IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No B14 of 2014

BETWEEN

STEFAN KUCZBORSKI

Plaintiff

AND

THE STATE OF QUEENSLAND

Defendant

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY (INTERVENING)

Part I: Certification

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

Part II: Basis of intervention

2. The Attorney-General for the Northern Territory intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the defendant. The purpose of the intervention is to make submissions only in relation to Question 3 at Amended Special Case Book (**ASCB**) 56, *viz* whether any of the legislative provisions referred to in the Schedule to the Special Case is invalid on the ground that it infringes the principle of *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (***Kable***).

Part III: Leave to intervene

3. Leave to intervene is not required.

Part IV: Applicable constitutional provisions, statutes and regulations

4. The applicable provisions are set out in paragraph 10 of the defendant's Written Submissions dated 8 August 2014.

Part V: Statement of argument

5. This Court's decision in *Kable* and subsequent authorities explaining and refining its principal rationale establish that a State or Territory legislature

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cannot confer upon a State or Territory court a function which substantially impairs, or which is incompatible with or repugnant to, the institutional integrity of the court and its role under Ch III of the *Constitution* as a repository of federal jurisdiction and as part of the integrated Australian court system.[1]

6. A court's institutional integrity will be impaired in the relevant sense where:

(a) the legislation in question directly enlists the court in the implementation of the legislative or executive policies of the State or Territory concerned;[2] or

(b) the legislation in question requires the court to depart to a significant degree from the methods and standards which have historically characterised the exercise of judicial power.[3]

New offences and circumstances of aggravation for existing offences under the Criminal Code 1899 *(Qld); New offences under the* Liquor Act 1992 *(Qld)*

7. It is not sufficient to engage the proscription against enlistment that the court may be required in the enforcement of legislation to give effect to government policy dictated by the executive. All judicial enforcement of legislation enacted substantially in conformity with a Bill presented to the legislature by the executive will have that operation.[4] In many cases, the legislation in question will be the outcome of political controversy, or reflect controversial political opinions; but administering and giving effect to such legislation does not compromise the integrity of a court by reason only of the fact that the result is the outcome of political action or in conformance with a legislative or executive intention.[5].

8. For that result, there must be some element of conscription in the operation of the legislation, such as the utilisation of confidence in the impartial, reasoned and public decision-making of judicial officers to

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1 *Wainohu v New South Wales* (2011) 243 CLR 181 at [44]-[45] per French CJ and Kiefel J, [105] per Gummow, Hayne, Crennan and Bell JJ; *South Australia v Totani* (2010) 242 CLR 1 at [69] per French CJ, [205], [212] per Hayne J, [426] per Crennan and Bell JJ.

2 *South Australia v Totani* (2010) 242 CLR 1 at [82] per French CJ, [149] per Gummow J, [236] per Hayne J, [481] per Kiefel J.

3 *South Australia v Totani* (2010) 242 CLR 1 at [131] per Gummow J, [428] per Crennan and Bell JJ; *International Finance Trust Co v New South Wales Crime Commission* (2009) 240 CLR 319 at [52] per French CJ; *Thomas* v *Mowbray* (2007) 233 CLR 307 at [111] per Gummow and Crennan JJ; *Forge* v *Australian Securities and Investments Commission* (2006) 228 CLR 45 at [63] per Gummow, Hayne and Crennan JJ.

4 *PSA (NSW) v Director of Public Employment* (2012) 87 ALJR 162 at [69] per Heydon J.

5 *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 at [21] per Gleeson CJ.

support inscrutable decision-making;[6] or the incorporation at the behest of the executive of unstated premises into a court's determination.[7]

9. The challenged provisions of the Criminal Code[8] share the following relevant characteristics:

- each creates an offence or a circumstance of aggravation by reference to an person's status as a "participant in a criminal organisation";
- for the purposes of each, a "criminal organisation" is one satisfying the criteria for declaration as a criminal organisation under the *Criminal Organisation Act 2009* (Qld), or one declared under that Act to be a criminal organisation, or one declared under a regulation to be a criminal organisation;[9]
- each defines participation by reference to holding office in the organisation (where the organisation is a body corporate), assertions of membership or association with the organisation, attendance at meetings or gatherings of persons who participate in the affairs of the organisation, or taking part in the affairs of the organisation;[10]
- each provides for either a minimum penalty of imprisonment to be "served wholly in a corrective services facility" (in the case of new offences), or an increased maximum penalty (in the case of new circumstances of aggravation); and
- each provides that it is a defence to the charge or circumstance of aggravation to prove that the criminal organisation is not an organisation that has as one of its purposes the purpose of engaging in or conspiring to engage in criminal activity.

10. The policy determination made by the executive and ultimately given effect in these provisions is that the public interest is served by creating criminal offences, or circumstances of aggravation for existing offences, having application to participants in certain organisations. The declaration by regulation of 26 motorcycle clubs as "criminal organisations" for the purposes of the Criminal Code[11] represents an assessment by the executive that those motorcycle clubs have as one of their purposes engaging in or conspiring to engage in serious criminal activity, and that they present an unacceptable risk to the safety, welfare and order of the community.

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6 See, for example, *Wainohu v New South Wales* (2011) 243 CLR 181 at [109] per Gummow, Hayne, Crennan and Bell JJ.

7 See, for example, *South Australia v Totani* (2010) 242 CLR 1 at [480] per Kiefel J.

8 Criminal Code 1899 (Qld), ss 60A, 60B(1), 60B(2), 60C, 72(2), 72(3), 72(4), 92A(4A), 92A(4B), 92A(5), 320(2), 320(3), 320(4), 340(1A), 340(1B), 340(3).

9 See definition of "criminal organisation" in Criminal Code 1899 (Qld), s 1.

10 See definition of "participant" in Criminal Code 1899 (Qld), s 60A(3) (subsequently adopted in the other provisions).

11 *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld), s 70.

11. Assessments of that nature do not fall within the exclusive province of the judiciary; nor is it impermissible for an executive assessment of that nature to operate as a criterion by reference to which the judicial function falls to be exercised. Two features marking out the legislation under consideration in *Totani* are absent here.

12. The first point of distinction is that the court applying the legislation under consideration in *Totani* was required to proceed upon a vital circumstance and essential foundation of the executive's making such that the executive had "set up" or "pre-determined" the outcome of the court's processes.[12] The role of the court was limited to determining whether the person the subject of an application for a control order was a member of an organisation declared by the Attorney-General, with the practical result that the making of an order in most circumstances would be inevitable.

13. The second, and related, point of distinction is that the determination of the court under that legislation was properly characterised as administrative or executive in nature, in the sense that it involved the creation by the court of a new norm of conduct rather than the resolution of an existing controversy having regard to an established norm of conduct. The court was not engaged in an adjudication of criminal guilt. Rather, it was obliged to impose significant restraints on a defendant upon satisfaction of criteria which did not require or permit any inquiry into past or threatened contraventions of any anterior legal norm.[13] When considering the issue of conscription, what was significant in *Totani* was not that the court had a limited role, but that the legislation recruited the court to an essentially executive process in order to give it the neutral colour of a judicial decision.[14] That result would not arise if, instead, the court had been engaged in adjudicating the prosecution for an offence of breaching a control order made by the executive.

14. The court's task under those provisions of the Criminal Code presently subject to challenge is to determine whether the elements of the subject offence, or the relevant circumstances of aggravation, are made out in accordance with the ordinary criminal trial processes. That process is judicial in character as it involves an inquiry concerning the law as it is and the facts as they are, followed by an application of that law as determined to the facts as determined, in order to settle a question as to the existence of a right or obligation.[15] Although the court may act on the basis of an inscrutable anterior declaration regarding an

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12 *South Australia v Totani* (2010) 242 CLR 1 at [139], [142] per Gummow J, at [435] per Crennan and Bell JJ; *Momcilovic v The Queen* ((2011) 245 CLR 1 at [597] per Crennan and Kiefel JJ.

13 *South Australia v Totani* (2010) 242 CLR 1 at [110], [139] per Gummow J, [225]-[227], [236] per Hayne J .

14 *South Australia v Totani* (2010) 242 CLR 1 at [82] per French CJ.

15 *South Australia v Totani* (2010) 242 CLR 1 at [226]-[227] per Hayne J.

organisation, it is not doing so or the purpose of making an order from which new rights and obligations spring. Adjudicating a prosecution does not lend neutral colour or legitimacy to the considerations of policy underlying the declaration of an organisation.

15. Nor is the application of those special regimes to a class identified as participants in criminal organisations suggestive of invalidity. It may be accepted for *Kable* purposes that legislation engaging a court's processes in a manner particular to an individual or to identified proceedings has a greater propensity to "cloak" the work of the executive or "conscript" the court to that work; but none of the provisions here under challenge is limited in application to specified individuals or to a limited class of individuals.[16] They are laws of general application in the sense that they have prospective operation on any person who conducts himself or herself in a manner proscribed by the statute.

16. So far as the methods and standards by which judicial power is exercised are concerned, the relevant provisions do not remove or affect any of the ordinary judicial processes by which the court performs its judicial function,[17] and the court undertakes an orthodox and conventional judicial exercise in the adjudication of rights and liabilities established by statute.[18] It remains open in the course of that process for an accused to prove by way of defence that the criminal organisation in question is not an organisation that has as one of its purposes the purpose of engaging in or conspiring to engage in criminal activity. The application of provisions which operate to reverse the onus of proof without unreasonable restriction on the assessment of evidence, including in the conduct of criminal proceedings, is not open to constitutional objection and not uncharacteristic of the exercise of federal judicial power.[19]

17. The other ground of invalidity asserted by the plaintiff is that the court is obliged to fix penalty based not on the seriousness of the offender's

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16 Cf the impugned legislation in *Kable*, which was expressly directed to the continued detention of a named individual and no other person: *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 98, 99 per Toohey J, 104 per Gaudron J, 121 per McHugh J, 130, 133 per Gummow J. Even the application of legislation to a limited class of individuals did not deny the validity of the impugned legislation in *Baker v The Queen* (2004) 223 CLR 513, notwithstanding that in the Second Reading Speech the Minister identified by name the 10 prisoners to whom the legislation was directed: see the text of the Second Reading Speech at [165] per Callinan J. The plurality in *Baker* (at [50] per McHugh, Gummow, Hayne and Heydon JJ) noted that the application of the legislation to a small class of persons was answered by what was said in *Nicholas v The Queen* (1998) 193 CLR 173 at [27]-[29], [50], [83]-[84], [163]-[167], [246]-[255].

17 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at [208] per Gummow J; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [19] per Gleeson CJ, [34] per McHugh J; [219] per Callinan and Heydon JJ; *Thomas v Mowbray* (2007) 233 CLR 307 at [15]-[16] per Gleeson CJ.

18 *Baker v The Queen* (2004) 223 CLR 513 at[177] per Callinan J; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at [207]-[208] per Gummow J.

19 *Nicholas v The Queen* (1998) 193 CLR 173 at [24] per Brennan CJ; *Sorby v The Commonwealth* (1983) 152 CLR 281 at 298 per Gibbs CJ.

criminal conduct, but upon his or her participation in an organisation designated by the legislature.[20] The legislative prescription of a fixed penalty for an offence, without any discretion reposed in the court, does not amount to an exercise or usurpation of judicial power.[21] It is an acknowledged feature of the sentencing process that a court must act in accordance with the relevant statute, and sentence an offender for the offence for which he or she has been convicted.[22] Fixing sentencing "yardsticks", including mandatory minima, falls within the province of the legislature after considering broad issues of policy including, as in this case, the seriousness of the problem outlaw motorcycle gangs are perceived to present. The application of mandatory sentences, including those enacted on the basis of policy determinations of that type, does not compromise the institutional integrity of the judiciary.[23]

18. To invoke notions of "equal justice" in this context wrongly elevates that principle to a constitutionally enforceable limitation on federal, state and territory legislative authority, which it is not;[24] and overlooks the fact that equal justice in sentencing requires identity of outcome in cases that are relevantly identical and different outcomes in cases that are different in some relevant respect.[25]

19. The challenge to the provisions of the *Liquor Act*[26] is also limited to *Kable* grounds. Those provisions are unremarkable except to the extent they define a "prohibited item", and so create offences, by reference to

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20 Plaintiff's Amended Written Submissions dated 23 July 2014, par [10(a)].

21 *Palling v Corfield* (1970) 123 CLR 52 at 58–61 per Barwick CJ; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 97–98 per Toohey J, 131 per Gummow J; *Leeth v Commonwealth* (1992) 174 CLR 455 at 470 per Mason CJ, Dawson and McHugh JJ. This is consistent with the more general proposition that there is no impermissible interference with the judicial function by legislation obliging a court to make specified orders if certain conditions are met, even if one condition that enlivens the court's duty depends upon a decision made by the executive: *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [49] per French CJ (citing *Palling v Corfield* (1970) 123 CLR 52), [77] per Gummow and Bell JJ, [157] per Heydon J; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [39] per Gummow, Hayne, Heydon and Kiefel JJ.

22 *Elias v The Queen; Issa v The Queen* (2013) 248 CLR 483 at [28]-[30] per the Court.

23 *Magaming v The Queen* (2013) 87 ALJR 1060 at [101]-[108] per Keane J. Nor do the provisions subject to challenge transfer from the court to the executive the discretion to determine the severity of the punishment to be imposed upon an individual within a class of offenders: see *Magaming v The Queen* (2013) 87 ALJR 1060 at [84]-[89] per Gageler J. Both the provisions creating new offences, and those adding a circumstance of aggravation to existing offences, stipulate the class of offenders, and all members of the class fall to be dealt with uniformly in accordance with the legislative stipulation.

24 *Leeth v Commonwealth* (1992) 174 CLR 455 at 467 per Mason CJ, Dawson and McHugh JJ; *Kruger v Commonwealth* (1996-1997) 190 CLR 1 at 44-45 per Brennan CJ, 64-66, 68 per Dawson J, 112-14 per Gaudron J, 142 per McHugh J, 153-155 per Gummow J; *Baker v The Queen* (2004) 223 CLR 513 at [45] per McHugh, Gummow, Hayne and Heydon JJ.

25 *Wong v The Queen* (2001) 207 CLR 584 at 608 per Gaudron, Gummow and Hayne JJ; *Green v The Queen; Quinn v The Queen* (2011) 244 CLR 462 at [28] per French CJ, Crennan and Kiefel JJ.

26 *Liquor Act 1992* (Qld), ss 173EB, 173EC, 173ED.

an entity declared to be a "criminal organisation" under the Criminal Code. The submissions made above concerning the conscripting effect of the Criminal Code provisions also have application to these provisions.

Special additional sentences under the Vicious Lawless Association Disestablishment Act 2013 (Qld) (**VLAD**)

20. It may be noticed that the VLAD regime, unlike that under the Criminal Code, involves no anterior executive or legislative declaration that an association has the purpose of engaging in or conspiring to engage in criminal activity. The adjudication of criminal guilt takes place in accordance with the ordinary judicial processes. So far as is relevant for the purpose of any *Kable* argument, the legislation requires a person who might otherwise be found for sentencing purposes to be a "vicious lawless associate" to prove that the association does not have a relevant purpose;[27] and failing such proof imposes sentencing outcomes additional to what would otherwise would have been the "base sentence" for the offence in question.

21. As already noted, the reversal of the onus of proof is not uncharacteristic of the exercise of judicial power in any material sense. The use of the descriptor "vicious lawless associate" is irrelevant to the question of validity.[28] While the sentencing scheme may give rise to disparity between outcomes for "vicious lawless associates" and other offenders, may result in severe and arguably disproportionate sentences, and does not allow account to be taken of individualised circumstances, there is no constitutional principle that would take the scheme outside State legislative prerogative.

22. The authority to make laws for "the peace welfare and good government" of the polity[29] confers a plenary power to create criminal laws and punish their violation.[30] The legislative power of the State of Queensland is not subject to any presently relevant restraint by reference to "rights deeply rooted" in the democratic system of government and common law.[31] In

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27 That burden may be discharged upon the balance of probabilities: see *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594 at 600-601 per Brennan, Dawson and Gaudron JJ.

28 *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 at [66]. The legislation does not require a court to declare an accused to be a "vicious lawless associate" but even had it done so the descriptor would be a reflex of the statutory criteria set out.

29 *Constitution Act 1867* (Qld), s 2.

30 See by way of comparison the power of the United States Congress to make all laws "which shall be necessary and proper" for carrying its powers into execution: Article I, Section 8 of the *United States Constitution*; *United States v. Comstock*, 130 S.Ct. at 1965.

31 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 71-76 per Dawson J; *Kruger v Commonwealth* (1996-1997) 190 CLR 1 at 72-73 per Dawson J; *Coco v The Queen* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [14] per Gleeson CJ; *South Australia v Totani* (2010) 242 CLR 1 at [31] per French CJ.

particular, a legislature can prescribe such penalty as it thinks fit for the offences it creates, it may make the penalty absolute, and in doing so no judicial power or function is invaded.[32]

23. The prescription of the further sentences is the statement of a general rule, which is one of the characteristics of legislation. The general rule is that where any person commits an offence falling within a prescribed category in circumstances where, in effect, that person is a participant in an association that engages in or conspires to engage in that category of offences, a further sentence will apply. This is wholly different from the selection by the legislature of a penalty to be imposed by a court in a particular citizen's case. The application of the sentencing rules is for the court, and their enunciation in the form of a fixed penalty means only that all citizens convicted in those circumstances must bear the same punishment.[33]

24. In the United States context, the only constitutional restriction on the imposition of mandatory minimum penalties derives from the cruel and unusual punishment clause in the Eighth Amendment; is predicated on notions of proportionality; and is limited to capital punishment and the imposition of life imprisonment on juveniles without the possibility of parole.[34] Suggestions in dissent[35] that the restriction extends to "all punishments which by their excessive length or severity are greatly disproportionate to the offences charged" have been rejected.

25. Any requirement for individualised consideration is also limited to capital cases[36] and derives from the Eighth Amendment (made binding on the states by the due process clause of the 14th Amendment). There is no express or implied constitutional limitation for present purposes, and the proportionality analysis is inapt for application to statutory minimum sentences in Australia for the reasons set out in *Magaming*.[37]

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32 *Palling v Corfield* (1970) 123 CLR 52 at 58–61 per Barwick CJ, 64-65 per Menzies J, 67 per Owen J, 68 per Walsh J. In the United States context, the Supreme Court has observed that "Congress has the power to define criminal punishments without giving the courts any sentencing discretion": *United States v. Chapman*, 500 U.S. 453, 467 (1991). *Mistretta* itself was a case that endorsed the legislature's power to set federal sentencing guidelines by way of a Sentencing Commission which produced a form of mandatory minima: *Mistretta v. United States*, 488 U.S. 361, 412 (1989).

33 See, for example, *Deaton v The Attorney-General and the Revenue Commissioners* [1963] IR 170 at 181-182.

34 *Woodson v North Carolina*, 428 U.S. 280, 305-306 (1976); *Miller v Alabama*, 132 S.Ct. 2455, 2463 (2012).

35 *O'Neil v Vermont*, 144 U.S. 323, 339-40, 371 (1892); *Solem v Helm*, 463 U.S. 277 (1983).

36 "We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes": *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978).

37 *Magaming v The Queen* (2013) 87 ALJR 1060 at [51]-[52] per French CJ, Hayne, Crennan, Kiefel and Bell JJ, [101]-[108] per Keane J.

Special bail regime under the Bail Act 1980 *(Qld)*

26. The challenged provisions of the *Bail Act*[38] apply to a defendant alleged to be, or to have been, a participant in a "criminal organisation" as defined in the Criminal Code so that:

    - the court or police officer must refuse to grant bail unless the defendant shows cause why detention in custody is not justified, or unless the defendant proves that at the time of his or her participation the organisation did not have a purpose of engaging in or conspiring to engage in criminal activity;
    - if bail is granted, the order must require the defendant to surrender his or her current passport, and provide a statement of the reasons for granting bail;
    - the defendant must be detained in custody until the court or police officer is satisfied whether the defendant is the holder of a current passport and, if so, until the passport is surrendered; and
    - those requirements have application to the defendant regardless of the type of offence with which the defendant is charged and held in custody, whether the defendant is alleged to have been a participant in the criminal organisation when the offence was committed, and whether there is any link between the participation and the offence charged.

27. Legislation has been used to prescribe the circumstances in which bail may or may not be granted since the passage of the Statute of Westminster of 1275 (3 Edw. I).[39] Subsequent bail legislation reflected the fact that there were considerations and circumstances that might militate against the grant of bail. Although the traditional focus was on the risk that an accused would not appear at court if not imprisoned,[40] the exercise of judicial discretion to refuse bail on preventative grounds developed in the United Kingdom in the 1940s.[41] A similar approach was subsequently adopted in Canada,[42] and then in Australia.[43] Bail reform in the 1970s created a rebuttable presumption in favour of bail, except for certain offences.[44] Since that time, legislatures have frequently excluded certain offences from the presumption in favour of bail by placing an onus on the defendant to show cause why detention in custody is not justified.[45] A table setting out the current Australian provisions is contained at Appendix A to these submissions.

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38 *Bail Act 1980* (Qld), ss 16(3A), 16(3B), 16(3C).

39 Ch 15, Prisoners And Bail Act 1275.

40 *R v Fraser* (1892) 13 NSWLR 150.

41 *R v Phillips* (1947) 32 Crim App 47.

42 *Rodway v. R* [1964] 44 CR 327; *R v Travers* [1963] 42 CR 32; *R v Black* [1969] 1 CCC 82.

43 *R v Appleby* [1966] 1 NSWR 35; *R v Wakefield* (1969) 89 WN (Pt 1) (NSW) 325.

44 See, for example, the *Bail Act 1978* (NSW), s 9(1).

45 As in, for example, *Bail Act 1980* (Qld), s 16(3).

28. There is no common law right to bail, and even if there were such a right it could be, and frequently has been, modified by statute. Even if there was some constitutionally implied principle of equality of treatment in the application of the judicial power of the Commonwealth under Ch III of the *Constitution*, statutory prescriptions concerning bail are too removed from the conduct of the substantive criminal proceedings to amount to an infringement of that guarantee.[46] Statutory presumptions against bail have been predicated variously on the nature of the offence charged, the commission of subsequent offences whilst on bail, and matters going to community protection and welfare. It is not inconsistent with Ch III of the *Constitution* for a statute to make it more difficult for persons charged with certain types of offence to obtain bail,[47] or even to abrogate the right to bail.[48] It yields no different result that the presumption operates with respect to an accused's status as a participant in an organisation which the executive and legislature considers to have a criminal purpose.

29. The presumption under this legislation is clearly rebuttable in the application of a conventional test (ie that detention in custody is not justified); a court retains both the power and the obligation to act judicially in the application of that test; and there is no stipulation that a relevant bail determination is final. In particular, the legislation does not compel or permit a court to set excessive bail, or to preclude an accused from asserting just cause for the grant of bail. Against that background, the bail regime cannot be said to require a court to depart to a significant degree from the methods and standards that have historically characterised the exercise of judicial power.

Dated: 15 August 2014

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46 *Chau v Director of Public Prosecutions (Cth)* (1995) 37 NSWLR 639 at 655A, 655F-656A per Kirby P.

47 Section 68 of the *Judiciary Act 1903* (Cth) provides expressly that the laws of a State or Territory for holding accused persons to bail shall "apply and be applied" to persons charged with federal offences. It has never been suggested that the application of those laws by a court, including those provisions creating a presumption against bail, are inconcomitant with the exercise of federal jurisdiction.

48 *Chau v Director of Public Prosecutions (Cth)* (1995) 37 NSWLR 639 at 646C per Gleeson CJ, with reference to the High Court's determination in *Sorby v The Commonwealth* (1983) 152 CLR 281 that consistently with Chapter III of the Constitution, a statute could abrogate the privilege against self-incrimination. See also *Milicevic v Campbell* (1975) 132 CLR 307.

Appendix A: Schedule provisions creating presumption against bail

Jurisdiction / Act	Section	Basis for presumption against bail
Commonwealth *Crimes Act 1914* (Cth) (Compilation start date: 24 June 2014)	s15AA (Bail not to be granted in certain cases)	**Nature of the offence** the person is charged with or convicted of [offences in s15AA(2)] i.e. - • Terrorism offences (other than offence of associating with terrorist organisations in s102.8, *Criminal Code Act 1995* (Cth)) (s15AA(2)(a)); or • Offences against a Commonwealth law involving a defendant intentionally engaging in conduct that caused the death of a person (whether or not the defendant intended to cause the death or knew or was reckless as to whether the conduct would result in death) (s15AA(2)(b)); or • Offences against Division 80 or 91 (treason, urging violence and espionage & similar activities), *Criminal Code*, or s24AA (treachery), *Crimes Act 1914* (Cth), involving conduct alleged to have caused the death of a person or carrying a substantial risk of causing death (s15AA(2)(c)); or • Ancillary offences against Division 80 or 91, *Criminal Code*, or s24AA, *Crimes Act*, involving conduct that would (if engaged in) have carried a substantial risk of causing death (s15AA(2)(d)). Presumption may be rebutted: If bail authority is satisfied exceptional circumstances exist to justify bail (s15AA(1)).
ACT *Bail Act 1992* (ACT) (Republication date: 17 May 2014)	Division 2.4 (Presumption against bail) ss9C–9G	**Nature of the offence** person is accused of (as set out in ss9C(1) or 9F(1)) i.e. – • murder (s9C(1)(a)); or • serious drug offences in identified provisions of the *Criminal Code 2002* (ACT) (i.e. trafficking, manufacturing for selling, cultivating for selling, or selling a large commercial quantity of a controlled drug, or supplying etc to a child for selling, or procuring a child to traffic in, a commercial quantity of a controlled drug) (s9C(1)(b)); or • domestic violence offence (s9F)(2). **Profile of the offender** – • Where a person is accused of committing a serious offence (i.e. punishable by imprisonment for 5 years or longer – s9D(6)) while a charge against the person for another serious offence is pending or outstanding (s9D). **Where an appeal is pending** (s9E) - • Where a person has been convicted and sentenced by a court to a period of imprisonment for an offence and an appeal is pending in relation to the conviction or sentence (or against a decision on appeal) (s9E). Presumption may be rebutted in any of the above situations: If a court or authorised officer (as relevant) is satisfied special or exceptional circumstances exist favouring grant of bail (ss9C(2), 9D(2)) and 9E(2)) (see also s9G – Special or exceptional circumstances).

Jurisdiction / Act	Section	Basis for presumption against bail
		In the case of a domestic violence offence, the presumption may be rebutted if the authorised officer is satisfied that the person poses no danger to a protected person while released on bail (s9F(2)). However, even if special or exceptional circumstances are established or, in the case of a person accused of a domestic violence offence, if the authorised officer is satisfied that the accused person poses no danger to a protected person, the court or officer must refuse bail if satisfied that refusal is justified after considering the criteria set out in s22 (criteria for granting bail to adults) and s23 (criteria for granting bail to children) (ss9C(3), 9D(3) and 9F(3)). If the serious offence is a domestic violence offence, an authorised person must not grant bail if satisfied that refusal of bail is required under s9F (domestic violence offence – bail by authorised officer) (s9D(4)).
	Division 2.3 (No presumption for bail) s9B	**Exceptions to the presumption for bail in Division 2.2** – s9B provides that the presumption for bail in Division 2.2 does not apply to the grant of bail to: • a person accused of an offence mentioned in Schedule 1 i.e. certain offences against the *Crimes Act 1900*, *Criminal Code*, *Drugs of Dependence Act 1989, Medicines, Poisons and Therapeutic Goods Act 2008* and *Customs Act 1901* (Cth) (s9B(a)); • a person accused of an offence identified in s9B(b), if the person has in the previous 10 years been found guilty of an offence involving violence or the threat of violence (e.g. certain offences against the *Crimes Act* or the *Domestic Violence and Protection Orders Act 2008*) (s9B(b)); • a person accused of an offence against the *Criminal Code Act 1995* (Cth), s80.1 (Treason) (s9B(c)); or • a person convicted of an indictable offence but not sentenced (s9B(d)).
New South Wales *Bail Act 2013* (NSW) (Current version for: 21 May 2014)	s22 (General limitation on court's power to release)	**Where an appeal is pending** in the Court of Criminal Appeal or High Court (referred to in s22(a) or (b)) i.e. – • where an appeal in relation to an offence is pending in the Court of Criminal Appeal against: o a conviction on indictment (s22(a)(i)); or o a sentence imposed on conviction on indictment (s22(a)(ii)); or • where an appeal in relation to an offence is pending in the High Court from the Court of Criminal Appeal in relation to an appeal referred to in s22(a) (s22(b)). Presumption may be rebutted: If it is established that special or exceptional circumstances exist that justify the decision to grant bail or dispense with bail for any of the offences referred to in ss22(a) or (b) (s22). **Note:** A Review into the New South Wales bail provisions published in July 2014 recommended, amongst other things, that a "show cause" "reverse onus" provision be introduced for certain categories of serious offences where the accused person is an adult.

Jurisdiction / Act	Section	Basis for presumption against bail
		A bill for that purpose is currently before the New South Wales Parliament.
Northern Territory *Bail Act* (NT) (As in force: 5 February 2014)	s7A (Presumption against bail for certain offences)	**Nature of the offence** the person is accused of (identified in s7A(1)) i.e. - • murder (s7A(1)(a)); • treason (s7A(1)(b)); • an offence against the *Misuse of Drugs Act* punishable by more than 7 years imprisonment (s7A(1)(c)); • an offence against the *Customs Act 1901* (Cth) in relation to narcotic goods punishable by 10 years imprisonment or more (s7A(1)(d)); • an offence against Division 307, *Criminal Code* (Cth), punishable by 10 years imprisonment or more (s7A(1)(da)); • an offence against ss36 (Associating with another controlled person), 37 (Recruiting person to become member of declared organisation), 38 (Applying for authority in contravention of control order) or 55 (Contravention of public safety order), *Serious Crime Control Act* (s7A(1)(db)); • an offence against s103A (Threats or reprisals relating to persons involved in criminal investigations or judicial proceedings or against public officers), *Criminal Code* (s7A(1)(dc)); • a serious violence offence (other than murder) alleged to have been committed within 5 years after the alleged offender has been found guilty of an earlier serious violence offence (s7A(1)(e)); • a serious sexual offence (s7A(1)(f)) Presumption may be rebutted: If the accused person satisfies an authorised member or court that bail should not be refused (s7A(2)). However, the rebuttal in s7A(2) is not available to a person accused of an offence in s7A(1) who is assessed as suitable to participate in a program of rehabilitation prescribed by the Regulations (s7A(2A)).
	s8 (Exceptions to presumption in favour of bail for certain offences)	**Exceptions to the presumption for bail in s8(2)** – s8(1) provides that the presumption for bail in s8(2) applies to all offences except: • an offence mentioned in s7A(1) (above) (s8(1)(a)); • an offence against ss181, 192(3), (4), (6), (7) or (8), *Criminal Code*, or s120, *Domestic and Family Violence Act*, if the accused person has, within the period of 10 years immediately preceding the date of that offence, been found guilty of any of the following offences (s8(1)(aa)): (i) murder; (ii) an offence against ss181, 186, 188, 188A, 189A or 192, *Criminal Code*; (iii) an offence against a law of a State or other Territory or another country that is similar to an offence mentioned in subparagraph (i) or (ii);

Jurisdiction / Act	Section	Basis for presumption against bail
	\	• a serious offence if the accused person (s8(1)(ab)): (i) is an adult charged with committing the relevant offence while on bail for a serious offence; and (ii) has been found guilty of another serious offence within the period specified in subsection (1A); • an offence where the accused person is the subject of an order made under s40, *Sentencing Act,* which may be breached if the person is convicted of the offence, unless (s8(1)(b)): (i) the offence is a contravention of or failure to comply with an instrument of a legislative or administrative character; or (ii) the authorised member or court is of the opinion that the offence is so minor that a court is unlikely to regard it as a breach of the suspended sentence.
	s23A (Presumption in favour of bail for certain offences)	**Where an appeal is pending** in the Court of Criminal Appeal against (s23A) - • a conviction on indictment (s23A(a)); • a sentence passed on conviction on indictment (s23A(b)); Presumption may be rebutted: Where it is established that special or exceptional circumstances exist justifying the grant of bail (s23A).
South Australia *Bail Act 1985* (SA) (Version: 22 December 2013)	s10A (Presumption against bail in certain cases)	**Profile of the offender –** • Where the offender is a "prescribed applicant" as defined in s10A(2) - i.e. - o an applicant taken into custody in the circumstances referred to for certain identified offences (as mentioned in ss10A(2)(a), (b), (ba), (c), (d) or (e)) (e.g. an offence against s13, *Criminal Law Consolidation Act 1935*, in which the victim's death was caused by the applicant's use of a motor vehicle in circumstances where the offence was committed by the applicant in the course of attempting to escape pursuit by a police officer); or o an applicant who is a "serious and organised crime suspect", as determined in accordance with s3A (s10A(2)(bb)). [s3A(1) provides that a bail authority may determine a person is a "serious and organised crime suspect" for the purposes of this Act if satisfied, on application by the Crown, that the person has been charged with a serious and organised crime offence, was not a child at the time of the alleged offence, and the grant of bail is likely to cause a potential witness or other person connected with proceedings for the alleged offence, to reasonably fear for his or her safety] Presumption may be rebutted: If the applicant establishes the existence of special circumstances justifying the applicant's release on bail.

Jurisdiction / Act	Section	Basis for presumption against bail
		However, in the case of an applicant who is a "serious and organised crime suspect", the applicant must also establish, by evidence verified on oath or by affidavit, that he or she has not previously been convicted of (s10A(1a)) – • a serious and organised crime offence (s10A(1a)(a)); or • an offence committed in another jurisdiction that would, if committed in South Australia, have been a serious and organised crime offence (s10A(1a)(b)).
Tasmania *Bail Act 1994* (Tas) (Valid for: 14 August 2014)	N/A	There is no statutory presumption against the grant of bail in the *Bail Act 1994* (Tas).
Victoria *Bail Act 1977* (Vic) (Version incorporating amendments as at: 1 July 2014)	s4(2) (Accused held in custody entitled to bail)	**Nature of the offence** the person is charged with (as identified in s4(2)(a) or (aa) and s4(4)(c), (caa), (ca), (cab), (cb), (cc) or (d)) i.e. - • treason or murder (except in accordance with s13) (s4(2)(a)); or • drug related offences in identified provisions of the *Drugs, Poisons and Controlled Substances Act 1982,* the *Customs Act 1901* (Cth), or the *Criminal Code* (Cth) (e.g. trafficking in relation to a commercial quantity of a drug of dependence) (s4(2)(aa)) and 4(4)(ca), (cab), (cb) and (cc)); or • aggravated burglary or any other indictable offence involving the alleged use or threatened use of a firearm, offensive weapon or explosive within the meaning of s77, *Crimes Act 1958* (s4(4)(c)); or • arson causing death under s197A, *Crimes Act* (s4(4)(caa)); or • an offence against the *Bail Act* (s4(4)(d)). Presumption may be rebutted (as relevant): • If the court is satisfied that exceptional circumstances exist that justify the grant of bail (for offences identified in s4(2)); or • If the accused shows cause why his detention in custody is not justified (for offences identified in s4(4)). **Profile of the offender** – • Where the court is satisfied that (s4(2)(d)): o There is an unacceptable risk (having regard to the relevant matters set out in s4(3)) that the accused, if released on bail, would (s4(2)(d)(i)): ▪ Fail to surrender himself into custody in answer to his bail; ▪ Commit an offence whilst on bail; ▪ Endanger the safety or welfare of members of the public; or ▪ Interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person; or

Jurisdiction / Act	Section	Basis for presumption against bail
		○ It has not been practicable to obtain sufficient information for the purpose of deciding any question referred to in this subsection for want of time since the institution of the proceedings against him (s4(d)(iii)). • Where the accused is charged with (s4(4)): ○ an indictable offence that is alleged to have been committed while he was at large awaiting trial for another indictable offence (s4(4)(a)); or ○ certain identified offences under the *Crimes Act 1958*, the *Family Violence Protection Act 2008*, and the *Personal Safety Intervention Orders Act 2010*, in the circumstances set out in s4(4)(b), (ba), (bb) – i.e. where - ▪ the accused has within the preceding 10 years been convicted or found guilty of an offence involving the use or threatened use of violence against any person; and ▪ the court is satisfied that the accused on a separate occasion used or threatened to use violence against that person. Presumption in s4(4) may be rebutted: If the accused shows cause why his detention in custody is not justified (s4(4)).
Western Australia *Bail Act 1982* (WA) (Version as at: 25 November 2013)	Part C, Schedule 1 (Jurisdiction as to bail and related matters – manner in which jurisdiction to be exercised) Clauses 3A, 3C and 4A	**Nature of the offence** for which the person is in custody (clause 3C, Part C, Schedule 1) - • murder (where person is in custody awaiting an appearance in court before conviction for offence of murder or waiting to be sentenced or otherwise dealt with for an offence of murder of which the accused has been convicted) (clauses 3C(a) & (b)). Presumption may be rebutted: If the judicial officer is satisfied – • there are exceptional reasons why the accused should not be kept in custody (clause 3C(c)); and • bail may properly be granted having regard to the provisions of clause 1 (bail before conviction at discretion of court etc) and clause 3 (matters relevant to cl. 1(a)) or, in the case of a child accused, clauses 2 and 3 (clause 3C(d)). **Profile of the offender** – • where an accused is in custody (clause 3A(1)): ○ awaiting an appearance in court before conviction for a serious offence (i.e. an offence against s51(2)(a) or described in Schedule 2) (clause 3A(1)(a)(i)); or ○ waiting to be sentenced or otherwise deal with for a serious offence of which the accused has been convicted (clause 3A(1)(a)(ii)); and ○ the serious offence is alleged to have been committed while the accused was: ▪ on bail for (clause 3A(1)(b)(i)); or

Jurisdiction / Act	Section	Basis for presumption against bail
		▪ at liberty under an early release order made in respect of, (clause 3A(1)(b)(ii)) another serious offence. [Note: "serious offences" identified in Schedule 2 include offences against the *Criminal Code* (e.g. s221E(1), participating in activities of criminal organisation); the *Bush Fires Act 1954*, the *Criminal Organisations Control Act 2012*, the *Misuse of Drugs Act 1981*, the *Restraining Orders Act 1997*, and the *Road Traffic Act 1974*) or • where an accused is in custody waiting for the disposal of appeal proceedings (clause 3A(1)): Presumption may be rebutted in either case: If the judicial officer or authorised officer in whom jurisdiction is vested is satisfied: • there are exceptional reasons why the accused should not be kept in custody (and, in the case of clause 3A(1) if clause 3B (exceptional reasons under cl. 3A(1), determining) applies, is so satisfied only after complying with that clause (clauses 3A(1)(c) and 4A(a)); and • bail may properly be granted having regard to the provisions of clauses 1 and 3 or, in the case of a child accused, clauses 2 and 3 (clauses 3A(1)(d) and 4A(b)).