IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

NO M251 OF 2015

BETWEEN: **JULIAN KNIGHT**
Plaintiff

AND: **THE STATE OF VICTORIA**
First Defendant

ADULT PAROLE BOARD
Second Defendant

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Filed on behalf of the Attorney-General of the Commonwealth (intervening) by:

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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (the **Commonwealth**) intervenes pursuant to s 78B of the *Judiciary Act 1903* (Cth) in support of the defendants.

PART III REASONS FOR LEAVE TO INTERVENE

3. Not applicable.

PART IV LEGISLATIVE PROVISIONS

4. The applicable legislative and constitutional provisions are identified in the Annexure to the plaintiff's submissions and Part V of the first defendant's submissions.

PART V ARGUMENT

Summary

5. On 10 November 1988, the Supreme Court of Victoria sentenced the plaintiff to life imprisonment for each of 7 counts of murder.[1] He remains detained under the authority of that sentence.

6. The plaintiff contends that s 74AA of the *Corrections Act 1986* (Vic) (the **Corrections Act**) infringes the principle identified in *Kable v Director of Public Prosecutions (NSW)* (***Kable***)[2] in two distinct ways:

   6.1. it interferes with a particular and readily identifiable exercise of judicial power by the Supreme Court of Victoria;[3] namely, the sentencing decision of Hampel J; and

   6.2. further, or in the alternative, it authorises Victorian judicial officers to participate in a decision-making process that compromises the institutional integrity of their courts.[4]

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1 Special case, para 3; Special Case Book 27 (**SCB**). The Court also sentenced the plaintiff to a term of 10 years' imprisonment for each of 46 counts of attempted murder and set a minimum term of 27 years.

2 (1996) 189 CLR 51.

3 Plaintiff's submissions, [5(a)].

4 Plaintiff's submissions, [5(b)].

7. In summary, the Commonwealth submits that these contentions should be rejected because:

7.1. the notion that s 74AA interferes with the exercise of judicial power by the Supreme Court of Victoria is irreconcilable with the decision in *Crump v New South Wales* (***Crump***);[5]

7.2. the involvement of a State judge as part of the Adult Parole Board (the **Board**) considering the plaintiff's parole application would not compromise the institutional integrity of any State court; and

7.3. if (contrary to the submission above) the involvement of a State judge would compromise the institutional integrity of a State court, that would not render s 74AA invalid, because the Corrections Act can be read down so as to preclude the Board from being constituted with a sitting judge to consider the plaintiff's application. Further, such a reading down would have no effect on the validity of anything that has been done in this case, because the Board as constituted to consider the plaintiff's application is not in fact constituted by a State judge.

No interference with exercise of judicial power

8. The plaintiff's initial argument proceeds in these steps:

8.1. the *Kable* principle prohibits legislation that would set aside or interfere with the exercise of judicial power by a State court;[6]

8.2. as a matter of substance, s 74AA sets aside or interferes with Hampel J's sentencing decision;[7] and

8.3. s 74AA is therefore invalid.

9. It is unnecessary to determine whether the first step is correct, because the argument fails at the second step.

10. Section 74AA of the Corrections Act is directed to the Board, an executive body. It prevents the Board from granting the plaintiff a parole order under s 74 except in limited circumstances, being where the plaintiff has made an application to the Board and the Board is satisfied that:

10.1. the plaintiff is in imminent danger of death, or so incapacitated that he lacks the physical capacity to harm any person;

10.2. the plaintiff has demonstrated that he does not pose a risk to the community; and

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5 (2012) 247 CLR 1.

6 Plaintiff's submissions, [30]-[34].

7 Plaintiff's submissions, [35]-[41].

10.3. because of those circumstances, the making of an order for parole is justified.

11. The operation and effect of a provision in almost identical terms to s 74AA was considered by this Court in *Crump*.[8] The impugned provision was s 154A of the *Crimes (Administration of Sentences) Act 1999* (NSW) (the **CAS Act**). That section prevented a small class of persons, which included Mr Crump, from being granted parole unless the same conditions as those found in s 74AA of the Corrections Act were met.

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12. Mr Crump submitted that s 154A was invalid because it purported to set aside, vary, alter or otherwise stultify the exercise by the New South Wales Supreme Court of judicial power in setting a minimum term for him.[9] This Court rejected the argument. It held that the Supreme Court's role was complete upon the making of the order setting the minimum term,[10] and that the making of the order setting the minimum term created no right or entitlement to release on parole. The minimum term was simply a criterion by reference to which the parole system operated. Whether a person would be released on parole depended on the legislation and policies in force from time to time. As Gummow, Hayne, Crennan, Kiefel and Bell JJ explained:[11]

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> [T]he practical reality which, as Gleeson CJ emphasised in *Baker*, faces sentencing judges (including those in the position of McInerney J) is the prospect of legislative and administrative changes in parole systems. *As a matter neither of form nor substance did the sentencing determination by McInerney J create any right or entitlement in the plaintiff to his release on parole*. In that regard, the determination itself had no operative effect. Rather it constituted a factum by reference to which the parole system (later including s 154A) operated. In particular, s 154A(3) ... qualified the jurisdictional facts which had to apply in order to enliven the power of the Parole Authority to make an order directing the release of the plaintiff on parole. Section 154A did not impeach, set aside, alter or vary the sentence under which the plaintiff suffers his deprivation of liberty.

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13. Chief Justice French distinguished between the legal effect of the sentencing decision and the consequences attached by statute to that decision.[12] His Honour stated:[13]

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> Section 154A imposed strict limiting conditions upon the exercise of the executive power to release the plaintiff and other serious offenders the

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8 (2012) 247 CLR 1.

9 (2012) 247 CLR 1, 25-6 [56] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) (summarising Mr Crump's argument).

10 This was a resentencing decision by McInerney J of the Supreme Court in 1997. The original sentence in 1974 was for life imprisonment. At the time that sentence was imposed, there was no non-parole period.

11 (2012) 247 CLR 1, 26-7 [60] (emphasis added).

50 12 (2012) 247 CLR 1, 19-20 [36]. Further, his Honour distinguished between the sentencing function of a judge and the function of a parole authority in determining whether a person eligible for release on parole should be released: at 16-17 [28].

13 (2012) 247 CLR 1, 19 [35].

> subject of a non-release recommendation. It may be said to have altered a statutory consequence of the sentence. It did not alter its legal effect.

14. To similar effect, Heydon J said:[14]

> This Court explained in *Baker v The Queen* that the effect of the additional term was to fix a period after "which the prisoner might, by the exercise of statutory authority given a non-judicial body, be released on parole". The statutes giving the statutory authority referred to can change from time to time... Section 154A left the terms of McInerney J's order untouched. It merely altered the conditions to be met before the plaintiff could be released on parole.

15. His Honour went on to observe that '[t]he minimum term marked the time at which the plaintiff could apply for parole, but it said nothing about the criteria for a grant of parole or the plaintiff's prospects of success in obtaining it.'[15]

16. None of the reasons advanced by the plaintiff for distinguishing *Crump* can be sustained.

17. ***First***, it was immaterial to the reasoning in *Crump* upholding the validity of s 154A of the CAS Act that the section applied to a number of persons (in fact, about 10).[16] Section 154A was valid not because it was a law of general application, but because the executive function of determining whether a person should be released was distinct from the sentencing function. Put differently, s 154A dealt with parole, not the sentence.[17] It therefore could not interfere with or undermine the sentence.

18. The same is true here. Indeed, in specifying the minimum term, Hampel J expressly recognised that the sentence remained imprisonment for life. He explained:[18]

> A minimum term is not a period at the end of which the prisoner is released. It is a period before the expiration of which, having regard to the interest of justice, he cannot be released... "The power to fix a minimum term may, and no doubt will, be exercised as a means of converting an indeterminate sentence into a finite one in cases where the proper authorities consider that after the minimum term has expired it is appropriate for the offender to be released on parole."

Given the above statements, the proposition that s 74AA sets aside or interferes with the sentence that Hampel J imposed is untenable, for the sentencing remarks expressly recognised that the plaintiff might not be released, and that whether release would occur depended not upon the expiry

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14 (2012) 247 CLR 1, 29 [72].

15 (2012) 247 CLR 1, 29 [73] (emphasis added).

16 See (2012) 247 CLR 1, 15 [22], 18-19 [34] (French CJ). See also *R v Baker v The Queen* (2004) 223 CLR 513, 521-2 [8] (Gleeson CJ), 534 [50] (McHugh, Gummow, Hayne and Heydon JJ) (on the number of persons who were the subject of non-release recommendations).

17 (2012) 247 CLR 1, 28 [70] (Heydon J).

18 SCB 38.7.

of the minimum term, but upon whether the 'proper authorities' considered release to be appropriate.

19. The change to the conditions on which the Board can grant parole to the plaintiff that is effected by s 74AA is indistinguishable from that made by s 154A of the CAS Act. The analysis that supported the validity of the latter section is not affected by the circumstance that s 74AA applies only to one person rather than about ten.

20. ***Secondly***, and relatedly, the fact that s 74AA(6) refers to 'Julian Knight who was sentenced by the Supreme Court in November 1988 to life imprisonment for each of 7 counts of murder' is irrelevant to the analysis of whether a change to parole conditions sets aside or interferes with the sentence. That reference is simply the means of identifying the person to whom s 74AA applies. It does not convert s 74AA into legislation that sets aside a judicial order, since Hampel J's order (like McInerney J's order in *Crump*) gave the plaintiff no right to release, whether in accordance with the conditions that governed the parole regime at the time that order was made or otherwise.

21. ***Thirdly***, the plaintiff's claim that the circumstances of s 74AA's enactment would undermine public confidence in the Supreme Court does not assist him. First, the argument depends on the assumption that the public would misunderstand the distinction between a sentence and the parole regime, and therefore that it would misunderstand the significance of the minimum term imposed by Hampel J. Further, even if that assumption could be made good, the argument goes nowhere, because public confidence is not a free-standing criterion of invalidity.[19] The plaintiff would need to establish that s 74AA undermines the institutional integrity of the Court, and he cannot discharge that burden once it is understood that consideration of parole is an executive function that is quite distinct from the function of the Court in imposing a sentence.

22. ***Finally***, the claim that s 74AA is akin to a bill of attainder[20] is groundless. A bill of attainder is a legislative determination of guilt for antecedent conduct, and punishment for that conduct, without a judicial trial.[21] But in this case the plaintiff, following a plea of guilt, was sentenced to multiple terms of life imprisonment by the Supreme Court. There was no legislative determination of guilt, nor any legislative determination of punishment. The plaintiff remains imprisoned under the authority of that sentence of the Supreme Court, whether

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19 *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575, 593 [23] (Gleeson CJ), 617-18 [102] (Gummow J); *South Australia v Totani* (2010) 242 CLR 1, 82 [206] (Hayne J); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 595 [40] (French CJ, Kiefel and Bell JJ). See also *Nicholas v The Queen* (1998) 193 CLR 173, 197 [37] (Brennan CJ).

20 Plaintiff's submissions, [37].

21 See, for example, *Haskins v Commonwealth* (2011) 244 CLR 22, 37 [26] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Duncan v New South Wales* (2015) 255 CLR 388, 408 [43] (the Court); *Kariapper v Wijesinha* [1968] AC 717, 735-6.

or not he can be ever released on parole.[22] By restricting the circumstances in which the plaintiff can be granted parole, s 74AA did not impose any further punishment upon him.[23] Any analogy with a bill of attainder is therefore misplaced.

23. For the above reasons, *Crump* cannot be distinguished. While the plaintiff applies, in the alternative, to overrule *Crump*,[24] no argument in support of that application has been advanced, and there is no basis to revisit a recent and unanimous decision of this Court.

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Section 74AA does not authorise Victorian judicial officers to participate in a decision-making process that compromises the institutional integrity of courts

24. This Court's decision in *Wainohu v New South Wales* (***Wainohu***)[25] recognises that the *Kable* principle and the reasoning in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (***Wilson***)[26] share 'a common foundation in constitutional principle'.[27] One consequence of that common foundation is that, because the Constitution does not permit of different grades of justice, neither
20 Commonwealth nor State legislation can confer a function upon a judicial officer as *persona designata* that is incompatible with the institutional integrity of the court from which that officer is drawn.[28]

25. Notwithstanding the above, *Wainohu* does not entail that the States are subject to precisely the same limitations on their capacity to confer non-judicial functions on State judges that attend the conferral of functions on federal judges *persona designata*. The reason for the difference is that, at the federal level, the *persona designata* doctrine operates as an exception to the
30 separation of powers doctrine,[29] and its scope therefore cannot be such as to undermine that doctrine.[30] No comparable separation of powers operates in the States, with the consequence that it has long been recognised that the Commonwealth may, pursuant to s 77(iii) of the Constitution, invest federal jurisdiction in a State court that exercises both judicial and non-judicial power. The practical consequence is that, while the foundational constitutional principle is the same with respect to the conferral of non-judicial functions on federal and State judges, the *application* of that principle in any given case must take

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40 22 *Baker v The Queen* (2004) 223 CLR 513, 528 [29] (McHugh, Gummow, Hayne and Heydon JJ); *Crump* (2012) 247 CLR 1, 16-17 [28] (French CJ), 20-1 [41] (Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also Corrections Act, s 76.

23 Compare *Duncan v New South Wales* (2015) 255 CLR 388, 409 [46] (the Court): 'Legislative detriment cannot be equated with legislative punishment.'

24 Plaintiff's submissions, fn 2.

25 (2011) 243 CLR 181.

26 (1996) 189 CLR 1.

27 (2011) 243 CLR 181, 228 [105] (Gummow, Hayne, Crennan and Bell JJ).

28 (2011) 243 CLR 181, 228-9 [105] (Gummow, Hayne, Crennan and Bell JJ).

50 29 *Grollo v Palmer* (1995) 184 CLR 348, 363 (Brennan CJ, Deane, Dawson and Toohey JJ).

30 *Grollo v Palmer* (1995) 184 CLR 348, 376 (McHugh J); *Wilson* (1996) 189 CLR 1 at 13-14 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Wainohu* (2011) 243 CLR 181 at [39] (French CJ and Kiefel J).

account of the features of the relevant State court of which the State judge is a member, which features may include that that court exercises numerous non-judicial functions.

26. In assessing whether State legislation breaches the *Kable* principle, allowance must be made for that fact.[31] It must also be made for 'the long history in the States of the appointments of judges to extra-judicial roles'.[32] States may therefore have greater scope to confer functions on their judges *persona designata* than exists at the Commonwealth level.

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27. Section 61(2) of the Corrections Act provides that judicial officers of the Supreme, County and Magistrates Courts may be appointed to the Board. Such appointments are made *persona designata*.[33]

28. Section 64 of the Corrections Act provides that the Board may exercise its powers and functions in divisions of the Board. Further, a decision of a majority of the members present at a meeting of the Board, including a meeting of a division of the Board, is the decision of the Board on that matter.[34] The Board
20 may therefore make decisions without particular members performing any function in relation to those decisions.

29. It follows from the provisions summarised above that, under the Corrections Act framework, there is the potential for judicial officers who are appointed to the Board to participate in determining an application by the plaintiff for parole in accordance with s 74AA. But equally, there is no requirement that any judicial officers who are appointed to the Board play any role in a decision under s 74AA, for such a decision can be made by a division of the Board that does
30 not include any serving judicial officers. That is, in fact, how the Board has been constituted to address the parole application made by the plaintiff.[35]

30. Contrary to the plaintiff's submissions,[36] the possibility that judicial officers may serve on the Board does not result in s 74AA infringing the *Kable* principle. That is so for several reasons.

31. ***First***, there is no connection between the executive function of deciding the plaintiff's parole and any future exercise of judicial power by a Victorian court.
40 Such a connection was important to the reasoning in *Wainohu*, which concerned provisions in the *Crimes (Criminal Organisations Control) Act* 2009 (NSW) (the **Organisation Act**) that permitted the Commissioner of Police to apply to an eligible judge of the NSW Supreme Court for a declaration under Pt

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31 *Wainohu* (2011) 243 CLR 181, 212-13 [52] (French CJ and Kiefel J); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 89-90 [125]-[126] (Hayne, Crennan, Kiefel and Bell JJ).

32 *Wainohu* (2011) 243 CLR 181, 212-13 [52] (French CJ and Kiefel J).

50 33 See *Kotzmann v Adult Parole Board Victoria* [2008] VSC 356, [32]-[33].

34 Corrections Act, s 66(3).

35 SCB, 31 [17].

36 Plaintiff's submissions, [43]-[49].

2 of the Act in respect of an organisation. The declaration sought was an administrative act and the eligible judge acted as *persona designata*. The Act allowed the eligible judge not to provide reasons for making a declaration. However, once a declaration was made, under Pt 3 of the Act the Supreme Court was empowered, on the application of the Commissioner of Police, to make control orders against individual members of the organisation.

32. In holding that the Organisation Act was invalid, it was central to the reasoning of at least French CJ and Kiefel J that there was a connection between the eligible judge's administrative function under Part 2 (which was exempt from the requirement to provide reasons) and the Supreme Court's exercise of jurisdiction under Part 3. As their Honours explained:[37]

> To the extent that the statute effectively immunises the eligible judge from any obligation to provide ... reasons, it marks the function which that judge carries out as lacking an essential incident of the judicial function. At the same time, however, the Act creates a connection between the non-judicial function conferred upon an eligible judge by Pt 2 of the Act and the exercise of jurisdiction by the Supreme Court under Pt 3 of the Act. This has the consequence that a judge of the Court performs *a function integral to the exercise of jurisdiction by the Court*, by making the declaration, but lacks the duty to provide reasons for that decision. *The appearance of a judge making a declaration is thereby created whilst the giving of reasons, a hallmark of that office, is denied. These features cannot but affect perceptions of the role of a judge of the Court, to the detriment of the Court*.

33. In the same vein, Gummow, Hayne, Crennan and Bell JJ stated that the effect of Part 2 was to 'utilise confidence in impartial, reasoned and public decision-making of eligible judge as members of the Supreme Court to support inscrutable decision-making' under the provisions of Part 2.[38]

34. In contrast to the provisions of Part 2 of the Organisation Act, a decision under s 74AA is not an integral step in the exercise of jurisdiction by any Victorian court. Indeed, such a decision has no relationship whatever with those courts' exercise of their jurisdiction. On that basis alone, it is difficult to see how the process created by s 74AA can substantially undermine the institutional integrity of Victorian courts.

35. ***Secondly***, the Board in applying s 74AA does not perform its function on 'the instruction, advice or wish' of the legislature or executive government.[39] Contrary to the plaintiff's submissions, the Board is not obliged to accept the

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37 *Wainohu* (2011) 243 CLR 181, 219 [68] (emphasis added). See also *Momcilovic v The Queen* (2011) 245 CLR 1, 226-7 [599] (Crennan and Kiefel JJ), observing that the statute in *Wainohu* 'denied the duty of a judge to give reasons, but at the same time created an apparent connection between the non-judicial function conferred and the exercise of jurisdiction by a Supreme Court judge'.

38 (2011) 243 CLR 181, 229-30 [109]. See also at 229 [106] (quoting from *Hilton v Wells* (1985) 157 CLR 57, 83-4, on the difficulty that an intelligent observer would have in distinguishing between the judge acting in a judicial capacity and acting as *persona designata*).

39 Contrast plaintiff's submissions, para 61, referring to *Wilson* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

Secretary's report on the matters in s 74AA(3), but instead may seek further information[40] relevant to its decision, as it has in this case.[41] In any event, the integrity of judicial members of the Board is not compromised by applying the criteria in s 74AA, for that merely involves applying the law.[42] In that respect, the judicial members are in an analogous position to other judges, whose application of the law does not compromise the institutional integrity of the courts in which they sit.[43]

36. ***Thirdly***, the fact that the Board is not bound by the rules of natural justice in exercising any of its functions[44] does not mean that s 74AA impairs the institutional integrity of Victorian courts. As the plaintiff concedes, there is no requirement that a judge exercising an administrative function as *persona designata* must afford natural justice.[45] Nor is there any requirement that they may not perform such functions 'behind closed doors'.[46] Furthermore, given the historical fact that the Secretary and his predecessors have never sat on the Board,[47] the possibility that a judicial member may be required to engage in a decision-making process on the basis of a report prepared by a person who also sits on the Board seems remote.[48]

37. ***Finally***, the *ad hominem* nature of s 74AA does not itself cause it to offend the *Kable* principle.[49] It is true that members of the Court in *Fardon v Attorney-General (Qld)* regarded it as important that the *Community Protection Act 1994* (NSW) (**the CPA**) targeted only Mr Kable.[50] But that feature of the CPA did not stand alone; the CPA undermined the institutional integrity of the Supreme Court because it drew the Court into implementing a plan to detain Mr Kable without the benefit of the ordinary judicial process.[51] As McHugh J put it in *Kable*:[52]

> [The Act] makes the Supreme Court the instrument of a legislative plan, initiated by the executive government, to imprison the appellant by a process that is far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person.

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40 Corrections Act, ss 71, 71A.

41 See SCB 45.

42 A point recognised in *Wilson* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

43 See *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 250 CLR 343, 365 [45] (French CJ), 368 [58] (Hayne, Crennan, Kiefel and Bell JJ), 372 [69] (Heydon J).

44 Corrections Act, s 69(2).

45 Cf Plaintiff's submissions, para 63.

46 Cf Plaintiff's submissions, para 63. Indeed, acceptance of any such requirements would require the overruling of at least *Hilton v Wells* (1985) 157 CLR 57 and *Grollo v Palmer* (1995) 184 CLR 348.

47 Special case, [14]; SCB 30.

48 Plaintiff's submissions, [63].

49 Plaintiff's submissions, [60].

50 (2004) 223 CLR 575, 591 [16] (Gleeson CJ), 595-6 [33], 601-2 [43] (McHugh J), 617 [100] (Gummow J), 658 [233] (Callinan and Heydon JJ).

51 *Attorney-General (Northern Territory) v Emmerson* (2014) 253 CLR 393, 425 [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

52 (1996) 189 CLR 51, 122.

38. Section 74AA is different. The plaintiff was imprisoned not by reason of any legislative plan, but by an ordinary exercise of judicial power following his plea of guilty. Furthermore, s 74AA does not authorise the Supreme Court, the County Court or the Magistrates Court to do *anything*. Like the legislation in *Crump*, it does not interfere with the sentence of life imprisonment. Its only operation is to change the jurisdictional prerequisites that must be satisfied before the Board, in the exercise of *executive* power, can grant the plaintiff parole.

10 39. No intelligent observer[53] could confuse the actions of the Board on which the judicial officers may sit, in deciding questions of parole, with those of the Supreme Court, the County Court or the Magistrates Court when exercising judicial power.[54] The fact that a judicial officer may sit on the Board and apply the criteria in s 74AA therefore does not cloak the work of the legislative and executive branches in 'the neutral colours of judicial action'.[55] That is all the more so in circumstances where the legislation does not *require* the involvement of any judicial officer in decisions under s 74AA, and where no judicial officer was in fact assigned to the Division that is considering the
20 plaintiff's parole application.

40. Accordingly, the plaintiff's second challenge based on the *Kable* principle should be rejected.

Reading down

41. Even if (contrary to the submissions above) the participation of a State judge in a decision applying s 74AA would breach the *Kable* principle, it does not follow
30 that s 74AA is invalid.

42. The constitutional objection, which would arise from the potential participation of a State judge in applying s 74AA, can be overcome by reading down s 64(3) of the Corrections Act so as to preclude the chairperson of the Board from directing that the Board be constituted by a Division that includes a sitting judge when determining an application by the plaintiff for parole.[56] If the Corrections Act would be in valid if read down in that way, the Act must be read in that way, that being a reading that would entirely preserve the valid operation of s 74AA.[57]
40 Such a reading is required because s 6 of the *Interpretation of Legislation Act 1984* (Vic) 'creates a statutory presumption the effect of which is that "the

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53 See *Hilton v Wells* (1985) 157 CLR 57, 83-4 (Mason and Deane JJ); *Wainohu* (2011) 243 CLR 181, 229 [106]-[107] (Gummow, Hayne, Crennan and Bell JJ) (on the intelligent observer who is unversed in 'distinctions without a difference').

54 In Victoria, the Board has existed continuously since 1957. Between 1957 and 2013, moreover, the Board necessarily included at least one judicial officer.

55 *Mistretta v United States* (1989) 488 US 361, 407, adopted in *Wilson* (1996) 189 CLR 1, 9 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

50 56 Alternatively, the appointment of serving judicial officers to the Board pursuant to s 61(2) of the Corrections Act might be invalid to the extent that it would authorise them to participate in decisions under s 74AA (but not otherwise).

57 This can be done pursuant to *Interpretation of Legislation Act 1984* (Vic), s 6.

intention of the legislature is to be taken prima facie to be that the enactment should be divisible and that any parts found constitutionally unobjectionable should be carried into effect independently of those which fail".'[58] A familiar and settled application of a provision such as s 6 is 'to read down a provision expressed in general words so as to have no application within an area in which legislative power is subject to a clear constitutional limitation'.[59] That comfortably accommodates a reading of s 64(3) that would prevent a State judge from being appointed to consider an application for parole by the Plaintiff, if that is necessary to avoid infringing the *Kable* principle. The mere fact that Parliament did not make specific provision for the constitution of the Board in applying s 74AA falls well short of revealing a contrary intention of the kind necessary to exclude s 6 of the *Interpretation of Legislation Act* (which, in the circumstances, would need to be an intention that s 74AA should be wholly invalid unless the Board can be constituted in a way that includes sitting judges).[60]

43. The above submission is supported by the approach adopted in *Wilson*, where this Court held that a federal judge could not be given the function, *persona designata*, of reporting to the Minister under a provision of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). The consequence of that conclusion was not that the provision allowing for the appointment of a reporter (which was expressed in general terms) was invalid. Instead, the relevant appointment power was read down so as not to authorise the appointment of a federal judge to that role.[61]

44. Provided the Court is satisfied that the Corrections Act could (if necessary) be read down as proposed above, it should not reach the second constitutional issue raised by the plaintiff.[62] This is a case where severance should be addressed as a 'threshold question'[63] because, in circumstances where the division of the Board that is actually considering the plaintiff's parole application does not include a serving judge,[64] there is in truth no question of a State judge performing, persona designate, a function that is incompatible with his or her judicial office. The question whether the Board *could* have been constituted so as to include a State judge when considering s 74AA therefore does not arise.

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58 *Tajjour v New South Wales* (2014) 254 CLR 508, 585-6 [169] (Gageler J), quoting *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 371.

59 *Tajjour v New South Wales* (2014) 254 CLR 508, 586 [171] (Gageler J), citing *Victoria v Commonwealth* (1996) 187 CLR 416, 502-3.

60 Cf Plaintiff's submissions, [56(b)].

61 (1996) 189 CLR 1, 20 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

62 *British Medical Association v Commonwealth* (1949) 79 CLR 201, 257 (Dixon J); *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 82 (Fullagar J); *Tajjour v New South Wales* (2014) 254 CLR 508, 586-7 [172] (Gageler J). See also *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 69 [156]-[157] (Gummow, Crennan and Bell JJ).

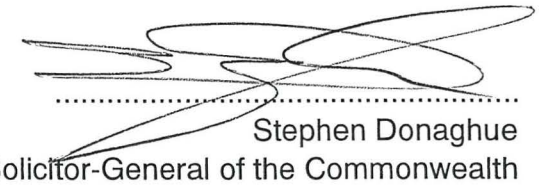
63 *Tajjour v New South Wales* (2014) 254 CLR 508, 589 [176] (Gageler J).

64 SCB 31 [17].

PART VI ESTIMATED HOURS

45. It is estimated that 15 minutes will be required for the presentation of the oral argument of the Commonwealth.

Dated: 17 February 2017



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