IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

No B14 of 2014

BETWEEN

STEFAN KUCZBORSKI
Plaintiff
and

THE STATE OF QUEENSLAND
Defendant

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ANNOTATED WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I Form of Submissions

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

Part II Basis of Intervention

2. The Attorney General for the State of New South Wales ("NSW Attorney") intervenes under s 78A of the Judiciary Act 1903 (Cth) in support of the defendant.

Part IV Constitutional and Legislative Provisions

3. The NSW Attorney adopts the defendant's statement of applicable constitutional and
20 legislative provisions.

Part V Argument

Issues presented

4. The NSW Attorney makes submissions in relation to question 3 of the Further Amended Special Case (Amended Special Case Book at 56) only. In summary, the

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NSW Attorney submits as follows:

(a) neither the Vicious Lawless Association Disestablishment Act 2013 (Qld) ("VLAD Act") nor the impugned provisions of the Criminal Code (Qld) ("Criminal Code") require a Queensland court to make orders resolving proceedings by reference to factors other than the personal and individual guilt of the person subject to the court's orders; to act as a mere instrument of the legislature or executive; or otherwise to act in any way that compromises its institutional integrity;

(b) the Queensland Parliament's choice of means to achieve the legislative object of the VLAD Act is not constitutionally problematic. The principle identified in Kable v Director of Public Prosecutions (1996) 189 CLR 51 ("Kable") requires consideration of a law's operation and effect; it does not necessitate a comparison of alternative potential means for achieving legislative ends or an evaluation of the tailoring of the chosen means to specified ends.

Interaction of the VLAD Act and the Criminal Code

5. The VLAD Act's objects are to "disestablish associations that encourage, foster or support persons who commit serious offences" (s 2(1)(a)), by that means to increase public safety and security (s 2(1)(b)) and, presumably also by such disestablishment as well as the provision for taking into account cooperation with law enforcement authorities (s 9), to deny to those who commit serious offences "the assistance and support gained from association with other persons who participate in the affairs of the associations": s 2(1)(c). The means by which those objects are to be achieved are set out in s 2(2), and involve a sentencing regime triggered when a "vicious lawless associate" (as defined in s 5) commits a "declared offence" (defined in s 3, including by reference to offences against 59 sections of the Criminal Code, five sections of the Drugs Misuse Act 1986 (Qld), three sections of the Weapons Act 1990 (Qld) and one section of each of the Corrective Services Act 2006 (Qld) and the Criminal Proceeds Confiscation Act 2002 as listed in Sch 1 to the VLAD Act).

6. The sentences required by s 7 of the VLAD Act, and the other provisions attaching to a "further sentence" (as defined in s 3 and imposed under s 7(1)(b) and (c)), only apply where a court is sentencing a vicious lawless associate – whose characterisation as such is a matter for judicial determination (or determination by a jury, if the relevant

trial is by jury, given ss 1 and 564(2) of the Criminal Code) – for such an offence. Guilt in relation to the relevant "declared offence" will be determined by the court prior to any operation of the VLAD Act sentencing provisions. In addition to the imposition of the further sentence, the court has its usual function in sentencing the person for the offence "under the law apart from this Act and without regard to any further punishment that will or may be imposed under this Act": s 7(1)(a). With the exception of those whose offer to cooperate with law enforcement authorities has been accepted pursuant to s 9, the further sentences are fixed. Their relationship with the base sentence, and their operation where a vicious lawless associate is being sentenced for more than one declared offence, is also fixed: see s 7(2)-(6).

7. The definition of "participant" in s 4 of the VLAD Act is picked up by one of the three limbs of the definition of "vicious lawless associate" in s 5: see s 5(1)(b). The definition of "participant" in s 4 of the VLAD Act is largely identical to that found in the impugned s 60A of the Criminal Code, picked up in ss 60B and 60C, each of which create an offence an element of which is that the person is a participant in a criminal organisation: see s 60A(3)(b)-(e). Each aspect of the definition of "participant" in the VLAD Act refers to active conduct by the relevant person: he or she "asserts" etc (s 4(a)), "seeks" (s 4(b)), "has attended" (s 4(c)) or "has taken part": s 4(d). Under either the VLAD Act or the relevant provisions of the Criminal Code, both of which are penal statutes and should be construed as such, it is not sufficient that the association treats the person as a member: cf the extended definition of "member" in s 3 of the Serious and Organised Crime (Control) Act 2008 (SA) considered in South Australia v Totani (2010) 242 CLR 1 ("Totani") at 26 [22]-[23] per French CJ, 90 [231] per Hayne J. While the definition of "participant" in s 60A(3) of the Criminal Code includes "a director or officer of the body corporate" if the association is a body corporate (s 60(3)(a)), it is seemingly insufficient for these offence provisions that a person is treated as a director or officer by the relevant organisation if they are not actually a director or officer: cf s 6(b) of the VLAD Act in relation to sufficient proof that a person is an office bearer of an association.

8. The VLAD Act does not create offences but attaches to general provisions of the Criminal Code, the elements of which do not include participation in an organisation. The circumstances of the VLAD Act's operation (relevantly that a person is a "vicious

lawless associate") are circumstances of aggravation of those general offences, and as such must be charged in an indictment: see ss 1 (definition of "circumstance of aggravation") and 564(2) of the Criminal Code. The same is true of the circumstance of aggravation added to the general offences in ss 72 (affray), 92A (misconduct in relation to public office), 320 (grievous bodily harm) and 340 (serious assault) of the Criminal Code by the Criminal Law (Criminal Organisations Disruption) Act 2013 (Qld), including that the offender is a participant in a criminal organisation and picking up on the definition of "participant" in s 60A(3): see ss 72(2), 92A(4A), 320(2) and 340(1A) of the Criminal Code. These circumstances of aggravation attract minimum penalties along with increased maximum penalties. Each of ss 72, 320 and 340 is also a "declared offence" for the purposes of the VLAD Act and so potentially attract a further sentence.

9. By contrast, the offences in ss 60A-60C of the Criminal Code, concerning presence in a public place with two or more other participants in a criminal organisation (s 60A), entering prescribed places or being present at prescribed events (s 60B) and recruiting persons to become participants in a criminal organisation (s 60C) can only be committed by persons who are participants in criminal organisations, defined in s 1 (not only by reference to organisations declared in the regulations: cf Plaintiff's Written Submissions ("PWS") at [15]). The offences in ss 60A-60C are not "declared offences" for the purposes of the VLAD Act and so attract only the sentences prescribed in those sections.

10. Being a "participant" in the affairs of an association at the time of, or during the course of, commission of a declared offence is insufficient to attract a further sentence under the VLAD Act: in order to be a "vicious lawless associate", a person must have done or omitted to do the act constituting the declared offence "for the purposes of, or in the course of participating in the affairs of" the relevant association: s 5(1)(c) of the VLAD Act. The VLAD Act thus operates by reference to the conduct of the offender (as a participant in the affairs of the relevant association) and the circumstances of the offence (committed for the purposes of, or as an aspect of participation in, those affairs).

11. Not only the circumstances of aggravation of a "declared offence" under the VLAD Act and the circumstance of aggravation in ss 72(2), 92A(4A), 320(2) and 340(1A) of

the Criminal Code but also the elements of the offences in ss 60A-60C of the Criminal Code (including as an accused person's participation in a criminal organisation) will require proof beyond reasonable doubt. Each of these legislative schemes is evidently very different from a control order regime under which a court order may restrict a person's conduct and create new norms of behaviour despite the person not having breached any law, thus filling "the legislative gap which exists because there is no offence": cf Totani at 170 [470] per Kiefel J. The same is true of the general offences in ss 173EB-173ED of the Liquor Act 1992 (Qld) ("Liquor Act"), the elements of which include wearing or carrying a prohibited item.

Imposition of outcomes by reference to an offender's personal and individual guilt

12. The plaintiff's submission that the VLAD Act and the impugned provisions of the Criminal Code yield different outcomes by references to differences between offenders that are not "relevant" and by reference to matters that do not pertain to an offender's personal and individual guilt (PWS at [60]) not only fails to differentiate between the operation of the VLAD Act and the Criminal Code (particularly the provisions of ss 60A-60C of the latter), but relies on the assumption that a vicious lawless associate or a participant in a criminal organisation commits the "same crime" with the same legal consequences as a person who commits a declared offence but is not a vicious lawless associate or participant in a criminal organisation. Putting aside ss 60A-60C of the Criminal Code, for which being a participant in a criminal organisation is an element of the offence, while the underlying offence committed by a vicious lawless associate/participant in a criminal organisation and a person who does not meet that statutory description may have the same elements, the respective offences carry different legal consequences. A person who commits a crime in circumstances of aggravation to which a different maximum penalty attaches is liable to different legal consequences as a result of conviction: see Kingswell v The Queen (1985) 159 CLR 264 at 280 per Gibbs CJ, Wilson and Dawson JJ.

13. The existence of such different legal consequences for offences committed with or without circumstances of aggravation does not constitute a breach of common law sentencing principles generally, or the norm of equality before the law specifically, so could not amount to a fundamental departure from the judicial process: cf PWS at [60]-[61]. Equal justice under the law only requires "identity of outcome in cases that

are *relevantly* identical": Wong v The Queen (2001) 207 CLR 584 at 608 [65] per Gaudron, Gummow and Hayne JJ, quoted in Green v The Queen (2011) 244 CLR 462 at 473 [28] per French CJ, Crennan and Kiefel JJ (emphasis in original). As Mason CJ, Dawson and McHugh JJ remarked in Leeth v The Commonwealth (1992) 175 CLR 455 at 470 "[i]t is obviously desirable that, in the sentencing of offenders, like offenders should be treated in a like manner. But such a principle cannot be expressed in absolute terms." Contrary to the implication arising from the plaintiff's submission (PWS at [60]) their Honours' use of the word "relevantly" in this passage does not suggest the existence of a judicial licence to determine which differences between cases are and are not "relevant" without reference to legal distinctions created by statute.

14. Common law sentencing principles including parity, proportionality and totality apply subject to any contrary statutory intention: Elias v The Queen (2013) 248 CLR 483 at 493 [25]. Where a sentencing discretion exists, it is to be exercised subject to applicable statutory provisions and judge-made law: Magaming at 1070 [48]; Barbaro v The Queen (2014) 88 ALJR 372 at 377 [25] per French CJ, Hayne, Kiefel and Bell JJ. Like cases are to be treated alike and differently situated persons are to be treated differently only "so far as the law permits": Green at 473 [28]. Both the parity principle in sentencing and the norm of equal justice "allow[] for different sentences to be imposed upon like offenders to reflect ... different circumstances": Green at 473 [28]. The potentially different sentencing outcomes for two offenders one of whom is and one of whom is not a vicious lawless associate (or participant in a criminal organisation) are justifiable by reference to the distinct circumstances of the two offences (see below at [18]) and Parliament's judgment as to the seriousness of the applicable circumstances of aggravation.

15. Even if the VLAD Act and the circumstances of aggravation in ss 72(2), 92A(4A), 320(2) and 340(1A) of the Criminal Code did generate disparity in sentences contrary to common law principles, no constitutional requirement of substantive legal equality of the type identified by Deane and Toohey JJ's dissenting judgment in Leeth has been adopted by this Court as a restriction on either Commonwealth or State legislative power: see Baker v The Queen (2004) 223 CLR 513 at 533 [45] per McHugh, Gummow, Hayne and Heydon JJ.

16. The plaintiff's submission that the VLAD Act and the impugned provisions of the Criminal Code impose sentences by reason of factors other than the offender's personal and individual guilt and "regardless of the circumstances and seriousness of the offence" (PWS at [57]) assumes an artificial distinction between circumstances of an offence which may and may not validly aggravate it, according to some novel and unspecified additional criterion implied from Ch III. The notion of individualised justice, according to which the criminal law is administered (see Elias at 494 [27]) does not involve any such distinction between circumstances of aggravation prescribed by the legislature in relation to particular acts constituting an offence. Nor does the text and structure of Ch III justify any implication of the kind the plaintiff advocates.

17. When sentencing pursuant to the impugned provisions, the "court is sentencing *the* offender for *the* offence", including circumstances of aggravation charged in accordance with s 564(2) of the Criminal Code, not for the offending conduct which might have resulted in conviction for a less serious offence or an uncharged circumstance of aggravation: Elias at 493-494 [26], emphasis in original. It is "beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences which it creates": Palling v Corfield (1970) 123 CLR 52 at 58 per Barwick CJ; see also Magaming v The Queen (2013) 87 ALJR 1060 at 1080 [105] per Keane J. Parliament may also "define the ingredients of offences and the circumstances to be taken into account in sentencing in whatever way it pleases": Kingswell at 285 per Mason J. As Gibbs CJ, Wilson and Dawson JJ put it in Kingswell (by reference to the Commonwealth Parliament, at 276):

> Putting aside ... s. 80 of the Constitution, there is no fundamental law that declares what the definition of an offence shall contain or requires the Parliament to include in the definition of an offence any circumstance whose existence renders the offender liable to a maximum punishment greater than that which might have been imposed if the circumstance did not exist.

18. The circumstances of aggravation arising under the VLAD Act and ss 72(2), 92A(4A), 320(2) and 340(1A) of the Criminal Code are specific and personal to the offender and the offence, concerning as they do the person's status at the relevant time as a participant in a relevant association (under the VLAD Act) or criminal organisation (for the Criminal Code provisions), which in turn depends upon the person's conduct:

see above at [7]; Totani at 83 [211] per Hayne J. The individualised nature of the circumstances of aggravation under the VLAD Act is further demonstrated by the requirement of s 5(1)(c) as to the purposes of the act that constitutes the offence or its connection with the affairs of the association: this will be specific to the particular act and may well require consideration of the offender's reasons for committing the offence. The requirement could not be satisfied by reference to the person's past acts or the past acts of others. The enactment of such circumstances of aggravation is far removed from a scheme whereby a court is required to make an order restricting a person's liberty without an inquiry into anything the person has done or may do, or by reference to the past activities of others, as was the case in Totani: see at 32 [35] per French CJ, 86-87 [222] per Hayne J, 160 [435] per Crennan and Bell JJ.

19. Apart from discrepancies in potential sentencing outcomes, the plaintiff does not point to any other interference with the judicial process such as would infringe the Kable principle. This is unsurprising, given the factum that triggers the consequence of the increased penalties under the VLAD Act and ss 72, 92A, 320 and 340 of the Criminal Code is a finding of guilt by a court in relation to what a person has done in the past, according to its ordinary processes for criminal trials. If the circumstances of aggravation prescribed in the VLAD Act are proven, a fixed mandatory sentence must be imposed. That is the extent of the legislative direction as to the outcome of the court's exercise of its jurisdiction, and it is accepted that mandatory sentences are not on that account alone invalid, even when found in Commonwealth legislation: Magaming at 1071 [49] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; see also Palling v Corfield (1970) 123 CLR 52 at 58, 59 per Barwick CJ, 62-63 per McTiernan J, 64 per Menzies J, 67 per Owen J and 68 per Walsh J. The proposition that a law requiring a court exercising federal jurisdiction to make a specified order upon satisfaction of a condition does not impermissibly interfere with judicial power was reiterated in International Finance Trust Co Ltd v New South Wales Crime Commission (2009) 240 CLR 319 ("IFTC") at 352 [49] per French CJ (citing Palling v Corfield), 360 [77] per Gummow J and 373 [120]-[121] per Hayne, Crennan and Kiefel JJ (dissenting) and Totani at 48 [71] per French CJ, 63 [133] per Gummow J.

20. The adjudicative process leading to the imposition of sentence under the impugned provisions of the VLAD Act, the Criminal Code and the Liquor Act is otherwise

orthodox. The reversal of the onus in relation to the character of a relevant association for the purposes of the definition of vicious lawless associate in s 5(2) of the VLAD Act, the defences in ss 60A(2), 60B(3) and 60C(2) and the circumstances of aggravation in ss 72(3), 92A(4B), 320(3) and 340(1B) of the Criminal Code does not alter the character of the judicial process conducted by the trial court: see Thomas v Mowbray (2007) 233 CLR 307 at 356 [113] per Gummow and Crennan JJ; Nicholas v The Queen (1998) 193 CLR 173 at 188-190 [23]-[24] per Brennan CJ, 234-236 [152]-[156] per Gummow J; Milicevic v Campbell (1975) 132 CLR 307 at 316-317 per Gibbs CJ. The same is true of the court's functions under s 16(3A)-(3D) of the Bail Act 1980 (Qld), which provide that bail must not be granted where it is alleged that the defendant is or has been a participant in a criminal organisation unless the person shows cause why his or her detention "is not justified" (s 16(3A)), adopting the same language as the presumption against bail in s 16A(3).

21. No element of any offence charged is deemed to exist under any of the impugned provisions: cf Totani at 64 [138] per Gummow J. To the contrary, elements of the relevant offences and circumstances of aggravation charged, as well as any other findings of fact taken into account by a sentencing judge in a manner that is adverse to the interests of the offender, must be proved beyond reasonable doubt: cf Totani at 52 [80] per French CJ as to the marginal relevance of standards of proof in that case. Judicial techniques of decision-making, including testing of the cogency of evidence tendered, are applied throughout: see Thomas v Mowbray at 335 [30], 352 [98]-[99] per Gummow and Crennan JJ. The court's capacity to afford an accused person procedural fairness is unaffected: see eg IFTC at 377-378 [134] per Hayne, Crennan and Kiefel JJ; Assistant Commissioner Condon v Pompano Pty Ltd (2013) 87 ALJR 458 ("Pompano") at 477 [67] per French CJ, 494 [156] per Hayne, Crennan, Kiefel and Bell JJ. Reasons will be provided in cases where fact finding is not conducted by a jury (such as where an order is made under s 614 of the Criminal Code): cf Wainohu v New South Wales (2011) 243 CLR 181. The court retains its capacity to act fairly and impartially, factors critical to its continued institutional integrity: Pompano at 495 [167] per Hayne, Crennan, Kiefel and Bell JJ.

22. It is relevant to consider the historic functions and processes of courts of law when determining questions of repugnancy for Kable purposes: see eg IFTC at 353 [52] per

French CJ; Totani at 63 [134] per Gummow J. Requirements for courts to have reference to circumstances of aggravation of an offence when sentencing are commonplace, as are statutory provisions which impose an increased maximum penalty or create an aggravated form of offence if an offence is committed by a person who has a particular history or status at the time of the offence, or commits the offence in the presence of others or for a specified purpose: see eg s 235 of the Customs Act 1901 (Cth) at the time of the offence in Kingswell (set out in 159 CLR at 270–272); Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A(2); Crimes Act 1914 (Cth), s 16A(2) (as to aggravating circumstances generally); Crimes Act 1900 (NSW), ss 25A(2) (assault causing death while intoxicated), 51B(1) (second police pursuit offence), 52A(2) (dangerous driving in circumstances of aggravation), 61J (aggravated sexual assault), 61M (aggravated indecent assault), 86(2)(a) (kidnapping in company), 91J(3) (aggravated voyeurism), 506 (second offence of stealing animals ordinarily kept in confinement); Criminal Code (Cth), ss. 132.3(1)(a) (aggravated robbery), 132.5(1)(a) (aggravated burglary).

23. Historically, courts have also been variously required or empowered to impose additional terms of preventative detention on conviction of a person on specified offences on two or more occasions. Under s 5 of the Habitual Criminals Act 1905 (NSW), for example, every person declared by a judge to be a habitual criminal pursuant to s 3 of that Act was to be detained during His Majesty's pleasure at the expiration of his sentence. Similar legislation providing for automatic indefinite detention upon a person being declared a habitual criminal was subsequently enacted in other States: R v White (1968) 122 CLR 467 at 470-471 per Barwick CJ; see also Pollentine v Bleijie [2014] HCA 30 at [68] per Gageler J; see eg Habitual Criminal Amendment Act 1907 (SA); Criminal Code Amendment Act 1914 (Qld) (inserting s 659D into the Criminal Code). Under s 6 of the Habitual Criminals Act 1957 (NSW) as enacted, a mandatory minimum period of detention of not less than five years was to be imposed once a person was declared a habitual criminal.

24. While habitual criminals legislation has been much amended over time and no longer provides for indefinite detention in any State or Territory, having regard to the long persistence of sentencing provisions for detention of habitual criminals (a status declared by reference to a person's antecedent convictions) beyond the sentence

imposed for any underlying offence, as well as provisions for increased penalties for offences committed in circumstances of aggravation of the type discussed above, it could not be said that either the VLAD Act or the impugned provisions of the Criminal Code require significant departure from the methods and standards that have characterised judicial activities in the past: see Thomas v Mowbray at 355 [111] per Gummow and Crennan JJ.

Selection of means to achieve the legislative object

25. The plaintiff's submission that the impugned provisions impermissibly enlist Queensland courts to do the bidding of the executive branch (PWS at [63]-[71]) depends on the proposition that the legislature's choice of means to achieve the object in s 2(1)(a) of the VLAD Act – namely, the disestablishment of certain associations – is constitutionally problematic on the basis that it is achieved "indirectly": see PWS at [69]. That proposition is incorrect. The Queensland parliament is entitled to employ a sentencing regime as a means of disestablishing associations the purposes of which include engaging in criminal offences, consistent with the manner that s 2(2) of the VLAD Act indicates that its purposes are to be achieved. The decisional independence of Queensland courts is not thereby compromised. The plaintiff does not suggest that the object of the VLAD Act is prohibited, such that an indirect or circuitous means to achieve it would also be prohibited. Queensland courts have not been enlisted to procure the imprisonment of any particular person: cf Kable, see Fardon at [100] per Gummow J.

26. The stated objects of an Act may be relevant to the characterisation of a court's role and the processes it undertakes under the relevant Act for the purposes of a Kable analysis (albeit not determinative, see eg Totani at 172 [478] per Kiefel J, her Honour expressing the view that it was incorrect to characterise the court's role and processes by reference to the stated purpose of the Serious and Organised Crime (Control) Act 2008 (SA)). That does not mean that the specification of legislative objects by a State Parliament in an Act conferring functions on a State court dictates the means that may be selected to achieve those objects in a constitutionally valid fashion. For the purposes of determining whether Ch III has been contravened, this Court has recently declined to apply proportionality reasoning of the type deployed in relation to purposive heads of Commonwealth legislative power or constitutionally guaranteed

freedoms that are not absolute: see Magaming at 1071 [51]. Such proportionality reasoning may involve a comparison of alternative means to achieve a legislative end, including whether the chosen means goes further than is necessary to achieve the end and whether other means apart from that selected by the legislature are equally practicable and available: Monis v The Queen (2013) 249 CLR 92 at 214 [346]-[347] per Crennan, Kiefel and Bell JJ. The cases in which the Kable principle has been engaged to invalidate State legislation have not involved this type of comparison of alternative means and their relationship with legislative objects.

27. By way of example, s 14(1) of the Serious and Organised Crime (Control) Act 2008 (SA) was not invalidated in Totani by reference to an inappropriate or ill-adapted choice of means to achieve the legislature's objects, but because of the character of the Magistrates Court's role in the legislative scheme: the court was enlisted or recruited to implement decisions of the executive in a manner incompatible with its institutional integrity: see Pompano at 489-490 [132] per Hayne, Crennan, Kiefel and Bell JJ; Attorney-General (NT) v Emmerson (2014) 88 ALJR 522 at 535 [46] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

28. Apart from the fact that the impugned provisions do not directly disestablish any association or criminalise membership, the plaintiff's submission that the legislature's objects are achieved "in a constitutionally impermissible manner" (PWS at [71]) seems to depend on his earlier arguments concerning repugnancy to the judicial process, addressed above.

Part VI Estimate of time for oral argument

29. It is estimated that 15 minutes will be required for oral argument.

Dated: 15 August 2014

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