IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M162 of 2018

BETWEEN:

CRAIG WILLIAM JOHN MINOGUE

Plaintiff

and

STATE OF VICTORIA

Defendant

PLAINTIFF'S SUBMISSIONS

Darebin Community Legal Centre
279 Spring Street
RESERVOIR VIC 3073

T: (03) 9484 7753
F: (03) 9484 9442
E: hui@darebinclc.org.au
Ref: Hui Zhou

I: Publication

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

II: Issues

2. On 24 August 1998, the Plaintiff was sentenced by the Supreme Court of Victoria to imprisonment for life with a minimum period of 28 years for the murder of Angela Taylor. The minimum term fixed by the Supreme Court formed part of the sentence for the offence of which the Plaintiff was convicted.

3. The fixing of a minimum period during which a prisoner shall not be eligible for parole was then, and remains now, a mandatory function of the judicial process of sentencing, unless the Court makes a finding that a minimum term is inappropriate in the particular circumstances. No such finding was made by the Supreme Court in relation to the Plaintiff.

4. On 1 August 2018, the *Corrections Act 1986* (Vic) (the **Act**) was amended to insert new s 74AB and to substitute ss 74AAA and 127A. Each of s 74AB and (if it applies to the Plaintiff) s 74AAA purports to extend the period during which the Plaintiff shall be ineligible for release on parole. The substantive operation and practical effect of those provisions is to extend the minimum term which was fixed by the sentence imposed by the Supreme Court – not by a formal alteration of the sentence itself, but by imposing an additional punitive consequence for the crime of which the Plaintiff was convicted. Indeed, the provisions remove any real prospect of release on parole, irrespective of the Plaintiff's potential rehabilitation and even in the absence of any risk to the community. Moreover, the amendments operate to convert the Plaintiff's ongoing imprisonment into cruel, inhuman and degrading treatment or punishment.

5. This proceeding is not about whether the Plaintiff should be granted parole, nor about the circumstances in which, or the conditions on which, prisoners are released on parole. Rather, the proceeding gives rise to the following issues.

   a. The extending of the minimum term during which the Plaintiff shall not be released on parole imposes on the Plaintiff an additional or different punishment for the offence of which he was convicted. That is beyond the legislative powers of the Parliament of Victoria as it is inconsistent with the proposition, accepted by the Defendant, that imposing punishment or punitive treatment on an individual as a consequence of criminal guilt is an exclusively judicial power or function: see [18]-[49] below.

   b. The quality of the treatment or punishment imposed – as cruel, inhuman and degrading – may not be imposed by the Parliament as it was not within the range of punishments which were capable of being imposed by the Supreme Court as a

repository of federal jurisdiction, or otherwise by reason of the *Bill of Rights 1688* (1 Will & Mar Sess 2 c 2): see [50]-[56] below.

c. The provisions are inconsistent with the constitutional assumption of the rule of law, on the basis that they arbitrarily single out the Plaintiff by placing him outside the general legislative scheme which governs the sentencing of offenders and the administration of sentences in Victoria: see [58]-[64] below. In so doing, the provisions also fail to give full faith and credit to the Plaintiff's sentence.

III: Section 78B notices

6. The plaintiff has given notice to the Attorneys-General under s 78B of the *Judiciary Act 1903* (Cth).

IV: Reasons for judgment below

7. This proceeding is commenced in the Court's original jurisdiction.

V: Factual background

8. The factual background is set out in the Special Case agreed between the parties.

9. The Plaintiff has been detained in custody in Victoria since 30 May 1986 (SC: [3]). Following a trial by jury in the Supreme Court of Victoria, the Plaintiff was convicted of the murder of Angela Taylor, who was a Constable in the Victoria Police Force. On 24 August 1988, the Plaintiff was sentenced by the Supreme Court (Vincent J).

10. The crime of murder is a common law offence. Section 3 of the *Crimes Act 1958* (Vic) provided at the relevant time that, notwithstanding any rule of law to the contrary, a person convicted of murder was liable to imprisonment for the term of his or her natural life, or for such other term as was fixed by the court, as the court determined.[1]

---

[1] The death penalty was abolished in Victoria, with effect from 29 April 1975, by the *Crimes (Capital Offences) Act 1975* (Vic). Mandatory life imprisonment was then substituted for the crime of murder. There was at that time no provision for the fixing of minimum terms or non-parole periods, although the length of time which prisoners actually spent in custody for murder ranged from 13 months to 27 years and four months, with the average being between 14 and 15 years: see *R v Stone* [1988] VR 141 at 150. The mechanism for early release under those arrangements was through the exercise by the Governor of the royal prerogative of mercy, on the advice of the Executive Council, which in turn acted on the recommendation of the Parole Board: see *Bugmy v The Queen* (1990) 169 CLR 525 at 534 (Dawson, Toohey and Gaudron JJ), citing *R v Stone* [1988] VR 141 at 144. Mandatory life imprisonment as punishment for murder was abolished with effect from 1 July 1986: see *Crimes (Amendment) Act 1986* (Vic), which substituted s 3 of the *Crimes Act 1958* and amended the *Penalties and Sentences Act 1985* (Vic) so as to permit minimum terms to be fixed. In relation to the outcomes of minimum term applications, see, eg, *Bugmy v The Queen* (1990) 169 CLR 525 at 538 (Dawson, Toohey and Gaudron JJ); *R v Hunter* (2013) 40 VR 660 at [46]-[56] (Priest JA, dissenting in the result).

11. As in force at the time of the Plaintiff's sentence, s 17 of the *Penalties and Sentences Act 1985* (Vic) required the Court to fix a minimum term '*as part of the sentence*' in respect of any person convicted and sentenced to life imprisonment, being a '*lesser term ... during which the offender shall not be eligible to be released on parole*', save where the Court considered that the nature of the offence and the antecedents of the offender rendered the fixing of a minimum term inappropriate. Such provisions exist in substantially the same form today in s 11 of the *Sentencing Act 1991* (Vic).

12. In sentencing the Plaintiff, Vincent J did not consider that the nature of the offence and the antecedents of the Plaintiff rendered the fixing of a minimum term inappropriate,[2] and the Court ordered that the Plaintiff '*serve a further period of 28 years before you will be eligible for parole*' (SC: Annex B, p 7253).

13. In contrast, the Plaintiff's co-offender Stan Taylor (who was convicted of the same offence) was sentenced to life with no minimum term (SC: Annex A) on the basis that the nature of Taylor's offending and his antecedents rendered the fixing of a minimum term inappropriate – despite Vincent J observing that the possibility that Taylor may never again be free in the community was '*a terrible thought to contemplate in relation to any human being*' (SC: Annex B, p 7572). The fixing of a minimum term as part of the Plaintiff's sentence specifically took into account the need for '*some disparity*' between the sentences imposed on the Plaintiff and Taylor respectively, taking into account differences in their measure of responsibility, prior criminal histories, ages and prospects of rehabilitation (SC: Annex B, pp 7570-7571).

14. The Plaintiff applied for leave to appeal against his conviction and sentence. In relation to the latter, his submissions were directed only to the length of the minimum term (SC: Annex C, p 114). The Crown did not cross-appeal against either the fixing of a minimum term or its length.[3] The Full Court of the Supreme Court of Victoria ultimately found that, given the circumstances of the offending, there was '*nothing wrong in the minimum term, long though it is*' (SC: Annex C, p 115).

15. The Plaintiff became eligible for parole on 30 September 2016 (SC: [11]), and made an application to the Adult Parole Board (the **Board**) for parole shortly thereafter (SC: [17], Annex D). On 20 October 2016, having considered the Plaintiff's application and the report of a Case Management Review Committee (SC: [18], Annex E and F), the Board decided to proceed to parole planning and to consider the Plaintiff's suitability for release on parole, on receipt of a Parole Suitability Assessment (SC: [19], Annex G).

---

2 See also [16] of the Plaintiff's Statement of Claim, which is admitted by the Defendant.

3 Since the commencement of the *Criminal Appeals Act 1970* (Vic) and the insertion of s 567A in the *Crimes Act*, the Attorney-General (or, since 1982, the Director of Public Prosecutions) has been able to appeal against a sentence passed on conviction.

The Plaintiff made a written submission in support of his application for parole (SC: [20], Annex H).

16. On 14 December 2016, s 3 of the *Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016* (Vic) commenced, inserting s 74AAA into the Act (SC: [21]). As so inserted, s 74AAA relevantly purported to restrict the making of a parole order in respect of a prisoner convicted and sentenced for the murder of a person who the prisoner knew was, or was reckless as to whether the person was, a police officer. On 20 June 2018, this Court held that s 74AAA did not apply to the Plaintiff (SC: [26]), because he was not sentenced on the basis that he knew that, or was reckless as to whether, the murdered person was a police officer as defined in that section.[4]

17. On 1 August 2018, ss 4 and 5 of the *Corrections Amendment (Parole) Act 2018* (Vic) commenced operation, amending the Act by inserting new s 74AB and substituting s 74AAA. In these proceedings, the Plaintiff challenges the constitutional validity of each of ss 74AB and 74AAA.

VI: Argument

The impugned provisions impermissibly impose legislative punishment

The minimum term fixed by Vincent J

18. The Supreme Court did not sentence the Plaintiff to life with no minimum term. As outlined above, Vincent J found that neither the nature of the offence nor the antecedents of the Plaintiff rendered the fixing of a minimum term inappropriate, and imposed a sentence that reflected a judicial assessment of the Plaintiff's culpability and prospects of rehabilitation and the need for disparity with the sentence imposed on his co-offender.

19. The minimum term fixed by the Court forms part of the Plaintiff's sentence, and it constitutes a judicial order.[5] Thus, the fixing of a minimum term has been described as '*an integral part of the process of determining the appropriate sentence*',[6] '*one component*' of the sentence (including for the purposes of comparison between co-offenders for parity purposes),[7] and '*as clear an example of the exercise of judicial*

---

4 See *Minogue v Victoria* (2018) 92 ALJR 668 (***Minogue (No 1)***).

5 *Crump v New South Wales* (2012) 247 CLR 1 (***Crump***) at [27] (French CJ), [47], [58] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

6 *R v Shrestha* (1991) 173 CLR 48 at 61 (Brennan and McHugh JJ, dissenting in the result); see also *Leeth v Commonwealth* (1992) 174 CLR 455 at 465-466, 471 (Mason CJ, Dawson and McHugh JJ), 472 (Brennan J), 491 (Deane and Toohey JJ).

7 *Postiglione v The Queen* (1997) 189 CLR 295 at 302 (Dawson and Gaudron JJ).

power as is possible'.[8] The fixing of a minimum non-parole period is susceptible of appeal,[9] both by the prisoner and by the Crown.

20. The nature of a minimum term was described in the following terms in *Power v The Queen*:[10]

> Confinement in a prison serves the same purposes whether before or after the expiration of a non-parole period and, throughout, it is punishment, but punishment directed towards reformation. The only difference between the two periods is that during the former the prisoner cannot be released on the ground that the punishment has served its purpose sufficiently to warrant release from confinement, whereas in the latter he can. In a true sense the non-parole period is a minimum period of imprisonment to be served because the sentencing judge considers that the crime committed calls for such detention. ...
>
> To read the [relevant parole] legislation in the way we have suggested fulfils the legislative intention to be gathered from the terms of the Act, ie to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence.

21. The fixing of a minimum non-parole period is an important and discrete punitive element in imposing a sentence. It is '*undoubtedly part of the punishment to be imposed*'.[11] Intermediate appellate courts have also consistently characterised the non-parole period as a discrete punitive element of the sentence imposed by a court. Thus, a Crown appeal against a minimum non-parole period is competent on the basis that it is an appeal '*against any punishment*' made in respect of a convicted prisoner, as '*a non-parole period in respect of a sentence of life imprisonment is a material component of the punishment imposed*'.[12] And the non-parole period has been described as containing '*an important penal element which reflected the need for condign punishment that would satisfy the requirements of denunciation and general and specific deterrence*'.[13]

22. Consistently with those propositions, it has been observed that the introduction of a mandatory minimum non-parole period for an offence constitutes '*an increase in the severity of the penalty prescribed for an offence and therefore an increase in the extent*

---

8 *Leeth v Commonwealth* (1992) 174 CLR 455 at 470 (Mason CJ, Dawson and McHugh JJ).

9 *Bugmy v The Queen* (1990) 169 CLR 525.

10 (1974) 131 CLR 623 at 628-629 (Barwick CJ, Menzies, Stephen and Mason JJ) (emphases added).

11 *Leeth v Commonwealth* (1992) 174 CLR 455 at 471 (Mason CJ, Dawson and McHugh JJ).

12 *R v Suarez-Mejia* (2002) 131 A Crim R 577 at [78] (Parker J, with whom Miller J agreed), see also at [19] (Murray J).

13 *Hudson v The Queen* (2010) 30 VR 610 at [45].

of the punishment which parliament has provided for the offence'.[14] Similarly, the introduction of provisions whose effect was to require an offender to serve 80 per cent of the term of imprisonment imposed on him '*punishes the offender to a greater extent than was authorised by the former law ... and increases the penalty for the offence*'.[15] Further, the making of an order by a sentencing judge that a prisoner shall not be eligible for parole, or extending the non-parole period, '*has the effect of increasing the severity of the punishment by delaying the possible time for release from prison*'.[16]

23. These statements of principle are not weakened by the remarks of Mason J in dissent in *Lowe v The Queen*,[17] to the effect that an appellate court's recommendation of a non-parole period of one year instead of the primary judge's recommendation of two years '*did not reduce the severity of the sentence*'. It is respectfully submitted that those remarks do not reflect a correct appreciation of the nature and effect of a minimum term or non-parole period, which were more accurately recognised by Dawson J (one of the Justices in the majority) who stated that '*the sooner a prisoner is eligible for parole, the less severe will his punishment be, even though he is not guaranteed his release after serving the minimum period and even though his release is conditional only until the expiration of the full term*'.[18] Justice Mason's remarks are also inconsistent with more recent authority of this Court, which treats minimum non-parole periods of co-offenders as a pertinent matter for the purposes of parity in sentencing.[19]

24. That a minimum non-parole period comprises a discrete punitive element of the sentence, and that an increase in a notional minimum non-parole period makes the sentence more punitive, is illustrated by *R v Maygar; Ex parte Attorney-General (Qld)*,[20] in which the Attorney-General appealed against a minimum non-parole period of 20 years fixed in respect of a person sentenced to life imprisonment, contending that the non-parole period was inadequate. Keane JA (as his Honour then was) accepted that the offences were '*in the category of the worst imaginable examples of murder*', and

---

14 *Olsen v Sims* (2010) 28 NTLR 116 at [55] (Southwood J), see also at [31] (Mildren J). See further *Director of Public Prosecutions v Ahwan* (2005) 17 NTLR 1 at [36] (Southwood J, dissenting in the result): '*To increase a non-parole period of 20 years to 25 years is clearly to provide for greater punishment*'.

15 *R v Mason and Saunders* [1998] 2 Qd R 186 at 189 (Davies and Pincus JJA).

16 *Brown v Lusted* (2015) 25 Tas R 24 at [24], quoting with approval *Gill v The Queen* [1990] TASSC 37 at 7-8 (Crawford J, with whom Neasey J agreed).

17 (1984) 154 CLR 606 at 614.

18 (1984) 154 CLR 606 at 625, also noting that the reduction of the minimum term recommendation '*does have the effect ... of reducing the severity of his sentence*'.

19 *Postiglione v The Queen* (1997) 189 CLR 295.

20 [2007] QCA 310.

held that a non-parole period of 30 years was '*necessary to punish offending of this order of criminality*' and was '*appropriate punishment*'.[21]

25. This does not deny that, upon the passing of the sentence (including the fixing of any minimum term or non-parole period), the judicial power is exhausted and it becomes a matter for the executive whether the offender serves the sentence in prison or at large.[22] However, even assuming that later legislation can alter the circumstances in which the prisoner may be granted parole or the conditions which may attach to the grant of parole, such legislation cannot in substance or effect lengthen the minimum term imposed by the sentencing court. The removal of the Board's executive power to release the Plaintiff on parole after the expiry of his minimum non-parole period has such an effect, effectively extending the period '*during which the offender shall not be eligible to be released on parole*'.[23] As detailed further below, such an action is part of the exclusively judicial function of determining the appropriate punishment for the offence, particularly where the criterion of operation of the legislation is framed specifically by reference to the criminal conduct which is the subject of a conviction of a particular prisoner or class of prisoners.

The general statutory scheme for parole

26. Division 5 of Pt 8 of the Act concerns parole. The parole of prisoners is considered and granted (or refused) by the Board, which is established under s 61(1) of the Act.

27. Section 74(1) provides that, subject to (relevantly) s 74AAB,[24] the Board may by instrument order that a prisoner serving a prison sentence in respect of which a non-parole period was fixed be released on parole at the time stated in the order (not being before the end of the non-parole period) and, unless the Board revokes the order before the time for release stated in the order, the prisoner must be released at that time. Section 74(1AA) now provides that, for the purposes of s 74(1), the Board must have regard to the record of the court in relation to the offending, including the judgment and the reasons for sentence. In determining whether to make or vary a parole order, the

---

21 [2007] QCA 310 at [65], [68] (emphasis added).

22 *Baker v The Queen* (2004) 223 CLR 513 at [29] (McHugh, Gummow, Hayne and Heydon JJ); *Elliott v The Queen* (2007) 234 CLR 38 at [5] (Gummow, Hayne, Heydon, Crennan, Kiefel JJ). In both *Baker* and *Elliott,* the appellant had not been sentenced with a minimum term, and had been held to be ineligible to receive a judicially determined minimum term. The dicta in *Baker* do not address themselves to the situation where a minimum term has been fixed by a court at the time of, and as a part of, the sentence for the offence.

23 Section 17 of the now repealed *Penalties and Sentences Act.* See also s 11 of the *Sentencing Act 1991* (Vic).

24 Section 74AAB is concerned with the parole of prisoners who have committed certain kinds of serious offences, including murder.

Board must give paramount consideration to the safety and protection of the community (s 73A).

Sections 74AB and 74AAA

28. Section 74AB(1) provides that the Board must not make a parole order under s 74 in respect of the prisoner Craig Minogue[25] unless an application for the order is made to the Board by or on behalf of the prisoner.

29. Section 74AB(3) provides that, after considering the application, the Board may make an order under s 74 in respect of the prisoner Craig Minogue if, and only if, the Board is satisfied (on the basis of a report prepared by the Secretary to the Department) that the prisoner is in imminent danger of dying or is seriously incapacitated and, as a result, he no longer has the physical ability to do harm to any person, and that he has demonstrated that he does not pose a risk to the community. The Board must be further satisfied that, because of those circumstances, the making of the parole order is justified.

30. The circumstances of which the Board must be satisfied under s 74AB(3) are analogous to the prospect of so-called '*compassionate release*' considered by the European Court of Human Rights in *Vinter v United Kingdom*,[26] which was not regarded as a relevant '*prospect of release*' in considering whether the imposition of otherwise '*irreducible*' life sentences was incompatible with Art 3 of the European Convention on Human Rights.[27]

31. Section 74AB(4) and s 74AA(9) provide that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) has no application to that section. Sections 74AB(5) and s 74AAA(10) specifically disapply the sunset provision that ordinarily applies to an override declaration under s 31(7) of the Charter, thereby removing a central mechanism in the Charter which is calculated to ensure '*that a person's human rights once overridden cannot be permanently forgotten*'.[28]

32. Section 74AAA(5) similarly withdraws the power of the Board to grant parole in respect of a class of prisoners who were convicted of murder and sentenced to a term of imprisonment with a non-parole period, where the murdered person was a police officer (as defined) and the Board is satisfied that the prisoner intended to cause the death of or really serious injury to a police officer or was reckless as to such consequences.

---

25 Namely, '*the Craig William Minogue who was sentenced by the Supreme Court on 24 August 1988 to life imprisonment for one count of murder*': see s 74AB(6). It may be observed that this description is inaccurate or incomplete, in so far as the sentence imposed on Plaintiff by the Supreme Court was one of life imprisonment *with a minimum term of 28 years*.

26 (2012) 34 BHRC 605.

27 (2012) 34 BHRC 605 at [127].

28 See *Minogue (No 1)* at [75]-[76] (Gageler J).

Section 74AAA(2) both mandates and limits the information to which the Board is to have regard in deciding whether it is so satisfied. Among other things, the prisoner cannot provide any fresh evidence (even of an exculpatory nature) to the Board, which is essentially confined to the record of a trial in which the issues to which s 74AAA(1) is directed did not necessarily arise. Moreover, the Board does not appear to be limited to the evidence which must have been accepted by the jury.[29] Further, the Board is not bound by the rules of natural justice (s 69(2)).

The substantive operation and practical effect of ss 74AB(3) and 74AAA(5)

33. The practical effect of s 74AB(3) and (if it applies to the Plaintiff) s 74AAA(5) is to deprive the Plaintiff of any relevant prospect of release on parole, thereby making the burden of the Plaintiff's sentence heavier in at least two respects.

34. *First*, those provisions operate as a matter of substance to extend the period during which the Plaintiff is ineligible to be released on parole. The consequence of the application of those provisions '*is effectively to deny [the Plaintiff] an opportunity for parole*'.[30] Before their commencement, the Plaintiff was eligible to be released on parole on and from 30 September 2016 (SC: [11]). After their commencement, and by their direct operation, a parole order cannot be made in respect of the Plaintiff until such time as he is in imminent danger of dying or is seriously incapacitated. It is an agreed fact that the Plaintiff is not in imminent danger of dying or seriously incapacitated (SC: [4]). He therefore is and will remain ineligible for parole for an indefinite period in excess of his non-parole period.

35. That this was the evident purpose of the provisions is made clear in the extrinsic materials, to which the Court may have regard.[31] Those materials include statements to the effect that s 74AB was intended '*[t]o provide complete certainty and ensure that [the Plaintiff] is denied parole*'[32]; and statements that the Plaintiff should spend the rest of his life in gaol and '*die in jail*'.[33] The Minister for Corrections, following this Court's judgment in *Minogue (No 1)* also stated '*[w]e will amend the legislation as required as soon as possible to make sure that this person never gets out of prison. ... [W]e will now focus on making the necessary changes to the law to ensure that Mr Minogue will never,*

---

29 In this respect, the Plaintiff was acquitted of two counts on the presentment, and so it must be inferred that some of the evidence against him was not accepted as proof beyond reasonable doubt of his alleged offending (SC: Annex A).

30 *Minogue (No 1)* at [47] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

31 *Interpretation of Legislation Act 1984* (Vic), s 35(b)(ii)-(iii).

32 Hansard, Legislative Assembly, 24 June 2018, p 2239.

33 Hansard, Legislative Assembly, 21 June 2018, p 2168 (Mr Andrews, Premier), pp 2194-2196; Hansard, Legislative Assembly, 25 June 2018, pp 2351, 2366-2369.

ever get access to parole'.[34] The Statement of Compatibility (as to which see [54] below) acknowledged the argument '*that the practical effect of these reforms is equivalent to replacing a court sentence that includes a non-parole period with an effective sentence that does not include a parole period [sic]*', and stated that '*the reforms will have the effect of removing the prospect of release of certain offenders and diminishing their possibility of rehabilitation.*'[35]

36. In that respect, it is not simply that the conditions for granting parole have become more stringent so as to reduce the probability of the Plaintiff's being granted parole. Rather, the practical effect of s 74AB(3) and (if it applies) s 74AAA(5) is to render the Plaintiff ineligible to be granted parole. The impugned provisions are therefore not just about the parole system or processes as an executive function, but are directed at the underlying eligibility for parole and the period during which the Plaintiff will not be eligible for parole, which is substantially different from the effect of the order of the sentencing court.

37. The sentencing order made by Vincent J quelled a controversy between the Plaintiff and the Defendant, by imposing a sentence of imprisonment for life and a minimum term of 28 years before which the Plaintiff would become eligible for parole. While a sentencing judge '*is not ordinarily required or empowered to determine whether a convicted person should in fact be released on parole at some future time*', the judge '*is concerned to decide whether a prisoner should be eligible to be considered for release on parole at that future time*'.[36] As Brennan J observed in *Leeth v Commonwealth*:[37]

> the legal effect of a court's fixing of a minimum term is to enliven an executive power to release on parole a prisoner who would otherwise be required to serve the head sentence, adjusted for statutory reductions and remissions. The minimum term determines the date on which a prisoner, who is serving a head sentence, becomes eligible for parole.

38. As outlined above, the effect of s 74AB(3) and (if it applies to him) s 74AAA(5) is to render the Plaintiff simply ineligible for parole. Given the expiry of the non-parole period fixed by Vincent J in this case, its effect has also been to extend the minimum time which the Plaintiff must serve before he is eligible to be released on parole and, in the words of Brennan J, before the executive power of the Board to release him on parole is enlivened.

---

34 Hansard, Legislative Council, 21 June 2018, p 2874.

35 Hansard, Legislative Assembly, 24 July 2018, p 2237.

36 *R v Shrestha* (1991) 173 CLR 48 at 72-73 (Deane, Dawson and Toohey JJ) (emphasis added).

37 (1992) 174 CLR 455 at 472 (citations omitted) (emphasis added).

39. The *second* way in which ss 74AB(3) and s 74AAA(5) increase the burden of the Plaintiff's sentence is by altering its qualitative nature. As was acknowledged in *Minogue (No 1)*,[38] there is clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is possible. Accordingly, for a prisoner serving a sentence of life imprisonment, the removal of any prospect of the grant of parole other than in circumstances similar to those set out in ss 74AB(3) and s 74AAA(5) amounts to cruel, inhuman or degrading treatment or punishment in violation of human rights norms.[39] In particular, an '*irreducible*' life sentence is analogous in many respects to a death sentence, but moreover has an arbitrary operation and is liable to be disproportionate to the offence.[40] If life without parole can ever be justified, it should only be imposed judicially in respect of a crime that is '*so heinous it can never be atoned for*'.[41] That is a determination which must be made by a court in the exercise of judicial power, having regard to all of the circumstances of the offence and the offender.

40. As was made clear in *Vinter*, it is the loss of any hope of release which is the crushing and offensive component; not whether or not a prisoner is ever in fact released on parole.[42] Similarly, in *Bugmy v The Queen*,[43] Dawson, Toohey and Gaudron JJ referred to the benefit of a minimum term to a prisoner lying '*in providing the prisoner a basis for hope of earlier release and in turn an incentive for rehabilitation*'. These remarks were picked up in *R v Shrestha* by Deane, Dawson and Toohey JJ, who continued:[44]

> From this flow two significant and valuable consequences. The first is that the prisoner is likely to be better behaved while in confinement. The second is that a prisoner who retains at least some degree of control over his future fortunes and who has a real incentive to reform is more likely to retain basic self-respect and to enjoy some real prospects of eventual rehabilitation. In the harsh context of a prison environment, the potential advantages – in terms of hope, self-esteem, incentive for reform and rehabilitation – which eligibility for release on parole offers a prisoner in an Australian gaol should not be underestimated.

---

38 *Minogue (No 1)* at [53] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ), [72] (Gageler J).

39 See *Vinter v United Kingdom* (2012) 34 BHRC 605.

40 See *Vinter v United Kingdom* (2012) 34 BHRC 605 at [54].

41 See *Vinter v United Kingdom* (2012) 34 BHRC 605 at [54].

42 See the concurring judgment of Judge Power-Forde *in Vinter v United Kingdom* (2012) 34 BHRC 605: '*Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading.*'

43 (1990) 169 CLR 525 at 536.

44 (1991) 173 CLR 48 at 69.

41. Since he was sentenced by the Supreme Court in 1988, the Plaintiff is to be treated as having served his sentence with the hope that one day he may be released, if he could demonstrate his rehabilitation to the parole authorities. Sections 74AB(3) and, if it applies, s 74AAA(5) remove any relevant hope of release. The Plaintiff is thereby subjected to a sentence of imprisonment that is both quantitatively and qualitatively heavier than that imposed by the Supreme Court. Notwithstanding that '*[i]t always remains a possibility that a prisoner may be required to serve the whole head sentence imposed*',[45] the impugned provisions mandate that the Plaintiff must serve a longer period before he may be released on parole, and remove any real prospect of such release in his lifetime.

Legislative punishment

42. As noted at [19] above, the setting of a minimum non-parole period as part of a sentence is quintessentially an exercise of judicial power. While matters that have been fixed or declared by judicial order may in some circumstances be affected by later legislation,[46] the effect of s 74AB(3) and (if it applies) s 74AAA(5) is to impose on the Plaintiff additional punishment in respect of specific criminal conduct, which is something that may only be done by a court upon an adjudication of criminal guilt.[47]

43. In this proceeding, the Defendant admits that the imposition of punishment or punitive treatment on an individual as a consequence of criminal guilt is an exclusively judicial power or function.[48] That concession is properly made.

44. In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,[49] Brennan, Deane and Dawson JJ held that '*the adjudgment and punishment of criminal guilt*' is a function that is essentially and exclusively judicial in character. While those observations were made in respect of the judicial power of the Commonwealth, they are equally capable of application to judicial power more generally, including at the State

---

45 *Minogue (No 1)* at [17] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ), citing *Crump* at [60]; *Knight v Victoria* (2017) 261 CLR 306 (***Knight***) at [27].

46 *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117.

47 *Cf. R v Boyd* (1995) 81 A Crim R 260, dealing with a sentence of life imprisonment without a minimum term that was imposed '*after a discretionary examination of the circumstances of the individual case*', including the appellant's age and background.

48 See the Plaintiff's Statement of Claim at [24.2] and the Defendant's Defence at [24.2].

49 (1992) 176 CLR 1 at 27.

level.[50] Further, in this context, '*the Constitution's concern is with substance and not mere form*'.[51]

45. One reason why the exercise of judicial power by a State Parliament is inconsistent with the *Commonwealth Constitution* is that Ch III thereof gives effect to an integrated Australian court system[52] at the pinnacle of which sits this Court exercising the appellate jurisdiction conferred by s 73.[53] An exercise of judicial power by the Victorian Parliament would stand outside this integrated judicial system, and would be incapable of both supervision by the Supreme Court of Victoria and appeal to this Court. This would create an island of judicial power '*immune from supervision and restraint*'.[54] It would also be contrary to rule of law concerns, which are addressed further below.

46. As to the proposition that s 74AB(3) and (if it applies to the Plaintiff) s 74AAA(5) impose punishment, an effective extension of a prisoner's minimum non-parole period is a corresponding effective extension of the punishment which is imposed on the prisoner. It may be accepted that legislative detriment cannot always be equated with legislative punishment.[55] In the present case, however, the conclusion that s 74AB(3) and 74AAA(5) effect legislative punishment in respect of criminal conduct is irresistible, for the following reasons.

47. *First*, notwithstanding the rehabilitative and protective purposes of parole, the fixing of a minimum term has a separate punitive character (see [21]-[24] above), so that an increase in that minimum term constitutes additional punishment.

48. *Secondly*, any detention in custody has a prima facie punitive character. In accordance with this Court's observations in *Lim*, unless falling within one of the established exceptions, '*the involuntary detention of a citizen in custody by the State is penal or punitive in character and ... exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt*'.[56]

---

50 *Duncan v New South Wales* (2015) 255 CLR 388 at [41]: '*Some functions of their nature pertain exclusively to judicial power. The determination and punishment of criminal guilt is one of them.*'

51 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27. See also *Nicholas v The Queen* (1998) 193 CLR 173 at [148] (Gummow J); *Magaming v The Queen* (2013) 252 CLR 381 at [62] (Gageler J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [157]-[158] (Kirby J).

52 *Kable v Director of Public Prosecutions* (1996) 189 CLR 51 at 102, 112, 138.

53 *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531 at [122] (Heydon J).

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

55 *Duncan v New South Wales* (2015) 255 CLR 388 at [46].

56 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.

49. Sections 74AB(3) and 74AAA(5) relate to no such established exception. While the Plaintiff has no immediate right to be at liberty in the Australian community by reason of his head sentence,[57] the effect of the relevant provisions is to extend the Plaintiff's ineligibility for parole and to expunge any relevant prospect of that conditional freedom. The impugned provisions therefore have the effect of depriving the Plaintiff of a prospect of release which he otherwise had under his sentence and, although they do not provide the authority for his continued detention, they nevertheless mandate his continued detention.

50. *Thirdly*, no inference can be drawn from the provisions or the extrinsic materials as to a non-punitive and permissible purpose for extending the period within which the Plaintiff is not eligible for parole. Indeed, the secondary materials strongly reinforce the presumption that the provisions are punitive in character. Thus, for example, the Minister emphasised the gravity of the offending (which is most often relevant to retributive principles of justice) when seeking to justify the provisions in her Second Reading Speech.[58]

Cruel, unusual and degrading treatment or punishment

51. The tenth article of the *Bill of Rights* relevantly provides that '*excessive baile ought not be required nor excessive fines imposed nor cruell and unusuall punishments inflicted*'. The *Bill of Rights* forms part of the constitutional fabric of the State of Victoria. As was stated in *Port of Portland Pty Ltd v Victoria*:[59]

> The Bill of Rights is one of the 'transcribed enactments' set out in s 8 of the *Imperial Acts Application Act 1980* (Vic) and by force of s 3 thereof continues 'to have in Victoria ... such force and effect, if any, as [it] had at the commencement of this Act'. The preferable view is that these provisions in the Victorian statute at best serve only to reinforce what are settled constitutional principles. From the grundnorm represented by the constitutional settlement by the Convention Parliament there was to be no turning back in England, or thereafter in the United Kingdom.

52. It is no accident that the ancient prohibition on '*cruell and unusuall punishments*' appears similar to more modern international covenants which prohibit '*inhuman or degrading treatment or punishment*'. Indeed, the tenth article of the *Bill of Rights*:[60]

> bec[a]me the source of provision in international instruments providing for statements of basic human rights: see, eg, the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, art 3 [which provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'] .... The same rule is reflected in the *International Covenant on*

---

57 *Cf. Al-Kateb v Godwin* (2004) 219 CLR 562 at [254] (Hayne J).

58 See further [35] above.

59 (2010) 242 CLR 348 at [13].

60 *Smith v The Queen* (1991) 25 NSWLR 1 at 14-15 (Kirby P, dissenting in the result).

> *Civil and Political Rights* to which Australia has adhered, although without express provision in respect of excessive fines. That Covenant provides in art 7: 'No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment'.

53. The common root for those prohibitions was identified (at least implicitly) by the United Supreme Court in *Brown v Plata*:[61]

> Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. ''The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.''

54. As observed by this Court in *Minogue (No 1)*, an irreducible life sentence, with no prospect of release on parole other than by way of so-called '*compassionate release*', is widely acknowledged to be cruel, inhuman or degrading treatment or punishment.[62] This was explicitly recognised and accepted in the Statement of Compatibility — which the Minister was obligated to lay or cause to be laid before the Parliament in accordance with s 28 of the Charter — in its conclusion that the Bill which introduced the impugned provisions was incompatible with the human rights in ss 10(b) and 22 (i.e. the protection against cruel, inhuman and degrading treatment, and the right to humane treatment when deprived of liberty). The Minister further accepted that the nature of the limitation on human rights was severe, and was aggravated by the retrospective effect of the provisions because affected persons such as the Plaintiff '*would have had an expectation, up until the time the JLA Bill was announced, that they may have had some possibility for release in the future and the capacity to live a useful life post-release*'.[63]

55. Thus, s 74AB(3) and (if it applies to the Plaintiff) s 74AAA(5) have the effect of converting the Plaintiff's imprisonment into detention that amounts to '*cruel, inhuman and degrading treatment or punishment*', and contrary to the proposition that '*[a]ll persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person*'.[64] Further or alternatively, the Plaintiff's sentence or imprisonment has been rendered cruel and unusual punishment within the meaning of the *Bill of Rights*. To the extent that anything need be added to the discussion in *Vinter* of irreducible life sentences, the Plaintiff's sentence has been rendered cruel and unusual punishment by its being '*grossly disproportionate*', or by its being '*arbitrary*' and insensitive to '*individual circumstances*', particularly in the light of the differential

---

61 563 US 493 (2011) at 12 (emphasis added) (citations omitted).

62 *Minogue (No 1)* at [53] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ), [72] (Gageler J).

63 See Hansard, Legislative Assembly, 24 July 2018, pp 2237-2238.

64 Charter, s 22(1).

treatment of the Plaintiff's co-accused (Stan Taylor) by the sentencing judge.[65] Such a sentence of imprisonment could not lawfully be imposed by the Supreme Court in the judicial exercise of the sentencing discretion.[66] More importantly, it amounts to punishment that cannot be imposed arbitrarily by a purported exercise of legislative power.

56. The Supreme Court, as a court capable of exercising federal jurisdiction, could not validly be authorised or required to impose a sentence which constitutes '*cruel, inhuman and degrading treatment or punishment*',[67] or cruel and unusual punishment. Insofar as the Supreme Court has power to impose a sentence of life imprisonment without parole, it may only do so on the basis of a judicial finding that it is inappropriate in all of the circumstances to fix a non-parole period. The Court could not be given a power to impose such a sentence without having any regard to the particular circumstances of the offence and the offender. It follows that the Parliament may not do indirectly what the Court could not do directly. The Parliament cannot take a judicial sentence of life imprisonment with a fixed non-parole period, and require the prisoner to serve life in prison without any real prospect of release on parole. To do so would be to countenance the employment of a '*circuitous device*'.[68] As observed in *Lim*, '*the Constitution's concern is with substance and not mere form*'.[69]

57. Further, insofar as the legislative power of the Parliament '*to make laws in and for Victoria in all cases whatsoever*'[70] is subject to restraints '*by reference to rights deeply rooted in our democratic system of government and the common law*',[71] the impugned provisions are inconsistent with the *Bill of Rights* and fundamental principles of the separation of the judicial power where punishment of criminal guilt is concerned, and contrary to the rule of law as outlined below.

---

65 See *R v Luxton* [1990] 2 SCR 711; *R v Smith* [1987] 1 SCR 1045. Compare *R v Boyd* (1995) 81 A Crim R 260.

66 Compare *R v Boyd* (1995) 81 A Crim R 260.

67 Compare *Director of Public Prosecutions v Hunter* [2013] VSC 440 at [110]-[111] (aff'd *Hunter v The Queen* (2013) 40 VR 660).

68 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 349 (Dixon J).

69 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ). See further the authorities cited in n 51 above.

70 *Constitution Act 1975 (Vic)*, s 16.

71 *Union Steamship v King* (1988) 166 CLR 1 at 10; *cf. Durham Holdings v New South Wales* (2001) 205 CLR 399 at 410 [14] (Gaudron, McHugh, Gummow and Hayne JJ). See also *Broken Hill Proprietary Co Ltd v Dagi* [1996] 2 VR 117 at 204-205 (Hayne JA).

The impugned provisions are impermissibly contrary to the rule of law

58. In *Australian Communist Party v Commonwealth*,[72] Dixon J stated that '*the rule of law forms an assumption*' of the Constitution.[73] To say that the rule of law is an assumption of the Constitution is not to say that it is an assumption without legal consequence.[74] That is because, as recognised in more recent judgments of this Court, '*it is an assumption upon which the Constitution depends for its efficacy*'.[75] And in *Kartinyeri v Commonwealth*,[76] it was acknowledged by Gummow and Hayne JJ that this Court has yet to determine '*all that may follow*' from Dixon J's observation.[77]

59. Once one recognises, as this Court has, that the *Constitution* depends upon the rule of law for its very efficacy, it is axiomatic that any law which conflicts with or is abhorrent to the rule of law will be unconstitutional and invalid. This is not to engage in impermissible '*[t]op-down reasoning*'.[78] It is simply to distinguish existential exigencies (on which the Constitution depends) from constitutional implications (which are its product). It is to recognise that matters extraneous to the constitutional text may nonetheless constitute '*a postulate of the Constitution*'[79] whose continued existence is a condition for the operation of constitutional government.

60. As Gummow and Crennan JJ indicated in *Thomas v Mowbray*, the question is not so much the status of the rule of law as an assumption upon which the Constitution depends for its efficacy, '*[b]ut what does the rule of law require?*'.[80] In that regard, there is now substantial agreement as to what the rule of law practically requires (at least in the so-called '*thin*' sense). In particular, the influential analysis of Joseph Raz,[81] who built on

---

72 (1951) 83 CLR 1.

73 The Canadian Supreme Court has similarly identified the rule of law as one of several '*vital unstated assumption upon which the text [of the Canadian Constitution] is based*': *Kesavanda Bharti v Kerala* (1973) 4 SCC 225. See also *R (Jackson) v Attorney-General* [2006] 1 AC 262 at 304 [107], where Lord Hope stated that '*the rule of law enforced by the courts is the ultimate controlling factor on which [the Constitution of the United Kingdom] is based*'.

74 *Cf. Australian Capital Television v Commonwealth* (1992) 177 CLR 106 at 135 (Mason CJ).

75 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 [30] (Gleeson CJ and Heydon J) (emphasis added). See also *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [61] (Gummow and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1 at 42 [61] (French CJ).

76 (1998) 195 CLR 337 at 381 [89].

77 See also *R v Momcilovic* (2011) 245 CLR 1 at 216 [563] where Crennan and Kiefel JJ identified, but did not answer, '*a large question concerning the limits, if any, which the rule of law may effect upon the grant of legislative powers to State parliaments*'.

78 *McGinty v Western Australia* (1996) 186 CLR 140 at 232 (McHugh J).

79 *Farey v Burvett* (1916) 21 CLR 422 at 453 (Isaacs J). See also *Australian Community Party v Commonwealth* (1951) 83 CLR 1 at 141 (Latham CJ) (in dissent), 202 (Dixon J).

80 (2007) 233 CLR 307 at [61].

81 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2009) at 214-218.

the work of Lon Fuller,[82] identifies various individuated requirements of the rule of law,[83] among them that laws generally be prospective rather than retroactive, and that laws be relatively stable. Lord Bingham (extra-curially) identified[84] eight '*sub-rules*', including the rules that '*the law must be accessible and so far as possible ... predictable*' and that '*the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation*'.

61. At least the former aspect of the rule of law forms part of British constitutional principle.[85] As Lord Diplock stated in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*:[86]

> 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.

62. It is submitted that s 74AB and (if it applies to the Plaintiff) s 74AAA offend the rule of law and those aspects of it identified above. In particular, those provisions single out the Plaintiff (either by name or as a one of a small class of prisoners) and place him outside the general operation of the otherwise operative sentencing law as it was applied by the Supreme Court in the Plaintiff's matter without '*a rational and relevant basis for the discriminatory treatment*'[87] and certainly not a rational and relevant basis justifying the '*extraordinary degree of disproportionality*'[88] of that discriminatory treatment. In that sense, the provisions are arbitrary, and arbitrarily disproportionate. Moreover, the provisions have been inserted into the Act some 30 years after the Plaintiff began serving his sentence and are calculated to destroy the expectation on which the Plaintiff relied throughout that time – not that he would in fact be released on parole at the expiry of his non-parole period, but that he *might* be so released if he could demonstrate his rehabilitation to the parole authorities.[89]

63. As the *Constitution* applies throughout the Commonwealth (covering clause 5), and as the legislative power of the State parliaments are subject to it,[90] a State law which

---

82 Lon Fuller, *The Morality of Law* (revised ed, 1969) at 39.

83 Lisa Crawford, *The Rule of Law and the Australian Constitution* (2017) at 21.

84 Lord Bingham, "The Rule of Law" (2007) 66 *Cambridge Law Journal* 67 at 69ff.

85 *Constitutional Reform Act 2005* (UK), s 1.

86 [1975] AC 591 at 638 (dissenting in the result).

87 *Leeth v Commonwealth* (1992) 174 CLR 455 at 488 (Deane and Toohey JJ, dissenting in the result). See also *Kruger v Commonwealth* (1997) 190 CLR 1 at 94 (Toohey J).

88 *Leeth v Commonwealth* (1992) 174 CLR 455 at 490 (Deane and Toohey JJ, dissenting in the result).

89 See [41] and [54] above.

90 *Cf. Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 54 (arguendo).

infringes the rule of law will be in no better position than a corresponding Commonwealth law.

64. Further, the constitutional assumption of the rule of law is reflected and given effect in s 118 of the *Commonwealth Constitution*, which requires that '*full faith and credit shall be given to the laws, the public Acts and records, and the judicial proceedings of every State*'. As is outlined above, the effect of the impugned provisions is to add additional punishment to the sentence imposed by Vincent J and in a way which fails to recognise that the period for which the Plaintiff would remain ineligible for parole was a controversy which was raised and quelled by Vincent J's sentence.

10 ***The decisions in* Crump *and* Knight**

65. The arguments set out above accept 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.[91]

66. The Plaintiff's arguments raise issues which were not the subject of argument, let alone decision, in *Crump* and *Knight*, including the operation of implied constitutional limitations derived from the rule of law, the power of a State Parliament to impose legislative punishment for a crime, and the significance of the Plaintiff's detention amounting to cruel, inhuman and degrading treatment or punishment. Insofar as Ch III considerations are raised, they are raised by reference to this Court's statements in *Chu*
20 *Kheng Lim* and *Duncan*, and not (as they were in *Knight*) by reference to *Kable v Director of Public Prosecutions (NSW)*.[92] Accordingly, the decisions in *Crump* and *Knight* do not stand in the way of acceptance of the Plaintiff's arguments in this case.

67. Alternatively, to the extent that it is necessary to do so, the Plaintiff seeks leave to re-open the decisions in *Crump* and *Knight*. Those cases did not '*rest upon a principle carefully worked out in a significant succession of cases*'.[93] Nor, with respect, have the decisions achieved any relevant useful result.[94] On the contrary, they have in fact led to the encroachment of fundamental human rights, as identified in *Minogue (No 1)*, and have opened the door to similar legislative measures in the future. Apart from the legislation under challenge in this case, the Plaintiff is not aware of any other State
30 having independently acted upon the decisions in *Crump* and *Knight* in any way which militates against their reconsideration.[95]

---

91 *Crump* at [60]; *Knight* at [29].

92 (1996) 189 CLR 51; see *Knight* at [5].

93 *John v Commissioner of Taxation* (1989) 166 CLR 417 at 488

94 *John v Commissioner of Taxation* (1989) 166 CLR 417 at 488.

95 *John v Commissioner of Taxation* (1989) 166 CLR 417 at 488-489.

68. Finally, it is respectfully submitted that both *Crump* and *Knight* approached the constitutional issues with an excessive formalism, insofar as they suggest that the relevant provisions did not make the sentence of life imprisonment '*more punitive or burdensome to liberty*'.[96] To a large extent, the dicta were based on earlier remarks in *Baker*,[97] in which the appellant had not been sentenced with a minimum term at all, and therefore in circumstances far removed from the instant case.[98] Of course, neither Knight nor Crump argued that the relevant provisions rendered his sentence more punitive and was therefore an exercise in legislative punishment. For the reasons given at [18] to [50] above, it is respectfully submitted that the dicta in *Knight* and *Crump* gave preference to form over substance and were incorrect. They should not now be followed.

VII: Orders sought

69. The questions stated for the opinion of the Full Court be answered as follows:

(a) Is s 74AB of the Act invalid?

Yes.

(b) Does the validity of s 74AAA arise in the circumstances of this case?

Yes.

(c) If the answer to question (b) is 'yes', is s 74AAA invalid?

Yes.

(d) Who should pay the costs of the Special Case?

The Defendant.

VIII: Estimate for oral argument

70. The Plaintiff estimates that he will require 2 hours for the presentation of oral argument.

Dated: 27 February 2019

C J Horan
T: (03) 9225 8430
F: (03) 9225 8668
E: chris.horan@vicbar.com.au

A F Solomon-Bridge
T: (03) 9225 6495
F: (03) 9225 8668
E: asolomonbridge@vicbar.com.au

R A Minson
T: (03) 9225 8967
E: rowan.minson@vicbar.com.au

---

96 *Knight* at [29]; *Crump* at [41].

97 *Baker v The Queen* (2004) 223 CLR 513 at 528 [29]; *cf.* at 548-549 [98]-[101] (Kirby J).

98 It was the decision of the Court of Criminal Appeal of New South Wales that Baker was ineligible to receive a judicially determined minimum term which was in issue.