IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B14 of 2014

BETWEEN:

STEFAN KUCZBORSKI
Plaintiff

and

THE STATE OF QUEENSLAND
Defendant

SUBMISSIONS ON BEHALF OF THE DEFENDANT

I. CERTIFICATION

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

II. THE ISSUES

2. The issues are reflected in questions 1.1 to 1.4 of the further amended special case. They are:

   (a) whether the Plaintiff has standing to obtain declaratory relief in respect of the *Vicious Lawless Association Disestablishment Act 2013* (Qld) and certain impugned provisions of the *Criminal Code* (Qld) and the *Bail Act 1980* (Qld);

   (b) whether the relief that the Plaintiff seeks in respect of the VLAD Act and certain of the impugned provisions would be hypothetical; and

   (c) whether the VLAD Act and the rest of the impugned provisions are invalid for infringing the principle identified in *Kable v Director of Public Prosecutions (NSW)* ('the *Kable* principle').[1]

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[1] (1996) 189 CLR 51.

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Filed on behalf of: the Defendant, the State of Queensland

Prepared by:
Gregory Richard Cooper
Crown Solicitor
11 Floor State Law Building
50 Ann Street
Brisbane Qld 4000

Tel: (07) 3239 0885
Fax: (07) 3239 3456
Ref: PL8/ATT110/3108/NAF

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III. SECTION 78B NOTICES

3. The Plaintiff has given notice to the Attorneys-General in compliance with s 78B of the *Judiciary Act 1903* (Cth). The Defendant does not consider that any further notice is required.

IV. FACTS

4. The principal facts are set out at paragraphs 1 to 22 of the further amended special case.[2]

5. The following facts are also relevant.

6. On 27 September 2013, at approximately 8:30pm, a brawl allegedly involving several dozen members of the Bandidos and another motorcycle club occurred in the restaurant precinct of Broadbeach on the Gold Coast.[3]

7. On 28 September 2013, in the wake of that incident, the Queensland Government announced its commitment to a range of measures, including the introduction of tougher laws to tackle criminal gangs and the provision of additional resources for the Queensland Police Service to carry out a crackdown on such gangs.[4]

8. On 15 October 2013, the Queensland Government introduced into State Parliament three Bills: the Vicious Lawless Association Disestablishment Bill 2013; the Criminal Law (Criminal Organisations Disruption) Amendment Bill; and the Tattoo Parlours Bill.

9. Each of the three Bills passed in the Legislative Assembly without a division being required and commenced on 17 October 2013.

V. APPLICABLE LEGISLATION

10. The applicable legislation is:

    (a) Chapter III of the Constitution;

    (b) *Vicious Lawless Association Disestablishment Act 2013* (Qld) ('the VLAD Act');

    (c) *Criminal Code* (Qld) ('the Criminal Code'), ss 1 (definition of 'criminal organisation'), 60A, 60B, 60C, 72, 92A, 320 and 340;

    (d) *Bail Act 1980* (Qld) ('the Bail Act'), s 16; and

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2 Amended Special Case Book at 51-55.

3 Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3160 (Hon J P Bleijie, Attorney-General and Minister for Justice).

4 Explanatory Note, Vicious Lawless Association Disestablishment Bill 2013, p 1.

(e) *Liquor Act 1992* (Qld) ('the Liquor Act'), ss 173EA, 173EB, 173EC and 173ED.

VI. ARGUMENT

A. Summary

11. The Plaintiff contends that he has standing to seek declaratory relief in respect of all the impugned provisions, and that none of the relief that he seeks would be hypothetical.[5] He further contends that the VLAD Act and certain provisions of the Criminal Code are invalid because they breach fundamental notions of equality before the law or equal justice; and, in any case, all of the impugned provisions are invalid because they require the courts to act as an instrument of the executive and legislature.[6]

12. In response, the Defendant submits that:

(a) with certain exceptions,[7] the Plaintiff lacks standing to obtain declaratory relief in respect of any of the impugned provisions;

(b) alternatively, the relief that the Plaintiff seeks in respect of those provisions is hypothetical;

(c) in any event:

(i) the Constitution contains no principle of equal justice or general principle of equality that would apply so as to invalidate the VLAD Act and provisions of the Criminal Code;

(ii) neither the provisions of the VLAD Act or the Criminal Code create any circumstances of unequal justice or offend any general principle of equality; and

(iii) none of the impugned provisions impermissibly requires the courts to act as instruments of the executive or legislature.

13. Accordingly, the Plaintiff's challenge should be dismissed.

B. Preliminary matters

14. Several points, to be developed more fully in the outline below, should be highlighted at the outset.

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5 Plaintiff's submissions at [74]-[85].
6 Plaintiff's submissions at [10] and [50]-[71].
7 Criminal Code, ss 60A, 60B(1) and 60C; Liquor Act, ss 173EB to 173ED.

15. First, many of the Plaintiff's assertions about the operation of the legislation are revealed to be unfounded when the legislation is properly construed. For example, and as explained below at paragraphs [25] to [29], and [99] to [104] the central conception of a 'participant in the affairs of' a criminal organisation[8] or an association[9] is directed only to those who take part in the affairs of an organisation or association, or seek to do so. The suggestion that the provisions may apply to innocent spouses and children, or to accountants, is not only farfetched and fanciful, it is wrong.[10] Similarly, it is erroneous to construe the phrase 'in the course of participating in the affairs of ... the relevant association' (found in s 5(1)(c) of the VLAD Act) as having a wide meaning which gives rise to the irrational results outlined by the Plaintiff.

16. Secondly, each of the challenged provisions (other than those in the Liquor Act) provide that it is a defence for a person to demonstrate that the relevant association or criminal organisation does not have as one of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity.[11] In substance, this is no more than a reversal of the onus of proof. Parliament is undoubtedly competent to reverse the onus of proof.[12]

17. Put another way, if instead of being a defence, the mirror reverse of this was an element of the offence, circumstance for refusing bail or a circumstance of aggravation, as the case may be, no basis for the complaints made on behalf of the Plaintiff would exist. It must follow, that if Parliament is capable of reversing the onus of proof, in respect of proceedings otherwise to be determined in the way disputes in court are ordinarily determined, no question of offending the *Kable* principle arises.

18. Thirdly, what is 'relevant'[13] to why and how[14] individuals and groups of individuals who engage in criminal activity are to be effectively deterred from doing so, and punished if they do, are political, value-laden concepts properly for the legislature and the executive, and ultimately the community that elects them.

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8 See Criminal Code, s 60A(3). This definition is relevant to all of the challenged provisions in the Criminal Code, as well as s 16(3C) of the Bail Act.

9 See VLAD Act, s 4.

10 Plaintiff's submissions at [17]-[18].

11 VLAD Act, s 5(2); Criminal Code, ss 60A(2), 60B(3), 60C(2), 72(3), 92A(4B), 320(3) and 340(1B); Bail Act s16(3D).

12 *Nicholas v The Queen* (1998) 193 CLR 173 at 190 (Brennan CJ), 234-235 (Gummow J); *Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1 at 12 (Knox CJ, Gavan Duffy and Starke JJ); *Williamson v Ah Oh* (1926) 39 CLR 95 at 108 (Isaacs J), 127 (Rich and Starke JJ); *Orient Steam Navigation Co Ltd v Gleeson* (1931) 44 CLR 254 at 263 (Dixon J); *Milicevic v Campbell* (1975) 132 CLR 307 at 316-317, 318-319 (Gibbs and Mason JJ).

13 Plaintiff's submissions at [60].

14 Plaintiff's submissions at [20]-[22], [32], [36]-[37] and [41].

C. The VLAD Act

(i) The purpose and operation of the VLAD Act

19. The objects of the VLAD Act include disestablishing 'associations'[15] that encourage, foster or support persons who commit serious offences, and denying to persons who commit serious offences the assistance and support gained from associating with other persons who participate in the affairs of the associations.[16] In simple terms, the VLAD Act pursues these objects by establishing a sentence regime whereby a person who is a 'vicious lawless associate' will receive, in addition to the sentence they would otherwise have received, 15 years' imprisonment without the possibility of parole. A 'vicious lawless associate' who was an 'office bearer' of an association will receive an additional 25 years' (15 + 10 years) imprisonment without the possibility of parole.

20. The only circumstance in which a court may reduce the mandatory sentence is if the offender has offered in writing to cooperate with law enforcement agencies and the offer has been accepted in writing by the Commissioner of the Police Service.[17] The aim of this exception is to cultivate informants within associations and to deny individual members the assistance and support usually provided by their grouping.[18]

21. Section 5 of the VLAD Act defines a 'vicious lawless associate' as a person who:

    (a) commits a 'declared offence', meaning an offence specified in Schedule 1 of the VLAD Act; and

    (b) at the time the offence is committed, or during the course of the commission of the offence, is a 'participant'[19] in the affairs of an association; and

    (c) committed the act or omission that constitutes the offence for the purposes of, or in the course of participating in the affairs of, the relevant association.

22. However, a person is not a vicious lawless associate if he or she proves that the relevant association is not an association that has, as one of its purposes, the purpose of engaging in, or conspiring to engage in, declared offences.[20]

23. As the extrinsic materials make plain, the intention of s 5 is to 'characterise persons as vicious lawless associates who belong to associations which encourage, support

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15 VLAD Act, s 3 definition of 'association': a corporation, an unincorporated association, a club or league, or any other group of 3 or more persons by whatever name called, whether associated formally or informally and whether the group is legal or illegal.

16 VLAD Act, s 1.

17 VLAD Act, s 9.

18 Explanatory Note, Vicious Lawless Association Disestablishment Bill 2013, p 2.

19 VLAD Act, s 4.

20 VLAD Act, s 5(2).

or foster the commission of offences and who are, therefore, persons who commit offences as part of their membership activities'.[21]

24. Section 4 of the VLAD Act defines a 'participant' as follows:

> For this Act, a person is a ***participant*** in the affairs of an association if the person—
> (a) (whether by words or conduct, or in any other way) asserts, declares or advertises his or her membership of, or association with, the association; or
> (b) (whether by words or conduct, or in any other way) seeks to be a member of, or to be associated with, the association; or
> (c) has attended more than 1 meeting or gathering of persons who participate in the affairs of the association in any way; or
> (d) has taken part on any 1 or more occasions in the affairs of the association in any other way.

25. In ascertaining the scope of the definition of 'participant', it is necessary to construe the terms of each subparagraph of s 4 in the context of the VLAD Act as a whole, and by reference to its evident purposes.[22]

26. Here, the statutory context evinces that each subparagraph of the definition of 'participant' is to be understood as directed to those who take part in the affairs of an association or seek to do so. Subparagraphs (a) and (b) deal respectively with persons who are members or associates and persons who seek to become members or associates. Subparagraph (d) speaks of a person who has 'taken part…in the affairs of an association *in any other way*' (emphasis added). These paragraphs, and in particular the concluding words of s 4(d) , indicate that s 4(c) is not intended to capture persons who merely attend two or more social or family functions at which other persons who are 'participants' happen to be present.

27. The relevant statutory context also includes the fact that the VLAD Act is penal.[23] That suggests that, in ascertaining Parliament's intention,[24] weight should be given to the common law principle that in the case of ambiguity penal statutes should be construed against extending their application.[25]

28. An interpretation of s 4 which focuses upon persons who take part in the affairs of the association or seek to do so is also consistent with the purposes of the VLAD Act. The objects of the VLAD Act include to 'disestablish associations that

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21 Explanatory Note, Vicious Lawless Association Disestablishment Bill 2013, p 4.

22 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] (McHugh, Gummow, Kirby and Hayne JJ); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *AB v Western Australia* (2011) 244 CLR 390 at [10] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

23 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [57] (Hayne, Heydon, Crennan and Kiefel JJ).

24 Parliament's 'intention' is to be understood as 'a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts': *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

25 See *Beckwith v R* (1976) 135 CLR 569.

encourage, foster or support persons who commit serious offences' and to 'deny to persons who commit serious offences the assistance and support gained from association with other persons who participate in the affairs of the associations'.[26] Those objects are not furthered by giving the definition of 'participant' a meaning that would cover persons, such as spouses and children, who neither take part in the affairs of the association nor seek to do so. Such an interpretation would be inconsistent not only with now well-settled purposive approach to statutory interpretation, but also with s 14 of the *Acts Interpretation Act 1954* (Qld), which provides that 'the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation'.

29. To the extent that the Plaintiff submits that the words of s 4(c) should be given their widest possible meaning,[27] his submission should be rejected as inconsistent with ordinary principles of statutory construction.

30. If the prosecution wished to rely upon the VLAD Act at all, they would have to plead the circumstances that attract its operation in the indictment. Subsection 564(2) of the Criminal Code requires all 'circumstances of aggravation' upon which the prosecution intends to rely to be charged in the indictment.[28] The term 'circumstance of aggravation' means 'any circumstance 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'. In its ordinary and natural meaning, that term would cover the circumstances that render a person a 'vicious lawless associate' under the VLAD Act. Subject to an order under s 614 of the Criminal Code,[29] the jury would therefore have to determine those circumstances beyond reasonable doubt.

(ii) Plaintiff lacks standing to obtain declaratory relief regarding the VLAD Act

31. It is settled that the High Court and other federal courts only have jurisdiction in respect of 'matters'.[30] That term imports a requirement for a real and justiciable controversy about an 'immediate right, duty or liability' to be established by determination of the Court.[31] As Hayne J explained in *Re McBain; Ex parte Australian Catholic Bishops Conference*:[32]

> At the heart of the constitutional conception of "matter" is a controversy about rights, duties or liabilities which will, by the application of judicial power, be quelled. *The "controversy" must be real and immediate.* That is why it was held, in *In re Judiciary and Navigation Acts*, that "matter" means

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26 VLAD Act, s 2(1)(a) and (c).

27 Cf Plaintiff's submissions at [17] and [18].

28 *R v De Simoni* (1981) 147 CLR 383, 392, (Gibbs CJ); *Kingswell v The Queen* (1985) 159 CLR 264 at 277, 280-281, (Gibbs CJ, Wilson and Dawson JJ); *R v Meaton* (1986) 160 CLR 359 at 363-364 (Gibbs CJ, Wilson and Dawson JJ).

29 This allows a court to make an order that the trial be by judge alone.

30 See the Constitution, s 76(i); *Judiciary Act 1903* (Cth), s 30(a).

31 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

32 (2002) 209 CLR 372 at [242] (emphasis added).

> more than legal proceeding and that "there can be no matter within the meaning of [s 76] unless there is some immediate right, duty or liability to be established by the determination of the Court". Hypothetical questions give rise to no matter.

32. Issues of 'standing' are subsumed within the concept of 'matter'.[33] Consequently, unless a plaintiff has standing, there is no 'matter' to found the jurisdiction of the High Court or a federal court.[34]

10 33. Standing, however, requires a plaintiff to have a 'special' or 'sufficient interest' in the subject matter of the action so as to warrant the relief sought.[35] While the 'nature and subject matter of the litigation will dictate what amounts to a special interest',[36] the existence of such a requirement has never been doubted.

34. In *Australian Conservation Foundation v Commonwealth*, moreover, Gibbs J, as his Honour then was, observed:[37]

> [A]n interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested...unless he is likely to gain some advantage, other
20 than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi. If that were not so, the rule requiring special interest would be meaningless.

35. The Plaintiff has no special interest in obtaining a declaration that the VLAD Act is invalid. Contrary to his submissions,[38] the VLAD Act does not challenge his 'freedom of action'. The Plaintiff remains free to engage in all the activities that he could have lawfully undertaken before the VLAD Act commenced. Furthermore,
30 although the Plaintiff is a member of the Brisbane Chapter of the Hells Angels

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33 *Croome v Tasmania* (1997) 191 CLR 119 (*'Croome'*) at 132-133 (Gaudron, McHugh and Gummow JJ); *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 262 (Gaudron, Gummow and Kirby JJ); *Truth About Motorways Pty Limited v Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591 at 611 [45] (Gaudron J), [103] (Gummow J).

34 *Croome* (1997) 191 CLR 119 at 126 (Brennan CJ, Dawson and Toohey JJ): '[A] justiciable controversy does not arise unless the person who seeks to challenge the validity of the law has a sufficient interest to do so.'

35 *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 511 (Aickin J); *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at [244] (Hayne J). See also *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 327-328 (Mason J); *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 527-528 (Gibbs J); *Onus v Alcoa* (1981) 149 CLR 28 at 35-36 (Gibbs CJ), 74 (Brennan J); *Croome* (1997) 191 CLR 119 at 126-127 (Brennan CJ, Dawson and Toohey JJ). Exceptions exist, however, for relator actions pursuant to the fiat of an Attorney-General.

36 *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 558 (Brennan, Dawson, Toohey, Gaudron and McHugh JJ).

37 (1980) 146 CLR 493 at 530-531. See also at 539 (Stephen J), 548 (Mason J).

38 Plaintiff's submissions at [78].

Motorcycle Club, he has not asserted that he intends to perform any act that would constitute a declared offence, let alone that he would do so for the purposes of the Club. Nor has he been charged with or convicted of any declared offence. In short, the VLAD Act does not currently apply to the Plaintiff and on the present facts there is no reason it ever will. For these reasons, the Plaintiff cannot claim that the VLAD Act affects him in his person or property or that it will probably do so in the immediate future.[39] He therefore lacks standing to seek a declaration that the VLAD Act is invalid.

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36. Nothing in *Croome v Tasmania*[40] supports any different view. In that case, the plaintiffs had sought declarations that sections of the *Criminal Code* (Tas) proscribing sexual relations between men were inconsistent with Commonwealth legislation. They specifically pleaded that they had engaged in the proscribed conduct and intended to continue doing so. The State of Tasmania conceded that the plaintiffs had standing, and the Court found that the concession was rightly made. Chief Justice Brennan and Dawson and Toohey JJ treated the fact that the plaintiff had engaged in that conduct as determinative. As their Honours put it:[41]

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> The concession of standing was rightly made not by reason of [the plaintiffs'] intention to engage in conduct of the kind pleaded in par 7 (though that intention may be relevant to the exercise of a discretion to grant or refuse a declaration) but by reason of their having engaged in such conduct.
>
> The plaintiffs plead that they have engaged in conduct which, if the impugned provisions of the Code were and are operative, renders them liable to prosecution, conviction and punishment. The fact that the Director of Public Prosecutions does not propose to prosecute does not remove that liability. Liability to prosecution under the impugned provisions of the Code will be established if the Court were to determine the action against the plaintiffs even if liability to conviction and punishment under those provisions cannot be determined by civil process. Controversy as to the operative effect of the impugned provisions of the Code will be settled and binding on the parties. The plaintiffs have a sufficient interest to support an action for a declaration of s 109 invalidity.

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37. Justices Gaudron, McHugh and Gummow, on the other hand, reasoned the plaintiffs had standing to seek declaratory relief because the *Criminal Code* (Tas) imposed norms of conduct which overshadowed their personal life in significant respects.[42]

38. As stated earlier, the Plaintiff here has not claimed that he has engaged in any conduct to which the VLAD Act applies or that he intends to do so in the future. The VLAD Act, moreover, does not prevent him from pursuing any lawful activity that he could have previously undertaken. Since that is so, the contrast with *Croome* is stark. The Plaintiff's interest in obtaining declaratory relief is properly

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39 Cf *Toowoomba Foundry Pty Ltd v Commonwealth* (1945) 71 CLR 545 at 570 (Latham CJ).

40 *Croome* (1997) 191 CLR 119.

41 Ibid at 127-128.

42 Ibid at 137-138.

seen as no more than 'the satisfaction of righting a wrong, upholding a principle or winning a contest'.[43] That is not enough to give him standing to obtain declaratory relief.

39. Because the Plaintiff lacks standing, there is no 'matter'. His challenge to the VLAD Act should be dismissed on that basis alone.

(iii) Relief sought would be hypothetical

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40. Alternatively, the relief sought by the Plaintiff should be refused because it would be hypothetical.[44] In *Re Tooth & Co Ltd*,[45] a case involving a declaration as to the lawfulness of future conduct, Brennan J addressed the difference between a hypothetical and a non-hypothetical question. His Honour said that the difference was one of degree.[46] He quoted with approval the following passage from the judgment of the United States Supreme Court in *Maryland Casualty Co v Pacific Coal & Oil Co*:[47]

> The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in every case is whether the facts alleged, under all the circumstances, show that there is a *substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality* to warrant the issuance of a declaratory judgment.

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41. In this case, however, there is no controversy of sufficient immediacy or reality to warrant relief. For the reasons outlined above in relation to standing,[48] the VLAD Act does not apply to the Plaintiff and it may never do so. That fact demonstrates that there is no 'immediate' right, duty or liability that would be established by the relief that the Plaintiff seeks.[49] Accordingly, the challenge raised by the Plaintiff is hypothetical.

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43 *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 530-531 (Gibbs J). In addition, the Plaintiff's claim that he has standing is not reconcilable with authorities that have found that a person's standing is limited to challenging the provisions of legislation that actually affect the person or their property, and that the person is not free to challenge other provisions in the same Act or regulations: see *Real Estate Institute of New South Wales v Blair* (1946) 78 CLR 213 at 227 (Starke J), 228 (Dixon J); *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at [156] (Gummow, Crennan and Bell JJ).

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44 A declaration that is hypothetical can give rise to no 'matter': *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582 (Mason CJ, Dawson, Toohey and Gaudron JJ); *IMF (Australia) Ltd v Sons of Gwalia Ltd (Administrator Appointed) ACN 008 994 287* (2004) 211 ALR 231 at [43] (French J).

45 (1978) 31 FLR 314; 19 ALR 191.

46 Ibid at 31 FLR 333; 19 ALR 208.

47 312 US 270 (1941) at 273 (emphasis added).

48 See paragraphs [31] to [39] above.

49 *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

(iv) The VLAD Act does not infringe equality before the law

42. The Plaintiff contends that the VLAD Act is invalid because it confers a function on sentencing courts that is 'repugnant to the judicial process in a fundamental degree'.[50] He contends that the VLAD Act requires courts to exercise their sentencing role in breach of the fundamental notion of equality before the law. It does so, it is asserted, by requiring a court to impose sentences on certain offenders by reason of who they associate with rather than their own personal and individual guilt.[51]

43. These submissions should be rejected.

44. First, the Constitution contains no general principle of equality before the law that operates to invalidate Commonwealth and State legislation. So much is clear from *Leeth v Commonwealth*[52] and *Kruger v Commonwealth*.[53] In *Leeth*, the Court considered a challenge to the validity of s 4(1) of the *Commonwealth Prisoners Act 1967* (Cth). That provision picked up and applied to federal offenders State and Territory laws relating to fixing non-parole periods. As a result, a federal offender could have been subject to different minimum terms depending on the State or Territory in which he or she had been sentenced. A majority of the Court[54] rejected a challenge to s 4(1) based on a general principle of equality. Justice Brennan, who formed part of the majority, said:[55]

> Discriminatory laws made under a constitutional head of power, where the discrimination is supported by the power, must be administered by the courts in which the judicial power of the Commonwealth is vested. The administration of such laws is consistent with a proper exercise of the judicial power; indeed, a court in which the relevant jurisdiction is vested is bound to exercise its jurisdiction in accordance with such laws.

45. In *Kruger*, five members of the Court again rejected the notion that the Constitution contained a general principle of legal equality.[56] Justice Dawson (with whom McHugh J agreed[57]) emphasised, among other things, that such a principle had no textual basis in the Constitution.[58] Other members of the majority made the same point.[59]

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50 Plaintiff's submissions at [10(a)].
51 Plaintiff's submissions at [51], [57]-[60].
52 (1992) 174 CLR 455 ('*Leeth*').
53 (1997) 190 CLR 1 ('*Kruger*'). See also *Baker v The Queen* (2004) 223 CLR 513 at [45] (McHugh, Gummow, Hayne and Heydon J) (on the position of State laws).
54 *Leeth* (1992) 174 CLR 455 (Mason CJ, Brennan, Dawson and McHugh JJ) (Deane, Toohey and Gaudron JJ dissenting).
55 Ibid at 480.
56 *Kruger* (1997) 190 CLR 1 at 45 (Brennan CJ), 68 (Dawson J), 113-114 (Gaudron J), 142 (McHugh J), 153-155 (Gummow J).
57 Ibid at 142 (McHugh J).
58 Ibid at 64-66 (Dawson J).
59 Ibid at 44-45 (Brennan CJ), 112-113 (Gaudron J), 154-155 (Gummow J).

46. The outcomes in *Leeth* and *Kruger* accord with the framers' rejection of a proposal to include in the Constitution an express guarantee of 'equal protection of the laws' based largely on the Fourteenth Amendment to the United States Constitution.[60] That rejection cannot be reconciled with the existence of any general principle of equality before the law.

47. Accordingly, insofar as the Plaintiff's submissions invoke such a principle, they are without foundation.

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48. Secondly, Chapter III of the Constitution does not entrench any separate principle of 'equal justice' that mandates identity of outcome in cases that are relevantly identical and different outcomes in cases that are relevantly different.[61] It is true that the principle of 'equal justice' has been described as a 'fundamental element in any rational and fair system of criminal justice'[62] and even as an 'aspect of the rule of law'.[63] But the principle informs the interpretation of Commonwealth and State laws; it does not invalidate them. In *Kruger*, Dawson J (with whom McHugh J relevantly agreed[64]) said:[65]

> 20 [C]ourts 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.

49. In *Green v The Queen*, moreover, French CJ, Crennan and Kiefel JJ reasoned:[66]

> "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
> 30 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."

50. Mandatory sentencing laws exemplify how legislatures can modify the principle of equal justice. Such laws may require a court to impose the same penalty irrespective of the circumstances of the offence and irrespective of any differences in culpability between offenders. An indigent person who has committed minor theft and has pleaded guilty may be subjected to the same term of imprisonment as
40 a person of wealth who has committed theft on a large scale and has offered no

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60 Ibid at 61, 67 (Dawson J); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, Vol IV, pp 664-691.

61 *Wong v The Queen* (2001) 207 CLR 584 at 608 [65] (Gaudron, Gummow and Hayne JJ).

62 *Lowe v The Queen* (1984) 154 CLR 606 at 610 (Mason J).

63 *Green v The Queen* (2011) 244 CLR 462 at 473 [28].

64 *Kruger* (1997) 190 CLR 1 at 142.

65 Ibid at 68 (Dawson J).

66 (2011) 244 CLR 462 at 473 [28] (emphasis added and citations omitted).

such plea. Despite these outcomes, however, mandatory sentences do not infringe Chapter III of the Constitution.[67] That demonstrates that Chapter III does not operate to invalidate laws merely because they might be thought to depart from the principle of equal justice.

51. In addition, a principle of the kind advanced by the Plaintiff would invite courts to assess the merits of criminal (and perhaps civil) laws. On the Plaintiff's argument, if a criminal law requires or authorises a court to reach outcomes that do not reflect 'relevant' differences, the judicial process is impermissibly compromised. Since legislatures necessarily make distinctions in creating offences and determining the penalties to be imposed for them, however, the consequences of accepting that argument would be striking. Courts would be drawn into the essentially political, value-laden task of determining the 'relevant' considerations for settling tariffs to discourage or punish particular criminal activity.[68] Such a role is inconsistent with acknowledging that the creation of offences is peculiarly the responsibility of legislatures, not judges.[69]

52. These points can be illustrated by considering circumstances of aggravation. Legislatures in the United Kingdom, Australia and elsewhere have long prescribed circumstances that expose an offender to an increased penalty for the same offence.[70] Depending on the offence in question, these circumstances have included causing injuries of certain kinds;[71] the commission of an offence with certain items;[72] previous convictions;[73] the status of victims;[74] the status of the perpetrator;[75] and the purpose of committing the offence.[76] If the Plaintiff is correct, however, the courts would be able to assess whether such circumstances amount to 'relevant' differences justifying the imposition of greater penalties on an offender. If the court did not regard the difference as 'relevant', the laws would be invalid for breaching the principle of equal justice. Such judicial second-guessing lacks a textual basis in the Constitution and does not reconcile with the obligation of courts

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67 *Palling v Corfield* (1970) 123 CLR 52; *Magaming v The Queen* (2013) 87 ALJR 1060 ('*Magaming*').

68 *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 ('*Emmerson*') at [85] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

69 *Magaming* (2013) 87 ALJR 1060 at [104] (Keane J).

70 This reflects the proposition that 'Parliament may define the ingredients of offences and the circumstances to be taken into account in sentencing in whatever way it pleases': *Kingswell v The Queen* (1985) 159 CLR 264 at 285 (Mason J). See also at 276 (Gibbs CJ, Wilson and Dawson J) and *Cheng v The Queen* (2000) 203 CLR 248 at [157]-[163] (McHugh J).

71 See, for example, Criminal Code, s 328A(4) (dangerous operation of a motor vehicle causing grievous bodily harm or death).

72 See, for example, Criminal Code, s 411(2) (robbery whilst armed with a dangerous or offensive weapon or instrument).

73 See, for example, Criminal Code, s 398(11) (stealing after previous conviction).

74 See, for example, Crimes Act, s 340(a) (assaulting a police officer in certain circumstances); *Crimes (Sentencing) Act* 2005 (ACT), s 33(1)(g) (pregnant women).

75 See, for example, Criminal Code, s 398(5), (6), (7), (8) and (10) (stealing by public servants, clerks or servants, directors, agents or tenants and lodgers respectively).

76 See, for example, Criminal Code, s 408A(1A) (unlawful use of a motor vehicle for the purpose of facilitating the commission of an indictable offence).

to apply the law, regardless of whether they regard it as unjust, harsh or unfair.[77] As Brennan CJ explained in *Nicholas v The Queen*:[78]

> It is the faithful adherence of the courts to the laws enacted by the Parliament, however undesirable the courts may think them to be, which is the guarantee of public confidence in the integrity of the judicial process and the protection of the courts' repute as the administrator of criminal justice.

53. Thirdly, in any event, the VLAD Act would not infringe any general principle of equality before the law or any principle of equal justice. The Plaintiff's basic complaint is that the VLAD Act requires the imposition of different sentences for the same crime.[79] There is, however, no reason why the circumstances of aggravation selected by the VLAD Act are 'irrelevant' to the penalties that it imposes. Legislatures are entitled to take action to suppress or disestablish associations that engage in criminal activity. That is a legitimate objective. Legislatures may therefore consider robbery by members of an organised crime group, for the purposes of that group, as meriting greater punishment than robbery by an individual. The same applies to the commission of other declared offences such as rape, kidnapping and the unlawful supply of weapons. By requiring declared offences committed for the purposes of a criminal association or in the course of participating in such an association to be punished more severely, the legislature has drawn a distinction that is appropriate and adapted to the attainment of a legitimate objective.[80] That is enough to satisfy any general principle of equality before the law and any principle of equal justice.[81]

54. None of the Plaintiff's examples supports a different view. In particular, his example of the ingénue who happens to be in possession of cannabis in her pocket while attending her first gathering of members of a club that, unbeknownst to her, has as a criminal purpose is not only artificial and farfetched but wrong.[82] It is wrong to approach the validity of the VLAD Act by reference to such examples.[83]

55. In any event, that example does not reflect the true operation of the VLAD Act. Paragraph 5(1)(c) of the VLAD Act requires the prosecution to prove that the participant committed the declared offence 'for the purposes of...participating in the affairs of the association' or 'in the course of participating in the affairs of the

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77 *Magaming* (2013) 87 ALJR 1060 at [106]-[108] (Keane J); *Emmerson* (2014) 88 ALJR 522 at [85] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

78 (1998) 193 CLR 173 at [37].

79 Plaintiff's submissions at [60].

80 The same is true of the penalty for vicious lawless associates who are 'office bearers' in an association. Their role in an association that has at its purposes engaging in criminal activity makes it appropriate that crimes they commit for the purpose of the association or while participating in the affairs of the association attract a heavier penalty.

81 *Street v Queensland Bar Association* (1989) 168 CLR 461 at 510-511 (Brennan J), 548 (Dawson J), 571-573 (Gaudron J), 582 (McHugh J); *Cameron v The Queen* (2002) 209 CLR 339 at 343-344 [15] (Gummow, Hayne and Callinan JJ); *Austin v Commonwealth* (2003) 215 CLR 185 at 247 [118] (Gaudron, Gummow and Callinan JJ) (explaining the essence of the notion of discrimination).

82 See Plaintiff's submissions at [34]-[37].

83 *Wainohu v New South Wales* (2011) 243 CLR 181 at [152]-[153] (Heydon J).

association'. The two situations are equivalent. As that is so, proof that the offence was committed 'in the course of participating in the affairs of the association' requires more than a mere temporal or coincidental connection between the commission of the offence and the affairs of the association; it suggests a substantial connection between those affairs and the commission of the offence. The term 'affairs of the association', which connotes the 'business' of the association, reinforces that construction of s 5(1)(c). The construction also reflects the penal nature of the VLAD Act, the impact that it has on a person's liberty and the objects of the legislation referred to above. It is, thus, inconsistent with the Plaintiff's example.

56. Realistic illustrations of the application of the VLAD Act in fact demonstrate its policy rationale. Take for example the situation of a group of persons with, among others matters, a common interest in the sale for profit of narcotics. A member of the group is standing trial on serious drugs charges. During the trial another member approaches a juror on his or her way home and makes threats to the family of the juror in the event of a conviction, contrary to s 119B of the Criminal Code, and a declared offence. The threat is made for the purposes of the group, which include the commission of other declared offences and evading the detection and punishment of those offences. The fact that the s 119B offence occurs with the support and encouragement of the club heightens the gravity of the threat and the offending, and accordingly attracts the application of the VLAD Act. VLAD in those circumstance represents a legislative response that is reasonably adapted to discouraging a serious threat to the community.

57. Finally, the Plaintiff's reliance on *South Australia v Totani*[84] is misplaced. In that case, s 10 of the *Serious and Organised Crime (Control) Act* 2008 (SA) ('the SOC Act') provided for the State Attorney-General, on application by the Commissioner of Police, to make a declaration in relation to an organisation if satisfied that members of the organisation associated for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity.[85] Subsection 14(1) then provided that, on application by the Commissioner of Police, the Magistrates Court of South Australia had to make a control order against a person if satisfied that the person was a member of a declared organisation.[86] It was an offence to contravene a control order.[87]

58. The vice of s 14(1) of the SOC Act, which led to its invalidity, was that the Magistrates Court's role was limited to determining whether a person nominated by the executive was a member of a declared organisation.[88] If the Court found that the person was, it had to make the control order without determining what that person had done or would do, in circumstances where contravention of the order was an

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84 *South Australia v Totani* (2010) 242 CLR 1 ('*Totani*').

85 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 ('*Pompano*') at [132] (Hayne, Crennan, Kiefel and Bell JJ).

86 Ibid at [132] (Hayne, Crennan, Kiefel and Bell JJ).

87 *Totani* (2010) 242 CLR 1 at [225](e) (Hayne J)).

88 *Pompano* (2013) 87 ALJR 458 at [133] (Hayne, Crennan, Kiefel and Bell JJ).

offence and there was no pre-existing restriction on the person's ability to associate.[89] In other words, the Magistrates Court was no more than an instrument of the executive for preventing certain persons from associating.[90]

59. By contrast, the VLAD Act only allows for the imposition of a heavier sentence if a court is satisfied that the offender committed certain offences for the purposes of the association or in the course of participating in the affairs of the association. Punishment, in short, follows judicial findings about the person's criminal acts and the circumstances in which those acts were done.[91] The VLAD Act consequently does not share the vice of the legislation invalidated in *Totani*.

(v) VLAD Act does not make the court an instrument of the legislature or the executive

60. The Plaintiff also contends that the VLAD Act is invalid because it requires courts to act as an instrument of the executive or legislature. He contends that the object of the VLAD Act and other legislation was to destroy criminal associations, but the legislature did not disestablish any association directly.[92] Instead, it required courts to impose significant terms of imprisonment on vicious lawless associates. In doing so, it enlisted courts to achieve a policy outcome in an impermissible manner instead of performing their ordinary function of applying the law.[93]

61. These submissions ignore the fact that a court applying the VLAD Act follows the ordinary judicial process. The sentencing court must conduct its proceedings in open court; it is obliged to afford procedural fairness;[94] and it exercises judicial power by applying the law to the facts.[95] The task that it performs is essentially the same as that performed by courts whenever they determine circumstances of aggravation. The requirement to impose particular sentences if certain facts are found, moreover, is an example of a mandatory sentence—something that does not, without more, breach Chapter III of the Constitution.[96] Since the VLAD Act does not require departure from the ordinary judicial process, there is no basis for

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89 *Totani* (2010) 242 CLR 1 at [82] (French CJ), [139]-[142] (Gummow J), [225]-[226] (Hayne J), [434]-[436] (Crennan and Bell JJ), [469]-470], [478]-[481] (Kiefel J).

90 *Pompano* (2013) 87 ALJR 458 at [133] (Hayne, Crennan, Kiefel and Bell JJ).

91 It should be recalled that under s 5(2) of the VLAD Act, a person can establish that the association does not have, as one of its purposes, engaging in or conspiring to engage in declared offences.

92 Plaintiff's submissions at [69]-[70].

93 Plaintiff's submissions at [71].

94 By giving the function of sentencing under the VLAD Act to a court, the legislature must be taken to have accepted that it will be exercised in accordance with usual judicial standards and processes, including the rules of procedural fairness and the open court principle: see *Electric Light and Power Supply* (1956) 94 CLR 554 at 560; *Mansfield v Department of Public Prosecutions* (WA) (2006) 226 CLR 486 at 491-492 [7]-[9]; *International Finance Trust* (2009) 240 CLR 319 at 377-378 [134] (Hayne, Crennan and Kiefel JJ).

95 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 (Kitto J).

96 *Palling v Corfield* (1970) 123 CLR 52; *Magaming* (2013) 87 ALJR 1060.

considering that it requires courts to act as instruments of the executive or the legislature.[97]

62. The Plaintiff's submissions assume that Chapter III of the Constitution puts legislatures to an election: they must either destroy criminal associations by proscribing membership or leave participants in such associations to be dealt with under existing criminal laws. Nothing in the text of Chapter III or the concept of judicial power, however, warrants that view. Legislatures in Australia, like legislatures in other countries, remain free to pursue the objective of suppressing criminal organisations and their activities without proscription.[98] If they choose to require harsher sentences for offences committed by participants for the purposes of criminal associations, or as part of the activities of such associations, they do not thereby transform the courts that apply those laws into instruments of the executive. To suggest otherwise is fallacious.

63. For these reasons, the VLAD Act does not infringe the *Kable* principle. The Plaintiff's challenge to the Act should therefore be dismissed.

D. Circumstances of Aggravation under the Criminal Code

(i) The purpose and operation of the Criminal Code, sub-sections 72(2)-(4), 92(A)-(4A) and (5), 320(2)-(4) and 340(1A), (1B) and (3)

64. The background circumstances leading to the passing of these provisions by the Queensland Parliament is referred to earlier in these submissions.[99]

65. The critical feature and rationale explaining the enactment of these provisions is that they apply only to participants in criminal organisations. The provisions are directed to individuals who commit criminal offences while enjoying the support and encouragement of a criminal group. The provisions are aimed at the illegal conduct of the criminal gang participant and are designed to promote community safety and protection from such offenders.[100]

66. The provisions are directed to discouraging and deterring those who choose to participate in a criminal organisation from committing the nominated offences.

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97 *Totani* (2010) 242 CLR 1 at [428], [430], [436] (Crennan and Bell JJ); *Emmerson* (2014) 88 ALJR 522 at [43]-[45] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

98 For examples of foreign laws that target activities of members or associates of criminal organisations, see ss 467.1, 467.11, 467.12 and 467.13 of the *Criminal Code* (Can). For consideration of these provisions, see *R v Pereira* (2008) BCSC 184 at [151]; *R v Venneri* [2012] 2 SCR 211.

99 See paragraphs [4]-[9] above.

100 Explanatory Note, Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013, p 5.

(ii) The Plaintiff lacks standing to obtain declaratory relief regarding the provisions of the Criminal Code

67. Articulated earlier in the submissions[101] are the reasons that the Plaintiff lacks standing to obtain declaratory relief regarding these provisions.

68. The Plaintiff is not charged with a relevant offence. He has not pleaded facts indicating an intention to engage in any conduct which would make him susceptible to prosecution or conviction.

69. Unless and until the Plaintiff engages in conduct for which he could be charged with an offence under these provisions he has no special interest in obtaining a declaration of invalidity.

(iii) The challenged Criminal Code provisions do not infringe equality before the law

70. As set out earlier in these submissions,[102] the Constitution contains no general principle of equality before the law; Chapter III does not entrench any separate principle of 'equal justice'; and mandatory sentencing laws are clear examples of how the legislature can modify the principle of equal justice.

71. It is open to the legislature to impose increased maximum sentences and mandatory minimum sentences in pursuit of policy objectives. They are 'known forms of legislative prescription of penalty for crime'.[103]

72. In *Magaming v The Queen,* Keane J reasoned:[104]

> The enactment of sentences by the legislature, whether as maxima or minima, involves the resolution of broad issues of policy by the exercise of legislative power. A sentence enacted by the legislature reflects policy-driven assessments of the desirability of the ends pursued by the legislation, and of the means by which those ends might be achieved. It is distinctly the province of the legislature to gauge the seriousness of what is seen as an undesirable activity affecting the peace, order and good government of the Commonwealth and the soundness of a view that condign punishment is called for to suppress that activity, and to determine whether a level of punishment should be enacted as a ceiling or a floor.
>
> In laying down the norms of conduct which give effect to those assessments, the legislature may decide that an offence is so serious that consideration of the particular circumstances of the offence and the personal circumstances of the offender should not mitigate the minimum punishment thought to be appropriate to achieve the legislature's objectives, whatever they may be.

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101 See paragraphs [31]-[39] above.
102 See paragraphs [44]-[52] above.
103 *Magaming* (2013) 87 ALJR 1060 at [48] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
104 *Magaming* (2013) 87 ALJR 1060 at [105]-[106] (Keane J).

(iv) The Criminal Code provisions do not make the court an instrument of the legislature or the executive

73. The submissions below concerning why s 60A does not offend the *Kable* principle,[105] including the reference at paragraph 105 below to Heydon J's reasons in *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment*[106] apply equally to the Plaintiff's submissions[107] concerning the so-called 'special sentences'.

74. The starting point for consideration is that the challenged Criminal Code provisions establish offences which the prosecution carries the burden of proving beyond reasonable doubt.

75. In the case of the offence of affray[108] the circumstance of aggravation that a defendant is a participant in a criminal organisation increases the maximum penalty from one years' imprisonment to seven years' imprisonment and imposes a mandatory minimum penalty of six months' imprisonment to be served wholly in a corrective services facility.[109]

76. The offence of misconduct in public office[110] provides for a circumstance of aggravation which increases from seven years' imprisonment to fourteen years' imprisonment, the sentence for a defendant who was a participant in a criminal organisation.[111]

77. The offence of doing grievous bodily harm[112] provides for a circumstance of aggravation which alleges that where a defendant is a participant in a criminal organisation and unlawfully does grievous bodily harm to a police officer acting in the execution of his duty, a mandatory minimum sentence of one year imprisonment served wholly within a corrective services facility must be imposed.[113]

78. The serious assault provisions[114] include a circumstance of aggravation which provides that where a defendant is a participant in a criminal organisation and assaults a police officer in any of the circumstances set out in s 320(a), a defendant is liable to a maximum penalty of fourteen years' imprisonment and a mandatory

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105 See paragraphs [100]-[120] below.
106 (2012) 87 ALJR 162 at [69].
107 Plaintiff's submissions at [15].
108 Criminal Code, s 72.
109 Ibid, s 72(2).
110 Ibid, s 92A.
111 Ibid, s 92(A)4A.
112 Ibid, s 320.
113 Ibid, s 320(2).
114 Ibid, s 340.

minimum sentence of one year imprisonment to be served wholly within a corrective services facility.[115]

79. The Plaintiff describes the sentencing procedure which is activated upon any conviction for these offences as a 'special penalty regime'.[116] The submission is respectfully in error. What follows demonstrates that the challenged provisions operate in a conventional manner and they do not undermine accepted sentencing processes.

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80. Sections 1 and 564(2) of the Criminal Code require all circumstances of aggravation which the prosecution intends to rely upon to be charged in the indictment.[117] On a proper construction, the Criminal Code makes the facts establishing the relevant circumstance of aggravation of being a participant in a criminal organisation relevant to both conviction and sentence.

81. Section 564(2) of the Criminal Code exemplifies the 'underlying principle' that an 'offender's liability to punishment or his [or her] liability to a particular maximum penalty depends upon the facts determined by his [or her] plea of guilty or the verdict of the jury'.[118] The corollary is that upon any conviction for an offence against the challenged provisions, an offender will be sentenced for a crime which he or she is charged with.[119]

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82. The circumstances of aggravation have relevance beyond the exercise of a sentencing judge's discretion. The prosecution must prove, and any jury be satisfied, beyond reasonable doubt that a defendant is a participant in a criminal organisation[120] for a sentencing judge to impose any increased maximum penalty, or mandatory minimum as the case may be.

30 83. The prosecution of persons charged under the challenged provisions do not engage any extraordinary processes. The Court performs its usual judicial function (in overseeing the trial and sentencing an offender upon conviction) which is independent of the Executive in fact and appearance. The jury performs its conventional and independent curial function. A further impediment to the Court doing the executive's 'bidding' is via the recognised primacy of the prosecutor's

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115 Ibid, s 340(1A).

116 Plaintiff's submissions at [22].

40 117 *R v De Simoni* (1981) 147 CLR 383 at 392, (Gibbs CJ); *Kingswell v The Queen* (1985) 159 CLR 264 at 277, 280-281, (Gibbs CJ, Wilson and Dawson JJ); *The Queen v Meaton* (1986) 160 CLR 359 at 363-364 (Gibbs CJ, Wilson and Dawson JJ).

118 *Kingswell v The Queen* (1985) 159 CLR 264 at 290-1 (Brennan J).

119 *R v Olbrich* (1999) 199 CLR 270 at [18] (Gleeson CJ, Gaudron, Hayne and Callinan JJ), [18], [53] (Kirby J) (dissenting). Also note Kirby J's reference in *Weininger v The Queen* (2003) 212 CLR 629 at [75] to this 'fundamental principle'.

120 'Participant' is defined in s 60A. Also note the terms of s 72(2) of the Criminal Code 'on conviction'.

role[121] and the exercise of prosecutorial discretion in, relevantly, framing the charges which are to be preferred against an accused.[122]

84. Further, the challenged provisions do not encroach upon an accused's right to a trial by jury. A judge alone does not determine an accused's criminal guilt or innocence.[123] A convicted offender is sentenced on the basis of the jury's findings which are based upon evidence led in open court.[124] The sentencing judge has no role in the relevant fact finding exercise but the judge is bound by 'the manner in which the jury, by verdict' decided the issue of the accused's participation in the criminal organisation for the purposes of imposing sentence[125] and the judge cannot form a view of the facts which are in conflict with jury's verdict.[126]

85. Consistently, a sentencing judge would be precluded from taking into account an offender's participation in a criminal organisation (which would be necessarily adverse to the offender's interests) unless the prosecution had established those facts beyond reasonable doubt.[127]

86. The defendant may challenge the prosecution's proof in the ordinary course, without necessarily going into evidence.

87. Furthermore, a defendant charged in relation to any of these provisions has available a statutorily prescribed defence which is made out if the accused proves, on the balance of probabilities,[128] that the criminal organisation is not an organisation that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity.[129]

Distinguishing *Totani*

88. The Plaintiff compares the challenged provisions to those considered in *Totani*. The challenged provisions are radically different from the invalid s 14(1) of the SOC Act.

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121 *Maxwell v The Queen* (1996) 184 CLR 501.

122 *Cheung v The Queen* (2001) 209 CLR 1 at [47] (Gleeson, Gummow and Hayne JJ), *Magaming* (2013) 87 ALJR 1060 at [20] (French CJ, Hayne, Crennan, Kiefel and Bell JJ)

123 See, for example, *Kingswell v The Queen* (1985) 159 CLR 264 at 312 (Deane J). Trial by jury is, of course, subject to an order being made under s 614 of the Criminal Code.

124 See paragraph [61] and the references in footnote 94 above.

125 *Cheung v The Queen* (2001) 209 CLR 1 at [4]-[5], [9] (Gleeson CJ, Gummow and Hayne JJ).

126 Ibid at 12 [12] (Gleeson CJ, Gummow and Hayne JJ), referring to *Savvas v The Queen* (1995) 183 CLR 1 at 8 (Deane, Dawson, Toohey, Gaudron and McHugh JJ); [76]-[77] (Gaudron J), referring to *R v De Simoni* (1981) 147 CLR 383 at 295-6 (Wilson J) and at 406 (Brennan J); [163] and [170] (Callinan J), referring to *R v Isaacs* (1997) 41 NSWLR 474 at 377-8.

127 *R v Olbrich* (1999) 199 CLR 270 at [27] (Gleeson CJ, Gaudron, Hayne and Callinan JJ), confirming the reasoning in *R v Storey* [1998] 1 VR 359 at 369 (Winneke P, Brooking and Hayne JJA and Southwell AJA, Callaway JA dissenting); *Cheung v The Queen* (2001) 209 CLR 1 at [164] (Callinan J).

128 *R v Carr-Briant* [1943] KB 607; *Sodeman v R* (1936) 55 CLR 192.

129 Criminal Code, ss 72(3), 92A4(B), 320(3) and 340(1B).

89. As explained above at paragraphs [57] above and [107] below, section 14(1) was invalid because the Magistrates Court was required to make an order based upon an Executive determination without engaging in any substantive adjudicative process.

90. By contrast, the challenged Criminal Code provisions require the court (constituted by judge and jury) to engage in its usual curial role in determining an accused's guilt or innocence.

10 91. There is nothing constitutionally invalid in a court, on convicting an offender, obeying the statute and imposing a mandatory penalty.[130]

92. The court's processes do not 'substantially impai[r] the court's institutional integrity' such that they are 'therefore incompatible with that court's role as a repository of federal jurisdiction…'.[131]

93. For the above reasons, the challenged provisions of Criminal Code do not infringe the *Kable* principle. The Plaintiff's challenge to these provisions should fail.

20 **E. New Offences**

(i) The purpose and operation of the Criminal Code, s 60A

94. Section 60A(1) of the Criminal Code makes it an offence for a person who is a participant in a criminal organisation to be knowingly present in a public place with two or more other participants in a criminal organisation.

95. The Plaintiff appears to challenge the validity of s 60A (and ss 60B and 60C) only insofar as it applies by reference to paragraph (c) of the definition of 'criminal
30 organisation' in s 1 of the Criminal Code.[132] That paragraph provides that 'criminal organisation' includes 'an entity declared under a regulation to be a criminal organisation'.

96. In a prosecution for an offence against s 60A(1), the prosecution must prove, beyond reasonable doubt, that:

(a) the defendant was a participant in a criminal organisation at the time of the relevant conduct;

(b) the defendant was knowingly present in a public place with two or more other persons;
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(c) each of those two other persons was a participant in a criminal organisation at the time of the relevant conduct; and

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130 *Palling v Corfield* (1970) 123 CLR 52 at 58 (Barwick CJ), cited with approval in *Magaming* (2013) 87 ALJR 1060 at [27] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). Also see paragraph [61] above.

131 *Emmerson* (2014) 88 ALJR 522 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

132 Plaintiff's submissions at [68](b).

(d) the defendant knew that each of the two other persons was a participant in a criminal organisation.

97. It is a defence for the defendant to prove, on the balance of probabilities,[133] that the criminal organisation is not an organisation that has, as one of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity (s 60A(2)). In accordance with s 35(1)(a) of the *Acts Interpretation Act 1954* (Qld), the reference to 'criminal organisation' in s 60A(2) is a reference to that organisation to the extent it operates in Queensland.

98. Although no reference to the defence is made in the Plaintiff's submissions, it is essential to a proper understanding the operation of s 60A. The defence demonstrates that in substance the provision is narrowly directed at participants in organisations the purposes of which include engaging in, or conspiring to engage in, criminal activity. Those organisations (such as the Hells Angels) identified in the Criminal Code (Criminal Organisations) Regulation 2013 are rebuttably presumed to have such a purpose. There is no constitutional obstacle that the onus of proving that an organisation does not have such a purpose is placed on the defendant.[134]

99. Also essential to a proper understanding of the operation of s 60A is the construction of the definition of 'participant' in s 60A(3). That definition is substantially the same as the definition of 'participant' in the VLAD Act. For the reasons given above at paragraph [25] to [27], understood in its context, each paragraph of the definition of 'participant' in s 60A(3) is properly construed as directed only to those who take part in the affairs of an organisation or who seek to do so.

100. That interpretation is consistent with the purposes of s 60A and the other provisions of the Criminal Code which operate by reference to the definition in s 60A(3). Those purposes, which reflect the objects in s 2 of the VLAD Act, include tackling criminal gangs by 'target[ing] only those individuals who offend while enjoying the support and encouragement of the criminal group'.[135]

101. Moreover, the definition of 'participant' in s 60A(3) must be understood in the context of s 60A(1), a penal provision which undoubtedly restricts the common law

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133 *Sodeman v The King* (1936) 55 CLR 192; *Momcilovic v The Queen* (2011) 245 CLR 1 at 668 (Bell J); *Braysich v The Queen* (2011) 243 CLR 434 at [32] (French CJ, Crennan and Kiefel JJ).

134 *Nicholas v The Queen* (1998) 193 CLR 173 at 190 (Brennan CJ), 234-235 (Gummow J); *Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1 at 12 (Knox CJ, Gavan Duffy and Starke JJ); *Williamson v Ah On* (1926) 39 CLR 95 at 108 (Isaacs J), 127 (Rich and Starke JJ); *Orient Steam Navigation Co Ltd v Gleeson* (1931) 44 CLR 254 at 263 (Dixon J); *Milicevic v Campbell* (1975) 132 CLR 307 at 316-317, 318-319 (Gibbs and Mason JJ).

135 See Explanatory Note, Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013, p 5.

freedom of assembly.[136] Its interpretation therefore attracts the principle of legality.[137]

102. Statutory context, purpose and common law canons of construction therefore support the view that subparagraph (d) of the definition of 'participant' (which refers to persons who attend 'more than 1 meeting or gathering of persons who participate in the affairs of the organisation in any way') is properly construed as having a purposive element. In other words, simply attending two gatherings at which there happen to be other persons who participate in the affairs of an organisation is not sufficient to make one a 'participant' if the gatherings are unconnected to the affairs of the organisation. As subparagraph (e) suggests, subparagraph (d) is directed to those who, through attending gatherings, themselves participate in the affairs of the organisation.

103. Accordingly, the Plaintiff's contention that 'to be a participant, it is unnecessary for a person to have ever participated or sought to participate in the criminal organisation'[138] should be rejected. Similarly, his conclusion that s 60A(3)(d) 'presumably' extends to the spouses and children of members of criminal organisations is without foundation.

104. For the same reasons, the definition of 'participant' does not capture professional service providers, such as accountants, who merely deal with an organisation. That follows from the terms of the definition, which, properly construed, are directed only at those who take part in the organisation's affairs, or who seek to do so. The express exclusion of lawyers acting in a professional capacity does not suggest any other result.[139]

(ii) Section 60A does not offend the *Kable* principle

105. The Plaintiff attacks s 60A on one ground: it breaches the *Kable* principle by requiring the court 'in appearance or reality, to act as an instrument of the executive'. The Plaintiff submits that the 'intended legal and practical operation' of s 60A (along with other impugned provisions) 'is to enlist the courts to achieve a particular policy objective of the executive (destruction of certain organisations) in a constitutionally impermissible manner rather than to perform their ordinary function of 'applying the law'.'[140]

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136 Freedom of assembly was recognised as a common law right attracting the principle of legality in *Totani* (2010) 242 CLR 1 at [30] (French CJ).

137 As to which, see *Momcilovic v The Queen* (2011) 245 CLR 1 at [43] (French CJ); *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [86]-[87] (Hayne and Bell JJ), [158] (Kiefel J); *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082 at [307]-[314] (Gageler and Keane JJ).

138 Plaintiff's submissions at [17].

139 As explained by the Attorney-General during debate the express exclusion of lawyers was included at the suggestion of the opposition for the avoidance of doubt. Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3258 (Hon J P Bleijie, Attorney-General and Minister for Justice); See also for comparison *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 513 (Aickin J).

140 Plaintiff's submissions at [71].

106. Respectfully, this submission has no substance.

107. Without expressly saying so, the Plaintiff appears to base his submission on *Totani.*[141] The statute found invalid in that case was, like s 60A, intended to prevent criminal conduct by restricting the freedom of association of persons connected with criminal organisations.[142] The vice of the SOC Act was not the policy to which it gave effect. As explained above, the vice of the SOC Act was that it enlisted the Magistrates Court of South Australia 'to implement decisions of the executive in a manner incompatible with that Court's institutional integrity'.[143]

108. Section 60A is very different from the legislative regime found invalid in *Totani.*

109. First, unlike the s 14(1) of the SOC Act, s 60A does not give to the court the task of creating 'new norms of behaviour' for particular persons identified by the executive.[144] Section 60A itself creates a norm of behaviour. The restrictions it imposes are transparently the result of legislative action. Section 60A does not seek to borrow the reputation of the judicial branch nor 'cloak' the work of the legislature 'in the neutral colours of judicial action'.[145] The section simply creates an offence.[146] The court's task is the ordinary task of determining whether the prosecution has proved the elements of the offence beyond reasonable doubt; and whether, if raised, the defendant has proved the defence on the balance of probabilities.

110. Secondly, s 60A does not seek impermissibly to enlist the court in the 'implementation of legislative policy'.[147] Like all legislation, s 60A reflects policies attributable to the legislature, and like most legislation, s 60A reflects policies attributable to the executive.[148] As Heydon J said in *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment*:[149]

> In a system of responsible government, all legislation enacted substantially in conformity with a Bill presented to the legislature by the Executive may be said to "give effect to ... government policy dictated by the executive". Most legislation is of that kind ... And when legislation enacted in conformity with the will of the Executive contains regulation-making power,

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141 *Totani* (2010) 242 CLR 1.
142 *Totani* (2010) 242 CLR 1 at [41] (French CJ).
143 *Totani* (2010) 242 CLR 1 at [82] (French CJ).
144 Compare *Totani* (2010) 242 CLR 1 at [236] (Hayne J); see also [82] (French CJ) and [139] (Gummow J).
145 Compare *Totani* (2010) 242 CLR 1 at [82] (French CJ); [142] (Gummow J); [479] (Kiefel J); *Kable* (1996) 189 CLR 51 at 133 (Gummow J).
146 Compare *Totani* (2010) 242 CLR 1 at [467] (Kiefel J).
147 Compare *Totani* (2010) 242 CLR 1 at [149] (Gummow J); [436] (Crennan and Bell JJ).
148 Compare *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* (2012) 87 ALJR 162 at [44] (French CJ).
149 (2012) 87 ALJR 162 at [69] (citation omitted).

> the regulations, which are themselves a form of legislation and which are subject to parliamentary scrutiny and the power of disallowance, may equally be said to "give effect to ... government policy dictated by the executive". Once that "policy" is reflected in statutes and regulations, it is binding as a matter of law. The judicial branch of government declares and enforces the law. In that sense, the judiciary gives effect to government policy dictated by the Executive. If the *Kable* statements invalidate legislation giving effect to government policy on that ground alone, they are wrong for that reason. They do not.

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111. Requiring a court to try a person for an offence against a statutory provision which reflects government policy cannot sensibly be said to enlist the court in the implementation of that policy, or to compromise the court's decisional independence and institutional integrity.

112. Thirdly, unlike the SOC Act which 'prevented the Magistrates Court on a s 14(1) application from canvassing in any way the validity of a s 10(1) declaration',[150] s 60A(2) allows a defendant to challenge directly the basis of a legislative or executive declaration of an entity as a 'criminal organisation'. The defendant will
20 have a complete defence if he or she can show that the organisation in which he or she is a participant (or, if it is different, an organisation in which one or both of the other persons present at the time is a participant) does not have the purpose of engaging in, or conspiring to engage in, criminal activity.

113. In the event that an organisation does not have those purposes, then proof of the defence would be relatively easy. Evidence of the constitutional framework of the organisation, recent minutes of meetings, what the organisation does and the fact that the preponderance of its members had not been charged with or convicted of serious criminal offences would be likely to be sufficient, indeed overwhelming,
30 proof, on the balance of probabilities, of this defence. Of course, any evidence led by the prosecution to negative the defence could not be withheld from disclosure to the defendant.[151]

114. The defence in s 60A(2) allows the court to assess for itself whether the purposes of the organisation include engaging in, or conspiring to engage in, criminal activity. As noted above, there is no constitutional difficulty with the fact that s 60A(2) places the onus of proof of one element of the offence on the defendant.[152] It

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150 *Totani* (2010) 242 CLR 1 at [127] (Gummow J).

40 151 In this respect the defence is fundamentally different from the procedure for judicial review for jurisdictional error of an Attorney-General's declaration under s 10(1) of the SOC Act, which was likely to encounter 'very large' forensic difficulties given the ability of the Attorney-General to rely on 'criminal intelligence' which a court could not provide to the applicant. See *Totani* (2010) 242 CLR 1 at [195] (Hayne J).

152 See the authorities referred to in footnote 133 above. As Isaacs J pointed out in *Williamson v Ah On* (1926) 39 CLR 95 at 108, 'It is one thing to say, for instance, in an Act of Parliament, that a man found in possession of stolen goods shall be conclusively deemed to have stolen them, and quite another to say that he shall be deemed to have stolen them unless he personally proves that he got them honestly.'

follows that, unlike s 14(1) of the SOC Act, s 60A(1) cannot be characterised as requiring the court 'to act at the behest of' the executive.[153]

115. For at least those reasons, the Plaintiff's submission that s 60A requires the courts to 'act as an instrument of the executive' should be rejected.

116. Furthermore, laws proscribing organisations, or restricting their activities or the activities of their members have a long history in Australia and in other countries of the British Commonwealth.[154] For example, s 1(1) of the *Prevention of Terrorism (Temporary Provisions) Act* 1974 (UK) ('the 1974 Act') provided that a person who belonged to, supported, or arranged or addressed meetings of a 'proscribed organisation' was guilty of an offence. 'Proscribed organisations' were set out in Schedule 1 to the Act. It was a defence for a person to show that the organisation was not proscribed at the time he became a member, and that he had not taken part in any of its activities since its proscription (s 1(6)). Section 2 made it an offence for any person, in a public place, to wear items of dress or wear, carry or display articles which suggested he was a member or supporter of a proscribed organisation.

117. Similarly, the current *Terrorism Act* 2000 (UK) makes it an offence to be a member of, invite support for or wear the uniform of, a proscribed organisation (see ss 11-13). Proscribed organisations are those set out in Schedule 2 to the Act.

118. A range of provisions of the *Criminal Code Act 1995* (Cth), Schedule, Chapter 5, Part 5.2, Division 102 operate by reference to 'terrorist organisations' specified in the regulations made under that Act (see s 102.1). Amongst other things, it is an offence under the Act for a person to associate on more than two occasions with another person who is a member of, or who promotes the activities of, a terrorist organisation specified in the regulations (s 102.8). It is also an offence for the person to recruit another person to join, or participate in the activities of, a terrorist organisation (s 102.4).

119. In *Thomas v Mowbray*[155] the High Court upheld the validity of s 104.4 of the Commonwealth *Criminal Code*. That section allows a court to make a control order in respect of a person if (amongst other things) it is satisfied on the balance of probabilities that the person has provided training to, or received training from, a listed terrorist organisation. Mr Thomas, the plaintiff in that case, had received training from Al Qa'ida, a listed organisation.[156] No constitutional difficulty arose from the fact that, in this aspect of its application, s 104.4 applied only to persons who were members of organisations selected by the Executive.

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153 *Totani* (2010) 242 CLR 1 at [149] (Gummow J).

154 There is also a long history of criminal laws applying only to particular groups. For example, the Act 57 Geo III c 19 was enacted 'for the more effectually preventing Seditious Meetings and Assemblies' and to suppress and prohibit 'certain Societies or Clubs calling themselves *Spenceans* or *Spencean Philanthropists*' (s 24), cited by Hayne J in *Totani* (2010) 242 CLR 1 at [235].

155 (2007) 233 CLR 308.

156 Ibid at [38] (Gummow and Crennan JJ) and [178] (Hayne J).

120. Legislation in Canada and New Zealand also proscribes activities of identified terrorist groups. For example, the *Terrorism Suppression Act* 2002 (NZ) provides that it is an offence to make available property, financial or related services to an entity knowing it is a designated terrorist entity (s 10), to recruit another person to an organisation knowing it is a designated terrorist entity (s 12), and to participate in a group knowing it is, or being reckless as to whether it is, a designated terrorist entity (s 13). A 'designated terrorist entity' is an entity designated as such by the Prime Minister under the Act (ss 20, 22).

121. Similar provision is made in the *Criminal Code 1985* (Can). Section 83.18 prohibits participating in or contributing to the activity of a terrorist group. Section 83.21 prohibits instructing people to carry out an activity for a terrorist group. 'Terrorist group' is defined to mean a person or group that has as one of its purposes or activities the facilitation or carrying out of any terrorist activity, *or* a person or group identified in a regulation made under the *Code*.[157]

122. The commonness of such laws suggests that they do not necessarily impair the institutional integrity of the courts that enforce them.

123. The principle in *Kable* prevents State legislatures from validly enacting laws which deprive courts of their 'institutional integrity', one aspect of which is a court's independence and impartiality.[158]

124. Section 60A does not impair a court's independence and impartiality. Like a court applying the VLAD Act, a court applying s 60A must conduct its proceedings in open court; it must afford procedural fairness and follow the ordinary rules of criminal procedure; and it would exercise judicial power by applying the law to the facts.[159] There is nothing novel nor constitutionally objectionable about certain elements of the offence being defined by reference to regulations,[160] or about the burden of proving a defence, on the balance of probabilities, being placed on the defendant.

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157 In *R v Khawaja* [2012] 3 SCR 555, the Supreme Court of Canada dismissed an appeal in which these provisions were alleged to be invalid for infringing s 7 of the *Canadian Charter of Rights and Freedoms*. Section 7 provides that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." That provision invalidates laws which restrict liberty more than is necessary to accomplish their goal.

158 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ). See also *Wainohu v New South Wales* (2011) 243 CLR 181 at [44] (French CJ and Kiefel J); *Emmerson* (2014) 88 ALJR 522 at [44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

159 See paragraph [61] above and the authorities there cited.

160 See, for example, ss 9A-9D of the *Drugs Misuse Act 1986* (Qld), which respectively provide that possessing, supplying, producing and trafficking in a 'relevant substance or thing' is an offence. 'Relevant substance or thing' is defined by reference to schedules to the Drugs Misuse Regulation 1987. See also *Customs Act 1901* (Cth), s 233(1)(b) (making it an offence to import 'prohibited imports', which are defined by regulation).

125. The plaintiff's challenge to s 60A should be dismissed.

(iii) Criminal Code, s 60B(1) and s 60C

126. For the same reasons, the plaintiff's challenge to the validity of ss 60B(1) and s 60C of the Criminal Code should fail.

10 127. Section 60B(1) makes it an offence for a person who is a participant in a criminal organisation to enter, or attempt to enter, a prescribed place.

128. 'Prescribed place' means a place declared under a regulation to be a prescribed place (s 60B(4)). Section 3 of the Criminal Code (Criminal Organisations) Regulation 2013 sets out a list of prescribed places.

129. Section 60C makes it an offence for a participant in a criminal organisation to recruit, or attempt to recruit, anyone to become a participant in a criminal organisation.

20 130. It is a defence to a charge under both of the above provisions for the defendant to prove, on the balance of probabilities, that the criminal organisation is not an organisation that has, as one of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity (see s 60B(3) and s 60C(2)).

131. The existence of the defence in s 60B(3) and s 60C(2) is again essential to a proper understanding of each offence provision. For example, there could be no constitutional objection to a provision which prohibited persons from recruiting others to an organisation proved by the prosecution to have the purpose of engage in, or conspiring to engage in, criminal activity. As discussed above, the fact that the burden of proof has been reversed in relation to this element of the offence in s 60C does not give rise to any objection to the legislation based on the *Kable* principle.[161]

132. Like s 60A, ss 60B(1) and 60C create offences to be tried by courts in the ordinary way. They therefore do not render courts instruments of the executive or the legislature. The plaintiff's challenge to them should be dismissed.

(iv) Criminal Code, s 60B(2)

40 133. The plaintiff lacks standing to challenge the validity of s 60B(2) and in any event, the relief he seeks in respect of that provision would be hypothetical.

134. Section 60B(2) makes an offence for a person who is a participant in a criminal organisation to attend, or attempt to attend, a prescribed event. The defence in s 60B(3) also applies to the offence in s 60B(2).

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161 See footnote 133 above.

135. A 'prescribed event' is an event declared under a regulation to be a 'prescribed event' (s 60B(4)). No events have yet been prescribed. It follows that s 60B(2) does not impose any norm of behaviour on the plaintiff or anyone else, and does not challenge the plaintiff's 'freedom of action'.[162]

136. In those circumstances, the plaintiff's challenge to the validity s 60B(2) does not give rise to a real and immediate controversy about 'rights, duties or liability which will, by the application of judicial power, be quelled'.[163] To determine the plaintiff's claim in respect of s 60B(2) would be 'to determine abstract questions of law without the right or duty of any body or person being involved'.[164]

137. In any event, s 60B(2) is valid for the reasons given in relation to s 60A, above.

(v) Liquor Act offence provisions

138. Sections 173EB-173ED of the *Liquor Act 1992* are amongst the 'impugned provisions' in respect of which the Plaintiff seeks relief in the Further Amended Special Case.[165] The Plaintiff baldly "challenges the constitutionally validity of these legislative provisions",[166] but, respectfully, no coherent basis for that challenge is developed.

139. The Plaintiff's submissions say nothing about the Liquor Act provisions specifically. To the extent that they challenge the creation of criminal offences that apply to or in relation to participants in criminal organisations generally,[167] the Defendant repeats its submissions in relation to the Criminal Code, ss 60A-60C above.

140. To the extent that the Liquor Act provisions are attacked on *Kable* grounds, the Defendant submits simply that there is nothing in the challenged provisions, and certainly nothing that is identified in the Plaintiff's submissions, that:

> confer[s] upon ... a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with the court's role as a repository of federal jurisdiction.[168]

141. Sections 173EB-173ED simply create offences of general application. Section 173EB makes it an offence for a licensee or manager of licensed premises, or an employee or agent working at the premises, to knowingly allow a person wearing a

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162 Plaintiff's submissions at [78].
163 *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 458-459 (Hayne J).
164 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 267.
165 Plaintiff's submissions at [12](d), footnote 13.
166 Plaintiff's submissions at [44]-[45].
167 Plaintiff's submissions at [46]-[49], [63]-[71].
168 *Emmerson* (2014) 88 ALJR 522 at 533 [40].

prohibited item to enter or remain in the premises. Section 173EC prohibits a person wearing or carrying a prohibited item from entering or remaining in licensed premises. Section 173ED requires a person wearing or carrying a prohibited item to leave licensed premises immediately if required to do so by the licensee, an employee or agent, or a policy officer. Those offences would be investigated, prosecuted and adjudicated in the ordinary way.

142. The aim of these provisions was to prevent people wearing or carrying clothing, jewellery and accessories that the legislature apprehended could be used to intimidate patrons of licensed premises, or which might identify members to rival clubs and thereby provoke criminal conduct. In other jurisdictions, such prohibited items have been associated with intimidation and criminal activity.[169] Provisions aimed at protecting the civility of licensed premises have a long provenance. For example, s 10 of the *Habitual Criminals Act* 1869 (UK) provided that it was an offence for keepers of lodging-houses, beerhouses, public houses or other places where excisable liquors were sold, knowingly to permit thieves and reputed thieves to meet or assemble therein. Similarly, s 22 of the *Police Offences Act* 1884 (NZ) provided that it was an offence for any person, who kept any house or public resort wherein liquors were sold or consumed, knowingly to permit prostitutes or persons of notoriously bad character to meet and remain therein.[170]

143. It is true that the offences of general application in ss 173EB to 173ED apply in relation to the wearing or carrying of 'prohibited items' which is defined in s 173EA by reference to 'declared criminal organisation'. A 'declared criminal organisation' is a criminal organisation mentioned in the Criminal Code, s 1, definition *criminal organisation*, para (c); that is, one prescribed by regulation.

144. However, the power or function which ss 173EB-173ED confer on a court hearing and determining an offence against any of those sections does not substantially impair the court's institutional integrity. It does not require the court, in appearance or reality, to act as an instrument of the executive.[171] It does not require the court to do the executive's bidding.

145. The plaintiff's challenge to the validity of the Liquor Act provisions should be dismissed.

F. The Bail Act

(i) Purpose and operation of ss 16(3A) to (3D) of the Bail Act

146. The impugned provisions of the Bail Act need to be understood in the context of s 9 and the rest of s 16 of the Bail Act.

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169 See Further Amended Special Case, paragraph [9]; Amended Special Case Book 52-53.

170 Compare also the provisions of the *Terrorism Act 2000* (UK) which prohibit wearing the uniform of a proscribed organisation, referred to in paragraph [116] above.

171 Plaintiff's submissions at [48](b), [63]-[71].

147. Section 9 of the Bail Act creates a presumption in favour of granting bail. By s 16(1), however, the presumption is rebutted if the court is satisfied that there is an 'unacceptable risk' of certain matters, including that the defendant if released on bail would fail to appear and surrender into custody.

148. Subsection 16(2) provides that in determining whether there is an unacceptable risk, the court may have regard to all matters that appear relevant. Without limiting those matters, however, the provision sets out specific matters to which the court may have regard. These include the nature and seriousness of the offence as well as the character, antecedents, associations, home environment, employment and background of the defendant.

149. Subsection 16(3) of the Bail Act provides that if the defendant is charged with certain offences (including offences under the Bail Act), the court must refuse to grant bail unless the defendant shows cause why the defendant's detention in custody is not justified. In effect, the defendant has the burden of demonstrating that there is not an unacceptable risk of the matters in s 16(1).

150. Subsection 16(3A) of the Bail Act operates in a similar way. It provides that where the defendant is charged with an offence and it is alleged that the defendant is, or has at any time been, a participant in a criminal organisation,[172] bail must be refused, unless:

(a) the defendant can show cause why his/her detention in custody is not justified, thus conferring on the court a plenary discretion to grant bail against the presumption, if so persuaded;[173] or

(b) the defendant proves that at the time of his/her alleged participation in the criminal organisation, the organisation did not have as one of its purposes, the purpose of engaging in criminal activity.[174]

151. Section 16(3C) provides that for subsection (3A), it does not matter whether the offence is indictable, summary or regulatory; whether the defendant is alleged to have been a participant in the criminal organisation when the offence was committed; or whether there is no link between the alleged participation in the criminal organisation and the offence charged. It therefore puts beyond doubt that s 16(3A) applies regardless of those particular circumstances.[175] It does not, however, have a wider operation.

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172 See Bail Act, s 6. The term 'criminal organisation' is defined by reference to Schedule 1 of the Criminal Code, incorporating the 'Hells Angels' by reference to s 2 of the Criminal Code (Criminal Organisations) Regulation 2013.

173 Bail Act, s 16(3A)(a).

174 Bail Act, s 16(3D).

175 Explanatory Note to the Criminal Law (Criminal Organisations Disruption) and other Legislation Amendment Bill 2013, p 16.

(ii) Plaintiff lacks standing

152. The Plaintiff contends that ss 16(3A) to (3D) of the Bail Act are invalid because they require a court to act in breach of the notion of equality before the law and they render the courts instruments of the executive or legislature.

153. However, the Plaintiff does not have standing to challenge those provisions. He has not pleaded that he has been charged with any offence or that he has engaged in any conduct that would render him liable to prosecution for an offence (whether summary, indictable or regulatory). The impugned provisions of the Bail Act therefore do not apply to him; indeed, as matters presently stand it may be expected that they will never apply to him. In these circumstances, the Plaintiff cannot claim that its provisions affect him in his person or property.[176] It follows that he lacks standing to obtain a declaration that s 16(3A) and related provisions are invalid.

154. Alternatively, the relief that the Plaintiff seeks would involve the Court in answering a hypothetical question. As outlined above,[177] whether relief is hypothetical may involve matters of degree. In this case, however, there is nothing real or immediate about the answer that he seeks, because the Bail Act does not apply to him and it is possible that it never will. In these circumstances, the relief that he seeks should be refused.

(iii) Impugned provisions do not infringe the *Kable* principle

155. Even if (contrary to the submissions above) the Plaintiff has standing and the relief that he seeks is not hypothetical, his challenge should be rejected. As outlined above,[178] the Constitution contains no general principle of legal equality. Chapter III of the Constitution, moreover, does not entrench a principle of 'equal justice' that would invalidate Commonwealth or State laws.[179] The Plaintiff's challenge on those bases therefore cannot succeed.

156. Nor do s 16(3A) and associated provisions render the court an instrument of the executive or the legislature. Chapter III does not prohibit laws that merely regulate the exercise of a court's powers, including the power to grant bail. In *Chau v Director of Public Prosecutions*, for example, the New South Wales Court of Appeal rejected an argument that Chapter III was inconsistent with provisions creating a presumption against bail for certain drug offences.[180] Chief Justice Gleeson explained:[181]

> A law conferring a discretion on a court can determine the factors to which the court must have regard in exercising the discretion, or the relative weight to be given to

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176 Cf *Croome* (1997) 191 CLR 119 at 127-128, 137-138.
177 See paragraph [40] above.
178 See paragraphs [44] to [47] above.
179 See paragraphs [48] to [52] above.
180 (1995) 37 NSWLR 639.
181 (1995) 37 NSWLR 639 at 647 (Gleeson CJ). See also at 657 (Kirby P).

different factors, or it can provide that there is a presumption that the discretion should be exercised in a particular way, save in exceptional circumstances.

157. In *Baker v The Queen*,[182] this Court upheld the validity of a provision that prevented the New South Wales Supreme Court from determining a minimum term and an additional term for a small group of prisoners[183] unless that Court was satisfied that there were 'special reasons' for doing so. Both *Chau* and *Baker* demonstrate that regulation of a court's powers will not, without more, infringe any prohibition in Chapter III.

158. Subsection 16(3A) shifts the burden of demonstrating that bail should be granted to a person in specific circumstances.[184] It does not, however, alter any aspect of the ordinary judicial process, such as the requirement to afford procedural fairness or the open court principle. Furthermore, neither it nor s 16(3C) restricts the considerations to which the court may have regard in deciding whether to grant bail. Put differently, the court remains free to consider all the factors that appear relevant to the existence of an unacceptable risk and to grant bail if satisfied that the risk would not arise.[185] In these respects, s 16(3A) operates in the same manner as s 16(3), a provision that the Plaintiff does not challenge.

159. Given the limited operation of s 16(3A) to (3D) of the Bail Act, those provisions are properly characterised as doing no more than regulating the discretion of the court to grant bail.

160. Accordingly, the Plaintiff's challenge based on *Kable* grounds should be dismissed.

G. Conclusion

161. The Defendant submits that the questions in the further amended special case should be answered as follows:

1. Does the plaintiff have standing to seek a declaration that any, and which, of the provisions referred to in the schedule (other than *Criminal Code* (Qld), sections 60A, 60B(1) and 60C, and *Liquor Act 1992* (Qld), sections 173EB to 173ED) is invalid?

   No.

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182 (2004) 223 CLR 513.

183 These were prisoners who were subject to a 'non-release recommendation'. There were only 10 such prisoners, and their identity was widely known: see (2004) 223 CLR 513 at [8] (Gleeson CJ), [50] (McHugh, Gummow, Hayne and Heydon JJ), [165] (Callinan J).

184 It is significant that there is no common law right to be at liberty on bail pending the resolution of a charge: see *Chau v Director of Public Prosecutions* (1995) 37 NSWLR 639 at 646 (Gleeson CJ).

185 There are many examples where the Supreme Court of Queensland has considered such factors and granted bail despite s 16(3A): see *Carew v The Office of the Director of Public Prosecutions* [2014] QSC 001; *Lansdowne v The Director of Public Prosecutions* [2014] QSC 002; *Re Halilovic* [2014] QSC 005; *Re Alajbegovic* [2014] QSC 006; *Re Van Rooijen* [2014] QSC 116; *Re Bloomfield* [2014] QSC 115.

2. Is the relief which the plaintiff seeks in answer to question 3 (other than the relief sought in relation to the *Criminal Code* (Qld), sections 60A, 60B(1) and 60C, and *Liquor Act 1992* (Qld), sections 173EB to 173ED) hypothetical?

   Yes.

3. Is any, and which, of the provisions referred to in the Schedule invalid on the ground that it infringes the principle of *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51?

   None of the provisions is invalid.

4. Who should pay the costs of the special case?

   The Plaintiff.

VI. ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT

162. The Defendant estimates that 3 hours should be sufficient to present its oral argument.

Dated: 8 August 2014

PETER DUNNING QC

Solicitor-General for Queensland
Tel: (07) 3218 0630
Fax: (07) 3218 0632
Email: solicitor.general@justice.qld.gov.au

ALAN MACSPORRAN QC

More Chambers
Tel: (07) 3236 2719
Fax: (07) 3236 2720
Email: alanmacsporran@morechambers.com

GIM DEL VILLAR

Murray Gleeson Chambers
Tel: (07)3175 4650
Fax: (07) 3175 4666
Email: gdelvillar@qldbar.asn.au

CHRIS TAM

Callinan Chambers
Tel: (07) 3218 0691
Fax: (07) 3218 0699
Email: tam@callinanchambers.com