IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M251 of 2015

BETWEEN:

JULIAN KNIGHT
Plaintiff

and

THE STATE OF VICTORIA
First Defendant

and

ADULT PAROLE BOARD
Second Defendant

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

PART I: Internet publication

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

PART II: Basis of intervention

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

PART III: Reasons why leave to intervene should be granted

3. Not applicable

Intervener's submissions
Filed on behalf of the Attorney-General for the State of Queensland
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PART IV: Statutory provisions

4. Queensland adopts the statement of relevant statutory provisions set out in Part V of the first defendant's submissions ('**DS**') and the Annexure to the plaintiff's submissions ('**PS**').

PART V: Submissions

Summary

5. Queensland adopts the submissions of the first defendant.

6. Queensland makes the following additional submissions:

(a) *No interference with sentencing discretion*: Justice Hampel's sentencing decision is not disturbed. Correctly with respect, his Honour did not decide whether at a future time, after the expiration of the non-parole period, it would be appropriate for the plaintiff to be released on parole. The administration of that aspect of the plaintiff's sentence is not part of the function of the sentencing judge. His Honour sentenced the plaintiff according to law and the role of the judiciary in relation to the plaintiff's offending and sentence was thus spent. Section 74AA of the *Corrections Act 1986* (Vic) (the ***Corrections Act***) does not disturb Hampel J's sentencing order.

(b) *Parole regime is a matter for parliament and the executive*: It is a valid exercise of legislative power by the parliament to enact legislation to establish a parole system and to prescribe the pre-conditions for release on parole.

Under the statutory scheme, a prisoner is not automatically entitled to release on parole at the expiry of a non-parole period. Expiry of the non-parole period only means that the prisoner may be eligible to apply for parole under the statutory scheme. Subject to statute, the parole board may, but need not, grant the prisoner release on parole.

(c) *The impugned legislation is not invalid only because it operates ad hominem.*

(d) *Kable principle not offended:* No incompatibility arises in the relevant sense from the legislature conferring parole board functions on a sitting judge or magistrate of a State court as *persona designata*.

(a) No interference with sentencing discretion

7. On 10 November 1988, Hampel J, a judge of the Supreme Court of Victoria, sentenced the plaintiff. In doing so, his Honour considered medical reports by two

eminent psychiatrists and one equally eminent psychologist, evidence of the plaintiff's family, teachers and friends[1] and relevant sentencing considerations.[2]

8. At the time, s 3 of the *Crimes Act 1958* (Vic) ('**Crimes Act**') permitted the courts to sentence a person convicted of murder for the term of his or her natural life or for such other term as the court determined having regard to various facts which may be taken into account in mitigation of penalty.[3] His Honour considered that the mitigatory factors were outweighed by the nature and multiplicity of the crimes committed by the plaintiff and the requirement that the sentences must be proportionate to the crimes.[4] Consequently, the plaintiff was sentenced to imprisonment for life in respect of each of the seven counts of murder and imprisonment for 10 years for each of the 46 counts of attempted murder.[5]

9. Additionally, the *Penalties and Sentences Act 1985* (Vic)[6] provided by s 17 that, subject to the court considering that the nature of the offence and the antecedents of the offender render the fixing of a minimum term inappropriate, the court must, for a term of imprisonment not less than two years, fix a lesser term (a "minimum term")[7] during which the offender would not be eligible to be released on parole.[8]

10. Justice Hampel held that:[9]

> 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. In sentences for murder, if a minimum term is fixed it must be fully served; no remissions operate to reduce it.

11. His Honour went on to determine that:[10]

> … the fixing of a minimum term in this case is appropriate because of your age and your prospects of rehabilitation, as well as the other mitigatory factors which justify some amelioration of your sentence, not only in your interest, but in the interest of the community.
>
> Dr Bartholomew [described by Hampel J as a "highly qualified and experienced psychiatrist"[11]] was confident that, having regard to the crimes which you have committed, it is most unlikely that a decision to release you would be made if, after a very thorough investigation, there was any doubt about your presenting a danger to the community …

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1 SCB 34; *R v Knight* [1989] VR 705, 706.
2 SCB 37; *R v Knight* [1989] VR 705, 709.
3 Mandatory sentences of life imprisonment was abolished under the *Crimes (Amendment) Act 1986* (Vic), s 8.
4 SCB 38; *R v Knight* [1989] VR 705, 710.
5 Special Case Book ('**SCB**') 38; *R v Knight* [1989] VR 705, 710.
6 Since repealed with effect from 22 April 1992.
7 Now known as the "non-parole period".
8 *Corrections Regulations 2009* (Vic), s 82 (meaning of 'non-parole period' and 'parole eligibility date'); *Sentencing Act 1991* (Vic) s 3 (meaning of 'non-parole period)'.
9 SCB 38; *R v Knight* [1989] VR 705, 710.
10 SCB 39; *R v Knight* [1989] VR 705, 711 (underlining added).
11 SCB 34; *R v Knight* [1989] VR 705, 706.

> In all the circumstances, I consider that the appropriate minimum term before which you will not be eligible for parole is 27 years.

12. Pursuant to the Penalties and Sentences Act, the non-parole period is part of the plaintiff's sentence and as much has been observed by this Court.[12] It is the period before the expiration of which release of the offender, would, in the estimation of the sentencing judge, be a violation of justice according to law, notwithstanding the mitigation of punishment which mercy to the offender and benefit to the public may justify.[13]

13. Sentencing an offender and fixing a minimum term of imprisonment is a judicial power that can only be exercised by a court.[14] Consistently with the importance of the finality of the outcome of the trial of a criminal offence, subject to any appeal, the role of the judiciary in sentencing the plaintiff was spent once Hampel J made his sentencing order. The controversy represented by the indictment had been quelled. From that point, responsibility for the administration of the plaintiff's sentence passed to the executive branch of the government of the State.[15]

14. In *Crump v New South Wales* (2012) 247 CLR 1 ('***Crump***'), French CJ observed that:[16]

> There is a clear distinction between the judicial function exercised by a judge in sentencing, and the administrative function exercised by a parole authority in determining whether a person eligible for release on parole, by reason of the judge's sentencing order, should be released ... the executive decision to release or not to release a prisoner on parole may reflect policies and practices which change from time to time. There nevertheless remains only one judicial sentence.

15. Mr Crump challenged the validity of s 154A of the *Crimes (Administration of Sentences) Act 1999* (NSW), on which the impugned legislation in present proceedings was modelled. The challenge was based on an argument that the law involved impermissible legislative interference in judgments of the Court.[17] This Court upheld the validity of the legislation. The Court found that the legislation did not impermissibly alter a judicial determination.

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[12] *R v Shrestha* (1991) 173 CLR 48, 60 (Brennan and McHugh JJ). Their Honours dissented on the answer to the question but not on principles regarding head sentence and non-parole periods and the function of the judiciary in fixing same.

[13] *R v Morgan* (1980) 7 A Crim R 146 (VCCA), 154 (Jenkinson J).

[14] *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 608-9; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27; *Leeth v Commonwealth* (1992) 174 CLR 455, 470; *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, [82]. *Winsor v Boaden* (1953) 90 CLR 345, 347; *Crump v State of New South Wales* (2012) 247 CLR 1, [27].

[15] *Elliott v The Queen* (2007) 234 CLR 38, 42[5] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ) citing Barwick CJ in *Ratten v The Queen* (1974) 131 CLR 510, 517 and the remarks of Wells J in *R v O'Shea* (1982) 31 SASR 129, 145. See also *Pearce v The Queen* (1998) 194 CLR 610, 626-629 [59]-[68]; *R v Carroll* (2002) 213 CLR 635; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 17-18 [34]-[35].

[16] *Crump v New South Wales* (2012) 247 CLR 1, 16-17 [28] (French CJ) referring to *Lowe v The Queen* (1984) 154 CLR 606, 615 (Mason J), 624 (Dawson J, Wilson J agreeing).

[17] See also *Australian Education Union v General Manager, Fair Work Australia* (2012) 246 CLR 117; *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83.

16. The joint reasons of Gummow, Hayne, Crennan, Kiefel and Bell JJ referred to the following passage from *Baker v The Queen*:[18]

> Whilst s 463 [of the *Crimes Act 1900* (NSW), which conferred upon the Governor a power of release on licence] remained in force, the judicial power to impose sentence upon a person convicted of murder was confined: the only sentence that could be passed was that the offender suffer penal servitude for life. Upon passing that sentence the judicial power was exhausted. Whether the offender served the sentence in prison or at large was a matter which then was to be decided by the Executive, not a court.

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17. The only notable difference between the legislation upheld in *Crump* and the impugned legislation in this matter is that the legislation in *Crump* was not expressly ad hominem, although the ad hominem purpose of the provision was made clear in the Second Reading Speech by the then-Premier of New South Wales.[19]

18. In *Baker*,[20] the High Court dismissed a challenge to the validity of legislation which required a person to serve at least 20 years of their sentence, if the person was the subject of a non-release recommendation. The Court held that there was nothing repugnant to the notion of judicial power in the legislature taking a past non-release
20 recommendation as the criterion for the operation of a subsequent curial regime. The correctness of the Court's decision in *Baker* was not challenged in *Crump*.

19. The Victorian Parliament intentionally mirrored the preconditions for the plaintiff's release on parole on the preconditions contained in the legislation unanimously upheld in *Crump*.[21] The applicable statutory regime applying at the expiry of the plaintiff's non-parole period, and now, is the Corrections Act as amended by the *Corrections Amendment (Parole) Act 2014* (Vic).

20. The Corrections Act neither expressly nor impliedly purports to vary Hampel's J's
30 sentencing order. Justice Hampel, rightly with respect, said nothing about whether the plaintiff should actually be released at the expiration of the non-parole period. Quite the contrary: his Honour made it clear that he had taken into consideration the evidence of Dr Bartholomew that it would be "unlikely" that the plaintiff would in fact be released on parole in absence of a "very thorough investigation" into whether he would present a danger to the community at that future time. If anything, s 74AA of the Act facilitates Hampel J's observations at the time he imposed sentence on the plaintiff.

21. Legislative criteria under s 74AA of the Corrections Act which the Parole Board is to
40 apply in considering whether the plaintiff should be released on parole do not, as contended by the plaintiff, operate to interfere with a particular and readily

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[18] *Baker v The Queen* (2004) 223 CLR 513, 528 [29] (McHugh, Gummow, Hayne and Heydon JJ), cited in *Crump v New South Wales* (2012) 247 CLR 1, 24 [50] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[19] New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 May 2001, p 13972, cited in *Crump v New South Wales* (2012) 247 CLR 1, 15 [22] (French CJ).

[20] *Baker v The Queen* (2004) 223 CLR 513.

[21] Victoria. Parliamentary Debates, Legislative Assembly, 13 March 2014, 746.

identifiable exercise of judicial power by the Supreme Court.[22] The provision merely operates on the factum of Hampel J's order and triggers a particular legislative consequence.[23]

(b) Parole regime is a matter for parliament and the executive

22. The Parliament of the State of Victoria has power to make laws "in and for Victoria in all cases whatsoever"[24] subject to the *Commonwealth Constitution* and any express or implied restrictions on state power arising from it.[25]

23. There is a clear distinction between the judicial function exercised by a judge in sentencing and the administrative function exercised by a parole authority in determining whether a person who, by reason of the judge's sentencing order, is eligible for release on parole, should be released.[26] The latter is a matter to be decided by the executive, not a court.[27] Further, the power of the executive to order a prisoner's release on parole may be broadened or constrained or even abolished by the legislature of the State.[28] However, even with an unchanging statutory framework, the executive decision to release or not release a prisoner on parole can reflect policies and practices which change from time to time.[29]

24. This Court has observed that the intention of the legislature in providing for the fixing of minimum terms is to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that they must serve having regard to all the circumstances of their offence.[30] The parole system operates in the interests of the offender by providing incentive to rehabilitate and in the interests of the community by aiding the offender's return, under supervision, to the community.[31] However, the offender's rehabilitation does not exclude community safety considerations. The practical effect of fixing a minimum term is that thereafter the Parole Board may, but need not, grant the plaintiff parole.[32]

25. At the time Justice Hampel sentenced the plaintiff, it was not possible to say (and not necessary to decide) whether circumstances in the future, on balance, would justify

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22 PS [5(a)]

23 *Baker v The Queen* (2004) 223 CLR 513; *Crump v New South Wales* (2012) 247 CLR 1, 24 [50] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

24 *Constitution Act 1975* (Vic) s 16, *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10.

25 Such as the principle espoused in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 ('***Kable***').

26 *Crump v New South Wales* (2012) 247 CLR 1, 16 [28] (French CJ).

27 *Baker v The Queen* (2004) 223 CLR 513, 528 [29] (McHugh, Gummow, Hayne and Heydon JJ); *Elliott v The Queen* (2007) 234 CLR 38, 42 [5] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); *Crump v New South Wales* (2012) 247 CLR 1, 17[28] (French CJ).

28 *Crump v New South Wales* (2012) 247 CLR 1, 19 [36] (French CJ).

29 *Crump v New South Wales* (2012) 247 CLR 1, 17 [28].

30 *Power v The Queen* (1974) 131 CLR 623, 629; *Crump v New South Wales* (2012) 247 CLR 1, 17 (French CJ).

31 *Bugmy v The Queen* (1990) 169 CLR 525, 530-1.

32 *Bugmy v The Queen* (1990) 169 CLR 525, 536 (Dawson, Toohey, Gaudron JJ).

the plaintiff's release on parole. Nor was it a case in which it could be said that the requirements of justice – including punishment and deterrence – dictated that the plaintiff serve in custody the whole of the sentence imposed.[33] In fixing the minimum term, his Honour's primary concern is not to be, and was not, the plaintiff's prospects of rehabilitation.[34]

26. There is an obvious vital public interest in the legislature being competent to deny release on parole entirely or to prescribe the pre-conditions for release on parole of prisoner convicted of a serious violent offence to ensure public safety; in particular where a prisoner is serving multiple life sentences for multiple indiscriminate murders. To that end, the impugned legislation alters the conditions on which the Parole Board may order the plaintiff's release on parole. It does not purport to alter the plaintiff's sentences.

27. The Corrections Act, with respect to its application to the plaintiff, only engages once the plaintiff has served the non-parole period and then only entitles him to apply for, and to be eligible for, release on parole subject to satisfying the relevant conditions. Section 74 of the Act provides, subject to ss 74AAB and 78(3), that the Parole Board may order that a prisoner serving a prison sentence in respect of which a non-parole period was fixed be released on parole at a time not before the end of the non-parole period.

28. The Act is unequivocal that the parole authority has, at the end of a non-parole period, a *discretion* as to whether an offender should be released from prison: the prisoner is merely *eligible* to be considered for release on parole at that time. There is no entitlement for the plaintiff, or indeed any prisoner, to be released on parole.[35] The plaintiff correctly does not go so far to suggest that he has a lawful entitlement to be released during the period of his head sentences.[36]

29. It is submitted that there is nothing constitutionally controversial about a state parliament and executive establishing and administering schemes for the release of convicted offenders into the community during the term of their imprisonment after the expiry of a non-parole period.

(c) The legislation is not invalid for being ad hominem

Kable and ad hominem legislation

30. The provisions of the *Community Protection Act 1994* (NSW) that were held invalid by the High Court in *Kable* applied exclusively to Gregory Wayne Kable. The legislation authorised the Supreme Court to order the continuing imprisonment of Mr Kable following the expiration of his sentence of imprisonment without a criminal trial, and on the basis that he presented an unacceptable risk to the

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33 *R v Shrestha* (1991) 173 CLR 48, 76-7 (Deane, Dawson, Toohey JJ).
34 *Bugmy v The Queen* (1990) 169 CLR 525, 530-1 (Mason CJ and McHugh J).
35 *Crump v New South Wales* (2012) 247 CLR 1, 26 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), 29 [71] (Heydon J); *R v Shrestha* (1991) 173 CLR 48, 60-3, 67-9, 72-4.
36 PS [9]-[10].

community. The majority of the High Court in *Kable* accepted the appellant's argument that the legislation attempted to dictate the way the judicial power should be exercised, thus undermining the independence of judicial judgment.[37] The majority held that the Act made a "mockery" of the judicial process in converting the Supreme Court of New South Wales into an "instrument of a legislative plan", thus impairing public confidence in the impartial administration of judicial functions.[38]

31. The legislation, in effect, made the Supreme Court a party to and responsible for implementing the political decision of the executive government that Mr Kable should be imprisoned without the benefit of the ordinary processes of the law. In contrast, the impugned legislation here does not affect the court or its sentencing order; it relates only to the Parole Board and the supervised release of a prisoner during the term of their imprisonment.

32. The Court did not, it is submitted, strike the legislation down because it was ad hominem, although its extraordinary character in that regard was observed.[39] The plaintiff's submission that the ad hominem character of the *Kable* legislation was "central to its invalidity" is, with respect, an overstatement.[40] The plaintiff cites *Fardon*[41] in making this submission.

33. In *Fardon*, the High Court noted the "extraordinary"[42] legislation in *Kable* in terms of a "combination of circumstances",[43] including its ad hominem application, which, taken together, amounted to invalidity. The combination of circumstances were that: it was directed at one person; it provided for post-sentence continuing detention; and it enlisted the Supreme Court in a process "far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person."

34. Contrary to the plaintiff's submission, what was central to the invalidity of the legislation in *Kable* was stated by McHugh J in *Fardon* as follows:[44]

> The majority of Justices in that case held that, because State courts can be invested with federal jurisdiction, State legislation cannot confer jurisdiction or powers on State courts that compromises their integrity as courts exercising federal jurisdiction.

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37 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 53.
38 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 51, 107-8, 122, 124, 133.
39 *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51, 121 (McHugh J), 131 (Gummow J).
40 PS [60].
41 *Fardon v Attorney-General* (Qld) (2004) 223 CLR 575 ('***Fardon***').
42 *Fardon v Attorney-General* (Qld) (2004) 223 CLR 575, 595 [33] (McHugh J).
43 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 601 [43], 617 [100]. Gummow J described it as "a particular combination of features of the NSW Act that led to its invalidity"), 658 [233] (Heydon and Callinan JJ observed that the legislation under consideration in *Fardon* required a "full and proper legal process in the making of decisions under it" and then simply observed that it was also an Act of general application, unlike the legislation in *Kable*. Unlike *Kable*, the legislation in *Fardon* sought to achieve its purpose "with due regard to the full and conventional judicial process".
44 *Fardon v Attorney-General* (Qld) (2004) 223 CLR 575, 595 [32] (McHugh J) citing *Kable* (1996) 189 CLR 51, 96 (Toohey J), 103 (Gaudron J), 116-119 (McHugh J) and 127-128 (Gummow J).

35. It was the legislature's attempt to involve the courts in implementing political decisions that made the legislation constitutionally invalid, not, it is submitted the severity of its provisions or that it was ad hominem. It is submitted that the ad hominem nature of the impugned legislation in present proceedings also does not, without more, invalidate it.

(d) Appointment to Parole Board of judicial officers as persona designata does not offend Kable

10 36. Since *Kable*, the principle for which it stands has been considerably refined in a long line of cases. Recently, the *Kable* principle was restated by six Justices in *Attorney-General (NT) v Emmerson* as follows:[45]

> The principle for which Kable stands is that because the Constitution establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid.

20 37. As a result of *Kable*, it is recognised that Ch III of the *Commonwealth Constitution* entrenches the Supreme Courts as part of an integrated national court system for the exercise of federal judicial power. Chapter III therefore requires State courts to retain certain fundamental institutional features, importantly, independence and impartiality (from the other branches of government).

38. The Supreme Court and County Court of Victoria are part of the integrated national court system created by Ch III of the *Constitution*. As such, their functions are constrained by Ch III,[46] not as a consequence of the doctrine of separation of powers enunciated in *R v Kirby; Ex parte Boilermakers' Society of Australia*,[47] but as a
30 consequence of the *Kable* principle.[48]

39. In the case of federal judges, the conferral of non-judicial power upon them as persona designata is an exception to the *Boilermakers* doctrine (that a judge of a Ch III court cannot exercise non-judicial power).[49] The legislature is competent to confer a function on a judge of a Ch III court as persona designata if the function is not repugnant to their judicial function as a judge or the functions of the court of which the judge is a member.[50]

40. The criterion of compatibility considered in *Grollo,* derived from the doctrine of
40 separation of powers, applies more stringent criteria in the case of federal judges than

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45 (2014) 253 CLR 393, 424 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (references omitted).
46 *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51, 103 (Gaudron J).
47 (1956) 94 CLR 254 ('***Boilermakers***').
48 *Wainohu v New South Wales* (2011) 243 CLR 501, 209 [45]; *South Australia v Totani* (2010) 242 CLR 1, 81 [201] (Hayne J).
49 *Hilton v Wells* (1985) 157 CLR 57, 81-2.
50 *Grollo v Palmer* (1985) 184 CLR 348 ('***Grollo***').

the *Kable* principles do in respect of State judges.[51] That being the case, if the law here had been a law of the Commonwealth and it would not have offended those principles, then an occasion for the application of *Kable* does not arise.

41. In *Grollo*, Brennan CJ, Deane, Dawson, and Toohey JJ held that the incompatibility conditions accord with the view of the Supreme Court of the United States in *Mistretta v United States*[52] where the Court said:[53]

> This is not to suggest, of course, that every kind of extrajudicial service under every circumstance necessarily accords with the Constitution. That the Constitution does not absolutely prohibit a federal judge from assuming extrajudicial duties does not mean that every extrajudicial service would be compatible with, or appropriate to, continuing service on the bench; nor does it mean that Congress may require a federal judge to assume extrajudicial duties as long as the judge is assigned those duties in an individual, not judicial, capacity. The ultimate inquiry remains whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch.
>
> (underlining added)

42. Their Honours went to say that the incompatibility may arise in a number of different ways including:

- where the non-judicial functions that are so permanent and complete a commitment by a judge that the further performance of substantial judicial functions by that judge is not practicable;
- where the non-judicial function is of such a nature that the capacity of the judge to perform their judicial functions with integrity would be compromised;
- where the performance of non-judicial functions are of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform their judicial functions with integrity is diminished.[54]

43. The notion of 'compatibility' underlining the *Kable* principle and its interrelationship with compatibility under *Grollo* and similar cases such as *Wilson,*[55] was considered by this Court in *Wainohu v New South Wales*.[56] Whilst the tests overlap, they are separate. In *Wainohu*, the Court accepted the Commonwealth's submissions that the

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[51] *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 561-2 [14], approved in *Duncan v ICAC* (2015) 256 CLR 83, 95-6 [17].Chief Justice Robert French AC, 'Essential and defining characteristics of courts in an age of institutional change' (2013) 23 *Journal of Judicial Administration* 3, 6.

[52] (1989) 488 US 361.

[53] (1989) 488 US 361, 404, cited in *Grollo* (1985) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson, and Toohey JJ). See also *Grollo* (1985) 184 CLR 348, 377 (McHugh J), 392 (Gummow J); *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 9 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ: "The passages cited from *Mistretta* are equally relevant to the interpretation of Ch III of the Constitution of this country.").

[54] *Grollo v Palmer* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson, Toohey JJ).

[55] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 ('***Wilson***'); *Hilton v Wells* (1985) 157 CLR 57.

[56] *Wainohu v New South Wales* (2011) 243 CLR 181 ('***Wainohu***').

reasoning in *Wilson* and *Kable* share a common foundation in constitutional principle which has at its touchstone protection against legislative or executive intrusion upon the institutional integrity of the courts, whether federal or State. It follows that repugnancy to or incompatibility with that institutional integrity may be manifested by State (and Territory), as well as federal, legislation which provides for the conferral of functions upon a judicial officer persona designata.[57]

44. The impugned legislation in *Wainohu* provided that an "eligible judge" might make a determination upon information and submissions, without regard to the rules of evidence, partly based on information and submissions not disclosable to the organisation or its members, and with no obligation to provide reasons for the determination made.[58] In applying the *Kable* principle, the majority held that the legislation was invalid on the basis that it substantially impaired the essential and defining characteristics of a State court contrary to Ch III, namely the duty to give reasons.[59]

45. Chief Justice French and Kiefel J explained "persona designata" as follows:[60]

> Underlying the "persona designata" characterisation … is the idea of detachment of a judge from the court of which the judge is a member. That detachment enables non-judicial functions conferred on a federal judge to be exercised by that judge without infringing the separation of powers doctrine. The separation of powers doctrine does not prevent non-judicial functions from being conferred on a State judge. In this case, however, the non-judicial function conferred by the Act on the eligible judge is closely connected to the exercise of the jurisdiction conferred by the Act on the Supreme Court.

46. Their Honours observed that there is no general constitutional prohibition against the appointment of judges to non-judicial offices or to the carrying out of non-judicial functions and that there is considerable history for such appointments in Australia.[61] However, there has nevertheless been a long debate about whether it is appropriate for judges to engage in such activities and, if so, under what circumstances and conditions. Their Honours noted that "[t]he question whether such activities are appropriate for a judge to undertake is not the same as the question whether they fall within limits imposed by the Constitution"[62] and went on to observe as follows:[63]

> What Dr Twomey has written of New South Wales is generally true for other Australian States:[64]
>
> > From the very beginning of responsible government in New South Wales, it was not considered inappropriate for judges to perform non-judicial tasks or offices.

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57 *Wainohu v New South Wales* (2011) 243 CLR 181, 228 [105] (Gummow, Hayne, Crennan and Bell JJ).
58 *Wainohu v New South Wales* (2011) 243 CLR 181, 191-2 [5]-[6], 217-8 [65] (French CJ and Kiefel J).
59 *Wainohu v New South Wales* (2011) 243 CLR 181, 192 [7], (French CJ and Kiefel J), 230 [110]-[111] (Gummow, Hayne, Crennan and Bell JJ), 248 [172] (Heydon J dissenting).
60 *Wainohu v New South Wales* (2011) 243 CLR 181, 218 [66] (French CJ and Kiefel J).
61 *Wainohu v New South Wales* (2011) 243 CLR 181, 196-202 [21]-[31].
62 *Wainohu v New South Wales* (2011) 243 CLR 181, 196-197 [21].
63 *Wainohu v New South Wales* (2011) 243 CLR 181, 197-198 [22].
64 Twomey, *The Constitution of New South Wales* (2004), p 747.

Evatt J said in *Medical Board (Vic) v Meyer*:[65]

> Under the State Constitutions, where there is no provision which suggests any separation of powers between the executive and judiciary, there is no reason why judges of the Supreme Court or any other court cannot be employed for the purpose of exercising administrative functions although such judges usually exercise judicial power.

47. In *Wilson*, Gaudron J resolved the issues posed in that case with reference to the statement of Evatt J in *Medical Board v Meyer* and in doing so, made three relevant statements of principle.[66] Her Honour's statements were adopted by the plurality in *Wainohu*, holding them to be "determinative of the issue of the validity of [the impugned provision].[67] Her Honour said that the confidence reposed in judicial officers:

> Depends on their acting openly, impartially and in accordance with fair and proper procedures for the purpose of determining the matter in issue by ascertaining the facts and the law and applying the law as it is to the facts as they are. And, just as importantly, it depends on the reputation of the courts for acting in accordance with that process …

48. In the present matter, the Act establishes the Parole Board which is to consist of persons appointed by the Governor in Council and a Secretary.[68] At least one person appointed to the Board must be appointed as a full-time member[69] and one as a part-time member.[70] At least one *retired* Judge of the Supreme Court or the County Court or a superior court or an intermediate court or retired Magistrate must be appointed.[71] There is a power to appoint current serving judicial officers but no obligation to do so. Rather there is a discretion to appoint "such number" on the recommendation of the Chief Justice, Chief Judge or Chief Magistrate as the case may be.[72] However, a member who is a judge or retired judge must be appointed to be the chairperson of the Parole Board and deputy chairperson.[73]

49. The judicial officers appointed to the Parole Board are not chosen by the Minister, are not appointed by the executive and not answerable to the executive in its day-to-day functions. It is difficult to see how there could be the appearance of, or in fact be, a case of the judiciary doing a job for the executive cloaked in judicial impartiality. However, the Parole Board is required to give a report to the Minister on 30 June each year concerning particular matters such as the number of persons released on parole during the past 12 month period and the number returned to prison on cancellation of parole.[74] According to the principles enunciated by Gaudron J in

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65 (1937) 58 CLR 62 at 106.
66 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 22 and 25-26.
67 *Wainohu v New South Wales* (2011) 243 CLR 181, 225 [94] (Gummow, Hayne, Crennan and Bell JJ).
68 *Corrections Act 1986* (Vic) s 61.
69 *Corrections Act 1986* (Vic) s 61(2)(d).
70 *Corrections Act 1986* (Vic) s 61(2)(e).
71 *Corrections Act 1986* (Vic) s 61(2)(da).
72 *Corrections Act 1986* (Vic) s 61(2).
73 *Corrections Act 1986* (Vic) s 61A.
74 *Corrections Act 1986* (Vic) s 72(1).

Wilson such reporting requirement would not be incompatible with the judicial officer's responsibilities as a judicial officer.

50. The functions of the members of the Parole Board are clearly of an administrative nature and not judicial. Whether the functions conferred on a sitting judge are incompatible with their role as judicial officers falls to be considered in accordance with the above principles in the context of the Corrections Act. The question requires an examination and assessment of the nature of the functions performed by the Parole Board, the manner in which the Parole Board performs its functions and the extent to which those matters may diminish public confidence in the integrity of the judiciary as an institution, or the capacity of the individual judge to perform his or her judicial functions with integrity.

51. Unlike the legislation in *Wainohu*, the impugned legislation in these proceedings does not establish a regime whereby a judicial officer carries out ostensibly judicial functions closely connected with the exercise of their judicial functions but in absence of a hallmark judicial responsibility.

52. On the contrary, the functions of the Parole Board are carried out entirely separately from the courts and the judicial system. The Act requires only that the Parole Board meets as often as is necessary to perform its functions under the Act and Regulations, such as to consider and decide applications for release on parole, prescribe conditions of release, and to ensure that the Secretary, Governor of the relevant prison and relevant Regional Manager are notified of the decisions of the Board as soon as possible after they are made.[75] The functions of the Parole Board are manifestly free of outside influence. Further, there is no direct relationship between the functions of the Parole Board and the judiciary, much less an unacceptable relationship within the meaning of the above principles.

53. It was observed in *Wainohu* that a legislatively prescribed detachment of a State judge from his or her court when performing non-judicial functions may weigh in the balance against a finding of impairment of the institutional integrity of the court.[76]

54. Previously, the Corrections Act required that a Judge of the Supreme Court be appointed to the Board.[77] That requirement was subject to challenge in the Supreme Court of Victoria in the matter of *Kotzmann v Adult Parole Board of Victoria*.[78] *Kotzmann* was decided before *Wainohu* and therefore before the statement of principles were confirmed by the High Court.

55. Mr Kotzmann submitted that the judge or judges of the Supreme Court were conscripted as members of the Board and that they were instruments of the executive

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75 *Corrections Act 1986* (Vic) s 66 and 69; *Corrections Regulations 2009* (Vic) s 81.

76 *Wainohu v New South Wales* (2011) 243 CLR 181, 211 [50].

77 As noted above, the current requirement at s 61(2)(a) provides for "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…" (emphasis added). The current provision was inserted by the *Corrections Amendment (Parole Reform) Act 2013*, s 4. The same amendment was made in respect of s 61(2)(b) to-(c) changing the requirement that "one or more" Judges of the County Court or Magistrates be appointed to "such number".

78 (2008) 221 FLR 134 ('***Kotzmann***')

to perform the functions of the Board. In response, the Secretary submitted that while the Board is closely connected with the executive, it operates independently and its decisions are made free of political influence and that it is unlikely that ordinary members of the community would regard the appointment of a judge of the Supreme Court, sitting as a member of the Board as chairman, as compromising the integrity and independence of the judge or of the Supreme Court.[79]

56. Justice Judd observed that:

> Individual views will differ as to what will erode public confidence in the court and judiciary. The functions of the Board fall within that category of case where the public confidence and its integrity is very likely to be enhanced by the appointment of judicial officers and in particular a judgement of this court. On the other hand, there are functions which may according to some, appear to diminish public confidence in the court.[80]

57. His Honour held that there was no incompatibility in the relevant sense, stating that "… the appointment of a judge or judges of this court, as serving members of the Board, does not give the appearance that this court, *as an institution*, is not independent of the executive government."[81]

58. It is submitted that a fair-minded observer would not view the non-judicial functions performed by a sitting judge, in the judge's individual capacity, in relation to an appointment to the Parole Board, as diminishing confidence in the judge's integrity or that of the judiciary as an institution.[82]

59. The plaintiff's submission that s 74AA contravenes the *Kable* principle because a serving Judge could participate in a decision taken by the Board under the section[83] is hypothetical. The involvement of serving Judges does not affect the provision's validity, but if it does, for the reasons given in the first defendant's submissions,[84] it can only do so if and when a serving Judge does participate in a s 74AA decision.

Answers to the questions in the Special Case

60. The questions for the opinion of the Full Court[85] should be answered as follows:

(a) No, s 74AA of the Act is not invalid on the ground that it is contrary to Ch III of the constitution.

(b) The plaintiff should pay the first defendant's costs.

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79 *Kotzmann v Adult Parole Board of Victoria* (2008) 221 FLR 134, 144 [40].
80 *Kotzmann v Adult Parole Board of Victoria* (2008) 221 FLR 134, 145 [44].
81 *Kotzmann v Adult Parole Board of Victoria* (2008) 221 FLR 134, 146 [50] (original emphasis).
82 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 23 (Gaudron J).
83 PS [49]-[64].
84 DS [37]-[43].
85 SCB 32.

PART II: Time estimate

61. The Attorney-General estimates that no more than 15 minutes will be required for the presentation of oral submissions.

Dated 3 February 2017.

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