IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M251 of 2015

BETWEEN:

JULIAN KNIGHT
Plaintiff

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and

THE STATE OF VICTORIA
First Defendant

ADULT PAROLE BOARD
Second Defendant

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

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Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Basis for intervention

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

Part III: Leave to intervene

3. Not applicable.

Part IV: Applicable legislative provisions

4. South Australia accepts the statement by the parties of the applicable legislative provisions.

Part V: Submissions

5. In summary, South Australia submits:

   i. section 74AA of the *Corrections Act 1986* (Vic) (***Corrections Act***) does not effect an impermissible interference with the sentencing order of Hampel J of 10 November 1988,[1] as it is addressed to different rights and liabilities from those with which Hampel J's sentencing order was concerned. The ad hominem nature of s 74AA does not alter this distinction; and

   ii. the features of the decision-making process stipulated by s 74AA[2] are not capable of undermining the impartiality and independence of the State courts, judicial officers of which may sit as personae designata on the Adult Parole Board (**the Board**), upon an application for parole by the plaintiff. The requisite close connection to the judicial function is lacking.

6. South Australia makes no submission with respect to the question of construction concerning the interaction between ss 74AA and 74AAB of the Act.[3]

***Kable* and the Plaintiff's Challenges to Validity**

7. The plaintiff challenges the validity of s 74AA of the *Corrections Act* on two distinct grounds. Each ground alleges contravention of Ch III and relies upon the principle enunciated by this Court in *Kable*:[4] that legislation which so undermines or impairs the institutional integrity of a State court that it ceases to be a fit repository of federal

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1 Special Case Book at 40.
2 See Plaintiff's Submissions (**PS**) at [58]-[63].
3 See PS at [16]-[17].
4 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 1 (***Kable***).

jurisdiction is beyond the legislative competence of the States.

8. The essential notion of the *Kable* doctrine so invoked "is that of repugnancy to or incompatibility with that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system."[5]

9. What is meant by repugnancy and incompatibility is "not susceptible of further definition in terms which necessarily dictate the outcome of future cases".[6] In determining whether a law is repugnant or incompatible, attention is necessarily directed to the "maintenance of the defining characteristics of a court"[7] because "if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies".[8]

Plaintiff's First Contention: Interference with Sentencing Order

10. The plaintiff's contention that s 74AA, in substance, interferes impermissibly with the sentencing order of Hampel J of 10 November 1988 – wherein the plaintiff was sentenced to life imprisonment, with a minimum term[9] of 27 years – mirrors the contention advanced unsuccessfully by the plaintiff in *Crump*.[10] That contention fails for the same reasons as its counterpart did in *Crump*.

11. The plaintiff's complaint requires precise identification of the nature and limits of the sentencing decision;[11] that must then be compared with the sphere of operation of s 74AA. That comparison reveals that neither in substance nor in form do they speak to the same rights, entitlements, liabilities or question of law. Their spheres of concern being wholly distinct, there can be no question of the latter constituting an impermissible legislative interference with the former.[12]

12. The expressly ad hominem feature of s 74AA does not qualitatively alter the sphere of operation of s 74AA, neither does it deny the applicability of the reasoning which disposed of the challenge in *Crump*.

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5 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [101] (Gummow J), cited with approval in *Pollentine v Bleijie* (2014) 88 ALJR 796 at [42] (French CJ, Hayne, Crennan, Kiefel, Bell, Keane JJ).

6 *Kuczborski v Queensland* (2014) 254 CLR 51 at [103] (Hayne J); see also at [106] (Hayne J, with whom French CJ agreed at [38].

7 *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ).

8 *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ).

9 Now referred to in the *Corrections Act 1986* (Vic) as a "non-parole period".

10 See a summary of the plaintiff's contention in *Crump v New South Wales* (2012) 247 CLR 1 (***Crump***) at [4] (French CJ).

11 *Crump* (2012) 247 CLR 1 at [26] (French CJ).

12 See *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117 at [89]-[90] (Gummow, Hayne and Bell JJ); see also *Crump* (2012) 247 CLR 1 at [71] (Heydon J).

Sentencing Orders and Parole Regimes

13. The sentencing order of Hampel J had two functions: it fixed a maximum term of imprisonment to be served (life) and it fixed a minimum term to be served (27 years).[13]

14. The effect of the order fixing the head sentence was that the plaintiff was obliged to undergo penal servitude for life.[14]

15. *"In fixing a minimum term before a prisoner can be considered for release on parole, the sentencing judge determines ... that 'all the circumstances of the offence require that the offender serve no less than that term, without the opportunity of parole'."*[15] The only consequence of Hampel J's order fixing a minimum term was that it created an opportunity for a parole application on or after the expiry of that term; *"it said nothing about the criteria for the grant of parole or the plaintiff's prospects of success in obtaining it."*[16] It did not create any right or entitlement in the plaintiff to release on parole.[17] It is no part of the function of a sentencing order to give a prisoner a prospect, of any particular magnitude, of release on parole.[18]

16. Rather, there exists *"a clear distinction between the judicial function exercised by a judge in sentencing, and the administrative function exercised by a parole authority in determining whether a person eligible for release on parole, by reason of the judge's sentencing order, should be released"*.[19] What is required for a grant of parole after expiry of the minimum term depends entirely on the requirements of the legislation at the relevant time.[20] In the present case, s 74AA of the *Corrections Act* forms part of the legislative scheme to be applied by the Board in discharging that administrative function.

17. In both its terms and practical operation, s 74AA is concerned only with stipulating conditions for the Board's making of a parole order for the plaintiff.[21] It is open to Parliament to alter the legislative scheme stipulating the criteria for the grant of parole, including with respect to those already serving a relevant custodial sentence.[22] Changes to systems of parole usually affect people serving existing sentences. The longer the

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13 *Crump* (2012) 247 CLR 1 at [73] (Heydon J).
14 *Crump* (2012) 247 CLR 1 at [71] (Heydon J).
15 *Crump* (2012) 247 CLR 1 at [28] (French CJ), quoting with approval *Bugmy v The Queen* (1990) 169 CLR 525 at 538 (Dawson, Toohey and Gaudron JJ). See also *Power v The Queen* (1974) 131 CLR 623 at 627 (Barwick CJ, Menzies, Stephen and Mason JJ).
16 *Crump* (2012) 247 CLR 1 at [73] (Heydon J).
17 *Crump* (2012) 247 CLR 1 at [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
18 *Crump* (2012) 247 CLR 1 at [73] (Heydon J).
19 *Crump* (2012) 247 CLR 1 at [28] (French CJ).
20 *Crump* (2012) 247 CLR 1 at [70] (Heydon J).
21 See *Crump* (2012) 247 CLR 1 at [72] (Heydon J) with respect to the similarly framed provision challenged in that case.
22 *Crump* (2012) 247 CLR 1 at [70] (Heydon J); *Baker v The Queen* (2004) 223 CLR 513 (***Baker***) at [7] (Gleeson CJ).

sentence *"the more likely it is that an offender will be affected by subsequent changes in penal policy."*[23] Policies and practices that affect decisions to release may change within a constant legislative environment.[24] In all cases of such change,[25] the judicially imposed sentence fixing the head sentence and minimum term remains *"untouched and unaltered"*.[26]

Denial of Access to a Parole Regime?

18. The plaintiff nevertheless contends that the conditions imposed by s 74AA render the prospect of release on parole illusory: *"in substance its preconditions deny the plaintiff access to a parole regime"*[27] and in so doing *"substantially legislate Hampel J's 'minimum*
10 *term' ... out of existence"*.[28] The language is revealing: s 74AA has "*considerably narrowed*"[29] the scope of the power to release the plaintiff on parole, not abolished it.

19. Even if it were to be taken, contrary to authority, that legislative abolition of any prospect of release on parole was capable of constituting an interference with a judicial order fixing a minimum term, it would remain necessary to show that satisfaction of the criteria in s 74AA is impossible.[30] The criteria are not of that character. They narrow the circumstances in which the plaintiff might be granted release on parole. There is no denial of access to a parole regime, in form or substance;[31] only an alteration of the applicable regime.[32]

Non-judicially Imposed Punitive Detention?

20 20. The limitations identified in *Chu Kheng Lim*[33] and invoked by the plaintiff[34] are not engaged by s 74AA: the provision cannot be characterised as a legislative imposition of detention (or a "penalty"[35]) upon the plaintiff. The order of Hampel J imposed a sentence of life imprisonment on the plaintiff and thereby rendered him liable to detention for that

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23 *Baker* (2004) 223 CLR 513 at [7] (Gleeson CJ).
24 *Crump* (2012) 247 CLR 1 at [28] (French CJ).
25 Including, for example, where more stringent conditions for parole are imposed on offenders who fall within various specified categories: see, eg, with respect to sexual offenders or serious violent offenders; s 74AAB *Corrections Act 1986* (Vic). See also, for example, ss 74AAA, 74AABA *Corrections Act 1986* (Vic); ss 66-68 *Correctional Services Act 1982* (SA).
26 See *Crump* (2012) 247 CLR 1 at [74] (Heydon J), see also at [28] (French CJ), [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
27 PS at [36].
28 PS at [39].
29 *Crump* (2012) 247 CLR 1 at [16] (French CJ), speaking of the similarly framed provision challenged in that case.
30 See *Baker* (2004) 223 CLR 513 at [18]-[19] (Gleeson CJ).
31 Cf PS at [36].
32 See *Crump* (2012) 247 CLR 1 at [72] (Heydon J) with respect to the similarly framed provision challenged in that case.
33 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 27.
34 See PS at [30]-[31].
35 PS at [41]; see also at [31].

period.[36] That s 74AA does not operate to render release on parole illusory further confirms that the provision does not itself effect detention. Consequently, no question arises as to whether the detention so imposed is punitive and/or beyond the power of the legislature.

21. The plaintiff's reliance[37] upon the passage in *Baker*[38] for the proposition that *"legislation cannot make a sentence heavier"*, is misplaced. First, as submitted, s 74AA is not properly characterised as increasing the severity of (or imposing) any sentence or term of imprisonment. Second, that passage does not identify a limit on legislative power. Rather, it notes that subsequent legislation affecting the circumstances for release on licence or parole is incapable, *as a matter of fact*, of making a pre-existing sentence of life imprisonment any more punitive or burdensome to liberty than it is already. It positively refutes the plaintiff's contention.

Crump – Does an ad hominem expression make a difference?

22. The plaintiff purports to identify four bases upon which this Court's decision in *Crump* is relevantly distinguishable.[39] Each devolves to a reliance on the expressly ad hominem feature of s 74AA.[40]

23. Accepting that s 74AA stipulates conditions for parole only applicable to the plaintiff, the question arises: does the ad hominem expression in s 74AA provide a relevant ground of distinction from the reasoning in *Crump*, such that the basis for conclusion of validity in that case does not apply with equal force in the present case? The reasoning in *Crump* requires that question to be answered in the negative.

24. In *Crump*, no member of the Court relied for their conclusion of validity upon the fact that the impugned provision governed the conditions for parole of more than one individual. The provision governed the conditions for only a small and readily identifiable group of individuals. Chief Justice French expressly acknowledged an ad hominem *"component"* of the impugned provision[41] and held that despite being *"directed at a small population"*, the provision did not have any effect on the legal operation of the sentencing order.[42]

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36 *Crump* (2012) 247 CLR 1 at [71] (Heydon J).
37 PS [32]
38 *Baker* (2004) 223 CLR 513 at [29] (McHugh, Gummow, Hayne and Heydon JJ).
39 PS at [26]-[29].
40 The "first" is because the legislation in *Crump* was not ad hominem: PS at [26]. The "second" relies on the fact that the provision in *Crump* was not a "party specific" legislative judgment: PS at [27]. The "third" relies on the fact that in *Crump* the changes were changes "of general application" whereas s 74AA is "an ad hominem determination": PS at [28]. The "fourth" denies the existence of a relevant historical analogue because Parliament has not previously determined when a "particular individual" should be eligible for parole: PS at [29].
41 *Crump* (2012) 247 CLR 1 at [22], [34] (French CJ).
42 *Crump* (2012) 247 CLR 1 at [34] (French CJ).

25. The reasons which founded the conclusion of validity in *Crump* do not lose their force or applicability where the provision's operation is limited to an identified individual. The ad hominem nature of s 74AA does not qualitatively alter the character of that provision to one which may be properly characterised as interfering with Hampel J's sentencing order. The provision still only governs the exercise of the Board's administrative function in determining whether to release a prisoner on parole by stipulating applicable jurisdictional facts. Justice Hampel's sentencing order remains concerned with different rights and liabilities.[43] Its defining and essential characteristics, including its completeness and finality, remain untouched. That s 74AA governs only those applications brought by the plaintiff does not alter these matters and cannot transform the provision into one which, either in form or substance, interferes with the sentencing order. Indeed, being addressed to the conditions for the making of a parole order for the plaintiff, the provision is predicated upon the subsisting force and effect of the sentencing order fixing a minimum term.[44]

26. The express references in s 74AA(6) to the plaintiff's sentence and to the offences for which the plaintiff was sentenced do not assist.[45] They supply a convenient means of identifying, with the requisite precision, that s 74AA applies to a grant of parole to the plaintiff (and only the plaintiff).

27. Finally, the timing of the enactment of s 74AA – shortly before the expiry of the plaintiff's non-parole period – is said to be "critical"[46] to the liability of the provision to undermine public confidence in the Supreme Court. However, given the purpose of the provision – to amend the conditions for making a parole order for the plaintiff[47] – the timing of its enactment discloses nothing more than that it should come into operation before its *raison d'etre* is superseded by a grant of parole to the plaintiff on the un-amended basis.

Conclusion

28. Section 74AA addresses different rights and liabilities from those with which Hampel J's sentencing order was concerned. Its sphere of operation being distinct, there is no question of it interfering impermissibly with the judicial order of the sentencing court. The ad hominem nature of s 74AA does not alter this essential distinction; this Court's reasoning in *Crump* applies with equal force. The plaintiff's first contention must be rejected.

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[43] See [13]-[17] above.
[44] Cf PS at [39].
[45] Cf PS at [27], [37]-[38].
[46] PS at [40].
[47] Namely, to amend the conditions for making a parole order for the plaintiff; see s 1 of the *Corrections Amendment (Parole) Act 2014* (Vic).

Plaintiff's Second Contention: Enlistment of Judicial Officers

29. The legislative scheme under the *Corrections Act* authorises judicial officers of the Supreme, County and Magistrates Courts of Victoria to sit as personae designata on the Board.[48] To the extent that this authorisation extends to determining an application for parole brought by the plaintiff, it is said to so undermine the impartiality and independence of each of the courts upon which those officers sit in their judicial capacity, as to cause those courts to cease to be fit repositories of federal jurisdiction.

30. Although the reasoning in *Wilson*[49] and *Kable* *"share a common foundation in constitutional principle"*,[50] it remains the case that the *Kable* principle *"is not a surrogate for the application of a separation of powers doctrine to the States"*.[51] That being so, the task invited by the plaintiff's contention is to be approached with restraint.[52] The focus of the inquiry remains the institutional integrity of the State courts in question[53] and whether the performance of the function conferred would impair the defining characteristics of those courts.[54] This focus led to the following observation of McHugh J in *Kable*, subsequently quoted with apparent approval by French CJ and Kiefel J in *Wainohu*:[55]

> No doubt there are few appointments of a judge as persona designata in the State sphere that could give rise to the conclusion that the court of which the judge was a member was not independent of the executive government.[56]

As observed in *Wainohu*, it is where the statute creates *"a close connection and therefore an association with the person's role as a judge"* which brings the *"potential for incompatibility of the non-judicial function ... more sharply into focus."*[57]

Five Features

31. Five features of the impugned scheme are said by the plaintiff to operate in combination to render the functions authorised relevantly incompatible.[58]

(i): Executive function

32. The first is the identification that the function is within the sphere of responsibility of the executive branch,[59] rather than the judicial branch.[60] However, that the function is

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48 Sections 61(1)-(2), 74(1) *Corrections Act 1986* (Vic); see also Special Case Book (**SCB**) at 29.
49 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1998) 189 CLR 1.
50 *Wainohu v New South Wales* (2011) 243 CLR 181 (***Wainohu***) at [105] (Gummow, Hayne, Crennan and Bell JJ).
51 *Wainohu* (2011) 243 CLR 181 at [52] (French CJ and Kiefel J).
52 *Wainohu* (2011) 243 CLR 181 at [52] (French CJ and Kiefel J).
53 *Wainohu* (2011) 243 CLR 181 at [105], [107] (Gummow, Hayne, Crennan and Bell JJ), [52] (French CJ and Kiefel J).
54 *Wainohu* (2011) 243 CLR 181 at [47] (French CJ and Kiefel J).
55 *Wainohu* (2011) 243 CLR 181 at [48] (French CJ and Kiefel J).
56 *Kable* (1996) 189 CLR 1 at 118 (McHugh J).
57 *Wainohu* (2011) 243 CLR 181 at [47] (French CJ and Kiefel J).
58 PS at [59]-[63].

administrative, rather than judicial does not itself further the enquiry; it is the feature which engages it. Absent the conferral of administrative functions on a judge or court, the long history of which was traced in *Wainohu*,[61] no inquiry into whether the particular functions are relevantly incompatible[62] arises. To observe that the scheme under the *Corrections Act* authorises judicial officers to discharge an executive role is merely to ask that question – it cannot itself help answer it.

(ii): Ad hominem legislation

33. The second is that the process by which the function is to be discharged is, in relation to the plaintiff, stipulated in part by a legislative provision which applies exclusively to the plaintiff.[63] Although the precise way in which this feature is said to undermine the impartiality and independence of the relevant State courts is not developed, reliance is placed on the *"centrality"* of the ad hominem feature in *Kable* to the holding of invalidity in that case. However, the vice which caused the ad hominem aspect of the legislation in *Kable* to contribute to its invalidity is precisely that which is absent in the present case.

34. In *Kable*, the impugned ad hominem legislation governed an exercise of power by the Supreme Court of New South Wales. In so doing, the provision drew in the Supreme Court of a State *"as an essential and determinative integer"*[64] and rendered that Court *"the instrument of a legislative plan, initiated by the executive government"*.[65] By conferring the power to make the relevant detention order on the Supreme Court, the legislation attempted to *"dress up"* the proceedings as judicial.[66] That public confidence in courts could not be maintained in a *judicial* system not predicated on equal justice,[67] led to the conclusion that where legislation left the Supreme Court of a State itself to conduct proceedings and make orders pursuant to ad hominem legislation in pursuit of a political exercise,[68] it offended Ch III.

35. The core vice of the *Kable* legislation was summarised by McHugh J thus:

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59 See *Crump* (2012) 247 CLR 1 at [59] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), see also at [28], [36] (French CJ).
60 PS at [59].
61 *Wainohu* (2011) 243 CLR 181 at [21]-[30] (French CJ and Kiefel J).
62 In the federal sphere, with the separation of powers. In the State sphere, with the role of State courts as repositories of federal jurisdiction and the institutional integrity of those courts mandated by that role.
63 PS at [60].
64 *Kable* (1996) 189 CLR 1 at 133 (Gummow J), see also at 134.
65 *Kable* (1996) 189 CLR 1 at 122 (McHugh J).
66 *Kable* (1996) 189 CLR 1 at 108 (Gaudron J).
67 *Kable* (1996) 189 CLR 1 at 107 (Gaudron J).
68 See *Kable* (1996) 189 CLR 1 at 133-134 (Gummow J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [16] (Gleeson CJ)

> The Parliament of New South Wales has the constitutional power to pass legislation providing for the imprisonment of a particular individual. And that is so whether the machinery for the imprisonment be the legislation itself or the order of a Minister, public servant or tribunal. ... However, whatever else the Parliament of New South Wales may be able to do in respect of the preventative detention of individuals who are perceived to be dangerous, it cannot, consistently with Ch III of the Constitution, *invoke the authority of the Supreme Court* to make the orders against the appellant by the methods which the Act authorises. This is because the Act and its procedures compromise the institutional integrity of the Supreme Court.[69]

(Emphasis added)

36. Section 74AA does not speak to any State court. It does not purport to control or govern a judicial process. It does not *"dress up"* an application for parole as a judicial proceeding. No State court has any role in the process stipulated by s 74AA, let alone a role which could be described as *"essential and determinative"*. The maintenance of a judicial system predicated on equal justice is untrammelled.

37. Here, the ad hominem feature of the legislative scheme is directed to the exercise of an administrative function that does not purport to be judicial. The attack on the institutional integrity of a State court which may be effected by an ad hominem provision governing a proceeding conducted by a court and cloaked as judicial is wholly lacking. The judicial officer participates in an administrative process, undertaken by a multi-member decision-making body. That administrative process is governed in part by an ad hominem provision. This does not impact upon the impartial and independent character of the court upon which that judicial officer sits: the causative link that the plaintiff attempts to draw is remote and tenuous. The suggestion that it denies the institutional integrity of that court and renders it an unsuitable repository of federal jurisdiction is untenable.

(iii)-(iv): Secretary's report

38. The third feature relied upon by the plaintiff is that the subjective preconditions applicable under s 74AA(3)(a) to the Board's making of a parole order for the plaintiff are to be made *"on the basis of"* a report of the Secretary. This is said to deny the Board's decision the character of being *"independent of any instruction, advice or wish of the Legislature or executive Government"* in the sense referred to in Heydon J's dissent in *Wainohu*.[70] The fourth feature is of the same genus; that is, that the requirement that *"paramount consideration"* be given to the *"safety and protection of the community"*[71] amplifies the significance of the Secretary's report. The interaction between s 73A and s 74AA(3)(a) is

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[69] *Kable* (1996) 189 CLR 1 at 121 (McHugh J).

[70] *Wainohu* (2011) 243 CLR 181 at [161] (Heydon J); see in the context of the federal separation of powers *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1998) 189 CLR 1 at [23] (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

[71] Section 73A, *Corrections Act 1986* (Vic).

said by the plaintiff to cause the Secretary's report to heavily inform, if not foreclose,[72] the Board's exercise of its discretion to make a parole order for the plaintiff under s 74.

39. The statutory recognition contained within the parentheses in s 74AA(3)(a), that the Board's states of satisfaction or non-satisfaction under that subsection will be formed *"on the basis of"* a report of the Secretary neither causes the Board's parole decision to occur on *"instruction"* nor causes the Secretary's report effectively to foreclose that decision.

40. The decision-making function in question is subject to the ordinary limitations attending the discharge of such administrative functions, including reviewability for error. It is not open to the Board to abdicate that function by mechanically deferring to conclusions or recommendations which may be included in the Secretary's report.[73] On its terms, s 74AA(3) requires the Board to reach the relevant states of satisfaction. A parole decision made by the Board upon an application by the plaintiff, wherein the Board failed to discharge its duty to form itself the relevant states of satisfaction under s 74AA(3), would be infected by error and beyond the scope of the powers conferred by the Act.[74]

41. The Secretary's report will constitute a relevant consideration of which the Board is bound to take account in determining whether it is satisfied of the matters set out in s 74AA(3)(a). It may be that in many, if not in most, cases of a parole application by the plaintiff, the Board *"will not need to go beyond the report"*.[75] However, that does not absolve the Board of the duty to be satisfied of the matters set out in subs (3)(a) (and subs (3)(b)).[76] If there is other material in the possession of the Board – for example, because the Board has exercised its powers under s 71A in order to *"[inform] itself in the performance of its functions"* – which is relevant to those questions, then the Board may similarly be bound to have regard to them.[77]

42. It is unremarkable that the Board must take account of the Secretary's report in determining whether it is satisfied of the preconditions for the making of a parole order of the plaintiff. The mere fact that a consideration relevant to a decision is composed and provided by an officer of the executive cannot cause the decision, (relevantly, insofar as it

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72 PS at [62].

73 See *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208 at 217-18 (Stephens J). See also *Tickner v Chapman* (1995) 57 FCR 451 at 493-494 (Kiefel J).

74 See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208 at 213-15 (Barwick CJ).

75 See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 30 (Gibbs CJ).

76 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 30 (Gibbs CJ); *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208 at 217 (Stephens J); *South Australia v O' Shea* (1987) 163 CLR 378 at 389 (Mason CJ), 409 (Brennan J).

77 See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 30 (Gibbs CJ), 44-46 (Mason J). Such a conclusion is particularly irresistible in light of the fact that a decision of the Board as to the plaintiff's parole is one which impacts on the plaintiff's liberty; see at 45 (Mason J).

is made by a judicial officer acting in an administrative capacity), to cease to be *"independent of any instruction, advice or wish of the Legislature or the executive Government"* in the sense referred to by the plurality in *Wilson*[78] and by Heydon J in *Wainohu*.[79]

43. The need for *"independence"* is even more acute where a decision is to be made by a court, yet it is equally unremarkable for a court to be required by statute to have regard to a submission or report as a precondition to the making of an order. Such requirements are commonplace[80] and constitutionally inoffensive. A fortiori, that the Board is to form its states of satisfaction *"on the basis"* of the Secretary's report cannot render the Board's function one performed at the behest of an instruction or wish of the executive such that the involvement of a judicial officer in that decision is incompatible with the court upon which that officer sits remaining a repository of federal jurisdiction.

(v): Natural justice

44. The final feature relied upon is that, in considering and determining an application by the plaintiff for parole, the Board is not bound by the rules of natural justice. The plaintiff concedes this not to be fatal.[81] It is common to all functions exercised by the Board;[82] the plaintiff does not contest the validity of the involvement of judicial officers in the general parole regime under the *Corrections Act*.[83] Again, the function here conferred is administrative. Acceptance of the proposition that a State judicial officer may exercise administrative functions as persona designata necessarily involves acceptance that a suite of limitations, which may not necessarily be acceptable upon an exercise of judicial power, may permissibly attend the exercise of that administrative function. Dispensation with the rules of natural justice is a quintessential example of such a limitation.

45. The contention that the potential for the Secretary both to prepare the report and to sit as a member of the Board which determines the plaintiff's application creates an *"inherent potential for apprehended bias"*,[84] proceeds from an unstated, and false, premise. That premise is that the Secretary has some interest in the plaintiff being denied parole or in

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78 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1998) 189 CLR 1 at 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
79 *Wainohu* (2011) 243 CLR 181 at [161] (Heydon J).
80 See for example s 23A *Criminal Law (Sentencing) Act 1988* (SA) where the Supreme Court, in determining an application for the discharge of an order for detention under s 23, "must" take into account a range of reports including those furnished by the Training Centre Review Board or Parole Board. Further, those reports are required to offer an opinion to the Court about the effect of an order for discharge "on the safety of the community" (s 23A(4)(c)(i)), in circumstances where the "paramount consideration" for the Court "must be the safety of the community" (s 23A(3)).
81 PS at [63].
82 Section 69(2) *Corrections Act 1986* (Vic).
83 PS at [50].
84 PS at [63].

the Board not being satisfied of the matters set out in s 74AA(3)(a) and (b). Whilst the Secretary sitting on such parole application be may be likely to accept as accurate and reliable the matters upon which he or she reported, there is no basis upon which it could be concluded that the Secretary holds an interest that is incompatible with his or her involvement in the decision-making process of the Board. If the report itself does not suffer from bias or an appearance of bias, then neither will a subsequent acceptance of it.

Absence of "close connection"

46. Finally, a *"close connection"* of the type identified in *Wainohu*[85] between the Board function and the judicial officers' roles on their respective State courts, is lacking. In contrast with some of the critical vices identified in *Wainohu*, the exercise of the administrative function in this case is wholly unrelated (still less *"integral"*[86] or *"necessary"*[87]) to the invocation of the jurisdiction of a court, nor is there the appearance that it is a judge (acting as such) who is making the administrative decision.[88]

Conclusion

47. The five identified features of the decision-making function, even when taken in combination, are not capable of undermining the impartiality and independence of the State courts of those judicial officers who may sit on the Board upon an application for parole by the plaintiff. The institutional integrity of those State courts is untarnished and their defining characteristics unimpaired.

Part VI: Estimate of time for oral argument

48. South Australia estimates that 10 minutes will be required for the presentation of oral argument.

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85 *Wainohu* (2011) 243 CLR 181 at [47] (French CJ and Kiefel J).
86 See *Wainohu* (2011) 243 CLR 181 at [68] (French CJ and Kiefel J).
87 See *Wainohu* (2011) 243 CLR 181 at [69] (French CJ and Kiefel J), see also at [90] (Gummow, Hayne, Crennan and Bell JJ).
88 *Wainohu* (2011) 243 CLR 181 at [68] (French CJ and Kiefel J).