IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B14 of 2014

BETWEEN:

STEFAN KUCZBORSKI
Plaintiff

10

and

STATE OF QUEENSLAND
Defendant

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ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR SOUTH AUSTRALIA

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Part I: Certification

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

Part II: Basis for intervention

2. The Attorney-General for South Australia (**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. South Australia adopts the Defendant's statement of the applicable legislative provisions.

Part V: Submissions

5. In summary, South Australia in answering question 3 of the amended special case, contends:

   i. the impugned provisions can broadly be divided into four categories. In the first, the laws provide, upon proof of a criminal offence, for proof of aggravating features which include being a "*participant*" as defined, so as to give rise to liability to additional penalties.[1] In the second, the laws create offences an element of which is being a "*participant*" in a criminal organisation as defined.[2] In the third, the laws create offences elements of which are wearing or carrying an item, where that item is a symbol of, or linked in meaning to, a "*declared criminal organisation*".[3] In the fourth, the law creates a circumstance, namely being a participant in a criminal organisation, that results in the reversal of the presumption in favour of bail.[4]

   ii. in relation to the first three categories, the impugned laws do not alter the ordinary processes for prosecution or sentencing of criminal offences, nor direct any outcome, nor affect the exercise of judicial power in the conduct of a criminal prosecution or sentencing.

   iii. in relation to the fourth category, the court as a bail authority, though commencing from a different starting point, proceeds in the ordinary way to determining the grant of bail.

   iv. as to the plaintiff's reliance on the principle of "*equal justice*", first, there is no substantive requirement of equal justice implicit in the *Constitution*, second, while courts are guided generally by the principle of equal justice so as to ensure consistency and fairness in outcome, its application is subject to the legislature's specification of differences, third, in

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1 *Vicious Lawless Associations Disestablishment Act 2013* (Qld) ("***VLAD Act***"), s7; *Criminal Code Act 1899* (Qld), sch 1 ("***Criminal Code***"), ss72, 92A, 320 and 340.

2 *Criminal Code*, ss60A, 60B and 60C.

3 *Liquor Act 1992* (Qld) ("***Liquor Act***"), ss173EA, 173EB, 173EC, 173ED.

4 *Bail Act 1980* (Qld) ("***Bail Act***"), s16(3A), (3B) (3C) and (3D).

the context of sentencing, the principle of equal justice is embodied in the principles of "*parity*", "*reasonable consistency*" and "*systematic fairness*". The application of those principles is subject to legislation which identifies the criteria for what is alike, and not alike. It forms no part of the exercise of judicial power to weigh the correctness or sufficiency of the competing political and social considerations relevant to the formulation of those criteria.

v. as to the plaintiff's contention that the impugned provisions make the courts an "*instrument of the executive*", the creation of criminal offences by Parliament inherently reflects considerations of social policy. The determination of an indictment alleging such an offence does not involve the court implementing those policies in any relevant sense.

10 ***An absence of facts***

6. Whether a statute contravenes a constitutional limitation is a question of law that is capable of being answered without facts. However, the facts to which an impugned law is applicable often inform the answer to any challenge to validity. The factual circumstances fix the relevant context in which the operation of the impugned laws fall to be considered and have the tendency to tease out the operation of provisions. Absent facts, the tendency is to postulate examples. Whether those examples are a realistic basis on which to assess the operation of the law can be hard to assess. That difficulty needs to be borne in mind when the complaint is about whether an outcome is directed and whether the result involves the different treatment of equals.[5] Resort cannot be had to the facts of "*this case*".

20 ***The operation of the impugned provisions***

7. Analysing whether an impugned law is valid requires the clear articulation of its operation and effect on existing rights, liabilities, privileges and interests. Where the impugned law is a criminal offence, or an aggravating factor relevant to sentence, that exercise in statutory interpretation requires the court to identify the elements of the offence and of the aggravating factor that require proof. Further, consideration of the operation and effect of criminal offences and aggravating factors must be considered in the context of the common law adversarial system and its distribution of burdens and standards of proof.

8. The ordinary grammatical meaning of the statutory language, read in light of its context and purpose,[6] provides the starting point for the exercise of construction of the impugned laws.
30 When regard is had to the language, context and purpose of the impuged provisions,[7] it is

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5 An analogous point is made in relation to the construction of the scope of a head of legislative power by reference to '*extreme examples*': see *New South Wales v Commonwealth* (2006) 229 CLR 1 at 188 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). The point is equally relevant to the question of whether a legislative provision is invalid: *Wainohu v New South Wales* (2011) 243 CLR 181 at [151]-[153] (Heydon J); see also *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [46] (Gleeson CJ).

6 *Acts Interpratation Act 1954* (Qld), s14A(1).

7 Including, as part of that broader context, the fact that they impose criminal sanctions: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [57] (Hayne, Heydon, Crennan and Kiefel JJ).

submitted that the orthodox process of construction reveals no "*intractable*" ambiguity.[8] There is therefore no need to have recourse to an interpretative principle of "*last resort*"[9] that would require a strict reading of the impugned provisions on the basis of their penal character.

9. Although the operation of each of the impugned provisions differ, they can be grouped into the four broad categories identified in paragraph [5.i] above because those categories reflect common features of each provision identified by the plaintiff as offending the *Kable* principle. It is convenient then to turn to identify the elements of the impugned laws within those categories.

The First Category: where being a "participant" is made an aggravating feature in sentencing

Section 7 of the VLAD Act

10. Section 7 of the *VLAD Act* provides, upon proof of a declared offence, for liability to additional penalties in the event of proof of an aggravating factor. That factor is that the defendant is an "*associate*". The combined operation of s7(1)(a) and (b) and ss4 and 5 is that liability to the additional sanctions in s7(1)(b) will only arise if the prosecution establishes beyond reasonable doubt that the defendant:

    i. is guilty of a declared offence,

    ii. was a participant in the affairs of an association either,

        a. when the declared offence was committed, or

        b. during the course of the commission of the declared offence, and

    iii. did, or omitted to do, the act that constitutes the declared offence, intentionally, knowingly or recklessly,

        a. for the purposes of the relevant association, or

        b. in the course of participating in the affairs of the relevant association.

11. The second element of being a "*participant in the affairs of an association*" (s5(1)(b)) takes its meaning from the definition of "*participant*" in s4. Participant is not used there in its ordinary sense. It includes those that assert, declare, advertise, or seek membership or association (irrespective of whether actual membership can be shown): s4(a) and (b). A person may also be a participant if the prosecution can establish past attendance at more than one gathering or meeting of others who can be demonstrated to participate in the affairs of the association: s4(c). Proof of that will require proof of at least two meetings or gatherings of those that participate in the affairs of the association and proof that the defendant attended those meetings or gatherings. The meeting must be a meeting or gathering *of* those persons. It is not sufficient that it is a meeting or gathering where those persons happen to be present (amongst

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8 *R v Lavender* (2005) 222 CLR 67 at 97 [94] (Kirby J).

9 *Beckwith v The Queen* (1976) 135 CLR 569 at 576 (Gibbs J); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [41] (Hayne, Heydon, Crennan and Kiefel JJ).

others). Accordingly, it will be necessary to understand something about the meeting to understand if it is *of* those who participate.

12. Subsection 4(d) is a 'catch all' provision. Establishing it will require proof of one or more of the affairs of the association and a sufficiently substantial contribution to those affairs by the defendant such that it can be said that they have '*taken part*' in them (where that contribution is not a form of taking part otherwise within subsections 4(a), (b) or (c)). "*Affairs*" is a matter apparently wider than purposes, and is directed to the activities or business of the association.

13. The third element [10(iii) above] contains a mental element directed to the physical act or omission that constituted the declared offence. It requires that the defendant must have done or omitted to do the act intending or knowing that it was for the purposes of the association, or being reckless thereto, or, intending or knowing that by their act they participated in the affairs of the association, or being reckless thereto. The existence of that mental element follows from an application of the principles stated by this Court in *He Kaw Teh v The Queen.*[10]

14. Proof of these alternatives requires a differing focus. As to the first, demonstrating the act or omission to be for the purposes of the association will require proof, first, of the relevant association and, second, that the act was intended or known to be for the purposes of the association in the sense that it contributed, benefited or advanced the association, or that the defendant was reckless thereto. It need not be established that it was in fact a purpose of the association. The alternative route contains both the mental element that it be intended for that purpose and a physical element that it was in fact for that purpose. Proof is required, first, of the association; second, of one or more of its affairs; third, that the act proven by the offence formed a part of the participation in those affairs; fourth, that was intended or known or the defendant was reckless to that result.

15. The possible circumstance of a person who was once, but who is no longer, affiliated with an association is addressed by the third element. A person who has ceased to be a member, or who once attended meetings but has at the time of the offence ceased to do so, cannot be shown to have acted for the designated purpose and, of course, will not have acted in the course of participating in the affairs of the association.

16. The elements so stated suggest that the prosecution could not show that the defendant posited as an example in the plaintiff's submissions was either possessing the drug in the course of participation in the affairs of the association, or for its purposes. That is, the act of possession must be part of the participation. Temporal coincidence is not sufficient.

17. The defence in s5(2) does not operate directly in aid of proof of any of the elements in s5(1). In

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10 *He Kaw Teh v The Queen* (1987) 157 CLR 523 at 529-30, 535 (Gibbs CJ), 546 (Mason J), 556-7 (Wilson J), 565, 583 (Brennan J), 596-7 (Dawson J).

that respect it differs from provisions widely used in the criminal law that cast a burden upon a defendant to disprove a presumed element on the balance of probabilities. The defence requires proof of an objective fact: that the association does not have as one of its purposes, the purpose of engaging in, or conspiring to engage in, declared offences. Proof of that matter will require the defendant to establish the purposes of the association. In the event it seeks to do so, the prosecutor will be entitled to lead evidence to establish that a purpose of the organisation was to engage in declared offences. Proof of that matter can be a matter of inference from objective circumstances about the commission of the declared offence, or from the circumstances of other offences, or from direct evidence as to the activities of its members.

18. It is relevant to the constitutional argument to observe that proof that a person committed a declared offence either for the purposes of, or in the course of participating in the affairs of, an association will be a substantial factual undertaking for the prosecutor. There is nothing about it that is 'presumptive'. In some cases it will be a matter of inference from the objective evidence of the presence of other participants in the association who are acting in concert, for example, an affray. In others, there will not be that objective evidence from which an inference can be drawn, but proof of a connection between the criminal activity and the association will be required.

Sections 72, 92A, 320 and 340 of the Criminal Code

19. Sections 72(2), 92A(4A), 320(2) and 340(1A) of the *Criminal Code* operate, in the event of proof of a basic offence, to give rise to liability to either a mandatory minimum penalty (ss320(2) and 340(1A)), a higher maximum penalty (s92A(4A)) or both (s72), upon proof of an aggravating factor. These aggravating factors operate, however, in a different way to the *VLAD Act*. The variations in ss92A, 320 and 340 are addressed briefly below, however at this point these submissions focus on the elements of the aggravating factor in s72 because, of all the impugned provisions, it is alone in making being a participant in a criminal organisation the sole aggravating feature. Before the penalties prescribed in s72(2) will apply, the prosecution must establish the elements of the offence and the aggravating factor beyond a reasonable doubt, namely that the defendant:

i. intentionally took part in a fight; and

ii. either,

   a. the fight was in a public place, or

   b. the fight was in any other place to which the public had access and of such a nature as to alarm the public; and

iii. that the defendant is a participant in a criminal organisation.

20. The prosecution may prove that a given organisation is a "*criminal organisation*" in three ways:[11]

    i. by adducing evidence proving that the defendant is one of 3 or more persons who have as their purpose, or 1 of their purposes, engaging in, organising, planning, facilitating, supporting, or otherwise conspiring to engage in, serious criminal activity as defined under the *Criminal Organisation Act 2009* (Qld), and, who, by their association, represent an unacceptable risk to the safety, welfare or order of the community;

    ii. by proving as a fact that the organisation is one in respect of which a declaration has been made under the *Criminal Organisation Act 2009* (Qld) or a registered declaration has been made under a corresponding law; or

    iii. by proving as a fact that the organisation is one which has been declared to be a criminal organisation under the *Criminal Code (Criminal Organisations) Regulation 2013* (Qld).

21. A "*participant*" in a criminal organisation for the purposes of s72(2) is defined in s60A of the *Criminal Code*. Although there are some similarities to the definition found in s4 of the *VLAD Act*, there are relevant differences significant to its operation. Aside from the inclusion of "*a director or officer of the body corporate*" as a participant, and the exclusion of "*a lawyer acting in a professional capacity*" from being a person taking part in the affairs of the organisation, there is a difference in the temporal expression of the remaining limbs from that found in the *VLAD Act*. The expression, "*a person who takes part*", introduces a requirement of contemporaneity. It is insufficient for a court to conclude that a person had once taken part, without also inferring that by reason of their past conduct they continue to do so. The same applies to a "*person who attends more than 1 meeting*", meaning that it is insufficient to prove only that in the past they had so attended, without the inference that they continue to be a participant by attending. This would allow a defendant that had broken off ties to demonstrate they were not a "*participant*". Aside from those differences, proof that a defendant is a "*participant*" is relevantly identical to that described above at paragraph [11].

22. Section 72(2) represents the clearest case to consider the plaintiff's *Kable* argument, because the aggravating feature for that offence is only that the defendant be a participant in a criminal organisation. There is no necessity to prove any direct or indirect relationship between being a participant and the conduct giving rise to the affray. While that linkage does not need to be demonstrated with the other offences in the *Criminal Code* either, the other offences are complicated by the need to establish additional aggravating factors relating to the circumstances of the crime. In the case of s320(2), in addition to establishing the defendant is a "*participant*", proof is required that the victim who sustained grievous bodily harm is a police officer acting in the execution of their duty. Section 340(1A) also requires the victim assaulted to be a police officer. Section 92A(4A) is altogether different. It does not penalise members of associations at all. Rather, it imposes a higher maximum penalty on public officers that unlawfully confer a benefit on a third party where that third party was a participant at the time of the offence in a

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11 *Criminal Code*, s1.

criminal organisation. It is only in that limited way that the concept of being a participant has relevance to the penalty to be imposed.

The Second Category: where participation is an element of a criminal offence

Sections 60A, 60B and 60C

23. Each of ss60A(1), 60B(1) and (2) and 60C create offences an element of which is that the defendant is a participant in a criminal organisation. In each case, they require proof of other intentional or reckless conduct.

24. To prove a breach of s60A, the prosecution would need to establish that the defendant:

    i. was a participant in a criminal organisation[12];

    ii. was present in a public place with 2 or more other persons who were participants in a criminal organisation; and

    iii. knew those other persons were participants in a criminal organisation.

25. The second element requires proof, in addition to the physical element, of knowledge of joint presence. The third element requires proof of knowledge by the participant of the participation of the others in a criminal organisation. It is not necessary that the criminal organisations be the same. Proof of the third element could be by inference, but in many cases will need to be demonstrated from past dealings or association. As with the *VLAD Act*, s60A(2) provides a defence that turns on the character of any of the criminal organisations which are the subject of s60A(1). The prosecution is not required to prove anything about the character of a given criminal organisation. As such, the defence does not operate to relieve the prosecution of the burden of proving an element of the offence.

26. In the case of s60B(1) and (2), the prosecution will need to establish that the defendant:

    i. is a participant in a criminal organisation; and

    ii. intentionally, either,

        a. enters, or attempts to enter, a prescribed place (s60B(1)), or

        b. attends, or attempts to attend, a prescribed event (s60B(2)).

27. Proof of the second element on either alternative does not require proof that the person intended to, or was reckless as to, entering a place or attending an event that they knew was prescribed under the regulations. It is sufficient that they were intending to enter or attend a place or event, whether or not they were aware it was prescribed.[13]

28. Section 60C requires proof that the defendant:

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12 Proof of this element will occur as discussed at paragraphs [20]-[21] above.

13 *Proudman v Dayman* (1941) 67 CLR 536, 541-2 (Dixon J).

i. is a participant in a criminal organisation[14];

ii. intentionally recruits, or attempts to recruit, (including by counselling, procuring, soliciting, inciting, or inducing a person, or by promoting the organisation to a person) anyone to become a participant in a criminal organisation;

iii. intending by that conduct that the other person becomes a participant in a criminal organisation.

29. The second element requires evidence of the relevant conduct, including whether it is sufficient to amount to recruiting and whether it amounts to recruiting the person to become a participant (as defined). The third element contains a mental element as to the intentional purpose of that conduct.

The Third Category: where wearing or carrying an item is an element of an offence where that item is a symbol of or linked in meaning to a declared criminal organisation

Sections 173EA, EB, EC and ED of the Liquor Act

30. The third category of impugned offences under ss173EB, 173EC and 173ED of the *Liquor Act* do not share characteristics in common with the other impugned provisions. They do not require proof of an element of participation. Rather, they simply prohibit certain items from being worn or carried in licensed premises, those items being linked with a declared criminal organisation by a marking displayed on the item.

31. The prohibition is structured in the familiar form of prohibiting possession in specified circumstances. Focussing on the offence directed at patrons, s173EC, the prosecution must prove that the defendant:

i. entered or remained in licensed premises;

ii. that at the time of entering or whilst remaining, they knowingly wore or carried an item;

iii. that item is clothing, jewellery or an accessory that displays either:

a. the name, club patch, insignia or logo of, or

b. any image or symbol, abbreviation or acronym or writing that indicates membership or association with,

iv. a declared criminal organisation (including the 1% symbol).[15]

32. The corresponding offence for licensees prohibits them from knowingly allowing entry of a person wearing or carrying such an item: s173EB. Section 173ED empowers a licensee to require a person wearing or carrying such an item to leave and makes it an offence if they fail to comply.

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14 Section 60C(3) provides that a criminal organisation does not include a criminal organisation under the *Criminal Organisation Act 2009*.

15 A patch bearing the 1% symbol is used to denote full membership of an outlaw motorcycle gang. It represents the fact that, as noted at [11] of the Further Amended Special Case, members of outlaw motorcycle gangs "*see themselves as the 'one percenters' who operate outside the law—as opposed to the 99 per cent operating within its confines.*" - Australian Crime Commission, Outlaw Motorcycle Gang Factsheet.

The Fourth Category: where participation alters the presumption applicable to the exercise of an executive and/or judicial power

33. The impugned provisions of the *Bail Act* require separate categorisation because there is no anterior trial resulting in a conviction and they do not exclusively involve the exercise of judicial power.

34. Putting to one side bail post-conviction and pending appeal, the jurisdiction to grant bail, now regulated by statute[16], is a power to order that an individual accused of committing a crime be released from the custody of the executive, upon such conditions as may be necessary, whilst awaiting trial. The jurisdiction is conferred both upon members of the police force, and upon the courts. In relation to certain crimes carrying heavy penalties, the Supreme Court is the sole bail authority.[17]

35. The duty to grant bail contained in s9 is expressed to be "*subject to this Act*".[18] Section 16 of the *Bail Act* is the primary provision to which that duty is "*subject*". It provides that "*notwithstanding*" the other provisions of the *Bail Act*, the bail authority shall refuse to grant bail to a defendant in certain circumstances. Section 16(1) provides that the bail authority shall refuse to grant bail if satisfied that there is an "*unacceptable risk*" that the defendant would fail to appear for trial, or commit an offence whilst on bail. The court is empowered, in determining whether a risk is unacceptable, to have regard to all matters which it considers to be relevant and further directed to have regard to any of a number of enumerated considerations which appear to be relevant.[19]

36. Section 16(3) identifies a number of circumstances in which the court is directed to refuse to grant bail unless the defendant "*shows cause*" why their detention in custody is "*not justified*". These circumstances relate to the circumstances of the offender and of the offence. In showing cause, the defendant is required, in practice, to show that there is not an unacceptable risk that they will either not appear for trial or commit an offence whilst on bail.

37. The impugned s16(3A) provides another circumstance in which the defendant is required to "*show cause*": where it is alleged that the defendant is a participant in a criminal organisation. The definitions of participant and criminal organisation are the same as under the *Criminal Code*.[20] In circumstances where it is alleged that the defendant is a participant in a criminal association, the defendant will need to show cause why their detention in custody is not justified. The accused bears the onus of demonstrating that the risk that they will fail to appear and surrender into custody, or will commit an offence whilst released on bail, is not unacceptable.

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16 See *Chu Kheng Lim v Minister for Immigration and Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28-9 (Brennan, Deane and Dawson JJ) as to the common law power to grant bail.

17 *Bail Act*, s13.

18 *Bail Act*, s9.

19 *Bail Act*, s16(2).

20 *Bail Act*, s6.

38. This shift in the onus does not otherwise affect the procedure adopted by the bail authority in determining whether bail ought to be granted. The bail authority will weigh the evidence put forward by the defendant and the complainant or prosecutor and reach its own view in the exercise of a broad discretion with respect to whether bail ought be granted. The defendant is not compellable as a witness and may not be examined by the court.[21] The court may have regard to any matter that it considers to be relevant,[22] and any matters agreed upon between the defendant and the complainant or prosecutor.[23] The court may receive evidence of any kind which it considers "*credible or trustworthy*".[24] The court remains obliged to afford procedural fairness.

10 ***The operation of the impugned provisions in the context of the prosecution of criminal offences and sentencing in Queensland***

39. The impugned offences addressed in the second[25] and third[26] categories operate in the same terms as any other criminal offence under the *Criminal Code*. All of the elements of the offence, including, where it is an element, participation, must be established beyond reasonable doubt. The normal features of the common law system of adversarial trial including the rights of the defendant and the rules of evidence and procedure are unaffected.

40. As to the impugned circumstances of aggravation in the first category,[27] the *Criminal Code* requires that any "*circumstance of aggravation*" upon which the prosecution intends to rely must be charged in the indictment.[28] A circumstance of aggravation is defined to mean "*any circumstance*
20 *by reason whereof an offender is liable to a greater punishment than that to which the offender would be liable if the offence were committed without the existence of that circumstance*".[29]

41. Any circumstance of aggravation which increases the maximum penalty applicable to an offence may only be taken into account by the sentencing court if it is admitted, or if contested, if it is proven to the satisfaction of the jury, or the trial judge.[30]

42. In the event of a plea of guilty to the charge without the aggravating circumstance, the relevant facts amounting to the aggravating feature remain to be resolved by the trier of fact. In the event of a plea of not guilty to an indictment where circumstances of aggravation are charged, a jury may return a verdict in relation to the underlying offence "*with or without any of the*

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21 *Bail Act*, s15(1)(b).
22 *Bail Act*, s16(2).
23 *Bail Act*, s15(1)(d).
24 *Bail Act*, s15(1)(e).
25 See paragraphs [23] to [29] above.
26 See paragraphs [30] to [32] above.
27 See paragraphs [10] to [22] above.
28 *Criminal Code*, s564(2).
29 *Criminal Code*, s1.
30 *Kingswell v The Queen* (1985) 159 CLR 264 at 279-80 (Gibbs CJ, Wilson and Dawson JJ), 288, 290-1 (Brennan J).

circumstances of aggravation charged in the indictment".[31]

43. Where a jury has given a verdict, the sentencing judge is not able to sentence upon a view of the facts which is inconsistent with the verdict of the jury.[32] Similarly, the prosecution may not seek to rely on a fact as warranting a higher penalty for a charge of an offence without aggravating features if that fact was capable of amounting to a circumstance of aggravation for which a higher maximum penalty was applicable if it is not pleaded and proven.[33]

44. Applied to the impugned provisions, the circumstances of aggravation comprise additional factual matters that must be proven by the prosecution beyond a reasonable doubt. The sentencing jurisdiction of the court with respect to the consequences of the circumstance of aggravation is only enlivened following a conviction or plea of guilty, with the full range of procedural safeguards ordinarily applicable to the process of determination of criminal guilt.

45. Under the *VLAD Act*, the sentencing judge is required to first impose a sentence for the declared offence without regard to the further punishment to be imposed by reason of the circumstances in which the offence was committed. The judge must then impose the further sentences fixed by s7(1)(b) and, in some circumstances, s7(1)(c). These further sentences must be served cumulatively with the base sentence imposed and may not be mitigated or reduced, except where an offender undertakes to cooperate with law enforcement agencies under s9.

46. Proof of the circumstances of aggravation created by ss72, 320 and 340 of the *Criminal Code* also has the effect of fixing the minimum sentence which the sentencing judge may impose in the exercise of the sentencing discretion. The operation of such minimum sentences has been fully addressed by this Court in *Magaming v The Queen*.[34]

The Kable doctrine and the argument made by the plaintiff

47. The principle for which *Kable*[35] stands is that the constitutional structure under which federal jurisdiction may be vested in State courts imposes an implied limitation on the legislative powers of the States.[36] That limitation prevents State Parliaments from interfering with the institutional integrity, or defining characteristics of, State courts. As the majority explained in

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31 *Criminal Code*, s575.

32 *Savvas v The Queen* (1995) 183 CLR 1 at 8 (Deane, Dawson, Toohey, Gaudron and McHugh JJ).

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

34 *Magaming v The Queen* (2013) ALJR 1060.

35 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

36 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 96 (Toohey J), 106 (Gaudron J), 116-9 (McHugh J), 127-128 (Gummow J); *Baker v The Queen* (2004) 223 CLR 513 at [6] (Gleeson CJ), [51] (McHugh, Gummow, Hayne and Heydon JJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [15] (Gleeson CJ), *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [41] (Gleeson CJ), [57] (Gummow, Hayne and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1 at [72] (French CJ); *Assistant Commissioner Condon v Pompano* (2013) 87 ALJR 458 at [67] (French CJ), [123] (Hayne, Crennan, Kiefel and Bell JJ); *Attorney-General (Northern Territory) & Anor v Emmerson* (2014) 88 ALJR 522 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

Attorney-General (NT) v Emmerson:[37]

> 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.

48. The *Kable* principle relevantly prevents:

    i. legislation requiring a State court to depart to a significant degree from ordinary methods and standards of judicial process;[38]

    ii. the direct enlistment of a State court in the implementation of legislative or executive policies[39] so as to cloak executive action with the neutral colours of judicial action;[40]

    iii. otherwise compromising the decisional independence of a State court.[41]

49. The plaintiff's complaint is expressed in the language of the first and second propositions. As to the first proposition, the plaintiff asserts that "*equal justice*" forms part of the ordinary methods and standards of judicial process and that the impugned laws contravene that requirement. The plaintiff's argument is that a requirement of "*equality before the law*" limits to "*relevant differences*" the power of a State Parliament to select a fact or circumstance to define a norm of conduct (or to define the penalty consequent upon a breach of a norm).[42] The plaintiff's complaint is that the factum selected by the Queensland legislature to create criminal liability or to distinguish between offenders in sentencing in each case is not a 'relevant' difference which could make offenders unequal. On its case, a factum so selected cannot be a "*matter which pertain[s] to the status and association of the offender rather than his or her 'personal and individual guilt*".[43] As to the second proposition, the plaintiff's complaint is that the impugned laws involve other than "*applying the law*" and enlist the courts to "*impose penalties and restrictions on organisations*" and thereby achieve "*disestablishment or destruction of [those] organisations*".[44]

Equal justice

50. The plaintiff submits that the impugned provisions are invalid because they require the Queensland courts to sentence individuals contrary to a fundamental principle of "*equality before*

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37 (2014) 88 ALJR 522 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); see also *Pollentine v Attorney-General (Qld)* [2014] HCA 30 at [42] ((French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

38 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 98 (Toohey J), 122 (McHugh J); *Pollentine v Attorney-General (Qld) and Ors* [2014] HCA 30 at [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at [54]-[56] (French CJ), [94]-[98] (Gummow and Bell JJ), [159] (Heydon J); *Wainohu v New South Wales* (2011) 243 CLR 181 at [68] (French CJ and Kiefel J), [104], (Gummow, Hayne, Crennan and Bell JJ). See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [100] (Gummow J), [141] (Kirby J).

39 *South Australia v Totani* (2010) 242 CLR 1 at [4], [41], [80]-[82] (French CJ), [100], [139], [149] (Gummow J), [226] (Hayne J), [428], [436] (Crennan and Bell JJ), [445], [469] (Kiefel J).

40 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 133 (Gummow J); *South Australia v Totani* (2010) 242 CLR 1 at [479] (Kiefel J).

41 *South Australia v Totani* (2010) 242 CLR 1 at [62] (French CJ).

42 Plaintiff's Amended Written Submissions, [60].

43 Plaintiff's Amended Written Submissions, [60].

44 Plaintiff's Amended Written Submissions, [70].

the law" or of *"equal justice"*. This submission should be rejected.

Equal justice and the *Constitution*

51. There is nothing in the text of the *Constitution* to support the existence of a principle of *"equality before the law"* which would limit the power of a State legislature to select facts or circumstances to define a norm of conduct. The Convention Debates show that the draft Bill of 1891 contained a clause modelled on the 14th Amendment of the United States Constitution, which required that a State not *"deny to any person ... the equal protection of the laws"*. Following extensive debate at the Melbourne session in 1898, which included discussion of United States Supreme Court jurisprudence on the equal protection clause, the clause was struck out.[45] However, it should be noted that even the United State Constitution's equal protection clause does not preclude discrimination on relevant grounds.[46]

52. Moreover, the existence within the *Constitution* of a principle of substantive equality, whether arising from Chapter III or the federal structure, has been rejected by a majority of this Court on a number of occasions. The majority in *Leeth v The Commonwealth*[47] rejected any implication of a principle of equal justice drawn from the text or structure of the *Constitution*.[48]

53. In *Kruger v Commonwealth,* the existence of a constitutional principle of equal justice was again rejected by a majority of this Court.[49] In so doing, Dawson J stated:

> What is clear is that Ch III says nothing, either expressly or by implication, requiring equality in the operation of laws which courts created by or under that Chapter must administer. Those courts have an obligation to administer justice according to law. No doubt that duty is to do justice according to valid law, but Ch III contains no warrant for regarding a law as invalid because the substantive rights which it confers or the substantive obligations which it imposes are conferred or imposed in an unequal fashion.[50]

54. Brennan CJ further rejected any implication of *"substantive equality"* by reference to the fact that from Federation until 1967, the *Constitution* itself by s127 had expressly discriminated against *"Aboriginal natives"*.[51]

Equal justice and the judicial process

55. Courts are guided by the principle of equal justice in applying the laws passed by the legislature. It requires laws to be applied equally and consistently. It is in that way that equal justice is embodied in the judicial process.[52] In *Green v The Queen* French CJ, Crennan and Kiefel said:

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45 Official Report of the National Australasian Convention Debates, Melbourne, 8 February 1898, 691.
46 *American Communications Association v Douds*, 339 U.S. 382 (1950), at 391-2.
47 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 470 (Mason CJ, Dawson and McHugh JJ), 480 (Brennan J).
48 See also *Putland v The Queen* (2004) 218 CLR 174 at [25] (Gleeson CJ), [59] (Gummow and Heydon JJ, with whom Callinan J agreed)
49 *Kruger v Commonwealth* (1997) 190 CLR 1 at 44-5 (Brennan CJ), 66-9 (Dawson J), 142 (McHugh J), 153-5 (Gummow J)
50 *Kruger v Commonwealth* (1997) 190 CLR 1 at 68 (Dawson J), McHugh J agreeing at 142.
51 *Kruger v Commonwealth* (1997) 190 CLR 1 at 44-5 (Brennan CJ); To similar effect see Gummow J at 153-5.
52 *Green v The Queen* (2011) 244 CLR 462 at [28] (French CJ, Crennan and Kiefel JJ).

> "Equal justice" embodies the norm expressed in the term "equality before the law". It is an aspect of the rule of law . It was characterised by Kelsen as "the principle of legality, of lawfulness, which is immanent in every legal order". It has been called "the starting point of all other liberties". It applies to the interpretation of statutes and thereby to the exercise of statutory powers. It requires so far as the law permits, that like cases be treated alike. Equal justice according to law also requires, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law. ... [53]

10 Equal justice and sentencing

56. In the sentencing context, the principle of equal justice informs the task of a sentencing court in applying the law to determine the appropriate sentence as part of the instinctive synthesis.[54] It finds expression in the concept of "*parity*" and more broadly in the objectives of "*reasonable consistency*" and "*systematic fairness*".[55] However, as noted in *Hili*, the "*first and paramount means*" for achieving consistency is the application of the relevant statutory provisions.[56] Equal application of the law will produce equal sentences only in cases that are relatively identical.[57] The plaintiff's argument fails to recognise that what equal justice requires is the equal application of legal principles.[58]

57. For that reason, the principle of equal justice cannot provide any basis for a judicial
20 determination of what differences fixed upon by the legislature are properly to be regarded as "*relevant*". That is for Parliament. The majority in *Green* referred to the "*useful*" description of the distinction between equality before the law and substantive equality in the work of Sadurski.[59] As that learned author notes, the principle of "*equal justice*" or "*equality before the law*" (as opposed to equality *in* law)-

> ...is neutral as to which differences are relevant and thus justify differentiated treatment ... Equality in the application of legal rules means nothing more than that only differences which are relevant (from the point of view of the legal rule) should be taken into account when this rule is applied or enforced. It is the legal rule (and not, say, a judge's whim) that determines which differences are relevant.[60]

30 Relevance is therefore determined by the legal rule which is being applied.

58. Similarly, in *Leeth v The Commonwealth*,[61] Mason CJ, Dawson and McHugh JJ stated:

> ...[i]t is obviously desirable that, in the sentencing of offenders, like offenders should be treated in a like manner. But such a principle cannot be expressed in absolute terms. Its application requires the determination of the categories within which equal treatment is to be measured.

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53 (2011) 244 CLR 462 at [28].
54 *Wong v The Queen* (2001) 207 CLR 584 at [75] (Gaudron, Gummow and Hayne JJ).
55 *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).
56 *Hili v The Queen* (2010) 242 CLR 520 at [50] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
57 *Wong v The Queen* (2001) 207 CLR 584 at [65] (Gaudron, Gummow and Hayne JJ).
58 *Wong v The Queen* (2001) 207 CLR 584 at [65] (Gaudron, Gummow and Hayne JJ).
59 *Green v The Queen* (2011) 244 CLR 462 at [28], footnote 72 (French CJ, Grennan and Kiefel JJ).
60 Wojciech Sadurski, "*Equality before the law: a conceptual analysis*" (1986) 60 ALJ 131 at 132.
61 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 470 (Mason CJ, Dawson and McHugh JJ).

59. A principle of equal justice, if it is to perform the task into which the plaintiffs seek to apply it, must be a principle of substantive equality.

60. If legislation could be held invalid if it required a court to impose a sentence by reference to factors which do not reflect *"relevant differences"*, courts would be required to assess the competing political and social considerations relevant to the formulation of the criminal law. This would, in turn, require the leading of evidence to establish the basis upon which the legislature had determined that certain distinguishing features should be treated as *"relevant"* and so warranted differential treatment. Even if such an evidentiary foundation could be laid, such an inquiry forms no part of the judicial function. It would be impossible to draw a logical limitation upon the scope of the enquiries into validity which courts would be required to undertake.[62]

Equal justice and the offences under the *Criminal Code* and the *VLAD Act*

61. Even if the institutional integrity of a State court would be impaired by a requirement that it act contrary to a principle of substantive equality before the law, properly understood the impugned principles do not impose such a function. As outlined above, the impugned provisions fall into four broad categories. The plaintiff only alleges that provisions falling into the first and fourth categories require a court to act in breach of a principle of equal justice.[63]

62. The first category involves making participation in a criminal organisation, or commission of an offence in furtherance of the purpose of, or an offender's participation in, an organisation, a circumstance of aggravation rendering such a participant liable to harsher penalties consequent upon the commission of an offence.

63. Contrary to the plaintiff's submissions, the additional penalties imposed under the *VLAD Act* are not imposed *"by reason of who [an offender] associates with"*[64] or, indeed, by reference to anything other than the *"personal and individual guilt"* of the individual.[65] The further sentences are imposed following proof that the offender committed a declared offence in particular circumstances with a particular state of mind, namely for the purposes of or in the course of participating in the affairs of an association: s5(2). It is open to the legislature to consider these circumstances a relevant difference warranting greater punishment. Doing so, Parliament has determined what ultimately is required, in the event of conviction by a court applying the common law adversarial process, to deter and protect.

64. The same is true of the mandatory minimum and increased maximum sentencing guideposts which are introduced following proof of participation in a criminal organisation as an

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62 *Nationwide News v Wills* (1992) 177 CLR 1 at 45 (Brennan J).
63 Plaintiff's Amended Written Submissions, [49], [12].
64 Plaintiff's Amended Written Submissions, [10](a).
65 Plaintiff's Amended Written Submissions, [60].

aggravating circumstance under ss 72(2), 92A(4A),[66] 320(2) and 340(1A) of the *Criminal Code*. Parliament is entitled to take the view that, if individuals having certain discriminating features pose a greater risk to the community, a greater penalty is warranted by way of specific and general deterrence.

65. Parliaments have for a long time selected discriminating features that make an offender subject to a greater penalty. Many such discriminating features can be found in the *Criminal Code*. Some of those features are dependent on a* characteristic of the offending (the amount of alcohol on a person's breath)[67], some on the characteristics or circumstances of the victim (whether they are a police officer[68]), the result of the offence (such as "*endangering life*"[69] or "*causing grievous bodily harm*"[70]) or the circumstances of the offender (including whether they are an employee,[71] a director[72] or a repeat offender[73]). In each instance, Parliament has undertaken an assessment of the seriousness of certain undesirable activity and determined accordingly a level of punishment aimed at suppressing it.[74]

66. Disregarding the mandatory nature of the sentences which are imposed,[75] the impugned provisions merely require the Queensland courts to administer the criminal law of Queensland in the ordinary way. No function is conferred upon a Queensland court directing it to *act, perform a function or conduct its processes* in a particular manner. Rather, the complaint is that the *result* of the court's enforcement of the impugned provisions may lead to injustice. This is a complaint about the political wisdom of the impugned provisions. It is not a complaint which is capable of judicial determination.[76]

67. The plaintiff further argues that the impugned provisions relating to sentencing and bail "*suffer from substantially the same vice*" as that identified in the judgment of Hayne J in *South Australia v*

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66 It can be observed that the challenge to s92A(4A) on the grounds of equality before the law is misconceived. As outlined at paragraph [22] above, s92A(4A) does not impose any penalty upon participants in criminal associations. It penalises conduct of public officers who dishonestly seek to confer benefits upon participants in criminal organisations.

67 *Criminal Code*, s328A(4) (dangerous driving causing death or grievous bodily harm while adversely affected by an intoxicating substance carries a maximum penalty of 14 years' imprisonment); s328A(3)(a) (requiring a custodial sentence to be imposed for dangerous operation of a vehicle if the offender has previously been convicted of the same offence while adversely affected by an intoxicating substance).

68 *Criminal Code*, s305(3) (murder of a police officer knowing that the person was a police officer carries a minimum non-parole period of 25 years' imprisonment).

69 *Criminal Code*, s322 (administering poison which endangers the life of, or does grievous bodily harm to, a person carries a maximum penalty of 14 years' imprisonment, otherwise 7 years' imprisonment).

70 *Criminal Code*, s61 (riot causing grievous bodily harm to a person carries a maximum penalty of life imprisonment, otherwise 3 years' imprisonment).

71 *Criminal Code*, s389 (clerk or servant stealing from employer carries a maximum penalty of 10 years' imprisonment).

72 *Criminal Code*, s389 (director stealing from company carries a maximum penalty of 10 years' imprisonment).

73 *Criminal Code*, s328A(3)(b) (requiring a custodial sentence to be imposed for dangerous operation of a vehicle if the offender has been twice previously convicted of a prescribed offence).

74 *Magaming v The Queen* (2013) ALJR 1060 at [105] (Keane J).

75 Which cannot itself impair the institutional integrity of a State court: *Palling v Corfield* (1970) 123 CLR 52 at 58 (Barwick CJ); *Magaming v The Queen* (2013) ALJR 1060 at [24], [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). The plaintiff appears to acknowledge as much: Plaintiff's Amended Written Submissions, [71].

76 *Burton v Honan* (1952) 86 CLR 169 at 179 (Dixon CJ); *Nationwide News v Wills* (1992) 177 CLR 1 at 45 (Brennan J).

Totani.[77] This submission should be rejected. Section 14 of the *Serious and Organised Crime (Control) Act 2008* (SA) ("**SOCC Act**") required the Magistrates Court, upon application of the executive, to make a control order if satisfied that the individual the subject of the application was a member of a declared organisation. The SOCC Act specified the terms to be included in the control order, which included a restriction on association with other members of declared associations, and created criminal sanctions for the breach of the control order. The terms of a control order imposed far stricter restrictions on association than were imposed on members of declared associations who were not subject to a control order.

68. The effect of the SOCC Act was that it required the Magistrates' Court to create new norms of conduct for only those members in respect of whom the executive determined that an application should be made, without the court being able to determine whether such norms were appropriate in relation to the individual. The Court was enlisted by the Executive to create norms of conduct upon proof of membership alone. By contrast, in *Thomas v Mowbray*,[78] the judicial creation of norms of conduct through the issuing of control orders was permissible as it required the court to be satisfied that the individual had, or was at risk of, committing an unlawful act. The passages from the judgment of Hayne J set out by the plaintiff merely make the point that the definition of membership under the Act did not enable the court to be satisfied that an individual possesses any particular characteristics which would justify the court in creating a new norm of conduct for that individual over and above that binding upon the public as a whole.[79]

69. In the present case, the Queensland courts are not required to create new norms of conduct. The impugned provisions themselves create the norms of conduct. The Queensland courts are simply required to enforce the criminal law in the ordinary way. *Totani* does not assist the plaintiff.

Equal justice and the *Bail Act*

70. The fourth category involves the reversal of the presumption in favour of bail in circumstances in which it is alleged that a defendant is a participant in a criminal organisation. The common law jurisdiction, referred to at paragraph [34] above, to release from custody a person detained by the executive while awaiting trial is subject to legislative regulation, or even abridgement. The legislative process of regulating the grant of bail necessarily includes an element of prediction, by reference to common characteristics, as to whether an individual would, if

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77 Plaintiff's Amended Written Submissions at [54]-[55], citing *South Australia v Totani* ("*Totani*") (2010) 242 CLR 1 at 90-3 [232]-[235] (Hayne J).

78 *Thomas v Mowbray* (2007) 233 CLR 307.

79 Thus, French CJ agreed with Hayne J's conclusion at [236] regarding "the operation of s 14(1) in permitting the executive to enlist the Magistrates Court for the purpose of applying special restraints to particular individuals identified by the executive as meriting application for a control order and the repugnancy of that function to the institutional integrity of the Court": *South Australia v Totani* (2010) 242 CLR 1 at [82] (French CJ).

released pending trial, be at risk of absconding or posing a danger to the community.

71. The impugned provisions of the *Bail Act* are examples of legislation that regulates the manner in which the court exercises its jurisdiction. It places a burden upon a participant in a criminal organisation to show cause why his or her detention in custody is not justified. The impugned provisions do not prevent the accused person from obtaining bail.[80] The court retains a broad discretion to have regard to all the relevant evidence in determining whether the detention of the accused in custody is justified. It is well established that a legislature may validly regulate the manner in which facts must be proven and in which a conferred jurisdiction will be exercised.[81]

An instrument of the executive

10 72. The analysis of the elements of the impugned offences and the rules of criminal procedure and sentencing practice within which they operate set out above[82] demonstrates that the court has a genuine and substantial adjudicative role. The elements, or circumstances of aggravation, must be proven by the prosecution beyond a reasonable doubt within the context of a contested criminal trial and sentencing hearing. Despite this, the plaintiff submits the impugned provisions are invalid because they enlist the courts to *"act as an instrument of the executive'*[83] in that the function conferred seeks to *"achieve a particular policy objective of the executive"*, namely the *"destruction of certain organisations"*, rather than requiring the courts to perform their ordinary function of *"applying the law."*[84]

73. This submission is premised on a misunderstanding of the *Kable* principle as a limitation on
20 State legislative power. What is prohibited is a court being required to act as an *'instrument of the Executive'* in relation to the outcome of a particular case.[85] The defining characteristic of a *'court'* which is being protected is that of decisional independence.[86]

74. The validity of legislation must be resolved by examining the practical effect of the legislation upon the apparent and actual decisional independence of the court. It does not depend upon the particular language employed by the Executive government in announcing the policy of a Bill introduced to the Legislature. In applying the impugned provisions, the court operates within an adjudicative process in which the outcome of each case is to be determined on its merits.[87] The court is not involved in implementing a political decision of the executive

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80 Indeed, participants in criminal associations have received bail on a number of occasions despite the impugned provisions of the *Bail Act*: see eg *Re Alajbegovic* [2014] QSC 6; *Re Bloomfield* [2014] QSC 115.

81 *Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1 at 12 (Knox CJ, Gavan Duffy and Starke JJ); *Nicholas v The Queen* (1998) 193 CLR 173 at [24] (Brennan CJ); *Williamson v Ah On* (1926) 39 CLR 95 at 122 (Higgins J).

82 Paragraphs [10] to [46] above.

83 Plaintiff's Amended Written Submissions, [63].

84 Plaintiff's Amended Written Submissions, [71].

85 *Assistant Commissioner Condon v Pompano* (2013) 87 ALJR 458 at [78] (French CJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [39] (Gummow, Hayne, Heydon and Kiefel JJ).

86 *South Australia v Totani* (2010) 242 CLR 1 at [62] (French CJ).

87 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [19] (Gleeson CJ).

government in relation to a particular case.[88]

75. All laws are necessarily premised upon the Parliament's view of social and public policy, as laws for the peace, order and good government of the State. Conduct which is viewed by the community as undesirable is criminalized through the creation of new norms of conduct and an appropriate range of penalties is determined, taking into account a broad range of policy factors. In some cases, the executive government may enunciate its view of the appropriate balance to be struck publicly in the form of a policy statement. Such a policy statement may indicate that proposed legislation will require courts to exercise their sentencing discretion in a particular way in relation to particular proscribed conduct. As French CJ has noted "*[a]ll legislation reflects policies attributable to the legislature but, in many if not most cases, they are policies originating with the executive government as the proponent of most statutes enacted by the parliament*".[89] Upon the plaintiff's approach, the institutional integrity of a court applying any law which was enacted pursuant to such a policy would be impermissibly impaired. This neglects the fundamental principle that the role of the judiciary is to apply the law as declared by Parliament.

76. Comparably, in *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment,*[90] the requirement that judicial members of the Industrial Relations Commission give effect to government policy in making or varying awards or orders was held not to impair the decisional independence of the related Industrial Court. French CJ held that the legislation did not permit the creation of a regulation incorporating a policy which '*consists simply of a direction about the outcome of a particular case*'.[91] The majority held that the fact that the rules and principles applied by the Commission were characterized as government policy did not mean that the Commission was not applying the law. Simply applying the law could not interfere with the institutional integrity of a court.[92]

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88 *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 at 124 (McHugh J).

89 *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 87 ALJR 162 at [44] (French CJ); see also at [69] (Heydon J).

90 *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 87 ALJR 162.

91 *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 87 ALJR 162 at [41] (French CJ).

92 *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 87 ALJR 162 at [58] (Hayne, Crennan, Kiefel and Bell JJ).

Part VI: Estimate of time for oral argument

77. South Australia estimates that 25 minutes will be required for the presentation of oral argument.

Dated 15 August 2014

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