IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No B14 of 2014

BETWEEN:

STEFAN KUCZBORSKI
Plaintiff

and

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THE STATE OF QUEENSLAND
Defendant

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

PART I: CERTIFICATION

20 1. These submissions are suitable for publication on the internet.

PART II: BASIS OF INTERVENTION

2. The Attorney-General for Victoria intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of the defendant.[1]

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

4. It is not necessary to add to the statement of applicable statutory provisions referred to in the defendant's submissions at [10].

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1 Intervention in support of the defendant does not obviate the need for the plaintiff to establish standing: see *Williams v Commonwealth* (2012) 248 CLR 156 at 181 [9] (French CJ), 223-224 [111]-[112] (Gummow and Bell JJ), 240 [168] (Hayne J), 341 [475] (Crennan J), 361 [557] (Kiefel J); cf 291 [326] (Heydon J).

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PART V: ARGUMENT

A. Summary

5. The *Vicious Lawless Association Disestablishment Act 2013* (Qld) (the **VLAD Act**), ss 60A, 60B, 60C, 72, 92A, 320 and 340 of the *Criminal Code* (Qld) (the **Code**), s 16 of the *Bail Act 1980* (Qld) (the **Bail Act**) and ss 173EB, 173EC and 173ED of the *Liquor Act 1992* (Qld) (the **Liquor Act**) (together, the **impugned provisions**) use a number of well-established legislative means of providing for, variously, the identification of elements of criminal liability and sentencing and the granting of bail.

6. In doing so, they preserve the judicial process and the integrity of the courts of Queensland. There is no infringement of the principle in *Kable v Director of Public Prosecutions (NSW)*[2] (the ***Kable* principle**).

7. The fact that the impugned laws may be directed to achieving the destruction of certain organisations, without proscribing those organisations, is no more than an assertion of a legislative objective to which no suggestion of invalidity attaches.

8. There is no constitutional principle that State laws are invalid to the extent that they provide for:

   (a) different sentencing consequences for persons whose offending and circumstances might be thought, despite Parliament's decision to treat them differently, not to be relevantly different;[3] or

   (b) different requirements for the grant of bail for persons whose circumstances might be thought, despite Parliament's decision to treat them differently, not to be relevantly different.[4]

9. The Attorney-General adopts the defendant's submissions as to the plaintiff's standing, and enlarges briefly on that subject with respect to the VLAD Act, below.

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2 (1996) 189 CLR 51 (***Kable***).

3 This is relevant to the challenge, based on the principle of equal justice, to the VLAD Act and some of the impugned provisions of the Code (ss 72, 92, 320 and 340).

4 This is relevant to the challenge, based on the principle of equal justice, to the impugned provisions of the Bail Act.

B. General principles

10. The principle for which *Kable* stands is that, because the Constitution establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State courts, State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid.[5]

11. The impugned legislation is supported by six well-established propositions:

(a) A State Parliament may create offences and define the elements of those offences.[6] Offences may be defined by reference to, among other things, the acts, circumstances and status of the offender.

(b) A State Parliament may prescribe the sentences for offences, which may include fixed sentences and mandatory minimum sentences, and sentences determined by reference to factors specified by Parliament.[7]

(c) It follows that a State Parliament may prescribe the seriousness of an offence (and specification of the punishment for the offence) by reference to the circumstances of the offence and the circumstances of the offender.[8] It also follows that a State Parliament is competent to decide what is an aggravating circumstance for the offence,[9] being a circumstance that, in the opinion of the Parliament, justifies greater punishment by reason of an offender's increased culpability or the increased seriousness of the offence.

(d) It follows as well that a State Parliament may prescribe conditions by reference to which a criminal sentence is to be determined, including a

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5 *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 at 533 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); see also *Pollentine v Bleijie* [2014] HCA 30 at [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

6 See *Kingswell v R* (1985) 159 CLR 264 at 285 (Mason J), 291 (Brennan J) as to the position of the Commonwealth Parliament. The competence of a State Parliament is no less ample.

7 *Palling v Corfield* (1970) 123 CLR 52 at 58 (Barwick CJ), 64-65 (Menzies J), 68 (Walsh J); *Magaming v R* (2013) 87 ALJR 1060 at 1070-1071 [46]-[49] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

8 *Magaming v R* (2013) 87 ALJR 1060 at 1080 [105]-[106] (Keane J).

9 See, eg, *R v CJK* (2009) 22 VR 104 at 113 [56]; *Penalties and Sentences Act 1992* (Qld), s 9(2)(f).

condition consisting of the making of an executive or administrative decision (and necessarily, therefore, a regulation).[10]

(e) A State Parliament may enact laws prescribing the rules of evidence and of procedure to be observed in criminal proceedings and may cast the onus of proof on either party.[11]

(f) A State Parliament may confer and regulate a statutory power to grant bail and may create a statutory presumption of a refusal of bail for certain offences or for certain offenders.[12]

12. In the impugned provisions, the Queensland Parliament has: (a) defined the elements of offences; (b) defined the circumstances to be taken into account in sentencing; and (c) regulated the power conferred on the courts to grant bail by reference to the status and associations of an offender.

13. The courts retain their usual powers and discretions in admitting and weighing evidence and their general powers to control their procedures in the interests of justice. Hearings are in open court, an offender has the right to be heard, to be represented, to make submissions and to receive a fair trial according to law. Accordingly, the impugned laws work no change to the general powers, procedures and discretions of the courts that are protective of the institutional integrity of the courts.

14. The principle of "equal justice" does not provide grounds to question the validity of the impugned laws. There is no general constitutional principle of "equal justice"[13]

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10 *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 at 537-538 [61] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Magaming v R* (2013) 87 ALJR 1060; *South Australia v Totani* (2010) 242 CLR 1 at 48-49 [71] (French CJ); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 352 [49] (French CJ); *Palling v Corfield* (1970) 123 CLR 52 at 58-59 (Barwick CJ), 62-63 (McTiernan J), 64-65 (Menzies J), 67 (Owen J), 69-70 (Walsh J).

11 *Nicholas v The Queen* (1998) 193 CLR 173 at 190 [24] (Brennan CJ), 203 [55] (Toohey J), 225 [123] (McHugh J), 234-236 [152]-[156] (Gummow J); *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 186 (Gibbs CJ); *Milicevic v Campbell* (1975) 132 CLR 307 at 316 (Gibbs J), 318-319 (Mason J), 321 (Jacobs J); *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 588 (Dixon and Evatt JJ); *Orient Steam Navigation Co Ltd v Gleeson* (1931) 44 CLR 254 at 259-260 (Gavan Duffy J), 262-263 (Dixon J), 264 (Evatt J); *Williamson v Ah On* (1926) 39 CLR 95 at 108 (Isaacs J), 127 (Rich and Starke JJ); *Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1 at 12 (Knox CJ, Gavan Duffy and Starke JJ), 17-18 (Isaacs J).

12 *Chau v DPP* (1995) 37 NSWLR 639 (***Chau***).

and the plaintiff advances no case to the contrary. The plaintiff's argument that references to "equal justice" in existing case law establish such a principle should be rejected, for the reasons advanced by the defendant.

15. Furthermore, the principle of "equal justice" requires "equality *before* the law (or, in other words, equality in the enforcement of legal rules)" or "equality according to law", not "equality *in* law (that is, equality in the content of legal rules)".[14] The principle operates within the legislative regime that creates the offences and which prescribes the punishment. In that context, it may be used to inform statutory interpretation. However, like other principles of statutory interpretation, its application is subject to contrary indications in the text, subject matter, scope and purpose of the statute in question, as well as to other principles of interpretation.[15]

16. Nor is there any textual or structural foundation in the Constitution for subjecting State criminal laws to a test for validity which requires proof of a relevant difference to sustain different treatment of individuals under those laws. Again, no such foundation is suggested by the plaintiff and, for the reasons advanced by the defendant, such a test would impermissibly compromise the judicial process.

17. In so far as the plaintiff's argument depends on the assertion that the impugned provisions are directed to a legislative or executive objective of "destroying" certain organisations, without proscribing them, it points to no constitutional vice. Such an objective is within State legislative power and the means employed to achieve it are, subject to other constitutional limits, a question for the legislature. The existence of a legislative objective which is not explicitly stated or pursued in the statute itself is

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13 This proceeding raises no issue regarding the concept of "equal justice" in relation to Commonwealth criminal laws.

14 *Green v R* (2011) 244 CLR 462 at [28] (French CJ, Crennan and Kiefel JJ); Sadurski, "Equality Before the Law: A Conceptual Analysis" (1986) 60 ALJ 131 at 131. Nothing in *Leeth v Commonwealth* (1992) 174 CLR 455 at 467-469 (Mason CJ, Dawson and McHugh JJ), 475-476 (Brennan J), 502 (Gaudron J) supports a principle of "equal justice" beyond that identified in *Green v R* and certainly not a substantive doctrine of "equal justice": *Kruger v Commonwealth* (1997) 190 CLR 1 at 44-45 (Brennan CJ), 63-64, 67-68 (Dawson J), 112-113 (Gaudron J), 153, 155 (Gummow J).

15 *Elias v R* (2013) 248 CLR 483 at [25] (French CJ, Hayne, Kiefel, Bell and Keane JJ); *Green v R* (2011) 244 CLR 462 at [28] (French CJ, Crennan and Kiefel JJ).

an unremarkable instance of legislation being enacted in order to achieve policy objectives.[16]

C. The VLAD Act

18. The VLAD Act is a law of general application. Section 7 provides for additional sentences to be imposed by a court sentencing a "vicious lawless associate" for a "declared offence". The VLAD Act does not single out particular associations or particular persons. It is capable of application to any participant in the affairs of an association who commits an offence in furtherance of the purposes or affairs of the association.

19. The effect of s 7 of the VLAD Act is that, for certain offences, being a "vicious lawless associate" is a circumstance that is, in effect, one of aggravation.[17] It is not participation in an association *simpliciter* that is aggravating; rather, it is the nexus between doing the act constituting the offence and doing so for the purposes of, or in the course of participating in the affairs of, an association, that is the aggravating circumstance (s 5(1)(c)). That nexus is analogous to the established aggravating circumstances of offenders operating in gangs or groups, the commission of offences for financial gain and "organised" offending.

20. The imposition of a "further sentence" under s 7(1)(b)-(c) of the VLAD Act is the statutory device employed to give effect to the policy that the aggravating circumstance warrants a fixed increase in the sentence.[18] Because it is an aggravating circumstance that makes the offence more serious, the increased sentence is properly called "further punishment" (s 7(1)(a)).

21. The statutory definition of a "vicious lawless associate" is critical to the operation of the law. Section 5(1) of the VLAD Act entails that a person's status as a "vicious lawless associate" must be charged in the indictment,[19] and that there be admissible

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16 See *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 87 ALJR 162 at 173 [44] (French CJ), 175 [58] (Hayne, Crennan, Kiefel and Bell JJ), 177-178 [69] (Heydon J).

17 A "circumstance of aggravation" is defined in s 1 of the Code to mean "any circumstance by reason whereof an offender is liable to a greater punishment than that to which the offender would be liable if the offence were committed without the existence of that circumstance".

18 *Kingswell v R* (1985) 159 CLR 264 at 280 (Gibbs CJ, Wilson and Dawson JJ).

19 *Criminal Code* (Qld), s 564(2).

and relevant evidence and findings beyond reasonable doubt of the following matters:

(a) the person committed a declared offence;

(b) there was, when the offence was committed, an identified "association";

(c) that association had identified "purposes" or "affairs";

(d) the person was, when the offence was committed, a "participant" in the "affairs" of the association; and

(e) the person did the act that constituted the offence "for the purposes of" or "in the course of participating in the affairs" of the association.

22. Further, a person is not a "vicious lawless associate" if he or she proves that the relevant association is not an association that has as one of its purposes the purpose of engaging in, or conspiring to engage in, declared offences (s 5(2)). That sub-section casts a burden of proof on an offender who satisfies s 5(1), but there is nothing impermissible about its doing so. The sub-section does not relieve the prosecution of having to prove either the purposes of the association, or its affairs (from which inferences about its purposes might be drawn), and the nexus between those purposes or affairs and the conduct constituting the offence, in order for a person to be at jeopardy of an increased sentence.

23. Even if there is a principle of "equal justice" that might be thought to be pertinent in respect of the VLAD Act, once it is accepted that the VLAD Act is concerned with identifying an aggravating circumstance and imposing a fixed increase in the sentence upon proof of that circumstance, the Act does not engage any such principle. That is because an offender who is found to be a "vicious lawless associate" is not a "like offender" with a person who is not a "vicious lawless associate". The circumstances of the offenders are different. For the purposes of sentencing, the Queensland Parliament has distinguished a "vicious lawless associate" from other offenders by reason of a legislative judgment about the increased culpability and increased seriousness of offences committed by such persons.

24. Further, there is no sense in which the Queensland courts are enlisted to do the bidding of the executive in resolving proceedings under the VLAD Act. The question whether a person is a "vicious lawless associate" is determined according to well-established and unchanged curial procedures. Section 5 preserves to a person who is *prima facie* a "vicious lawless associate" the ability to prove that the association in question is not one with the purpose of engaging in declared offences. If that proof is lacking, a court must impose mandatory fixed sentences, but that is constitutionally unremarkable.[20]

25. The Attorney-General adopts the submissions of the defendant as to the plaintiff's standing in this proceeding generally. The lack of standing is especially marked in relation to the challenge to the VLAD Act which, as noted, is of general application. The plaintiff is not alleged to be a person who has committed or is likely to commit a declared offence. There is no allegation that the plaintiff has done or is likely to do an act constituting any offence for the purposes of or in the course of participating in the affairs of the Hells Angels Motorcycle Club, or any other association, or at all. There is therefore no factual basis asserted for expecting that the VLAD Act is or will be engaged with respect to the plaintiff. Absent those facts, there is no matter; there is no basis for a justiciable controversy involving the plaintiff. This case is quite unlike *Croome v Tasmania*, where the evidence before the Court disclosed prior conduct, not yet charged, and the likelihood of further such conduct, that fell within the impugned provision.[21]

D. The Code

26. The provisions in the Code need to be analysed in two groups.

(a) Sections 60A, 60B and 60C of the Code create new offences.

(b) Sections 72, 92A, 320 and 340 of the Code enact circumstances of aggravation and mandatory minimum (and fixed) sentences for those circumstances.

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20 Cf *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 at 537 [60] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

21 (1997) 191 CLR 119 at 127-128 (Brennan CJ, Dawson and Toohey JJ), 137-138 (Gaudron, McHugh and Gummow JJ).

27. As to the first group of provisions, these criminalise certain conduct of a person who is a "participant in a criminal organisation" (namely, being knowingly present in a public place with two or more other such participants: s 60A; entering prescribed places or attending prescribed events: s 60B; and recruiting new participants in the organisation: s 60C). A State Parliament may validly create new offences and define the elements of those offences. The fact that elements of those offences may be defined by regulation does not, without more, render them invalid.[22] It is permissible for a person to be exposed to a risk of conviction or the imposition of a penalty, in either case on the basis of a criminal trial according to law, notwithstanding that an element of the offence or liability to a particular sentence involves an executive or administrative determination. Nor does the ease of proof of that element mean that the court is not performing a judicial function[23] or that it is conscripted to some executive purpose. Further, a State Parliament may validly cast an onus upon a person charged to make out a defence.

28. That ss 60A-60C of the Code do not enlist the courts to do the bidding of the executive is made plain by three matters.

(a) First, the status of an entity as a "criminal organisation" under regulation is not determinative of the application of the offence provisions to participants in that organisation. In effect, the regulation creates a presumption, which is rebuttable. Under each offence provision, it is a defence for a person to prove that the entity is not an organisation that has, as one of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity. If an accused leads evidence about the purposes of the entity, it is for the court alone to decide whether the defence is established, in accordance with general, judicially applicable standards and the laws of evidence and procedure. The fact that the accused bears an onus of proof in respect of that matter does not result in invalidity.

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22 Section 70 of the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) provides that the Criminal Code (Criminal Organisations) Regulation 2013 as set out in schedule 1 to that Act is a regulation under the Code.

23 *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 at 538 [65] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

(b) Secondly, the offences do not simply attach criminal penalties to persons identified through the application of regulations. Specific conduct must be charged and proved. In the first place, there must be conduct by which a person may be found to be a "participant". There must also be the conduct of being "knowingly present", "entering" a place, or "recruiting" another person, which must be charged and proved. Accordingly, the courts are not directed to impose penalties on persons by virtue of their identification through regulations.

(c) Thirdly, the usual powers, procedures and discretions of the court in the conduct of a criminal trial are unchanged. There is no suggestion that an offender cannot receive a fair trial in respect of a charge under these offences.

29. The second group of provisions specifies that being a "participant" in a "criminal organisation" is an aggravating circumstance and attaches either an increased mandatory minimum sentence or a fixed term to that circumstance, in respect of participants convicted of certain offences (namely, affray: s 72; misconduct in relation to public office: s 92A; grievous bodily harm to a police officer: s 320; and serious assault of a police officer in specified circumstances: s 340). For the reasons given above in relation to the VLAD Act (as to circumstances of aggravation) and for the reasons given above about the new offences in the Code (as to the defence which casts an onus on an accused), those provisions are within power.

E. The Bail Act

30. The Bail Act confers and regulates the powers of the courts in respect of bail. There is no common law right in a person who has been charged with a serious offence to be at liberty on bail and, in any event, any such right could be modified by statute. [24]

31. Section 9 of the Bail Act imposes a duty on courts, "subject to this Act", to grant bail to a person charged, but not convicted, of an offence.

32. Section 16(1) of the Bail Act relevantly provides that a court "shall refuse to grant bail" if the court is satisfied that there is an unacceptable risk that the defendant, if released on bail: (a) would fail to appear; (b) would commit an offence; (c) would

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24 *Chau* (1995) 37 NSWLR 639 at 646 (Gleeson CJ).

endanger the safety or welfare of a person; (d) would interfere with witnesses or otherwise obstruct the course of justice. In assessing whether there is an "unacceptable risk", the court shall have regard under s 16(2) of the Bail Act to all relevant matters, including "the character, antecedents, associations, home environment, employment and background" of the defendant. That is because those are matters from which a court may properly draw inferences about the nature of the risk.

33. Further, there are (aside from the impugned provisions) circumstances identified in s 16(3) of the Bail Act by reference to the nature or circumstances of the offence, in which a court shall refuse bail "unless the defendant shows cause why the defendant's detention in custody is not justified". The nature or circumstances of the offence provide the basis for a statutory presumption against the grant of bail.

34. Section 16(3A) of the Bail Act operates in a similar manner. Instead of selecting a feature of the *offence*, it selects a feature of the *offender* as the basis for the presumptive refusal of bail. If the defendant shows that at the time of his or her alleged participation in the criminal organisation, the organisation did not have, as one of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity, s 16(3A) is disapplied (s 16(3D)). It is not contrary to the Constitution for a statute to make it more difficult for persons charged with certain types of offences to obtain bail.[25] Equally, the Constitution does not preclude a statute from making it more difficult for offenders who satisfy specified conditions to obtain bail.

35. Under s 16(3A) of the Bail Act, the allegation that the offender is or was a member of a "criminal organisation" provides the basis for a statutory presumption against the grant of bail. It is true that one of the ways an entity may be a "criminal organisation" is by executive declaration. Clearly enough, that is because of an executive judgment formed, on the basis of material such as that contained in Annexure 1 to the special case[26], that, relevantly, a person who is or was a participant in such an organisation should *prima facie* be refused bail because he or she poses an "unacceptable risk" of one or more of the matters in s 16(1). The

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25 *Chau* (1995) 37 NSWLR 639 at 646.

26 Amended Special Case Book at 61-67.

court's satisfaction as to a person's participation in such an organisation means, as a matter of legislative judgment, that there is a likelihood that he or she will use the contacts and resources provided by that association to abscond, commit further offences, or intimidate witnesses.

36. For the purposes of the *Kable* principle, what matters is not that the executive might declare an entity to have a particular status, but how that status is then employed under the impugned legislation in relation to persons found to be participants in that entity. Under the Bail Act, the status is used as the basis for a statutory presumption. But that presumption is rebuttable. In determining whether it is rebutted, the court uses familiar standards and its discretion is not constrained. There is no limitation on how a person might establish that his or her detention is not justified. As was said of comparable provisions in *Chau*: "the grant or refusal of bail ultimately depends upon the exercise of a judicial discretion".[27] Accordingly, it cannot be said that the powers of the courts in relation to bail are conscripted to serve the ends of the executive. The courts are not required or obliged to exercise the discretion in a particular way.

37. Further, there is real doubt about the operation and practical effect of any principle of "equal justice" or parity in bail applications.[28] In any event, the fact that an offender with no associations with "criminal organisations" is presumptively entitled to bail unless an "unacceptable risk" is shown, and an offender who has such associations is presumptively denied bail unless he shows cause why detention in custody is not justified, does not establish any disparity in the affording of equal justice. The Parliament has enacted that associations of a certain kind distinguish one offender from another. There is not, then, such a degree of similarity between the associations of the offenders that they should be treated alike.

F. The Liquor Act

38. The offences in ss 173EB-173ED of the Liquor Act are laws of general application. The statutory concept of a "declared criminal organisation" is used to identify which items of clothing or jewellery are "prohibited items" for the purposes of the sections.

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27 (1995) 37 NSWLR 639 at 644 (Gleeson CJ).

28 See, eg, *DPP (Cth) v Abbott* (1997) 97 A Crim R 19 at 29 (Gillard J); *In re an application for bail by Kelly Michael Gray* [2008] VSC 4 at [15] (Bongiorno J).

That the scope of "prohibited items" is to some extent fixed by reference to regulation (through the identification of "declared criminal organisations") is unexceptional and does not render the laws invalid.

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

39. Approximately 20 minutes will be needed for the presentation of oral submissions.

Dated: 15 August 2014

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