IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M251 of 2015

BETWEEN:

JULIAN KNIGHT
Plaintiff

and

STATE OF VICTORIA
First Defendant

ADULT PAROLE BOARD
Second Defendant

FIRST DEFENDANT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are suitable for publication on the Internet.

PART II: ISSUES

2. The ultimate issue is the validity of s 74AA of the *Corrections Act 1986* (Vic) (the **Act**). The Plaintiff makes two arguments against validity:[1]

   (a) First, that s 74AA interferes with the sentencing orders made by Hampel J; and

   (b) Second, that it would be contrary to the principle in *Kable v Director of Public Prosecutions (NSW)*[2] (***Kable* principle**) for sitting judges to make decisions applying s 74AA as members of the Adult Parole Board (the **Board**).

3. In summary, the Plaintiff's first argument is precluded by the decision of this Court in *Crump v New South Wales*,[3] which upheld the validity of a NSW law on which s 74AA of the Act is modelled. Although s 74AA is expressed to apply to a single person (unlike the NSW law considered in *Crump*), that does not affect the analysis in *Crump*.

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1 See Plaintiff's submissions (**PS**), [5].

2 (1996) 189 CLR 51.

3 (2012) 247 CLR 1 (***Crump***).

4. The Plaintiff's second argument, even if accepted, would only prevent the appointment of a sitting judge to participate in a decision applying s 74AA; it would not invalidate s 74AA. However, no decision has yet been made applying s 74AA, and no sitting judge participated in the preliminary decision made on 27 July 2016. This argument cannot give rise to the relief sought.

5. The *Kable* argument should be rejected on its merits in any event. Section 74AA does not make a State court, or a State judge, the instrument of the executive. Although a report from the Secretary to the Department of Justice and Regulation (the **Secretary**) provides the factual foundation for the Board's decision on the matters in s 74AA(3)(a), the Board is not bound to accept the Secretary's views on whether those criteria are met.

PART III: SECTION 78B NOTICE

6. Notice has been given in accordance with s 78B of the *Judiciary Act 1903* (Cth).

PART IV: MATERIAL FACTS

7. The material facts are contained in the special case. The First Defendant (the **State**) emphasises the following matters.

Plaintiff sentenced

8. On 10 November 1988, the Plaintiff was sentenced by Hampel J to life imprisonment in respect of seven counts of murder, and to 10 years imprisonment for each of 46 counts of attempted murder (Special Case Book (**SCB 38**)). Hampel J set a minimum term of 27 years, but stated:[4]

> 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 interests of justice, he cannot be released.

9. Consistently with this observation, the order for imprisonment states that the Plaintiff is "[t]o be imprisoned in Her Majesty's Prison at Pentridge or such other Prison as H.E. the Governor may direct, for the term of life … A minimum term of twenty-seven (27)

4 SCB 38.

years fixed before being eligible for parole" (SCB 40). The minimum term (now referred to as a "non-parole" period) expired on or about 8 May 2014.[5]

Act, s 74AA added

10. On 2 April 2014, the *Corrections Amendment (Parole) Act 2014* (Vic) (the **Amendment Act**) came into operation.

11. Section 1 of that Act stated that "[t]he purpose of this Act is to amend the [Act] in relation to the conditions for making a parole order for the prisoner Julian Knight". Section 3 inserted new s 74AA into the Act, set out in paragraph 21 below.

Application for parole

12. On 11 March 2016, the Plaintiff sent a parole application to the Secretary of the Board.[6] On 27 July 2016, that application was considered by a Division of the Board, constituted by a retired judge and two non-judicial members.[7]

13. The Board decided to require several reports to be prepared, including a report from the Secretary under s 74AA(3) of the Act, and not to make any order that the Plaintiff be released on parole under s 74.[8]

14. The Board has not yet received a report from the Secretary under s 74AA(3) of the Act.[9] Accordingly, no decision has yet been made applying s 74AA of the Act. Moreover, no sitting judge has participated in decisions made in relation to the Plaintiff.

PART V: STATUTORY PROVISIONS

Composition of the Board

15. The Board is established by s 61 of the Act. By s 61(2), the Board consists of:

    (a) such number of Judges of the Supreme Court as are appointed by the Governor in Council on the recommendation of the Chief Justice of the Supreme Court; and

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5 Special case, [4]; SCB 28.

6 Special case, [16]; Annexure C; SCB 31, 43-4.

7 Special case, [17]; Annexure D; SCB 31, 45-7.

8 Ibid.

9 Special case, [18]; SCB 32.

(ab) such number of Associate Judges of the Supreme Court as are appointed by the Governor in Council on the recommendation of the Chief Justice of the Supreme Court; and

(b) such number of Judges of the County Court as are appointed by the Governor in Council on the recommendation of the Chief Judge of the County Court; and

(c) such number of Magistrates as are appointed by the Governor in Council on the recommendation of the Chief Magistrate; and

(d) one or more persons appointed by the Governor in Council as full-time members; and

(da) one or more retired Judges of the Supreme Court or the County Court or a superior court or an intermediate court or retired Magistrates, appointed by the Governor in Council; and

(e) one or more persons appointed by the Governor in Council as part-time members; and

(f) the Secretary.

16. Currently, there is one sitting judge of the County Court; two retired judges of that Court; seven sitting magistrates; and five retired magistrates (of whom four are reserve magistrates).[10] The chairperson of the Board is a retired County Court judge.[11] There are no sitting or retired judges or Associate Judges of the Supreme Court.[12]

Divisions of the Board

17. The Board may exercise its powers and functions in divisions (s 64(1)). Subject to ss 64A and 74AAB, a division of the Board consists of at least 3 members, of whom at least one must be a judicial officer or retired judicial officer, and that officer is the chairperson of that division (s 64(2)).

18. Section 74AAB establishes the Serious Violent Offender or Sexual Offender Parole division (**SVOSO division**), which has the function of deciding whether or not to release a prisoner on parole in respect of a sexual offence or a "serious violent offence" (s 74AAB(2)-(3)).

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10 Cf Special Case, [10]; SCB 30. On 9 December 2016, one of the sitting magistrates finished as a member of the Board. The State proposes that the Special Case should be amended to reflect this, and will be approaching the Plaintiff with a view to this amendment being made by consent.

11 Special Case, [8]; SCB 30.

12 Special Case, [11]; SCB 30. In 2015-16, there were 4 full-time members, 16 judicial members, and 16 community members: Adult Parole Board of Victoria, *Annual Report 2015-16*, 16. See <http://assets.justice.vic.gov.au/corrections/resources/98e9d49c-f9c2-43c7-ab61-aae194d2e882/adult+parole+board+annual+report+2015-16.pdf>.

(a) "Serious violent offence" includes murder.[13] The Plaintiff's offending was therefore a serious violent offence within s 74AAB.

(b) The SVOSO division consists of the chairperson of the Board; one full-time member or one part-time member of the Board selected by the chairperson; and any other members of the Board selected by the chairperson from time to time (s 74AAB(1)).

19. The SVOSO division may only make an order that a prisoner be released on parole in respect of a serious violent offence if another division of the Board has recommended that parole be granted; and the SVOSO division has considered the recommendation (s 74AAB(5)).

Making orders for parole

20. Subject to ss 74AAB and 78(3) (release on parole more than once), the Board may by instrument order that a prisoner serving a prison sentence in respect of which a non-parole period was fixed be released on parole at the time stated in the order and, unless the Board revokes the order before the time for release stated in the order, the prisoner must be released at that time (s 74(1)).

21. Section 74AA provides:

74AA Conditions for making a parole order for Julian Knight

(1) The Board must not make a parole order under section 74 in respect of the prisoner Julian Knight unless an application for the order is made to the Board by or on behalf of the prisoner.

(2) The application must be lodged with the secretary of the Board.

(3) After considering the application, the Board may make an order under section 74 in respect of the prisoner Julian Knight if, and only if, the Board—

(a) is satisfied (on the basis of a report prepared by the Secretary to the Department) that the prisoner—

(i) is in imminent danger of dying, or is seriously incapacitated, and as a result he no longer has the physical ability to do harm to any person; and

(ii) has demonstrated that he does not pose a risk to the community; and

(b) is further satisfied that, because of those circumstances, the making of the order is justified.

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[13] See *Sentencing Act 1991* (Vic), Sch 1 cl 2(a), read with para (a) of the definition of "serious violent offence" in s 77(9) and s 74AAB(8) of the Act.

(6) In this section a reference to the prisoner Julian Knight is a reference to the Julian Knight who was sentenced by the Supreme Court in November 1988 to life imprisonment for each of 7 counts of murder.

PART VI: ARGUMENT

A. Section 74AA does not interfere with the sentencing decision of Hampel J

22. Contrary to the Plaintiff's first argument, s 74AA of the Act does not interfere with the sentencing decision of Hampel J.

Crump and *Baker*: changes to parole laws do not interfere with sentencing decisions

23. Section 74AA of the Act is modelled on s 154A of the *Crimes (Administration of Sentences) Act 1999* (NSW) (the **NSW Act**),[14] which was upheld by this Court in *Crump*. The Plaintiff does not challenge the correctness of *Crump*, but seeks to distinguish it: PS, [6]

24. *Crump* establishes that the States have broad power to alter the conditions which a person who has been sentenced must meet to be eligible for parole. That is, legislation that alters the conditions on which parole will be available does not interfere with the judicial order sentencing the person to imprisonment.

(a) Gummow, Hayne, Crennan, Kiefel and Bell JJ held that the sentence imposed on Mr Crump had settled the controversy as to the sentence to be imposed, so that that the exercise of judicial power was then spent.[15] Section 154A of the NSW Act did not purport to set aside, vary, alter or otherwise stultify the effect of the judgment, decree or sentence of the Supreme Court.[16] The sentencing order did not "create any right or entitlement in the plaintiff to his release on parole", and s 154A "did not impeach, set aside, alter or vary the sentence under which the plaintiff suffers his deprivation of liberty".[17]

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14 See Second Reading Speech to the Corrections Amendment (Parole) Bill 2014 (Vic), Legislative Assembly Debates, 13 March 2014, 746: "This bill means that Julian Knight will never be released except in very restrictive circumstances, essentially mirroring preconditions contained in New South Wales legislation upheld by the High Court in the decision of *Crump v NSW* (2012) 247 CLR 1 … By essentially mirroring the preconditions contained in the New South Wales legislation we are seeking to ensure the constitutional validity of the bill. These provisions change the preconditions on which the adult parole board must be satisfied before it can grant parole to Julian Knight. These same preconditions have been upheld by the High Court in the Crump case".

15 *Crump* (2012) 247 CLR 1, 26 [58]-[59].

16 *Crump* (2012) 247 CLR 1, 26 [60].

17 Ibid.

(b) French CJ also held that s 154A of the NSW Act did not alter the "effect" of the decision made by the sentencing Judge.[18] Although s 154A may have altered "the statutory consequence of the sentence", it did not alter its legal effect.[19] The sentencing judge would not have been entitled to base the sentencing decision on any assumptions about the continuity of statutory arrangements for parole.[20]

(c) Similarly, Heydon J held that s 154A of the NSW Act "did not alter either the rights and entitlements created by [the sentencing Judge's] order or the effect of the order".[21] Mr Crump had no right or entitlement that the system of parole as in force at the time of the sentencing decision should continue to apply to him.[22] The minimum term sentence "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".[23]

25. The reasoning in *Crump* set out above is equally applicable to s 74AA of the Act. Section 74AA does not impeach, set aside, alter or vary the sentence under which the Plaintiff suffers his deprivation of liberty.[24] Section 74AA may have altered the statutory consequences of the sentence, but it did not alter the sentence's legal effect.[25] Equally, s 74AA left the sentencing order untouched, and merely altered the conditions to be met before the Plaintiff can be released on parole.[26]

26. *Crump* confirms the more general point: once a sentence is imposed on a defendant, then (subject to appeals), the exercise of judicial power with respect to the trial upon indictment is spent, and the responsibility for the future of the defendant passes to the executive branch of the government of the State.[27] There is no intersection between a law altering the conditions on which parole is available, and the sentencing order, and therefore the parole law does not interfere with that order.

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18 *Crump* (2012) 247 CLR 1, 18-19 [34].
19 *Crump* (2012) 247 CLR 1, 20 [35].
20 *Crump* (2012) 247 CLR 1, 20 [38].
21 *Crump* (2012) 247 CLR 1, 28-9 [71].
22 Ibid.
23 *Crump* (2012) 247 CLR 1, 29 [73].
24 *Crump* (2012) 247 CLR 1, 26 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
25 *Crump* (2012) 247 CLR 1, 19 [35] (French CJ).
26 *Crump* (2012) 247 CLR 1, 29 [72] (Heydon J).
27 *Elliott v The Queen* (2007) 234 CLR 38, 41-2 [5] (the Court) (***Elliott***).

27. Another illustration of that point is *Baker v The Queen*.[28]

(a) Mr Baker was sentenced in 1974 to "life" imprisonment, at a time when the only prospect of release was the exercise of executive discretion. Legislative amendments in 1989 enabled a prisoner serving a life sentence to apply for the determination of a minimum term (the equivalent of a non-parole period) and an additional term during which the prisoner would be at liberty on parole.

(b) In 1997, a further amendment provided that, if the sentencing judge had made a "non-release recommendation" in respect of a prisoner, then the prisoner was not eligible for the determination of a minimum term unless there were special circumstances. This Court held that the "special circumstances" requirement was valid.

28. As with *Crump*, the legislative amendments in *Baker* to the conditions on which parole would be available to certain prisoners "d[id] not alter the nature of the original sentence".[29] The argument at PS, [32] therefore inverts the true meaning of the quoted passage in *Baker*.[30] The true meaning is that, once a person is sentenced to "life" imprisonment, any amendment to parole laws (even amendments that make it more difficult to obtain parole) will not and could not extend that sentence or make it heavier, because a life sentence is already the maximum penalty that could be imposed.

29. Here, the Plaintiff was sentenced to seven life sentences. This sentence is the maximum penalty that could be imposed. As with *Baker*, any change to the parole laws would not extend that sentence or make it heavier. Thus s 74AA is not a bill of attainder, because it does not impose any punishment: [31] contra PS, [36]-[37]. Although s 74AA(6) refers to the orders made by Hampel J, that is simply to identify

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28 (2004) 223 CLR 513 (***Baker***).

29 See *R v Elliott* (2006) 68 NSWLR 1, 16 [67] (Spigelman CJ), citing *Baker* (2004) 223 CLR 513, 528 [29] (McHugh, Gummow, Hayne and Heydon JJ). Appeal dismissed: *Elliott* (2007) 234 CLR 38.

30 See (2004) 223 CLR 513, 528 [29].

31 The second feature of a bill of attainder is that there is a legislative imposition of punishment for a breach of conduct (not a "legal burden"): *Duncan v New South Wales* (2015) 255 CLR 388, 408 [43] (the Court) (***Duncan***), contra PS, [31(b)].

the "Julian Knight" to which the section applies: cf PS, [38].[32] For the reasons given in *Crump* and *Baker*, s 74AA does not interfere with those orders.

30. It is true, but irrelevant, that Hampel J decided to set a minimum term, and thus did not find that the nature of the offence and the antecedents of the offender rendered the fixing of a minimum term inappropriate:[33] cf PS, [8(c)] and [9]. That decision simply reflects judicial caution that a court sentencing a young person should not attempt to anticipate decisions that might fall to be made by other persons, under other legislation, over the ensuing decades.[34] His Honour's reasons for sentence made the legally sound point that setting a minimum term did not create a right in the Plaintiff to be released at the end of that period; rather, this period is the period before the end of which he must not be released: see paragraph 8 above.

31. It is therefore incorrect to say that s 74AA expresses any "legislative opinion" about the correctness of the orders of Hampel J setting a minimum term: contra PS, [39]. Those orders did not create any entitlement in the Plaintiff to be granted parole.[35] The effluxion of a non-parole period enlivens the Board's discretion to grant parole, but does not create any presumption that parole will be granted.[36] There is no entitlement to release on parole until the Board has so directed.[37] Following the enactment of s 74AA, the Board can only direct the Plaintiff's release if satisfied of the matters set out in s 74AA(3). Any parole decision made in relation to the Plaintiff will be made under s 74 of the Act,[38] and thus is administrative in nature, not judicial: cf PS, [37].

Crump is not distinguishable

32. The Plaintiff contends that *Crump* is not controlling, essentially because s 74AA applies only to him, whereas s 154A of the NSW Act is said to be a law of general application: see PS, [26]-[28].

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32 There is no legislative determination that the Plaintiff has breached some antecedent standard of conduct: cf *Duncan* (2015) 255 CLR 388, 408 [43] (the Court), referred to in PS, [31].

33 Cf *Penalties and Sentences Act 1985* (Vic) s 17(2).

34 See *R v Jamieson* (1992) 60 A Crim R 68, 80 (Gleeson CJ, with Hope AJA and Lee AJ agreeing).

35 See the cases collected in *Knight v Money* [2015] VSC 105, [79]-[81] (Cavanough J) (24 March 2015).

36 *Knight v Adult Parole Board* [2012] VSC 23, [13] (Osborn J) (3 February 2012).

37 *Mercorella v Secretary, Department of Justice* [2015] VSC 18, [26] (Weinberg JA) (4 February 2015).

38 Section 74AA provides that the Board "must not make a parole order under [s] 74" unless an application is made under s 74AA(1), and the Board is satisfied of the matters in s 74AA(3).

33. Contrary to the Plaintiff's argument, the difference between s 74AA of the Act and s 154A of the NSW Act in this respect is not material. Although s 154A applied to a "serious offender the subject of a non-release recommendation", that was a limited number of identified people (around 10 people).[39] In *Crump*,[40] French CJ stated that there was "an ad hominem component" of the objects of s 154A, and quoted a passage from the Second Reading Speech that referred to Mr Baker and Mr Crump by name.

34. In any event, the reasoning in *Crump* demonstrates that a law making it more difficult to obtain parole does not interfere with the sentencing order. That is so, whether the law applies to one person or 10. The conditions in s 74AA(3) on which parole may be granted to the Plaintiff are the same conditions as in s 154A(3). Therefore the reasoning in *Crump* is directly applicable and the Plaintiff can only succeed on this aspect by having *Crump* overruled, a task he expressly eschews: cf PS, [25].

35. The Plaintiff also contends that there is no historical analogue for s 74AA (unlike Parliament making winding up orders or dissolving marriages): PS, [29]. This point does not provide any basis for distinguishing s 74AA from s 154A of the NSW Act, given that s 74AA is modelled on that provision. Section 154A determines when the particular individuals who are the subject of a non-release recommendation will be eligible for parole, in the same way that s 74AA determines when the Plaintiff will be eligible for parole: cf PS, [29].

B. There is no breach of the *Kable* principle

36. Contrary to the Plaintiff's second argument, it is not contrary to the *Kable* principle for a sitting judge to participate as a member of the Board in a decision applying s 74AA of the Act. It is convenient to begin with some preliminary points.

Argument is hypothetical at this stage

37. The vice identified by the Plaintiff is not mandated by the Act and may never come to pass. He contends that the *Kable* principle prohibits a sitting judge from participating in a decision applying s 74AA of the Act. However, no decision has yet been made applying s 74AA. No sitting judge was involved in the preliminary decision made on

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39 On the persons who were serving a life sentence and the subject of a non-release recommendation, see *Baker* (2004) 223 CLR 513, 521 [8] (Gleeson CJ), 534 [50] (McHugh, Gummow, Hayne and Heydon JJ).

40 (2012) 247 CLR 1, 15 [22].

27 July 2016: see paragraphs 12-14 above. Moreover, a sitting judge is not required by the Act to participate and may never participate: see paragraphs 39-43 below.

38. The Plaintiff contends that invalidity arises because the Act purports to authorise a sitting judge to participate in a decision applying s 74AA: PS, [52]-[53]. However, this Court does not decide constitutional issues unless it is necessary to do so,[41] and the Plaintiff's argument (even if accepted) would not lead to the invalidity of s 74AA (cf question (a) in paragraph 19 of the Special Case) (SCB 32).

(a) At most, this argument would invalidate the appointment of a sitting judge to the relevant Division of the Board. In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,[42] this Court held that a function of "reporter" was incompatible with the duties of a federal judge. However, the consequence was that a Federal Court judge could not be appointed as a "reporter".[43] The reporting function itself was valid. The same analysis would apply to s 74AA.

(b) This case is very different from *Wainohu v New South Wales*[44] (referred to in PS, [52]). The incompatibility in that case followed from the express legislative permission not to give reasons, so it was immaterial that a judge might choose in practice to do so.[45] Here, by contrast, any invalidity would follow from the participation by a sitting judge in a decision applying s 74AA.

A sitting judge may never participate in the decision

39. For the following reasons, a sitting judge may never participate in a decision applying s 74AA of the Act.

40. Section 74AA must be interpreted in the light of the scheme of Pt 8, Div 5 as a whole. A decision applying s 74AA will be made under s 74.[46] Section 74AA alters the

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41 See eg *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159, 171 [28] (McHugh, Gummow, Hayne and Heydon JJ).

42 (1996) 189 CLR 1 (***Wilson***).

43 *Wilson* (1996) 189 CLR 1, 10 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), 26 (Gaudron J).

44 (2011) 243 CLR 181 (***Wainohu***).

45 See *Wainohu* (2011) 243 CLR 181, 219-20 [69] (French CJ and Kiefel J), 228 [103] (Gummow, Hayne, Crennan and Bell JJ).

46 Section 74AA provides that the Board "must not make a parole order under [s] 74" unless an application is made under s 74AA(1), and the Board is satisfied of the matters in s 74AA(3). See fn 38 above.

conditions on which parole can be granted to the Plaintiff,[47] but says nothing about the procedure to be followed by the Board in making a decision applying s 74AA(3), other than requiring an application to be made to the Secretary of the Board (s 74AA(1)). The Board therefore applies its usual procedures in making a decision under s 74.

41. As noted, the Plaintiff's offending is a serious violent offence, and therefore a decision releasing him on parole could only be made by the SVOSO division: see Act s 74AAB(2)-(3); paragraph 18 above. The SVOSO division is comprised of:

(a) the chairperson of the Board (s 74AAB(1)(a)), who is a retired judge;[48]

(b) one full-time or part-time member selected by the chairperson (s 74AAB(1)(b)), being a person appointed under either s 61(2)(d) or (e); that is, a member who is not a current or former judicial officer; and

(c) any other members of the Board selected by the chairperson from time to time (s 74AAB(1)(c)).

42. Thus a sitting judge will not participate in a decision made by the SVOSO division unless the chairperson decides to appoint the judge as an additional member.

43. The SVOSO division may only recommend that a prisoner be released if another division of the Board has recommended that parole be granted, and the SVOSO division has considered that recommendation (s 74AAB(5)).

(a) By s 64(2), that other division will have at least 3 members, and will be chaired by a member who is a current or former judicial officer.

(b) Excluding the chairperson of the Board (see s 74AAB(6)),[49] there are 15 other judicial members of the Board, who include 8 sitting judicial officers and 4 reserve magistrates: see paragraph 16 above.[50]

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47 See Amendment Act s 1.

48 Special case, [8]; SCB 30.

49 By s 74AAB(6), a member of the SVOSO division must not have sat as a member of the division making the recommendation under s 74AAB(5)).

50 Cf Special Case, [10]; SCB 30. A sitting magistrate finished as a member of the Board in December 2016: see footnote 10 above.

Kable and functions conferred on State judges in their personal capacity

44. The *Kable* principle prevents a State from conferring a function on a State court that "substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction".[51]

45. Here, the members of the Board include a sitting County Court judge and seven magistrates: see paragraph 16 above.[52] These judicial officers act as members of the Board in their personal capacity, and not as members of their respective courts.[53] *Wainohu* establishes that a State law that confers a function on State judges in their personal capacity is capable of infringing the *Kable* principle.[54] However, the *Kable* principle "depends on the effect of the law upon the functioning of the courts".[55] A function conferred on a judge in a personal capacity would rarely undermine the integrity of the judge's court as an institution.[56]

46. There are differences between the functions that may be validly conferred on State judges in their personal capacity, and on State courts, particularly as to the manner in which a function is performed. A procedure that may be repugnant if required of a court "will not necessarily be unacceptable if required of an administrative body or tribunal."[57] For example, a State law can validly provide that a function conferred on a State judge in a personal capacity does not attract the requirements of natural justice (see Act s 69(2)). There is at least a question whether a State law could exclude the requirements of procedural fairness altogether in a State court.

47. Moreover, it should not be assumed that the content of the *Kable* doctrine in this respect is identical to the constitutional restriction on Commonwealth laws conferring

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51 See eg *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 424 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Kuczborski v Queensland* (2014) 254 CLR 51, 98 [139] (Crennan, Kiefel, Gageler and Keane JJ), 127 [265] (Bell J) (***Kuczborski***).

52 NB an amendment is required to Special Case, [10]: see footnote 10 above.

53 *Kotzmann v Adult Parole Board* [2008] VSC 356, [32]-[33] (Judd J) (15 September 2008) (***Kotzmann***).

54 *Wainohu* (2011) 243 CLR 181, 210 [47] (French CJ and Kiefel J), 228-9 [105] (Gummow, Hayne, Crennan and Bell JJ).

55 *Kuczborski* (2014) 254 CLR 51, 119 [231] (Crennan, Kiefel, Gageler and Keane JJ).

56 Thus the effect of a law on the court's institutional integrity determines whether the function conferred on the judge in a personal capacity was "substantially incompatible with the functions of the court of which the judge is a member", to adopt the test from *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569, 595 [39] (point 7) (French CJ, Kiefel and Bell JJ).

57 *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241 279 [163], 280 [171] (the Court) (***Hussain***), applying the limitation on Commonwealth laws conferring functions on federal judges in their personal capacity.

functions on federal judges in their personal capacity. It is true that the federal doctrine of incompatibility and the *Kable* principle share a "common foundation" of preserving the institutional integrity of courts.[58] Even so, the federal doctrine derives from the constitutional separation of federal judicial power,[59] whereas the *Kable* principle does not impose a constitutional separation of State judicial power.[60] At the same time, if a function could validly be conferred by a Commonwealth law on a federal judge in a personal capacity, it must follow that the same function could also be validly conferred by a State law on a State judge in a personal capacity.[61]

48. The key issue therefore is the relationship created by the relevant law between a State judge and the elected branches of government when performing the function exercised by the judge in a personal capacity, and any effect on the independence and impartiality of the court of which the judge is a member. *Wilson* suggests, by analogy, several relevant factors.[62] The first is whether the relevant law requires that the function be performed "independently of any instruction, advice or wish of the Legislature or Executive Government, other than a law or instrument made under a law".[63] A second factor is whether any discretion is exercised on "political grounds"; that is, grounds that are not prescribed by law.[64] A third factor is whether the judge is simply providing an advisory opinion on a matter of law to the executive.[65] Finally, it is relevant whether the judge is liable to removal by the Minister before the function is completed.[66]

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

59 *Wilson* (1996) 189 CLR 1, 12-14 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), 21-22 (Gaudron J).

60 See eg *Pollentine v Bleijie* (2014) 253 CLR 629, 648-9 [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (***Pollentine***).

61 This type of approach has been taken with State laws that confer functions on courts: see eg *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 561-2 [14] (the Court); *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83, 95-6 [17] (French CJ, Kiefel, Bell and Keane JJ).

62 See *Wainohu* (2011) 243 CLR 181, 242 [159] (Heydon J, dissenting in the result): "analogous" questions arise to those considered in *Wilson*.

63 See *Wilson* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Wainohu* (2011) 243 CLR 181, 243 [160] (Heydon J, dissenting in the result).

64 See *Wilson* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Wainohu* (2011) 243 CLR 181, 243 [161] (Heydon J, dissenting in the result).

65 See *Wilson* (1996) 189 CLR 1, 19-20 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Wainohu* (2011) 243 CLR 181, 243 [162] (Heydon J, dissenting in the result); *Momcilovic v The Queen* (2011) 245 CLR 1, 95-6 [183] (Gummow J) (***Momcilovic***).

66 See *Wilson* (1996) 189 CLR 1,18-19 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

Sitting judges may validly participate in decisions applying s 74AA

49. As explained below, a sitting judge may validly participate in decisions applying s 74AA of the Act. Two points can be made before addressing the Plaintiff's arguments.

50. First, independence from government is an important characteristic of parole boards, to ensure institutional separation from political influence. At the same time, parole authorities commonly have both a judicial and a community membership, reflecting the varied goals of the parole process.[67] Accordingly, this is an instance where conferring functions on judges (albeit judges acting in a personal capacity) is to ensure that decisions are made impartially and independently.[68]

51. Second, the Plaintiff does not suggest that the *Kable* principle prevents sitting judges from performing any functions as members of the Board: PS, [50].[69] Rather, the constitutional difficulty is said to arise from particular features of s 74AA. It should be noted that s 74AA does not engage several of the factors relevant to validity referred to in paragraph 48 above.

(a) The criteria in s 74AA(3)(a) and (b) do not require forming any judgments of a "political" nature, and are readily amenable to judicial review.

(b) Section 74AA does not involve the Board providing an advisory opinion on a question of law to the executive government. The Board is entrusted with the function of determining whether the Plaintiff should be released on parole, applying the criteria in s 74AA(3).

(c) The Act does not contain any provision for the Minister to dismiss a judicial member of the Board. A member holds office for the term stated in the instrument of appointment (s 63(1)).

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67 See Bronwyn Naylor and Johannes Schmidt, "Do Prisoners have a Right to Fairness before the Parole Board?" (2010) 32 *Sydney Law Review* 437, 441.

68 See *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 586 [2] (Gleeson CJ) (***Fardon***); *Thomas v Mowbray* (2007) 233 CLR 307, 329 [17] (Gleeson CJ); *Kotzmann* [2008] VSC 356, [44] (Judd J). See also *Grollo v Palmer* (1995) 184 CLR 348, 367 (Brennan CJ, Deane, Dawson and Toohey JJ), concerning federal judges issuing telephone intercept warrants in a personal capacity.

69 *Kotzmann* [2008] VSC 356 rejected a *Kable* challenge to sitting judges being members of the Board.

52. The Plaintiff refers to the following features of s 74AA:

(a) Section 74AA applies only to the Plaintiff: PS, [60].

(b) The Board makes its decision on the criteria in s 74AA(3)(a) "on the basis of" a report prepared by the Secretary, which is said to have the consequence that the Board does not make its decision free from instruction or advice from the executive: PS, [61]. It is also said that this report will foreclose the Board's consideration of the safety of the community under s 73A: PS, [62].

(c) The Board is not required to provide natural justice (s 69(2)). There is said to be an apprehension of bias because the Board makes its decision on the basis of a report prepared by the Secretary, who may sit as a member of the Board: PS, [63].

There is no significance in the fact that the Board exercises executive power (cf PS, [59]), because there is no constitutional separation of judicial power at the State level.

53. Taking the features referred to by the Plaintiff in turn, it must be accepted that an important factor in *Kable* was that the NSW law applied only to Mr Kable.[70] However, as noted, the law upheld in *Crump* only applied to a small and identifiable group of people, but was nevertheless valid: see paragraph 33 above. The fact that a law applies only to a small group of people, or one person, does not establish incompatibility in itself.[71]

54. Instead, in *Kable*, the ad hominem nature of the relevant NSW law,[72] when coupled with the procedural aspects of the legislation, created a distinct implication that Parliament expected Mr Kable to be imprisoned, and was treating the NSW Supreme

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70 See particularly the analysis of *Kable* in *Fardon* (2004) 223 CLR 575, 591 [16] (Gleeson CJ), 596 [34] (McHugh J); see also 614-15 [91] (Gummow J).

71 See *Baker* (2004) 223 CLR 513, 534 [50] (McHugh, Gummow, Hayne and Heydon JJ). Not every enactment that can be described as ad hominem and ex post facto will inevitably usurp or infringe the judicial power: see *Nicholas v The Queen* (1998) 193 CLR 173, 211-2 [83] (Gaudron J) (***Nicholas***), citing *Liyanage v The Queen* [1967] AC 259, 289.

72 *Community Protection Act 1994* (NSW).

Court as its instrument to that end.[73] But nothing in s 74AA treats a State court, or State judges, as instruments of the government.

(a) A key aspect in *Kable* is that the NSW law provided for an order of imprisonment made by the NSW Supreme Court. The NSW law attempted to dress up proceedings under that Act as legal proceedings, by referring to Mr Kable as "the defendant", by specifying that the proceedings were civil proceedings, and by suggesting that the rules of evidence applied.[74] However, other provisions of the NSW law expressly removed the ordinary protections inherent in the judicial process.[75] Thus, Mr Kable would be imprisoned by order of the NSW Supreme Court, but pursuant to proceedings that were the "antithesis of the judicial process".[76]

(b) In this case, by contrast, s 74AA of the Act confers a function on the Board, not a court. Although the Board contains judicial members (including some sitting judges), the decision is made, and is seen to be made, by an administrative body. Unlike *Kable*, there is no attempt to "dress up" the process for making a decision applying s 74AA as something that it is not. The criteria for making a decision, and the information to be used by the Board, are set out in the Act. As explained below, those criteria and that information do not create any constitutional difficulties.

(c) Further, for the reasons explained in *Crump*, the decision to grant or withhold parole is not a decision to imprison the person affected. The ongoing incarceration of the Plaintiff remains pursuant to the order of imprisonment for life made by the Supreme Court.

55. The second feature of s 74AA referred to by the Plaintiff is that the Board decides whether it is satisfied that the Plaintiff meets the criteria in s 74AA(3)(a) "on the basis of" a report prepared by the Secretary.

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73 See the analysis of *Kable* in *R v England* (2004) 89 SASR 316, 332 [63] (Doyle CJ). See also *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45,76 [63] (Gummow, Hayne and Crennan JJ): the task that the NSW legislation considered in *Kable* required the NSW Supreme Court to perform made that Court the instrument of the executive.

74 *Kable* (1996) 189 CLR 51, 106 (Gaudron J).

75 *Kable* (1996) 189 CLR 51, 122 (McHugh J).

76 *Kable* (1996) 189 CLR 51, 106 (Gaudron J).

(a) The criteria in s 74AA(3)(a) are purely factual:[77] whether the Plaintiff "is in imminent danger of dying, or is seriously incapacitated, and as a result he no longer has the physical ability to do harm to any person", and "has demonstrated that he does not pose a risk to the community". The Secretary is the obvious person to report on those matters. A person who is the subject of an order for imprisonment (such as the Plaintiff) is in the legal custody of the Secretary (s 6A). The Secretary is responsible for monitoring performance in the provision of all correctional services to achieve the safe custody and welfare of prisoners and offenders (s 7(1)).

(b) Although the Secretary's report will provide the factual foundation for the Board's decision applying s 74AA(3)(a), the Board is not bound to accept the Secretary's views on whether those criteria are met. The Board could request further information from the Secretary if it considered a report was unclear. Thus the Secretary cannot dictate to the Board the result of its deliberations.

56. For these reasons, it is incorrect to say that the Board would be acting on the instruction or wish of the executive government: contra PS, [61]. In any event, the statement in *Wilson* refers to a judge acting "independently of any instruction, advice or wish of the Legislature or Executive Government, other than a law or instrument made under a law" (emphasis added).[78] It does not undermine the integrity of the courts for judges to apply the law.[79] Although, like most legislation, s 74AA is informed by matters of policy, a judicial member of the Board is not acting at the behest of the executive in applying s 74AA.[80]

57. Nor does any difficulty arise in the application of s 73A of the Act (which relevantly provides that the Board "must give paramount consideration to the safety and protection of the community" in determining whether to make a parole order): contra PS, [62]. As just noted, the Secretary's report under s 74AA(3)(a) will provide the factual foundation of the Board's decision, but the Board is not required to accept the

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77 Cf the evaluative criterion in s 74AA(3)(b) (whether the Board is satisfied that the making of the parole order is justified), which the Board determines without any input from the Secretary.

78 *Wilson* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

79 *Baker* (2004) 223 CLR 513, 519-20 [6] (Gleeson CJ), quoting *Nicholas* (1998) 193 CLR 173, 197 [37] (Brennan CJ).

80 See, by analogy, *Kuczborski* (2014) 254 CLR 51,73-4 [40] (French CJ), 117 [220] (Crennan, Kiefel, Gageler and Keane JJ).

Secretary's view. In any event, the general guidance in s 73A merely reinforces the specific criteria in s 74AA(3) when making a decision in respect of the Plaintiff.

58. The third feature of s 74AA referred to by the Plaintiff is that the Secretary prepares the report required by s 74AAB(3)(a), and is also a member of the Board (s 61(2)(f)).

(a) If there were any potential difficulties, they could be avoided by appropriate practices. In *Grollo v Palmer*, the plurality accepted that it would be "troubling" if a judge who had granted a telephone interception warrant were then to sit on a case that involved information obtained from that warrant, but that this problem could be addressed through an appropriate practice.[81] Those practices could not be publicly checked, as a judge was not permitted to disclose the fact that a warrant had been granted.[82] Even so, there was no undermining public confidence in the independence of the courts. A similar analysis applies here.

(b) In any event, the Secretary could not sit on the SVOSO division unless the chairperson of the Board were to appoint the Secretary as an additional member under s 74AAB(1)(c): see paragraphs 41-42 above. Moreover, the Secretary has not sat as a member of the Board.[83] Given that practice, there is only a remote possibility[84] that the Secretary would seek to sit as a member in a division of the Board that was applying s 74AA.

59. The Plaintiff correctly does not contend that the exclusion of procedural fairness by s 69(2) of the Act gives rise to incompatibility in itself: PS, [63]. By way of comparison, the provision for the Commonwealth Minister to issue security certificates under ss 39A or 39B of the *Administrative Appeals Tribunal Act 1975* (Cth) does not prevent a Federal Court judge from sitting as a member of the Administrative Appeals Tribunal, even though the effect of those certificates is that an applicant may not know the case against him or her or have the opportunity to respond to that case.[85]

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81 (1995) 184 CLR 348, 366 (Brennan CJ, Deane, Dawson and Toohey JJ).

82 See *Grollo v Palmer* (1995) 184 CLR 348, 366-7 (Brennan CJ, Deane, Dawson and Toohey JJ).

83 Special case, [14]; SCB 30.

84 Cf *Wainohu* (2011) 243 CLR 181, 228 [103] (Gummow, Hayne, Crennan and Bell JJ).

85 See *Hussain* (2008) 169 FCR 241, 274 [135] (describing effect of certificates), 277 [151] (holding that ss 39A and 39B do not give rise to incompatibility).

59 There is no comparison with the law held invalid in *Wainohu*: contra PS, [49]. The vice of the law in *Wainohu* was the apparent connection between the step for which the judge was not required to give reasons (declaring an organisation to be a "declared organisation"), and the later exercise of judicial power by the NSW Supreme Court (making an interim control order or control order).[86] There is no comparable connection between a decision of the Board applying s 74AA and a later exercise of judicial power. In any event, the Act confers functions on the Board, not judges, and (unlike the law considered in *Wainohu*) does not expressly permit the Board not to provide reasons.

C. Answers to questions in special case

61. The questions in paragraph 19 of the special case (SCB 32) should be answered as follows:

(a) No, s 74AA of the Act is not invalid; and

(b) The Plaintiff should pay the First Defendant's costs.

PART VII: ESTIMATE OF TIME FOR ORAL ARGUMENT

62. The State estimates that it will require approximately 1.5 hours for the presentation of oral submissions in these appeals.

Dated: 20 January 2017

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[86] See the analysis of *Wainohu* (2011) 243 CLR 181 in *Momcilovic* (2011) 245 CLR 1, 226-7 [599] (Crennan and Kiefel JJ).