IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **NO B14 OF 2014**

BETWEEN: **STEFAN KUCZBORSKI**
Plaintiff

AND: **THE STATE OF QUEENSLAND**
Defendant

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA (INTERVENING)

Filed on behalf of the Attorney-General of the Commonwealth of Australia by:

Australian Government Solicitor
4 National Circuit, Barton, ACT 2600
DX 5678 Canberra

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File ref: 14053667
Simon Thornton and Andrew Buckland
Telephone: 02 6253 7300
E-mail: Simon.Thornton@ags.gov.au
Andrew.Buckland@ags.gov.au
Facsimile: 02 6253 7303

PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**).

PART IV LEGISLATIVE PROVISIONS

3. The Commonwealth adopts the statement of applicable legislative provisions of the plaintiff and the defendant.

PART V ARGUMENT

4. The Commonwealth advances the following propositions as regards the plaintiff's claim that the various provisions impugned by the Plaintiff (**Impugned Provisions**[1]) are invalid.

5. The plaintiff lacks standing, and raises merely hypothetical questions, to the extent he seeks to challenge the validity of the amended sentencing provisions[2] in the absence of (a) any challenge to the validity of the underlying offences; (b) any assertion that the plaintiff has been charged with the underlying offences or intends to engage in conduct which could be charged under such offences; (c) any assertion that his lawful conduct is in some way curtailed by the existence of those provisions. The relief sought in respect of the amended bail provisions is equally hypothetical and the same conclusion follows.

6. The plaintiff's *Kable* argument, so far as it depends on notions of equal justice, is no more than a disguised attempt to introduce a freestanding guarantee of equality in the content of the law which has been correctly rejected in *Leeth* and *Kruger*.

7. None of the features of the Impugned Provisions "enlists" the Court in the service of the executive so as to offend the *Kable* doctrine.

8. Accordingly, the Commonwealth submits that question 3 should be answered 'no' on the basis of the arguments advanced by the plaintiff. The Commonwealth makes some further submissions as to constitutional principle regarding the amended bail provisions.

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1 The provisions of the *Vicious Lawless Association Disestablishment Act 2013* (Q) (**VLAD Act**), the *Criminal Code* (Q) (**Criminal Code**), the *Bail Act 1980* (Q) (**Bail Act**) and the *Liquor Act 1992* (Q) (**Liquor Act**) identified in the Schedule to the further amended special case (**special case**): see Amended Special Case Book (**ASCB**) 56.

2 Criminal Code, ss 72(2), 72(3), 92A(4A), 92A(4B), 320(2), 320(3), 340(1A), 340(1B); VLAD Act, s 7.

A. Standing/matter

Constitutional principles and their rationale

9. Chapter III of the Commonwealth Constitution prevents a court from exercising federal jurisdiction to 'determine abstract questions of law without the right or duty of any body or person being involved'.[3] It does this by confining the federal jurisdiction that can be conferred upon any court to jurisdiction in respect of the 'matters' enumerated in ss 75 and 76 of the Constitution.[4] The distinction between a purely abstract (or hypothetical) question and one that involves a 'matter' is given form by the notion that a 'matter' must involve a real justiciable controversy as to some immediate right, duty or liability to be established by the determination of the Court.[5]

10. Those statements of bedrock constitutional principle have a structural and systemic explanation which is similar to the broad rationale underpinning various doctrines that the Supreme Court of the United States has identified as flowing from the constitutional requirement[6] for a "case" or "controversy" to found federal jurisdiction – in particular, the related principles that a federal court cannot adjudicate hypothetical controversies and that a case must be 'ripe' for adjudication. As the Supreme Court explained in *United Public Workers v Mitchell*:[7]

> The Constitution allots the nation's judicial power to the federal courts. Unless those courts respect the limits of that unique authority, they intrude upon powers vested in the legislative or executive branches. Judicial adherence to the doctrine of the separation of powers preserves the courts for the decision of issues, between litigants, capable of effective determination. Judicial exposition upon political proposals is permissible only when necessary to decide definite issues between litigants. When the courts act continually within these constitutionally imposed boundaries of their power, their ability to perform their function as a balance for the people's protection against abuse of power by other branches of government remains unimpaired. Should the courts seek to expand their power so as to bring under their jurisdiction ill defined controversies over constitutional issues, they would become the organ of political theories.

11. That broad rationale is not undermined by, and is distinct from, the US Supreme Court's more recent development of the 'injury in fact' requirement of the 'standing' doctrine in the US,[8] which has been said to flow in part from a different aspect of the relationships between the organs of the United States Government (in particular the responsibility of the President for the executive). Those more

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3 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 267.

4 See also s 77 of the Constitution.

5 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 610-11 [42]-[43] per Gaudron J, 631 [104] per Gummow J, 646-7 [147] per Kirby J, 660-1 [183]-[184] per Hayne J; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 (***McBain***) at 458-9 [242] per Hayne J.

6 In Art III §2 of the *United States Constitution.*

7 330 US 75 (1947) at 90-91 [9].

8 See eg *Steel Co v Citizens for a Better Environment* (1998) 523 US 83 at 103 and *Lujan v Defenders of Wildlife* (1992) 504 US 555 at 560.

recent authorities, as this Court said in *Truth About Motorways*,[9] are not of assistance in the context of Chapter III. But, the same is not true of the statement from *Mitchell*. Indeed, similar observations have been made by members of this Court. For example, in *Grollo v Palmer*,[10] after observing that the advisory opinion was alien to judicial power, Gummow J explained that the 'association of serving judges with advisory opinions has the potential to deplete the capital of the judicial branch of government'. And that same concern was expressed by the Privy Council in the *Boilermakers Case*,[11] where their Lordships suggested that advisory opinions were objectionable because they tended to 'sap [judicial] independence and impartiality'.[12]

12. The point is that it is, emphatically, the province and duty of the judicial department to say what the law is;[13] and, equally emphatically, not what it may be in poorly defined hypothetical factual scenarios, that may never come to pass. The latter possibility potentially places the Court in the position of providing, with complete generality and in a manner divorced from concrete facts, for the regulation of future activity. Under the Constitution, that mode of regulation (and the necessarily attendant process of weighing of competing policy choices and interests) is reserved to the legislative branch.

Identification of the matter said to arise here

13. The 'matters' in respect of which federal judicial power can be exercised include 'any matter ... [a]rising under this Constitution, or involving its interpretation': Constitution s 76(i). Jurisdiction in those terms is conferred on this Court by s 30(a) of the *Judiciary Act 1903* (Cth). The plaintiff seeks to invoke that jurisdiction to seek declarations of invalidity in respect of the Impugned Provisions.

14. But, having regard to the essential conception of a matter identified above, that conferral of jurisdiction does not permit this Court to 'pronounce, in the abstract, upon the validity or meaning of Commonwealth or State statutes. To do so would not be an exercise of judicial power conferred by or under Ch III'.[14] Question 2 of the questions stated for the Full Court raises whether the declaratory relief sought by the plaintiff in respect of the provisions there specified is 'hypothetical' in that sense. If so, then it necessarily follows that there is no 'matter'. Question 1 raises the issue of the plaintiff's 'standing' to seek that relief. Where, as here, the issue is whether federal jurisdiction has been invoked with respect to a 'matter', so-called questions of 'standing' to seek equitable relief including declarations are subsumed within that issue.[15]

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9 *Truth About Motorways v Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591 at 603 [21] per Gleeson CJ and McHugh J; at 606-607 [33] and 610 [42] per Gaudron J; at 632-637, [108]-[119] per Gummow J; 666 [197] and 671 [213] per Callinan J.

10 (1995) 184 CLR 348 (***Grollo***) at 391.

11 *Attorney General (Cth) v R* (1957) 95 CLR 529 at 541.

12 See similarly *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 318-319 per Brennan J (in dissent).

13 *Marbury v Madison* (1803) 1 Cranch 137at 177 [5 US 137 at 111].

14 *McBain* at 389 [5] per Gleeson CJ. See also 389 [6], 396 [26] per Gleeson CJ and 449 [204] per Kirby J.

15 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 (***Pape***) at 35 [50]- [51] per French CJ, 68 [152] per Gummow, Crennan and Bell JJ, 99 [272]-[273] per Hayne and Kiefel JJ; *Plaintiff*

15. In seeking to discern whether there is a 'matter', resort can be had to a tripartite inquiry requiring:

    a. the identification of the *subject-matter* said to arise for determination;

    b. the identification of the *right, duty or liability* which it is said is to be established in the proceeding; and

    c. the identification of the *controversy* said to arise between the parties for the quelling of which the judicial power of the Commonwealth is invoked.

16. Whilst each of those inquiries may be pursued separately, all are related aspects of the question of whether there is a 'matter'.[16] Those inquiries may be illuminated by the conduct of the proceedings and especially by the pleadings in which the issues in controversy are defined and the claims for relief are set out.[17]

17. The pleading reveals that the *subject matter* said to arise is whether the Impugned Provisions exceed the legislative power of the Queensland legislature by reason of a constraint arising under Ch III of the Constitution. When read with the special case, it also reveals that any immediate *right, duty or liability* to be established could only relate to the operation of ss 60A, 60B(1) and 60C of the Criminal Code and ss 173EB to 173ED of the Liquor Act. The effect of the amendments adding those provisions was to prohibit the plaintiff from engaging in certain forms of conduct (by criminal sanction[18]), being conduct:

    17.1. identified with precision;

    17.2. in which the plaintiff would otherwise now be free to engage; and

    17.3. in which the plaintiff asserts that he wishes to engage (para [20] of the special case, noting the caveat made by the defendant at ASCB 51 lines 21-23).

18. Questions 1 and 2 do not raise whether this is sufficient to give rise to a 'matter'.

19. As regards the balance of the pleading, the plaintiff seeks declarations of invalidity regarding the impugned provisions dealing with bail in the Bail Act and those dealing with sentencing in the VLAD Act and in the Criminal Code. In the case of the sentencing provisions, they could have no application to the plaintiff unless, *first,* he were in the future to engage in conduct triggering such provisions (and he is silent about this prospect). *Second*, he would need to:

    a. be charged with; and

    b. be convicted of

S10/2011 v Minister for Immigration and Citizenship (2012) 246 CLR 636 at 659 [68] per Gummow, Hayne, Crennan and Bell JJ; *McBain* at 405-406 [62] per Gaudron and Gummow JJ (with whom Hayne J relevantly agreed).

16 Ibid.

17 *Fencott v Muller* (1983) 152 CLR 570, 608, quoted with approval in *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261, 294; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 585 [139].

18 Which, in the case of s173EB of the Liquor Act, operates on licensees, approved managers and employees or agents.

the offences upon which those provisions operate.[19]

20. Importantly, the plaintiff does not challenge the validity of the offences themselves – only the super-added sentencing provisions. Nor does he assert that his conduct is or will be altered in any way by reason of those provisions.

21. It is true that conduct found to contravene ss 60A, 60B(1) and 60C of the Criminal Code and ss 173EC and 173ED of the Liquor Act (the validity of which the plaintiff does attack) may engage the impugned provisions of the Bail Act.[20] But it is still the case that that possibility is subject to fulfilment of a number of contingencies: the plaintiff engaging in conduct violating those laws or other laws, followed by detection and arrest, followed by charge and custody and accompanied by an allegation that the plaintiff is or has been a participant in a criminal organisation.

22. For the reasons developed below, those aspects of the plaintiff's claim do not give rise to a matter.

Declaratory relief

23. It is first necessary to say something further about declaratory relief. There is no doubt that that remedy is a flexible one that ought not be fettered by laying down rules as to the manner of its exercise. There is equally no doubt that it is confined by considerations that mark out the boundaries of judicial power, including (in federal jurisdiction) the requirement for a 'matter.'[21]

24. It is true that the power to grant such relief extends to the power to declare that conduct that has not yet taken place will not infringe a law or a provision of a contract. It also extends to the power to declare that conduct that has not yet taken place will be a nullity in law.[22] In such a case, the element of futurity does not render the exercise of judicial power relevantly "hypothetical", provided that:

    24.1. the dispute is attached to "specific" or "concrete" facts and the question is not merely concerned with whether a party is generally entitled to act in a certain fashion;[23]

    24.2. the relevant question is of 'real practical importance' or, put another way, of 'real consequence' to the parties;[24] and

    24.3. there exists a relevant controversy about rights, duties or liabilities – for example a privilege or immunity from the requirement to observe the law in

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19 See Criminal Code, ss 72(1) and (2), 92A(1) and (4A), 320(1) and (2), 340(1) and (1A); VLAD Act, ss 3, 7 and Schedule 1.

20 Bail Act ss 16(3A), 16(3B), 16(3C) and 16(3D).

21 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 (***Plaintiff M61***) at 359, [103].

22 See *Commonwealth v Sterling Nicholas Duty Free Pty Limited* (1972) 126 CLR 297 at 305 per Barwick CJ; *Bass v Permanent Trustee Co Limited* (1999) 198 CLR 334 (***Bass***) at 356 [47]; *Edwards v Santos* (2011) 242 CLR 421 (***Santos***) at 435 [37] per Heydon J (French CJ, Gummow, Crennan, Kiefel and Bell JJ agreeing).

23 *Bass* at [48], 356-7; *Ainsworth v Criminal Justice Commission* (1991) 175 CLR 564 (***Ainsworth***) at 582 per Mason CJ, Dawson, Toohey and Gaudron JJ.

24 *Forster v Jododex Australia Pty Limited* (1972) 127 CLR 421 at 437-438; *Plaintiff M61* at 359 [103]; *Santos* at 436 [37], [38].

question.[25]

25. Albeit in the context of considering the powers of superior courts, those criteria were described by this Court in *Ainsworth* as the 'considerations which mark out the boundaries of judicial power'.[26] The boundary thus traced reflects the limits implicitly suggested by the statement of Latham CJ in *Toowoomba Foundry Pty Ltd v The Commonwealth*[27] that '[i]t is now ... too late to contend that a person who is, or in the immediate future probably will be, affected in his person or property by Commonwealth legislation alleged to be unconstitutional has not a cause of action in this Court for a declaration that the legislation is invalid'. In the context of Chapter III, those criteria are to be understood as necessary conditions for the existence of a 'matter' in a claim for declaratory relief.[28]

26. Their application is usefully illustrated by reference to the passage from Dixon J's reasons in the *BMA Case*[29] (to which both sets of joint reasons made reference in *Croome*[30]). As was noted in *Croome*, his Honour there doubted that the Association had any sufficient material interest that would be prejudiced by the operation of the Act. But it mattered not because the other medical practitioner plaintiffs would be directly affected by the legislation in their practice of medicine or surgery.

27. Importantly for present purposes, Dixon J went on to say that the position would be different for severable provisions that did 'not in themselves affect the [medical practitioner plaintiffs] and [did] not touch the practice of their profession'. To illustrate that point, his Honour referred to an aspect of the plaintiffs' claim that arose from a power conferred upon the Director-General to suspend or revoke approval for medical practitioners practising in an area where there was no pharmaceutical chemist approved under the Act. The plaintiffs had impugned provisions purporting to give an appeal from such a decision to the Supreme Court of each State. That was said to be invalid for purporting to impose an administrative duty upon the State Courts and so infringe Chapter III. His Honour observed as to that part of the claim:

> It is not alleged that any of the plaintiffs practises in a particular area in which there is no approved pharmaceutical chemist and, even if he did, it would not give him a sufficient present interest to raise, as an independent question, the validity of the attempt to give a right of appeal if the double contingency should occur in the future of his being approved for the purpose of supplying pharmaceutical benefits and of his approval subsequently being revoked or suspended.[31]

Those impugned provisions being severable, their validity did not arise for

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25 *McBain* at 407, [68]-[69] per Gaudron and Gummow JJ explaining *Croome v Tasmania* (1997) 191 CLR 119 (***Croome***).

26 *Ainsworth* at 582 per Mason CJ, Dawson, Toohey and Gaudron JJ.

27 (1945) 71 CLR 545 at 570, approved in *Croome* at 126 per Brennan CJ, Dawson and Toohey JJ and 137 per Gaudron, McHugh and Gummow JJ.

28 *Truth About Motorways* at 613 [52] per Gaudron J; See also *Plaintiff M61* at 359, [102]. Reflecting the fact that the line to be drawn as regards those matters involves questions of degree, they will also be potentially relevant to the discretion as to whether to grant declaratory relief: *Re Tooth & Company Ltd* (1978) 19 ALR 191 at 208 per Brennan J.

29 *British Medical Association v Commonwealth* (1949) 79 CLR 201 (***BMA Case***) at 257 per Dixon J.

30 See *Croome* at 126-127 per Brennan CJ, Dawson and Toohey JJ and at 137-138 per Gaudron, McHugh and Gummow JJ.

31 *BMA Case* at 258 per Dixon J.

determination.

28. Returning to the necessary conditions for the existence of a 'matter' identified (at [25]) above: the dispute as regards that aspect of the claim was not attached to specific facts. Indeed, there were several significant factual contingencies that would need to be satisfied before the provision could have had any effect at all upon the medical practitioner plaintiffs. There was, by reason of those unfulfilled contingencies, no immediate controversy about rights, duties or liabilities, or at least none that was of any 'real consequence' or 'real practical importance' for the parties.

29. A further illustration is provided by Gibbs CJ's observations in *University of New South Wales v Moorhouse*.[32] His Honour there said that in the case of an owner of copyright seeking to assert her or his rights, a declaration should not as a general rule be made unless 'it is established that actual infringement has occurred or that the defendant intends to take action that will amount to an infringement'. His Honour also referred to the many examples of cases in which a declaration had been refused as regards 'circumstances that [have] not occurred and might never happen'. The declaration that his Honour held had been wrongly made rested purely on hypothetical facts. In particular there was no evidence on the critical question of authorisation. As such, and for the reasons given in *Bass* at [48]-[49], it did not resolve a question of real consequence for the parties, because there could be no certainty that such a general declaration would quell the dispute. And any relevant controversy about rights, duties or liabilities remained to be determined on the basis of facts that had been merely assumed, not determined.

30. It is presently unclear whether an intention of the nature identified by Gibbs J suffices where the issue concerns the potential application of the criminal law to a party seeking a declaration. In *Croome*, Brennan CJ, Dawson and Toohey JJ expressly reserved the question of whether a desire or intention to act in contravention of the impugned law would necessarily found such relief. Their Honours were content to hold that the question of standing had rightly been conceded by reason of the plaintiffs having engaged in the proscribed conduct in the past, rendering them liable to prosecution, conviction and punishment.[33]

31. A wider view is suggested by the reasons of Gaudron, McHugh and Gummow JJ. Their Honours said that federal jurisdiction was properly invoked to seek declaratory relief where the controversy raised by the plaintiffs' case concerned the validity of laws imposing duties that 'affect[ed] the plaintiffs in their person' by requiring the observance of particular norms (to which were attached liability to prosecution and subsequent punishment).[34] Where it is established, in the exercise of the judicial power of the Commonwealth, that the Constitution invalidates or renders inoperative a law, there is met by the Constitution a call of great importance to the ordinary citizen affected in that fashion. Such a person is "entitled to know" whether there continues a requirement to observe that law.

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32 (1975) 133 CLR 1 at 10. His Honour considered that the hypothetical nature of the question went to the exercise of the discretion to grant relief. But the decision was cited in *Ainsworth* at 582 in discussing the boundaries of judicial power.

33 *Croome* at 127-128 per Brennan CJ, Dawson and Toohey JJ.

34 Ibid at 137 per Gaudron, McHugh and Gummow JJ.

32. The Commonwealth submits that, should it be necessary to decide this point, it is sufficient that the moving party establishes with precision that they intend to engage in identified conduct of a kind establishing a sufficient interest and which, if the impugned law is valid, will undoubtedly expose them to a penalty. So in *Croome* the plaintiffs had a sufficient interest as 'the conduct ... of their personal lives in significant respects [was] overshadowed' by the presence of the impugned law.[35]

33. That does not involve any departure from the proposition identified above that the question must not merely be concerned with whether a party is generally entitled to act in a certain fashion. The reason that is so is that given by Gaudron and Gummow JJ in *McBain*. Their Honours there explained *Croome* by reference to a particular controversy with a concrete factual basis: saying it was an example of a case which, like other challenges founded upon s109, involved a 'claim under the Constitution...to a privilege or immunity from a requirement to observe the state law in question'. As their Honours went on to make clear, they were there referring to a 'claim [by the relevant party] in this present litigation' (408 [72]). A person making a claim to such a privilege or immunity is 'entitled to know' whether that law is binding.

34. In Hohfeldian terms, the claim of a privilege or immunity will require specific identification of the correlative duty or obligation from which the person seeks to be relieved, which will in turn require identification of the specific facts and circumstances in which that duty arises. When that is understood, there is no difficulty in concluding that the relevant question is one that is of 'real' consequence to the parties – the decision on that question will amount to a binding one raising a res judicata between the parties in respect of those specific facts. But a plaintiff cannot otherwise 'roam at large' over the legislation – she or he is confined to those provisions that affect her or his rights or obligations.[36]

35. It is, of course, the case that relief granted in such a case will have more general application, in the sense identified by Gaudron and Gummow JJ in *McBain* at 408 [71] (see also Gleeson CJ at 395 [23]). It will potentially influence or control the outcome of future litigation in which the validity of the impugned law is in issue and, in that sense, establish a result that will apply to all. But that does not render inapposite the proposition that a claim for such relief must involve a claim for an immunity or privilege. By its nature, and having regard to its unique and essential function, judicial power produces such a result only through the quelling of controversies by the ascertainment of facts, by application of the law and, where appropriate, exercise of judicial discretion.[37]

36. Insistence on those matters is not at odds with *Truth About Motorways*. That decision is authority for the proposition that (unlike the position in the United States) the means available to the Parliament under s76(ii) of the Constitution to enforce (by new remedies) compliance with legislative norms of conduct are not limited by a requirement for reciprocity or mutuality of right and liability between the plaintiff and the defendant. That does not alter the established position that a

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35 Ibid at 138.

36 *Real Estate Institute of NSW v Blair* (1946) 73 CLR 213 at 227. That proposition was not doubted in *Pape*, although it was not found to be applicable (see at 69 [156] per Gummow, Crennan and Bell JJ).

37 *Fencott v Muller* (1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ and *McBain* at 458-459 [242] per Hayne J.

'matter' must involve some right, privilege or protection given by law (or the prevention, redress or punishment of some act prohibited by law). It is not the case that, if there is no 'wrong', nevertheless there is a matter, so long as there is an available remedy.[38]

Answers to questions 1 and 2

37. Aside from ss 60A, 60B(1) and 60C of the *Criminal Code* and ss 173EB to 173ED of the *Liquor Act 1992*, the plaintiff does not make any claim for a privilege or immunity from a requirement to observe Queensland law. And there is no privilege or immunity that could be claimed. That is because there is no correlative duty or obligation from which to be relieved. Properly understood, there is no analogy with *Croome*.

38. The plaintiff does not allege that he has engaged in conduct constituting an offence to which the sentencing or bail provisions in the Impugned Provisions would apply. Nor, in contrast to his claims as regards ss 60A, 60B(1) and 60C of the Criminal Code and ss 173EB to 173ED of the Liquor Act, does the plaintiff allege that he intends to engage in any such conduct that would engage the impugned sentencing laws. Indeed, if the legislation succeeds in the objects identified in the extrinsic materials and in the objects clause of the VLAD Act,[39] neither the plaintiff nor any other person will ever be subject to those provisions.

39. As submitted above, the engagement of the impugned provisions of the Bail Act is equally subject to a number of contingencies that may never be fulfilled.

40. The current matter is analogous to the second example given by Dixon J in *BMA*. There, as here, it is conceivable that the powers or duties of the Court, which the plaintiff asserts were invalidly conferred or imposed, might be brought to bear on the plaintiff at some time in the future, if a particular combination of factual circumstances comes to pass. But that is not sufficient. For there, as here, those contingencies render the claim hypothetical. The words of Gibbs CJ in *Moorhouse* aptly capture such a case: the relief claimed concerns matters that have not happened and may never happen. And by reason of those unfulfilled contingencies, there is no immediate controversy about rights, duties or liabilities, or at least none that is of any 'real practical importance'.

41. A further helpful analogy, close to the current facts, may be seen in the decision of the United States Supreme Court in *O'Shea v Littleton*.[40] Again that authority precedes (and deals with concepts distinct from) the development of the 'injury in fact' doctrine considered in *Truth About Motorways*. There, the respondents had brought a civil rights class action seeking injunctive relief against various executive and judicial officers, alleging that they were engaging in a continuing pattern of unconstitutional conduct against African Americans in the administration of the State criminal justice system. The complaint alleged, relevantly, that a county magistrate and judge were imposing higher sentences and harsher penalties on black defendants than white defendants. Importantly,

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38 *McBain* at 407 [66] per Gummow and Gaudron JJ.

39 Extracted at PS [65], [66].

40 414 US 488 (1974).

the respondents did not challenge the validity of any State criminal laws. Nor did they allege that they were themselves serving unconstitutional sentences or awaiting trial by the petitioners (although they asserted at oral argument that some of them had previously been defendants before the petitioners and had suffered from the alleged unconstitutional practices). The Supreme Court dismissed the action for want of jurisdiction, holding that it failed to give rise to a "case" or "controversy" for the purposes of Art III, observing (at 496-497):

> ...the question becomes whether any perceived threat to respondents is sufficiently real and immediate to show an existing controversy simply because they anticipate violating lawful criminal statutes and being tried for their offenses, in which event they may appear before petitioners and, if they do, will be affected by the allegedly illegal conduct charged. Apparently, the proposition is that *if* respondents proceed to violate an unchallenged law and *if* they are charged, held to answer, and tried in any proceedings before petitioners, they will be subjected to the discriminatory practices that petitioners are alleged to have followed. But it seems to us that attempting to anticipate whether and when these respondents will be charged with crime and will be made to appear before either petitioner takes us into the area of speculation and conjecture...(original emphasis).

42. The Court added (at 498):

> In these circumstances, where respondents do not claim any constitutional right to engage in conduct proscribed by therefore presumably permissible state laws, or indicate that it is otherwise their intention to so conduct themselves, the threat of injury from the alleged course of conduct they attack is simply too remote to satisfy the case-or-controversy requirement and permit adjudication by a federal court.[41]

43. The same is true of the challenge to the sentencing provisions in the current matter. And while the challenge to the impugned bail provisions stands in a somewhat different position, their operation is nevertheless subject to contingencies that may never be fulfilled, which equally takes the court into the area of speculation and conjecture.

44. The resulting difficulties are illustrated by the plaintiff's claims. For reasons developed below, the plaintiff is wrong to assert that the Constitution requires that the legislature, where it provides for different outcomes, must do so by reference to 'relevant differences'.

45. But let it be assumed that such a requirement exists. It surely could not be absolute and, as in other constitutional contexts, will require consideration of whether any different treatment was justified.[42] Necessarily, such an inquiry will often (if not always) involve facts. Indeed, the anterior question of whether the criteria chosen by the legislature have a substantive effect that relevantly

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41 See also the similar approach taken by the Court in *Ashcroft v Mattis*, 431 US 171 (1977) and approved in *City of Los Angeles v Lyons*, 461 US 95 at 104-5 (1983).

42 See eg *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 136 [444] per Kiefel J (in dissent in the result).

disadvantages some persons over others is equally one that potentially requires further factual analysis (perhaps of some complexity).[43]

46. The plaintiff seeks to supply the factual substratum which is missing from his pleading by invoking various extreme hypothetical examples. But it is wrong to approach an allegation that a particular legislative provision is invalid by identifying an operation of that legislative provision that is theoretically possible, although in fact unlikely – the validity of the conferral of a statutory power is to be tested bearing in mind "practical realities and likelihoods", not by reference to "extreme examples" or to "distorting" or "remote and fanciful" possibilities.[44] If declaratory relief is granted in such circumstances, it is likely to lead to the result deprecated in *Bass*: it will be unclear what facts will be determinative of the relevant legal issue. As this Court there observed, that does not assist in the efficient administration of justice. And as submitted above, it also potentially involves entry into the arena reserved to the legislative branch, in a manner that threatens the impartiality and institutional integrity of the Court.

47. For those reasons, question 2 should be answered 'yes'. Question 1 should be answered 'By reason of the answer to question 2, the plaintiff's claims for that declaratory relief do not give rise to a matter within the meaning of s 76(i) of the Constitution or s 30(a) of the *Judiciary Act 1903* (Cth) and accordingly the plaintiff has no standing to seek that relief'.

Declaratory relief sought to aid an unlawful purpose

48. The reference in the passage extracted from *O'Shea* (at [42] above) to engaging in conduct proscribed by 'permissible State laws' brings to mind a further important point.

49. Even if it were the case that the plaintiff now said that he intended or desired to contravene the valid law so as to be exposed to the impugned sentencing provisions, public policy reasons should lead the Court to decline to hear and grant his plea for declaratory relief. In effect, the plaintiff's claim in this scenario would be to the following effect: "I seek to engage in conduct, which I accept would be unlawful, [45], and if I do so I wish to know the severity of the penalty that will apply to me". For similar reasons to those animating the English courts in authorities such as *Mellstrom v Garner,*[46] *Guarantee Trust Co of New York v Hannay and Co*[47] and *Marshall v English Electric Co,*[48] declaratory relief should

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43 *Betfair Pty Limited v Racing New South Wales* (2012) 249 CLR 217 at 270-271 [56] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

44 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 (***Forge***) at 69 [46] per Gleeson CJ and *Wainohu v New South Wales* (2011) 243 CLR 181 (***Wainohu***) at 240-241, [151]-[153] per Heydon J (in dissent on the result).

45 Cf *Croome* at 123-124.

46 [1970] 1 WLR 603 at 605 per Harman LJ, refusing to grant a declaration that the plaintiff was entitled to canvass customers of the plaintiff's partnership in circumstances where this would have breached the relevant industry rules.

47 [1915] 2 KB 536 at 572 per Bankes LJ, stating that a court will not make orders for relief that would be 'unlawful or unconstitutional or inequitable for the Court to grant or contrary to the accepted principles upon which the Court exercises its jurisdiction'.

48 [945] 1 All ER 653 at 659 per du Parcq LJ (dissenting in the result, but relevantly expressing doubt as to whether it would be 'desirable or proper' to grant declaratory relief that would effectively advise a party minded to 'act illegally and wrongfully' on 'how severe the penalty is likely to be').

be refused on discretionary grounds in such a case. To so advise the plaintiff would be in some tension with the Court's role as an institution that exists for the administration of justice; it is 'not the sort of thing that the court will do'.[49] For that further reason, question 1 should be answered in the manner outlined above.

B. Equality before the law

50. The plaintiff argues that the impugned provisions relating to sentencing and bail are 'repugnant to the judicial process to a fundamental degree': PS [50]. That argument rests principally on the proposition that those provisions 'involve a requirement that courts impose very different outcomes for the same crime' (PS [60]). That, in turn, is said to be antithetical to the notion of 'equality before the law'.

51. Although formulated in terms of equality before the law, the plaintiff's argument is in fact one that depends critically upon the proposition that the Constitution guarantees equality in the content of the law. He takes issue with the particular criteria of classification that the legislature has selected as the basis for different outcomes in sentencing and in bail determinations. Those criteria, it is said, fix upon differences that are not 'relevant' differences.

52. That submission cannot stand with what was decided by this Court in *Leeth*[50] and in *Kruger*.[51] *Leeth* concerned the possible lack of uniformity in the geographical operation of Commonwealth laws, which is not of course in issue here. Only Deane and Toohey JJ (in dissent) accepted a proposition similar to that advanced by the plaintiff.[52] Gaudron J (also in dissent) held that there was an implied constitutional requirement of 'equal justice'.[53] But, as is apparent from her Honour's focus upon the 'judicial process', the principle was directed to equality in the methods by which laws are applied by a Court (that is a form of procedural equality). To the extent there was any doubt about that matter, it was clarified by her Honour in *Kruger* where she said that there was a 'limited' constitutional guarantee of 'equality before the courts', not an immunity from discriminatory laws.[54]

53. Even more clearly, Mason CJ, Dawson and McHugh JJ rejected any argument that Commonwealth laws must have a uniform geographical operation. In doing so, they necessarily rejected (at least to that extent) the proposition that the Constitution requires equality in the content of legal rules.[55]

54. Importantly, their Honours went on to compare the impugned sentencing

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49 *Mellstrom v Garner* [1970] 1 WLR 603 at 605 per Harman LJ. See also *Croome* at 138; Lord Woolf and J Woolf *The Declaratory Judgment* Sweet and Maxwell 4th edition (2001) at 174-175.

50 *Leeth v Commonwealth* (1992) 174 CLR 455 (***Leeth***).

51 *Kruger v Commonwealth* (1997) 190 CLR 1 (***Kruger***).

52 *Leeth* at 485-486, 488.

53 Ibid at 502. Brennan J's observations at 475-476 are premised on the notion that exposing offenders against the same law of the Commonwealth to different maximum penalties depending upon geographical location would be offensive to the 'constitutional unity of the Australian people' (noting specifically that that need not lead to uniform sentences). His Honour said that otherwise, subject to any issue regarding the particular head of Commonwealth legislative power, the Courts may apply '[d]iscriminatory laws' consistent with the proper exercise of judicial power (at 480).

54 *Kruger* at 112.

55 *Leeth* at 467.

legislation with examples of legislative measures that might infringe Chapter III. Amongst other examples, they included 'any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice'. That suggests two things. First, any constitutional requirement concerning equality before the law is limited to what their Honours identified as 'essentially functional or procedural matters'. That is, the more limited constraint advanced by Gaudron J in *Kruger*.

55. Secondly, it also suggests the constraints imposed by Chapter III are not best understood by reference to overarching concepts like 'equality', or for that matter 'proportionality'.[56] As this Court has emphasised a number of times, the critical operative notions determining validity under Chapter III are insusceptible of definition in terms that necessarily dictate future outcomes.[57] In contrast, the notion of 'equality' as a criterion for validity suggests a certain mathematical precision which is inapposite and potentially misleading. As is apparent from this Court's more recent jurisprudence far more assistance is to be gained from considerations such as the essential or defining characteristics of a Court;[58] the "central" consideration of the role that the judicature must play in a federal form of government, including in particular its ultimate responsibility for determining the limits of the respective powers of the integers of the federation[59] and the matters required to ensure the integrity of the Court as an institution.

56. The constraints Chapter III imposes as regards procedural fairness and the judicial process are to be understood in that context.[60] The application of procedural fairness is one of the defining characteristics of a Court.[61] The result is to provide some guarantee of equality before the law. But one does not commence with empirical observation of that outcome and then reverse engineer a broad unifying theory requiring equality in the content of all laws.

57. In any event, any such proposition was decisively rejected in *Kruger*.[62]

58. The reasoning in *Kruger* has a firm basis in the constitutional text (to which the Court there referred). As regards the Commonwealth Parliament, s 51 contains many powers to enact laws that will have a differential operation depending upon the persons to whom they apply. And those are not limited to the examples given in *Kruger* (the aliens power in s 51(xix) and the races power in s 51(xxvi)[63]). The corporations power will equally support laws that may operate

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56 *Magaming v R* (2013) 87 ALJR 1060 (***Magaming***) at 1070 [46] per French CJ, Hayne, Crennan, Kiefel and Bell JJ and 1080-1081 [107], [108] per Gageler J and *Al-Kateb v Godwin* (2004) 219 CLR 562 at 648 [256] per Hayne J, Heydon J agreeing at 662 [303]; see also 584 [44] and 595 [74] per McHugh J.

57 See eg *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 (***Fardon***) at [104] per Gummow J and *Assistant Commissioner Condon v Pompano Pty Limited* (2013) 87 ALJR 458 (***Pompano***) at 488 [124].

58 *Wainohu* at 208-209 [44] per French CJ and Kiefel J and the authorities there cited.

59 *Forge* at 73 [56] per Gummow, Hayne and Crennan JJ.

60 See, explaining *Leeth* in that fashion, *Wainohu* at 208-209 [44] per French CJ and Kiefel J and *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 (*International Finance Trust Co Ltd*) 355-356 [55] per French CJ. See also *Pompano* at 498 [184] per Gageler J.

61 *Pompano* at 477 [67] per French CJ.

62 *Kruger* at 44-45 per Brennan CJ, 63-64 and 67-68 per Dawson J (with whom McHugh J agreed), 112 and 113 per Gaudron J and 153-55 per Gummow J. See also *Putland v R* (2004) 218 CLR 174 at 185 [25] per Gleeson CJ, 195 [59] per Gummow and Heydon JJ (Callinan J agreeing).

63 See eg *Kruger* at 44, 64, 113 and 155.

to the benefit or detriment of juristic persons. And as Mason CJ, Dawson and McHugh JJ held in *Leeth*,[64] the same is true of 'non-people' powers such as s 51(i) (subject only to a sufficient connection with the relevant head of power or any other applicable constitutional constraint). It is not readily to be supposed that those plenary grants of legislative power are constrained by some free-floating *requirement* for equality of content, entirely detached from the text.

59. Further powerful textual indicia that there is no such requirement include:

59.1. The fact that certain provisions of the Constitution expressly proscribe different treatment for different classes of people (ss 51(ii), (iii), 88 and 92); and

59.2. That, by the 'dual aspect' to s 117[65], the Constitution simultaneously proscribes and permits such differential treatment, depending upon whether one is or is not a subject of the Queen.

60. Those textual features leave no room for an implication of the nature asserted by the Plaintiff. They may also be seen to reflect the expressed views of the framers, who rejected a proposal to include an express guarantee of individual rights based largely upon the Fourteenth Amendment to the Constitution of the United States and including a right to due process of law and equal protection of laws.[66]

61. It follows from the above that, to the extent Chapter III contains a requirement for equality before the law, the question of who is relevantly 'equal' and who is relevantly 'different' for the purposes of the impugned sentencing and bail laws is conclusively determined by reference to the criteria of classification adopted in the particular rule.

62. Thus in the present case it is constitutionally permissible for the legislature to select, as part of the sentencing rule, aggravating factors that do not on their face have a direct connection to the conduct constituting the offence.[67] It is not for the courts to decide whether the selected criteria are appropriate for assessing the relative seriousness of conduct. As Keane J observed in *Magaming*, the selection of those criteria and their relevance are the province of the Parliament and not the Courts.[68]

63. Accordingly, the plaintiff's submissions at [50]-[62] should be rejected.

64. Alternatively, a rational connection between the offence and the aggravating factor will be sufficient for validity. In the present case that would involve

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64 *Leeth* at 469.

65 *Kruger* at 113 per Gaudron J.

66 Ibid at 61 per Dawson J. See also the *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 8 February 1898, vol IV at 664-691 (the text of the clause appears at 110 and was negative at 691) and Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 614-615.

67 See eg *Palling v Corfield* (1970) 123 CLR 52 (***Palling***) at 58 per Barwick CJ; *Kingswell v The Queen* (1985) 159 CLR 264 (***Kingswell***) at 285 per Mason J.

68 *Magaming* at 1080 [103].

considering, for example, whether there is a rational basis for the view that participants in motorcycle clubs are notorious for engaging in affray. The Commonwealth does not seek to put submissions as to whether that is or is not the case. In the context of Commonwealth laws, that inquiry will coincide with the question of whether the law is within a relevant head of power.[69]

C. Enlistment

65. The plaintiff's broader argument, directed to all of the Impugned Provisions, is that they impermissibly enlist a State Court to do the executive's bidding.

'Policy objectives of the executive'

66. An important aspect of the plaintiff's argument appears to be that one can determine that issue by reference to what was in the minds of individual legislators or from express legislative statements of the objects (eg [65], [66] and [71]).

67. Those submissions should be rejected. The essential notion underlying *Kable*[70] is that of repugnancy to or incompatibility with the institutional integrity of the State courts, which bespeaks their constitutionally mandated position in the Australian legal system.[71] As French CJ and Kiefel J said in *Wainohu*, that is an essentially 'functionalist' inquiry as to the matters required to ensure the integrity of the Court as an institution.[72] Gageler J similarly observed in *Pompano*[73] that the doctrine lies upon an 'essentially structural and functional foundation', arising from the expedient adopted in Chapter III: that of permitting State and Territory Courts to be vested with the judicial power of the Commonwealth. That 'structural expedient' can function only if those Courts can act judicially, requiring attention to their institutional integrity.

68. Those structural and functional underpinnings indicate that the only inquiry that arises from the plaintiff's claim is: what is it that the Court has been required or empowered to do? Is it such as to cause it to cease to be or to appear to be an independent and impartial tribunal administering the law? And that is to be asked by reference to the practical operation of the impugned measure.[74] The underlying legislative purpose or policy that may have actuated the conferral of the relevant functions or powers does not speak to that inquiry (or the underlying structural imperatives) and is beside the point.[75] The word 'calculated' in the formulation adopted by Gummow J in *Fardon* ('calculated…to undermine public

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69 *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492 [16] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; *Leeth* at 469 per Mason CJ, Dawson and McHugh JJ.

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

71 *Fardon* at 617 [101] per Gummow J; *Pompano* at 487 [123] per Hayne, Crennan, Kiefel and Bell JJ; *Pollentine v Bleije* [2014] HCA 30 (***Pollentine***) at [42] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

72 *Wainohu* at 212 [52].

73 *Pompano* at 497 [181]-[183].

74 *South Australia v Totani* (2010) 242 CLR 1 (***Totani***) at 63-64 [134] per Gummow J, French CJ agreeing at 50 [74].

75 See similarly, in the context of s96, *ICM Agriculture v Commonwealth* (2009) 240 CLR 140 at 167 [36].

confidence') means no more than 'apt or likely', as his Honour expressly said. [76]

69. It is also necessary to note that almost all legislation (and certainly all delegated legislation) may be seen to give effect to some policy of the executive government.[77] And it has long been established that the task of the judiciary in construing an Act or an instrument made under an enactment is to seek to interpret it according to the "intent of them that made it".[78] But none of that can be said to lead to a conclusion that the courts have been co-opted to do the bidding of the executive. The ascertainment of legislative 'intention' by reference to that principle does not refer to a divination of the collective mental state of the legislators (many of whom will, of course, be members of the executive government). It is rather to be understood as an orthodox expression of the constitutional relationship between all the arms of government with respect to the making, interpretation and application of laws.[79] It is only in that sense that, under the Impugned Provisions, the Court will be giving effect to any 'particular policy objective of the executive' (PS [71]). And that cannot engage the *Kable* principle.

'Directness'

70. The plaintiff also argues that invalidity arises from the following matters:

    a. The legislature has not directly disestablished any declared 'criminal organisation'.

    b. Nor has it sought to criminalise membership of such an organisation.

    c. But it has sought to achieve a similar end 'indirectly' and with the aid of the judicial branch by the application of the Impugned Provisions.

71. Those submissions are also incorrect. The plaintiff's argument seemingly reduces to the startling proposition that Parliament must either choose to prohibit the conduct it wishes to deter, or otherwise abandon the attempt. Regulation by (indirect) means, including less onerous indirect means, would not be permitted – at least if the Courts are to be involved in its enforcement. That cannot be correct.

72. The legislation to be construed and applied by the courts will frequently involve pursuit of more than one objective purpose, some more and some less 'direct'. For example, the Commonwealth Parliament may tax a harmful activity, rather than banning it outright or directly regulating its use. The 'direct' effect might be said to be to raise revenue; the 'indirect' effect to reduce or eradicate a social harm that the Parliament has not determined to prohibit. In such a case, the raising of revenue may be secondary to the attainment of the other 'indirectly achieved' legislative object.[80] Indeed, the measure may deter the activities taxed

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76 *Fardon* at 618 [102].

77 *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 87 ALJR 162 at 177-178 [69] per Heydon J.

78 *Momcilovic v The Queen* (2011) 245 CLR 1 at 44 [37] per French CJ.

79 *Zheng v Cai* (2009) 239 CLR 446 at 455 [27] per curiam; *Lacey v Attorney-General (Queensland)* (2011) 242 CLR 573 ***(Lacey)*** at 591-592, [43], [44] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

80 *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2011) 244 CLR 97 (***Roy Morgan***) 102 [7], 112-113 [48] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ;

to such a degree that it results in negligible revenue.[81] But that is no reason for treating it otherwise than as a law with respect to taxation within the meaning of s 51(ii) or otherwise impugning the validity of the provision. And that is so even if the legislation is designed for the 'indirect' purpose of carrying out a policy affecting matters not directly within the legislative competence of the Parliament of the Commonwealth.

73. Subject to the requirement for a relevant head of legislative power, the Commonwealth Parliament can equally impose civil penalties, forfeitures or fines in respect of harmful conduct, rather than making them the subject of an offence or a prohibition.[82] And, on the other side of the coin, the fact that a prohibition may serve some 'indirect' purpose (including a purpose not a subject of federal legislative power) is equally irrelevant for constitutional analysis.[83] Such laws are commonplace. And the enforcement of those measures by a Court exercising federal judicial power is unremarkable, even if the Court thereby contributes to the 'indirect' achievement of that which the Parliament has not done 'directly'.[84]

74. That result flows through to the State and Territory level. A State Parliament can also impose measures seeking 'indirectly' to deter or eliminate harmful conduct or goods (subject to s 90 in the case of taxes). And, unsurprisingly given that the constitutional principle on which *Kable* is founded 'has as its touchstone protection ... [of] the institutional integrity of the courts, whether federal or State'[85] the enforcement of such laws by State and Territory Courts is equally unremarkable[86] and certainly not a circumstance that, absent more, infringes that principle.

The general features of the judicial process are not disturbed

75. The more fundamental point (and the complete answer to this branch of the plaintiff's claim) is that it remains the case that the courts applying those provisions are engaged in a process immediately recognisable as a judicial process[87] - here, the adjudication and punishment of criminal guilt, by reference to past acts and in a fair trial.[88]

76. To the extent membership of a declared criminal organisation has been included as an element of the new offences impugned by the plaintiff or that the offences operate upon 'prohibited items' defined by reference to declared criminal

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Northern Suburbs General Cemetery Reserve Trust v Commonwealth (1993) 176 CLR 555 at 568-569.

81 *Roy Morgan* at 102 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ and at 104 [16] referring to *Fairfax v Federal Commissioner of Taxation* [(1965) 114 CLR 1, 12 per Kitto J.

82 See eg *Theophanous v Commonwealth* (2006) 225 CLR 101 at 127-128 [67]-[71] per Gummow, Kirby, Hayne, Heydon and Crennan JJ.

83 *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 12 per Stephen J.

84 Eg the 'incapacitation' sought to be achieved by the application of forfeiture law: *Re Director of Public Prosecutions; Ex Parte Lawler* (1994) 179 CLR 270 at 290 per Dawson J

85 *Wainohu* at 228 [105] per Gummow, Hayne, Crennan and Bell JJ.

86 See eg, as regards forfeiture, *Attorney General (NT) v Emmerson* (2014) 88 ALJR 522 (***Emmerson***) at 537 [60] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

87 See *Re Nolan; Ex Parte Young* (1991) 172 CLR 460 at 496 per Gaudron J and *Pompano* at 491 [142] per Hayne, Crennan, Kiefel and Bell JJ.

88 *Nicholas v R* (1998) 193 CLR 173 at 208-209 [74] per Gaudron J and *Fardon* at 612 [79] [80] per Gummow J.

organisations,[89] it is well established that it is open to the Parliament to select an element that involves some anterior decision or determination not made in the exercise of judicial power.[90] The choice of such a 'factum' as an element of an offence does not, without more, involve an impermissible attempt to direct the outcome of the exercise of the Court's jurisdiction.[91] And in the case of the offences under the Criminal Code which the plaintiff impugns, the legislature has included defences, which operate in respect of the lawfulness of the purposes of the organisation.[92]

77. The same is true of the selection of such criteria (or those bound up in the statutory term 'vicious lawless associate') as aggravating factors in the Impugned Provisions dealing with sentencing, each of which also includes a defence or an exception in respect of the lawfulness of the purposes of the criminal organisation.[93] It is open to the Parliament to define the circumstances to be taken into account in sentencing by reference to such matters – or, for that matter, by reference to such other circumstances as it pleases.[94] It is also established that there is no constitutional difficulty with a law merely because it requires a court to make a certain order (including an order for a mandatory minimum sentence) once the Court is satisfied that certain conditions exist.[95] None of that detracts from the decisional independence of the Court.

78. That is particularly so when it is remembered that the determination of which offences a person will be charged with will be made by a prosecutor, who has a wide discretion, but is nevertheless subject to duties of fairness.[96] Those duties may be enforced by a trial judge, by staying the proceeding. However, that would be a rare case.[97] It is apparent from the breadth of the prosecutorial discretion that the prosecutor and the court perform quite different functions. It follows from that (and the fact that the role of the prosecutor in exercising the discretion to initiate judicial action exists as a matter of common necessity in an adversarial system) that the prosecutor does not by selecting a particular charge remove from the Court any element of the sentencing function.[98]

79. Nor does any question of enlistment arise from the presumption against bail enacted in s 16(3A) of the Bail Act. For it remains for the Court to determine whether the defendant has shown cause why their detention in custody was not

89 Sections 60A, 60B and 60C of the Criminal Code and note the definition of prohibited item in s173EA of the Liquor Act.

90 *Palling* at 58-59 per Barwick CJ, 62-63 per McTiernan J, 64-65 per Menzies J, 65 per Windeyer J, 66-67 per Owen J, 68-70 per Walsh J, 70 per Gibbs J; *International Finance Trust Co Ltd* at 352 [49] per French CJ, 360 [77] per Gummow and Bell JJ and at 373 [121] per Hayne, Crennan and Kiefel JJ; *Emmerson* at 537 [57] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

91 *Baker v The Queen* (2004) 223 CLR 513 at 532 [43] per McHugh, Gummow, Hayne and Heydon JJ; *Totani* at 48-49 [71] per French CJ.

92 Sections 60A(2), 60B(3) and 60C(2) of the Criminal Code.

93 Sections 72(3), 92A(4B), 320(3) and 340(1B) of the Criminal Code and s5(2) of the VLAD Act.

94 *Kingswell* at 285 per Mason J. See also *Magaming* at 1080 [104], [105] per Keane J.

95 *Magaming* at 1070-71, [45]-[49] per French CJ, Hayne, Crennan, Keifel and Bell JJ; at 1080-81, [105], [106] per Keane J.

96 *Emmerson* at 538 [63], and the authorities there collected.

97 The more important sanctions governing the proper performance of a prosecuting authority's functions are likely to be political, not legal: *Maxwell v R* (1996) 184 CLR 501 at 514 per Dawson and McHugh JJ.

98 *Emmerson* at 537-8 [61] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ; *Magaming* at 1060 [38] per French CJ, Hayne, Crennan, Keifel and Bell JJ.

justified (s 16(3A)(a)). The circumstance that the presumption is enlivened simply by the prosecution alleging the defendant is a participant in a criminal organisation[99] does not alter the analysis, at least where the prosecution is subject to normal prosecutorial duties in making such an allegation.[100]

80. Of course, the position would be different if the cumulative effect of those matters was to leave the adjudicative process 'so confined' that there is in fact no independent curial determination: the legislation considered in *South Australia v Totani*[101] provides an example of such a case. The *Serious and Organised Crime Control Act (2008)* (SA) provided for the State Attorney-General, on application by the Commissioner of Police, to make a declaration in relation to an organisation if satisfied of certain matters (that members of the organisation associated for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity). Section 14(1), in turn, required that on application by the Commissioner, the relevant Court 'must' make a control order against a person if satisfied that the person is a member of a declared organisation.

81. The resulting constraints on the Court's usual adjudicative process were extreme. As four members of this Court explained in *Pompano*:

> Whether and why an organisation should be declared was a matter for the Executive; the only question to be determined by the Magistrates Court was whether a person was a member of a declared organization.[102]

82. But contrary to the submissions sought to be advanced by the plaintiff, there is no relevant analogy to be drawn with the legislation impugned in the current matter. There is no requirement to depart from the Court's ordinary judicial processes and certainly no radical confinement of the Court's adjudicative processes so as to leave the Court dependent on (and an instrument of) the executive. The passage from Hayne J's reasons in *Totani* which the plaintiff extracts in his submissions concerning legal equality[103] is to be understood in light of his Honour's immediately preceding observation (at 89 [229]) to the effect that it 'was important to recognise that the Court must act at the behest of the Executive'. The Court in the current matter does not.

83. Accordingly, the plaintiff's submissions at [63]-[71] should be rejected.

E. Answer to question 3

84. Question 3 asks whether any, and if so which, of the provisions impugned by the plaintiff are invalid on the ground they infringe the *Kable* principle? The Commonwealth submits that, on the basis of the arguments advanced by the

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99 See s16(3A) of the *Bail Act 1980* (Qld). It provides that a court must not grant bail to a defendant who is *alleged* to be, or to have been at any time, a participant in a criminal organisation, unless the defendant shows cause why the defendant's detention in custody is not justified.

100 See the power to make guidelines addressing such matters conferred by s 11 of the *Director of Public Prosecutions Act 1984* (Qld).

101 (2010) 242 CLR 1.

102 *Pompano* at 490 [133].

103 PS [54] –referring to 90-93 [232]-[236].

plaintiff, question 3 should be answered 'In each case, no'.

F. Bail

85. The Commonwealth puts the following further submissions as to matters of general constitutional principle regarding bail.

86. At least at the federal level, committal to custody awaiting trial is not contrary to Chapter III because it is not seen as punitive but rather a matter in aid of ensuring a person's availability for trial.[104] The power to detain a person in custody pending trial is subject to the supervisory jurisdiction of the courts, which has long included the 'ancient common law jurisdiction' to order that a person detained in such custody be admitted to bail.[105] A law regulating that jurisdiction by 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 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'.[106]

87. Thus Parliament (federal, State or Territory) can create a presumption against bail by reference to a characteristic of the individual (rather than the charged offence), at least if the characteristic may be relevant to the risk to the community posed by the individual.[107]

PART VI ESTIMATED HOURS

88. It is estimated that 45 minutes will be required for the presentation of the oral argument of the Commonwealth.

Dated: 15 August 2014

Justin Gleeson SC
Solicitor-General of the Commonwealth
Telephone: 02 6141 4145
Facsimile: 02 6141 4149
Email: justin.gleeson@ag.gov.au

Craig Lenehan
Telephone: 02 8257 2530
Facsimile: 02 9335 3520
Email:
craig.lenehan@stjames.net.au

104 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28. See as regards the position of the States, *Totani* at 66-67 [146]-[147] per Gummow J and note also *Pollentine* at [43]-[45] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ and at [69]-[71] per Gageler J.

105 Ibid.

106 *Ngoc Tri Chau v Director of Public Prosecutions* (1995) 37 NSWLR 639 at 438 per Gleeson CJ; See also at 446-9 per Kirby P.

107 See *Pollentine* at [45] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ and at [73] per Gageler J. Note in that regard that the terms of section 16(3A) of the Bail Act have the effect of reversing the onus in relation to the presumption of bail and do so by reference to a characteristic of the defendant, rather than by reference to the offence with which the defendant is charged (the latter is the case with s 15AA of the *Crimes Act 1914* (Cth)).