IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M2 of 2017

BETWEEN:

CRAIG WILLIAM JOHN MINOGUE
Plaintiff

AND

STATE OF VICTORIA
Plaintiff

ANNOTATED SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

PART I: Internet publication

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

PART II: Basis of intervention

2. The Attorney-General for the State of Queensland ('Queensland') intervenes in these proceedings in support of the defendant pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART III: Reasons why leave to intervene should be granted

3. Not applicable.

PART IV: Submissions

Summary

4. Queensland's written submissions are confined to addressing the novel arguments of the plaintiff directed to constitutionalising his particular conception of the rule of law. The plaintiff submits that if ss 74AAA and 127A of the *Corrections Act 1986* (Vic) apply to his parole application then they operate retrospectively and that such retrospectivity is inconsistent with the constitutional assumptions of the rule of law and therefore invalid.[1]

[1] Plaintiff's submissions, 2 [4](c), 19 [68]; **[SCB 84 [36], 85 [37](c)]**.

Intervener's submissions
Filed on behalf of the Attorney-General for the State of Queensland (Intervening)
Form 27c
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Per Kent Blore
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5. Queensland's primary submission is that ss 74AAA and 127A of the *Corrections Act* do not operate retrospectively as they merely prescribe criteria for the Board to apply in the future.

6. To the extent that the plaintiff relies upon some broader conception of retrospectivity under the rubric of the rule of law, Queensland submits:

a. The rule of law connotes more than one legal principle and its meaning depends always upon context. Yet in the Australian constitutional context, it is submitted that it is tolerably clear that the core meaning of the rule of law is that no branch of government may exceed the authority reposed in it by its constitutional structure. The courts are duty bound to strike down legislation that exceeds the legislative competence of Parliament, but equally, the courts must not exceed their mandate by reviewing the merits of legislation. The great underlying principle of the Australian Constitution is that individual rights and liberties are to be secured through Parliament, not the courts. The constitutional underpinnings of the States are materially identical in this regard. The function served by the rule of law is thus to preserve the essential features of the constitutional system. It is in this sense that the efficacy of the Constitution depends on the rule of law.

b. The plaintiff's conception of the rule of law does not appear to be directed to this core definition. Rather, it is directed to the desirability that laws be prospective and stable. If the plaintiff's submissions about the rule of law are in reality merely about prospectivity, then the orthodox principles regarding retrospective laws apply: provided Parliament has evinced its intention with sufficient clarity, there is no constitutional impediment to passing retrospective laws.

c. If the plaintiff's submissions are a more abstract appeal to the rule of law then they are insufficiently precise to invite this Court to identify a new limit on legislative competence. As an abstract concept beyond its core definition, the indeterminate nature of the rule of law means that compliance is a matter for Parliament (and not the courts).

d. That does not mean that abstract notions of the rule of law are without legal consequence. The principle of legality represents the appropriate reconciliation of the

importance of aspects of the rule of law such as clarity and prospectivity on the one hand and parliamentary sovereignty on the other.

Sections 74AAA and 127A do not operate retrospectively

7. Before considering the constitutional validity of any statute, it is first necessary to consider its construction and operation.[2] Queensland adopts the defendant's construction of ss 74AAA and 127A of the *Corrections Act*,[3] and makes the following additional points.

8. Sections 74AAA and 127A of the *Corrections Act* do not engage any 'accrued rights' of the plaintiff nor do they operate retrospectively. Neither provision impacts the plaintiff's ability to orient himself as a rights-and-duty-bearing juristic person and to make decisions about whether to engage in actions with legal consequences, because neither provision is in any way directed to him.[4] The subject of s 74AAA is the Board and not an applicant for parole. The provision establishes three norms of conduct, all of which are directed to the Board. Subsection (1) provides that '[t]he Board must not' make a parole order in respect of a certain prisoners unless it has first received an application. Subsection (3) provides that 'the Board must' have regard to the court record when considering the application. Subsection (4) provides that 'the Board must not' make a parole order unless satisfied of certain things. Although subs (2) provides that '[t]he [prisoner's] application must be lodged with the secretary of the Board' before it may be considered, subs (2) does not thereby prescribe a norm of conduct for prisoners. It avoids identifying who must lodge the application by use of the passive voice.

9. In terms of s 74AAA's temporal operation, question (a)(i) stated for the opinion of the Full Court directs attention to three temporal markers: the prisoner's parole eligibility

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[2] *Brown v Tasmania* (2017) 91 ALJR 1089, 1179 [485], 1180 [487] (Edelman J); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 581 [11] (French CJ, Kiefel and Bell JJ); *Coleman v Power* (2004) 220 CLR 1, 21 [3] (Gleeson CJ), 68 [158] (Gummow and Hayne JJ), 84 [219]-[220] (Kirby J).

[3] Defendant's submissions, 12-13 [36]-[38], 19-20 [61].

[4] Indeed, the plaintiff may be ignorant of s 74AAA and still obey the law: cf FAR Bennion, *Bennion on Statutory Interpretation* (LexisNexis, 5th ed, 2008) 807, quoted in *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459, 479 [48] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

date, the date an application is made and the date that the Board decides to proceed with parole planning.[5] Yet s 74AAA does not hinge upon any of those temporal markers. While subs (1) makes the receipt of an application a condition precedent to the Board exercising its power, nothing in s 74AAA turns on what point in the past the application was made, provided only that it was made at some point prior to the exercise of power. Each of the three norms of conduct directed to the Board are all prospective. A retrospective law in the true sense is one which 'provides that as at a past date the law shall be taken to have been that which it was not'.[6] That does not include a provision like s 74AAA which merely alters existing duties as from the date it comes into effect.[7] It may be acknowledged that legislation introducing a penalty may stand in a different category.[8] However, it is abundantly clear that the granting or withholding of parole does not involve the punishment of criminal guilt.[9]

10. Section 127A is a declaratory provision prefaced with the words, 'To avoid doubt, and without limiting the application of the amendments [that introduced s 74AAA]'.[10] Expressions such as this are '[c]ommonly ... used as a bridging phrase between a general provision and an example that the draftsman fears may not have been clearly enough covered by the general statement.'[11] Thus, the references to actions taken by an applicant for parole and associated temporal markers in s 127A do not affect the above construction of s 74AAA. They merely reinforce it.

11. A review of the legislative context into which ss 74AAA and 127A were inserted also reveals that they do not 'affect [any] rights or liabilities [of the plaintiff] which the law had defined by reference to past events'.[12] Whilst '[t]he common law presumption

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[5] **[SCB 84-85 [37](a)(i)]**.
[6] *West v Gwynne* [1911] 2 Ch 1, 12 (Buckley CJ).
[7] *R v Kidman* (1915) 20 CLR 425, 443 (Isaacs J).
[8] *Bakker v Stewart* [1980] VR 17, 22-23 (Lush J). Cf *Maher v Hamilton* [1990] Tas R 199, 204 (Cox J).
[9] *Baker v The Queen* (2004) 223 CLR 513, 528 [29] (McHugh, Gummow, Hayne and Heydon JJ), quoted with approval in *Crump v New South Wales* (2012) 247 CLR 1, 21 [41] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Knight v Victoria* (2017) 91 ALJR 824, 830 [29] (the Court).
[10] Defendant's submissions, 11 [34].
[11] *Re John* [2000] 2 Qd R 322, 326 [15] (McMurdo P, Davies and Thomas JJA). 'The drafter uses the device of incorporating a provision "to remove doubt" in order to confirm the interpretation of the operative provision that is intended by the drafter': *Karanfilov v Inghams Enterprises Pty Ltd* [2001] 2 Qd R 273, 289 [58] (Mullins J).
[12] *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1, 15 [27] (French CJ, Crennan, Kiefel and Keane JJ), 21 [50] (Gageler J); *Chang Jeeng v Nuffield (Australia) Pty Ltd* (1959) 101 CLR 629, 637-638 (Dixon CJ); *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ).

against imputing to the legislature an intention to interfere retrospectively with rights which have already accrued does not call for a narrow conception of a right',[13] that does not relieve the plaintiff of 'the need to identify a right that has been acquired or has accrued under the relevant legislation before it was amended.'[14]

12. Yet prior to the amendments (as well as thereafter), the *Corrections Act* did not (and does not) furnish the plaintiff with a right to apply to the Board, nor a right to have his application considered, periodically or at all. Conversely, the Act does not impose a duty on the Board to consider parole applications within any particular timeframe. The Board is required by reg 81 of the *Corrections Regulations 2009* (Vic) to meet as often as is necessary to perform its functions. Section 69(1)(a) of the *Corrections Act* provides that the Board has the functions conferred on it by the Act or the Regulations. Those functions include a duty to consider submissions from victims under s 74B, a duty to consider whether to cancel parole or vary the conditions of parole in certain circumstances under s 77 and a duty to consider a breach of a term or condition of parole under s 78C. Conspicuously absent is any duty to consider parole applications. No doubt this owes to the nature of parole as a 'concession made' by the executive in its 'discretion'.[15]

13. The absence of any duty to consider parole applications distinguishes the *Corrections Act* from the legislation at issue in *Ford v National Parole Board.* In that case, the National Parole Board of Canada had a positive duty to 'consider the case of the inmate as soon as possible after the inmate has been admitted to a prison, and in any event within six months thereof, and fix a date for his parole review'.[16] Pursuant to that duty, the Board advised Mr Ford that he would be eligible for parole on a certain date. Later amendments were then introduced, which if applicable would have had the effect of delaying Mr Ford's parole eligibility date by three years. In that particular statutory setting, Walsh J held, 'he did have what I consider to be a right to have his file reviewed

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[13] *Carr v Finance Corporation of Australia Ltd [No 2]* (1982) 150 CLR 139, 151 (Mason CJ, Murphy and Wilson JJ). See also *Mathieson v Burton* (1971) 124 CLR 1, 12 (Windeyer J).
[14] *Chang v Laidley Shire Council* (2007) 234 CLR 1, 34 [116] (Hayne, Heydon and Crennan JJ).
[15] *Bugmy v The Queen* (1990) 169 CLR 525, 530, 532 (Mason CJ and McHugh J). See also at 536 (Dawson, Toohey and Gaudron JJ) ('may, but of course need not').
[16] Regulation 3(l)(a) of the Regulations in PC 1960-681, quoted in *Ford v National Parole Board* (1976) 73 DLR 3d 630, 632 (Walsh J).

as of that date, this right having accrued to him from the date of his incarceration in 1971.'[17] By contrast, regular review times are not required by the *Corrections Act* such that it does not vest any concomitant rights in prisoners to have their parole reviewed.

14. Thus, the plaintiff cannot argue that he has an accrued right to parole: '[p]arole is a privilege, not a right.'[18] The highest he could put such an argument is that he has a 'potential right' to parole, but that would only obscure characterisation of the right as 'accrued'.[19] 'A mere hope or expectation that a right will be created' will not amount to an accrued right.[20] Further, the plaintiff cannot argue that he has an accrued right under the Act to have his parole application considered, other than perhaps 'a public law right to require the [Board] to observe its duty to comply with the law as it exists from time to time.'[21] Without any statutory right to make an application, there is not even 'a power to take advantage of an enactment', which itself would be insufficient to amount to an accrued right.[22] Perhaps the plaintiff does not merely argue that he had an accrued right to have his application considered, but also that his application be considered 'in accordance with the statutory regime as it existed at that time.'[23] However, as in *Crump v New South Wales*, 'he had no right or entitlement that that regime should continue to apply to him.'[24]

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[17] *Ford v National Parole Board* (1976) 73 DLR 3d 630, 635 (Walsh J). In any event, the paucity of cases relying on *Ford* should be noted. The plaintiff notes in his submissions at 15, n 38 that *Ford* has been cited with apparent approval in DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 421 [10.33]. However, it would appear that no Australian court has referred to *Ford* despite featuring in Pearce since the second edition: DC Pearce, *Statutory Interpretation in Australia* (Butterworths, 2nd ed, 1981) 160 [224]. It is true that Lord Rodger referred to *Ford* in *Flynn v Her Majesty's Advocate (Scotland)* [2004] UKPC D1 (18 March 2004); 2004 SLT 863, 875 [64]. However, the reasoning in *Ford* does not form part of the ratio of his Lordship's speech. His Lordship went on to find that even if a vested right to a parole board hearing was 'somewhat generous[ly] assum[ed]', the amendments were effective to displace any such 'rights': 876 [68]-[69]. Moreover, as Lord Rodger pointed out at 879 [84], other members of the Board reasoned in an entirely different way without recourse to the idea of accrued rights.

[18] *McCallum v Parole Board (NSW)* [2003] NSWCCA 294 (17 September 2003) [28] (Smart AJ).

[19] *Chang v Laidley Shire Council* (2007) 234 CLR 1, 34 [115] (Hayne, Heydon and Crennan JJ).

[20] *Yao v Minister for Immigration* (1996) 69 FCR 583, 588 (Black CJ and Sundberg J), citing *Director of Public Works v Ho Po Sang* [1961] AC 901.

[21] *Attorney General (Qld) v Australian Industrial Relations Commission* (2002) 213 CLR 485, 502 [40] (Gaudron, McHugh, Gummow and Hayne JJ) (underlining added).

[22] *Esber v Commonwealth* (1992) 174 CLR 430, 440 (Mason CJ, Deane, Toohey and Gaudron JJ), quoting *Mathieson v Burton* (1971) 124 CLR 1, 23 (Gibbs J). See also *Robertson v City of Nunawading* [1973] VR 819, 825-826 (Winneke CJ, Gowans and Starke JJ); *Abbott v Minister for Lands* [1895] AC 425, 431.

[23] Plaintiff's submissions, 14 [54].

[24] *Crump v New South Wales* (2012) 247 CLR 1, 29 [71] (Heydon J).

15. It follows that, properly construed, ss 74AAA and 127A of the *Corrections Act* do not impact on any accrued rights of the plaintiff nor do they operate retrospectively. The plaintiff's submissions fail at the outset. If this Court accepts that construction and comes to the view that the plaintiff's rule of law argument is solely about prospectivity, then it is neither necessary nor desirable for the Court to go on to consider the constitutional point.[25] In the event that this construction is not accepted or the plaintiff's complaint goes beyond retrospectivity to a complaint based on a more nebulous conception of the rule of law, then the Attorney-General for Queensland makes the following additional submissions.

The need for caution when invoking the rule of law

16. The plaintiff points to invocations of the rule of law by this Court,[26] most notably the observation of Dixon J (as his Honour then was) in the *Communist Party Case* that 'the rule of law forms an assumption' of the Constitution.[27] The existence of references by this Court to the rule of law should be accepted. The plaintiff also points to conceptions of the rule of law that are antipathetic towards retrospectivity.[28] Joseph Raz, for example, argued that 'the law must be capable of guiding the behaviour of its subjects'.[29] Again, the existence of such theories should be accepted. However, the plaintiff falls into a logical error by uncritically equating one reference to the rule of law with another, as though the concept admits of only one accepted meaning. That is not so.

17. The rule of law is a 'protean concept'.[30] Perhaps more accurately, the rule of law is a 'cluster of principles', rather than any single conception;[31] in French CJ's words, 'a

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[25] *Knight v Victoria* (2017) 91 ALJR 824, 830-831 [32]-[33] (the Court); *Duncan v New South Wales* (2015) 255 CLR 388, 410 [52] (the Court).
[26] Plaintiff's submissions 17-18 [62].
[27] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).
[28] Plaintiff's submissions 18 [65].
[29] Joseph Raz, 'The Rule of Law and Its Virtue' in Keith Culver (ed), *Readings in the Philosophy of Law* (Broadview Press, 1999) 13, 16. See also FA Hayek, *The Road to Serfdom* (Routledge, 1944) 54.
[30] John Basten, 'Human Rights and the Rule of Law' (2008) 11 *Newcastle Law Review* 31, 33; Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017) 5.
[31] Jeffrey Goldsworthy, 'Foreword' in Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017) v.

many coloured dream coat'.[32] Often the principle is summed up by reference to John Adam's distillation, 'a government of laws and not of men',[33] though that explanation tends to hide more than it reveals.[34] As Dr Lisa Crawford has recently pointed out, 'if we scratch the surface, profound differences of opinion soon emerge.'[35] The rule of law has been variously conceptualised, among many other conceptualisations, as:

- the opposite of rule by the best men (Aristotle);[36]
- the antithesis of the divine right of kings (Sir Edward Coke);[37]
- the requirement that laws be 'established and promulgated' rather than 'extemporary' (Locke);[38]
- the requirement that laws be general (Rousseau);[39]
- the consequence of separating powers between the three branches of government (John Adams);[40]
- the consequence of judicial independence (Alexander Hamilton);[41]
- the opposite of arbitrary power, the idea of legal equality (that government is subject to the ordinary common law not a separate system of administrative law) and the idea of the constitution as ordinary law (AV Dicey);[42]
- a protection that embraces individual rights (Dworkin);[43]

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[32] Chief Justice Robert French, 'The Rule of Law as a Many Coloured Dream Coat' (Speech delivered at the Singapore Academy of Law 20th Annual Lecture, Singapore, 18 September 2013) 1.
[33] *Massachusetts Constitution* (1780) Part The First, art XXX (drafted by John Adams). See also *Milirrpum v Nabalco Pty Ltd* (1970) 17 FLR 141, 267 (Blackburn J); *Waters v Public Transport Corporation* (1991) 173 CLR 349, 413 (McHugh J).
[34] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 212.
[35] Crawford, above n 30, 10.
[36] Aristotle, *The Politics of Aristotle* (Ernest Barker trans, Clarendon Press, 1946) 145-149 (book 3, ch 16, 1287a-1287b).
[37] *Case of Prohibitions* (1607) 12 Co Rep 64, 65; 77 ER 1342, 1343 (Sir Edward Coke).
[38] John Locke, *Two Treatises of Government* (Cambridge University press, first published 1689, 1988 student ed) 358-360 (§§136–137).
[39] Ruzha Smilova, 'The General Will Constitution: Rousseau as a Constitutionalist' in DJ Galligan (ed), *Constitutions and the Classics* (Oxford University Press, 2014) 265, 283-285.
[40] See *Massachusetts Constitution* (1780) Part The First, art XXX ('In the government of this commonwealth, [there shall be a separation of powers]: to the end it may be a government of laws and not of men').
[41] MNS Sellers, 'The Constitutional Thought of Alexander Hamilton' in DJ Galligan (ed), *Constitutions and the Classics* (Oxford University Press, 2014) 354, 364-366.
[42] AV Dicey, *Introduction to the Study of the Law of the Constitution* (Palgrave McMillian, first published 1885, 10th ed, 1959) 187.
[43] Ronald Dworkin, 'Political Judges and the Rule of Law' (1978) 64 *Proceedings of the British Academy* 259, 262.

- a protection that embraces substantive justice and equality, including democracy (Allan);[44]
- the guarantee of human rights (the Universal Declaration of Human Rights);[45]
- the consequence of proportionality (Barak);[46] and
- a protection that embraces social welfare rights.[47]

18. Broadly, theories of the rule of law can be divided into 'formal' or 'thin' accounts, which focus upon principles of legal form and procedure such as clarity, publicity and prospectivity, and 'substantive' or 'thick' accounts, which include additional principles of substance such as the protection of human rights, liberty and equality.[48] Laid over the dichotomy between formal and substantive accounts is a further distinction between theories that subscribe to the rule of law as comprising ideals to which to aspire and theories that hold out the rule of law as a justiciable constraint on legislative power. Within formal accounts of the rule of law, Raz considers that a law may validly violate the rule of law even if 'most radically and systematically',[49] whereas Lon L Fuller thought that a 'total failure' of any of the formal requirements of the inner morality of law would 'not simply result in a bad system of law; it [would] result[] in something that is not properly called a legal system at all'.[50] When it comes to substantive accounts, Professor Trevor Allan holds that courts may strike down legislation in breach of the rule of law,[51] whereas Lord Bingham – who subscribed to a conception of the rule of law that embraces human rights – conceded that parliamentary supremacy means that Parliament may validly infringe the rule of law when necessary.[52]

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[44] TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001) 2; TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford University Press, 2013) 89, 119.

[45] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), preamble. See also Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 230-2; Tom Bingham, *The Rule of Law* (Allen Lane, 2010) 66.

[46] Barak, above n 45, 234.

[47] Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) 112-3.

[48] Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] *Public Law* 467, 467.

[49] Joseph Raz, above n 34, 223.

[50] Lon L Fuller, *The Morality of Law* (Yale University Press, 1969 revised ed) 39.

[51] Allan (2001) above n 44, 7, 238; Allan (2013) above n 44, 88-89, 120, 124, 127, 215-216, 224.

[52] Bingham, above n 45, 168.

19. Far from the plaintiff's submission that 'there is now substantial agreement as to what the rule of law practically requires',[53] with respect, it can be seen that the rule of law is in fact an inherently 'contested concept',[54] the precise content of which is 'hotly disputed'.[55] Even narrowing the enquiry to the 'thin' sense as the plaintiff appears to do,[56] there is no unanimity among theorists as to what the rule of law in the thin sense means, what amounts to breach nor what the consequences of a breach are.

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20. When it comes to judicial invocations of the rule of law, it has been used by this Court in at least the following contexts and senses:[57]

- the practical effect of Ch III of the Constitution;[58]
- the consequence of an independent judiciary;[59]
- a principle enforced by judicial review of executive action (in particular in the context of s 75(v) of the Constitution);[60]

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- that it is the province of the courts to say what the law is and that Parliament cannot decide the limits of its constitutional power;[61]
- at the heart of which is the certainty and finality of judicial decisions;[62]

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[53] Plaintiff's submissions, 18 [65].

[54] Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137, quoted in *Graham v Minister for Immigration and Border Protection* (2017) 91 ALJR 890, 915 [106] (Edelman J). See also Robert French, 'Rights and Freedoms and the Rule of Law' (2017) 28 *Public Law Review* 109, 109 ('much debated'); Ninian Stephen, 'The Rule of Law' (2003) 22(2) *Dialogue* 8, 8 ('far from uniform').

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[55] *Graham v Minister for Immigration and Border Protection* (2017) 91 ALJR 890, 909 [82] (Edelman J).

[56] Plaintiff's submissions, 18 [65] ('at least in the so-called "*thin*" sense').

[57] See also the list provided by Chief Justice Murray Gleeson, 'Courts and the Rule of Law' (Speech delivered at the Rule of Law Series, Melbourne, 7 November 2001).

[58] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 351 [30] (Gleeson CJ and Heydon J), 441 [350] (Kirby J); *South Australia v Totani* (2010) 242 CLR 1, 91 [233] (Hayne J), 156 [423] (Crennan and Bell JJ); *Momcilovic v The Queen* (2011) 245 CLR 1, 216 [563] (Crennan and Kiefel JJ).

[59] *South Australia v Totani* (2010) 242 CLR 1, 40 [55] (French CJ).

[60] *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 70 (Brennan J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 482 [5], 492 [31] (Gleeson CJ), 513-514 [103]-[104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 525 [111] (Kirby J); *Combet v Commonwealth* (2005) 224 CLR 494, 579 [167] (Kirby J); *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 171-172 [85]-[86] (Kirby J); *Graham v Minister for Immigration and Border Protection* (2017) 91 ALJR 890, 901 [40], 902 [44] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

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[61] *Abebe v Commonwealth* (1999) 197 CLR 510, 560 [137] (Gummow and Hayne JJ); *Western Australia v Ward* (2002) 213 CLR 1, 392 n 1091 (Callinan J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 69 [158] (Gummow, Crennan and Bell JJ); *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 355-356 [87] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

[62] *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 26 [52] (French CJ, Kiefel, Bell, Gageler and Keane JJ).

- a principle that is contingent upon access to justice, or which protects access to justice, or an aspect of which is access to justice;[63]
- the corollary of, or justification for, legal professional privilege;[64]
- underpinned by predictability and consistency in the context of sentencing;[65]
- an aspect of which is that guilt is personal and individual rather than by association;[66]
- a principle that protects individual rights and liberty;[67]
- a principle which 'posits legality as an essential presupposition for political liberty and the involvement of electors in the enactment of law';[68]
- a principle associated with the protection of human rights;[69]
- a principle from which proportionality derives;[70]
- preservation of safety of persons within the Queen's peace and preservation of the government itself;[71] and,
- the requirement to give effect to duly enacted legislation.[72]

21. This list reveals that almost without exception, the rule of law is defined in the case law by its components or by the relation it bears to other concepts, rather than what it is. It is the sheer indeterminacy of what the term means that led Gummow and Crennan JJ in *Thomas v Mowbray* to ask instead, 'But what does the rule of law require?'[73] Given the

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[63] *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 517 [88] (Kirby J); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 351 [30] (Gleeson CJ and Heydon J), 446 [364] (Kirby J); *Combet v Commonwealth* (2005) 224 CLR 494, 619 [304] (Kirby J); *Kuczborski v Queensland* (2014) 254 CLR 51, 109 [185] (Crennan, Kiefel, Gageler and Keane JJ).
[64] *Carter v Managing Partner, Northmore Hale Davy & Leake* (1995) 183 CLR 121, 128 (Brennan J), 161 (McHugh J); *Waterford v Commonwealth* (1987) 163 CLR 54, 74 (Brennan J).
[65] *Markarian v The Queen* (2005) 228 CLR 357, 390 [84] (McHugh J), 405 [132] (Kirby J); *Director of Public Prosecutions (Vic) v Dalgliesh (a pseudonym)* (2017) 91 ALJR 1063, 1073 [50] (Kiefel CJ, Bell and Keane JJ).
[66] *South Australia v Totani* (2010) 242 CLR 1, 91 [232] (Hayne J).
[67] *Momcilovic v The Queen* (2011) 245 CLR 1, 216 [563] (Crennan and Kiefel JJ); *South Australia v Totani* (2010) 242 CLR 1, 155 [423] (Crennan and Bell JJ); *Abebe v Commonwealth* (1999) 197 CLR 510, 560 [137] (Gummow and Hayne JJ).
[68] *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 47 [120] (Gummow and Bell JJ).
[69] *Momcilovic v The Queen* (2011) 245 CLR 1, 152 [382] (Heydon J).
[70] *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 140 [457] (Kiefel J); *Momcilovic v The Queen* (2011) 245 CLR 1, 39 [22] (French CJ), 214 [556] (Crennan and Kiefel JJ).
[71] *South Australia v Totani* (2010) 242 CLR 1, 93-94 [240] (Heydon J).
[72] *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168, 196 [77] (Kirby J); *Cornwell v The Queen* (2007) 231 CLR 260, 323 [181] (Kirby J).
[73] *Thomas v Mowbray* (2007) 233 CLR 307, 342 [61] (Gummow and Crennan JJ). See also *South Australia v Totani* (2010) 242 CLR 1, 91 [233] (Hayne J) ('But that then invites attention to what the rule of law requires').

breadth of possible meanings, it is impermissible to fasten upon examples of judges using the formula of words 'rule of law' and then simply superimpose one's own particular conception of that principle. The various conceptualisations of the rule of law are not substitutable and the same consequences do not necessarily follow. As Gleeson CJ pointed out extra-judicially, '[t]he rule of law is such a powerful rhetorical weapon, both in legal and political argument, that care is needed in its deployment.'[74]

10 This warning is echoed by Professor Paul Craig:[75]

> It is ... important to understand the consequences of adopting a particular position on this matter. The phrase the 'rule of law' has a power of force of its own. To criticise governmental action as contrary to the rule of law immediately casts it in a bad light. Such criticism may well be warranted depending upon the circumstances. Yet if the nub of the critique is posited upon a substantive conception of the rule of law then intellectual honesty requires that this is made clear, and it also demands clarity as to the particular theory of justice which informs the critique.

22. For these reasons, it is submitted that whenever any reliance is placed upon judicial
20 endorsement of the rule of law, it is important to identify which guise of the principle is being endorsed. Conversely, it is submitted that any reliance upon a particular theory of the rule of law must always be tethered to the Constitution. Not all versions of the principle have a foothold in our legal system.

23. Some of the propositions in the above list reflect the fact that the rule of law takes its complexion from its constitutional context, being closely linked to the idea of
30 constitutionalism.[76] One example is the idea sourced from the US authority of *Marbury v Madison* that the courts have a duty to review the validity of legislation.[77] While in the UK context, the courts lack that power, it cannot be said that the UK has realised the rule of law less perfectly than the US.[78] Thus, the rule of law consists of a number of propositions. Not all constitutional settings demand the same combination of those propositions and even within a particular constitutional setting it cannot be said that any one combination is necessarily mandated.

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[74] Chief Justice Murray Gleeson, 'Courts and the Rule of Law' (Speech delivered at the Rule of Law Series, Melbourne, 7 November 2001).
[75] Craig, above n 48, 487.
[76] Murray Gleeson, *Boyer Lecturers 2000: The Rule of Law and the Constitution* (ABC Books, 2000) 9.
[77] *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (Marshall CJ) (1803).
[78] By one measure, the opposite is true: World Justice Project, *Rule of Law Index 2017-2018* (2018) 3.

24. It is submitted that in the Australian constitutional setting, the core meaning of the rule of law is captured by the metaphor, 'a stream cannot rise higher than its source', meaning that all three branches of government are subject to the Constitution, such that governmental power is derived from and constrained by law.

Sections 74AAA and s 127A of the Corrections Act do not infringe the core definition

10 25. According to Callinan J in *Western Australia v Ward*, Dixon J's remark in the *Communist Party Case* that the rule of law forms an assumption of the Constitution:[79]

> meant no more than that the Parliament could not decide the limits of its constitutional power. It simply expresses the notion encapsulated in the saying 'The stream cannot rise above its source.' Fairly interpreted, it provides no support for the notion that judges are empowered to strike down legislation on the basis that it infringes some unwritten aspect of the rule of law.

26. Although McHugh and Gummow JJ did not refer to Dixon J's reference, their Honours
20 came to the same conclusion in respect of a similar conception of the rule of law in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*:[80]

> It may be said that the rule of law reflects values concerned in general terms with abuse of power by the executive and legislative branches of government. But it would be going much further to give those values an immediate normative operation in applying the Constitution.

27. That is, this Court is bestowed with the duty to strike down unconstitutional legislation, but equally, this Court cannot exceed its own constitutional bounds by invalidating
30 legislation on the basis of extra-constitutional norms like the rule of law. It is the function of Parliament to determine the extent to which legislation is to comply with such norms. The 'great underlying principle' of the Constitution is that norms directed to individual rights and liberties are to be secured by the people through Parliament.[81]

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[79] *Western Australia v Ward* (2002) 213 CLR 1, 392 n 1091 (Callinan J). Although his Honour was in dissent
40 regarding whether the grant of certain leasehold interests in land extinguished native title, his reasoning in respect of the rule of law is not contradicted by the reasoning of the other judges. His Honour was alone in addressing the submissions of the Human Rights and Equal Opportunity Commission regarding the rule of law. See also Crawford, above n 30, 200.

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

[81] Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 329, quoted with approval in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136 (Mason CJ); *McCloy v New South Wales* (2015) 257 CLR 178, 202 [27] (French CJ, Kiefel, Bell and Keane JJ), 226 [110] (Gageler J), 258 [219] (Nettle J), 284 [318] (Gordon J). For recognition of this in a case concerning the rule of law, see *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 352 [32] (Gleeson CJ and

The plaintiff's argument reduced to retrospectivity

28. Although the plaintiff has not categorically stated which conceptions of the rule of law he adopts and which he disavows, it would appear that his submissions are not directed to this core meaning of the rule of law in the Australian context. Rather, he has in mind Raz and Fuller's requirement that 'laws generally be prospective rather than retroactive, and that laws be relatively stable', as well as Lord Bingham's requirement that laws be 'accessible and so far as possible intelligible, clear and predictable'.[82] If that is the extent of the plaintiff's reliance upon the rule of law, then his argument is simply that laws should generally (though not always) be prospective and predictable. With respect, the gloss of 'rule of law' adds little and only serves to distract from the application of orthodox principles regarding retrospectivity.

29. According to that orthodoxy, provided the legislative intention is expressed sufficiently clearly,[83] there is no constitutional impediment to Australian Parliaments enacting laws with retrospective effect.[84] To hold otherwise would be – in Isaac J's words in *Ex parte Walsh and Johnson; Re Yates* – to 'write a new chapter on constitutional law, entirely foreign to the whole theory and practice of the British constitution.'[85] This Court upheld the validity of such laws as long ago as 1915 in *R v Kidman*.[86] That case concerned the validity of a Commonwealth law criminalising conspiracy to defraud the Commonwealth, backdated by one year. Among the majority, Higgins J noted:[87]

> There are plenty of passages that can be cited showing the inexpediency, and the injustice, in most cases, of legislating for the past, of interfering with vested rights, and of making acts unlawful which were lawful when done; but these passages do not raise any doubt as to the power of the Legislature to pass retroactive legislation, if it see fit.

Heydon J) ('The primary responsibility for deciding where the public interest lies is with the State and Territory legislatures').

[82] Plaintiff's submissions, 18 [65].

[83] *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ); *Fisher v Hebburn Ltd* (1960) 105 CLR 188, 194 (Fullagar J); *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459, 478-479 [47]-[48] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[84] See also Crawford, above n 30, 92-96.

[85] *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36, 86 (Isaacs J).

[86] *R v Kidman* (1915) 20 CLR 425, 442-443 (Isaacs J), 451-454 (Higgins J), 455 (Gavan Duffy and Rich JJ), 462 (Powers J). See also *R v Snow* (1917) 23 CLR 256, 265 (Barton ACJ); *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36, 81, 86 (Isaacs J), 124-125 (Higgins J); *Millner v Raith* (1942) 66 CLR 1, 6 (Starke and McTiernan JJ), 9 (Williams J); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 172 (Latham CJ); *University of Wollongong v Metwally* (1984) 158 CLR 447, 461 (Mason J), 484 (Dawson J).

[87] *R v Kidman* (1915) 20 CLR 425, 451 (Higgins J).

30. Although the case concerned Commonwealth legislative competence, Powers J noted that the power to pass retrospective laws is equally enjoyed by 'all Australian State Parliaments'.[88]

31. The point is made even more starkly in *Polyukhovich v Commonwealth*, in which this Court upheld a Commonwealth law criminalising war crimes committed during the Second World War more than 40 years after the fact.[89] In the majority, Dawson J said:[90]

> There is ample authority for the proposition that the Commonwealth Parliament may in the exercise of its legislative powers create retrospective laws, including criminal laws with an ex post facto operation. I have earlier referred to the authorities which establish that the power of the Parliament to make laws for the peace, order and good government of the Commonwealth is, in constitutional terms, a sovereign legislative power with respect to the matters enumerated in s 51 ... And sovereignty necessarily involves the power to legislate retrospectively. Whatever the objections which might be raised to ex post facto laws – and as the passage cited from Blackstone shows, they are considerable – there can be no doubt about the capacity of Parliament to pass them.

32. The sovereignty of State Parliaments – being expressed in like terms as a power to pass laws for the peace, order and good government of the State[91] – is as ample and plenary as the sovereignty of the Commonwealth Parliament to pass retrospective laws.[92] The Tasmanian Court of Criminal Appeal applied *Kidman* and *Polyukhovich* to uphold a retrospective State law in *Bellemore v Tasmania*. After referring to *Kidman*, Crawford J held, '[i]t must follow that the Parliament of this State has similar powers, given the absence of any other constitutional limits on it doing so.'[93] Likewise, Slicer J held, '[r]etroactive or retrospective legislation has long been accepted as a valid exercise of power by a Parliament, both State and Commonwealth'.[94]

33. In addition to a general complaint of retrospectivity, the plaintiff more specifically complains that s 74AAA offends the rule of law by 'remov[ing] or interfer[ing] with the

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[88] Ibid 463 (Powers J).
[89] *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 535 (Mason CJ), 643-644 (Dawson J), 689 (Toohey J), 718 (McHugh J).
[90] Ibid 643-644 (Dawson J).
[91] In Vic, a 'power to make laws in and for Victoria in all cases whatsoever': *Constitution Act 1975* (Vic) s 16.
[92] *Duncan v New South Wales* (2015) 255 CLR 388, 406 [37] (the Court); *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10 (the Court).
[93] *Bellemore v Tasmania* (2006) 16 Tas R 364, 373 [10] (Crawford J), 418 [158] (Blow J agreeing).
[94] Ibid 387 [87] (Slicer J).

jurisdiction of the Board'.[95] Yet standing against that proposition, *Duncan v Independent Commission Against Corruption* is clear and recent authority that a State law may retrospectively alter the scope of a non-judicial body's power to make findings.[96] If s 74AAA operates retrospectively, given that it alters the scope of the Board's power to grant parole, it is indistinguishable from the law upheld in *Duncan*. As with s 127A of the *Corrections Act* in the instant case, the State law upheld in *Duncan* was also introduced after the commencement of legal proceedings but before they were heard.[97] *Duncan* is only the latest of a long line of authority upholding legislation which alters the substantive law applicable in pending judicial proceedings.[98]

34. If the plaintiff's submissions regarding the rule of law are in truth submissions about retrospectivity and no more, they cannot succeed without overturning case law that has been settled for at least a century as well as constitutional theory with deeper roots.

The plaintiff's argument as an abstract appeal to the rule of law

35. To the extent that the plaintiff's reliance on the rule of law extends beyond the desirability of prospectivity to some more abstract principle, with respect, his contention for a new limit on legislative competence nonetheless founders at every stage of the analysis. The first step of his argument is to point to the statement by Dixon J (as his Honour then was) in the *Communist Party Case* that 'the rule of law forms an assumption of the Constitution'.[99] However, the plaintiff assumes without demonstrating that Dixon J had in mind the plaintiff's conception of the rule of law. Dixon J's judgment itself hints that his Honour had in mind the 'traditional

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[95] Plaintiff's submissions, 19 [68].
[96] *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83, 94-95 [14], 98 [25] (French CJ, Kiefel, Bell and Keane JJ), 101-102 [42] (Gageler J), 102 [46] (Nettle and Gordon JJ).
[97] Ibid 91 [3] (French CJ, Kiefel, Bell and Keane JJ).
[98] *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495, 503-504 (Williams J), 579-580 (Dixon J); *R v Humby; Ex parte Rooney* (1973) 129 CLR 231, 250 (Mason J); *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 96-97 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ); *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 563-564 [19]-[20] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Australian Education Union v General Manager, Fair Work Australia* (2012) 246 CLR 117, 141-142 [50], 143 [53] (French CJ, Crennan and Kiefel JJ), 154 [90], 156 [96]-[97] (Gummow, Hayne and Bell JJ), 161-162 [116]-[117] (Heydon J).
[99] See also *Brown v Tasmania* (2017) 91 ALJR 1089, 1181 [491], 1192 [558] (Edelman J).

conception[]'.[100] As outlined above, that traditional conception should be taken to mean that the three branches of government are subject to the Constitution.

36. Even assuming that Dixon J's reference does embrace the plaintiff's particular conception of the rule of law, he then seeks to avoid the well-known distinction between assumptions and implications[101] – only the latter of which may give rise to invalidity of legislation – by emphasising obiter that the rule of law is unlike other assumptions; it 'is an assumption upon which the Constitution depends for its efficacy'.[102] Again, the plaintiff assumes without demonstrating that each instance of that obiter concerns his particular conception of the rule of law. It is submitted this obiter should be taken as referring to the core definition outlined above.

37. The plaintiff's abstract appeal to the rule of law is, with respect, insufficiently precise to found a new restraint on legislative competence. As in *APLA*, if the rule of law (or an aspect of the rule of law) 'is said to be a matter of implication, then it is necessary to identify, with reasonable precision, the suggested implication.'[103] Precision is required because a legislative restraint purportedly drawn from the Constitution must be shown to have a foothold in the Constitution: it must be 'logically or practically necessary' for the preservation of the constitutional structure, as well as 'securely based' in the Constitution.[104] This precision is necessary whether the plaintiff labels the rule of law an 'assumption', 'implication' or 'postulate' of the Constitution.

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[100] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J). See Crawford, above n 30, 1.
[101] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ).
[102] Plaintiff's submissions, 18 [62]. See *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 351 [30] (Gleeson CJ and Heydon J); *Thomas v Mowbray* (2007) 233 CLR 307, 342 [61] (Gummow and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1, 42 [61] (French CJ), 62-63 [131] (Gummow J), 91 [233] (Hayne J), 156 [423] (Crennan and Bell JJ); *Momcilovic v The Queen* (2011) 245 CLR 1, 224 [593] (Crennan and Kiefel JJ).
[103] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 352 [32] (Gleeson CJ and Heydon J) (underlining added). For an example of the need to render an abstract appeal to the rule of law more precise, see *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 347 [58] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) ('*Offshore Processing Case*'); *Graham v Minister for Immigration and Border Protection* (2017) 91 ALJR 890, 931 [175] (Edelman J).
[104] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ); *McGinty v Western Australia* (1996) 186 CLR 140, 169 (Brennan CJ); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 453-454 [389] (Hayne J); *McCloy v New South Wales* (2015) 257 CLR 178, 283-284 [318] (Gordon J); *Burns v Corbett* [2018] HCA 15 (18 April 2018) [94] (Gageler J), [175] (Gordon J).

38. Even if the efficacy of the Constitution depends on a more abstract notion of the rule of law, breach cannot give rise to invalidity for the very reasons given by the theorists upon which the plaintiff relies. Although Fuller considered that law would cease to exist in extreme scenarios such as the conditions in Nazi Germany, outside of those 'distorting possibilities',[105] Fuller clearly considered that compliance with the rule of law was only capable of being enforced by the legislature (not the judiciary) due to the indeterminate nature of the rule of law:[106]

> Because of the affirmative and creative quality of its demands, the inner morality of the rule of law lends itself badly to realization through duties, whether they be moral or legal. No matter how desirable a direction of human effort may appear to be, if we assert there is a duty to pursue it, we shall confront the responsibility of defining at what point that duty has been violated. It is easy to assert that the legislator has a moral duty to make laws clear and understandable. But this remains at best an exhortation unless we are prepared to define the degree of clarity he must ascertain in order to discharge his duty. The notion of subjecting clarity to quantitative measure presents obvious difficulties. We may content ourselves, of course, by saying that the legislator has at least a moral duty to try to be clear. But this only postpones the difficulty, for in some situations nothing can be more baffling than to attempt to measure how vigorously a man intended to do that which he failed to do ... [T]he inner morality is condemned to remain largely a morality of aspiration and not of duty. Its primary appeal must be to a sense of trusteeship and to the pride of the craftsman.

39. Raz did not even allow for distorting possibilities. For Raz, the reason why breach of the rule of law does not lead to invalidity is that the rule of law is a means to an end and not an end in itself:[107]

> Since the rule of law is just one of the virtues the law should possess, it is to be expected that it possesses no more than prima facie force. It has always to be balanced against competing claims of other values ... Conflict between the rule of law and other values is just what is to be expected. Conformity to the rule of law is a matter of degree, and though, other things being equal, the greater the conformity the better – other things are rarely equal. A lesser degree of conformity is often to be preferred precisely because it helps realization of other goals ... [R]egarding the rule of law as the inherent excellence of the law means that it fulfils essentially a subservient role. Conformity to it makes the law a good instrument for achieving certain goals, but conformity to the rule of law is not itself an ultimate goal ... [O]ne should be wary of disqualifying the legal pursuit of major social goals in the name of the rule of law. After all, the rule of law is meant to enable the law to promote social good, and should not be lightly used to show that it should not do

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[105] *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 43 [32] (Gleeson CJ, Gummow and Hayne JJ); *Burns v Corbett* [2018] HCA 15 (18 April 2018) [100] (Gageler J).
[106] Fuller, above n 50, 43. To similar effect, see *Graham v Minister for Immigration and Border Protection* (2017) 91 ALJR 890, 915 [106] (Edelman J).
[107] Raz, above n 34, 228-229.

so. Sacrificing too many social goals on the altar of the rule of law may make the law barren and empty.

40. Of course, the doctrine of parliamentary supremacy means that the end of legislation is up to Parliament. The 'great underlying principle' of the Australian Constitution is that the people through Parliament are to determine the social good (and thereby protect individual rights to the extent necessary). Indeed, retrospectivity and frequent changes to the law are sometimes required to secure the social good.[108] A clear example is the avoidance of unfairness where a penalty is reduced following the commission of an offence but prior to sentence.[109] As presently relevant, another social good to which the rule of law is subservient is 'the safety and protection of the community', a social good the Victorian Parliament has deemed paramount.[110]

41. Although some commentators have noted a tension between the rule of law and parliamentary supremacy,[111] the reality is that our constitutional system recognises the importance of both and reconciles the two through the principle of legality. That is a principle to which the framers made explicit reference when they declined to introduce 'any constitutional prohibition against the enactment of retrospective legislation in Australian law.'[112] As French CJ, Crennan and Kiefel JJ said in *Australian Education Union v General Manager, Fair Work Australia*:[113]

> In a representative democracy governed by the rule of law, it can be assumed that clear language will be used by the Parliament in enacting a statute which falsifies, retroactively, existing legal rules upon which people have ordered their affairs, exercised their rights and incurred liabilities and obligations. That assumption can be viewed as an aspect of the principle of legality, which also applies the constructional assumption that Parliament will use clear language if it intends to overthrow fundamental principles, infringe rights, or depart from the general system of law.

42. In fact, the principle of legality can be seen as giving prima facie recognition to aspects of the rule of law such as clarity and prospectivity, subject to the overriding aspect of

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[108] Goldsworthy, above n 31, v; Crawford, above n 30, 176-177.
[109] *R v Morton* [1986] VR 863, 866-867 (Young CJ, King and Beach JJ); Ben Juratowitch, *Retroactivity and the Common Law* (Hart Publishing, 2008) 55. See also *George Hudson Ltd v Australian Timber Workers' Union* (1923) 32 CLR 413, 434 (Isaacs J).
[110] *Corrections Act 1986* (Vic) s 73A **[SCB 78 [12](b)]**.
[111] Bingham, above n 45, 160-162, cf at 168.
[112] Crawford, above n 30, 57. See also *Official Report of the National Australasian Convention Debates*, Adelaide, 19 April 1897, 848.
[113] *Australian Education Union v General Manager, Fair Work Australia* (2012) 246 CLR 117, 134-135 [30] (French CJ, Crennan and Kiefel JJ) (underlining added).

the rule of law that the courts must 'give effect to the commands of the several legislatures of the States and the Commonwealth'.[114] That 'hypothesis' of the principle of legality which resolves the tension between those two aspects of the rule of law is itself said to be a further aspect of the rule of law.[115] In addition, because the principle of legality compels Parliament to 'squarely confront what it is doing and accept the political cost',[116] it gives effect to Hayne J's extrajudicial observation that departure from the rule of law 'cannot be always excluded but must in every case be justified'.[117] For the reasons given by the defendant, the Victorian Parliament has done so in this case and any presumption against instability and retrospectivity has been displaced by the clear language of ss 74AAA and 127A of the *Corrections Act*.[118]

43. Thus, the indeterminacy of the rule of law as an abstract concept means that it cannot serve as a judicially-enforced restraint on legislative power. No doubt it is for this reason that '[t]he High Court has never struck down legislation on the basis that it violates th[e] rule of law or one of its more specific desiderata – or at least, not ostensibly so.'[119] There is no cogent reason offered in this case to begin doing so.

PART V: Time estimate

44. Queensland estimates that no more than 15 minutes will be required for oral argument.

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[114] *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168, 196 [77] (Kirby J).
[115] *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ). See also *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [20] (Gleeson CJ); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 605-606 [81] (Gageler J).
[116] *R v Secretary for Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffmann).
[117] Justice Kenneth Hayne, 'Dispute Resolution and The Rule of Law' (Speech delivered at the Sino-Australian Seminar, Beijing, 20-22 November 2002).
[118] Defendant's submissions, 11 [33]-[35].
[119] Crawford, above n 30, 4, see also at 197. See also George Williams and David Hume, *Human Rights Under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 133.