# HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

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STEFAN KUCZBORSKI PLAINTIFF

AND

THE STATE OF QUEENSLAND DEFENDANT

*Kuczborski v Queensland*
[2014] HCA 46
*14 November 2014*
B14/2014

**ORDER**

*The questions asked by the parties in the further amended special case dated 23 July 2014 and referred for consideration by the Full Court be answered as follows:*

***Question 1***

*Does the plaintiff have standing to seek a declaration that any, and which, of the provisions referred to in the schedule to these questions (other than* Criminal Code *(Q), sections 60A, 60B(1) and 60C, and* Liquor Act 1992 *(Q), sections 173EB to 173ED) is invalid?*

***Answer***

*No.*

***Question 2***

*Is the relief which the plaintiff seeks in answer to question 3 (other than the relief sought in relation to the* Criminal Code *(Q), sections 60A, 60B(1) and 60C, and* Liquor Act 1992 *(Q), sections 173EB to 173ED) hypothetical?*

***Answer***

*It is unnecessary to answer this question.*

***Question 3***

*Is any, and which, of the provisions referred to in the schedule invalid on the ground that it infringes the principle of* Kable v Director of Public Prosecutions (NSW) *(1996) 189 CLR 51?*

***Answer***

*None of ss 60A, 60B(1), 60B(2) and 60C of the* Criminal Code *(Q) or ss 173EB, 173EC and 173ED of the* Liquor Act *1992 (Q) is invalid on the ground that it infringes the principle in* Kable v Director of Public Prosecutions (NSW). *The plaintiff does not have standing to challenge the validity of the other provisions in the schedule.*

***Question 4***

*Who should pay the costs of the special case?*

***Answer***

*The plaintiff.*

***Schedule***

Vicious Lawless Association Disestablishment Act *2013 (Q)*

Criminal Code *(Q), 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) and 340(3)*

Bail Act *1980 (Q), ss 16(3A), 16(3B), 16(3C) and 16(3D)*

Liquor Act *1992 (Q), ss 173EB, 173EC and 173ED*

**Representation**

K C Fleming QC with W Baffsky and S Robertson for the plaintiff (instructed by Irish Bentley Lawyers)

P J Dunning QC, Solicitor-General of the State of Queensland with A J MacSporran QC, G J D del Villar and C M Tam for the defendant (instructed by Crown Law (Qld))

**Intervenors**

J T Gleeson SC, Solicitor-General of the Commonwealth with C L Lenehan for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales with J E Davidson for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor (NSW))

M P Grant QC, Solicitor-General for the Northern Territory with A K Chong-Fong for the Attorney-General for the Northern Territory, intervening (instructed by Solicitor for the Northern Territory)

M G Hinton QC, Solicitor-General for the State of South Australia with C Jacobi for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

S G E McLeish SC, Solicitor-General for the State of Victoria with C P Young for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

G R Donaldson SC, Solicitor-General for the State of Western Australia with A J Sefton for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

## CATCHWORDS

### Kuczborski v Queensland

Constitutional law (Cth) – Standing – Plaintiff sought declaration that *Vicious Lawless Association Disestablishment Act* 2013 (Q) and provisions of the *Criminal Code* (Q), *Bail Act* 1980 (Q) and *Liquor Act* 1992 (Q) were invalid – Where certain provisions only operated where offence committed against existing unchallenged laws – Whether plaintiff had sufficient interest to bring action.

Constitutional law (Cth) – Constitution, Ch III – Institutional integrity of State courts – Where ss 60A, 60B(1), 60B(2) and 60C of *Criminal Code* created offences elements of which involved being a "participant" in a "criminal organisation" – Where ss 173EB, 173EC and 173ED of *Liquor Act* created offences elements of which involved wearing symbols of membership of a "declared criminal organisation" – Where power, by regulation, to declare organisation a "criminal organisation" – Whether impugned provisions offended principle in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 – Whether Court enlisted to implement legislative or executive policy – Whether task given to Court incompatible with institutional integrity.

Words and phrases – "association", "criminal organisation", "institutional integrity", "*Kable* principle", "participant", "standing", "sufficient interest".

*Bail Act* 1980 (Q), ss 16(3A), 16(3B), 16(3C), 16(3D).
*Criminal Code* (Q), 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).
*Liquor Act* 1992 (Q), ss 173EB, 173EC, 173ED.
*Vicious Lawless Association Disestablishment Act* 2013 (Q).

FRENCH CJ.

Introduction

1 The plaintiff is a member of the Brisbane Chapter of the Hells Angels Motorcycle Club ("the Club") and a former office bearer of a Sydney Chapter. By proceedings instituted in the original jurisdiction of this Court, he challenges the validity of legislation enacted by the Parliament of Queensland, which is directed at disrupting the operations of such clubs and other associations. He asserts that the legislation confers functions on Queensland courts which, contrary to Ch III of the Constitution, are incompatible with their institutional integrity. The impugned legislation was enacted in a package and comprises the *Vicious Lawless Association Disestablishment Act* 2013 (Q) ("the VLAD Act"), new provisions of the *Criminal Code* (Q) ("the Criminal Code") and the *Bail Act* 1980 (Q) ("the Bail Act") enacted by the *Criminal Law (Criminal Organisations Disruption) Amendment Act* 2013 (Q) ("the Amendment Act") and amendments to the *Liquor Act* 1992 (Q) ("the Liquor Act") made by the *Tattoo Parlours Act* 2013 (Q). The VLAD Act provides for significant additional penalties by way of imprisonment to be imposed upon persons convicted of declared offences who are participants in associations which have not been shown not to have a criminal purpose. New provisions in the Criminal Code provide for enhanced penalties to be imposed on persons, convicted of certain offences against the Criminal Code, in the aggravating circumstance where such persons are participants in organisations which are found to be, or have been declared by the Supreme Court or designated by regulation as, criminal organisations. The amendments to the Bail Act impose constraints upon the grant of bail to persons who are participants in such organisations if they are charged with any offences. Further amendments to the Criminal Code create new offences which effectively impose restrictions upon the freedom of movement and association of participants in criminal organisations. Amendments to the Liquor Act proscribe the wearing or carrying in licensed premises of items bearing insignia and other markings of criminal organisations.

2 The plaintiff seeks declarations that the impugned provisions are invalid. Given that he has not been charged with any offence which would attract the additional or enhanced penalties under the VLAD Act and the Criminal Code and the new constraints on the grant of bail under the Bail Act, Queensland contests his standing to challenge those provisions[1]. The parties have agreed questions in a special case referred to the Full Court going to the plaintiff's standing and the validity of the legislation. It is necessary to consider the impugned provisions, the nature of the challenges to each of them, and the related questions of

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**1** The text of the relevant provisions is set out in the Joint Reasons. They are, for the most part, paraphrased in these Reasons.

jurisdiction and standing where they are in issue. As explained in these Reasons, the plaintiff lacks standing to challenge the VLAD Act, the aggravating circumstance provisions of the Criminal Code and the amendments to the Bail Act. His challenges to the validity of the new offence-creating provisions of the Criminal Code and the new provisions of the Liquor Act fail on their merits.

Jurisdiction, standing and declaratory relief

3 The jurisdiction which the plaintiff invokes is that conferred on this Court, pursuant to s 76(i) of the Constitution, by s 30(a) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") in "all matters arising under the Constitution or involving its interpretation". That jurisdiction cannot and does not extend to authorise the Court to make a declaration of the law divorced from any attempt to administer that law[2]. However, in proceedings for a declaration of the invalidity of an impugned law, the law that is being administered is not the impugned law but the constitutional law which determines its validity or invalidity[3].

4 This Court held in *In re Judiciary and Navigation Acts* that a matter in respect of which jurisdiction is conferred on the Court under s 76 of the Constitution must be concerned with "some immediate right, duty or liability to be established by the determination of the Court."[4] That criterion is not to be read unduly restrictively. Where a declaration of the invalidity of a criminal statute is sought, it is not necessary in order to satisfy it that "the Executive Government of the State has, at least, invoked legal process against the particular

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**2** *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266–267 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ; [1921] HCA 20; *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 303 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ; [1991] HCA 53.

**3** *Croome v Tasmania* (1997) 191 CLR 119 at 126 per Brennan CJ, Dawson and Toohey JJ; [1997] HCA 5.

**4** (1921) 29 CLR 257 at 265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ; see also *Fencott v Muller* (1983) 152 CLR 570 at 591 per Gibbs CJ, 603 per Mason, Murphy, Brennan and Deane JJ; [1983] HCA 12; *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 303 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ, 316 per Brennan J, 321–322 per Toohey J; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582 per Mason CJ, Dawson, Toohey and Gaudron JJ; [1992] HCA 10; *Croome v Tasmania* (1997) 191 CLR 119 at 127 per Brennan CJ, Dawson and Toohey JJ; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 356 [47]–[48] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [1999] HCA 9.

citizen to enforce the criminal law."[5] In their joint judgment in *Croome v Tasmania*, in which Gaudron, McHugh and Gummow JJ made that observation, they referred[6] to the judgment of Dixon J in *British Medical Association v The Commonwealth*[7] concerning the operation of the *Pharmaceutical Benefits Act* 1947 (Cth) prohibiting medical practitioners from writing prescriptions, other than on a prescription form supplied by the Commonwealth, and said[8]:

> "There was no suggestion that it was necessary for the plaintiffs to show that there already had been set in motion against them the punitive provisions of the legislation. It was significant enough that the plaintiffs 'faced possible criminal prosecution'." (footnote omitted)

5 The question whether there is a matter grounding federal jurisdiction to entertain a claim for relief is linked to the question of standing to claim that relief. They are concepts with distinct origins and histories. Standing is a question that arises in federal and non-federal jurisdictions. Both concepts are concerned to "mark out the boundaries of judicial power"[9]. Their attempted severance has been described as "conceptually awkward, if not impossible."[10] Gummow, Crennan and Bell JJ observed in *Pape v Federal Commissioner of Taxation*[11]:

> "It is now well established that in federal jurisdiction, questions of 'standing' to seek equitable remedies such as those of declaration and injunction are subsumed within the constitutional requirement of a 'matter'." (footnote omitted)

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**5** *Croome v Tasmania* (1997) 191 CLR 119 at 136 per Gaudron, McHugh and Gummow JJ, see also at 127 per Brennan CJ, Dawson and Toohey JJ.

**6** (1997) 191 CLR 119 at 137–138.

**7** (1949) 79 CLR 201 at 257; [1949] HCA 44.

**8** (1997) 191 CLR 119 at 138 referring to a phrase used in *Diamond v Charles* 476 US 54 at 64 (1986).

**9** *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 262 [37] per Gaudron, Gummow and Kirby JJ; [1998] HCA 49 quoting from *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582 per Mason CJ, Dawson, Toohey and Gaudron JJ.

**10** *Croome v Tasmania* (1997) 191 CLR 119 at 132 per Gaudron, McHugh and Gummow JJ.

**11** (2009) 238 CLR 1 at 68 [152]; [2009] HCA 23.

That does not mean, as Gaudron J observed in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*[12], "that, for the purposes of Ch III, questions of standing are wholly irrelevant." A negative answer to the question — is there a matter before the Court in which it has federal jurisdiction? — would render the question of the plaintiff's standing moot. On the other hand, an affirmative answer to the question — is there a matter? — may not be sufficient to answer the question whether the plaintiff has standing[13].

6 A law which proscribes specified conduct as a criminal offence affects the freedom of a person who would otherwise engage in that conduct. If there is an arguable question whether such a law, properly interpreted, would prohibit what that person intends or wishes to do, he or she may have standing, in a court with the relevant jurisdiction[14], to seek a declaration that the intended or desired conduct is not unlawful[15]. Similarly, if there is an arguable question that the law is invalid, there may be standing to seek a declaration to that effect[16]. As a general rule, however, declaratory relief cannot be claimed as a way of obtaining legal advice from a court or answering an hypothetical question divorced from a real controversy. As Mason CJ, Dawson, Toohey and Gaudron JJ said in *Ainsworth v Criminal Justice Commission*[17]:

> "declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. The

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**12** (2000) 200 CLR 591 at 611 [45]; [2000] HCA 11.

**13** See generally Evans, "Standing To Raise Constitutional Issues Reconsidered", (2010) 22(3) *Bond Law Review* 38, especially at 57.

**14** The question may arise in federal or non-federal jurisdictions depending upon the source of the law.

**15** *The Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297 at 305 per Barwick CJ; [1972] HCA 19; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 356 [47]–[48] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ. See also *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800; *Airedale NHS Trust v Bland* [1993] AC 789 at 862 per Lord Goff of Chieveley, 880–881 per Lord Browne-Wilkinson.

**16** If the question concerns the validity of an Act of a parliament, it will most likely arise in federal jurisdiction. If it goes to the validity of delegated legislation, it may arise in federal or non-federal jurisdiction depending upon the source of the empowering legislation.

**17** (1992) 175 CLR 564 at 582.

> person seeking relief must have 'a real interest' and relief will not be granted if the question 'is purely hypothetical', if relief is 'claimed in relation to circumstances that [have] not occurred and might never happen' or if 'the Court's declaration will produce no foreseeable consequences for the parties'." (footnotes omitted)

7 This Court has sometimes dealt with a question of standing as a preliminary issue and on other occasions proceeded to deal with the case on its merits, including the issue of standing as one among other issues[18]. In *Robinson v Western Australian Museum*[19], Gibbs J observed that if a plaintiff's claim to have standing were merely colourable, the court would no doubt proceed to determine that question immediately and, determining it against the plaintiff, dismiss the action. His Honour went on to say that if determination of standing requires the consideration of important questions which may never fall for decision if the plaintiff's claim is dismissed on its merits, it may be more convenient to determine the validity of the challenged statute. That discretion is, of course, always subject to the constraint that the court cannot decide validity as an abstract or hypothetical question[20].

8 In *Robinson*, the Commonwealth and a number of States had intervened on both sides of the case and questions of validity had been very fully examined. Those facts, in the opinion of Gibbs J, supported the conclusion that the question of validity should be determined and the action should not be dismissed for want of standing[21]. In *Williams v The Commonwealth*[22], where issue had been joined on both sides of the questions raised by the plaintiff, the question of the plaintiff's standing was put to one side. There was a matter before the Court agitated by parties with standing independently of the plaintiff's standing. That is not this

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**18** *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 302 per Gibbs J; [1977] HCA 46; *Paterson v O'Brien* (1978) 138 CLR 276 at 282; [1978] HCA 2; *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 532–533 per Gibbs J, 546 per Stephen J, 552 per Mason J; [1980] HCA 53; Allars, "Standing: The Role and Evolution of the Test", (1991) 20 *Federal Law Review* 83 at 89–91; Taylor, "Standing to Challenge the Constitutionality of Legislation", in Stein (ed), *Locus Standi*, (1979) 143 at 145.

**19** (1977) 138 CLR 283 at 302.

**20** (1977) 138 CLR 283 at 302–303.

**21** (1977) 138 CLR 283 at 303.

**22** (2012) 248 CLR 156 at 223–224 [112] per Gummow and Bell JJ, French CJ agreeing at 181 [9], Hayne J agreeing at 240 [168], Crennan J agreeing at 341 [475], Kiefel J agreeing at 361 [557]; [2012] HCA 23.

case. The Commonwealth and the intervening States and the Northern Territory made common cause in support of the impugned legislation. In any event, as appears below, the plaintiff's claim to have standing in relation to the VLAD Act, the aggravated circumstance provisions of the Criminal Code and the impugned provisions of the Bail Act is unsustainable. The question of standing converges upon the constitutional question of jurisdiction and is appropriately determined at the outset.

The VLAD Act

9 At the heart of the VLAD Act is the term "vicious lawless associate", which is defined in s 5(1) of the Act as a person who:

> "(a) commits a declared offence; and
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> (b) at the time the offence is committed, or during the course of the commission of the offence, is a participant in the affairs of an association (***relevant association***); and
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> (c) did or omitted to do the act that constitutes the declared offence for the purposes of, or in the course of participating in the affairs of, the relevant association."

The status of "participant in the affairs of an association" attaches to a person who "asserts, declares or advertises his or her membership of, or association with, the association"[23], a person who "seeks to be a member of, or to be associated with, the association"[24] and a person who "has attended more than 1 meeting or gathering of persons who participate in the affairs of the association in any way"[25]. It also includes a person who "has taken part on any 1 or more occasions in the affairs of the association in any other way."[26] The term "participating in the affairs of ... the relevant association" in s 5(1)(c) bears a corresponding meaning[27]. Participation does not necessarily involve any criminal act or purpose.

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**23** VLAD Act, s 4(a).

**24** VLAD Act, s 4(b).

**25** VLAD Act, s 4(c).

**26** VLAD Act, s 4(d).

**27** *Acts Interpretation Act* 1954 (Q), s 32.

10 The VLAD Act provides that a court sentencing a "vicious lawless associate" for a declared offence must impose a further sentence of 15 years imprisonment[28]. In the case of a "vicious lawless associate" who was, at the time of the commission of the declared offence, an office bearer of an association, there is a further mandated cumulative sentence of 10 years imprisonment[29]. The additional sentences cannot be mitigated or reduced under any other Act or law[30]. If the base sentence did not involve a term of imprisonment, the vicious lawless associate is to immediately begin to serve the further sentence provided for by s 7(1)(b)[31]. There is no eligibility for parole during any period of imprisonment for a further sentence[32].

11 It is not necessary, in order to attract those additional sentences, that the prosecution prove that the relevant association has a criminal purpose. There is, however, a carve out from the definition of "vicious lawless associate" by way of the defence in s 5(2), the burden of proving which rests upon the alleged associate:

> "a person is not a vicious lawless associate if the person proves that the relevant association is not an association that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, declared offences."

12 Declared offences are set out in Sched 1 to the VLAD Act. They may also be prescribed by regulation[33]. The range of the declared offences in Sched 1 is wide in subject matter and gravity. They include offences punishable by a maximum sentence of one year's imprisonment[34] up to offences punishable by imprisonment for life[35]. Under the VLAD Act, it is quite possible that a person

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**28** VLAD Act, s 7(1)(b).

**29** VLAD Act, s 7(1)(c).

**30** VLAD Act, s 7(2)(a).

**31** VLAD Act, s 7(3).

**32** VLAD Act, s 8(1).

**33** VLAD Act, s 3, definition of "declared offence", s 10.

**34** The offence of affray under s 72 of the Criminal Code is punishable by a maximum penalty of one year's imprisonment, although it attracts an enhanced penalty under the new s 72(2) of the Criminal Code if the person convicted is a participant in a criminal organisation.

**35** See eg Criminal Code, s 305.

who would not receive a custodial sentence for a declared offence in the lower range of seriousness would nevertheless, if an officer of a relevant association, be sentenced to a mandatory 25 years imprisonment.

13 Neither "vicious" nor "lawless" is a defined term. The class of persons designated by the VLAD Act as "vicious lawless associates" may include some who would attract the epithets "vicious" and "lawless" in ordinary parlance. It includes persons who would not. The class of declared offences includes offences which, according to the facts of a particular case, could be described as "vicious". It includes offences which would not.

14 The term "association" in the VLAD Act is defined as meaning any of a corporation, an unincorporated association, a club or league and any group of three or more persons by whatever name called, whether associated formally or informally and whether the group is legal or illegal[36]. Only a tiny minority of the range of the bodies or groups covered by the definition of "association" could conceivably attract the description "vicious" or "lawless". The term "vicious lawless association", which appears in the title to the VLAD Act, is not defined and appears nowhere in the body of the Act. It is a piece of rhetoric which is at best meaningless and at worst misleads as to the scope and substance of the law.

The challenge to the VLAD Act

15 The plaintiff characterised the VLAD Act as requiring courts to impose long custodial sentences on certain offenders based not on the seriousness of their offences but on their association with a particular group. He pointed to the inequality of the treatment which courts are required to mete out to persons convicted of declared offences depending upon whether or not they were participants in the affairs of a relevant association. He submitted that the VLAD Act is invalid because it confers a function on courts offensive to the principle of equality before the law and thereby repugnant to the judicial process, and also because it requires the courts in reality to act as instruments of the Executive.

16 Queensland contended that the plaintiff's claim should not be considered because, not having been charged with a declared offence, he lacked legal standing to seek a declaration that the VLAD Act is invalid. As explained below, that submission should be accepted. The question of the validity of the VLAD Act must await consideration on another day.

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**36** VLAD Act, s 3, definition of "association".

The VLAD Act — the plaintiff's standing

17 The plaintiff's case in relation to the VLAD Act is not one in which declaratory relief is sought concerning the lawfulness of intended conduct. He does not complain that his freedom to act is constrained by the direct legal operation of the Act. The mandatory penalties for which the VLAD Act provides would only be imposed if and when the plaintiff were convicted of a declared offence created by another law. The validity of the laws creating the declared offences is not in question. If and when the plaintiff were to commit a declared offence and the prosecution were to invoke the provisions of the VLAD Act against him, it would be open to him to contend that those provisions are invalid.

18 The plaintiff nevertheless submitted that, as a member of the Club, he is a participant in the affairs of a "relevant association" for the purposes of the VLAD Act. He could become subject to very significant penalties and other restrictions which would not apply to him if he were to cease to be a participant in the Club or any other association. He submitted that he has a real interest in the subject matter of the proceedings which exceeds that of a member of the general public. That submission should be rejected.

19 In a formal sense, the plaintiff's position under the VLAD Act is indistinguishable from that of any other member of the public who is a participant in the affairs of any association. It may be accepted, as a practical matter, that his current membership of the Club, which has been designated as a "criminal organisation" under two separate provisions of Queensland law[37], puts him at risk of exposure to a significant additional penalty if he were to be charged with a declared offence. It may be assumed that the risk he faces in that respect is greater than that of most other members of the public. Whether the VLAD Act would apply to him, however, would depend, among other things, upon whether he was charged with a declared offence and whether it was alleged that the conduct constituting that offence was done for the purposes of, or in the course of participating in the affairs of, the Club. It is not suggested that any of the contingencies which would attract the application of the VLAD Act provisions to the plaintiff has arisen. Given that the validity of the laws creating the declared offences is not in dispute, he could hardly expect to be heard by this Court on the basis that he intended to contravene one or more of those laws. Nor does he do so. The risk of exposure to draconian penalties, which he invokes in support of the assertion that he has standing, is a risk that he will be charged with, and convicted of, committing a declared offence. The risks so based should not be accepted as founding a sufficiently concrete claim for declaratory relief. It

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**37** For the purposes of the Criminal Code by s 2 of the Criminal Code (Criminal Organisations) Regulation 2013 (Q) and for the purposes of the *Crime and Corruption Act* 2001 (Q) by s 18 of the Crime and Corruption Regulation 2005 (Q).

is a foundation resting upon contingencies which, if they did occur, could occur in a variety of factual circumstances. It is a foundation which is singularly unattractive in terms of public policy as justifying access to the exercise of judicial power. The plaintiff does not have standing to challenge the validity of the VLAD Act.

Criminal organisations under the Criminal Code

20 Central to the impugned provisions, other than the VLAD Act, is the concept of a "criminal organisation" and the status of a "participant in a criminal organisation". The term "criminal organisation" in s 1 of the Criminal Code was redefined by the Amendment Act to mean:

> "(a) an organisation of 3 or more persons—
>
> (i) who have as their purpose, or 1 of their purposes, engaging in, organising, planning, facilitating, supporting, or otherwise conspiring to engage in, serious criminal activity as defined under the *Criminal Organisation Act 2009*; and
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> (ii) who, by their association, represent an unacceptable risk to the safety, welfare or order of the community; or
>
> (b) a criminal organisation under the *Criminal Organisation Act 2009*; or
>
> (c) an entity declared under a regulation to be a criminal organisation."

The new definition of "criminal organisation" applies to that term as used in the new offence-creating provisions of the Criminal Code, ss 60A, 60B and 60C, save for an exclusion in s 60C of criminal organisations under the *Criminal Organisation Act* 2009 (Q) ("the CO Act"), which is not material for present purposes. The definition is also adopted in the new provisions of the Criminal Code which render the status of participant in a criminal organisation an aggravating circumstance in relation to certain existing offences. It is adopted in the Bail Act[38] and is used in the new subsections of that Act, ss 16(3A)–16(3D), which are challenged in these proceedings. Paragraph (c) of the definition is incorporated in the definition of a "declared criminal organisation" in s 173EA of the Liquor Act for the purposes of the impugned amendments to that Act[39].

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**38** Bail Act, s 6, definition of "criminal organisation".

**39** Liquor Act, ss 173EB–173ED.

21 The criteria for an organisation to be found to be a criminal organisation pursuant to par (a) are closely similar to the criteria which can lead to the declaration of an organisation by the Supreme Court as a criminal organisation for the purposes of the CO Act[40] and thus bring it within par (b) of the definition in the Criminal Code. In each case the characterisation of an organisation as a criminal organisation requires findings of fact by a court, either in proceedings under the Criminal Code in which par (a) of the definition is relied on, or, where par (b) is relied upon, in earlier proceedings under the CO Act.

22 Paragraph (c) of the definition is in a different category. It contemplates the declaration of entities as criminal organisations by regulation rather than judicial determination. It directs attention to the general regulation-making power in s 708 of the Criminal Code:

> "The Governor in Council may make regulations under this Code."

The term "Governor in Council" is defined in s 27 of the *Constitution of Queensland* 2001 (Q) as "the Governor acting with the advice of Executive Council."[41]

23 Section 70 of the Amendment Act, by a rather unusual mechanism, enacts a regulation titled the Criminal Code (Criminal Organisations) Regulation 2013 ("the Regulation"), which is set out in Sched 1 to the Amendment Act. The regulation so created declares entities listed in it to be criminal organisations. One of the entities so declared is "the motorcycle club known as the Hells Angels". Section 70 provides:

> "(1) Schedule 1 has effect to make the *Criminal Code (Criminal Organisations) Regulation 2013* that is set out in schedule 1 as a regulation under the Criminal Code.
>
> (2) To remove any doubt, it is declared that the *Criminal Code (Criminal Organisations) Regulation 2013*, on the commencement of schedule 1, stops being a provision of this Act and becomes a regulation made under the Criminal Code."

24 Section 708A, introduced into the Criminal Code by the Amendment Act, sets out matters to which the Minister may have regard in "deciding whether to recommend" an amendment to the Regulation to declare an entity to be a criminal organisation. The matters to which the Minister may have regard are

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**40** CO Act, s 10(1).

**41** See also *Acts Interpretation Act*, Sched 1, meaning of "Governor in Council" read with s 36(1).

wide-ranging and include "any information suggesting a link exists between the entity and serious criminal activity"[42] and "any other matter the Minister considers relevant."[43] It may be inferred that those are matters to which the Governor in Council may have regard in amending the Regulation. The Solicitor-General of Queensland submitted that the Minister would be constrained to consideration of matters relevant to whether the organisation had, as one of its purposes, the commission of serious criminal offences and the effect of such purposes on public order. It is not necessary to determine the limits of "relevant" matters for present purposes.

25 The status "participant in a criminal organisation" is defined in the offence-creating provision, s 60A of the Criminal Code, and that definition is adopted in the other offence-creating provisions, ss 60B and 60C. It is adopted in the aggravating circumstance provisions of the Criminal Code, ss 72(2), 92A(4A), 320(2) and 340(1A), and for the purposes of the impugned provisions of the Bail Act[44]. The definition covers directors or officers (if the organisation is a body corporate)[45], and any person who (whether by words or conduct, or in any other way) asserts, declares or advertises his or her membership of, or association with, the organisation[46] or who seeks to be a member of, or to be associated with, the organisation[47]. It extends to a person who attends more than one meeting or gathering of persons who participate in the affairs of the organisation in any way[48] and a person who takes part in the affairs of the organisation in any other way[49]. It does not include a lawyer acting in a professional capacity[50].

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**42** Criminal Code, s 708A(1)(a).

**43** Criminal Code, s 708A(1)(e).

**44** Bail Act, s 6.

**45** Criminal Code, s 60A(3), par (a) of definition.

**46** Criminal Code, s 60A(3), par (b) of definition.

**47** Criminal Code, s 60A(3), par (c) of definition.

**48** Criminal Code, s 60A(3), par (d) of definition.

**49** Criminal Code, s 60A(3), par (e) of definition.

**50** Criminal Code, s 60A(3), definition of "participant".

The Criminal Code — aggravating circumstance provisions

26 The plaintiff challenged the validity of a number of new provisions of the Criminal Code introduced by the Amendment Act which treat status as a participant in a criminal organisation as an aggravating circumstance attracting enhanced or additional penalties in respect of certain offences.

27 The offences to which the circumstance of aggravation applies are offences for which the Criminal Code already provides. They are affray[51], misconduct in relation to public office[52], grievous bodily harm[53] and serious assault upon a police officer[54]. Enhanced penalties attaching to the aggravating circumstance are provided for in new subsections introduced into each of the offence-creating provisions[55]. It is a defence to the circumstance of aggravation in each case "to prove that the criminal organisation is not an organisation that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity."[56]

Aggravating circumstance provisions — the plaintiff's standing

28 The plaintiff's challenge to the aggravating circumstance provisions ran along similar lines to his challenge to the VLAD Act. The liability to the greater penalties could arise whether or not there was any connection between an accused person's participation in a criminal organisation and the offences charged. The plaintiff submitted, in substance, that those provisions obliged courts to impose penalties which lacked a rational connection to the seriousness of the offender's criminal conduct.

29 As with the plaintiff's challenge to the VLAD Act, the plaintiff's claim for declaratory relief was based upon the risk of an enhanced penalty if he should be charged with an offence in respect of which the circumstance of aggravation was

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**51** Criminal Code, s 72(1).

**52** Criminal Code, s 92A(1) and (2).

**53** Criminal Code, s 320(1). The aggravating circumstance provision applies in the circumstance in which grievous bodily harm is inflicted upon a police officer: s 320(2).

**54** Criminal Code, s 340(1)(b).

**55** Criminal Code, ss 72(2), 92A(4A), 320(2) and 340(1A).

**56** Criminal Code, ss 72(3), 92A(4B), 320(3) and 340(1B).

alleged. He has not been charged with any such offence. There is no suggestion that he has committed or is likely to commit any such offence.

30 The offence-creating provisions to which the circumstance of aggravation is attached proscribe certain conduct. The plaintiff did not challenge those proscriptions. His freedom to act is not further constrained by the circumstance of aggravation. If he were charged with any of the relevant offences, and the circumstance of aggravation was alleged, he could, no doubt, raise a challenge to the validity of the enhanced penalties in or collaterally to the criminal proceedings against him. The plaintiff argues that the provisions affect the question whether he should dissociate from the Club so as to avoid their application. As with his challenge to the VLAD Act, that concern does not support his claim for declaratory relief where his standing rests upon contingencies, including the contingency that he will have been charged with one of the relevant offences.

The Bail Act

31 The Amendment Act introduced new subss (3A)–(3D) into s 16 of the Bail Act. Subsection (3A) sets out circumstances in which a court, or police officer authorised to give bail, must refuse bail. Prior to the amendment, s 16 relevantly mandated refusal of bail only if there was an unacceptable risk that the defendant, if released on bail, would not appear and surrender into custody, or would, while released on bail, commit an offence, endanger the safety or welfare of an alleged victim or anyone else, or interfere with witnesses or otherwise obstruct the course of justice[57].

32 Section 16(3A) additionally requires that, unless the defendant shows cause why detention in custody is not justified, bail must be refused where the defendant is charged with an offence and it is alleged that he or she is, or has at any time been, a participant in a criminal organisation. It does not matter, for the purposes of s 16(3A), whether the offence charged is an indictable offence, a simple offence or a regulatory offence[58], or whether the defendant is alleged to have been a participant in a criminal organisation when the offence was committed[59]. Nor does it matter that there is no link between the defendant's alleged participation in a criminal organisation and the offence with which the defendant is charged[60].

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**57** Bail Act, s 16(1).

**58** Bail Act, s 16(3C)(a).

**59** Bail Act, s 16(3C)(b).

**60** Bail Act, s 16(3C)(c).

The Bail Act — the plaintiff's standing

33 The plaintiff submitted that the amendments to the Bail Act are directed towards keeping a particular class of person in custody by reason of their associations rather than by reason of the risks of release. He submitted that requiring courts to proceed in this manner would undermine their institutional integrity. It is not necessary to consider the merits of that argument.

34 The plaintiff has not been charged with any offence to which the new provisions of the Bail Act might apply. There is a wide variety of circumstances relevant to the question under s 16(3A)(a) whether he could show cause why his detention in custody would not be justified. The inchoate nature of the question which the plaintiff's application presents to the Court on this aspect of his case again indicates that there is no concrete basis upon which he can base his claim for declaratory relief.

The new offence-creating provisions of the Criminal Code

35 In addition to providing for enhanced penalties for existing offences against the Criminal Code, the Amendment Act has introduced new offence-creating provisions, ss 60A, 60B and 60C of the Code. The new provisions make it an offence for a person who is a participant in a criminal organisation to:

- be knowingly present in a public place with two or more other persons who are participants in a criminal organisation[61];
- enter, or attempt to enter, a prescribed place[62];
- attend, or attempt to attend, a prescribed event[63]; or
- recruit, or attempt to recruit, anyone to become a participant in a criminal organisation[64].

It is an element of the offence in each case that the defendant "is a participant in a criminal organisation". As with the aggravating circumstance provisions, it is a defence in each case to prove that "the criminal organisation is not an

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**61** Criminal Code, s 60A(1).

**62** Criminal Code, s 60B(1).

**63** Criminal Code, s 60B(2).

**64** Criminal Code, s 60C(1).

organisation that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity."[65] The term "criminal activity" is not defined. The Solicitor-General of Queensland accepted that it would cover any contravention of the law attracting a penalty.

36 Given that the plaintiff is a member of the Club, which is designated as a criminal organisation, the offence-creating provisions of the Criminal Code directly affect, inter alia, his freedom of movement and association. His claim for declaratory relief that the provisions are invalid invokes the jurisdiction of the Court under s 30(a) of the Judiciary Act. The matter is one on which it is properly conceded that the Court has jurisdiction and the plaintiff has standing[66].

The challenge to the offence-creating provisions of the Criminal Code

37 In the amended statement of claim, the plaintiff alleged that the question whether an organisation is a "criminal organisation" for the purposes of ss 60A, 60B and 60C of the Criminal Code can be predetermined by declaration in a regulation. A person accused of an offence against one of the provisions would bear the onus of establishing what was described as "an impossible negative proposition" that the relevant organisation was one "whose members do not have as their purpose, or one of their purposes, engaging in, or conspiring to engage in, criminal activity". Although the amended statement of claim was wide-ranging in its attack upon those provisions, the further amended special case, as reflected in question 3, was confined to a challenge based upon principles derived from *Kable v Director of Public Prosecutions (NSW)*[67] and subsequent decisions.

38 The principles developed from and since the decision of this Court in *Kable* preclude State legislatures from enacting a law which would be repugnant to, or incompatible with, the institutional integrity of State courts as elements of the national integrated judicial system. In particular applications of that proposition it has been held that State legislatures cannot:

- effect an impermissible executive intrusion into the processes or decisions of a court;

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**65** Criminal Code, ss 60A(2), 60B(3), 60C(2).

**66** The concession did not extend to s 60B(2). However, it is not necessary to consider this matter.

**67** (1996) 189 CLR 51; [1996] HCA 24.

- authorise the Executive to enlist a court to implement decisions of the Executive in a manner incompatible with that court's institutional integrity; or

- confer upon a court a function (judicial or otherwise) incompatible with the role of that court as a repository of federal jurisdiction[68].

In so saying, I agree with Hayne J[69] that, whatever particular propositions have emerged from particular cases, there is no single comprehensive statement of the content to be given to the essential notion of repugnancy to, or incompatibility with, the institutional integrity of State courts. The question of substance in relation to the plaintiff's challenge to ss 60A, 60B and 60C of the Criminal Code is whether their attachment of norms or proscriptions of conduct to participation in a class of entity determined by legislative or executive declaration to be a criminal organisation offends against that essential notion.

39 The Club of which the plaintiff is a member was declared a criminal organisation by operation of s 70 of the Amendment Act, albeit that declaration was effected by enacting a schedule to the Amendment Act to be treated as a regulation. That regulation was subject thereafter to the regulation-making power in s 708 of the Criminal Code to be exercised, in relation to amendments to the Regulation, by reference to s 708A. The declaration of the Club and a number of other entities as criminal organisations was therefore effected by an Act of the Queensland Parliament and the amendment of that list, by addition or subtraction, entrusted to the Executive Government exercising regulation-making power.

40 It is the function of a court in determining rights and liabilities arising under Acts of Parliament, including criminal statutes, to interpret the legislation and to apply it to the facts of the case as found on the basis of the evidence before the court. In applying an Act of Parliament, a court will give effect to a law which reflects a policy which, at the time of enactment, was in all likelihood a policy propounded to the Parliament by the Executive Government. In so doing, a court is not enlisted by and does not act at the direction of the Executive. So much was accepted by senior counsel for the plaintiff. In the application of delegated legislation, which may reflect a current policy of the Executive Government, the same is true[70]. Contrary to the plaintiff's submissions in reply,

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**68** *Wainohu v New South Wales* (2011) 243 CLR 181 at 210 [46] per French CJ and Kiefel J; [2011] HCA 24.

**69** Reasons of Hayne J at [106].

**70** *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 250 CLR 343 at 365 [44] per French CJ, 368 [58] per Hayne, Crennan, Kiefel and Bell JJ; [2012] HCA 58.

the declaration of a criminal organisation by regulation does not amount to an impermissible direction to the courts to do anything. It creates a factum, in relation to an entity, which has consequences provided by law. The declaration of criminal organisations by regulation in this case does not give rise to the difficulty considered by the Court in *South Australia v Totani*[71], where a declaration of a criminal organisation mandated, upon application by the Commissioner of Police, a judicial control order against a member of such an organisation, which amounted to little more than rubber stamping an executive determination without any substantive judicial function.

41 If the Parliament, or the Executive Government acting pursuant to statutory authority, designates an organisation as a criminal organisation, membership of which attracts penalties or disabilities in certain circumstances, it does not thereby intrude impermissibly into the judicial function. The determination of whether a person is a member of a criminal organisation and whether circumstances attracting a penalty or disability are established is left to the courts. So too, when raised as a defence, is the question whether the organisation in fact has as one of its purposes the purpose of engaging in, or conspiring to engage in, criminal activity.

42 There is a distinct question arising from the juxtaposition of three different bases for establishing that an entity is a criminal organisation in a prosecution for an offence against ss 60A, 60B or 60C of the Criminal Code. The first basis, that set out in par (a) of the definition, would require a determination by the trial court, in a prosecution for an offence against ss 60A, 60B or 60C, of whether the entity said to be a criminal organisation had the characteristics set out in par (a). Such a finding, as Hayne J points out in his Honour's Reasons[72], would preclude the defence that the entity "is not an organisation that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity."

43 To establish that an entity is a criminal organisation within the meaning of par (b) of the definition, it would suffice for the prosecution to prove that a declaration to that effect was made by the Supreme Court of Queensland under the CO Act. Proof of such a declaration made in earlier and different proceedings in the Supreme Court and not involving the accused would not prove anything more than the fact of the declaration. The consequence of proving the declaration is the legal characterisation of the relevant entity. Proof of the declaration would not preclude the accused, as a matter of law, from establishing

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**71** (2010) 242 CLR 1; [2010] HCA 39.

**72** Reasons of Hayne J at [121].

the defence in proceedings under ss 60A or 60B (the definition in par (b) not being applicable to s 60C[73]).

44 If the prosecution in a charge of an offence against ss 60A, 60B or 60C were to rely upon par (c) of the definition of "criminal organisation", it would have to do no more to establish the characterisation of the relevant entity than produce a regulation declaring the entity to be a criminal organisation. As with the proof of a declaration under the CO Act, evidence of the declaration by regulation would prove no more than the fact of the declaration and attract the legal characterisation of the relevant entity as a "criminal organisation". It would be open to the accused person to establish the defence.

45 If by hypothesis the definition of "criminal organisation" in s 1 of the Criminal Code were limited to that set out in par (c), it could not be said that the offence-creating provisions, requiring the existence of a criminal organisation as so defined, involved any impermissible intrusion by the Executive upon the judicial function or an enlistment of the court to do the bidding of the Executive, nor that it conferred upon the court a function that was incompatible with its institutional integrity. Nor could it be said, more generally, that the definition of "criminal organisation" in par (c), taken by itself, would, by reason of the function that it conferred upon the court or otherwise, be repugnant to or incompatible with the institutional integrity of the court. The juxtaposition of the definitions in pars (a), (b) and (c) does not alter that consequence. The common classification of entities as "criminal organisations" according to three different processes, one directly judicial, one indirectly judicial and one executive, is, in the end, a matter of labelling. They could have been designated respectively as "a criminal organisation", "a declared criminal organisation" and "a listed criminal organisation", each characterisation attracting the same proscriptions, set out in ss 60A, 60B and 60C, for participants in such entities.

46 The existence of alternative pathways to conviction, one of them based upon a factum determined by declaration under a regulation, does not impermissibly entangle judicial functions with those of the Executive Government. Although the nomenclature of "criminal organisation" and the outcomes are the same, the pathways are distinct and do not have any legally operative effect upon each other.

47 The plaintiff's challenge to the validity of ss 60A, 60B and 60C of the Criminal Code must fail.

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**73** Criminal Code, s 60C(3), definition of "criminal organisation".

The Liquor Act

48 Sections 173EB, 173EC and 173ED combine to prevent persons being on licensed premises while wearing or carrying an item of clothing or jewellery or an accessory that displays the name, club patch, insignia or logo of a declared criminal organisation. The prohibition extends to persons carrying an item of clothing or jewellery or an accessory displaying any image, symbol, abbreviation, acronym or other form of writing that indicates membership of, or an association with, a declared criminal organisation[74]. The term "declared criminal organisation" is defined in s 173EA by reference to par (c) of the definition of "criminal organisation" in the Criminal Code.

49 The plaintiff, having failed in his challenge to the validity of ss 60A, 60B and 60C on *Kable* grounds, cannot succeed on such grounds in relation to the amendments to the Liquor Act. The declaration of an entity as a criminal organisation under par (c) enlivens the prohibitions in relation to the circumstances in which its name, logo or other insignia may be worn or carried in licensed premises. There is nothing in the construction of the definition of the offences created by the amendments to the Liquor Act that involves executive direction to, or enlistment of, the courts to implement decisions of the Executive Government in a manner incompatible with the courts' institutional integrity. In hearing and determining a prosecution for an offence against any of the impugned provisions of the Liquor Act, courts are not undertaking any function incompatible with their role as repositories of federal jurisdiction. The challenge to the validity of the impugned provisions of the Liquor Act fails.

Conclusion

50 The questions in the further amended special case should be answered as proposed in the Joint Reasons.

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**74** Liquor Act, s 173EA, definition of "prohibited item".

51 HAYNE J. In October 2013, the Queensland Parliament enacted the *Vicious Lawless Association Disestablishment Act* 2013 (Q) ("the VLAD Act"), the *Criminal Law (Criminal Organisations Disruption) Amendment Act* 2013 (Q) ("the Disruption Act") and the *Tattoo Parlours Act* 2013 (Q). The Disruption Act made numerous amendments to several Acts. So far as presently relevant, the *Tattoo Parlours Act* amended the *Liquor Act* 1992 (Q).

52 The plaintiff, Mr Kuczborski, is a member of the Brisbane Chapter of the Hells Angels Motorcycle Club. He has brought proceedings in the original jurisdiction of this Court challenging the validity of the VLAD Act, the validity of some of the provisions inserted or amended in other Acts by the Disruption Act and the validity of the amendments made to the *Liquor Act* by the *Tattoo Parlours Act*. He alleges that the impugned provisions offend the principles derived from *Kable v Director of Public Prosecutions (NSW)*[75].

53 The parties have agreed to state questions of law in the form of a special case. Those questions ask about the validity of the impugned provisions but also raise issues about whether some of the questions of validity are, so far as the plaintiff is concerned, hypothetical questions, questions which he has no standing to raise, or both.

The structure of these reasons

54 It is important to begin consideration of the questions which the parties have asked from a proper understanding of the impugned provisions. Having first identified what provisions are impugned, it is necessary to describe the general scheme of which the impugned provisions form a part and then deal with some particular features of the impugned provisions. From there it will be convenient to deal with the questions about standing and hypothetical issues, then describe the *Kable* principles and, finally, consider the application of those principles.

The impugned provisions

55 As the plaintiff originally framed his proceedings, he challenged the validity of provisions of a number of Acts and regulations, and he founded those challenges on a number of different bases. The parties agreed on a special case to raise those issues but, before it came on for hearing, the plaintiff confined both the provisions which he attacked and the basis on which he founded the attack. The special case was amended accordingly.

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**75** (1996) 189 CLR 51; [1996] HCA 24.

56 It is necessary, therefore, to identify only those provisions which remain the subject of challenge. They are provisions of four Acts: the VLAD Act, the *Criminal Code* (Q), the *Bail Act* 1980 (Q) and the *Liquor Act*.

57 The plaintiff alleges that the whole of the VLAD Act is invalid. The VLAD Act requires[76] a court sentencing a "vicious lawless associate" for a "declared offence" to impose a sentence for the offence (without regard to the further punishment for which the VLAD Act provides) plus an additional sentence of 15 years' imprisonment and, if the offender held office in the relevant association, a still further additional sentence of 10 years' imprisonment. What is meant by a "vicious lawless associate" will be explained later in these reasons.

58 The plaintiff challenges the validity of several provisions[77] of the *Criminal Code* inserted or amended by the Disruption Act[78]. Put shortly, those provisions of the *Criminal Code* are of two kinds. Sections 60A, 60B and 60C create new offences. An element of each of those offences is that the offender is "a participant in a criminal organisation". The other provisions prescribe more severe punishment for persons convicted of certain offences if the offender is "a participant in a criminal organisation". More will be said about those provisions later in these reasons.

59 The provisions[79] of the *Bail Act* which the plaintiff challenges were also inserted by the Disruption Act[80]. They provide, among other things, that, where it is alleged that a person charged with an offence is, or has at any time been, a participant in a criminal organisation, bail must be refused unless the defendant shows cause why his or her detention is not justified.

60 The provisions[81] of the *Liquor Act* which the plaintiff challenges were inserted by the *Tattoo Parlours Act*[82]. They make it an offence to enter or remain

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**76** s 7.

**77** ss 60A, 60B(1) and (2), 60C, 72(2), (3) and (4), 92A(4A), (4B) and (5), 320(2), (3) and (4) and 340(1A), (1B) and (3).

**78** ss 42-46.

**79** s 16(3A), (3B), (3C) and (3D).

**80** s 4. Sub-sections (3A), (3B) and (3C) of s 16 of the *Bail Act* were later amended by the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act* 2013 (Q), s 7. The detail of that amendment need not be noticed.

**81** ss 173EB, 173EC and 173ED.

**82** s 75.

in licensed premises wearing or carrying a "prohibited item" and oblige licensees and others to exclude from licensed premises persons wearing or carrying a "prohibited item". A "prohibited item" is defined[83] as an item of clothing or jewellery or an accessory that displays the name of "a declared criminal organisation", "the club patch, insignia or logo" of such an organisation, or any writing (or other symbol or image) that indicates membership of, or association with, such an organisation.

A legislative scheme?

61 The Explanatory Notes to each of the Bills that became the VLAD Act and the Disruption Act referred[84] to "a comprehensive package of legislative reforms, contained in three Bills". The Tattoo Parlours Bill 2013, introduced into the Queensland Parliament on the same day, was the third of the Bills which formed the "comprehensive package".

62 The Explanatory Notes to the Bills that became the VLAD Act and the Disruption Act said[85] each Bill was directed at "criminal gangs". The Explanatory Notes to the Tattoo Parlours Bill said[86] the Bill was directed at "criminal organisations, including criminal motor cycle gangs and their associates". In a Ministerial Statement, the Premier said[87] that the three Bills were "not designed to just contain or manage [criminal motorcycle gangs]; they [were] designed to destroy them".

63 The provisions made by the resulting Acts do not seek to achieve the destruction of any organisation by dissolving the organisation or making membership of the organisation unlawful. The Acts provide for some new norms of conduct but, for the most part, proceed by requiring the courts to impose special additional punishment on offenders who are shown to have been, at the time of the commission of the offence, participants in a particular kind of

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**83** s 173EA.

**84** Queensland, Vicious Lawless Association Disestablishment Bill 2013, Explanatory Notes at 1; Queensland, Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013, Explanatory Notes at 1.

**85** Queensland, Vicious Lawless Association Disestablishment Bill 2013, Explanatory Notes at 1; Queensland, Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013, Explanatory Notes at 1.

**86** Queensland, Tattoo Parlours Bill 2013, Explanatory Notes at 1.

**87** Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 15 October 2013 at 3114.

association or organisation. But the provisions made by the Acts do not operate by reference to a single definition of what are the relevant associations or organisations or even by reference to a single definition of what constitutes being a participant in the relevant group. And as will later become apparent, although the provisions can be seen as divided by reference to the two forms of association or organisation with which they deal, even that division must take account of variations and qualifications applicable to only some of the provisions dealing with the relevant form of association or organisation.

64 The VLAD Act is directed at what it defines as a "participant" in the affairs of an "association". By contrast, the provisions made by the Disruption Act are directed at what it defines as a "participant" in a "criminal organisation", and the provisions made by the *Tattoo Parlours Act* are directed to articles associated with what it defines as a "declared criminal organisation". An "association" is defined in the VLAD Act in different terms from the (more than one) definition of "criminal organisation" given in the provisions of the Disruption Act. The definition of a "declared criminal organisation" in the *Tattoo Parlours Act* takes up only one limb of a definition of "criminal organisation" given in the Disruption Act.

65 No doubt it is necessary to recognise that the provisions made by the Disruption Act and the *Tattoo Parlours Act* amended other Acts. And each of those other Acts must be construed according to its terms. But if the VLAD Act, the Disruption Act and the *Tattoo Parlours Act* were to constitute a "package" of laws, it might reasonably have been expected that the most basic elements of the laws (identifying the individuals and groups to which they were directed) would be defined identically.

66 That this has not been done can only create unnecessary difficulty and complexity in the administration of the criminal law. It entails, at least, that those administering and enforcing the relevant provisions must pay the closest attention to the applicable provisions and recognise that a conclusion reached about the engagement of one set of provisions very often cannot be applied when considering the application of other provisions.

67 The task of those administering and enforcing the relevant provisions is made no easier by the fact that the relevant provisions of the VLAD Act hinge on the definition of a "vicious lawless associate". As will shortly be explained, that expression is defined in a way that does not depend upon any determination that the person concerned is personally "vicious" or generally "lawless". The expression is, therefore, at least inapt. Perhaps it was thought to reflect the stated political objective of dealing with "criminal gangs", but it is an expression which is likely to mislead in at least two ways. First, it is an expression which suggests a much narrower focus for the Act than its provisions require. Second, it is an expression which, at a trial, can only create prejudice and divert attention from the issues which a jury would have to decide. The adoption of this manner of

drafting is antithetical to the proper statement and administration of the criminal law.

68 It is necessary to say more about the relevant definitions.

*An "association" for the VLAD Act*

69 Section 3 of the VLAD Act defines "association" as any of a corporation, an unincorporated association, a club or league, or "any other group of 3 or more persons by whatever name called, whether associated formally or informally and whether the group is legal or illegal". In its terms, this definition embraces any three-member conspiracy to commit a crime, as well as a wide variety of other formal and informal groups of three or more persons.

*A "vicious lawless associate"*

70 The definition of "vicious lawless associate" in s 5(1) of the VLAD Act has three elements: (a) the person must commit "a declared offence"; (b) "at the time the offence is committed, or during the course of the commission of the offence", the person must be "a participant in the affairs of an association"; and (c) the person must do or omit to do the act that constitutes the declared offence "for the purposes of, or in the course of participating in the affairs of, the relevant association". A schedule to the VLAD Act identifies 70 offences as "declared offences". They include, but are not limited to, offences of violence, drug offences and offences in relation to weapons. Regulations may be made[88] prescribing other offences as declared offences.

71 Section 4 of the VLAD Act prescribes what is meant by being a "***participant*** in the affairs of an association". Four forms of conduct are identified: (a) asserting, declaring or advertising membership of, or association with, the association; (b) seeking to be a member of, or to be associated with, the association; (c) having attended more than one meeting or gathering of persons who participate in the affairs of the association in any way; and (d) having taken part on any one or more occasions in the affairs of the association in any other way.

72 Obviously, this definition of a participant in the affairs of an association includes many kinds of connection with an "association". Some of those connections refer to past acts: having attended more than one meeting or gathering[89]; having taken part on any one or more occasions in the affairs of the

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**88** VLAD Act, s 3, definition of "declared offence".

**89** s 4(c).

association[90]. Yet the definition of "vicious lawless associate" in s 5 is cast in the present tense. Section 5(1)(b) provides that the person must be a participant in the affairs of an association "*at the time the offence is committed, or during the course of the commission of the offence*" (emphasis added). How the apparent tension between these requirements should be resolved was not examined in argument of this matter.

73 Section 5(2) of the VLAD Act qualifies the definition of "vicious lawless associate". It provides that a person is not a vicious lawless associate if that person proves "that the relevant association is not an association that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, declared offences".

*A "criminal organisation"*

74 By contrast with the VLAD Act, those of the impugned provisions which were inserted or amended in other Acts by the Disruption Act depend upon a definition of "criminal organisation". It is convenient to proceed by reference to the definition of "criminal organisation" inserted in the *Criminal Code*. That definition is applied by the impugned provisions of the *Criminal Code*, is taken up by the impugned provisions of the *Bail Act*[91] and, in part, is taken up by the impugned provisions of the *Liquor Act*[92].

75 The *Criminal Code* definition[93] of a "criminal organisation" has three distinct limbs: (a) an organisation of three or more persons which has specified characteristics; (b) "a criminal organisation under the *Criminal Organisation Act 2009* [(Q)]"; or (c) "an entity declared under a regulation to be a criminal organisation". The characteristics specified in the first limb of this definition are that the three or more persons who comprise the organisation have as their purpose, or one of their purposes, "engaging in, organising, planning, facilitating, supporting, or otherwise conspiring to engage in, serious criminal activity" as defined in the *Criminal Organisation Act*, and that they are persons "who, by their association, represent an unacceptable risk to the safety, welfare or order of the community". If the Commissioner of Police applies[94] for a declaration under the *Criminal Organisation Act* that an organisation is a criminal organisation, the

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**90** s 4(d).

**91** s 6.

**92** s 173EA.

**93** s 1.

**94** *Criminal Organisation Act* 2009 (Q), s 8.

characteristics stated in par (a) of the *Criminal Code* definition of "criminal organisation" are, in substance, the criteria which the Supreme Court would be required[95] to find established before declaring that the organisation is a "criminal organisation" under that Act.

76 Hence, the first two forms of "criminal organisation" identified in the *Criminal Code* definition of that term have relevantly identical characteristics. The persons who comprise the organisation must have a particular purpose: "engaging in, organising, planning, facilitating, supporting, or otherwise conspiring to engage in, serious criminal activity" as defined in the *Criminal Organisation Act*. By their association, those persons must "represent an unacceptable risk to the safety, welfare or order of the community".

77 "Serious criminal activity", as defined[96] in the *Criminal Organisation Act*, is the commission of a "serious criminal offence" in Queensland or an equivalent offence elsewhere. "Serious criminal offence" is defined[97] as an offence against specified sections of the *Criminal Code*, an offence against the *Criminal Organisation Act* or another indictable offence punishable by imprisonment for at least seven years.

78 If, in prosecuting an offence against one of the impugned provisions of the *Criminal Code*, the prosecution relies on the first limb of the definition of "criminal organisation", the prosecution must establish, beyond reasonable doubt, that the organisation in which it is alleged the accused is a participant has both of the characteristics which have been described. That is, the prosecution must prove that the members of the organisation have the purpose that has been described and that, by their association, they represent an unacceptable risk of a relevant kind.

79 If, in prosecuting an offence against one of the impugned provisions of the *Criminal Code* (other than s 60C), the prosecution relies upon the second limb of the definition of "criminal organisation", it will be enough to establish that the organisation in question has been declared to be a criminal organisation under the *Criminal Organisation Act*. (In s 60C(3) "criminal organisation" is defined as *not* including an organisation under the *Criminal Organisation Act*.) Behind the making of a declaration under the *Criminal Organisation Act* would lie the litigation in, and decision of, the Supreme Court (after trial and, if needs be, appeal[98]) about issues not relevantly different from those presented by the two

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**95** s 10.

**96** s 6.

**97** s 7.

**98** Under Pt 9 Div 5.

characteristics stated in the first limb of the *Criminal Code* definition of "criminal organisation".

80 The first two limbs of that definition must be compared and contrasted with the third limb.

81 It will be recalled that the third limb of the *Criminal Code* definition of "criminal organisation" is "an entity declared under a regulation to be a criminal organisation". The impugned provisions of the *Liquor Act* take up[99] only this last limb of the *Criminal Code* definition of "criminal organisation". That is, those provisions apply only in respect of "an entity declared under a regulation to be a criminal organisation".

*Declaring an entity to be a "criminal organisation"*

82 The Disruption Act made[100] the Criminal Code (Criminal Organisations) Regulation 2013 (Q) ("the Regulations"). As made by the Disruption Act, the Regulations provided that 26 named motorcycle clubs, including "the motorcycle club known as the Hells Angels", were declared to be criminal organisations. The Regulations also declared certain places to be "prescribed places". One prescribed place is the club premises of the Hells Angels Motorcycle Club.

83 The Disruption Act also amended[101] the *Criminal Code*, by inserting s 708A, to prescribe criteria for recommending that an amendment be made to the Regulations to declare an entity to be a "criminal organisation". Three points may be made about s 708A. First, it prescribes criteria to which the Minister *may* have regard, including not only matters of the kind which would inform the exercise of the power of the Supreme Court under the *Criminal Organisation Act* to declare that an organisation is a "criminal organisation" but also[102] "any other matter the Minister considers relevant". Second, the criteria specified in s 708A are relevant considerations but they are not[103] mandatory considerations. Third, there is no expressed connection between the criteria specified in s 708A and the legislative determination made in the Disruption Act that each of the organisations nominated in the Regulations is a "criminal organisation".

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**99** s 173EA.

**100** s 70.

**101** s 49.

**102** s 708A(1)(e).

**103** cf *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 per Mason J; [1986] HCA 40.

84 Two consequences should be noticed. First, the legislative determination made in the Disruption Act, that the named organisations are "criminal organisations", is unreviewable. Neither the information on which the determination was based nor the criteria applied in making it is known. Second, if an organisation is declared by regulation to be a "criminal organisation" it is difficult to see how that declaration could be attacked. The criteria stated in s 708A are not mandatory relevant criteria and the Minister may take into account any other matter the Minister considers relevant. For all practical purposes, a declaration by regulation (like the legislative determination made in the Disruption Act) would also be unreviewable. And again, both the matters taken into account and the criteria applied in making the declaration would most likely remain unknown.

*A "participant" in a "criminal organisation"*

85 Section 60A(3) of the *Criminal Code* defines who is a "participant" in a criminal organisation. This definition is taken up by the impugned provisions of the *Criminal Code*[104] and the *Bail Act*[105]. The term has five applications, including: (a) if the organisation is a body corporate, a director or officer of the body corporate; (b) a person who asserts, declares or advertises his or her membership of, or association with, the organisation; (c) a person who seeks to be a member of, or to be associated with, the organisation; (d) a person who attends more than one meeting or gathering of persons who participate in the affairs of the organisation in any way; and (e) a person who takes part in the affairs of the organisation in any other way. The definition expressly excludes from its reach "a lawyer acting in a professional capacity".

86 This definition of a "participant" in a criminal organisation is similar to, but not identical with, the definition, in the VLAD Act[106], of a "participant" in the affairs of an association. Those similarities, however, should not be permitted to obscure the differences between an "association" for the purposes of the VLAD Act and a "criminal organisation" for the purposes of the other impugned provisions.

87 Something more must be said about the impugned provisions of the *Criminal Code*.

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**104** ss 60B(4), 60C(3), 72(4), 92A(5), 320(4), 340(3).

**105** s 6.

**106** s 4.

*Criminal Code*, ss 60A, 60B and 60C

88 Sections 60A, 60B and 60C of the *Criminal Code* prohibit certain acts by "[a]ny person who is a participant in a criminal organisation". The acts prohibited are: being knowingly present in a public place with two or more other persons who are participants in a criminal organisation[107], entering or attempting to enter a prescribed place[108], attending or attempting to attend a prescribed event[109] and recruiting or attempting to recruit anyone to become a participant in a criminal organisation[110]. Each of ss 60A, 60B and 60C provides that it is a defence to a charge of the offence to prove that "the criminal organisation is not an organisation that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity"[111]. As already noted, some organisations, including that with which the plaintiff is associated, have been declared to be criminal organisations and some places have been declared to be prescribed places.

*Criminal Code*, ss 72(2), (3) and (4), 92A(4A), (4B) and (5), 320(2), (3) and (4) and 340(1A), (1B) and (3)

89 Apart from ss 60A, 60B and 60C, each of the impugned provisions of the *Criminal Code* makes special provision if a person convicted of the offence with which the section deals is a participant in a criminal organisation. It is convenient to take s 72 as an example. It provides for the offence of affray. Section 72(2) provides that, if the person convicted of that offence is a participant in a criminal organisation, the offence is punishable on conviction by a minimum six months' imprisonment "served wholly in a corrective services facility" and a maximum penalty of seven years' imprisonment. The penalty otherwise provided by s 72 is a maximum of one year's imprisonment, with no minimum punishment prescribed.

90 Section 72(3) provides that, for an offence alleged to have been committed with the circumstance of aggravation mentioned in s 72(2), "it is a defence to the circumstance of aggravation to prove that the criminal organisation is not an organisation that has, as 1 of its purposes, the purpose of engaging in, or

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**107** s 60A.

**108** s 60B(1).

**109** s 60B(2).

**110** s 60C.

**111** ss 60A(2), 60B(3), 60C(2).

conspiring to engage in, criminal activity". Section 72(4) defines "participant" in a criminal organisation by reference to s 60A.

91 The other impugned provisions of the *Criminal Code* follow the pattern that has just been described. Each provides for punishment to be imposed on a participant in a criminal organisation that is more severe than the punishment provided in respect of others who commit the offence. Each provides that it is a defence to the circumstance of aggravation (being a participant in a criminal organisation) to prove that the criminal organisation in question "is not an organisation that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity".

92 References in the impugned provisions to the circumstance of being a participant in a criminal organisation as a "circumstance of aggravation" invite attention both to the definition of that term in s 1 of the *Criminal Code* and to the requirements of s 564 of the *Criminal Code*. Because being a participant in a criminal organisation renders an offender 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, it is a circumstance of aggravation as defined in s 1 of the *Criminal Code*. Section 564 requires[112] that, if the prosecution seeks to rely upon a circumstance of aggravation, it must charge that circumstance of aggravation in the indictment[113]. Hence, if it is alleged that a person is a participant in a criminal organisation, the truth of that allegation will be a matter to be determined at trial by the tribunal of fact.

*The defence*

93 As has been noted, the impugned provisions of the *Criminal Code* provide that it is a defence to a charge of an offence against any of ss 60A, 60B or 60C, and a defence to the circumstance of aggravation provided by the other impugned provisions, to prove that the criminal organisation in question "is not an organisation that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity".

94 This defence requires an accused person to establish a proposition larger than would be necessary to negate the expressly stated defining characteristics of a "criminal organisation". As already noted, the two defining characteristics expressly stated in par (a) of the definition of "criminal organisation" in the *Criminal Code* are, first, a purpose of the members of the organisation (to engage in, organise, plan, facilitate, support or otherwise conspire to engage in *serious*

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**112** *R v De Simoni* (1981) 147 CLR 383; [1981] HCA 31; *Kingswell v The Queen* (1985) 159 CLR 264 at 277 per Gibbs CJ, Wilson and Dawson JJ; [1985] HCA 72.

**113** Each of the offences in ss 72, 92A, 320 and 340 is an indictable offence.

criminal activity) and, second, a consequence (representing, by their association, "an unacceptable risk to the safety, welfare or order of the community"). The defence requires proof that the organisation does not have as a purpose engaging in, or conspiring to engage in, *any* criminal activity, regardless of whether the activity concerned is any risk to the "safety, welfare or order of the community".

95 It will later be necessary to assess the significance of this discordance when considering the application of the *Kable* principles. But it is better to deal first with the questions about standing and hypothetical issues.

Standing and hypothetical issues

96 There was no dispute that the plaintiff, as a member of a declared criminal organisation, has standing to challenge the validity of ss 60A, 60B and 60C of the *Criminal Code* and ss 173EB, 173EC and 173ED of the *Liquor Act*. And no party or intervener submitted that the dispute about the validity of those provisions is hypothetical. Each provision prohibits what would otherwise be lawful conduct of a kind in which the plaintiff wishes to engage.

97 The State of Queensland and the Attorneys-General for the Commonwealth and Victoria intervening submitted, however, that the plaintiff has no standing to challenge any of the other impugned provisions and that the issues which he seeks to raise about their validity are hypothetical. All of those other impugned provisions (the whole of the VLAD Act, those provisions of the *Criminal Code* which provide for imposing more severe punishment on participants in criminal organisations and the impugned provisions of the *Bail Act*) ("the relevant provisions") apply only to persons who have been charged with or convicted of certain offences. The arguments about standing and hypothetical issue in respect of the relevant provisions were all ultimately founded on the proposition that the plaintiff has not been accused of, or charged with, and does not say that he has committed, or will commit, any of the offences which engage the relevant provisions. And even if the relevant provisions are invalid, the plaintiff could not lawfully engage in the conduct which would have engaged those provisions.

98 Questions of standing, matter and hypothetical issue cannot be separated into watertight compartments. The statement in *In re Judiciary and Navigation Acts*[114] that "there can be no matter within the meaning of [s 76 of the Constitution] unless there is some immediate right, duty or liability to be established by the determination of the Court" emphasises the intersection between standing and matter and the associated question of whether an issue is

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**114** (1921) 29 CLR 257 at 265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ; [1921] HCA 20.

hypothetical. As was said in *Mellifont v Attorney-General (Q)*[115], this statement in *In re Judiciary and Navigation Acts* refers not only to "the notion of an abstract question of law not involving the right or duty of any body or person", but also to "the making of a declaration of law divorced or dissociated from any attempt to administer it".

99 In this case, the central observation to make is that the plaintiff does not seek to have this Court establish by its determination of his challenge to the relevant provisions any immediate right, duty or liability which the plaintiff claims or to which he alleges he is subject. Unlike the plaintiffs in *Croome v Tasmania*[116], the plaintiff does not suggest that he will engage in conduct which will engage the relevant provisions. Because he does not say that he will engage in that conduct, the plaintiff does not show that he is a person who is now, or in the immediate future probably will be, affected, whether in his person or his property, by the relevant provisions[117]. And unlike the challenge which was made in *Croome*, if the plaintiff succeeded in his challenges to the validity of the relevant provisions, the relevant conduct would still be unlawful.

100 It is not necessary, in these circumstances, to deal with any differences that may be revealed by the reasons for decision in *Croome*. It is not necessary to consider any more detailed questions about standing, matter or hypothetical issue. It is not necessary to consider whether, or when, a declaration may be made if the conduct in question is not lawful. It is enough to conclude that the plaintiff's challenges to the relevant provisions (the whole of the VLAD Act, those provisions of the *Criminal Code* which provide for imposing more severe punishment on participants in criminal organisations and the impugned provisions of the *Bail Act*) fail for want of standing, or because, being hypothetical questions, there is no "matter" for the purposes of s 76 of the Constitution, or for both want of standing and absence of "matter". It is not necessary, and the answers to the questions in the Further Amended Special Case should not attempt, to attribute one rather than another of those reasons to the

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**115** (1991) 173 CLR 289 at 303 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ; [1991] HCA 53. See also *Croome v Tasmania* (1997) 191 CLR 119 at 124-125 per Brennan CJ, Dawson and Toohey JJ, 136 per Gaudron, McHugh and Gummow JJ; [1997] HCA 5; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 262 [37] per Gaudron, Gummow and Kirby JJ; [1998] HCA 49.

**116** (1997) 191 CLR 119.

**117** cf *Toowoomba Foundry Pty Ltd v The Commonwealth* (1945) 71 CLR 545 at 570 per Latham CJ; [1945] HCA 15; *Croome* (1997) 191 CLR 119 at 126 per Brennan CJ, Dawson and Toohey JJ, 137 per Gaudron, McHugh and Gummow JJ.

plaintiff's being refused the relief which he seeks in respect of the relevant provisions.

101 There remains for consideration, however, the plaintiff's challenge to ss 60A, 60B and 60C of the *Criminal Code* and to the impugned provisions of the *Liquor Act*. Consideration of the issues raised by those challenges should begin from an examination of the *Kable* principles.

The *Kable* principles

102 The central *Kable* principle is that the Parliaments of the States may not legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth[118]. It is now accepted[119] that, as Gummow J said[120] in *Fardon v Attorney-General (Qld)*, "the essential notion is that of repugnancy to or incompatibility with that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system".

103 As the plurality pointed out[121] in *Assistant Commissioner Condon v Pompano Pty Ltd*, three points must be made about this "essential notion". First, the notions of repugnancy and incompatibility are not susceptible of further definition in terms which necessarily dictate the outcome of future cases. Second, the repugnancy doctrine does not imply into the constitutions of the States the separation of judicial power required for the Commonwealth by Ch III. Third, content must be given to the notion of "institutional integrity" and that, too, is a notion not readily susceptible of definition in terms which will dictate future outcomes.

104 As was also said[122] in *Pompano*, independence and impartiality are defining characteristics of all of the courts of the Australian judicial system.

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**118** *Kable* (1996) 189 CLR 51 at 103 per Gaudron J.

**119** See, for example, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [15], 593 [23] per Gleeson CJ, 598-599 [37] per McHugh J, 617 [101] per Gummow J, 648 [198] per Hayne J, 655 [219] per Callinan and Heydon JJ; [2004] HCA 46; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at 487 [123] per Hayne, Crennan, Kiefel and Bell JJ; 295 ALR 638 at 673; [2013] HCA 7.

**120** (2004) 223 CLR 575 at 617 [101].

**121** (2013) 87 ALJR 458 at 488 [124]; 295 ALR 638 at 673.

**122** (2013) 87 ALJR 458 at 488 [125]; 295 ALR 638 at 673-674.

These are notions which connote separation from the other branches of government, at least in the sense that the courts must be and remain free from external influence. But, because the repugnancy doctrine does not imply into the constitutions of the States the separation of judicial power required for the Commonwealth by Ch III, there can be no direct application to the States of all aspects of the doctrines that have been developed in relation to Ch III. The repugnancy doctrine cannot be treated as simply reflecting what Ch III requires in relation to the exercise of the judicial power of the Commonwealth. Hence, there can be no direct and immediate application of what has been said[123] in the context of Ch III about the "usurpation" of judicial power. But, as the decisions in *Kable*, *International Finance Trust Co Ltd v New South Wales Crime Commission*[124], *South Australia v Totani*[125] and *Wainohu v New South Wales*[126] show, not only the task which is given to a State court, but also the manner in which that Court is required to perform the task, may require the conclusion that the legislation in question is invalid.

105 In *Fardon*, Gummow J referred[127] to a metaphor adopted by the Supreme Court of the United States in *Mistretta v United States*[128]: that the reputation of the judicial branch of government may not be borrowed by the legislative and executive branches "to cloak their work in the neutral colors of judicial action". As the plurality recently said[129] in *Pollentine v Bleijie*, the use of that metaphor can "be no substitute for consideration of the principles of repugnancy and incompatibility". Conclusions cannot and must not be formed by reference only to particular verbal formulae.

106 A point made[130] by the plurality in *Pompano* should be repeated. The questions of validity presented in this case "cannot be decided simply by taking what has been said in earlier decisions of the Court about the validity of other

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**123** See, for example, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 26-29 per Brennan, Deane and Dawson JJ; [1992] HCA 64.

**124** (2009) 240 CLR 319; [2009] HCA 49.

**125** (2010) 242 CLR 1; [2010] HCA 39.

**126** (2011) 243 CLR 181; [2011] HCA 24.

**127** (2004) 223 CLR 575 at 615 [91].

**128** 488 US 361 at 407 (1989).

**129** (2014) 88 ALJR 796 at 805 [49]; 311 ALR 332 at 343; [2014] HCA 30.

**130** (2013) 87 ALJR 458 at 490-491 [137]; 295 ALR 638 at 677.

laws and assuming, without examination, that what is said in the earlier decisions can be applied to the legislation now under consideration"[131]. But likewise, observing that what is said in those other cases does not fit precisely with the issues presented in this case does not conclude the question. It remains necessary to grapple with that "essential notion" of repugnancy to or incompatibility with the institutional integrity of the State courts and to do that recognising that there cannot be any single, let alone comprehensive, statement of the content to be given to that essential notion.

The plaintiff's submissions

107 The plaintiff made two principal, partially overlapping, submissions. Both were framed with particular reference to what was described as the "role" or powers of the Queensland courts with respect to bail and sentencing. The first submission, given chief weight in oral argument, centred upon the notion of a departure from "equal justice". It was said that the impugned provisions required departure from "equal justice" "by requiring [the courts] to impose sentences on certain offenders by reason of who they associate with rather than by reason of their own 'personal and individual' guilt" (footnote omitted). The second submission was to the effect that the impugned provisions sought to enlist the courts of Queensland "to do the 'bidding' of the Queensland legislature and executive" in the exercise of the powers with respect to sentencing and bail "in a manner designed to 'destroy' certain (legal) associations of the executive's choosing" (footnote omitted).

The plaintiff's first submission

108 The plaintiff's first submission may be dealt with briefly. By appealing to a notion of "equal justice", the plaintiff invoked ideas of treating like cases alike and relevantly different cases differently. The submission thus assumed that participation in a "criminal organisation", as defined in the *Criminal Code*, is not a criterion which the legislature can adopt when prescribing norms of behaviour of the kind created by ss 60A, 60B and 60C of the *Criminal Code*. The submission assumed that participation in a "criminal organisation", as defined in the *Criminal Code*, is not a criterion which the legislature can adopt to identify certain persons as meriting different punishment for some offences under the *Criminal Code* from the punishment applicable to those to whom the criterion does not apply. The submission assumed that participation in an "association", as defined in the VLAD Act, is not a criterion which the legislature can adopt to identify certain persons as meriting different punishment for declared offences from the punishment applicable to those to whom the criterion does not apply. Only by assuming that the identified criteria could not be treated by the

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**131** (2013) 87 ALJR 458 at 490 [137]; 295 ALR 638 at 677.

legislature as relevant differences could the plaintiff assert, as he did, that there was some failure to treat like cases alike and different cases differently.

109 The plaintiff advanced no substantial argument to show the validity of any of the three assumptions which have been identified. That is reason enough to reject the submission. It is important to say, however, that this branch of the plaintiff's argument did not engage directly with the essential notion of repugnancy to or incompatibility with the institutional integrity of State courts. And without identifying how the impugned provisions are repugnant to or incompatible with that institutional integrity, the plaintiff cannot make good his claim that there is a contravention of the *Kable* principles.

The plaintiff's second submission

110 The plaintiff's second submission asserted that the impugned provisions require the courts of Queensland to do the bidding of the political branches of government by having the courts exercise the powers given by the impugned provisions to "destroy" what are otherwise lawful associations. So expressed, the submission sought to borrow the *Mistretta* metaphor referred to earlier: that the law cloaks the purposes of the political branches of government "in the neutral colors of judicial action". But the submission is too broad, and reveals the flaw in attempting to decide this case by application of verbal formulae rather than consideration of essential principles. The submission, as expressed, must be rejected.

111 Statutes are framed and enacted by the political branches of government. Thus, when a court applies any statute, it might loosely be said that the court is doing the "bidding" of the political branches of government. And if, by the courts faithfully applying a statute, the aims or objectives with which the statute was enacted are achieved, it might loosely be said that the courts have exercised their powers under that Act to achieve those aims or objectives. But what has been described is no more than an unremarkable aspect of the nature of the relationship between the courts and the other branches of government. The courts must give effect to valid laws.

112 Beneath the rhetoric of the plaintiff's second submission, however, lie deeper issues. Those issues are revealed only by paying close attention to the way in which the impugned provisions may operate. In particular, it is necessary to consider three aspects of the operation of ss 60A, 60B and 60C of the *Criminal Code*: the *Criminal Code*'s three-limbed definition of a "criminal organisation"; the legislative prescription in the Regulations of some organisations (including the Hells Angels Motorcycle Club) as criminal organisations; and the discordance that has been identified between the *Criminal Code* definition of a "criminal organisation" and the statutory defence to an allegation of that element of an offence. It must be noted that s 60C(3) provides that, for the purposes of that section, "criminal organisation" does not

include a criminal organisation under the *Criminal Organisation Act*. While that exclusion would be important when considering the application of s 60C in a particular case, the exclusion is not one of significance for the issues in this matter.

Three limbs to the definition of "criminal organisation"

113 If, as here, a particular organisation has been declared by the Regulations to be a "criminal organisation", and a person is charged with an offence under any of ss 60A, 60B or 60C, the court of trial would not be required to determine whether the organisation has the characteristics identified in the first limb of the *Criminal Code* definition of the term. Nor would the Supreme Court have been required to examine and decide those questions in an application under the *Criminal Organisation Act* to declare that the organisation is a criminal organisation. The court trying an offence under any of ss 60A, 60B or 60C would not be required to examine, and the Supreme Court would not previously have examined under the *Criminal Organisation Act*, whether the members of the organisation associated for the purpose of engaging in or conspiring to engage in "serious criminal activity" or whether, by their association, the members of the organisation represent "an unacceptable risk to the safety, welfare or order of the community". But, subject to what must later be said about the application of the defence, the court of trial would be required to determine the guilt of the accused, and then impose punishment on the accused, on the footing that he or she is a participant in an organisation which is not to be distinguished from a criminal organisation as it is defined in the first limb or the second limb of the definition.

114 It is convenient to assume, for the purpose of testing the validity of the relevant provisions, that the legislature made the Regulations prescribing the identified organisations as criminal organisations on the basis that those organisations were of a kind which met the defining characteristics identified in the first limb of the definition. It is convenient to make that assumption because allowing the possibility that those declared organisations (or subsequently declared organisations) do not meet those criteria would exaggerate, not avoid, the vice in the provisions which is now identified.

The vice in the provisions

115 The vice in the provisions lies in a legislative or regulatory determination of what is a criminal organisation being afforded the same legal significance as a judicial determination of that question, against stated criteria, in accordance with accepted judicial methods. The necessarily opaque, forensically untested and effectively untestable conclusion expressed in the legislative or regulatory identification of an organisation as a "criminal organisation" is given the same

legal effect as a conclusion reached in proceedings which, subject to limited exceptions[132], are held in public with either the accused person being able to test the material relied on by the prosecution to prove this element of its case or the organisation in question being afforded the opportunity to meet and test the allegations levelled against it and its members.

116 By treating these three different paths to establishing what is a criminal organisation as legally indistinguishable, the Executive and the legislature seek to have an untested and effectively untestable judgment made by the political branches of government treated as equivalent to a judgment made in judicial proceedings according to stated criteria and by reference only to admissible evidence received in proceedings conducted chiefly in public. For the courts to be required to treat a judgment by one or both of the political branches in that way assimilates a legislative or executive judgment with the judgment which the impugned provisions otherwise require the courts to make on the same issue according to ordinary judicial processes. To require the courts to treat the two radically different kinds of judgment as equivalent is repugnant to and incompatible with the institutional integrity of the courts. It is using "confidence in impartial, reasoned and public decision-making of [judges] to support inscrutable decision-making"[133] by the political branches of government.

117 If it is thought necessary or desirable to resort to metaphor, the *Mistretta* metaphor of cloaking may be thought to be apt. But, if it is, the metaphor is apt for reasons different from those identified by the plaintiff. The repugnancy and incompatibility do not arise because the courts are required to do no more than implement decisions made by the political branches. Rather, by assimilating the two different kinds of judgment, each is cloaked in the dress of the other. The clothes do not fit.

118 Contrary to the submissions of Queensland and some interveners, the availability of the defence provided by ss 60A(2), 60B(3) and 60C(2) does not remove the vice which has been identified. If anything, its provision makes the vice more apparent.

119 There are three overlapping respects in which the provision of the defence might be thought to prevent or avoid the assimilation of a legislative or executive judgment with the judgment made by the courts. First, the defence is expressed to be available whichever limb of the definition of "criminal organisation" is engaged. Second, it is the court which will decide whether the defence is made out. Third, the defence might be thought to provide the relevant content to the

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**132** *Criminal Organisation Act*, s 108.

**133** *Wainohu* (2011) 243 CLR 181 at 230 [109] per Gummow, Hayne, Crennan and Bell JJ.

notion of "criminal organisation". Consideration of each of those matters requires close examination of the relevant provisions. That examination will show why those matters do not meet the vice that has been identified.

The defence

120 The defence provided by ss 60A(2), 60B(3) and 60C(2) requires a defendant to prove that the criminal organisation "is not an organisation that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity". Although expressed generally, the defence does not apply equally to all three limbs of the definition of "criminal organisation".

121 Proof of the elements of the first limb of the definition of "criminal organisation" would necessarily deny the availability of the defence. To establish the first limb of the definition, the prosecution would have to prove beyond reasonable doubt that members of the organisation associated for purposes which included a purpose of engaging in, organising, planning, facilitating, supporting or otherwise conspiring to engage in serious criminal activity. If that was established, the accused could not show that it was *no* purpose of the organisation to engage in or conspire to engage in any criminal activity. Hence, if the first limb of the definition of "criminal organisation" is relied on, and established, the defence can have no application.

122 If the prosecution relies on the second limb of the definition (a declaration under the *Criminal Organisation Act*), proof of the defence would require the accused to show some change in the characteristics of the organisation between the time of the declaration by the Supreme Court and the time of the offence. Unless there had been some relevant change in those characteristics, a defendant could not establish that it was no purpose of the organisation to engage in or conspire to engage in any criminal activity. If the second limb of the definition of "criminal organisation" is relied on, the defence could have application only in limited circumstances.

123 If the prosecution relies on the third limb of the definition, other issues arise. The fact to be proved in order to establish the defence is necessarily larger than the facts which it may be assumed that the legislature or the Executive thought were (or could be) established when it prescribed the organisation to be a criminal organisation. That is, the legislative or executive judgment that the organisation is one whose members engage in, or conspire to engage in, serious criminal activity and one whose members, by their association, represent an unacceptable risk of the kind described, cannot be met by demonstrating that the organisation does not have either or both of those characteristics. It can be met only by showing that the organisation's members have no criminal purpose whatever. Absent that proof, the accused must be held subject to the same restrictive norms of behaviour and punishment as a "participant" in an organisation judicially determined to have the prescribed characteristics,

regardless of how and why the legislature or the Executive decided that the organisation in which the accused is a participant should be declared to be a "criminal organisation".

124 That it is the courts which determine whether the defence is made out does not vindicate the judgment which the legislature or the Executive has made. To the extent to which the determination of whether the defence is established gives content to what is a "criminal organisation" within the third limb of the definition, the content that is given is wider than and discordant with the content given to that expression by the first two limbs of the definition.

125 The result is that the vice already identified is not met. Although the legislative or executive judgment which lies behind declaring an organisation to be a "criminal organisation" is not vindicated by any finding made at trial, the court must give effect to that legislative or executive judgment as if it had been found by the court to have been established. There is thus the assimilation of the legislative or executive judgment with a judgment pronounced by a court after trial.

126 The assimilation occurs despite the provision of a single form of defence to an allegation that an organisation is a "criminal organisation". The assimilation occurs, despite the provision of a single form of defence, because of the discordance which reliance on, and proof of, the defence would give to the characteristics of a "criminal organisation", as defined in the third limb of the definition, and those characteristics that must be found by judicial determination of what is a "criminal organisation" under the first or second limbs of the definition. The assimilation is repugnant to, and incompatible with, the institutional integrity of the courts.

Consequences

127 It follows from what has been said that all of ss 60A, 60B and 60C (as inserted in the *Criminal Code* by s 42 of the Disruption Act) are beyond the legislative power of the Queensland Parliament. No party or intervener submitted that any part of ss 60A, 60B or 60C could be severed or given[134] some reduced, but valid, operation.

128 The reasoning which supports the conclusion that ss 60A, 60B and 60C of the *Criminal Code* are invalid would apply equally to those other provisions of the *Criminal Code* in issue in this case[135] but, as explained earlier in these

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**134** cf *Pidoto v Victoria* (1943) 68 CLR 87 at 111 per Latham CJ; [1943] HCA 37.

**135** ss 72(2), (3) and (4), 92A(4A), (4B) and (5), 320(2), (3) and (4) and 340(1A), (1B) and (3).

reasons, the plaintiff should have no relief relating to those provisions, the VLAD Act or the impugned provisions of the *Bail Act*.

129 By contrast, however, the impugned provisions of the *Liquor Act*[136] do not suffer from the vice that has been identified in ss 60A, 60B and 60C of the *Criminal Code*. It is necessary to explain why that is so.

130 As previously noted, the relevant provisions of the *Liquor Act* apply only in respect of prohibited items associated with an entity declared to be a criminal organisation under the third limb of the *Criminal Code* definition of that term. And the *Liquor Act* makes no provision for a defence of the kind provided by ss 60A, 60B and 60C of the *Criminal Code* to the allegation that an organisation is a "criminal organisation". The relevant provisions of the *Liquor Act* neither permit nor require the courts to make any judgment about what is or is not a "criminal organisation" for the purposes of those provisions.

131 The legislative prescription of an element of an offence is commonplace. Provision for prescription by regulation of the content to be given to an element of an offence is equally commonplace. Legislative or regulatory prescription of what drugs may not lawfully be possessed or sold is an obvious example. The direct or indirect legislative prescription of what constitutes an element of an offence presents no threat to the institutional integrity of the courts. But that is not the vice which has been identified in ss 60A, 60B and 60C of the *Criminal Code*. The vice is assimilation of legislative or executive judgment with the judgment of a court. And the impugned provisions of the *Liquor Act* make no assimilation of that kind. They are provisions which take the common form of proscribing conduct of a kind defined by the legislature by reference to proof of an identified connection between the relevant conduct and organisations specified by legislative or regulatory instrument. The plaintiff's challenge to the validity of these provisions fails.

132 The questions in the Further Amended Special Case should be answered accordingly. The defendant should pay the plaintiff's costs of the special case.

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**136** ss 173EB, 173EC and 173ED.

133 CRENNAN, KIEFEL, GAGELER AND KEANE JJ. The plaintiff, a member of the Brisbane Chapter of the Hells Angels Motorcycle Club ("the HAMC"), seeks to challenge the validity of the *Vicious Lawless Association Disestablishment Act* 2013 (Q) ("the VLAD Act") and certain provisions of the *Criminal Code* (Q), the *Liquor Act* 1992 (Q) ("the Liquor Act") and the *Bail Act* 1980 (Q) ("the Bail Act").

134 The challenged provisions may conveniently be grouped into three categories for the purposes of discussion and analysis. The first category includes the VLAD Act, which, in cases where a designated offence has been proved against an individual, imposes more severe penalties than would otherwise be applicable where the individual is also proved to be a "participant" in the affairs of an association. Also in the first category are ss 72(2), 92A(4A), 320(2) and 340(1A) of the *Criminal Code*. They provide for either a mandatory minimum penalty, a higher maximum penalty, or both, where an individual, found guilty of a designated offence, is also found to be a participant in a criminal organisation. The HAMC and 25 other motorcycle clubs were declared to be criminal organisations for the purposes of the *Criminal Code* by the Criminal Code (Criminal Organisations) Regulation 2013.

135 The second category of challenged provisions includes ss 60A, 60B and 60C of the *Criminal Code*, which were enacted by s 42 of the *Criminal Law (Criminal Organisations Disruption) Amendment Act* 2013 (Q) ("the Disruption Act"). These provisions create new offences, an element of which is being a "participant" in a criminal organisation as defined in the *Criminal Code*. Also in this category are ss 173EB, 173EC and 173ED of the Liquor Act, which were enacted by s 75 of the *Tattoo Parlours Act* 2013 (Q), and which create new offences, elements of which involve the wearing or carrying of symbols of membership of a "declared criminal organisation", such as the HAMC.

136 The third category of challenged provisions consists of sub-ss (3A), (3B), (3C) and (3D) of s 16 of the Bail Act, which were added to the Bail Act by the Disruption Act. They effect a reversal of the presumption in favour of bail against an individual who is alleged to be a participant in a criminal organisation, such as the HAMC.

137 None of the laws in any of the three categories operates directly to proscribe membership of the HAMC or any other organisation. The plaintiff contends, however, that all the challenged laws were enacted with the objective of destroying the HAMC and other motorcycle clubs.

The proceedings

138 The plaintiff commenced proceedings in the original jurisdiction of this Court[137] seeking declarations that the challenged laws are invalid on the ground that they offend the principle in *Kable v Director of Public Prosecutions (NSW)*[138] ("the *Kable* principle").

139 The *Kable* principle was most recently summarised in *Attorney-General (NT) v Emmerson*[139], where French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ said:

> "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 Supreme 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." (footnotes omitted)

140 Decisions of this Court establish that the institutional integrity of a court is taken to be impaired by legislation which enlists the court in the implementation of the legislative or executive policies of the relevant State or Territory[140], or which requires the court to depart, to a significant degree, from the processes which characterise the exercise of judicial power[141].

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**137** Section 76 of the Constitution and s 30 of the *Judiciary Act* 1903 (Cth).

**138** (1996) 189 CLR 51; [1996] HCA 24.

**139** (2014) 88 ALJR 522 at 533 [40]; 307 ALR 174 at 185; [2014] HCA 13.

**140** *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [15], 593 [23], 598-599 [37], 617-619 [100]-[105], 648 [198], 655-656 [219]; [2004] HCA 46; *South Australia v Totani* (2010) 242 CLR 1 at 52 [82], 67 [149], 92-93 [236], 173 [481]; [2010] HCA 39.

**141** *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 353 [52]; [2009] HCA 49; *South Australia v Totani* (2010) 242 CLR 1 at 62-63 [131], 157 [428]; *Wainohu v New South Wales* (2011) 243 CLR 181 at 208-210 [44]-[45]; [2011] HCA 24.

141 The plaintiff sought to contend that the challenged laws require the courts to perform their functions in a manner which is incompatible with the judicial process in two respects: the first and third categories of challenged provisions were said to be contrary to fundamental notions of equal justice in that they require certain offenders to be dealt with by the courts more severely than other offenders by reason of their lawful choice of associates rather than by reason of their personal and individual culpability for the offence. Secondly, all the impugned laws, considered together, were said impermissibly to enlist the courts to implement the policy of the executive and legislature to destroy associations which have not directly been made unlawful by the challenged provisions[142].

142 The defendant, the State of Queensland, argued that the plaintiff had no standing to challenge the validity of the first and third categories of impugned laws. The defendant also argued that none of the impugned laws infringes the *Kable* principle.

143 The Attorney-General of the Commonwealth and the Attorneys-General of each of the States (except Tasmania) and the Northern Territory intervened in support of the defendant.

The scope of the plaintiff's challenge

144 It is necessary at the outset to be clear as to what the plaintiff's challenge does not involve. First, the plaintiff does not seek to rely upon the freedom of communication on governmental or political matters which arises from the limitations on legislative or executive power implicit in ss 7, 24, 64 and 128 of the Commonwealth Constitution or a cognate freedom of association[143].

145 Secondly, the plaintiff does not seek to raise an issue of the kind resolved in *Australian Communist Party v The Commonwealth*[144], where it was held that the Commonwealth Parliament was not competent to determine, or to authorise

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**142** In a Ministerial Statement preceding the introduction of the Bills for these laws, the Premier of Queensland said that they were "not designed to just contain or manage [criminal motorcycle gangs]; they [were] designed to destroy them": Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 15 October 2013 at 3114.

**143** *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560-561; [1997] HCA 25; *Unions NSW v New South Wales* (2013) 88 ALJR 227 at 249 [135]; 304 ALR 266 at 295; [2013] HCA 58.

**144** (1951) 83 CLR 1; [1951] HCA 5.

the executive government to determine, the very facts upon which the existence of a necessary head of Commonwealth legislative power depends. No such question arises in relation to the legislative competence of the State of Queensland. Apart from the question raised as to the application of the *Kable* principle, there is no dispute that the challenged laws are within the plenary competence of the Queensland Parliament to make laws for the peace, order and good government of the State[145].

146 Thirdly, it is not part of this Court's function to pass judgment on the political wisdom of the impugned laws[146]. As explained by Brennan CJ in *Nicholas v The Queen*[147]:

> "It is for the Parliament to prescribe the law to be applied by a court and, if the law is otherwise valid, the court's opinion as to the justice, propriety or utility of the law is immaterial. Integrity is the fidelity to legal duty, not a refusal to accept as binding a law which the court takes to be contrary to its opinion as to the proper balance to be struck between competing interests."

The special case

147 The parties agreed to state a number of questions of law for the opinion of this Court in a special case. As well as the questions of whether and the extent to which the challenged laws are contrary to the *Kable* principle, the special case poses questions as to the plaintiff's standing to seek a declaration that the first and third categories of the challenged laws are invalid, and whether that challenge is hypothetical.

148 The special case includes a number of facts agreed between the parties in relation to these questions. In this regard, it may be noted that networks involving members of the HAMC have been the subject of multiple investigations by the Queensland Police Service in relation to organised crime, predominantly drug trafficking. It is also an agreed fact that a significant number of members of the HAMC in Queensland have been convicted of offences

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**145** *R v Burah* (1878) 3 App Cas 889 at 904; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 9-10; [1988] HCA 55.

**146** *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 at 541-542 [85]; 307 ALR 174 at 195-196.

**147** (1998) 193 CLR 173 at 197 [37]; [1998] HCA 9.

including the possession, production and trafficking of dangerous drugs. The motto of the HAMC is "When we do right nobody remembers, when we do wrong nobody forgets."

149 The plaintiff claims that the HAMC, and he as a member, have been engaged for many years in various fundraising activities for assorted registered charities, and other charitable purposes, including St John Ambulance and children's hospitals.

150 The defendant contends that the plaintiff lacks standing to seek declaratory relief as to the invalidity of the first and third categories, and also contends that the plaintiff's challenge to those provisions is hypothetical.

151 It must be accepted that, for reasons to be stated in more detail, the plaintiff does not have standing to challenge the validity of the laws in the first category of impugned provisions. None of those laws materially affects the plaintiff's legal position. Those laws operate only where an offence has been committed against existing unchallenged laws. The plaintiff has not been charged with any offence which might attract the operation of any of the impugned provisions. More importantly, he has not indicated that he has conducted, or intends to conduct, himself in a manner which would lead to such charges; he does not assert that he would do so were it not for the extra penalties that might be imposed under the challenged laws; and he does not assert that his freedom of action is otherwise legally or practically impeded. He cannot be assumed to intend to commit any offence that would engage the operation of the impugned provisions. In relation to the third category, the provisions of the Bail Act also have no material application in relation to the plaintiff; they do not affect his legal position in any way.

152 By contrast, the laws in the second category do restrict the plaintiff's freedom to conduct himself as he wishes, and as he would be free to do if these laws had not been enacted. It is an agreed fact that the plaintiff does wish to continue to attend at the HAMC Clubhouse, to attend social events in public places in company with other members of the HAMC, to wear the HAMC's colours on premises licensed under the Liquor Act, and to promote to other individuals the benefits of membership of the HAMC.

153 In these circumstances, the defendant was not disposed to make a general objection to the plaintiff's standing to challenge the validity of these

provisions[148], nor did it argue that his challenge to these laws is in any way hypothetical. Accordingly, it should be held that the plaintiff has a sufficient interest to challenge the validity of the provisions because they have an immediate effect upon his liberty[149].

154 The plaintiff's contention that the second category of impugned laws infringes the *Kable* principle should be rejected. It is fair to say that the language in which these provisions are expressed is apt to create confusion as to their operation, and indeed to give colour to the plaintiff's argument. In particular, the legislative reference to "criminal organisation" is apt to mislead a casual reader as to the effect of the laws.

155 In truth, these laws do not declare membership of any organisation a criminal offence. Rather, they make membership of a designated association one ingredient of an offence. The commission of the offence must be proved in order to establish criminal guilt and liability to criminal punishment. Notwithstanding the colour lent to the plaintiff's argument by the tendentious language in which these provisions are expressed, their effect is not to enlist the courts to implement the policies of the executive or legislative branches of government.

156 These laws do not require a court to give effect, by judicial order, to a legislative or executive decision which establishes new norms of conduct for the plaintiff or other members of any association. Nor do they require a court to proceed otherwise than in accordance with the processes which are understood to characterise the exercise of judicial power. In these respects, the present case stands in contrast to the decision in *South Australia v Totani*[150], on which the plaintiff founded this aspect of his challenge.

157 It should be noted that the arguments concerning "equal justice" before the law were not advanced in support of the plaintiff's challenge to the laws in the second category. Accordingly, they need not be discussed further.

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**148** It may be noted that the defendant did not concede that the plaintiff had standing to challenge s 60B(2) of the *Criminal Code*. As will appear, the defendant's position is not prejudiced by the Court's dealing with the plaintiff's challenge to s 60B(2) on its merits.

**149** *Croome v Tasmania* (1997) 191 CLR 119 at 137; [1997] HCA 5.

**150** (2010) 242 CLR 1.

158 The operation of each category of the challenged provisions must be considered more closely in order to explain these conclusions. In considering the merits of the plaintiff's challenge to the second category of impugned laws, it is necessary to bear in mind the plaintiff's contention that all three categories operate as a package designed to destroy organisations such as the HAMC. The operation of the first and third categories must be noted, both to explain why the plaintiff has no standing to challenge their validity, and as part of the milieu in which the laws in the second category operate.

The first category of challenged laws

*The VLAD Act*

159 The VLAD Act seeks to achieve its "objects" by establishing a sentencing regime, involving mandatory minimum sentencing, which targets offenders connected to a relevant association. It has no operation where an offence has not been committed under existing law.

160 Section 2(1) of the VLAD Act states that the objects of that Act are to:

> "(a) disestablish associations that encourage, foster or support persons who commit serious offences; and
>
> (b) increase public safety and security by the disestablishment of the associations; and
>
> (c) deny to persons who commit serious offences the assistance and support gained from association with other persons who participate in the affairs of the associations."

161 Section 2(2) of the VLAD Act provides that these objects are to be achieved by:

> "(a) imposing significant terms of imprisonment for vicious lawless associates who commit declared offences; and
>
> (b) removing the possibility of parole for vicious lawless associates serving terms of imprisonment except in limited circumstances; and
>
> (c) encouraging vicious lawless associates to cooperate with law enforcement agencies in the investigation and prosecution of serious criminal activity."

162 The substantive operation of the VLAD Act is effected by s 7(1), which provides as follows:

> "A court sentencing a vicious lawless associate for a declared offence must impose all of the following sentences on the vicious lawless associate –
>
> (a) a sentence for the offence under the law apart from this Act and without regard to any further punishment that may or will be imposed under this Act;
>
> (b) a further sentence of 15 years imprisonment served wholly in a corrective services facility;
>
> (c) if the vicious lawless associate was, at the time of the commission of the offence, or during the course of the commission of the offence, an office bearer of the relevant association – a further sentence of 10 years imprisonment served wholly in a corrective services facility which must be served cumulatively with the further sentence mentioned in paragraph (b)."

163 Section 7 operates by reference to the concepts of "participant" and "vicious lawless associate". In this regard, "participant" is defined in s 4 as follows:

> "For this Act, a person is a ***participant*** in the affairs of an association if the person –
>
> (a) (whether by words or conduct, or in any other way) asserts, declares or advertises his or her membership of, or association with, the association; or
>
> (b) (whether by words or conduct, or in any other way) seeks to be a member of, or to be associated with, the association; or
>
> (c) has attended more than 1 meeting or gathering of persons who participate in the affairs of the association in any way; or
>
> (d) has taken part on any 1 or more occasions in the affairs of the association in any other way."

164 The concept of "participant" is relevant to the identification of an individual as a "vicious lawless associate", which is defined in s 5 as follows:

"(1) For this Act, a person is a ***vicious lawless associate*** if the person –

(a) commits a declared offence; and

(b) at the time the offence is committed, or during the course of the commission of the offence, is a participant in the affairs of an association (***relevant association***); and

(c) did or omitted to do the act that constitutes the declared offence for the purposes of, or in the course of participating in the affairs of, the relevant association.

(2) However, a person is not a vicious lawless associate if the person proves that the relevant association is not an association that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, declared offences."

165 Section 3 of the VLAD Act contains the following material definitions:

"***association*** means any of the following –

(a) a corporation;

(b) an unincorporated association;

(c) a club or league;

(d) any other group of 3 or more persons by whatever name called, whether associated formally or informally and whether the group is legal or illegal.

***base sentence***, for a vicious lawless associate, means the sentence imposed on the associate under section 7(1)(a).

***declared offence*** means –

(a) an offence against a provision mentioned in schedule 1; or

(b) an offence prescribed under a regulation to be a declared offence.

***further sentence***, for a vicious lawless associate, means a sentence imposed on the associate under section 7(1)(b) or (c).

***office bearer***, of an association, means –

(a) a person who is a president, vice-president, sergeant-at-arms, treasurer, secretary, director or another office bearer or a shareholder of the association; or

(b) a person who (whether by words or conduct, or in any other way) asserts, declares or advertises himself or herself to hold a position of authority of any kind within the association."

166 Under s 10, the Act empowers the Governor in Council to "make regulations declaring offences for the purposes of this Act." Schedule 1 lists the declared offences under the Act. It is unnecessary to set out all the offences listed in Sched 1. It is sufficient to note that those offences are existing offences under the *Corrective Services Act* 2006 (Q), the *Criminal Code*, the *Criminal Proceeds Confiscation Act* 2002 (Q), the *Drugs Misuse Act* 1986 (Q) and the *Weapons Act* 1990 (Q).

167 In addressing the question of the plaintiff's standing to challenge the validity of the VLAD Act, it is to be noted that a defendant will be liable to the additional penalty provided by s 7(1)(b) of the VLAD Act only if each of the following elements is proved by the prosecution:

(a) the defendant has committed an offence listed in Sched 1 (that is, an offence already known to the law);

(b) the defendant was a participant in the affairs of an association either when the declared offence was committed or during the course of the commission of the declared offence; and

(c) the defendant intentionally, knowingly or recklessly committed the declared offence for the purposes of the association or in the course of participating in the affairs of the association.

168 The important point in relation to the plaintiff's standing is that the exposure of any individual to additional penalty under the VLAD Act depends upon proof that an offence, not created by the impugned provisions, has been committed. No challenge is made to the validity of the laws which create those offences; and, unsurprisingly, the plaintiff does not assert that he is at liberty to choose whether or not to commit any one of these offences. It is sufficient, for present purposes, to note that the plaintiff's freedom of action is not affected in any way by the extra punishment for which the VLAD Act provides.

*Sections 72, 92A, 320 and 340 of the Criminal Code*

169 Sections 72, 92A, 320 and 340 of the *Criminal Code* were amended by the Disruption Act to introduce more severe sentences where the offender is found guilty of one of those existing offences and is also found to be a participant in a criminal organisation.

170 Section 72 was amended so that where an offender is convicted of the basic offence of affray, the penalty for a participant is a minimum of six months' imprisonment without parole and a maximum of seven years, whereas the maximum penalty for the basic offence is one year's imprisonment.

171 Section 92A was amended so that where an offender has been convicted of the basic offence of misconduct in respect of public office, the maximum penalty for a participant is 14 years' imprisonment, whereas the maximum penalty for the basic offence is seven years' imprisonment.

172 Section 320 was amended so that where an offender is convicted of the basic offence of doing grievous bodily harm, the penalty for a participant (where the grievous bodily harm is done to a police officer) is a minimum of one year's imprisonment without parole and a maximum of 14 years, whereas the maximum penalty for the basic offence is 14 years' imprisonment.

173 Section 340 was amended so that where an offender has been convicted of the basic offence of serious assault, the penalty for a participant is a minimum of one year's imprisonment without parole and a maximum of seven years, whereas the maximum penalty for the basic offence is seven years' imprisonment.

174 Once again, it is not suggested that the plaintiff has infringed, intends to infringe, or would like to infringe, any of the provisions which establish the basic offences.

*Standing*

175 The plaintiff did not call into question the authorities[151] which establish that a party who seeks a declaration that a law is invalid must have sufficient

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**151** *Pharmaceutical Society of Great Britain v Dickson* [1970] AC 403; *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493; [1980] HCA 53; *Croome v Tasmania* (1997) 191 CLR 119; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247; [1998] HCA 49.

interest in having his or her legal position clarified. In *Pharmaceutical Society of Great Britain v Dickson*[152], in a passage cited with approval in *Croome v Tasmania*[153], Lord Upjohn said "[a] person whose freedom of action is challenged can always come to the court to have his rights and position clarified". In *Croome v Tasmania*[154] it was observed that such a person would have a sufficient interest to establish a justiciable controversy, which is to acknowledge that issues as to standing and whether a question is hypothesised may overlap.

176 The plaintiff argued that his claim was supported by the authorities and that he was entitled to know whether the impugned laws applied to him. It can be said immediately that they do apply to him, just as they apply to everyone else in Queensland. The plaintiff has no more interest than anyone else in clarifying what the law is. The pertinent question is whether the plaintiff has a sufficient interest to have his "rights and position clarified" by the declaration he seeks[155].

177 Under the established requirements as to standing, the plaintiff does not have a sufficient interest in the validity of the laws in the first category to claim a declaration that they are invalid. In *Australian Conservation Foundation v The Commonwealth*[156], Gibbs J said of the notion of "sufficient interest" that:

> "A person is not interested ... unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi."

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**152** [1970] AC 403 at 433.

**153** (1997) 191 CLR 119 at 127.

**154** (1997) 191 CLR 119 at 127.

**155** *Pharmaceutical Society of Great Britain v Dickson* [1970] AC 403 at 433, cited with approval in *Croome v Tasmania* (1997) 191 CLR 119 at 127.

**156** (1980) 146 CLR 493 at 530.

178 In *Croome v Tasmania*[157], it was held by Brennan CJ, Dawson and Toohey JJ that a sufficient interest extends to any case where a person's freedom of action is affected by the impugned laws. The laws which the plaintiff seeks to challenge do not affect his freedom of action. The activities upon which the operation of the first category of challenged laws depends are unlawful under the general law. The new provisions add to the adverse consequences of contravention of existing norms of conduct, but do not impose any new prohibition or restriction on any person. The new provisions might lead to a more severe sentence; but their only present operation is to provide an extra incentive to obey existing, valid laws. That is not something which is said, or could be said, to be a disadvantage to the plaintiff.

179 The laws challenged in *Croome v Tasmania* criminalised the plaintiffs' existing relationships with other people[158]. Brennan CJ, Dawson and Toohey JJ held[159] that the plaintiffs' admitted conduct rendered them liable to criminal prosecution, and, on this basis, that they had sufficient interest to support their claim for declarations that the impugned laws were invalid. Gaudron, McHugh and Gummow JJ held[160] that the challenged laws affected the plaintiffs by imposing "duties which require the observance of particular norms of conduct and attach liability to prosecution and subsequent punishment for disobedience."

180 Any difference between the approaches to the question of standing taken in the two judgments in *Croome v Tasmania* is not material for present purposes. While in *Croome v Tasmania* the plaintiffs' standing to challenge the validity of the laws did not depend upon the commencement by the executive government of processes to enforce the challenged law against the plaintiffs, their liberty was constrained by the proscriptions in question.

181 In the present case, as indeed the plaintiff emphasised in his argument, none of the challenged laws purports to criminalise the plaintiff's relationship with his fellow members of the HAMC. As noted above, the challenged laws in the first category do not impose any legal or practical restriction upon the plaintiff's freedom of action: the plaintiff does not assert that he has broken, or that he intends to break, any existing laws; and if any assumption is to be made

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**157** (1997) 191 CLR 119 at 127.

**158** (1997) 191 CLR 119 at 131.

**159** (1997) 191 CLR 119 at 127.

**160** (1997) 191 CLR 119 at 137.

about the plaintiff's activities in the future, it should be assumed that he will conduct his activities within the law so as to avoid prosecution and conviction[161].

182 In *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*[162], Gaudron, Gummow and Kirby JJ held that a plaintiff had standing where its interest was "as a matter of practical reality … immediate, significant and peculiar to [it]." In the present case, it may be accepted that the avowed objective of the VLAD Act (whether considered alone or together with the other challenged laws) is to discourage membership of the HAMC and like associations by the threat of draconian punishment of those who break the law while a member of such an association. If the Act is effective in that regard, membership of the HAMC might be expected to decline. That might be disappointing for the plaintiff in a way which would be peculiar to him, in the sense that members of the general public would not be similarly affected. But to say that the VLAD Act is calculated to discourage membership of the HAMC is distinctly not to say that the legal position of the plaintiff is immediately or significantly affected by the VLAD Act. His liberty and other rights, duties, liabilities and obligations remain unaffected by the enactment of these provisions; and his legal position would not be materially advantaged if his challenge were to succeed[163].

183 The power to declare a law to be invalid is confined by the boundaries of judicial power[164]. In *Robinson v Western Australian Museum*[165], Mason J said that the requirement as to standing to invoke the exercise of judicial power:

> "reflects a natural reluctance on the part of the courts to exercise jurisdiction otherwise than at the instance of a person who has an interest in the subject matter of the litigation in conformity with the philosophy

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**161** *O'Shea v Littleton* 414 US 488 at 497 (1974).

**162** (1998) 194 CLR 247 at 267 [52].

**163** *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 257-258; [1949] HCA 44.

**164** *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582; [1992] HCA 10; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 262 [37].

**165** (1977) 138 CLR 283 at 327; [1977] HCA 46.

that it is for the courts to decide actual controversies between parties, not academic or hypothetical questions."

184 The established requirements as to standing ensure that the work of the courts remains focused upon the determination of rights, duties, liabilities and obligations as the most concrete and specific expression of the law in its practical operation, rather than the writing of essays of essentially academic interest. To recognise that a person has a sufficient interest to seek the exercise of judicial power where that exercise is apt to affect "the legal situation of persons subject to the jurisdiction of the court"[166] serves to maintain the ordinary characteristics of judicial power[167].

185 It may be accepted that there is a general public interest that governments act in accordance with the law enforced by the courts[168]; but to conclude that the plaintiff's sense of grievance at the injustice of these laws is not an interest which suffices to give him standing to challenge their validity is not to undermine this aspect of the rule of law[169]. Any person actually in jeopardy of punishment under these laws will have standing to challenge their validity.

186 In addition, the established requirements as to standing help to ensure that the exercise of judicial power is informed, as fully as possible, by the "concrete adverseness which sharpens the presentation of issues"[170]. It may be acknowledged that the rules as to standing will not always achieve that purpose, as will be seen in the discussion of the wide-ranging arguments agitated in this case in relation to the second category of challenged laws. Nevertheless, adherence to the established requirements as to standing is generally apt to

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**166** *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 318; [1991] HCA 53.

**167** cf *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 304-305. See also *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 609-610 [41], 637 [121]; [2000] HCA 11.

**168** *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 284-285 [109].

**169** See Keyzer, *Open Constitutional Courts*, (2010) at 138; Evans, "Standing to Raise Constitutional Issues Reconsidered", (2010) 22(3) *Bond Law Review* 38 at 44-49.

**170** *Baker v Carr* 369 US 186 at 204 (1962); *O'Shea v Littleton* 414 US 488 at 494 (1974); *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 262 [37].

improve the quality of judicial decision-making by ensuring that the focus and strength of the arguments advanced by the parties reflect the importance of the prospective outcome for the parties[171].

187 Finally at this stage, it may be noted that the plaintiff does not claim a declaration as to his proper sentence were he to commit an offence in circumstances which would attract the operation of the impugned provisions. Such a claim would also be an impermissible request for an advisory opinion[172]. It is inconceivable that a court would entertain a claim for an indication, in advance of the commission of an offence, of the extent of the punishment to be imposed on a person contemplating the commission of the offence. It is not necessary to explore these difficulties further.

188 It is sufficient here to conclude that the plaintiff lacks standing to seek a declaration that the first category of laws is invalid.

The second category of challenged laws

*Sections 60A, 60B and 60C of the Criminal Code*

189 The amendments made to the *Criminal Code* by the Disruption Act proscribe certain otherwise lawful activities by individuals who are participants in a "criminal organisation".

190 The defendant does not dispute that these provisions operate to impede the plaintiff in the lawful exercise of his membership of the HAMC[173]. Accordingly, the plaintiff has standing to seek a declaration as to their invalidity, and his challenge is not hypothetical.

191 To establish a breach of s 60A, the prosecution must prove that the defendant:

(a) was a participant in a criminal organisation;

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**171** *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 318.

**172** *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-267; [1921] HCA 20; *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 303.

**173** See footnote 148 above.

(b) was present in a public place with two or more other persons who were participants in a criminal organisation; and

(c) knew that those persons were participants in a criminal organisation.

192 Section 60A(2) provides that it is a defence, to a charge of an offence under s 60A(1), to prove that "the criminal organisation is not an organisation that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity."

193 To establish a breach of s 60B, the prosecution must prove that the defendant:

(a) was a participant in a criminal organisation; and

(b) intentionally entered or attempted to enter a prescribed place or attended or attempted to attend a prescribed event.

194 Section 60B(4) provides that:

"***prescribed event*** means an event declared under a regulation to be a prescribed event.

***prescribed place*** means a place declared under a regulation to be a prescribed place."

195 It may be noted that the clubhouse of the HAMC is a prescribed place.

196 Section 60B(3) provides for a defence to a charge under s 60B(1) or (2) in terms similar to s 60A(2).

197 To establish a breach of s 60C, the prosecution must prove that the defendant:

(a) was a participant in a criminal organisation; and

(b) intentionally recruited or attempted to recruit another person to become a participant in a criminal organisation.

198 Section 60C(2) provides for a defence to a charge under s 60C(1) in terms similar to s 60A(2).

199 Section 60A(3) provides the following definitions for the purposes of ss 60A, 60B and 60C:

"***member***, of an organisation, includes an associate member, or prospective member, however described.

***participant***, in a criminal organisation, means –

(a) if the organisation is a body corporate – a director or officer of the body corporate; or

(b) a person who (whether by words or conduct, or in any other way) asserts, declares or advertises his or her membership of, or association with, the organisation; or

(c) a person who (whether by words or conduct, or in any other way) seeks to be a member of, or to be associated with, the organisation; or

(d) a person who attends more than 1 meeting or gathering of persons who participate in the affairs of the organisation in any way; or

(e) a person who takes part in the affairs of the organisation in any other way;

but does not include a lawyer acting in a professional capacity."

200 For the purposes of ss 60A, 60B and 60C of the *Criminal Code*, the term "criminal organisation" is defined by s 1 of the *Criminal Code*[174] to mean:

"(a) an organisation of 3 or more persons –

(i) who have as their purpose, or 1 of their purposes, engaging in, organising, planning, facilitating, supporting, or otherwise conspiring to engage in, serious criminal activity as defined under the *Criminal Organisation Act* 2009; and

(ii) who, by their association, represent an unacceptable risk to the safety, welfare or order of the community; or

(b) a criminal organisation under the *Criminal Organisation Act* 2009; or

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**174** As amended by s 41 of the Disruption Act.

(c) an entity declared under a regulation to be a criminal organisation."

201 By s 70 of the Disruption Act, Sched 1 was declared to have effect to make the Criminal Code (Criminal Organisations) Regulation 2013 a regulation under the *Criminal Code*. The HAMC is one of 26 entities declared by Sched 1 to be a criminal organisation.

202 Section 708A(1) of the *Criminal Code*, inserted by the Disruption Act, provides that:

> "In deciding whether to recommend an amendment of the *Criminal Code (Criminal Organisations) Regulation* 2013 to declare an entity to be a criminal organisation, the Minister may have regard to the following matters –
>
> (a) any information suggesting a link exists between the entity and serious criminal activity;
>
> (b) any convictions recorded in relation to –
>
> (i) current or former participants in the entity; or
>
> (ii) persons who associate, or have associated, with participants in the entity;
>
> (c) any information suggesting current or former participants in the entity have been, or are, involved in serious criminal activity (whether directly or indirectly and whether or not the involvement has resulted in any convictions);
>
> (d) any information suggesting participants in an interstate or overseas chapter or branch (however described) of the entity have as their purpose, or 1 of their purposes, organising, planning, facilitating, supporting or engaging in serious criminal activity;
>
> (e) any other matter the Minister considers relevant."

203 For the purposes of s 708A, the term "serious criminal activity" is defined by s 6 of the *Criminal Organisation Act* 2009 (Q) ("the CO Act") as meaning:

> "(a) a serious criminal offence; or

(b) an act done or omission made outside Queensland, including outside Australia, that, if done or made in Queensland would have been or would be a serious criminal offence."

204 The expression "serious criminal offence" is defined in s 7 of the CO Act as an indictable offence punishable by at least seven years' imprisonment or an offence against either the CO Act itself or certain specified provisions of the *Criminal Code*.

205 The defence provided by each of ss 60A(2), 60B(3) and 60C(2) requires proof that the organisation in question does not have, as one of its purposes, "the purpose of engaging in, or conspiring to engage in, criminal activity." It does not refer to "serious criminal activity". The expression "criminal activity" is not defined in the CO Act or the *Criminal Code*; but it would naturally be read as referring to specific criminal offences[175].

*The breadth of these provisions*

206 The plaintiff emphasised the novelty and broad reach of these laws. It suited the plaintiff's forensic strategy to emphasise the novelty and breadth of operation of these provisions, especially the definition of "participant" and the power to declare a group of persons to be a criminal organisation. That strategy may have been based upon an assumption that the greater the extent of these novel intrusions into the liberty of the subject appeared to be, the stronger would become the prospect of their being held to be invalid.

207 One difficulty with the plaintiff's strategy is that merely to point out the severity of the laws is not to articulate the connection between the novelty and breadth of the second category of impugned laws and the engagement of the *Kable* principle. A further difficulty involved in this aspect of the plaintiff's argument is that it urges a wider operation for these laws than would ordinarily be accorded to penal legislation which interferes with basic common law freedoms. It might be expected that in a setting of greater "concrete adverseness"[176] than obtains in the present case – for example, in a case in which a defendant was actually charged with a contravention of one of the impugned laws – a sharper focus would be brought to bear in the interests of the defendant. In this hypothetical scenario, the defence would, no doubt, urge a narrower view

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**175** *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at 485 [108]; 295 ALR 638 at 670; [2013] HCA 7.

**176** *Baker v Carr* 369 US 186 at 204 (1962).

of the construction of these laws than was urged by the plaintiff in the present case, where there was no immediate prospect of substantial adverse consequences from the rejection of his expansive view of the legislation. The defence might also be expected to argue that provisions not bearing on the particular contravention charged would be severable if invalid[177], and therefore that questions as to their validity do not arise on the hearing and determination of that contravention.

208 The plaintiff suggested, for example, that the spouse or child of a member of the HAMC who attended more than one meeting of members would thereby become a "participant" for the purposes of s 60A by reason of the wide definition of "participant" in par (d) in s 60A(3). This suggestion is arguably incorrect. A person becomes a participant by reason of this particular definition only if he or she "has attended more than one meeting of persons who participate in the affairs of the entity in any way". It is arguable that a person does not become a participant, under this definition, merely by meeting "*other* persons who participate in the affairs of the entity"; rather, it would seem, the definition contemplates that a participant is a person who attends the meetings as one of the persons who, together, participate in the affairs of the entity. However that may be, there can be no doubt that these provisions are capable of having a wide operation which might be thought to be unduly harsh.

209 Thus, it is arguable that a person who has attended more than one such meeting is "marked for life" as a participant, even though the person ceased to be a member long before committing the acts which lead to a charge. And to the extent that three or more members of the HAMC may have been present in court for the hearing of the arguments in this case, it might be argued that they have contravened s 60A(1), if they were unable to make out the defence in s 60A(2). That may well be thought to be an odd and undesirable outcome. On the other hand, it must also be said that, so far as the *Kable* principle is concerned, that outcome would be a consequence of the enforcement of the legislation by ordinary judicial processes, not some extraordinary imposition upon the judiciary.

210 A further concern raised in the course of argument was that the already wide reach of the challenged provisions might be expanded even further by the executive government's use of its regulation-making power under s 708 of the *Criminal Code* to declare a wide range of associations to be criminal organisations. According to this argument, the power to declare an entity to be a

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**177** *Acts Interpretation Act* 1954 (Q), s 9.

criminal organisation is not confined by s 708A(1) to those associations believed by the executive government to be engaged in serious criminal activity. This argument, which derives from the apparently open-ended language of s 708A(1)(e), raises the concern that an association whose purposes include the active pursuit of political objectives, which might in turn involve agitation leading to breaches of laws designed to preserve public order, might be declared to be a criminal organisation.

211 One possible answer to the concern raised by this hypothetical argument depends on the proper construction of the provisions which empower the executive to declare a group of individuals to be a criminal organisation. In a case where a person was actually charged with a contravention of s 60A, one would expect the defence to urge that the context in which ss 708 and 708A(1)(e) appear confines the power to declare a group of persons to be a criminal organisation to those associations whose activities are believed by the Minister to be connected to serious criminal offences, as distinct from lesser offences, such as regulatory offences against public order. There would be some force in such an argument.

212 Considerations of context support the narrower view of the regulation-making power. The matters to which the Minister may have regard under s 708A, in deciding whether to declare an entity to be a criminal organisation, are all, with the exception of s 708A(1)(b) and (e), expressly concerned with the Minister's apprehension of connections between the entity and "serious criminal activity", which, as noted above, is defined in such a way that regulatory offences are not included. It might be argued that the scope of s 708A(1)(b) and (e) is informed by the other paragraphs of s 708A(1) so that the Minister may take into account only apprehended connections between the entity and serious criminal activity. It is also significant that these provisions are to be found in the *Criminal Code*.

213 The context for the regulation-making power in s 708A also includes par (a) of the definition of "criminal organisation" in s 1 of the *Criminal Code*. That definition would be applied at a trial of a person for an offence under ss 60A, 60B and 60C unless an organisation had already been declared to be a criminal organisation. Paragraph (b) of the definition refers to a declaration to that effect made by a court under s 10 of the CO Act. Section 10(1) of the CO Act requires that a court making such a declaration be satisfied that the purpose for which members of the organisation associate is to engage in serious criminal activity and that the organisation represents an unacceptable risk to the safety, welfare and order of the community. Whilst not in terms identical to par (a) of the definition, s 10(1) of the CO Act reflects essential aspects of the par (a)

definition. Consistently, any declaration made by regulation, to which par (c) refers, would also be informed by such considerations.

214 If the hypothesised offences against public order contemplated by this argument were only regulatory offences, as opposed to serious criminal offences, the entities in question would not be within the regulation-making power. This would be because there would be no apprehended link between the entity and serious criminal offences. In this regard, s 2 of the *Criminal Code* provides that "[a]n act or omission which renders the person doing the act or making the omission liable to punishment is called an ***offence***." Section 3(1) of the *Criminal Code* provides that offences are of "2 kinds, namely, criminal offences and regulatory offences." If the activity in question were a regulatory offence, rather than a criminal offence, it would be arguable that that activity is not criminal activity, much less serious criminal activity, and so the entity is outside the scope of the power to declare an entity by regulation to be a criminal organisation. The argument in support of this narrower view would be supported by the consideration that the right of free association under the common law[178] should not be limited save by clearly expressed legislative intention.

215 There is force in the arguments for the narrower view of the regulation-making power. One would not readily accept that a Minister who disapproved of Catholicism could rely upon his or her subjective view that that was "a relevant matter", in some general way unconnected to serious criminal activity, to justify the making of a declaration that either the St Vincent de Paul Society or the Knights of the Southern Cross is a criminal organisation.

216 And finally in the hypothetical scenario under consideration, it is inconceivable that an issue would not be raised by the defence as to the invalidity of the declaration based on the limitation on executive and legislative power implied by the freedom of communication and association on matters of political and governmental interest[179]. As noted above, this issue was not agitated in this case.

217 It does not advance the plaintiff's case to resolve these hypothetical arguments. It is not necessary to resolve these arguments in this case because they do not afford a basis to impugn the validity of the challenged laws in terms of the *Kable* principle. It may be accepted that the possible reach of these

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**178** *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 200.

**179** *Coleman v Power* (2004) 220 CLR 1; [2004] HCA 39; *Monis v The Queen* (2013) 249 CLR 92; [2013] HCA 4.

provisions is very wide, and even that their operation may be excessive and even harsh. But as was explained in *Magaming v The Queen*[180], to demonstrate that a law may lead to harsh outcomes, even disproportionately harsh outcomes, is not, of itself, to demonstrate constitutional invalidity. It is necessary to articulate the connection between these laws and the engagement of the *Kable* principle. It is also necessary to bear in mind that the *Kable* principle is concerned to preserve the integrity of the judicial function.

218 The second category of laws do not, in terms, advert to the performance of any judicial function. The plaintiff's attempt to articulate the necessary connection may be considered under the headings: enlisting judicial power, cloaking, and usurpation of judicial power. They may now be considered in turn.

*Enlisting judicial power*

219 The plaintiff contended that, while Parliament has not directly outlawed or disestablished criminal organisations, the courts have been enlisted to give effect to that intention, and, in this way, the *Kable* principle has been engaged.

220 It must be said immediately that, so framed, the plaintiff's contention is too broad. That the legislature's policies inform the laws which it passes does not mean that the court's enforcement of those laws is incompatible with its institutional integrity. As French CJ observed in *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment*[181]:

> "All legislation reflects policies attributable to the legislature but, in many if not most cases, they are policies originating with the executive government as the proponent of most statutes enacted by the parliament."

221 In the same case[182], Heydon J said:

> "In a system of responsible government, all legislation enacted substantially in conformity with a Bill presented to the legislature by the

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**180** (2013) 87 ALJR 1060 at 1071 [50]-[52], 1080-1081 [103]-[108]; 302 ALR 461 at 471-472, 484-485; [2013] HCA 40. See also *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 at 540-541 [79]-[80]; 307 ALR 174 at 194-195.

**181** (2012) 250 CLR 343 at 365 [44]; [2012] HCA 58.

**182** (2012) 250 CLR 343 at 372 [69].

> Executive may be said to 'give effect to … government policy dictated by the executive'. Most legislation is of that kind ... Once that 'policy' is reflected in statutes and regulations, it is binding as a matter of law. The judicial branch of government declares and enforces the law. In that sense, the judiciary gives effect to government policy dictated by the Executive. If the *Kable* statements invalidate legislation giving effect to government policy on that ground alone, they are wrong for that reason. They do not."

222 The plaintiff did, however, present a more focused submission in relation to enlistment of judicial power, arguing that the laws in question are analogous to the law considered in *South Australia v Totani*[183]. In that case, as in this, the impugned legislation did not seek to outlaw particular organisations or kinds of organisations. Beyond this point of similarity, however, the analogy breaks down.

223 In *Totani*, this Court held that s 14 of the *Serious and Organised Crime (Control) Act* 2008 (SA) ("the SOCC Act") was invalid. That provision required the Magistrates Court, upon application by the executive government, to make a control order if it was satisfied that the individual, the subject of the application, was a member of a declared organisation. The SOCC Act itself specified the terms of the control order. These included strict restrictions on association with other members. The SOCC Act provided criminal sanctions for a breach of a control order. There was no scope for the Magistrates Court to determine whether the restrictions were appropriate to the individual subjected to a control order: membership alone was sufficient to require the imposition by the Court of the restrictions upon the individual's liberty specified by the Act.

224 The judgments of the members of the majority in *Totani*[184] identified the vice of s 14 of the SOCC Act, in terms of the *Kable* principle, as the requirement that the Magistrates Court create new norms of conduct the content of which was determined by the executive and legislature, and which restricted the liberty of the subject (over and above the norms binding the public under the general law), without any inquiry by the Court into past or threatened contraventions by the individual of any existing legal norm. The Court was called upon to implement, under the forms of judicial process, an executive judgment to restrict the liberty of any person who was a member of a declared organisation. It was this

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**183** (2010) 242 CLR 1 at 91-93 [234]-[236].

**184** (2010) 242 CLR 1 at 52 [82], 67 [149], 92-93 [235]-[236], 172-173 [480].

combination of features which warranted the description of s 14 of the SOCC Act as a provision which sought to enlist the Court to implement the policy of the executive and legislature under the guise of judicial determination.

225 Sections 60A, 60B and 60C of the *Criminal Code* do not require a court to lay down new norms of conduct. The new norms of conduct are created by the legislature anterior to the performance of the judicial function. Sections 60A, 60B and 60C do not require a court to perform any function other than a characteristically judicial function. They do not require a court to give effect to an executive or legislative decision to subject a given individual to new norms of conduct, much less that it should do so independently of the contravention of existing norms. They require the court to find facts and impose punishment as a result of the contravention of norms of conduct laid down by the legislature. That is not unorthodox[185]: it is at "the heart of judicial power" to determine whether a person has engaged in conduct which is forbidden by law and, if so, to make an order as to the consequences which the law imposes by reason of that conduct[186].

226 The processes which characterise the judicial function have been usefully, though not exhaustively, summarised as:

> "open and public enquiry … the application of the rules of natural justice, the ascertainment of the facts as they are and as they bear on the right or liability in issue and the identification of the applicable law, followed by an application of that law to those facts"[187].

227 These laws do not authorise or require a court to depart from these characteristic processes of the judicial function.

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**185** *R v McDonnell* [1997] 1 SCR 948 at 974-975 [33]; *Markarian v The Queen* (2005) 228 CLR 357 at 372 [30]; [2005] HCA 25; *Magaming v The Queen* (2013) 87 ALJR 1060 at 1070 [48], 1080 [104]; 302 ALR 461 at 471, 484.

**186** *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580; [1989] HCA 12; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 497; [1991] HCA 29; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 611 [76].

**187** *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 496; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 615 [92].

*Cloaking*

228 It is also necessary to bear in mind that the rationale of the *Kable* principle was identified by Gummow J as being "to forestall the undermining of the efficacy of the exercise of the judicial power of the Commonwealth."[188] His Honour went on to explain by reference to United States authorities the concerns addressed by the principle. These include, importantly, the concern that the legitimacy of the judicial branch of government, which "ultimately depends on its reputation for impartiality and nonpartisanship", should not be undermined by the political branches of government borrowing that reputation "to cloak their work in the neutral colors of judicial action."[189]

229 These laws do not purport to "cloak the work of the legislature or executive in the neutral colours of judicial action". To the contrary, it is abundantly clear that the responsibility for any perceived harshness or undue encroachment on the liberty of the subject by these laws lies entirely with the political branches of government.

230 The public acceptability of these laws is in no way shored up by camouflaging legislative responsibility "in the neutral colours of judicial action". The only judicial activity which attends the enforcement of these laws is the characteristically judicial process of a criminal trial, upon which these laws do not trench.

231 It makes no difference to this conclusion that these laws operate as part of a package calculated to destroy organisations such as the HAMC. Whether a law is invalid by reason of the *Kable* principle depends on the effect of the law upon the functioning of the courts. Whether considered together or in isolation, these laws are not incompatible with the institutional integrity of the courts. That conclusion cannot be affected by a consideration of whether the judiciary approve or do not approve of the purpose of the laws. In *Grain Pool of Western Australia v The Commonwealth*[190], Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ said that if a law is otherwise within power, "the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice".

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**188** *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 132.

**189** *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 133, citing *Mistretta v United States* 488 US 361 at 407 (1989).

**190** (2000) 202 CLR 479 at 492 [16]; [2000] HCA 14.

*Usurpation of judicial power*

232 The plaintiff urged, as an aspect of his challenge to the second category of impugned laws, that members of motorcycle clubs such as the HAMC are branded "criminal organisations" without judicial process. It may be said immediately that this submission sits ill with the plaintiff's emphasis of the point that the laws do not make membership of such an organisation a crime.

233 As was recently said by French CJ, Hayne, Crennan, Kiefel and Bell JJ in *Magaming v The Queen*[191], "adjudging and punishing criminal guilt is an exclusively judicial function." Earlier, in *Leeth v The Commonwealth*[192], Mason CJ, Dawson and McHugh JJ had recognised that:

> "legislation may amount to a usurpation of judicial power, particularly in a criminal case, if it prejudges an issue with respect to a particular individual and requires a court to exercise its function accordingly".

234 The power to declare an organisation to be a criminal organisation does not involve an adjudication of criminal guilt; and the declaration of associations as "criminal organisations", whether by the legislature or by the executive, does not involve a usurpation of judicial power. The exercise of the power to declare an organisation to be "a criminal organisation" does not purport to adjudge or punish the criminal guilt of any person; the exercise of the regulation-making power to declare a group of persons to be a criminal organisation involves no adjudication of rights or duties or liabilities.

235 As noted above, the tendentious language in which these laws are expressed conceals their true legal effect. The only legal effect of a declaration is to establish an ingredient of an offence, the contravention of which must still be proved in the ordinary way. The argument for the plaintiff confuses the exercise of judicial power with the power of the legislature to impose norms of conduct and to provide for the consequences of breach of those norms. In *Leeth v The Commonwealth*, Mason CJ, Dawson and McHugh JJ explained that "a law of general application which seeks in some respect to govern the exercise of a jurisdiction which it confers does not trespass upon the judicial function."[193]

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**191** (2013) 87 ALJR 1060 at 1070 [47]; 302 ALR 461 at 471. See also *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27; [1992] HCA 64.

**192** (1992) 174 CLR 455 at 469-470; [1992] HCA 29.

**193** (1992) 174 CLR 455 at 470.

236 Barwick CJ said in *Palling v Corfield*[194]:

> "it is within the competence of the Parliament to determine and provide … a contingency on the occurrence of which the court shall come under a duty to impose a particular penalty or punishment."

His Honour added[195]:

> "There may be limits to the choice of the Parliament in respect of such contingencies but the nature of the contingency in this case does not require any examination or discussion as to the existence and, if they exist, the nature of such limits."

This case, similarly, does not require such an examination.

237 The mere circumstance that the stipulated contingency may be established by the opinion of the legislature or executive does not mean that the stipulation is an exercise of judicial power[196]. The plaintiff's argument did not seek to controvert this proposition or to deny the authority of the judicial statements which support it, or to suggest that the *Kable* principle has somehow outflanked or superseded them. If such an attempt had been made by the plaintiff, it might be expected that the defendant would have responded by pointing out that it has never been suggested that the *Kable* principle is inconsistent with this proposition or the authorities which support it: it might also have been said that, if there is an inconsistency in this regard between the operation of the *Kable* principle and these authorities, the problem lies with the propounded application of the *Kable* principle rather than with authoritative judicial statements that stand unchallenged. Given that the plaintiff's argument did not raise these issues, it is not necessary to speculate on how they might be resolved.

238 In any event, the declaration that a group of persons is a criminal organisation does not conclusively establish, without judicial process, the nature of the organisation in which the defendant is alleged to be a participant. At this

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**194** (1970) 123 CLR 52 at 58; [1970] HCA 53.

**195** (1970) 123 CLR 52 at 59.

**196** *Palling v Corfield* (1970) 123 CLR 52 at 59, 64-65, 67, 69; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 97-98, 131; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 352 [49], 360 [77], 386 [157].

point one must turn to consider the defence provided by each of ss 60A(2), 60B(3) and 60C(2).

*The defences*

239 Under these provisions, it is a defence for an accused person to prove that the criminal organisation in question does not have, as one of its purposes, an intention to engage in, or engaging in, criminal activity. Thus, the substantive operation of these laws is confined to cases where the accused is found by a jury to be a participant in an organisation which has as one of its purposes an intention to engage or an actual engagement in criminal activity.

240 It has long been established that it is within the competence of the legislature to regulate the incidence of the burden of proof[197] of matters on which questions of substantive rights and liabilities depend. Laws which do no more than effect such changes do not "deal directly with ultimate issues of guilt or innocence"[198].

241 In *Orient Steam Navigation Co Ltd v Gleeson*[199], Dixon J said:

> "[T]he Parliament may place the burden of proof upon either party to proceedings in a Court of law. The onus of proof is a mere matter of procedure. If the Parliament may place the burden of proof upon the defendant, it may do so upon any contingency which it chooses to select."

242 To the suggestion that it is harsh to impose a burden on the defendant to prove that the purposes of the organisation did not include a purpose of criminal

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**197** *The Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1 at 12, 17-18; [1922] HCA 31; *Williamson v Ah On* (1926) 39 CLR 95 at 108, 119, 121-122, 127; [1926] HCA 46; *Orient Steam Navigation Co Ltd v Gleeson* (1931) 44 CLR 254 at 259-260, 262-263, 264; [1931] HCA 2; *Nicholas v The Queen* (1998) 193 CLR 173 at 188-190 [23]-[24], 203 [55], 234-236 [152]-[156], 272-274 [234]-[238]; *Thomas v Mowbray* (2007) 233 CLR 307 at 356 [113]; [2007] HCA 33; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 560 [39]; [2008] HCA 4; *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 120 [48]; [2013] HCA 29.

**198** *Nicholas v The Queen* (1998) 193 CLR 173 at 277 [249]; *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 120 [48].

**199** (1931) 44 CLR 254 at 263.

activity, one may make the same answer as Dixon J gave in *Orient Steam Navigation*[200], namely that it "would be no less harsh if the burden of proof upon a charge … were unconditionally placed upon the defendant."

243 In *Nicholas v The Queen*[201], Brennan CJ identified a qualification upon the power of the legislature to regulate the incidence of the burden of proof:

> "The reversal of an onus of proof affects the manner in which a court approaches the finding of facts but is not open to constitutional objection *provided it prescribes a reasonable approach* to the assessment of the kind of evidence to which it relates." (emphasis added)

244 It may be accepted that the "reasonable approach" adverted to by Brennan CJ would be absent where the statutory reversal of the burden of proof entailed "a moral impossibility" of the defendant obtaining the evidence necessary to establish a defence[202]. But it was not explained how a prosecution under these laws would give rise to the moral impossibility of a defendant adducing exculpatory evidence.

245 In the absence of such an explanation, it seems distinctly unpersuasive to suggest that a defendant would find himself or herself in an "impossible" position in a case where the prosecution relies solely upon a declaration by legislation or regulation that an organisation is a criminal organisation in order to prove this element of the charge. It needs to be kept in mind that the declaration does not create a presumption that one or more of the organisation's purposes involve serious criminal activity. As earlier explained[203], the purpose of an organisation is a matter which should inform the making of a declaration by regulation (or by statute). However, a declaration so made is not to be equated with a presumptive finding of that fact.

246 In such a case, evidence from the defendant or his or her witnesses to the effect that, to his or her knowledge, the activities of the association were entirely innocent would, if left uncontradicted by the prosecution, support the inference that the "criminal organisation is not an organisation that has, as 1 of its

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**200** (1931) 44 CLR 254 at 263.

**201** (1998) 193 CLR 173 at 190 [24].

**202** *Williamson v Ah On* (1926) 39 CLR 95 at 114.

**203** See above at [212].

purposes, the purpose of engaging in, or conspiring to engage in, criminal activity."

247 In this hypothetical case, the only evidence before the court of the only purposes of the association would be those purposes which could be inferred from the activities of the association of which the defendant gave evidence. On this hypothesis, there would be no evidence to contradict that of the defendant. It is necessary to bear in mind as well that the defendant's burden is discharged on the balance of probabilities[204].

248 Of course, the prosecution might not be content to rely upon the declaration, and might itself adduce evidence of the purposes of the association. But in such a case, the question of guilt or innocence would still depend on the curial evaluation of the evidence, not some presumptive effect of the declaration.

*The Liquor Act*

249 The Liquor Act was amended by the *Tattoo Parlours Act* 2013 (Q) to include provisions which place restrictions on persons in a "declared criminal organisation".

250 Section 173EB of the Liquor Act prohibits a licensee from knowingly allowing entry of a person wearing or carrying certain items onto licensed premises. Section 173EC prohibits the wearing or carrying of such items on premises licensed under the Liquor Act where those items are apparently linked with a declared criminal organisation. Section 173ED empowers a licensee to require a person wearing or carrying such an item to leave licensed premises and makes failure to comply an offence.

251 For the purposes of these provisions, s 173EA provides:

"In this division –

***declared criminal organisation*** means an entity declared to be a criminal organisation under the Criminal Code, section 1, definition *criminal organisation*, paragraph (c).

***prohibited item*** means an item of clothing or jewellery or an accessory that displays –

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**204** *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594 at 600-601; [1990] HCA 5.

(a) the name of a declared criminal organisation; or

(b) the club patch, insignia or logo of a declared criminal organisation; or

...

(c) any image, symbol, abbreviation, acronym or other form of writing that indicates membership of, or an association with, a declared criminal organisation, including –

(i) the symbol '1%'; and

(ii) the symbol '1%er'; and

(iii) any other image, symbol, abbreviation, acronym or other form of writing prescribed under a regulation for this paragraph."

252 As to the significance of the "1%" logo, it may be noted that, according to a report of the Australian Crime Commission referred to in the special case, outlaw motorcycle gangs identify themselves as the "one percenters" who operate outside the law.

253 The special case refers to findings by a Canadian court that the wearing of the HAMC patch not only guarantees that a person is a member of the HAMC and not the police, it allows members of the HAMC to intimidate, threaten and extort other persons.

254 The *Kable* principle is not a limitation on the competence of a State legislature to make laws of general application to determine what acts or omissions give rise to criminal responsibility. Sections 173EB, 173EC and 173ED of the Liquor Act are laws of general application. The concept of "declared criminal organisation" used in these provisions has no operative effect other than to identify items of clothing or jewellery as "prohibited items". The kinds of clothing or jewellery which are "prohibited items" may be fixed by regulation. That circumstance is not an intrusion upon judicial power[205].

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**205** *Palling v Corfield* (1970) 123 CLR 52 at 59, 64-65, 67, 69; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 352 [49], 360 [77], 386 [157].

255 Laws of this kind are not novel[206]. It is significant that no concern has previously been raised as to their compatibility with the integrity of the judicial function[207]. These provisions do not require a court to act as an instrument of the executive. They are not analogous to the law invalidated in *Totani*[208].

The third category of challenged laws: the Bail Act

256 Under s 16(1) of the Bail Act, if the court is satisfied that there is an "unacceptable risk" of particular matters, the presumption in favour of bail in s 9 of the Bail Act is rebutted.

257 As a result of amendments made by Pt 2 of the Disruption Act, s 16(3A) relevantly provides:

> "If the defendant is charged with an offence and it is alleged the defendant is, or has at any time been, a participant in a criminal organisation, the court or police officer must –
>
> (a) refuse to grant bail unless the defendant shows cause why the defendant's detention in custody is not justified".

258 Prior to the amendments in question, s 16(3) of the Bail Act identified a number of circumstances in which a court is directed to refuse an application for bail unless the defendant shows cause why his or her detention in custody is not justified. Section 16(3A) added the circumstance that it is alleged that the defendant is a participant in a criminal organisation. But it remains the case that a defendant may obtain a grant of bail by satisfying the court that the risk that he or she will fail to answer his or her bail is not unacceptable.

259 There is no basis for concluding that the plaintiff is affected in his rights or interests by the new provisions. His legal position would not be altered if these provisions were held to be invalid. He has not committed any offence. He is not an applicant for bail. It cannot be assumed that he will commit an offence,

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**206** *Habitual Criminals Act* 1869 (UK), s 10; *Police Offences Act* 1884 (NZ), s 22. See generally McLeod, "On the Origins of Consorting Laws", (2013) 37 *Melbourne University Law Review* 103.

**207** *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 [29]; [2005] HCA 44.

**208** (2010) 242 CLR 1.

and so become an applicant for bail. Accordingly, the plaintiff has no standing to seek a declaration that these provisions are invalid.

Conclusion

260 The questions posed for determination by the Court should be answered as follows:

1. Does the plaintiff have standing to seek a declaration that any, and which, of the provisions referred to in the schedule to these questions (other than *Criminal Code* (Q), ss 60A, 60B(1) and 60C, and *Liquor Act* 1992 (Q), ss 173EB to 173ED) is invalid?

   Answer: No.

2. Is the relief which the plaintiff seeks in answer to question 3 (other than the relief sought in relation to the *Criminal Code* (Q), ss 60A, 60B(1) and 60C, and *Liquor Act* 1992 (Q), ss 173EB to 173ED) hypothetical?

   Answer: It is unnecessary to answer this question.

3. Is any, and which, of the provisions referred to in the schedule invalid on the ground that it infringes the principle of *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51?

   Answer: None of ss 60A, 60B(1), 60B(2) and 60C of the *Criminal Code* (Q) or ss 173EB, 173EC and 173ED of the *Liquor Act* 1992 (Q) is invalid on the ground that it infringes the principle in *Kable v Director of Public Prosecutions (NSW)*. The plaintiff does not have standing to challenge the validity of the other provisions in the schedule.

4. Who should pay the costs of the special case?

   Answer: The plaintiff.

Schedule

*Vicious Lawless Association Disestablishment Act* 2013 (Q)

*Criminal Code* (Q), 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) and 340(3)

*Bail Act* 1980 (Q), ss 16(3A), 16(3B), 16(3C) and 16(3D)

*Liquor Act* 1992 (Q), ss 173EB, 173EC and 173ED

261 BELL J. On 19 March 2014, the plaintiff commenced proceedings in the original jurisdiction of the Court claiming declarations of invalidity respecting a raft of laws enacted by the Parliament of Queensland on 15 October 2013. The scope of the plaintiff's proposed challenge has since been refined. It is now confined to the provisions listed in the Schedule ("the Schedule") to the Further Amended Special Case ("the special case") upon which the parties agreed in stating questions of law for the opinion of the Full Court[209].

262 The plaintiff challenges the validity of the *Vicious Lawless Association Disestablishment Act* 2013 (Q) ("the VLAD Act"); provisions of the *Criminal Code* (Q) ("the Code") creating offences having as an element that the accused is a "participant in a criminal organisation"[210] or which make proof of that fact a circumstance of aggravation of an existing offence[211]; provisions of the *Bail Act* 1980 (Q) ("the Bail Act") which impose restrictions on the grant of bail in the case of a person who is, or has at any time been, a participant in a criminal organisation[212]; and provisions of the *Liquor Act* 1992 (Q) ("the Liquor Act") which, among other things, make it an offence to enter or remain in licensed premises while wearing or carrying clothing, jewellery or an accessory conveying an association with a "declared criminal organisation"[213].

263 The VLAD Act requires a court when sentencing a person for a "declared offence" committed for the purposes of, or in the course of participating in the affairs of, "an association" to impose a mandatory further sentence or sentences[214]. In these reasons, the VLAD Act and the provisions of the Code and the Bail Act that apply to the sentencing of and grant of bail to participants in criminal organisations will be referred to as "the sentencing and bail provisions". The provisions of the Code and the Liquor Act that create new offences will be referred to as "the new offence provisions".

264 The challenged provisions of the Code and the Bail Act were enacted by the *Criminal Law (Criminal Organisations Disruption) Amendment Act* 2013 (Q)

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**209** High Court Rules 2004 (Cth), r 27.08.1.

**210** *Criminal Code* (Q), ss 60A, 60B(1), 60B(2) and 60C.

**211** *Criminal Code*, ss 72(2), 72(3), 72(4), 92A(4A), 92A(4B), 92A(5), 320(2), 320(3), 320(4), 340(1A), 340(1B) and 340(3).

**212** Bail Act, ss 16(3A), 16(3B), 16(3C) and 16(3D).

**213** Liquor Act, ss 173EB, 173EC and 173ED.

**214** VLAD Act, s 7.

("the Disruption Act"). The challenged provisions of the Liquor Act were enacted by the *Tattoo Parlours Act* 2013 (Q) ("the Tattoo Act").

265 The plaintiff contends that each of the provisions in the Schedule exceeds the legislative power of the Parliament of Queensland by reason of the constraint arising under Ch III of the Constitution explained in *Kable v Director of Public Prosecutions (NSW)*[215]: the Parliament of a State may not confer a power or function on a court which substantially impairs the court's institutional integrity[216]. The impairment here is said to arise in two ways. First, the sentencing and bail provisions require the court to impose sentences, or make bail determinations, based upon a person's choice of associates and not an assessment of "personal and individual"[217] guilt in the former case or personal risk factors in the latter case. In these respects the sentencing and bail provisions are attacked as repugnant to the concept of equality before the law ("the first *Kable* argument"). Secondly, all of the provisions in the Schedule are said to impermissibly enlist the court to do the legislature's and the executive's bidding: they require the court "to treat certain individuals as participants in organised crime" while denying the court the power to engage in a genuine adjudicative process to determine whether the accused is in fact "a participant in organised crime" ("the second *Kable* argument").

266 The second *Kable* argument is focussed on the manner in which the Parliament has chosen to define the expression "criminal organisation" for the purposes of the Code, the Bail Act and the Liquor Act. Under s 1 of the Code, the expression "criminal organisation" includes an entity that is declared by a regulation to be such[218]. The Criminal Code (Criminal Organisations) Regulation 2013 ("the Regulation")[219] declares 26 motorcycle clubs to be "criminal

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**215** (1996) 189 CLR 51; [1996] HCA 24.

**216** *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 at 533 [40] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ; 307 ALR 174 at 185; [2014] HCA 13.

**217** *South Australia v Totani* (2010) 242 CLR 1 at 90-91 [232] per Hayne J; [2010] HCA 39.

**218** Paragraph (c) of the definition of "criminal organisation".

**219** Under s 70 of the Disruption Act, the Regulation, contained in Sched 1 to the Act, ceased, on its commencement, to be a provision of the Disruption Act and became a regulation made under the Code.

organisations"[220]. The motorcycle club known as the Hells Angels ("the HAMC") is one of these clubs.

The special case

267 The plaintiff is a current member of the Brisbane Chapter of the HAMC and a former office-bearer of a Sydney Chapter of the HAMC. He claims that his membership of the HAMC makes him a person who is "entitled to know" whether the laws listed in the Schedule are valid laws. The State of Queensland ("Queensland") concedes, subject to one reservation[221], that the plaintiff's challenge to the validity of the new offence provisions raises a justiciable controversy but it disputes that the sentencing and bail provisions do.

268 The special case states three substantive questions of law for the opinion of the Full Court[222]. The first question asks whether the plaintiff has standing to seek a declaration that any, and which, of the provisions referred to in the Schedule (other than the new offence provisions) are invalid.

269 The second question asks whether the relief that the plaintiff claims in the proceeding (other than the relief claimed respecting the new offence provisions) is hypothetical.

270 The third question asks whether any, and which, of the impugned provisions is invalid on the ground that it infringes the principle in *Kable*.

271 The Attorney-General of the Commonwealth ("the Commonwealth") and the Attorney-General for the State of Victoria ("Victoria") intervened in support of Queensland's submission that question one should be answered "No" and question two should be answered "Yes".

272 The Commonwealth, the Attorney-General for the State of New South Wales ("New South Wales"), the Attorney-General for the Northern Territory, the Attorney-General for the State of South Australia, Victoria, and the Attorney-General for the State of Western Australia intervened in support of Queensland's submission that question three should be answered "No".

273 For the reasons to be given, the only "matter" engaging the jurisdiction of the Court is the challenge to the validity of the new offence provisions. The

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**220** Section 2.

**221** See [288] below.

**222** A fourth question asks who should pay the costs of the special case.

plaintiff's first *Kable* argument does not apply to the new offence provisions and for that reason it is inappropriate to address it[223].

274 Returning to the special case, the plaintiff accepts that Queensland enacted the challenged legislation in response to "legislative and community perceptions" of certain matters, the truth of which the plaintiff does not accept. The plaintiff makes claims concerning the contents of discussions at HAMC meetings; the uses of the HAMC clubhouse; and the HAMC's charitable activities, the truth of which Queensland does not accept. The relevance of the matters that may have prompted the enactment of the challenged legislation and of the plaintiff's claims respecting the purposes of HAMC meetings, the use of the clubhouse and the HAMC's charitable activities was not explained.

275 Apart from the agreed fact of the plaintiff's membership of the HAMC and past office within a Sydney Chapter, the only claims made in the special case to which it is necessary to refer are the plaintiff's wish to: enter the HAMC clubhouse located at 3/31 Tradelink Drive, Hillcrest; ride his motorcycle in the company of other members of the HAMC; attend social events in public places with other members of the HAMC; wear the HAMC club colours, jewellery and rings associated with the HAMC on premises that are licensed under the Liquor Act; and, if approached by an individual to join the HAMC, promote the benefits of membership of the HAMC to that individual. The Regulation declares 3/31 Tradelink Drive, Hillcrest to be a prescribed place for the purposes of one of the new offences under the Code[224].

276 The plaintiff does not claim that he has committed, or is likely to commit, any offence under the Code for which his participation in the HAMC would constitute a circumstance of aggravation. Nor does the plaintiff claim that he has committed, or is likely to commit, any "declared offence" for the purposes of the VLAD Act. Nor, more generally, does he claim that he has committed, or is likely to commit, any offence so as to engage the provisions of s 16(3A)-(3D) of the Bail Act.

Questions 1 and 2

277 The Constitution provides that the Parliament may make laws conferring original jurisdiction on the High Court in any matter arising under the

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**223** *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 per Dixon CJ; *Cheng v The Queen* (2000) 203 CLR 248 at 270 [58] per Gleeson CJ, Gummow and Hayne JJ; [2000] HCA 53; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 437 [355] per Crennan J; [2009] HCA 2.

**224** Regulation, s 3 and *Criminal Code*, s 60B(4).

Constitution or involving its interpretation[225]. The Parliament has conferred jurisdiction on the Court in these respects[226] and it is this jurisdiction that the plaintiff seeks to invoke by this proceeding. The exclusion of the new offence provisions from questions one and two reflects Queensland's acceptance that the restrictions thereby imposed on the plaintiff's liberty as a member of the HAMC give rise to a sufficient interest to support his claim to declarations of invalidity.

278 The drafting of questions one and two treats standing and the relief that the plaintiff claims as discrete inquiries and not as aspects of the single inquiry of whether the plaintiff's claim is a "matter"[227]. The requirement that there be a "matter" engaging federal jurisdiction reflects the separation of powers under the Constitution. The Court does not have authority to determine an abstract question of the validity of a State law divorced from a real controversy about an immediate right, duty or liability of the plaintiff grounding the relief that he claims[228]. If, as Queensland, the Commonwealth and Victoria contend, the relief claimed by the plaintiff is hypothetical, there is no "matter" to engage the jurisdiction of the Court. The fact that the plaintiff claims declaratory relief respecting the validity of State laws that have not been the subject of attempted

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**225** Constitution, s 76(i).

**226** *Judiciary Act* 1903 (Cth), s 30(a).

**227** *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 550-551 per Mason J; [1980] HCA 53; *Croome v Tasmania* (1997) 191 CLR 119 at 132-133 per Gaudron, McHugh and Gummow JJ; [1997] HCA 5; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 262 [37] per Gaudron, Gummow and Kirby JJ; [1998] HCA 49; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 611 [45] per Gaudron J; [2000] HCA 11; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 35 [50]-[51] per French CJ, 68 [152] per Gummow, Crennan and Bell JJ, 99 [272]-[273] per Hayne and Kiefel JJ; [2009] HCA 23; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 659 [68] per Gummow, Hayne, Crennan and Bell JJ; [2012] HCA 31.

**228** *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 267 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ; [1921] HCA 20; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 610-611 [42]-[43] per Gaudron J, 630-631 [103]-[104] per Gummow J, 646-647 [147]-[148] per Kirby J, 660-661 [183]-[184] per Hayne J; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 389 [5] per Gleeson CJ, 405-406 [62] per Gaudron and Gummow JJ, 449 [204] per Kirby J, 458-459 [242] per Hayne J; [2002] HCA 16. See also *United Public Workers v Mitchell* 330 US 75 at 90-91 (1947).

enforcement against him does not make the proceeding hypothetical[229]. However, as the plaintiff's argument accepts, he must identify an interest greater than the interest of members of the public generally in the validity of the challenged legislation to give rise to a justiciable controversy entitling him to declaratory relief[230].

279 The plaintiff identifies his sufficient interest as arising from his participation in an organisation that the Parliament has declared to be a "criminal organisation" for the purposes of the Code, the Bail Act and the Liquor Act, and which may be a "relevant association" for the purposes of the VLAD Act. He contends that he may be made subject to significant penalties and other restrictions that do not apply to other members of the public.

280 In the case of the VLAD Act, the plaintiff's analysis fails at the outset. Proof that a person is a participant in an organisation that has been declared to be a criminal organisation by the Parliament or the executive is not an integer of liability under the VLAD Act. The VLAD Act attaches penal consequences to participation in a "relevant association" in specified circumstances. Liability to a mandatory further sentence or sentences on conviction for a "declared offence" arises where the offence is committed for the purposes of, or in the course of participating in the affairs of, a "relevant association". Any group of three or more persons, whether associated formally or informally and whether the group is lawful or unlawful, may be a relevant association under the VLAD Act. The plaintiff's participation in the HAMC will only found liability to a further sentence or sentences under the VLAD Act in the event he were to commit a declared offence for the purposes of, or in the course of participating in the affairs of, the HAMC. Were the plaintiff to cease to be a participant in the affairs of the HAMC he would remain subject to the VLAD Act in the same way that the public of Queensland generally is subject to it.

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**229** *Toowoomba Foundry Pty Ltd v The Commonwealth* (1945) 71 CLR 545 at 570 per Latham CJ; [1945] HCA 15; *Croome v Tasmania* (1997) 191 CLR 119 at 126 per Brennan CJ, Dawson and Toohey JJ, 132-136 per Gaudron, McHugh and Gummow JJ.

**230** *Toowoomba Foundry Pty Ltd v The Commonwealth* (1945) 71 CLR 545 at 570 per Latham CJ, 584 per Williams J; *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 257 per Dixon J; [1949] HCA 44; *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 530-531 per Gibbs J; *Croome v Tasmania* (1997) 191 CLR 119 at 126-127 per Brennan CJ, Dawson and Toohey JJ, 137-138 per Gaudron, McHugh and Gummow JJ; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 267 [51] per Gaudron, Gummow and Kirby JJ.

281 Turning to the challenged sentencing provisions of the Code and the Bail Act provisions, the plaintiff contends that his admitted participation in an organisation declared by the Parliament to be a "criminal organisation" gives him an "entitle[ment] to know"[231] whether the provisions are valid. His interest is suggested to be more than a "mere intellectual or emotional concern"[232]: the validity of the laws affects whether he should disassociate from the HAMC "so as to avoid the operation of those provisions".

282 The plaintiff relies on *Croome v Tasmania*[233] as demonstrating the justiciability of his challenge. In *Croome*, Brennan CJ, Dawson and Toohey JJ rested their conclusion that the plaintiffs' claim to declaratory relief raised a justiciable controversy on the plaintiffs' admission to having engaged in the conduct criminalised under the challenged provisions of the *Criminal Code* (Tas)[234]. The plaintiffs were liable to prosecution, conviction and punishment if those provisions were valid laws of Tasmania[235]. Gaudron, McHugh and Gummow JJ in their joint reasons observed that the conduct of the plaintiffs' personal lives was in significant respects overshadowed by the impugned provisions[236]. Their Honours considered the fact that the plaintiffs faced possible criminal prosecution to be a sufficient interest to support their claim for declaratory relief: a claim that was not denied because it was brought to establish the legal character of a state of affairs that had not yet come to pass[237]. They rejected that the question raised by the proceeding was abstract or hypothetical[238]. That rejection was because the plaintiffs had a "real interest" in

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**231** *University of Wollongong v Metwally* (1984) 158 CLR 447 at 458 per Gibbs CJ; [1984] HCA 74.

**232** *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 530 per Gibbs J. See also *Edwards v Santos Ltd* (2011) 242 CLR 421 at 436 [37] per Heydon J; [2011] HCA 8.

**233** (1997) 191 CLR 119.

**234** *Croome v Tasmania* (1997) 191 CLR 119 at 127.

**235** *Croome v Tasmania* (1997) 191 CLR 119 at 127.

**236** *Croome v Tasmania* (1997) 191 CLR 119 at 138.

**237** *Croome v Tasmania* (1997) 191 CLR 119 at 138.

**238** *Croome v Tasmania* (1997) 191 CLR 119 at 138 noting *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582 per Mason CJ, Dawson, Toohey and Gaudron JJ; [1992] HCA 10 and *Oil Basins Ltd v The Commonwealth* (1993) 178 CLR 643 at 649 per Dawson J; [1993] HCA 60.

knowing if the impugned provisions were valid in circumstances in which the State of Tasmania and the Director of Public Prosecutions did not take the position that no offences had been committed nor that offences were not continuing[239].

283 The plaintiff's argument draws on the joint reasons of Gaudron, McHugh and Gummow JJ by asserting that his freedom of action is overshadowed by the challenged sentencing provisions of the Code and the challenged provisions of the Bail Act. However, the analogy with *Croome* does not hold good. Unlike the plaintiffs' real interest that supported the relief claimed in *Croome*, no immediate right, duty or liability[240] would be established by the grant of the relief here claimed. A declaration that the sentencing provisions of the Code and the Bail Act provisions are invalid would have no effect on the plaintiff's obligation to comply with the law. The "entitlement to know" the validity of a law, identified by Gibbs CJ in *University of Wollongong v Metwally*, arises when the controversy concerns the obligation to observe the challenged law[241]. The plaintiff's claim is of an entitlement to know whether, should he commit an offence, his participation in the HAMC will expose him to a more severe penalty (or, in the case of the Bail Act, whether, if he is charged with any offence, his membership of the HAMC will subject him to additional restrictions).

284 In *O'Shea v Littleton*, a group of residents of Cairo, Illinois brought an action claiming injunctive relief against the claimed violation of their constitutional rights[242]. The violations were alleged to arise from the pattern of conduct of two judicial officers with respect to bond-setting, sentencing and jury-fee practices. None of the plaintiffs was serving a sentence imposed by either defendant and none was on trial or awaiting trial before either defendant. Among the reasons for the Supreme Court of the United States' conclusion that the action did not constitute a "case" or "controversy" within Art III of the Constitution was the view that anticipating whether the plaintiffs would be charged with any crime, and made to appear before either defendant, would take

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**239** *Croome v Tasmania* (1997) 191 CLR 119 at 138-139.

**240** *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 612-613 [47]-[50] per Gaudron J.

**241** *University of Wollongong v Metwally* (1984) 158 CLR 447 at 458; *Croome v Tasmania* (1997) 191 CLR 119 at 138 per Gaudron, McHugh and Gummow JJ; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 408 [70], [72] per Gaudron and Gummow JJ.

**242** 414 US 488 (1974).

the Court into the realm of "speculation and conjecture"[243]. The Supreme Court considered that it should proceed upon the assumption that the plaintiffs would conduct their activities within the law[244]. The different constitutional context in which these observations were made[245] does not detract from their aptness to the present challenge.

285 Question two should be answered "Yes". And as the Commonwealth submits, question one should be answered "By reason of the answer to question 2, the plaintiff's claims for that declaratory relief do not give rise to a 'matter' within the meaning of s 76(i) of the Constitution or s 30(a) of the *Judiciary Act* 1903 (Cth) and accordingly the plaintiff has no standing to seek that relief".

The validity of the new offence provisions

286 The new offence provisions of the Code are set out in full in the joint reasons and it suffices here to refer to them in summary form. Section 60A(1) makes it an offence for a participant in a criminal organisation to be knowingly present in a public place with two or more other persons who are participants in a criminal organisation. "Participant" is defined in wide terms[246]. It is a defence to an offence against s 60A(1) 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 ("the defence")[247].

287 Section 60B(1) makes it an offence for a participant in a criminal organisation to enter, or attempt to enter, a prescribed place. Section 60B(2) makes it an offence for a person who is a participant in a criminal organisation to attend, or attempt to attend, a prescribed event. "Participant" is defined in the same wide terms as for the s 60A(1) offence[248]. Offences against s 60B(1) and (2) are subject to the defence[249]. A "prescribed place" is a place declared under a

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**243** *O'Shea v Littleton* 414 US 488 at 497 (1974).

**244** *O'Shea v Littleton* 414 US 488 at 497 (1974).

**245** *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 530 per Gibbs J; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 603 [21] per Gleeson CJ and McHugh J.

**246** *Criminal Code*, s 60A(3).

**247** *Criminal Code*, s 60A(2).

**248** *Criminal Code*, s 60B(4).

**249** *Criminal Code*, s 60B(3).

regulation to be a prescribed place[250] and, as earlier noted, the HAMC's clubhouse is declared to be a prescribed place.

288 A "prescribed event" is an event declared under a regulation to be a prescribed event[251]. Queensland's acceptance that the plaintiff's challenge to the new offence provisions constitutes a "matter" engaging the Court's original jurisdiction does not extend to the validity of s 60B(2) because to date no event has been declared to be a prescribed event. Nothing turns on Queensland's reservation in this respect.

289 Section 60C(1) makes it an offence for a participant in a criminal organisation to recruit, or attempt to recruit, anyone to become a participant in a criminal organisation. "Participant" has the same wide meaning as for the s 60A(1) offence[252]. The offence is subject to the defence[253].

290 The hinge for the plaintiff's second *Kable* argument, insofar as the argument applies to the new offence provisions, is the manner of proving that the organisation in which the accused is a participant is a "criminal organisation". Although the provision is set out in the reasons of other members of the Court, it is convenient to extract the definition in full in these reasons.

291 Section 1 of the Code defines "criminal organisation" to mean:

> "(a) an organisation of 3 or more persons –
>
> (i) who have as their purpose, or 1 of their purposes, engaging in, organising, planning, facilitating, supporting, or otherwise conspiring to engage in, serious criminal activity as defined under the *Criminal Organisation Act* 2009; and
>
> (ii) who, by their association, represent an unacceptable risk to the safety, welfare or order of the community; or
>
> (b) a criminal organisation under the *Criminal Organisation Act* 2009; or
>
> (c) an entity declared under a regulation to be a criminal organisation."

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**250** *Criminal Code*, s 60B(4).

**251** *Criminal Code*, s 60B(4).

**252** *Criminal Code*, s 60C(3).

**253** *Criminal Code*, s 60C(2).

292 "Serious criminal activity" is relevantly defined under the *Criminal Organisation Act* 2009 (Q) ("the CO Act") to mean a "serious criminal offence"[254], which is in turn defined to include an indictable offence punishable by at least seven years' imprisonment or an offence under the Code that is mentioned in Sched 1 to the CO Act[255]. The three characteristics stated in par (a) mirror the characteristics of which the Commissioner of Police is required to satisfy the Supreme Court of Queensland before that Court is authorised to declare that an organisation is a "criminal organisation" under the CO Act[256].

293 In his written submissions, the plaintiff states that his second *Kable* argument requires that account be taken of the objects of the legislative package passed by the Legislative Assembly of Queensland on 15 October 2013 comprising the VLAD, Disruption and Tattoo Acts. He identifies those objects by reference to s 2(1)(a) of the VLAD Act, which states that one object of the Act is to "disestablish associations that encourage, foster or support persons who commit serious offences" and by reference to the statement of the Premier of Queensland on the introduction of the Bills for the VLAD, Disruption and Tattoo Acts in the Legislative Assembly that they were "not designed to just contain or manage ['criminal motorcycle gangs']; they [were] designed to destroy them"[257]. Despite that stated intention, the plaintiff observes that the Parliament has not made it unlawful to be a member of any particular organisation; rather, the Parliament has determined that some motorcycle clubs are to be "branded as 'criminal organisations'" without judicial process. The intent of the legislative scheme is said to be the indirect attainment of that which the Parliament has not done directly, namely the destruction of organisations of the Parliament's choosing. In his reply, the plaintiff disavows any contention that invalidity is the consequence of the Parliament's choice to do indirectly what it has not done directly. On the hearing, the plaintiff encapsulated his second *Kable* argument as the conscription of the courts to do the legislature's and the executive's bidding by requiring the courts to treat certain individuals as "participants in organised crime" while denying the courts the power to engage in a genuine adjudicative process as to whether the person before the court is in fact "a participant in organised crime".

294 Before turning to the substance of the argument, it is to be observed that the special case does not raise any issue of the enlistment of the court to do the

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**254** *Criminal Organisation Act* 2009 (Q), s 6.

**255** *Criminal Organisation Act*, s 7.

**256** *Criminal Organisation Act*, s 10.

**257** Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 15 October 2013 at 3114.

executive's bidding. The declaration that the HAMC is a criminal organisation has been made by the Parliament of Queensland. No issue arises as to the scope of executive power to amend the Regulation by the declaration that additional entities are "criminal organisations"[258]. The plaintiff's submissions as to the possibility that the Beefsteak and Burgundy Club, the Australian Bar Association and the Australian Medical Association might be declared to be criminal organisations[259] may be left to a case in which the issue is presented.

295 The second *Kable* argument draws on the language of certain statements in *South Australia v Totani*[260]. The *Serious and Organised Crime (Control) Act* 2008 (SA) ("the SOCC Act"), considered in that case, empowered the Attorney-General for South Australia, on the application of the South Australian Commissioner of Police, to make a declaration respecting an organisation if he was satisfied of certain matters[261]. The Magistrates Court of South Australia was required upon the application of the Commissioner of Police to make a control order against a person upon proof that the person was a member of a declared organisation[262]. The adjudicative role of the Court was confined to the determination of whether the defendant was a member of the declared organisation within the broadly defined concept of membership under the SOCC Act[263]. The constitutional infirmity of s 14(1) of the SOCC Act lay in the substantial recruitment of the judicial function of the Magistrates Court of South Australia to an essentially executive process[264].

296 By contrast, the new offence provisions create criminal offences having as an element of liability proof that the accused is a participant in a criminal organisation. At the trial of an accused for such an offence, the court's powers and functions are exactly the same as on the trial of an accused for any criminal offence.

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**258** *Criminal Code*, s 708A.

**259** [2014] HCATrans 187 at lines 887-888.

**260** (2010) 242 CLR 1 at 36 [43] per French CJ, 80 [200] per Hayne J, 160 [436] per Crennan and Bell JJ, 169-170 [470] per Kiefel J.

**261** *Serious and Organised Crime (Control) Act* 2008 (SA), s 10(1).

**262** *Serious and Organised Crime (Control) Act*, s 14(1).

**263** *South Australia v Totani* (2010) 242 CLR 1 at 25 [17] per French CJ.

**264** *South Australia v Totani* (2010) 242 CLR 1 at 52 [82] per French CJ, 67 [149] per Gummow J, 160 [436] per Crennan and Bell JJ, 173 [481] per Kiefel J.

297 At the trial of an offence under ss 60A, 60B or 60C of the Code ("the new Code offences"), the prosecution may establish that the organisation in which the accused is a participant is a "criminal organisation" in one of three ways. It may adduce evidence of facts and circumstances that establish that the organisation has the characteristics of a criminal organisation as defined (par (a)); it may tender an order made by the Supreme Court of Queensland under the CO Act declaring that the organisation is a criminal organisation (par (b))[265]; or it may invite the court to take judicial notice of a declaration in a regulation that the organisation is a criminal organisation (par (c))[266]. It is only in a case in which the prosecution essays the first method of proof that the jury must be satisfied on the criminal standard that the organisation has as one of its purposes engaging in or supporting serious criminal activity. In a case in which the prosecution relies on the second method of proof, the jury is not required to find that the organisation has as one of its purposes engaging in or supporting serious criminal activity. Nonetheless, the CO Act declaration reflects the finding of the Supreme Court of Queensland on the civil standard that the organisation does have such a purpose.

298 The plaintiff's second *Kable* argument accepts that there is no compromise of the institutional integrity of the court on the trial of an offence in a case in which the prosecution proves that the organisation in which the accused is a participant is a criminal organisation pursuant to pars (a) or (b) of the definition. In each case, that the organisation has, as at least one of its purposes, the purpose of engaging in or supporting serious criminal activity has been established by a curial proceeding.

299 The claimed compromise of institutional integrity arises on the prosecution of an offence in which the fact that the organisation is a criminal organisation is established by declaration under the Regulation. This is because the court has no role in the determination of the organisation's criminal purpose or purposes.

300 Queensland and the interveners point to the defence, submitting that the issue of the organisation's criminal purpose or purposes is determined by the court. They contend that no compromise to the court's integrity arises from the creation of offences that impose a reverse onus of proof with respect to an element of liability[267]. Victoria notes that, in a case in which the prosecution

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**265** *Criminal Organisation Act*, s 136(2).

**266** *Evidence Act* 1977 (Q), s 43(b).

**267** *The Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1 at 12 per Knox CJ, Gavan Duffy and Starke JJ, 17-18 per Isaacs J; [1922] HCA 31; *Orient Steam Navigation Co Ltd v Gleeson* (1931) 44 CLR 254 at 263 per Dixon J;

(Footnote continues on next page)

proves on the criminal standard the criminal purpose or purposes of the organisation (par (a)), there will be no room for the defence. As a practical matter, Victoria submits, there is likely to be little room for the defence to operate in the case of an organisation that has been declared under the CO Act. The provision of the defence, in Victoria's submission, is best understood as guarding against the risk that an organisation is wrongly declared by regulation to be a criminal organisation.

301 In a case in which the accused raises the defence, the court tries an issue as to the organisation's purpose or purposes. However, it does not follow, in the event of conviction, that the court is satisfied that the organisation has as one of its purposes engaging in or supporting criminal activity. The failure to establish the probability that an organisation does not have any criminal purpose is no evidence that it has such a purpose or purposes.

302 The special case records that, at the date of the enactment of the challenged legislation, there were 13 "criminal motorcycle gangs" in Queensland. Parliament on that date chose to declare 26 motorcycle clubs to be "criminal organisations". The Parliament's selection of the pejorative descriptor "criminal organisation" (and the provision of the defence) should not obscure that the court trying a new Code offence based on the accused's participation in an organisation declared under the Regulation to be a "criminal organisation" is not required to be satisfied that the organisation in fact has any criminal purpose or purposes. The plaintiff's complaint that in such a case "there has never been a judicial determination of the issue of the criminality of the organisation"[268] is not to the point. Liability does not depend upon the "criminality of the organisation", much less on proof that the accused is "a participant in organised crime". Liability arises in consequence of the choice to participate in an organisation that the Parliament has declared to be a "criminal organisation" in the circumstances proscribed in the new Code offences.

303 Subject to the qualification that the Parliament of a State may not enact a law which subjects a court in reality or appearance to direction from the executive as to the content of its judicial decisions[269], the Parliament may select whatever factum that it wishes to trigger a consequence that it determines[270].

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[1931] HCA 2; *Nicholas v The Queen* (1998) 193 CLR 173 at 189-190 [24] per Brennan CJ, 234-236 [152]-[156] per Gummow J, and see 273-274 [237]-[238], 277-278 [249] per Hayne J; [1998] HCA 9.

**268** [2014] HCATrans 187 at lines 512-513.

**269** *South Australia v Totani* (2010) 242 CLR 1 at 49 [71] per French CJ.

**270** *Baker v The Queen* (2004) 223 CLR 513 at 532 [43] per McHugh, Gummow, Hayne and Heydon JJ; [2004] HCA 45.

Legislative declaration of a state of affairs forming an element of liability does not, without more, amount to an impermissible direction to the court as to the content of its decision. It is a common feature of legislation criminalising the possession and supply of prohibited drugs. Here, the Parliament has chosen to declare certain entities to be "criminal organisations" and to make participation in those entities an element of liability in the new Code offences. On the trial of a new Code offence, the court performs its ordinary functions in the determination of whether guilt has been established.

304 Queensland accepts that, had the plaintiff attended the hearing of the special case knowing that two or more other members of the HAMC were also in attendance at the hearing, he might have been liable to conviction for the s 60A(1) offence. The acknowledgment of the singular reach of the provision does not engage the limitation on the legislative power of the Parliament of Queensland that arises under the *Kable* principle. And, as the joint reasons note, the plaintiff does not assert any other basis of constitutional infirmity.

305 The plaintiff's submissions do not address the provisions of the Liquor Act in terms. Correctly, Queensland submits that ss 173EB-173ED of that Act simply create offences of general application. The court on the trial of these offences, as on the trial of the new Code offences, performs its ordinary functions in the determination of criminal guilt.

306 For these reasons, the questions of law should be answered as follows:

1. Does the plaintiff have standing to seek a declaration that any, and which, of the provisions referred to in the schedule to these questions (other than *Criminal Code* (Q), ss 60A, 60B(1) and 60C, and *Liquor Act* 1992 (Q), ss 173EB-173ED) is invalid?

Answer: By reason of the answer to question 2, the plaintiff's claims for that declaratory relief do not give rise to a "matter" within the meaning of s 76(i) of the Constitution or s 30(a) of the *Judiciary Act* 1903 (Cth) and accordingly the plaintiff has no standing to seek that relief.

2. Is the relief which the plaintiff seeks in answer to question 3 (other than the relief sought in relation to the *Criminal Code* (Q), ss 60A, 60B(1) and 60C, and *Liquor Act* 1992 (Q), ss 173EB-173ED) hypothetical?

Answer: Yes.

3. Is any, and which, of the provisions referred to in the schedule invalid on the ground that it infringes the principle

of *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51?

Answer: No.

4. Who should pay the costs of the special case?

Answer: The plaintiff.