IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S114 of 2013

BETWEEN:

BONANG DARIUS MAGAMING
Appellant

and

THE QUEEN
Respondent

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR SOUTH AUSTRALIA

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 South Australia intervenes pursuant to s78A of the *Judiciary Act 1903* (Cth).

Part III: Leave to intervene

3. Not applicable.

Part IV: Applicable legislative provisions

4. The Attorney-General for South Australia adopts the appellant's statement of the applicable legislative provisions.

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Part V: Submissions

5. The appellant submits, in essence, that:

   a. in exercising judicial power in sentencing for a criminal offence, a Ch III court cannot be required to impose a penalty that is "unjust, arbitrary or cruel" by reason of that penalty's disproportion to the offending;

   b. s236B of the *Migration Act 1958* (Cth) (***Migration Act***) in providing for a minimum sentence, violates that principle because it deprives the sentencing court of a discretion to impose a sentence below a minimum and therefore requires the court to impose a sentence that is disproportionate to the offending; and

   c. s236B results in the sentence being "reached by an unfair process" because the appellant was not heard as to whether he should be charged with an offence against s223A or 233C of the *Migration Act*. Further, the court was not "able to give reasons for that which determined the critical component of the appellant's sentence". Lastly, that a mandatory minimum sentence applies to an offence against s233C, but does not apply to the offence created by s233A, gives rise to a departure from the principle of equal justice.

6. In summary, the Attorney-General for South Australia submits that:

   a. s236B of the *Migration Act* has three effects: (1) it requires the court to have regard to additional lower yardsticks in the fixation of sentence; (2) it prevents in the least serious case the imposition of a lesser sentence of imprisonment; and (3) it excludes the operation of provisions, such as s20AB of the *Crimes Act 1914* (Cth) (***Crimes Act***) which provide for sentencing alternatives. Save for those three effects, sentencing for an offence to which s236B of the *Migration Act* applies is carried out in accordance with the general approach to sentencing stated by this Court in *Markarian v The Queen*,[1] and ordinary common law principles as incorporated in Part 1B of the *Crimes Act*. The construction and operative effect of s236B of the *Migration Act* adopted in *Bahar v R*[2] is correct;

   b. neither the separation of powers under the *Constitution*, nor the conferral of judicial power on Ch III courts, supplies a principle which limits the power of the Commonwealth Parliament to provide for minimum sentences for offences. The principle of proportionality, in the sense explained in *Veen v The Queen (No 2)*,[3] does not require the evaluation of the severity of the sentencing law to be applied. The vesting of judicial power in Ch III courts does not support the implication of a requirement that sentences must be proportionate. The language of "unjust, arbitrary or cruel" and "grossly disproportionate" drawn from

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1 (2005) 228 CLR 357.

2 (2011) 214 A Crim R 417 at [45]-[54] (McLure P).

3 (1988) 164 CLR 465.

discussions about express guarantees in other constitutional contexts has no place in the Australian constitutional discussion. In any event, that jurisprudence provides no single test of validity to be applied.

c. s236B of the *Migration Act* does not alter either the executive function in prosecuting a matter or the judicial function in trying a matter and imposing sentence. Full reasons for sentence may be given in the normal way. Nor does s236B provide for an arbitrary result simply because the minimum penalty, as opposed to other factors relevant to sentence, assumes greater significance in sentencing in a particular case. Finally, s236B does not prevent the court from affording equal justice, assuming there is such a requirement. The offence of which a person is convicted is a relevant basis for different treatment.

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The construction of s236B of the Migration Act 1958 (Cth) and its effect on the exercise of judicial power in sentencing

7. Assessing the appellant's argument that s236B of the *Migration Act* is invalid is assisted by first considering the exercise of judicial power in sentencing an offender who has committed a federal offence for which there is a maximum, but no minimum penalty. That analysis discloses the true effect upon the exercise of judicial power that s236B occasions. In passing, it should be noted that the appellant does not contend that the maximum penalty fixed by the legislature impermissibly interferes with the exercise of judicial power in imposing punishment for the commission of a crime notwithstanding that it deprives a court of power to impose a greater sentence were it so minded.

20 *The exercise of judicial power in sentencing in the absence of a mandatory minimum*

8. In sentencing an offender for a federal offence, a court is required to sentence in accordance with the requirements of Part 1B of the *Crimes Act*. Pursuant to s16A(1) of the *Crimes Act* the court "must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence." Further, the court is to have regard to the matters set out in s16A(2) insofar as they are relevant. That list of factors is not exhaustive.[4] Nothing in s16A requires a court to depart from the common law approach to the fixing of the head sentence and a non-parole period.[5] Further, nothing in Part 1B of the *Crimes Act* excludes the common law principles of sentencing from application in the sentencing of federal offenders under s16A(1).[6] In this regard s 16A has been held to incorporate common law principles including general deterrence,[7] proportionality[8] and totality.[9] Put slightly

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4 *Hili v The Queen* (2010) 242 CLR 520 at [24] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

5 In *Hili v The Queen* (2010) 242 CLR 520 at [40], French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ considered that in making a recognizance release order, the requirement in s16A(1) to "make an order that is of a severity appropriate in all of the circumstances of the offence" is determined having regard to the principles stated by this Court in *Power v The Queen* (1974) 131 CLR 623, *Deakin v The Queen* (1984) 58 ALJR 367 and *Bugmy v The Queen* (1990) 169 CLR 525.

6 *Director of Public Prosecutions (Cth) v Said Khodo El Karhani* (1990) 21 NSWLR 370 at 378 (The Court); *Johnson v The Queen* (2004) 78 ALJR 616 at [15] (Gummow, Callinan and Heydon JJ).

7 *Director of Public Prosecutions (Cth) v Said Khodo El Karhani* (1990) 21 NSWLR 370 at 378 (The Court).

differently, judicially developed sentencing principles apply to the extent that they provide content to the expressions in ss16A(1) and (2).[10]

9. In *Baumer v The Queen*[11] this Court conveniently summarised the judicial function in determining the appropriate penalty in a case where the legislature had fixed a maximum penalty as follows:

> ... the task of the sentencing judge was to evaluate the circumstances of the offence in their entirety, ... and to determine an appropriate term of imprisonment having regard to the prescribed maximum of eleven years and to the possible range of offences to which it applied.[12]

10. The task as described is predicated upon the sentencing judge having determined the facts constituting the offence for which the offender is to be sentenced as well as other facts relevant in evaluating the circumstances of the offending, including matters personal to the offender. In undertaking this process the approach of the court will vary depending upon whether there has been a finding of guilt following trial, or a guilty plea. In either case, it is the duty of the court to determine the facts relevant to sentencing,[13] which will relate to both the offence and the offender. That said, a sentencing hearing is not an inquisition into all matters bearing upon the offence and offender.[14] The court will sentence on the basis of matters in so far as they are known to the court.[15]

11. In the case of a guilty plea, a degree of informality often marks the sentencing process.[16] Parties in sentencing proceedings are not joined in issue in the ordinary sense.[17] Should the prosecution seek to have some matter adverse to the accused taken into account in passing sentence, it must bring the matter to the court's attention, and if necessary (either because the matter is controverted or the court is not prepared to act upon the assertion), establish the matter in evidence beyond reasonable doubt.[18] If the defendant wishes to have some matter in mitigation taken into account, he or she must bring it to the attention of the court, and if necessary, call evidence to establish it on the balance of probabilities.[19] There may be other matters which the court will consider that do not fall within the

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8 *Wong v The Queen* (2001) 207 CLR 584 at [71] (Gaudron, Gummow and Hayne JJ).

9 *Johnson v The Queen* (2004) 78 ALJR 616 at [25]-[34] (Gummow, Callinan and Heydon JJ).

10 *Hili v The Queen* (2010) 242 CLR 520 at [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Johnson v The Queen* (2004) 78 ALJR 616 at [15]; *Bui v Director of Public Prosecutions (Cth)* [2012] HCA 1 at [18] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

11 (1988) 166 CLR 51.

12 *Baumer v The Queen* (1988) 166 CLR 51 at 57 (The Court).

13 *Cheung v The Queen* (2001) 209 CLR 1 at [14]-[16] (Gleeson CJ, Gummow and Hayne JJ), [162] (Callinan J).

14 *Weiniger v The Queen* (2003) 212 CLR 629 at [23] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

15 This is the position at common law and pursuant to s16A(2)(a) of the *Crimes Act*: R *v Olbrich* (1999) 199 CLR 270 at [17] (Gleeson CJ, Gaudron, Hayne, Callinan JJ).

16 R *v Olbrich* (1999) 199 CLR 270 at [52] (Kirby J). See, for example, *Weiniger v The Queen* (2003) 212 CLR 629 at [7] (Gleeson CJ, McHugh, Gummow and Hayne JJ) in relation to proceeding on the basis of agreed facts.

17 R *v Olbrich* (1999) 199 CLR 270 at [25] (Gleeson CJ, Gaudron, Hayne, Callinan JJ).

18 R *v Olbrich* (1999) 199 CLR 270 at [25]-[27] (Gleeson CJ, Gaudron, Hayne, Callinan JJ).

19 R *v Olbrich* (1999) 199 CLR 270 at [25]-[27] (Gleeson CJ, Gaudron, Hayne, Callinan JJ).

classification of being mitigating or aggravating. There is no universal requirement that matters urged in sentencing hearings be either proved or admitted.[20]

12. In the case of a finding of guilt following trial, the court must sentence on the basis of facts that are consistent with the jury's verdict; if the resolution of certain facts is express or necessarily implied by the verdict, they will be binding on the sentencing judge.[21] Subject to that requirement, the court is to make its own assessment of the offender's culpability, and where relevant facts have not been presented at trial,[22] to determine those facts in accordance with the approach above. The court is not obliged to sentence upon a basis most favourable to the defendant.[23]

13. Once the court has determined the relevant factual basis, it will, as explained in *Baumer v The Queen*, evaluate the circumstances of the offence in its entirety, taking into account matters personal to the offender, and will arrive at an appropriate penalty having regard to:

    a. the various, overlapping, and sometimes countervailing purposes of criminal punishment, namely the protection of the community, deterrence of the offender and others, retribution and rehabilitation;[24] and

    b. the prescribed maximum and the possible range of offences to which it applies.[25]

14. That process is often referred to as the synthesis of competing factors whereby a sentencing judge translates matters human into the currency of years of imprisonment or dollars in fines. In this regard in *Markarian v The Queen*,[26] it was observed:

> [27] Express legislative provisions apart, neither principle, nor any of the grounds of appellate review, dictates the particular path that a sentencer, passing sentence in a case where the penalty is not fixed by statute, must follow in reasoning to the conclusion that the sentence to be imposed should be fixed as it is. The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence. And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies.
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> ...
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> [37] In general, a sentencing court will, after weighing all of the relevant factors, reach a conclusion that a particular penalty is the one that should be imposed. ... (footnotes omitted)[27]

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20 *Weiniger v The Queen* (2003) 212 CLR 629 at [20]-[24] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

21 *Cheung v The Queen* (2001) 209 CLR 2 at [14]-[17] (Gleeson CJ, Gummow and Hayne JJ).

22 *Cheung v The Queen* (2001) 209 CLR 2 at [162] (Callinan J).

23 *Cheung v The Queen* (2001) 209 CLR 2 at [38], [48]-[51] (Gleeson CJ, Gummow and Hayne JJ), [101]-[105] (Kirby J), [165]-[166] (Callinan J).

24 *Veen (No 2) v The Queen* (1988) 164 CLR 465 at 476 (Mason CJ, Brennan, Dawson and Toohey JJ); *R v Kear* (1977) 16 LSJS 311.

25 *Baumer v The Queen* (1988) 166 CLR 51 at 57 (The Court).

26 (2005) 228 CLR 357.

27 *Markarian v The Queen* (2005) 228 CLR 357 at [27], [37] (Gleeson CJ, Gummow, Hayne and Callinan JJ); see also *Wong v The Queen* (2001) 207 CLR 584 at 611-612 (Gaudron, Gummow and Hayne JJ); *AB v The Queen* (1999) 198 CLR 111. See also *Muldrock v The Queen* (2011) 244 CLR 120.

15. Where the legislature has fixed a maximum penalty for an offence,[28] the court will have regard to it as a yardstick or benchmark representing the sort of head sentence that the worst category of offending of that type should attract. Thus the yardstick or benchmark manifest in the maximum penalty reflects the seriousness with which Parliament views the offence.[29] Against this benchmark a sentencing judge will compare the offending in the case before the court.[30]

16. As a yardstick or benchmark the maximum penalty will guide the court in its application of the proportionality principle explained by this Court in *Veen v The Queen (No 2)*.[31] That principle requires that the sentencing court take into account all relevant factors and the various purposes of sentencing and impose a penalty that is proportionate to the crime, where the "crime" is understood as incorporating matters relating to both the offence and offender. As touched upon in the quotation taken from *Markarian* and reproduced above, the proportionality principle applicable in sentencing finds expression in the grounds for appellate review of a discretion.[32] Thus the principle is not offended where the sentence imposed is not manifestly excessive or manifestly inadequate as those expressions have come to be understood.[33] For present purposes, the significant point is that the proportionality principle is not invoked in sentencing as a means of determining whether the benchmark set by the legislature is appropriate. It is applied accepting the legislative judgment that the benchmark represents.

17. Once the head sentence is determined, the court will consider the appropriate non-parole period.[34] In fixing the non-parole period, the task is to determine the minimum term that the defendant must serve in prison to satisfy the punitive, deterrent and preventive purposes of punishment:[35]

> ... in the end the minimum term is to be fixed because all the circumstances of the offence require that the offender serve no less than that term, without the opportunity of parole: see generally King CJ in *Reg v Robinson*. There is no incongruity necessarily involved in this approach, as Jenkinson J noted in *Morgan and Morgan*, when, as a member of the Victorian Court of Criminal Appeal, he said:

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28 For common law indictable offences for which there is no penalty legislatively prescribed, the court has an unlimited discretion to imprison or fine, subject only to the prohibition on excessive fines and cruel and unusual punishments in the *Bill of Rights 1688* (UK), 1 Will & Mar Sess 2 c 2.

29 *Markarian v The Queen* (2005) 228 CLR 357 at [31] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

30 *Markarian v The Queen* (2005) 228 CLR 357 at [31] (Gleeson CJ, Gummow, Hayne and Callinan JJ); *Baumer v The Queen* (1998) 166 CLR 51 at 57 (The Court).

31 (1988) 164 CLR 465.

32 *House v The King* (1936) 55 CLR 499 at 505 (Dixon, Evatt and McTiernan JJ).

33 *Wong v The Queen* (2001) 207 CLR 584 at [8]-[9] (Gleeson CJ), [36] (Gaudron, Gummow and Hayne JJ); *Everett v The Queen* (1994) 181 CLR 295 at 306 (McHugh J); R *v Osenkowski* (1982) 30 SASR 212 at 213 (King CJ); R *v Morse* (1979) 23 SASR 98 at 99 (King CJ).

34 It is apparent from s19AB of the *Crimes Act*, that the non-parole period is imposed following the imposition of the head sentence. That sequence has been inverted in other statutory schemes: e.g. s44 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

35 *Bugmy v The Queen* (1990) 169 CLR 525 at 536 (Dawson, Toohey and Gaudron JJ); R v Shrestha (1991) 173 CLR 48 at 60-61 (Brennan and McHugh JJ), 68-69 (Deane, Dawson and Toohey JJ), *Muldrock v The Queen* (2011) 244 CLR 120 at [57] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Crump v New South Wales* (2012) 86 ALJR 623 at [28] (French CJ). Both the head sentence and non-parole period form part of the penalty imposed: *PNJ v The Queen* (2009) 83 ALJR 384 at [11] (The Court).

> "The term of the sentence is the period which justice according to law prescribes, in the estimation of the sentencing judge, for the particular offence committed by the particular offender. The ... minimum term is the period before the expiration of which release of that offender would, in the estimation of the sentencing judge, be in violation of justice according to law, notwithstanding the mitigation of punishment which mercy to the offender and benefit to the public may justify." (footnotes omitted)[36]

18. In setting a non-parole period the considerations which a court will take into account will be the same as those applicable to the setting of the head sentence, that is, all factors relevant to sentence are considered. However, the weight to be attached to those factors and the way in which they are relevant will differ due to the different purposes underpinning each function.[37]

The exercise of judicial power in sentencing with a mandatory minimum - the effect of s236B of the Migration Act

19. Section 236B provides that for a first offence against s233C(1), the court must impose a head sentence of *at least* 5 years, and a non-parole period of *at least* 3 years. The minimum penalties, just like a maximum penalty, constitute the bounds of the sentencing court's power. They impose a floor on the range of appropriate penalties, just as a maximum penalty imposes a ceiling. The court's power in the imposition of punishment is constrained by the minimum and maximum penalties. However, within the context of that legislative prescription, the provisions call for the exercise of discretionary judgment.[38] In this regard the minimum head sentence and minimum non-parole period provide a sentencing judge with two further yardsticks or benchmarks, in addition to the maximum penalty, to which regard must be had when fixing a head sentence and non-parole period.

20. The effect of the yardstick created by a maximum penalty, as set out above, is well-established. Unlike some other statutory schemes, the content of the additional guideposts created by the minimum non-parole period and minimum head sentence in s236B is not made explicit.[39] However, by analogy to a maximum, the purpose of a minimum penalty is readily discernible. A minimum represents a penalty appropriate for an instance of offending which is at the lowest end of the scale of seriousness. Like a maximum, a minimum represents the legislature's assessment of the seriousness of the offence, inviting comparison between the case before the court and offending of that type which would fall within the least serious category. The approach of the Western Australian Court of Appeal in *Bahar v R*[40] to the construction and application of s236B is, with respect, correct. The identification of a mandatory minimum head sentence and non-parole period reflects the legislature's assessment of the seriousness of the conduct that it has chosen to criminalise. The minimums allow the court to determine the appropriate penalty within the minimum and maximum set by Parliament. Thus the principle of proportionality as discussed above, now operates in the

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36 *Bugmy v The Queen* (1990) 169 CLR 525 at 538 (Dawson, Toohey and Gaudron JJ).

37 *Bugmy v The Queen* (1990) 169 CLR 525 at 531 (Mason CJ and McHugh J); *Power v The Queen* (1974) 131 CLR 623 at 628-9 (Barwick CJ, Menzies, Stephen and Mason JJ); *Deakin v The Queen* (1984) 58 ALJR 367 (The Court); *R v Strestha* (1991) 173 CLR 48 at 68-69 (Deane, Dawson and Toohey JJ).

38 *Leach v The Queen* (2007) 230 CLR 1 at [18] (Gleeson CJ).

39 *Cf* the standard non-parole period considered in *Muldrock v The Queen* (2011) 244 CLR 120 at [27] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

40 (2011) 214 A Crim R 417 at [45]-[54] (McLure P).

context of the additional benchmarks. To determine the appropriate head sentence and non-parole period, the task for the sentencing judge involves taking account of all relevant factors, the purposes of punishment, and having regard to the prescribed maximum and minimums as they apply to the possible range of offending.

21. It is incorrect to say that "the Act does not proceed from a legislative assumption about the irreducible seriousness of offences against ss 233A and 233C"[41]:

    a. as a crew member aboard SIEV 185 the appellant facilitated the bringing or coming to Australia of 52 non-citizens.[42] In relation to each non-citizen the appellant committed the offence of people smuggling contrary to s233A. Consequently, it was open to the respondent to charge the appellant with 52 counts of people smuggling. Had that occurred, the elements of the counts would have overlapped with the result that the sentencing judge would have had to ensure that he or she did not punish the appellant twice for any overlapping element.[43] To the extent that each count would have related to a different person, each count could be differentiated for the purposes of punishment in that by facilitating the bringing or coming to Australia of each non-citizen the appellant did, in relation to each, assist them in circumventing the laws of Australia as to migration;[44]

    b. had the respondent charged the appellant with only one count of people smuggling contrary to s233A, the sentencing court would have been constrained by the principle identified in *R v De Simoni*[45] to punish the appellant for facilitating the bringing or coming into Australia of only one person, and not take into account as a circumstance of aggravation a matter which would have warranted a conviction for an offence against s233C or additional counts of offences against s233A.[46] South Australia here adopts the Commonwealth Attorney-General's submission[47] that to charge the appellant with one count of people smuggling, contrary to s233A, alleging in the particulars that the appellant did facilitate the bringing or coming into Australia of 52 non-citizens, would be duplicitous. That is so because the references in s233A to a "second person" having certain characteristics, being "a non-citizen" with "no lawful right to come to Australia" mean that multiple entrants cannot be bundled up in a single count. Section 233C(3) supports such a construction;

    c. to the extent that the direction by the Attorney-General to the Director of Public Prosecutions reflects a different interpretation of s233A (as to which South Australia makes

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41 Appellant's Submissions, [41].

42 Court Attendance Notice **[AB2]**, Australian Federal Police Statement of Facts **[AB4-5]**.

43 *Pearce v The Queen* (1998) 194 CLR 610 at [40]-[45] (McHugh, Hayne and Callinan JJ).

44 *R v Karabi* [2012] QCA 47 at [21] (Muir JA).

45 (1981) 147 CLR 383.

46 *R v De Simoni* (1981) 147 CLR 383 at 389 (Gibbs CJ).

47 Commonwealth Attorney-General's Submissions, [34.1].

no submission), that opinion does not overcome the correct construction of s233A and therefore is irrelevant to an assessment of the validity of s236B.

22. By creating the floor, the minimum penalty also prevents the imposition of alternative penalties. Section 236B overrides the directive in s17A of the *Crimes Act* that a sentence of imprisonment is only to be imposed if the court is satisfied that no other sentence is appropriate in all of the circumstances. Further, it prevents the imposition of alternative penalties pursuant to s20AB of the *Crimes Act* and it prevents the making of a recognizance release order that might otherwise be available under s19AB of the *Crimes Act*.

23. Section 236B does not modify the court's *process* in sentencing. In particular, it does not affect the manner of the court's hearing of submissions in relation to penalty, the determination by the court of the factual basis of the offence or the facts regarding the offender, or alter the division of fact-finding responsibilities between the judge and jury in the case of a jury verdict following trial.

24. Nor does s236B impact upon otherwise applicable substantive common law principles and sentencing norms. For example, it does not impair the courts' ability to ensure reasonable consistency in the treatment of offenders. Within the bounds of the limits fixed by the maximum and minimums, a court will act in a manner that is consonant with reasonable consistency,[48] in the sense of consistency in sentencing for an offence, because a person is sentenced for an offence, not offending conduct[49] (the penalty applicable to some other offence of which the defendant might have been convicted, such as s233A of the *Migration Act* is not relevant to that process). Further it does not prevent the court from applying the proportionality principle explained in *Veen v The Queen (No 2)*. Rather, as stated, in applying the principle of proportionality the court will be guided by the maximum and minimum penalties in determining a penalty that is appropriate to the offence, the seriousness of the offence being reflected in those yardsticks. Further again, s236B does not prevent the court from taking into account a guilty plea as reflecting remorse and acceptance of responsibility and/or a subjective willingness to facilitate the course of justice.[50] Those matters are relevant considerations for the court to take into account in deciding where the case falls in the spectrum of seriousness between the minimum and maximum. Lastly, s236B does not direct the court as to the appropriate proportion between the head sentence and non-parole period and thus does not change the position in *Hili v The Queen*.[51]

25. In summary, s236B of the *Migration Act* has only three effects:

    a. first, it requires the court to have regard to additional benchmarks or yardsticks in determining the appropriate penalty;

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48 *Elias v The Queen* [2013] HCA 31 at [28] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

49 *Elias v The Queen* [2013] HCA 31 at [29] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

50 *Cameron v The Queen* (2002) 209 CLR 339 at [11]-[14] (Gaudron, Gummow and Callinan JJ).

51 (2010) 242 CLR 520.

b. second, for the least serious case it prevents the imposition of a penalty of imprisonment below the minimums;

c. third, it operates to exclude the substitution of another kind of penalty, such as a recognizance release order.

In each of these ways it affects the availability of powers, and constrains the exercise of discretion in sentencing.

26. Whether a law that has these effects interferes with or impairs the exercise of judicial power requires an identification of the respective roles of each branch of government in relation to the sentence imposed for a criminal offence.

10 ***The division of Constitutional responsibility between the legislature, the executive and the judiciary in the area of criminal law***

27. The Commonwealth Parliament, to the extent of its legislative power, is empowered to create offences and define penalties for those offences,[52] to establish bodies and to define arrangements for the investigation of crime, and prosecution of criminal offences. It is empowered to establish criminal courts and to vest jurisdiction in State criminal courts.[53] Subject to the limits of judicial power, it is entitled to provide for matters of procedure and the rules of evidence to be followed in criminal proceedings.[54]

28. At the federal level, the judiciary, in accordance with the requirements for the exercise of judicial power,[55] is exclusively entitled to adjudge and punish criminal guilt.[56] However, it is fundamental to
20 the exercise of judicial power that the court acts in response to the institution of proceedings by the prosecution.[57] The courts do not adjudge and punish criminal guilt of their own motion.

29. The executive, with such authority as is conferred by statute, is empowered to investigate offences. It has authority and responsibility to institute proceedings and to prosecute, independent of the

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52 *R v Kidman* (1915) 20 CLR 425 at 433-4 (Griffith CJ), 441 (Isaacs J), 448-50 (Higgins J), 459-60 (Powers J); *Viro v R* (1978) 141 CLR 88 at 161 (Murphy J); *Leeth v Commonwealth* (1992) 174 CLR 455 at 469 (Mason CJ, Dawson and McHugh JJ).

53 Sections 71, 77 of the *Constitution.*

54 *Nicholas v The Queen* (1998) 193 CLR 173 at [23]-[25] (Brennan CJ), [52]-[55] (Toohey J), [123] (McHugh J), [152]-[156] (Gummow J), [234] (Hayne J).

55 *Nicholas v The Queen* (1998) 193 CLR 173 at [74] (Gaudron J); *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 496 (Gaudron J).

56 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ). In modern times, the punishment of guilt includes the imposition of a minimum term: *Leeth v Commonwealth* (1992) 174 CLR 455 at 470 (Mason CJ, Dawson and McHugh JJ).

57 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 (Griffith CJ); *Elias v The Queen* [2013] HCA 31 at [33]-[35] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

judiciary,[58] but subject to an obligation of fairness.[59] At the conclusion of the process, subject to orders made by the court, and subject to any exercise of the prerogative of mercy by the executive, the executive is obliged to carry into effect the orders made by courts with respect to sentences of imprisonment and other penalties.[60] Upon expiration of the non-parole period, the executive has power to approve a prisoner's release on parole and impose conditions on that release.

30. As to sentencing, the executive solely occupies the role of the prosecution. The exercise of legislative power, unless retrospective, has occurred prior to the time of the offending itself in defining the norm the subject of the offence and the relevant penalty. The Parliament may also have legislated for particular sentencing options to be available, such as diversionary programs or community service, or a bond or suspended sentence, in particular circumstances. It may also have defined the relevance of certain criteria in the process of sentencing. The exercise of judicial power in sentencing necessarily involves the imposition of sentence having regard to those legislatively defined criteria, and the facts and circumstances of the particular case as found by the court. The existence of discretion available to the court is a common, but not essential aspect of that process.[61]

31. It is against this background that the appellant asserts that a principle of proportionality when sentencing for criminal offences is an inviolable requirement in the exercise of judicial power. That principle, it is said, is derived from Ch III, as an extrapolation from the principle of proportionality long applied by the judiciary in sentencing, and reiterated by this Court in *Veen v The Queen (No 2)*, or, by implication from the nature of judicial power, such implication being informed by principles drawn from other constitutional contexts. That submission is incorrect because proportionality, in either of the two senses in which it is used, is a substantive principle of law, not a characteristic of judicial process or method, and is not the subject of any guarantee in the *Constitution*.

The principle of proportionality - that punishment must fit the crime

32. Proportionality in the sense explained in *Veen v The Queen (No 2)* cannot provide a foundation for the argument that a sentence imposed applying s236B is invalid. That is so because the principle of proportionality is: (1) a common law principle capable of abrogation by statute; (2) one of many substantive principles guiding the outcome of sentencing which is not apposite to be described as an essential element in the exercise of judicial power; and, (3) does not involve any evaluation by the court of the severity or otherwise of the legislative context in which it is to be applied.

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58 *Likiardopoulos v The Queen* (2012) 86 ALJR 1168 at [2]-[4] (French CJ); *Maxwell v The Queen* (1996) 184 CLR 501 at 534 (Gaudron and Gummow JJ).

59 *Elias v The Queen* [2013] HCA 31 at [35] (French CJ, Hayne, Kiefel, Bell and Keane JJ); *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-664 (Deane J), 675 (Dawson J); *R v Apostilides* (1984) 154 CLR 563 at 575-576 (The Court); *Libke v The Queen* (2007) 230 CLR 559 at [34]-[35] (Kirby and Callinan JJ), [71]-[72] (Hayne J).

60 *Nicholas v The Queen* (1998) 193 CLR 173 at [18] (Brennan CJ); *Leeth v Commonwealth* (1992) 174 CLR 455 at 470 (Brennan J). Pursuant to s120 of the *Constitution*, federal offenders are detained in State prisons.

61 *Wong v The Queen* (2001) 207 CLR 584 at [36] (Gaudron, Gummow and Hayne JJ).

33. As it is explained in *Veen v The Queen (No 2)*, the principle of proportionality requires that a sentence for an offender be proportionate "to the crime",[62] in relation to which both the circumstances of offence and offender are relevant. Used in that sense it is compared to a sentence that is made yet greater solely for the "protection of society from the risk of recidivism."[63] The principle described in *Veen v The Queen (No 2)* is a common law principle. It is amenable to abrogation by statute.[64]

34. Thus, proportionality is a principle of substantive law to be applied by judges in imposing a particular sentence. As one of a number of substantive principles to be applied in sentencing, it is not a principle apt to be characterised as one that conditions the exercise of judicial power. It may be contrasted to requirements such as procedural fairness or the obligation to provide reasons, which are aspects of the *process* and *method* of judicial decision-making.[65]

35. Further, the principle of proportionality as applied at common law does not involve an evaluation of the severity of the legislative requirements. To describe a sentence as proportionate is to state a conclusion, one reached by applying the law, including criteria fixed by Parliament and by evaluating all relevant factors. That is, a proportionate sentence is a *product* of the application by the sentencing judge of the legislative framework such as the maximum penalty, the consideration of sentencing alternatives and the purposes of punishment, in evaluating the offending conduct in all of the circumstances. A penalty ceases to be proportionate when the severity of the sentence is directed at the achievement of some extraneous purpose. That sort of disproportion involves an error in the exercise of discretion.

36. Thus, proportionality, as explained in *Veen v The Queen (No 2)*, does not involve any evaluation or assessment by the court of the severity of the legislative requirements. Nor does it involve a comparison, assuming it could be conducted as a matter of legal analysis, of a sentence reached applying the law and another sentence the court would be minded to impose disregarding one or more of the legislative requirements.

37. For those reasons, where as a result of an increased maximum penalty or the introduction of a minimum penalty, an offender is sentenced to a period of imprisonment greater than he or she would have been under the previous regime, the sentence is not any more or less proportionate. The proportionality of a sentence is determined accepting and applying the legislative requirements. So understood it can be seen that the appellant's argument cannot be founded in the discussion of proportionality in *Veen v The Queen (No 2)*.

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62 *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472 (Mason CJ, Brennan, Dawson and Toohey JJ).

63 *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472 (Mason CJ, Brennan, Dawson and Toohey JJ).

64 *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 496 (Wilson J).

65 *Leeth v Commonwealth* (1992) 174 CLR 455 at 469-470 (Mason CJ, Dawson and McHugh JJ).

Unjust, arbitrary or cruel by reason of lack of proportionality

38. It is asserted that the Parliament may not validly require a court to impose a sentence which is "grossly disproportionate" and thereby "unjust, arbitrary or cruel". Such a requirement of proportionality has no place in Australian constitutional law.

39. There is no express prohibition in the text of the *Constitution* of "cruel and unusual" or "inhuman or degrading" punishment. As was observed by Mason CJ in *Polyukhovich v Commonwealth* in relation to an asserted prohibition on an "ex post facto law" or "bill of attainder" that depended on express guarantees not replicated in Australia:

> The absence of any similar prohibition in our Constitution against bills of attainder and ex post facto laws is fatal to the plaintiff's argument except in so far as the separation of powers effected by our Constitution, in particular the vesting of judicial power in Ch III courts, imports a restraint on Parliament's power to enact such laws.[66]

40. The appellant's argument invites the drawing of an implication from the vesting of judicial power by Ch III of the *Constitution*. As to whether it is appropriate to draw an implication, it has been said:

> The critical point to recognise is that "any implication must be securely based". Demonstrating only that it would be reasonable to imply some constitutional freedom, when what is reasonable is judged against some unexpressed *a priori* assumption of what would be a desirable state of affairs, will not suffice. Always, the question must be: what is it in the text and structure of the *Constitution* that founds the asserted implication? (footnotes omitted)[67]

41. The appellant has not identified what in Ch III of the *Constitution* grounds the implication. The vesting of judicial power in Ch III courts does not supply the framework for an implication which the appellant seeks to draw. The element of evaluative assessment contended for by the appellant is not supported by, and in fact conflicts with the separation of powers as it applies to criminal sentencing in Australia. On the appellant's view, what is proposed to be evaluated is the social utility or purpose of the rule fixed by Parliament. Nothing in the vesting of judicial power in Ch III courts warrants an assessment by the courts of the appropriateness of the sentence to be applied. Nor does it provide a basis for selection of the appropriate proportionality analysis to be applied.

42. Instead, the appellant in adopting the language of "unjust, arbitrary or cruel" or "grossly disproportionate"[68] appears to source the implication in international jurisprudence relating to express guarantees in different constitutional settings, where constraints on legislative power have the consequence of committing to the courts the power to review. That is not the correct approach. Moreover, the case law in those different settings does not provide for a single test of invalidity. Notwithstanding that those guarantees have a similar form of expression and shared history, a contrast of the cases concerning those express guarantees discloses a divergence in approach.

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66 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 536 (Mason CJ). See also *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at [57] (McHugh, Gummow and Heydon JJ).

67 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [389] (Hayne J).

68 Appellant's Submissions, [93]

The United States

43. The protection against "cruel and unusual punishments" found in the Eighth Amendment to the United States *Constitution* has been held, in addition to having an application to certain modes of punishment, to give rise to a narrow form of proportionality analysis. That guarantee operates in both capital and non-capital penalty cases.[69]

44. Where it applies in non-capital cases, four principles guide the analysis: the primacy of the legislature, the variety of legitimate penological schemes, the nature of the federal system and that the result be guided by objective factors. Consideration of these factors produces the result that only extreme sentences that are "grossly disproportionate to the crime" are prohibited.[70]

45. The results of a number of cases decided by the United States Supreme Court illustrate that the Eighth Amendment is not to be read as restricting legislative choice in imposing what might be regarded as harsh, or even very harsh, penalties, thereby supporting the proposition that circumstances of judicial review will be "rare". Thus:

    a. a sentence of life with the possibility of parole mandated under a Texas recidivist statute was held to be valid for a defendant's third felony involving dishonesty: *Rummell v Estelle*;[71]

    b. a sentence of two consecutive terms of imprisonment for 20 years (imprisonment for forty years) and a fine of $20,000 authorised under a Virginian statute (that required a sentence of not less than 5 years and not more than 40 for each offence) was held to be valid for a defendant convicted of possession with intent to distribute and distribution of nine ounces of marijuana: *Hutto v Davis*;[72]

    c. a sentence of life imprisonment without the possibility of parole was held to be invalid for a seventh non-violent felony involving dishonesty. The case was distinguished from *Rummell* because of the unavailability of parole, without which the sentence was the second most serious available (short of the death penalty), and which was triggered by what was otherwise a dishonesty felony involving uttering a $100 cheque: *Solem v Helm*;[73]

    d. in a case not concerned with recidivism, a mandatory sentence of life without the possibility of parole under a Michigan statute for possessing more than 650g of cocaine was held to be valid for a first time offender convicted of possessing 672g of cocaine: *Harmelin v Michigan*;[74]

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69 *Harmelin v Michigan* 501 US 957 (1991) at 996-7.

70 *Ewing v California* 538 US 11 (2003) at 23-24.

71 445 US 263 (1980).

72 454 US 370 (1982).

73 463 US 277 (1983).

74 501 US 957 (1991).

e. a sentence of life imprisonment, but with the possibility of parole after 25 years under a Californian "three strikes" statute was held to be valid for a defendant who had committed four previous felonies involving dishonesty: *Ewing v California*;[75]

f. in relation specifically to the sentencing of children, a sentence of life imprisonment without parole (parole having been generally abolished) under a Florida statute was held to be invalid for a 16 year old defendant who had committed burglary and later offences,[76] and a mandatory sentence of life imprisonment without parole was held to be invalid for a juvenile who had committed murder.[77]

Canada

10 46. In Canada, a requirement of "proportionality" is drawn from the express guarantee provided for in s12 of the *Canadian Charter of Rights and Freedoms* that "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment".[78] That provision has the same source as the Eighth Amendment,[79] though the approach to its interpretation differs from that in the United States. That is in part the result of different federal responsibilities for the criminal law in the United States and Canada. It is also the result of different and additional guarantees found in the United States and Canadian constitutions.[80]

47. The Canadian Supreme Court, in *R v Smith*,[81] in holding invalid a minimum seven year sentence for importing narcotics identified "guidelines" relevant to proportionality. They were: "whether the punishment is necessary to achieve a valid penal purpose", "whether it is founded on recognised
20 sentencing principles" and "whether there exist valid alternatives to the sentence imposed."[82] Those guidelines affect whether "the sentence is so unfit having regard to the offence and the offender as to be grossly disproportionate."[83]

48. In *R v Smith*, the Court reasoned that the minimum sentence which applied to a broad range of conduct would apply to cases with strong mitigating circumstances and that this would give rise in those cases to a "certainty" of a disproportionate sentence.[84] That was so notwithstanding that "the legislature may… provide for a compulsory term of imprisonment upon conviction for certain offences without infringing the rights protected by s12."[85] That approach has been followed in later

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75 538 US 11 (2003).
76 *Graham v Florida* 560 US _ (2010).
77 *Miller v Alabama* 567 US _ (2012).
78 See also s2 of the Canadian *Bill of Rights*.
79 *R v Smith* [1987] 1 SCR 1045 at 1061 i.e. *Bill of Rights 1688* (UK); 1 Will & Mar Sess 2 c 2.
80 *R v Smith* [1987] 1 SCR 1045 at 1074-6.
81 [1987] 1 SCR 1045.
82 *R v Smith* [1987] 1 SCR 1045 at 1074.
83 *R v Smith* [1987] 1 SCR 1045 at 1072.
84 *R v Smith* [1987] 1 SCR 1045 at 1078.
85 *R v Smith* [1987] 1 SCR 1045 at 1077.

cases.[86] This does not appear to reflect the approach later taken in the United States. Contrasting the reasoning and outcome in *Ewing v California* and R *v Smith*, the respective Courts now appear to differ in their approach to proportionality where the issue is the severity of the sentence by reason of a mandatory minimum.

European Court of Human Rights and the domestic application of human rights law in the United Kingdom

49. In the United Kingdom, by operation of the *Human Rights Act 1998* (UK) and Article 3 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* which prohibits "torture or inhuman or degrading treatment or punishment", there is a requirement that a sentence imposed for an offence not be "grossly disproportionate". The interpretation of that requirement is affected by the fact that the guarantee is drawn from a human rights Convention as opposed to a domestic Constitution.[87] In *Vinter & Others v United Kingdom*,[88] the European Court of Human Rights decided a challenge to mandatory life sentences imposed in the United Kingdom. It held that mandatory life sentences with eligibility for release after a minimum period would not offend Article 3,[89] but life sentences with no prospect of release (so called "whole life sentences"), even for murder, contravened Article 3.[90] Article 3 required a review of the circumstances of the prisoner, "no later than twenty five years after imposition of a life sentence."[91] The contrast between the sort of proportionality required by the Convention, and that considered by the High Court in *Veen (No 2)*, can be seen by the holding that detention for protective purposes does not contravene Article 3.[92]

Arbitrariness, absence of reasons and denial of natural justice

50. Drawing upon the statement above regarding the division of responsibilities between executive, legislature and judiciary in criminal sentencing, the appellant's other arguments cannot succeed.

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86 The Supreme Court in R *v Goltz* [1991] 3 SCR 485 held as valid, though not unanimously, a mandatory minimum penalty of imprisonment for seven days for a first offence of driving whilst prohibited. In R *v Latimer* [2001] SCR 3, the Court upheld as valid a criminal law requiring a sentence of life imprisonment with a minimum non-parole period of 10 years for the offence of second degree murder. That case was, however, was restricted to the circumstances of Mr Latimer, and involved no hypothetical circumstances being considered: at 39. See also R *v Morrisey* [2000] 2 SCR 90.

87 *Vintner and Others v The United Kingdom* (9 July 2013) at [105]-[106].

88 *Vintner and Others v The United Kingdom* (9 July 2013).

89 *Vintner and Others v The United Kingdom* (9 July 2013) at [108].

90 *Vintner and Others v The United Kingdom* (9 July 2013) at [119].

91 *Vintner and Others v The United Kingdom* (9 July 2013) at [120].

92 *Vintner and Others v The United Kingdom* (9 July 2013) at [108]. Earlier the House of Lords in R *v Lichniak* [2003] 1 AC 903, held that a mandatory life sentence for murder was not inconsistent with Article 3 of the Convention. It so held reasoning that deference was required to the judgment of a "democratic assembly on how a particular social problem is best tackled" and that the sentence was restricted to a particular class of offenders and further, relevant to the interpretation of the Convention that "mistreatment must attain a certain level of severity to breach Art 3."

Reasons

51. Section 236B neither prevents, nor impairs, the sentencing court's provision of reasons that explain the sentence it has imposed.[93] The penalty is explicable by reference to the circumstances of the case, the offence and the penalties provided for, including the minimum. That a factor such as the minimum assumes particular significance in a given case does not mean "no reasons" have been, or can be, given for a sentence. The minimum penalty is no less a reason for the sentence than is the maximum penalty in a very serious case. The appellant's argument is really that the minimum penalty does not offer a "good reason" or "sound justification" for the sentence on the facts. But that invites the court to substitute its view of the merit of the law, a task which, for the reasons discussed above, the courts are not required nor permitted by the *Constitution* to undertake.

A lack of procedural fairness in the decision to charge and arbitrary or capricious outcomes arising from that decision

52. The appellant further argues that if the offence contrary to s233A had been charged, the same sentence would not follow.[94] It is said that the result is arbitrary and that s236B is inconsistent with the requirements of Ch III and therefore invalid. In a similar vein it is asserted that the sentence imposed "was a consequence only of decisions made in respect of which he [the appellant] was not heard".[95] It is said that the process "viewed in its entirety" did not entail procedural fairness. That is said to be inconsistent with the requirements of Ch III and therefore invalid.

53. It is important to observe that no complaint is made that there was a lack of procedural fairness following the initiation of the proceedings. As explained above at [23]-[25], the minimum penalty provided for in s236B does not operate to alter the process undertaken by a court in sentencing for an offence contrary to s233C. No occasion therefore arises to consider the issues considered in *International Finance Trust Ltd v New South Wales Crime Commission*[96] and *Condon v Pompano*.[97]

54. Rather, the assertion of arbitrariness and denial of procedural fairness is directed at the decision of the Director to charge a breach of s233C. In doing so, and by suggesting the decision to charge should be treated as part of the process in its entirety, it fails to draw a distinction between the exercise of executive and judicial power. The laying of the charge, though initiating the exercise of judicial power, was an executive decision. If the Director's decision was unlawful on the basis of arbitrariness or denial of procedural fairness, it would go to the lawfulness of the laying of the information. The appropriate remedy for an impropriety in that decision is a stay of the proceedings as an abuse of process. No question can arise on such an argument as to the validity of ss 233A, 233C, or s236B.

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93 Appellant's Submissions, [86].

94 Appellant's Submissions, [68]-[69].

95 Appellant's Submissions, [77].

96 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [54]-[55] (French CJ), [97] (Gummow and Bell JJ), [134] (Hayne, Crennan and Kiefel JJ), [141], [155] (Heydon J).

97 *Condon v Pompano* [2013] HCA 7.

55. Further, the appellant's argument on this ground fails to acknowledge the critical part of the process which mediates the initiation of the proceedings and the imposition of penalty – namely the determination by the court of guilt. It is that determination – reached either by way of plea or following trial – that is the factum triggering the imposition of the penalty.

56. The asserted lack of procedural fairness must also fail for other reasons. No basis has been identified to contend that a prospective defendant must be accorded procedural fairness prior to charge, or to be heard as to the form of any charge. Further, difference of outcome – asserted to be arbitrary – arising from a different charge cannot in any event be a basis for a challenge to the decision of the Director.

10 57. *Fraser Henleins v Cody*[98] is authority for the proposition that the judicial power is not impermissibly interfered with where the legislature creates two separate offences, each criminalising the same conduct but attracting different penalties, one being a mandatory minimum, leaving it to the executive to choose which offence to pursue in a given case. The dissenting opinion of Sir Frederick Jordan in *Ex Parte Coorey*,[99] which corresponds to the argument advanced by the appellant, was specifically rejected by four of the justices in *Fraser Henleins*. It is not offensive to judicial power that the exercise of executive power in the choice of charge will have a bearing on the ultimate penalty imposed by the court. So much is acknowledged by this Court in *Elias v The Queen*.[100]

58. In any event, the appellant's argument as to executive choice between charging under s233A and s233C cannot be accepted. There are many offences where in the same or similar circumstances
20 different charges might be laid with differing applicable penalties.[101] For the reasons given above at [21], a single charge under s233A provides no reference point for comparison with the outcome of the charge against s233C. The decision to charge under s233C is explicable and informed by a difference in elements between s233A and s233C. The offences created by those sections deal with different conduct. In *Ex Parte Coorey* Sir Frederick Jordan indicated that his view would be different in such circumstances. Significantly, no judge in either *Ex Parte Coorey* or *Fraser Henleins* doubted the power of the legislature to prescribe a minimum penalty.

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98 (1945) 70 CLR 100.

99 (1944) 45 SR (NSW) 287.

100 *Elias v The Queen* [2013] HCA 31 at [34] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

101 Statements about "arbitrary or capricious liabilities" relevant to whether a fiscal burden is a "tax" offer no support, or relevant analogy to a limit on judicial power. That limit is concerned with whether the legislature has acted within legislative power by reason that it is within a head of power. Arbitrariness of an exaction marks out the boundary between a law supported by s51(ii) and one that is not; *WR Carpenter Holdings Pty Ltd v Commissioner of Taxation* (2008) 237 CLR 198, *Roy Morgan Research v Commissioner of Taxation* (2011) 244 CLR 97, *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622.

59. No mileage can be gained from the fact of *Fraser Henleins* being decided pre-*Boilermakers*.[102] The argument made in *Ex parte Cooley* and *Fraser Henleins* is founded on the separation of powers and is consistent with the application of *Boilermakers*.

Equality before the law and equal justice

60. The appellant submits that s236B is inconsistent with the requirement of equal justice inherent in the notion of judicial power. It is said that s236B:

    a. results in different treatment of relevantly like co-offenders, in circumstances where one is convicted of an offence against s233A and the other of an offence against s233C;

    b. results in like treatment of relevantly different co-offenders, such as the appellant's co-offender who went to trial but received the same sentence as the appellant.

61. Assuming for the purposes of discussion that there is such a requirement, s236B does not offend it.

62. In relation to the first complaint, it is erroneous to describe the co-offenders as relevantly alike. The treatment of a person differently on the basis of the penalty applicable to the offence of which they are convicted, as compared with some other offence of which they *might have been convicted*, does not infringe equal justice, because a person is sentenced for the offence of which they are convicted, not the offending conduct.[103] The norm of equal justice manifests itself in criminal sentencing law in the objectives of "reasonable consistency" and "systematic fairness".[104] The appellant's focus on the *result* of the sentencing task distracts attention from what equal justice requires, namely the equal application of legal principles.[105] Equal application of the law will produce equality of result only in cases that are relatively identical.[106] It cannot be said that the penalty applicable to different offences is not a relevant difference between co-offenders.[107]

63. The second complaint relates to the sentence imposed on the appellant's co-offender. However, no further information in relation to that offender, or his involvement in the criminal enterprise, is given. It is not possible to conclude that there has been like treatment of different co-offenders as the existence of other mitigating factors in the co-offender's favour are not known. In any event, in a given case there is no single correct sentence to be imposed. Rather, the sentencing discretion

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102 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

103 *Elias v The Queen* [2013] HCA 31 at [30] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

104 *Green v The Queen* (2011) 244 CLR 462 at [29] (French CJ, Crennan and Kiefel JJ); Hili v The Queen (2010) 242 CLR 520 at [47]-[56] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Wong v The Queen* (2001) 207 CLR 584 at [6] (Gleeson CJ).

105 *Wong v The Queen* (2001) 207 CLR 584 at [65] (Gaudron, Gummow and Hayne JJ).

106 *Wong v The Queen* (2001) 207 CLR 584 at [65] (Gaudron, Gummow and Hayne JJ).

107 By analogy, it does not infringe equal justice to treat an offender differently than he would have been previously based upon a change in the law: *Siganto v The Queen* (1998) 194 CLR 656 at [17] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

operates within a range of acceptable outcomes.[108] It may be that the circumstances relevant to the offences of the appellant and his co-offender put both within the lowest category of seriousness. Finally, to the extent that the sentencing of the appellant's co-offender failed to give appropriate consideration to the absence of a guilty plea, it may have been in error. Such error cannot support an argument that s236B is invalid.

Lack of discretion

64. Ultimately, the appellant's argument amounts to a complaint about the constraint upon the discretion available to the court in sentencing for an offence against s233C. *Palling v Corfield*[109] is authority for the proposition that the legislature does not impermissibly interfere with the judicial power by imposing a duty upon a court to undertake a particular course and impose a specified penalty upon a person convicted of an offence if the prosecution requests the court to do so. That conclusion is consistent with authority that it does not offend Ch III to require a court to make a particular order upon satisfaction of certain matters.[110] If it is permissible for the Parliament to *remove* sentencing discretion altogether, it cannot be impermissible for Parliament to merely constrain discretion, without directing the outcome of its exercise.

Part VI: Oral argument

65. South Australia estimates it will require 30 minutes for presentation of its oral argument.

Dated 9 August 2013

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108 *Pearce v The Queen* (1998) 194 CLR 610 at [46] (Gummow J); *Markarian v The Queen* (2005) 228 CLR 357 at [27], [37] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

109 (1970) 123 CLR 52.

110 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [49] (French CJ), [77] (Gummow and Bell JJ), [120]-[121] (Hayne, Crennan and Kiefel JJ); *South Australia v Totani* (2010) 242 CLR 1 at [71] (French CJ), [133] (Gummow J), [339] (Heydon J), [420]-[421] (Crennan and Bell JJ).