IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **No. B14 of 2014**

BETWEEN:

STEFAN KUCZBORSKI
Plaintiff

and

10 **THE STATE OF QUEENSLAND**
Defendant

WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

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

20 ## PART II: BASIS OF INTERVENTION

2. Section 78A of the *Judiciary Act 1903* (Cth) in support of the defendant.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. See Part VII of the plaintiff's submissions.

PART V: SUBMISSIONS

5. Western Australia makes no submission on the answers to questions 1 and 2; standing and utility. Western Australia intervenes to contend that the legislation impugned is
30 valid.

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THE IMPUGNED PROVISIONS

The *Vicious Lawless Association Disestablishment Act 2013*

6. Proper construction of the *Vicious Lawless Association Disestablishment Act 2013* (Qld) ('*VLAD Act*') deflects a number of the criticisms made by the plaintiff[1], and disposes of some of the more extreme scenarios painted. The mandatory additional sentence in s.7(1)(b) applies to a vicious lawless associate, in terms of s.5, which, in turn, invokes the definitions of association and participant. A number of the observations of the plaintiff focus on the breadth of the definition of participant in s.4. This is relevant to the operation of s.5(1)(b). The plaintiff, however, pays insufficient regard to s.5(1)(c). Section 5(1)(c) is the essence of the *VLAD Act* — committing the declared offence for the purpose of the association or in the course of participating in the affairs of the association. Being a participant (s.5(1)(b)) is a necessary condition to the central operation of the Act; committing crimes as an aspect of being in an association (s.5(1)(c)). Further, many of the difficulties contended by the plaintiff, with the breadth of s.4, are obviated by the defence in s.5(2).

The *Criminal Code* and *Liquor Act* provisions

7. In respect of ss.60A, 60B and 60C of the *Criminal Code* (Qld) ('*Criminal Code*'), as regards application of the *Kable* doctrine, no issue arises *per se* with the imposition of a mandatory minimum penalty[2] and nor, *per se*, with the legislative criminalising of presence in a public place. Vagrancy laws are an example of the latter and perhaps closer still, consorting laws[3]. Such laws have existed in Australian States for decades[4] and reflect what French CJ in *Totani* referred to as the "long history of laws concerned to prevent or impede criminal conduct by imposing restrictions on certain classes or groups of persons and on their freedom of association"[5].

8. The complaint, at least as regards ss.60A and 60B, is to the operation of the provisions to a participant in a criminal organisation. In terms of the *Kable* doctrine, it is difficult to imagine any objection to s.60C.

9. Nor does any *Kable* doctrine issue arise, *per se*, in respect of ss.173EB, 173EC and 173ED of the *Liquor Act 1992* (Qld) ('*Liquor Act*') and their criminalising of conduct relating to presence on licensed premises while carrying prohibited items.

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[1] See Plaintiff's Amended Written Submissions at [24]–[37].

[2] See generally, *Magaming v The Queen* [2013] HCA 40; (2013) 87 ALJR 1060 ('*Magaming*').

[3] See generally, Andrew McLeod, 'On the Origins of Consorting Laws' (2013) 37 *Melbourne University Law Review* 103.

[4] Historical examples of consorting offences include the *Police Act Amendment Act 1928* (SA) s.5, inserting s 66(g2) into the *Police Act 1916* (SA); *Vagrancy (Amendment) Act 1929* (NSW) s.2(b), inserting s.4(j) into the *Vagrancy Act 1902* (NSW); *Police Offences (Consorting) Act 1931* (Vic) s.2; *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s.4(1)(v); *Police Offences Act 1935* (Tas) s.6; *Police and Police Offences Ordinance 1947* (NT) s.3(b), inserting s.56(1)(i) into the *Police and Police Offences Ordinance 1923* (NT); *Police Offences Ordinance 1948* (ACT) s.2(b), inserting s.22(h) into the *Police Offences Ordinance 1930* (ACT); *Police Act Amendment Act 1955* (WA) s.2, inserting s.65(9) into the *Police Act 1892* (WA). Contemporary examples include the *Summary Offences Act 1966* (Vic) s.49F; *Summary Offences Act 1953* (SA) s.13; *Criminal Code* (WA) ss.557J, 557K; *Police Offences Act 1935* (Tas) s.6; *Summary Offences Act* (NT) s.55A. See also *Crimes Act 1900* (NSW) s.93X, the subject of the pending *Tajjour; Hawthorne; Forster* matters.

[5] *South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 at 30 [32] ('*Totani*').

10. The complaint as to ss.72, 92A, 320 and 340 of the *Criminal Code* is different. None of these provisions create *sui generis* offences and declarations of invalidity are only sought, in this action, in respect of the aggravating circumstance of the offender being a "participant in a criminal organisation".

The *Bail Act* provisions

11. As recent decisions of the Supreme Court of Queensland[6] demonstrate, ss.16(3A)–(3C) of the *Bail Act 1980* (Qld) (*'Bail Act'*) operate in the same way as s.16(3). Section 16(3A) reverses the presumption in favour of bail. Membership or alleged membership of a criminal organisation is treated the same way as the presence of one of the factors identified in ss.16(3)(a)–(f); that is the presence of the factor imposes an onus on an accused to show that detention in custody is not justified. Whether detention is or is not justified is determined having regard to the factors set out in s.16(2). That membership or alleged membership of a criminal organisation does not *ipso facto* result in refusal of bail is evident from the course of decisions in the Supreme Court of Queensland.

'EQUALITY BEFORE THE LAW'

12. The plaintiff's central thesis is expressed at [51] of his written submissions; that certain of the challenged provisions require a court, in exercising judicial power, "to breach the fundamental notion of equality before the law"[7]. Even in this expression, the notion of "breach" is immediately problematic, and the plaintiff's later articulation or paraphrasing of this as "equal justice"[8] assists little.

13. Although not expressed as such, the plaintiff's contention seeks, in effect, to revive the reasoning in the dissenting judgments of Deane and Toohey JJ in *Leeth*[9] or to invoke the similar reasoning of Gaudron J in *Leeth*. The plaintiff's argument, put at its highest and best, would appear to be that of Gaudron J in *Leeth*; that judicial power can only lawfully be exercised "in accordance with the judicial process"[10]; "the concept of equal justice" "is fundamental to the judicial process"[11]; and, "the concept of equal justice" is "a concept which requires the like treatment of like persons in like circumstances, but also requires that genuine differences be treated as such"[12]. So, the plaintiff would contend, any purported exercise of judicial power that requires different treatment of like persons or like treatment of different persons is contrary to the concept of equal justice, which is in turn fundamental to the judicial process, and, therefore, invalid.

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[6] See *Re Van Rooijen* [2014] QSC 116; *Re Bloomfield* [2014] QSC 115; *Re Alajbegovic* [2014] QSC 6; *Re Halilovic* [2014] QSC 5; *Carew v Director of Public Prosecutions (Qld)* [2014] QSC 1.

[7] It is assumed that the plaintiff's contention as to invalidity arising from inequality, relate to all of the challenged provisions except those referred to in [12(d)] of the submissions. This seems to be the effect of [49] and [51] of the Plaintiff's Amended Written Submissions. That said, it would appear from the submissions generally that the plaintiff actually contends that this submission, as to equality, would apply also to the new ss.60A, 60B and 60C of the *Criminal Code*.

[8] See Plaintiff's Amended Written Submissions at [52]–[53].

[9] *Leeth v Commonwealth* [1992] HCA 29; (1992) 174 CLR 455 (*'Leeth'*).

[10] *Leeth* [1992] HCA 29; (1992) 174 CLR 455 at 502.

[11] *Leeth* [1992] HCA 29; (1992) 174 CLR 455 at 502.

[12] *Leeth* [1992] HCA 29; (1992) 174 CLR 455 at 502.

14. The observation of McHugh J in *Cameron*[13] that "equal justice under the law is one of the central concerns of ... judicial power" is often thought to convey the same meaning[14]. Whether this is so is uncertain as McHugh J did not, in *Cameron*, have to address the consequence of inconsistency with this "central concern"[15].

15. But, as these short references to the judgments of Gaudron J in *Leeth* and McHugh J in *Cameron* illustrate, the phrase equal justice is often prefaced or described by words or terms of even greater opaqueness; "central concern", "concept".

16. Other authorities, relied upon by the plaintiff, invoke other descriptors. The authorities expressed to be relied upon by the plaintiff for his lodestone proposition are *Wong*[16] and *Green*[17]. Both cases considered applications of the "basic principle of sentencing law"[18] of parity. Consistency in sentencing is oftentimes associated with use of the term "equality before the law"[19]; but a sentencing principle, even if fundamental, is not, by this description, a defining or essential aspect of judicial power. The same slide was rejected in *Magaming*[20], where it was sought to transmogrify the sentencing principle of proportionality into an essential or defining or mandatory aspect of judicial power. As French CJ, Hayne, Crennan, Kiefel and Bell JJ noted in *Magaming*, this was to "impermissibly mix two radically different ideas"[21].

17. It is uncontroversial that the idea of equality before the law plays a role in the exercise of the judicial power to sentence. The idea is near constitutive of the parity rule[22]. It

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[13] *Cameron v The Queen* [2002] HCA 6; (2002) 209 CLR 339 at 352–353 [44] ('*Cameron*'):

> If there is one principle that lies at the heart of the judicial power of the Commonwealth, it is that courts, exercising federal jurisdiction, cannot act in a way that is relevantly discriminatory. To deny that proposition is to deny that equal justice under the law is one of the central concerns of the judicial power of the Commonwealth. And it is at least arguable that it is relevantly discriminatory to treat convicted persons differently when the *only* difference in their circumstances is that one group has been convicted on pleas of guilty and the other group has been convicted after pleas of not guilty.

[14] See James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths, 2010) at 302–303 [6.51].

[15] *Cameron* [2002] HCA 6; (2002) 209 CLR 339 at 353 [47] (McHugh J). See also Kirby J at 369 [94].

[16] *Wong v The Queen* [2001] HCA 64; (2011) 207 CLR 584 at 608 [65] (Gaudron, Gummow and Hayne JJ) ('*Wong*'); Plaintiff's Amended Written Submission at [52].

[17] *Green v The Queen* [2011] HCA 49; (2011) 244 CLR 462 at 473 [28] (French CJ, Crennan and Kiefel JJ) ('*Green*'); Plaintiff's Amended Written Submissions at [52].

[18] *Hoare v The Queen* [1989] HCA 33; (1989) 167 CLR 348 at 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ), referring to the "basic principle of sentencing law" of proportionality. For the proposition that parity is one such principle of sentencing law, see *Muldrock v The Queen* [2011] HCA 39; (2011) 244 CLR 120 at 128 [18] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ): "At common law the exercise of the sentencing discretion is the subject of established principles. These include proportionality, parity, totality, and the avoidance of double punishment" (footnotes omitted). See also Gaudron J in *Siganto v The Queen* [1998] HCA 74; (1998) 194 CLR 656 at 670 [49]: "the principle of parity or consistency in sentencing", and at 672 [57]: "the fundamental nature of the principle of parity or consistency in sentencing".

[19] *Lacey v Attorney-General (Qld)* [2011] HCA 10; (2011) 242 CLR 573 at 595 [54] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Lacey*'). See also *Green* [2011] HCA 49; (2011) 244 CLR 462 at 473–474 [28]–[30] (French CJ, Crennan and Kiefel JJ).

[20] *Magaming* [2013] HCA 40; (2013) 87 ALJR 1060 at 1071 [51]–[52] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 1080 [102]–[104] (Keane J).

[21] *Magaming* [2013] HCA 40; (2013) 87 ALJR 1060 at 1071 [51].

[22] *Green* [2011] HCA 49; (2011) 244 CLR 462 at 473–474 [28]–[30] (French CJ, Crennan and Kiefel JJ).

can also be accepted that "the fundamental idea of equality before the law"[23] plays a role broader than just the parity rule in the exercise of judicial power to sentence. This is demonstrated in the judgment of French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ in *Munda*[24], where vindication of the dignity of the victim, by imposing an appropriate sentence as a sanction or punishment for crime, was also associated with the idea of equality before the law.

18. That the idea plays a role in aspects of sentencing does not, of course connote, that it plays a role elsewhere, let alone everywhere. As expressed in *Lacey*[25], if used inaptly, the term, as an idea, simply confuses.

10 19. It can also be accepted that the idea operates beyond the exercise of judicial power to sentence. One such is in the interpretation of statutes and consequent exercise of statutory powers[26]. Legislation will be presumed to have a non-discriminatory[27] meaning and to not require or permit a discriminatory exercise of power. Used in this sense, the idea plays a role similar to that of a fundamental right when applying the principle of legality to the interpretation of statutes; that is, any legislative "infringement" of any such fundamental right must be clear and unambiguous[28].

20. In other contexts it might be thought that the idea is more like an informing principle[29]; akin to the equitable maxim that equality is equity. In this context, the idea or principle informs the development of legal rules. An example of this use of the
20 term "equality before the law" can be seen in the joint judgment of Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ in *Stingel*[30] in the development of the defence of provocation.

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[23] *Munda v Western Australia* [2013] HCA 38; (2013) 249 CLR 600 at 620 [55] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ) ('*Munda*').

[24] *Munda* [2013] HCA 38; (2013) 249 CLR 600 at 620 [55].

[25] *Lacey* [2011] HCA 10; (2011) 242 CLR 573 at 595 [54] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ):

> The question raised in this case is: what purpose is served by the construction of s 669A(1) [of the *Criminal Code* (Qld) that empowered the Attorney-General to appeal sentences] adopted by the majority and advanced on behalf of the Attorney-General on the hearing of this appeal? The majority described the right of appeal conferred on the Attorney-General by s 669A(1) as "an important tool in the maintenance of equality before the law of all convicted persons." ... The majority appear to have been using the term "equality before the law" in the sense of consistency in sentencing. Yet, as the plurality pointed out in *Hili v The Queen*, consistency in sentencing refers to "consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence." Consistency in that sense is maintained by the decisions of intermediate courts of appeal. (footnotes omitted)

[26] *Green* [2011] HCA 49; (2011) 244 CLR 462 at 473 [28] (French CJ, Crennan and Kiefel JJ).

[27] Non-discriminatory meaning requiring identity of outcome in cases that are relevantly identical and different outcomes in cases that are different in some relevant respect – see *Wong* [2001] HCA 64; (2001) 207 CLR 584 at 608 [65] (Gaudron, Gummow and Hayne JJ).

[28] For the purpose of this contention, the principle is adequately expressed in *Attorney-General (NT) v Emmerson* [2014] HCA 13; (2014) 88 ALJR 522 at 542 [86] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[29] Perhaps what Sir Owen Dixon referred to as a "deep-rooted legal doctrine" — Sir Owen Dixon, 'The Common Law as the Ultimate Constitutional Foundation' in *Jesting Pilate* (Law Book Co, 1965) 203 at 205.

[30] *R v Stingel* [1990] HCA 61; (1990) 171 CLR 312 at 329:

> No doubt, there are classes or groups within the community whose average powers of self-control may be higher or lower than the community average. Indeed, it may be that the average power of self-control of the members of one sex is higher or lower than the average power of self-control of members of the other sex. The principle of equality before the law requires, however, that the

21. What is contended by the plaintiff in this matter is revival of a totally different notion, which finds no support in *Wong* or *Green* or *Magaming* or *Munda* or *Stingel*.

The plaintiff's contentions based on *Leeth*

22. As noted, in truth, the plaintiff relies primarily upon the reasoning of Gaudron J in *Leeth* and *Kruger*[31]. Her Honour's reasoning is not much different to that of Deane and Toohey JJ in *Leeth*. That the plaintiff so relies can be seen from [51] of the plaintiff's written submissions; where he refers to the notion of "breach the fundamental notion of equality before the law". Breach connotes the existence of a (substantive) right of some kind, which, no doubt, is inspired by the reasoning of Deane and Toohey JJ in *Leeth*.

23. In *Kruger*, all except Toohey J dismissed the contention that, implied from the *Constitution* is a "guarantee of legal equality"[32]. So, to the extent that the plaintiff seeks to invoke the reasoning of Deane and Toohey JJ in *Leeth*, it has been rejected.

24. Even though this reasoning has been rejected, because of the plaintiff's attempt to rely upon it, it is well to say something of the reasoning of Deane and Toohey JJ[33] in *Leeth*. Their Honours use the term "doctrine of legal equality" in two senses:

> The first is the subjection of all persons to the law: "every man, whatever be his rank or condition, is subject to the ordinary law ... and amenable to the jurisdiction of the ordinary tribunals" [fn.61 – Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (1959), p 193]. The second involves the underlying or inherent theoretical equality of all persons under the law and before the courts [fn.62 – See, e.g., Holdsworth, *A History of English Law*, (1938), vol 10, p 649].

25. The reference in footnote 61 of this passage is to the following passage from the 10th edition of Dicey at page 193, which appears after a description by Professor Dicey of "royal lawlessness"[34] in European States (other than Britain) during the latter eighteenth century:

> In England the idea of legal equality, or of the universal subjugation of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable to a collector of taxes is under the same responsibility for every act done without legal justification as any other citizen.

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differences between different classes or groups be reflected only in the limits within which a particular level of self-control can be characterized as ordinary. The lowest level of self-control which falls within those limits or that range is required of all members of the community.

[31] *Kruger v Commonwealth* [1997] HCA 27; (1997) 190 CLR 1 ('*Kruger*').

[32] *Kruger* [1997] HCA 27; (1997) 190 CLR 1 at 44–45 (Brennan CJ), 63–68 (Dawson J), 112–114 (Gaudron J), 141–142 (McHugh J), 153–155 (Gummow J). See also *Leeth* [1992] HCA 29; (1992) 174 CLR 455 at 467–468 (Mason CJ, Dawson and McHugh JJ), 479–480 (Brennan J).

[33] *Leeth* [1992] HCA 29; (1992) 174 CLR 455, in particular at 484–487.

[34] A V Dicey, *An Introduction to the Study of the Law of the Constitution* (Palgrave Macmillan, 10th ed, 1959) at 191.

26. This passage might be thought to be relevant to a decision (or body of jurisprudence) such as (say) *Kirk*[35] but says nothing about the matters that were in issue in *Leeth* or in this matter.

27. The reference by Deane and Toohey JJ in footnote 62 in the passage from *Leeth* extracted above to Professor Holdsworth, is more curious. Page 649 of Volume 10 of Holdsworth is in a chapter headed "The Basing of the Authority of the State upon the Rule of Law"[36]. The relevant passage is as follows:

> Thus the doctrine of the rule of law means first "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the influence of arbitrariness of prerogative, or even of wide discretionary authority on the part of the government" [fn.1]; and secondly it means "equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts." [fn.2] These were the most important of all the constitutional results which flowed from the independent position which the courts had attained in the eighteenth century; and the fact that they had been attained afforded one of the greatest contrasts between the public law of England and that of continental states. And from these results another very important result has emerged. Because, in the sixteenth and seventeenth centuries, the common law had been victorious in the struggle for supremacy with rival courts and councils, and many of those branches of English law, which define the constitutional rights of the subject as against the Crown, have continued to be evolved by the courts as branches of the common law, and in the same manner as other branches of the common law.

28. The first two footnotes in this passage refer to the 7th edition of Dicey[37] at p.198. Page 198 of the 7th edition of Dicey states:

> That "rule of law," then, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view.
>
> It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.
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> It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the "administrative law" (*droit administratif*) or the

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[35] *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531.
[36] Sir William Holdsworth, *A History of English Law* (Methuen & Co, first published 1938, 1981 ed) vol X at 647.
[37] A V Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan & Co, 7th ed, 1908).

> "administrative tribunals" (*tribunaux administratifs*) of France. The notion which lies at the bottom of the "administrative law" known to foreign countries is, that affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil Courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs.
>
> The "rule of law," lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts; that, in short, the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.

29. Clearly enough, this passage, from p.198 of the 7th edition of Dicey, conveys the same meaning as the passage from the 10th edition of Dicey at p.193. Neither passage says anything about a "fundamental [common law] constitutional doctrine"[38] of "theoretical equality of all persons under the law and before the courts"[39] in the manner in which this latter term is used by Deane and Toohey JJ[40]. These passages refer to the much more mundane idea that the Common Law applies to all.

30. The sources relied upon by their Honours to support the existence of an historical "underlying or inherent theoretical equality of all persons under the law and before the courts" say nothing of it[41].

31. It might also be noted that, at an unhelpful level of abstraction, the notion that the idea of legal equality plays a role in Common Law legal systems is banal. It is dubious to attribute uniquely to the Common Law a role for the idea. It is difficult to conceive that any modern system of law would abjure the notion playing a role in some way. To the observations of French CJ, Crennan and Kiefel JJ in *Green*[42], as to universality and long history of the idea, can be added the reference to equal justice under law in

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[38] *Leeth* [1992] HCA 29; (1992) 174 CLR 455 at 485 (Deane and Toohey JJ).
[39] *Leeth* [1992] HCA 29; (1992) 174 CLR 455 at 485 (Deane and Toohey JJ).
[40] With respect, the (same) passages from Professors Dicey and Holdsworth are cited accurately at fn.71 in the judgment of French CJ, Crennan and Kiefel JJ in *Green* [2011] HCA 49; (2011) 244 CLR 462 at 473 [28].
[41] The reasoning of Deane and Toohey JJ in *Leeth* [1992] HCA 29; (1992) 174 CLR 455 at 484 to the effect that, in light of the *Melbourne Corporation* doctrine, and its implication from the *Constitution*, "it would be somewhat surprising" if "no similar protection of the people who constitute the Commonwealth and the States" could be implied, is misplaced. For this purpose, it can be taken that the joint judgment of Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ in *Re Australian Education Union* [1995] HCA 71; (1995) 184 CLR 188 at 227 identifies the doctrinal basis or bases of the *Melbourne Corporation* limitation on Commonwealth legislative and executive power. Their Honours in turn relied upon the reasoning of Dixon J in *Melbourne Corporation v Commonwealth* [1947] HCA 26; (1947) 74 CLR 31 at 82: "The foundation of the *Constitution* is the conception of a central government and a number of State governments separately organized. The *Constitution* predicates their continued existence as independent entities." The rationale of the *Melbourne Corporation* doctrine says nothing of the relation between legislatures and citizens or residents of States.
[42] *Green* [2011] HCA 49; (2011) 244 CLR 462 at 473 [28], and in particular at fns.70 and 72.

the funeral oration attributed to Pericles in Thucydides' *History of the Peloponnesian War*[43].

The reasoning of Gaudron J in *Leeth*

32. Gaudron J in *Leeth* observed that[44]:

> All are equal before the law. And the concept of equal justice — a concept which requires the like treatment of like persons in like circumstances, but also requires that genuine differences be treated as such — is fundamental to the judicial process.

33. Her Honour sought to express the same idea in *Kruger*[45]; "Ch III operates to preclude the conferral on courts of discretionary powers which are conditioned in such a way that they must be exercised in a discriminatory manner".

34. In none of Gaudron J's judgments in *Leeth* or *Kruger* or in McHugh J's judgment in *Cameron* is there a citation to support such conclusions or reasoning. Nor do their Honours state that, even if the "concept" of equal justice is "fundamental to the judicial process", or a "central concern of judicial power", it is an inviolable and mandatory feature of judicial power, in the sense that the converse would be repugnant to or incompatible with the institutional integrity of the State courts[46].

35. To so contend would be, in this country, ahistorical. As Professor La Nauze has observed, including something like section 1 of the Fourteenth Amendment to the US Constitution in the *Constitution* was rejected by the framers, in large part because to do so would have affected colonial/State laws that discriminated against people of "coloured races" and "alien races"[47]. Australian courts, at federation, were required to give effect to discriminatory laws. Section 51(xxvi) of the *Constitution* empowers the Commonwealth to enact laws "discriminating against or benefiting the people of any race"[48]. A law within such power would necessarily come to be considered in federal

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[43] Sometimes translated as: "If we look to the laws, they afford equal justice to all in their private differences; if no social standing, advancement in public life falls to reputation for capacity, class considerations not being allowed to interfere with merit; nor again does poverty bar the way".

[44] *Leeth* [1992] HCA 29; (1992) 174 CLR 455 at 502.

[45] *Kruger* [1997] HCA 27; (1997) 190 CLR 1 at 112.

[46] Cf. the accepted formulation of the *Kable* principle as stated by Gummow J in *Fardon v Attorney-General (Qld)* [2004] HCA 46; (2004) 223 CLR 575 at 617 [101]; quoted with approval in *Pollentine v Attorney-General (Qld)* [2014] HCA 30 at [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) ('*Pollentine*').

[47] J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) at 232. In this respect, note also *Kartinyeri v Commonwealth* [1998] HCA 22; 195 CLR 337 at 363 [33] (Gaudron J) ('*Kartinyeri*'); the observation of Dawson J (McHugh J agreeing at 141–142) in *Kruger* [1997] HCA 27; (1997) 190 CLR 1 at 65 that "[g]uarantees of equality before the law and due process were specifically rejected [by the framers of the *Constitution*], not because they were already implicit and therefore unnecessary, but because they were not wanted." See also Justice McHugh, 'Does Chapter III of the Constitution protect substantive as well as procedural rights?' (2001) 21 *Australian Bar Review* 235 at 251, where his Honour noted that the 1898 Melbourne Constitutional Convention specifically rejected a provision modelled on the US Fourteenth Amendment; George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in Geoffrey Lindell (ed) *Future Directions in Australian Constitutional Law* (Federation Press 1994) 185 at 205.

[48] *Commonwealth v Tasmania (Tasmanian Dam Case)* [1983] HCA 21; (1983) 158 CLR 1 at 273 (Deane J). See also *Kartinyeri* [1998] HCA 22; 195 CLR 337 at 381–383 [90]–[94] (Gummow and Hayne JJ); *Western Australia v Commonwealth (Native Title Act Case)* [1995] HCA 47; (1995) 183 CLR 373 at 460–461 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

jurisdiction and require a Chapter III court to apply it. This would be so, even though it can be accepted that, in the interpretation of statutes and consequent exercise of statutory powers, legislation will be presumed to have a non-discriminatory[49] meaning and to not require discriminatory exercises of power.

36. The narrowing of Gaudron J's reasoning, as some have sought to do, to "due process of an essentially procedural rather than a substantive kind"[50] simply does not accord with the expression of her Honour's reasoning; "Ch III operates to preclude the conferral on courts of discretionary powers which are conditioned in such a way that they must be exercised in a discriminatory manner"[51]. No distinction between substance and procedure can be extracted from this.

37. Even if her Honour's meaning relates to "procedural [as opposed to substantive] due process", it is doubtful that invocation of this notoriously difficult distinction clarifies much in this context. Even if it might be thought to do so, it cannot be doubted that the imposition of a "discriminatory" mandatory additional sentence is, in this sense, substantive, or at least, not procedural.

38. There is no underlying basis for the plaintiff's assertions of invalidity.

AN ALTERNATIVE PLAINTIFF CASE (THAT IS ALSO WRONG)

39. Even if it is implied in the *Constitution* (as opposed to being a "basic principle of sentencing law"[52]) that a valid exercise of judicial power requires that there be identity of outcome in cases that are relevantly identical and different outcomes in cases that are different in some relevant respect, the differentiator in all of the legislation impugned in this action does not offend this implicit "principle".

40. The plaintiff, in effect, contends that being a "participant in a criminal organisation", or a "participant in the affairs of a relevant association", which attract the additional mandatory sentence, and the special bail provision, is not a relevant differentiator. The plaintiff's contention is that, in effect, those who commit the relevant offences, while participants, are relevantly identical to an accused who simply commits the offence *simpliciter*. The basis for the contention that, being a participant is not

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[49] Non-discriminatory meaning requiring identity of outcome in cases that are relevantly identical and different outcomes in cases that are different in some relevant respect – see *Wong* [2001] HCA 64; (2001) 207 CLR 584 at 608 [65] (Gaudron, Gummow and Hayne JJ).

[50] *Kruger* [1997] HCA 27; (1997) 190 CLR 1 at 67–68 (Dawson J). Although Dawson J was not seeking to preserve Deane and Toohey JJ's or Gaudron J's reasoning in *Leeth*, his Honour's judgment suggests that such a distinction can be drawn in the Commonwealth *Constitution*. A similar distinction between substantive and procedural due process is drawn in George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in Geoffrey Lindell (ed) *Future Directions in Australian Constitutional Law* (Federation Press 1994) 185 at 200–201; James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths, 2010) at 296 [6.39]; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) at 281.

[51] *Kruger* [1997] HCA 27; (1997) 190 CLR 1 at 112.

[52] *Hoare v The Queen* [1989] HCA 33; (1989) 167 CLR 348 at 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ), referring to the "basic principle of sentencing law" of proportionality. In relation to the sentencing principle of parity, see *Muldrock v The Queen* [2011] HCA 39; (2011) 244 CLR 120 at 128 [18] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Siganto v The Queen* [1998] HCA 74; (1998) 194 CLR 656 at 670 [49], 672 [57] (Gaudron J).

relevantly different from being an offender *simpliciter*, is the quoted observation of Hayne J's in *Totani*[53].

41. Before dealing with Hayne J's reasoning, it is to be noted that this submission is put at a level of generality applying to all of the impugned provisions. But the provisions are different.

42. As noted above, s.5(1)(c) is the core of the *VLAD Act* – committing the declared offence for the purpose of the association or in the course of participating in the association. Being a participant or member (s.5(1)(b)) is a necessary condition of the central operation of s.5(1)(c). Membership of or participating in the affairs of an association is not the key element of the operation of the Act. So, when the plaintiff's proposition is considered, it is, in respect of the *VLAD Act* as follows; committing a declared offence for the purpose of an association or in the course of participating in the association, in the affairs of which association the accused is a participant, is the same as committing a declared offence.

43. Sections 72, 92A, 320 and 340 of the *Criminal Code* are, relevantly the same. Being a participant in a criminal organisation aggravates and gives rise to a greater sentence for existing offences.

44. Although ss.60A, 60B and 60C of the *Criminal Code* operate centrally upon the notion of "being a participant in a criminal organisation", the offences do not criminalise membership of a criminal organisation. Each offence is relevantly identical to consorting; association and keeping company, where the accused seeks out or accepts the association[54]. Consorting laws have been applied by Chapter III courts for decades[55].

45. The vice alleged by the plaintiff is even less applicable to the *Liquor Act* provisions. The provisions are of general application; they do not apply in terms to "participants in criminal organisations", although "prohibited items" is defined by reference to a range of items with a connection to declared criminal organisations.

46. In respect of the *Bail Act* provisions, s.16(3A) of the *Bail Act* simply equates membership of a criminal organisation to the matters provided for in factors in ss.16(3)(a)–(f). Presence of a factor, including being or alleged to be a participant in a criminal organisation, burdens the applicant for bail to prove that remand in custody is not justified. Members or alleged members of criminal organisations are not singled

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[53] See Plaintiff's Amended Written Submission at [54]–[55].

[54] See, generally, *Johanson v Dixon* [1979] HCA 23; (1979) 143 CLR 376.

[55] Historical examples of consorting offences include the *Police Act Amendment Act 1928* (SA) s.5, inserting s 66(g2) into the *Police Act 1916* (SA); *Vagrancy (Amendment) Act 1929* (NSW) s.2(b), inserting s.4(j) into the *Vagrancy Act 1902* (NSW); *Police Offences (Consorting) Act 1931* (Vic) s.2; *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s.4(1)(v); *Police Offences Act 1935* (Tas) s.6; *Police and Police Offences Ordinance 1947* (NT) s.3(b), inserting s.56(1)(i) into the *Police and Police Offences Ordinance 1923* (NT); *Police Offences Ordinance 1948* (ACT) s.2(b), inserting s.22(h) into the *Police Offences Ordinance 1930* (ACT); *Police Act Amendment Act 1955* (WA) s.2, inserting s.65(9) into the *Police Act 1892* (WA). Contemporary examples include the *Summary Offences Act 1966* (Vic) s.49F; *Summary Offences Act 1953* (SA) s.13; *Criminal Code* (WA) ss.557J, 557K; *Police Offences Act 1935* (Tas) s.6; *Summary Offences Act* (NT) s.55A. See also *Crimes Act 1900* (NSW) s.93X, the subject of the pending *Tajjour; Hawthorne; Forster* matters.

out or singularly differentiated, but equated to the circumstance of others described in s.16(3)(a)–(f). Reversing the burden in this manner is not novel[56].

47. Hayne J's reasoning in *Totani* refers to a circumstance plainly different to that of the *VLAD Act* or ss.72, 92A, 320 and 340 of the *Criminal Code*. The vice to which Hayne J refers was; the imposition of "disadvantageous consequences upon any person who falls within that extended definition of "member", regardless of what the person has or has not done, and regardless of what purposes that person has had, or may now or later harbour, for having a connection with the organisation."[57] Taken at its highest, his Honour could be understood to refer to imposing a disadvantageous consequence to membership of a group *simpliciter*.

48. In *Totani* the legislation challenged was not premised upon, nor required, the commission of a crime. His Honour's observations, relied upon by the plaintiff, are expressed in the specific context of criminalising membership of a group or imposing a disadvantage solely as a result of group membership. In respect of each of the *VLAD Act* and ss.72, 92A, 320 and 340 of the *Criminal Code,* a person attracting the mandatory additional sentence[58] or mandatory minimum sentence[59] or increased maximum sentence[60], has been convicted of an underlying crime. Committing the crime for the purpose of an association or in the course of participating in the association (*VLAD Act*) or because the convicted person is a participant in a criminal organisation (ss.72, 92A, 320 and 340 of the *Criminal Code*) is a factor that aggravates and gives rise to an additional sentence. There is nothing novel in this. Membership of a group or class can, properly, be relevant to sentencing. For instance, in *Munda*[61], French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ refer to the "specific legislative direction" considered by the Supreme Court of Canada in *Gladue*[62] and *Ipeelee*[63]. Section 718.2(e) of the Canadian *Criminal Code* required judges in sentencing to "pay particular attention to the circumstances of aboriginal offenders"[64]. As the allusion to these authorities in *Munda* suggests, the validity of such legislation in this country could not be doubted.

49. Sections 60A, 60B and 60C of the *Criminal Code* might be thought to be closer to the vice referred to by Hayne J. But, although the provisions create *sui generis* offences, no provision criminalises membership. In s.60A, the offence relates to going in public with other participants; akin to consorting. Section 60B is similar and the gravamen of s.60C is recruitment to participation in a criminal organisation.

50. Sections 173EB, 173EC and 173ED of the *Liquor Act* are even further removed from the vice referred to by Hayne J. In s.173EC, the offence relates to entering or remaining on licensed premises while wearing or carrying a prohibited item. Section 173ED relates to such a person refusing to leave licensed premises and

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[56] *Chau v Director of Public Prosecutions (Cth)* (1995) 37 NSWLR 639 at 644–647 (Gleeson CJ, Powell JA agreeing), 657–658 (Kirby P).
[57] *Totani* [2010] HCA 39; (2010) 242 CLR 1 at 92 [234].
[58] *VLAD Act* s.7.
[59] *Criminal Code* ss.72(2), 320(2), 340(1A).
[60] *Criminal Code* ss.72(2), 92A(4A).
[61] *Munda* [2013] HCA 38; (2013) 249 CLR 600 at 618 [50]. See also *Bugmy v The Queen* [2013] HCA 37; (2013) 249 CLR 571 at 589–592 [28]–[34] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
[62] *R v Gladue* [1999] 1 SCR 688.
[63] *R v Ipeelee* [2012] 1 SCR 433.
[64] *R v Gladue* [1999] 1 SCR 688 at 704–708.

s.173EB concerns certain persons in authority knowingly allowing a person wearing or carrying a prohibited item to enter or remain in the premises. As noted above, these are offences of general application.

PART VI: LENGTH OF ORAL ARGUMENT

51. It is estimated that the oral argument for the Attorney General for Western Australia will take no more than 15 minutes.

10 Dated: 15 August 2014

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