AC 221 at 247 [12].

41 [2000] 2 AC 115.

42 [2000] 2 AC 115 at 125.

43 (1973) 4 SCC 225 at [1591].

30. A similar understanding of the rule of law as being opposed to arbitrariness is expressed in other Indian decisions. For example, Beg J in *Gandhi v Narain* was part of the majority which struck down constitutional amendments on the basis that they were '*arbitrary and calculated to damage or destroy the rule of law*'. Justice Beg stated that '*the rule of law means that the exercise of powers of government shall be conditional by law and that ... no one shall be exposed to the arbitrary will of the Government*'.[44]

31. Arbitrariness was key, too, for the Supreme Court of India in *Centre for Public Interest Litigation v Union of India*.[45] The Court there interpreted the guarantee of the constitutional doctrine of equality to mean that the government must not act arbitrarily in the distribution of natural resources. It held that the government, by distributing mobile phone spectrum on a 'first come, first served' basis, had acted arbitrarily and therefore unconstitutionally. '*Constitutionalism*', the Court stated, '*must be reflected at every stage of the distribution of natural resources*'.[46] The Court rejected the State's submission that its review of the decision was an improper expansion of the parameters of judicial review – it stated that it had a duty to exercise its power in the public interest, to maintain constitutional principles.[47] In so stating, its concern to use its role to maintain the rule of law was clear.

32. The rule of law also underpinned the Supreme Court of India's decision in *Narain v Union of India* to direct government agencies to perform their duties and obligations by investigating credible allegations against high-ranking bureaucrats. That direction was compelled by consideration of '*[p]robity in public life, the rule of law and the preservation of democracy*'.[48]

The rule of law as a constitutional principle can be given content and legal effect

33. The ICJV submits that the above discussion of comparative case law demonstrates that the question asked by Gummow and Crennan JJ in *Thomas v Mowbray*, and extracted at [60] of the Plaintiff's Submissions – '*what does the rule of law*

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44 AIR 1975 SC 2299; 1975 (2) SCR 347 at [681].
45 Writ Petition (Civil) No 423 of 2010.
46 Writ Petition (Civil) No 423 of 2010 at [63].
47 Writ Petition (Civil) No 423 of 2010 at [79].
48 (1992) 2 SCC 1999.

require?'[49] – *can* be answered. Courts in Canada, the United Kingdom and India have, by their decisions, demonstrated that the meaning of the rule of law is not so vague or varied that it cannot be given legal effect in its application to a particular case.

34. In *Manitoba Language Rights*, the Canadian Supreme Court founded its power to make the declaration as to the validity of legislation on the rule of law as a constitutional principle, which it identified through a process of supplementing '*textual analysis with historical, contextual and purposive interpretation in order to ascertain the intent of the makers of our Constitution*'.[50] In *Quebec Secession*, the rule of law requirement that government must comply with the law underpinned, in part, the Supreme Court's holding that Quebec could not unilaterally secede. Having identified the rule of law as a fundamental and organising principle of Canada's Constitution, the Court stated that that

> *[u]nderlying constitutional principles may in certain circumstances give rise to substantive legal obligations ... which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.*[51]

35. In other cases discussed above (*Christie*, *Imperial Tobacco*, *Canadian Bar Association* and *Babcock*), Canadian courts held that that which was impugned did not, in the particular circumstances, fall within the scope of protection by the constitutional principle. But in so holding the courts accepted the statement in *Quebec Secession* that, in some cases, the rule of law might give rise to substantive obligations which limit government action.

36. In the United Kingdom, too, judges have recognised that the rule of law might provide the basis for invalidating an attempt to oust judicial review altogether (*R (Jackson)*). They have held, on rule of law grounds, that judicial review of decisions of a tribunal cannot be excluded by legislation designating it a 'superior court of record' (*R (on the application of Cart)*). In applying the principle of legality, they have safeguarded values like freedom of expression, which they have stated to be a requirement of the rule of law (*Simms*). They have also sometimes

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49 (2007) 233 CLR 307 at [61].
50 [1985] 1 SCR 721 at 751.
51 [1998] 2 SCR 217 at 249.

given the rule of law more limited content and potential effect, defining the role of the judiciary vis-à-vis the rule of law as being impartially to identify and apply the law in every case (*R (on the application of Miller)*).

37. The Supreme Court of India, meanwhile, has relied on an understanding of the rule of law as opposed to arbitrariness to strike down a constitutional amendment (*Gandhi v Narain*) and to hold unlawful a government body's system of resource allocation (*Centre for Public Interest Litigation v Union of India*).

***Sections 74AB and 74AAA of the* Corrections Act 1986**

38. In the aforementioned cases where courts have held the rule of law to be a constitutional assumption capable of having legal effect, they have not found it necessary to define the precise parameters of the rule of law. Rather, determinations of compliance with the rule of law have been made on a case-by-case basis, by reference to the constellation of attributes and circumstances unique to that particular act of government. The principle can be applied in a particular case without its entire bounds being established.

39. The ICJV submits that, in assessing the compliance with the rule of law of ss 74AB and 74AAA of the *Corrections Act 1986*, the attributes of concern are:

a. that the provisions constitute a usurpation of judicial authority by the legislature;

b. that the provisions impact arbitrarily upon the liberty of the individual.

40. The constitutionally protected separation of powers[52] is, in the ICJV's submission, an aspect of the rule of law as contemplated by the *Commonwealth Constitution.* The Plaintiff at [42]-[50] outlines why the legislation inserting ss 74AB and 74AAA into the *Corrections Act 1986* is an impermissible exercise of judicial power. That legislation having the effect of overriding or fundamentally altering a judicial order is opposed to the intent and purposes of the Constitution is supported by Quick and Garran:

> *...there remains the principle that "to declare what the law is, or has been, is a judicial power; to declare what the law shall be is legislative." (Cooley, Const. Lim., p. 94.) It cannot be doubted that any attempt by the Parliament, under cover*

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52 *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Commonwealth Constitution* ss 1, 61, 71.

of a declaratory law or otherwise, to set aside or reverse the judgment of a court of federal jurisdiction, would be void as an invasion of the judicial power.[53]

41. This principle should be given particular salience in the context of a judicial order depriving an individual of liberty. A term of imprisonment is the most severe sanction that an Australian court can impose upon an individual.[54] Criminal procedure[55] and presumptions of a fair trial articulated in international law[56] and domestic legislation, the court's requirement to consider the purposes and principles of sentencing as well as aggravating and mitigating circumstances,[57] laws of police conduct in investigations, and laws of evidence[58] are the principal ways by which the power to convict is constrained, and upon which the judicial power to sentence is premised. The extent of the regulation and procedure surrounding the court's power to sentence, the sentencing discretion afforded to courts,[59] the sentencing options available for most criminal offences,[60] and the jurisprudence protecting the fundamental principles of sentencing, including proportionality,[61] parsimony,[62] totality,[63] parity[64] and the avoidance of double

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53 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Commonwealth of Australia* (Sydney, Angus & Robertson 1901) 722, s 71.

54 This is reflected in a finding by the Full Court of the Supreme Court of Victoria: '*A sentencing judge is obliged to satisfy himself that no other sentence is appropriate before he imposes a sentence of imprisonment*': *R v O'Connor* [1987] VR 496 at 501.

55 See, eg, *Criminal Procedure Act 2009* (Vic).

56 *International Covenant of Civil and Political Rights*, GA Res 2200A (XXI) annex, UN GAOR, 21st Sess, Agenda Item 68, 1496th plen mtg, UN Doc A/RES/21/2200 (16 December 1966, entered into force 23 March 1976), art 14.

57 *Sentencing Act 1991* (Vic), s 1 (Purposes) and Part 2 (Governing Principles).

58 See, eg, *Evidence Act 2008* (Vic).

59 See, eg, *R v Young* [1990] VR 951 at 954: 'In almost very case, the passing of a sentence involves the exercise of a discretion, a discretion which must of course be exercised judicially'.

60 See generally *Sentencing Act 1991* (Vic).

61 '*[A] sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances*': *Hoare v R, Easton v R* (1989) 167 CLR 348 at 354, citing *Veen v R (No 2)* (1988) 162 CLR 465.

62 *Sentencing Act 1991* (Vic) s 5; *Crimes Act 1914* (Cth) s 17A.

63 '*[W]hat is fitting is that a convicted prisoner should be sentenced, not simply and indiscriminately for every act that can be singled out and brought within the compass of a technically identifiable conviction, but for what, viewing the circumstances broadly and reasonably, can be characterised as his criminal conduct*': *Johnson v R* (2004) 205 ALR 346 per Gleeson CJ, citing *Attorney-General v Tichy* (1982) 30 SASR 84 at 92-3 per Wells J.

64 '*Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.*' *Lowe v R* (1984) 154 CLR 606 at 610-1 per Mason J. See also *Sentencing Act 1991* (Vic) s 1(a).

punishment[65] or a crushing sentence[66] are evidence of the extent to which the liberty of an individual is respected and protected by the law.

42. The impugned provisions in substance alter a court order sentencing an individual to a term of imprisonment, with the effect of, in the submission of the ICJV, undermining the processes and procedures upon which that sentence is based. As such, the provisions undermine the legitimate basis of detention and render it arbitrary.

43. The Indian authorities discussed above focus on arbitrariness as anathema to the rule of law. They bear similarities to the Canadian decisions in *Manitoba Language Rights* and *Quebec*, and the United Kingdom statements about judicial review in *R (Jackson)* and *R (on the application of Cart)*, inasmuch as they reflect the broader constitutional value that public power is to be exercised in a principled, reasonable and orderly way.

44. The question of when it is that detention becomes arbitrary can be further informed by international law. The Human Rights Committee, treaty body of the International Covenant on Civil and Political Rights ('ICCPR'),[67] has clearly distinguished between 'arbitrary' and 'unlawful' activity. In General Comment No 35 on the right to liberty and security of person, the Committee held:

> '*An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality. For example, remand in custody on criminal charges must be reasonable and necessary in all the circumstances. Aside from judicially imposed sentences for a fixed period of time, the decision to keep a person in any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention.*'[68]

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65 '*To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common*': *Pearce v R* (1998)194 CLR 610 at 623 [40] per McHugh, Hayne and Callinan JJ. See also *Interpretation of Legislation Act 1984* (Vic) s 51.

66 '*It has been said that the notion of a crushing sentence has never been adequately defined in this State, although it is generally conceived of as one that is imposed in such a way that it would provoke a feeling of helplessness in the applicant if and when he is released or as connoting the destruction of any reasonable expectation of useful life after release*': *R v Beck* [2005] VSCA 11 at [19].

67 GA Res 2200A (XXI) annex, UN GAOR, 21st Sess, Agenda Item 68, 1496th plen mtg, UN Doc A/RES/21/2200 (16 December 1966, entered into force 23 March 1976.

68 Human Rights Committee, *General Comment 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) at [12] (emphasis added).

45. General Comments are authoritative interpretations of specific provisions of the ICCPR. They are compilations of principles drawn from Individual Communications, in which the Human Rights Committee has determined individual cases under the ICCPR. In one such Individual Communication, *Danyal Shafiq v Australia*,[69] the Committee concluded that the complainant's mandatory immigration detention for a period of over 7 years was arbitrary, noting its jurisprudence that 'arbitrariness' included inappropriateness and injustice (rather than simply unlawfulness), and that every decision to keep a person in detention should be open to periodic review, with detention not to continue beyond the period for which the State can provide appropriate justification.[70]

46. For the reasons given in the Plaintiff's Submissions (especially from [42]-[50]), the effect of s 74AB(3) and (if it applies) s 74AAA(5) is to impose additional punishment on the Plaintiff. The provisions constitute an inappropriate exercise of judicial power, which is arbitrary inasmuch as it undermines the institutional safeguards that are necessary to legitimise a punitive deprivation of liberty.

47. The impugned provisions are unjust: as the Plaintiff notes at [41], they remove any relevant hope of release and render irrelevant any demonstrated rehabilitation. The injustice is all the more potent given the Crown decided against appealing the fixing of a minimum term (noted by the Plaintiff at [14]), and the fixing of a minimum term as part of the Plaintiff's sentence specifically took into account the disparity between the Plaintiff and the co-offender's relative degrees of culpability (noted by the Plaintiff at [13]).

48. The impugned provisions lack predictability and due process. A judicial order imposing a custodial sentence upon an individual is delivered along with comprehensive reasons, after hearing both prosecution and defence arguments. A decision of the Adult Parole Board is made on the basis of materials gathered from a variety of sources, including sentencing remarks, formal risk-assessments, prison intelligence report and behaviour reports.[71] While the Adult Parole Board is not

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69 Human Rights Committee, *Views: Communication No 1324/2004*, 88th sess, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006).

70 Ibid at [7.2]-[7.3].

71 Adult Parole Board Victoria, 'Parole Manual: Adult Parole Board of Victoria' (Victoria State Government, 5th ed, September 2018) 18-21, Part 5.3. See generally *Corrections Act 1986* (Vic) ss 73A, 74(1), 74(1AA), and 74(1AB).

obliged to afford procedural fairness[72] or give reasons for a grant or denial of parole, it is obliged, by virtue of the materials it is expected to consider and the fact it is subject to judicial review,[73] to make decisions according to reason. As appears plain from the Plaintiff's Submissions at [35], Parliament's decision to ensure that the Plaintiff will 'die in jail'[74] was not made according to reason. No material was cited to support a claim that the Plaintiff would present an unmitigated risk to the community for the rest of his healthy life.

49. For these reasons, the provisions are also unreasonable and unnecessary.

Conclusion

10 50. In the submission of the ICJV, the questions stated for the opinion of the Full Court should be answered in the terms proposed by the Plaintiff, because:

a. the impugned provisions contravene the constitutional assumption of the rule of law;

b. comparative jurisprudence demonstrates that courts in other jurisdictions have, at times, used rule of law principles to impose limits on legislative or executive action;

c. as those courts have noted, constitutionality, by definition, suggests a state governed by law, where public power is created by and limited by law;

d. the *Commonwealth Constitution* entrenches a system of responsible
20 government, judicial review[75] and separation of powers,[76] thereby organising, limiting and making accountable power in order to constrain its arbitrary exercise; and

e. particular care and respect must be given to fundamental assumptions of the Constitution, including the rule of law, in cases where the liberty of the individual is concerned.

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72 *Corrections Act 1986* (Vic) s 69(2).

73 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) Order 56.

74 Hansard, Legislative Assembly, 21 June 2018, p 2168 (Mr Andrews, Premier), pp 2194-2196; Hansard, Legislative Assembly, 25 June 2018, pp 2351, 2366-2369 (cited in the Plaintiff's Submissions at n 33).

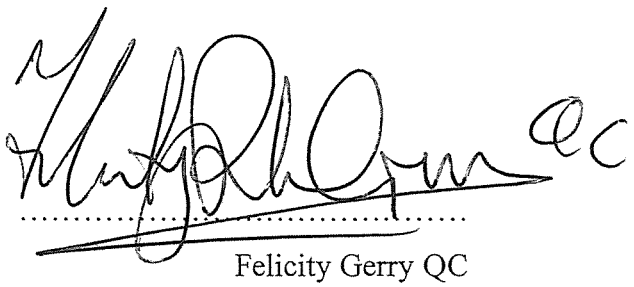
75 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Commonwealth Constitution* s 75(v).

76 *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Commonwealth Constitution*, ss 1, 61, 71.

Part V: Estimated Time for Argument

51. The ICJV estimates that the time for presentation of any oral argument, if permission is granted, would be no longer than 30-45 minutes.

Dated: 8 March 2019



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