IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

No B14 of 2014

Between:

STEFAN KUCZBORSKI
Plaintiff

THE STATE OF QUEENSLAND
Defendant

PLAINTIFF'S WRITTEN SUBMISSIONS IN REPLY

PART I: CERTIFICATION FOR PUBLICATION ON THE INTERNET

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

PART II: ARGUMENT IN REPLY

Reply with respect to the Plaintiff's first *Kable* argument

2. The Defendant and interveners attempt to save the validity of the special sentences and special bail regime challenged by the Plaintiff in two principal ways:

   (a) by wrongly asserting that the Plaintiff's arguments are foreclosed by the decisions of this Court in *Leeth* (1992) 174 CLR 455 and *Kruger* (1997) 190 CLR 1[1]; and

   (b) by erroneously seeking to characterise the special sentences as mere circumstances of aggravation[2] (including by advancing strained constructions of some of the Impugned Provisions).

3. Both of these attempts should be rejected.

The Plaintiff's argument is not foreclosed by the decisions of this Court in Leeth and Kruger

4. The Plaintiff does not seek to establish a free-standing constitutional principle of legal equality along the lines of that favoured by Deane, Toohey and Gaudron JJ in *Leeth v Commonwealth* (1992) 174 CLR 455 but rejected by the majority in that case and in the subsequent case of *Kruger v Commonwealth* (1997) 190 CLR 1.

5. Instead, the Plaintiff's contention is a narrower one which seeks to apply existing doctrines of constitutional law to the Impugned Provisions rather than to create new doctrines.

6. In short, the Plaintiff asks the Court to apply the "*Kable principle*" and says that, in doing so, the Court can and should consider whether (and, if so, the extent to which) the Impugned Provisions purport to require state courts to act in breach of fundamental notions of equality before the law.

7. That approach, if accepted, would not elevate equality before the law to the status of a free-standing principle of constitutional law in the same way that this Court's decisions in *IFTC* (2009) 240 CLR 319 (***IFTC***) and *Wainohu* (2011) 243 CLR 181 (***Wainohu***) do not constitutionally entrench a free-standing requirement of due process[3] or a constitutional requirement that judges must always or usually give reasons.

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[1] DS at [44]-[48], [70]; Cth at [52]-[63]; Vic at [14]; SA at [51]-[54]; NT at [18].

[2] DS at [52]; NSW at [12]-[18]; Vic at [11(c)], [12], [20], [23]; SA at [5(i)], [7], [19], [40]-[46], [63], [65]; NT at [9], [10], [14].

[3] See *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [52] per French CJ.

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8. Rather, *Wainohu*, *IFTC* and the present case each provide examples of particular legislative contexts in which departures from established judicial processes are sufficiently significant to support a conclusion that a state law is repugnant to the judicial process in a fundamental degree and thereby invalid.

9. In this way, accepting the Plaintiff's argument would not be inconsistent with the decisions in *Leeth* and *Kruger*. Indeed, McHugh J (one of the members of the majority in *Leeth*) seems to have accepted that an argument of the kind presently being made might be available (at least when courts are exercising federal jurisdiction). In this regard, his Honour said the following in *Cameron v The Queen* (2002) 209 CLR 339 at 352 [44] (albeit while dissenting in the result in that case):

> 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.

The challenged special sentences are not properly characterised as mere aggravating factors

10. The Defendant and the interveners seek to characterise the special sentences purportedly imposed by the Vicious Act and the Disruption Act as unexceptional instances of a legislature prescribing aggravating factors for particular offences.

11. That is not an accurate characterisation of the special sentences which the Plaintiff challenges.

12. As the Attorney-General for South Australia (**South Australia**) correctly submits (at [22]), s 72(2) of the *Criminal Code* (Q) provides the clearest case to consider the Plaintiff's first *Kable* argument. As South Australia also correctly observes, that subsection is enlivened with respect to a "*participant in a criminal organisation*" whether or not there is "*any direct or indirect relationship between being a participant and the conduct giving rise to the [simple offence of] affray*"[4].

13. That being so, s 72(2) is not properly characterised as an aggravating factor in the sense of being a factor which increases the seriousness of the underlying offence and/or the culpability of the offender for that offence.

14. There is no apparent rational basis for concluding that an affray committed by a person who happens to be a participant of an organisation that the Queensland Parliament has decided to call a "*criminal organisation*" is any more serious than an affray committed by any other class of person.

15. No such basis has been proffered by the Defendant. The closest that the Defendant comes is a statement that s 72(2) (and the other special sentences inserted to the *Criminal Code* (Q) by the Disruption Act) are "*directed to individuals who commit criminal offences while enjoying the support and encouragement of a criminal group*"[5].

16. However, as South Australia correctly observes[6], s 72(2) is enlivened whether or not there is any nexus between being a participant in a "*criminal organisation*" and the offence charged. Thus, s 72(2) purportedly applies whether or not the offender "*enjoy[ed] the support and encouragement of a criminal group*" whilst committing the offence charged. While a special penalty conditioned on the offender "*enjoying the support and encouragement of a criminal group*" may have avoided the objection now raised by the Plaintiff, s 72(2) is not so conditioned.

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[4] SA at [22].

[5] DS at [65] (emphasis added).

[6] SA at [22].

17. Subsection 72(2) of the *Criminal Code* (Q) might be compared with the various examples of circumstances of aggravation given in the Defendant's submissions.[7] In the case of each of those examples, there is a rational connection[8] between the offence and the aggravating factor.

18. By way of illustration (and by reference to the examples proffered by the Defendant of aggravating factors based on the "*status of the perpetrator*"[9]), there is a rational basis for concluding that the offence of stealing is more serious if it is done by a public servant with respect to public property, by an employee or company officer with respect to her company's property, by an agent with respect to his principal's property or by a lessee trusted with her landlord's property. In each of those cases, the offender is in a position of trust vis-à-vis the victim with the result that there is a rational basis for concluding that an offence by such an offender is more serious than one committed by a person who was not in a position of trust.

19. In distinction to s 72(2) of the *Criminal Code* (Q), each of these aggravating factors require a nexus between the factor and the underlying offence (for example, a person is not subject to a greater penalty merely because that person happens to be a company director; they are only subject to the greater penalty if that company director steals his or her company's property).

20. Once the above is appreciated, it must be recognised that the Plaintiff's objection to s 72(2) of the *Criminal Code* (Q) is not centred on the common (and usually unobjectionable) legislative practice of prescribing aggravating factors for particular offences. Rather, the Plaintiff's objection is centred on the Queensland Parliament's decision to seek to require courts to impose one set of penalties on a group of people that Parliament has decided are undesirable and another set of penalties on everyone else. The Plaintiff says that that purported requirement is repugnant to the judicial process in a fundamental degree.

21. The Plaintiff's objection to s 72(2) of the *Criminal Code* (Q) similarly applies to the special penalties purportedly imposed by the Vicious Act and ss 92A(4A), 320(2), 340(1A) of the *Criminal Code* (Q) as well as to the special bail regime in s 16(3A) of the *Bail Act 1980* (Q).

22. In the case of the Vicious Act, the Defendant asserts that the "*irrational results outlined by the Plaintiff*" can be avoided at the level of construction.[10]

23. In chief[11], the Plaintiff observed that the Vicious Act could (if valid) operate to require a court to impose a mandatory minimum sentence of fifteen years without parole on a person who committed an offence during the course of participating in the affairs of an association which, unbeknownst to that person, had a criminal purpose and which offence was not connected with her participation in the affairs of the association.

24. The Defendant submits (at [54], [55]) that that example is "*wrong*" and "*does not reflect the true operation of the VLAD Act*".

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[7] DS at [52].

[8] The Attorney-General of the Commonwealth (**Commonwealth**) submits (at [64]) that, if (despite his submissions) the Court accepts the Plaintiff's submissions regarding the role that legal equality may play in the operation of the *Kable* principle, "*a rational connection between the offence and the aggravating factor will be sufficient for validity*". For the purposes of analysis, it is convenient to assess the impugned sentencing provisions by reference to that proposed standard (which standard also disposes of the Defendant's complaint that the Plaintiff's approach might require "*judicial second-guessing*" of political decisions: DS at [18], [52]). However, the Plaintiff contends that there is ultimately only one relevant test for validity – whether the impugned laws substantially impair courts' institutional integrity. In the Plaintiff's submission, subsidiary standards for analysis such as that proposed by the Commonwealth provide indicators of validity but not conclusive tests.

[9] DS at [52].

[10] DS at [15].

[11] PS at [34]-[36].

25. In making that submission, the Defendant fixes on the definition of "*vicious lawless associate*" in s 5 of the Vicious Act. Under that definition, a person is only a "*vicious lawless associate*" if (inter alia) the person did or omitted to do an act that constitutes a declared offence "*for the purposes of, **or** in the course of participating in the affairs of*" a relevant association[12].

26. The Defendant appears to submit that, despite the existence of the word "*or*" between the phrase "*for the purposes of*" and the phrase "*in the course of participating in the affairs of*", those two phrases should be construed as being "*equivalent*".[13] The Defendant does not explain how that approach can be reconciled with the well-established principle of statutory interpretation that "*such a sense is to be made upon the whole [of a statute] as that no clause, sentence, or word shall prove superfluous, void or insignificant, if by any other construction they may all be made useful and pertinent*"[14].

27. The correct view is that the phrase "*in the course of participating in the affairs of*" is different to (and broader than) the phrase "*for the purposes of*". Consistent with this, a person may be a "*vicious lawless associate*" in relation to an offence even if that offence was not committed for the purposes of an association. Instead, it will be sufficient for the offence to be committed in the course of "*participating*" in the affairs of an association whether or not the person knew that the association had criminal purposes (the Defendant appears to agree that, to be a "*vicious lawless associate*" it is unnecessary for an offender to know that the persons with whom he or she associates are "*lawless*" or otherwise have a criminal purpose).

28. When construed in this manner, the Vicious Act suffers from substantially the same vice to that discussed above and in chief with respect to s 72(2) of the *Criminal Code* (Q) – namely, that it purports to require courts to impose special penalties on particular classes of people on grounds which are not required to have any connection with the offence charged.

29. The Plaintiff contends that purporting to require courts to proceed in this manner is repugnant to the judicial process in a fundamental degree and therefore beyond the power of the Queensland Parliament.

Reply with respect to the Plaintiff's second *Kable* argument

30. Contrary to the Defendant's and some of the intervener's submissions,[15] the Plaintiff does not contend that the Impugned Provisions are invalid merely because the Queensland Parliament has sought to do indirectly what it has not sought to do directly.

31. Rather, the Plaintiff points to the extraordinary nature of the Impugned Provisions and says that their combined effect is to require courts to act as an instrument of the Queensland executive and legislature in a way which impermissibly impairs the institutional integrity of Queensland courts.

32. The Plaintiff's observations regarding the Queensland Parliament's decision not to prohibit participation in any particular motorcycle club or other association must be viewed in that context.

33. The Plaintiff's principal complaint is that the Impugned Provisions (whether taken individually or cumulatively) require courts to use their ordinary powers with respect to sentencing and bail as if it was an offence or other wrong to be associated with one of the 26 motorcycle clubs which the Queensland Parliament has deemed to be "*criminal*

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[12] Vicious Act s 5(1)(c) (emphasis added).

[13] DS at [55].

[14] *R v Berchet* (1688) 1 Show KB 196; 89 ER 480. Cited with approval in, eg, in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] per McHugh, Gummow, Kirby and Hayne JJ.

[15] DS at [62]; Cth at [70]-[74]; NSW at [25].

organisations"[16] even though the Queensland Parliament has not seen fit to make it a wrong to be so associated. As a result, the practical effect of the Impugned Provisions is (and appears to be) to conscript courts to adversely treat certain individuals by reason of their (legal) associations with particular organisations of the Queensland executive or legislature's choosing rather than by reason of their own wrongful acts.

34. The Plaintiff says that the nature and extent of that conscription is significant enough to support a conclusion that the functions conferred upon courts by the Impugned Provisions purport to impair substantially the institutional integrity of the Queensland courts with the result that those provisions are invalid.

10 **Reply with respect to questions 1 and 2 of the Amended Special Case**

35. On the question of "*standing*", issue is sufficiently joined by the written submissions already filed.[17] In short, the Plaintiff says that he has standing "*because [he] ha[s] an interest in the question whether [the Impugned Provisions] [are] valid which is greater than that of other members of the public*".[18]

36. As for the question of whether these proceedings are "*hypothetical*" and therefore do not give rise to a "*matter*" in the constitutional sense, there is no principle of law to the effect that a constitutional challenge to a criminal law must fail as being "*hypothetical*" unless the plaintiff proves that he or she has been charged with an offence under the challenged law or has or intends to engage in the conduct purportedly prohibited by that law.[19] Rather, provided that proceedings raise matters of "*practical consequence*"[20] (rather than "*mere intellectual or emotional*
20 *concern*"[21]), the proceedings will not fail on the grounds that they are "*hypothetical*".

37. In the present case, the Plaintiff has more than a "*mere intellectual or emotional concern*" in the subject matter of these proceedings and "*is likely to gain some advantage*"[22] should he succeed. In particular, if he succeeds, it will be clear that he can continue his (legal) association with his choice of motorcycle club without being at risk of the significant penalties and other detriments which could apply to him if the Impugned Provisions were valid. In those circumstances, the proceedings do not fail on the basis that they raise questions which are hypothetical.

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[16] Or such other organisations as might later be declared by regulation to be a "*criminal organisation*" or which might be "*relevant associations*" for the purposes of the Vicious Act.

[17] PS at [74]-[80]; DS at [31]-[39]; Vic at [25]. The Attorneys-General for New South Wales, South Australia and the Northern Territory have made no submissions with respect to this issue. The Attorney-General for the Commonwealth does not complain about a want of standing generally but says that the substantive question raised on the Amended Special Case is hypothetical with the result that the Plaintiff's claim do not give rise to a "*matter*" in respect of which the Plaintiff could have standing: see Cth at [47].

[18] *Edwards v Santos Ltd* (2011) 242 CLR 421 at 436 [37] per Heydon J (with whom the remainder of the Court agreed on the issue of "*standing*").

[19] Cf Cth at [32].

[20] See *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582 per Mason CJ, Dawson, Toohey and Gaudron JJ.

[21] *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 530.

[22] *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 530.