RULE OF LAW
INSTITUTE OF AUSTRALIA

Criminal Organisation Control Legislation and Cases

2008 -2013

Contents

The Rule of Law Institute of Australia is an independent, not-for-profit organisation which promotes discussion of the rule of law in Australia. It supports principles such as equality before the law, access to justice, the presumption of innocence, fair trials as well as accountability and transparency in government. The Institute makes submissions to Government committees on a range of issues, and provides education programs for teachers and students to understand current legal issues.

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Background

Most states and territories have passed laws allowing the police to apply for an organisation to be declared a criminal organisation. Once declared, control orders can be sought for individual members of the organisation. The conditions of the control orders vary depending on the jurisdiction, all make it a crime for a controlled member to associate with another controlled member. Typically, a controlled member is also prohibited from participating in certain forms of employment.

The following pages provide a summary of the legislation introduced to deal with the so called 'Bikie gangs' the term which is used by the press. The declaration of motorcycle clubs under this legislation has occurred so far in South Australia, New South Wales and Queensland – each attempt at a declaration has led to a High Court challenge. The following documents provide a summary of the legislation by year, by state/territory, a summary of recent changes to NSW's law, and a summary of the judgments in the 2013 High Court challenge to the Queensland laws.

The threat to procedural fairness, and the criminalisation of association is problematic from a rule of law perspective.

Suggested Reading

The Hon Kevin Lindgren AM QC, 'The Rule of Law: Its State of Health in Australia' - **http://www.ruleoflaw.org.au/wp-content/uploads/2012/10/Lindgren-Rule-of-Law-Its-State-of-Health-in-Australia-2012.pdf**

Malcolm Stewart, 'Individual Rights or the Imperitives of the state – which should be paramount under the rule of law?', pp. 8 - 13
http://www.ruleoflaw.org.au/wp-content/uploads/2012/09/Legal-Studies-Bikie-Gangs-Individual-Rights-or-the-Imperatives-of-the-State.pdf

Victorian Parliamentary Research Service:
http://www.parliament.vic.gov.au/publications/research-papers/8419-criminal-organisations-control-bill-2012

Queensland Parliamentary Library and Research Service:
http://www.parliament.qld.gov.au/documents/explore/ResearchPublications/ResearchBriefs/2012/RBR201209.pdf

Legislation and Case law By Year

2008

- The *Serious Organised Crime (Control) Act 2008 (SA)* came into force on the 15 May 2008.

2009

- The *Crimes (Criminal Organisations Control) Act 2009 (NSW)* came into force in March 2009.
- The South Australian Finks Motorcycle Club was declared under the *Serious Organised Crime (Control) Act 2008 (SA)* on 14 May 2009.
- The *Serious Crime Control Act 2009 (NT)* came into force on 11 November 2009.
- The *Criminal Organisation Act 2009 (Qld)* came into force on 3 December 2009.

2010

- The NSW Hells Angels Motorcycle Club was declared under the *Crimes (Criminal Organisations Control) Act 2009 (NSW)* in July 2010.
- The High Court strikes down provisions of the South Australian Act making it unusable but not invalid in *South Australia v Totani* [2010] HCA 39

2011

- The High Court strikes down the NSW Act in *Wainohu v NSW* [2011] HCA 24 (23 June 2011).

2012

- The *Crimes (Criminal Organisations Control) Act 2012 (NSW)* addressed the issues raised in *Wainohu v NSW* [2011] and came into force on 21 March 2012.
- Addressing aspects of *South Australia v Totani* [2010] and *Wainohu v NSW* [2011] the *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012 (SA)* came into force on 10 May 2012 and fixed the provisions struck down by the High Court.
- The Gold Coast Chapter of the Finks Motorcycle club was declared under the *Criminal Organisations Act 2009 (Qld)* on 1 June 2012.
- The *Criminal Organisations Control Act 2012 (Vic)* came into force on 3 November 2012.
- The *Criminal Organisations Control Act 2011 (WA)* came into force on 29 November 2012.

2013

- The High Court upholds the QLD Act in *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 (14 March 2013)
- The *Crimes (Criminal Organisations Control) Amendment Act 2013 (NSW)* came into force on 3 April 2013 and added provisions upheld in *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 (14 March 2013).

Legislation and Case Law By State

NSW – Crimes (Criminal Organisations Control) Act

- The *Crimes (Criminal Organisations Control) Act 2009 (NSW)* came into force in March 2009.
- The Hells Angels Motorcycle Club was declared under the Act in July 2010.
- The High Court strikes down the Act in *Wainohu v NSW* [2011] HCA 24 (23 June 2011).
- The *Crimes (Criminal Organisations Control) Act 2012 (NSW)* addressed the issues raised in *Wainohu v NSW* [2011] and came into force on 21 March 2012.
- The *Crimes (Criminal Organisations Control) Amendment Act 2013 (NSW)* came into force on 3 April 2013 and added provisions to the Act upheld in *Assistant Commisioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 (14 March 2013).

South Australia – Serious Organised Crime (Control) Act 2008

- The *Serious Organised Crime (Control) Act 2008 (SA)* came into force on the 15 May 2008.
- The Finks Motorcycle Club was declared under the Act on 14 May 2009.
- The High Court strikes down provisions of the Act making it unusable in *South Australia v Totani* [2010] HCA 39.
- Addressing aspects of *South Australia v Totani* [2010] and *Wainohu v NSW* [2011] the *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012* came into force on 10 May 2012 and fixed the provisions struck down by the High Court.

Queensland – Criminal Organisation Act 2009

- The *Criminal Organisation Act 2009 (Qld)* came into force on 3 December 2009.
- The Finks Motorcycle club was declared under the Act on 1 June 2012.
- The High Court upholds the Act in *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 (14 March 2013).

Western Australia

- The *Criminal Organisations Control Act 2011 (WA)* came into force on 29 November 2012.

Victoria

- The *Criminal Organisations Control Act 2012 (Vic)* came into force on 3 November 2012.

Northern Territory

- The *Serious Crime Control Act 2009* came into force on 11 November 2009.

Amendments to Crime (Criminal Organisations Control) Act 2012 (NSW)

Amendments to the *Crimes (Criminal Organisations Control) Act 2012 (NSW)* came into force on 3 April 2013. An earlier bill to amend the act was tabled in the NSW Legislative Assembly in late 2012, but did not progress, pending the decision of the High Court in *Assistant Commissioner Michael James Condon v Pompano Pty Ltd [2013] HCA 7 (14 March 2013)* ("the CO Act"). The High Court, in that case, unanimously upheld the CO Act. The Provisions relating to the process of declaring criminal intelligence upheld by the High Court in the Queensland legislation were included in the amendments to the *Crimes (Criminal Organisations Control) Act 2012 (NSW)*.

The amendments to the NSW Act were as follows:

- Declarations of criminal organisations are now made by the Supreme Court of NSW itself rather than the Attorney-General appointing an eligible judge of the Supreme Court, and the facts which the Supreme Court must consider before issuing a declaration of an organization have been expanded. (s7)

- The test to obtain a declaration has been modified to ensure a declaration can be sought in respect of an organization that has a national or global presence.(s7)

- Provisions have been included which allow mutual recognition of declarations and control orders from other states and territories. (s27A – 27Y)

- Serious criminal activity has been redefined so it is consistent with the s6 of the *Criminal Assets Recovery Act 1990 (NSW)*, and to include obtaining material benefits from conduct that constitutes any such offence regardless of whether any person has been charged or convicted of such an offence. (s3)

- To lengthen the term of a declaration from three to five years. The Second Reading speech for the amendment suggests this is required considering the amount of time and work required for police to make an application under the Act. (s9)

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The Use of Criminal Intelligence

- The Police Commissioner is no longer able to classify information as criminal intelligence which can be withheld from the respondent. A *criminal intelligence application* (s28G – 28H) must be made by the Commissioner to the Supreme Court for information to be declared:

    - Hearings for criminal intelligence declarations are held ex parte (s28I) and no notice of the hearing is to be given other than to the 'criminal intelligence monitor'.

    - A retired judicial officer or someone qualified to be appointed a judicial officer is to be appointed under the act as the 'criminal intelligence monitor'. The monitor is provided a copy of any criminal intelligence application (s28E) and appears at the hearing and under S28F:

'(2) The monitor may:

(a) for the purpose of testing the appropriateness and validity of the application:
(i) present questions for the applicant to answer
(ii) examine or cross-examine a witness, or

(b) make submissions to the Court about the appropriateness of granting the application.'

- The court may declare that information is criminal intelligence if it is satisfied it is criminal intelligence. s28M directs the court in exercising its discretion to have regard to whether matters mentioned in s28B (a) (i) – (iii) outweigh any unfairness to a respondent:

'**28B Objects of Part**

The objects of this Part are to:

(a) allow evidence that is or contains criminal intelligence to be admitted in applications under this Act without the evidence:

(i) prejudicing criminal investigations, or

(ii) enabling the discovery of the existence or identity of confidential sources of information relevant to law enforcement, or

(iii) endangering anyone's life or physical safety, and'

Michael James Condon v Pompano Pty Ltd [2013] HCA 7

The Assistant Commissioner of the Queensland Police filed an application on 1 June 2012 in the Supreme Court under s 8 of the *Criminal Organisations Act 2009 (Q)* seeking a declaration that the Finks Motorcycle Club, Gold Coast Chapter and Pompano Pty Ltd, said to be "part of" that Chapter, were a criminal organisation.

The CO Act sets out a three stage process as described by Gageler J in his judgement:

> 199. The COA provides for a three-stage process. Stage one is the declaration of criminal intelligence. Stage two is the declaration of a criminal organisation. Stage three is the making of a control order, or a public safety order or a fortification removal order.
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> 200. Stage one – the declaration of criminal intelligence – is anterior to the second and third stages. An application for a declaration of criminal intelligence must, by s 67, be decided before the information can be relied on in any substantive application.

In accordance with that process, prior to the application the applicant applied ex parte to the Supreme Court for particular information in the application to be declared "criminal intelligence". Section 66 of the CO Act had the effect that the application and the supporting material were not served on the respondent and the informant(s) whose information was relied upon could not be required to give evidence. By agreement between the parties a Special Case was referred to the High Court. The critical issue that emerged was whether the reliance upon criminal intelligence for the making of orders against the Club, when that criminal intelligence was not disclosed to the respondent as part of the earlier process was procedurally unfair and incompatible with the institutional integrity of the Qld Supreme Court as a Chapter III court.

In particular, the following matters were considered in the decision:

- The effect of the CO Act on the defining characteristics of the Supreme Court with regard to the making of declarations for criminal intelligence heard ex parte in a closed court, and the use of declared criminal intelligence in substantive proceedings where the respondent is to be excluded.

- Whether the institutional integrity of the Supreme Court is compatible with making a criminal organisation declaration.

- The limited time which the CO Act provided to a respondent may reply to an application for a criminal organization declaration.

- The role of the criminal organisation public interest monitor (the COPIM) who is appointed to review the criminal intelligence and make submissions about it to the Court.

Three judgments were delivered. French CJ held that the status of the Supreme Court as an independent and impartial tribunal was not impaired, and that while the use of ex parte hearings and anonymous informants presented an incursion on the open court principle and normal protections of procedural fairness, that this did not, 'impair the essential or defining characteristics of the Supreme Court as a court as to be beyond the legislative power of the Queensland Parliament.' (Paragraph 89)

French CJ:

> 68. The defining or essential characteristics of courts are not attributes plucked from a platonic universe of ideal forms. They are used to describe limits, deriving from Ch III of the Constitution, upon the functions which legislatures may confer upon State courts and the commands to which they may subject them. Those limits are rooted in the text and structure of the Constitution informed by the common law, which carries with it historically developed concepts of courts and the judicial function. Historically evolved as they are and requiring application in the real world, the defining characteristics of courts are not and cannot be absolutes. Decisional independence operates within the framework of the rule of law and not outside it[1]. Procedural fairness, manifested in the requirements that the court be and appear to be impartial and that parties be heard by the court, is defined by practical judgments about its content and application which may vary according to the circumstances. Both the open court principle and the hearing rule may be qualified by public interest considerations such as the protection of sensitive information and the identities of vulnerable witnesses, including informants in criminal matters.
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> …
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> 70. The ordinary rule of open justice in the courtroom may give way to the need for confidentiality in order to avoid prejudice to the administration of justice in cases in which publicity would destroy the subject matter of the litigation[2]…

French CJ found that the COPIM "provides a limited measure of redress for the imbalance between the parties in respect of the use criminal intelligence" (Paragraph 87).

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[1] *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* [2012] HCA 58; (2012) 87 ALJR 162; 293 ALR 450.

[2] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 560–561 [41] per Gummow, Hayne, Heydon and Kiefel JJ citing Deane J in *Australian Broadcasting Commission v Parish* (1980) 29 ALR 228 at 255.

Hayne, Crennan, Kiefel and Bell JJ in a joint judgment found the court was able to act fairly and impartially, and that despite departing from usual incidents of procedure and judicial process, that they did not impair the essential characteristics of the Supreme Court, or its continued integrity. They distinguished the earlier decisions in *Kable*, *International Finance*, *Totani* and *Wainohu*, emphasizing that procedural fairness is a flexible term and it must be examined against the totality of the process in particular matters.

> 166. In deciding any application for declaration of an organisation as a criminal organisation, the Supreme Court would know that evidence of those assertions and allegations that constituted criminal intelligence had not been and could not be challenged directly. The Court would know that the respondent and its members could go no further than make general denials of any wrongdoing of the kind alleged. What weight to give to that evidence would be a matter for the Court to judge[3].
>
> 167. Contrary to a proposition which ran throughout the respondents' submissions in this case, noticing that the Supreme Court must take account of the fact that a respondent cannot controvert criminal intelligence does not seek to deny the allegation of legislative invalidity by asserting that the Supreme Court can be "relied on" to remedy any constitutional infirmity or deficiency in the legislative scheme. Rather, it points to the fact that under the impugned provisions the Supreme Court retains its capacity to act fairly and impartially. Retention of the Court's capacity to act fairly and impartially is critical to its continued institutional integrity.
>
> 168. In this respect, it is useful to contrast the impugned provisions of the CO Act with the CCOC Act considered in *Wainohu.* It will be recalled that the CCOC Act provided that an eligible judge need not give reasons for declaring an organisation to be a declared organisation. That an eligible judge could choose to do so was not to the point[4]. The CCOC Act was held invalid as repugnant to or inconsistent with the institutional integrity of the Supreme Court of New South Wales. But in the present case, the CO Act does not in any way alter the duty of the Supreme Court to assess the cogency and veracity of the evidence that is tendered in an application for a declaration of an organisation as a criminal organisation.

On the question of addressing the time provided for the respondents to reply to an application:

> 172. …Given the well-established principle[5] that the CO Act should be read as taking the Supreme Court "as it finds it", neither s 9 nor s 106 should be read as disclosing a clear intention to prevent the Supreme Court from acting upon either a response filed later than the time fixed by the CO Act or an affidavit filed after a response was, or should have been, filed. The challenge to the validity of these provisions should be rejected.

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3 See *K-Generation* (2009) 237 CLR 501 at 543 [148].

4 (2011) 243 CLR 181 at 220 [69] per French CJ and Kiefel J, 228 [103] per Gummow, Hayne, Crennan and Bell JJ.

5 *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW* (1956) 94 CLR 554 at 560; [1956] HCA 22.

Both of the above judgments found that the CO Act needed to be read in the context of the Court's inherent powers to govern its own processes and to make its own determinations throughout the three stage process, such as whether to accept certain evidence and the weight that should be accorded such evidence. Analogies were made with the process adopted in public interest immunity matters where the respondent is prevented from viewing the evidence relied upon.

Gaegler J agreed with French CJ that all the questions posed should be answered in the negative, however, he added some comments with regard to the nature of procedural fairness, and some reservations with regard to the Act. In his view, the criminal intelligence ex parte process upon which the second and third stages of the CO Act processes depend were fundamentally contrary to procedural fairness but the entirety of the process was saved by the Court's inherent power to stay the proceedings on the ground of miscarriage of justice.

> 177. My view, in short, is that Ch III of the Constitution mandates the observance of procedural fairness as an immutable characteristic of a Supreme Court and of every other court in Australia. Procedural fairness has a variable content but admits of no exceptions. A court cannot be required by statute to adopt a procedure that is unfair. A procedure is unfair if it has the capacity to result in the court making an order that finally alters or determines a right or legally protected interest of a person without affording that person a fair opportunity to respond to evidence on which that order might be made.
>
> 178. The criminal intelligence provisions of the COA have the potential to result – in some but not all cases – in the Supreme Court of Queensland making a declaration of a criminal organisation or a control order or other order without the organisation or individual affected being afforded a fair opportunity to respond to evidence on which the declaration or order might be made. The criminal intelligence provisions are not rendered compatible with the constitutional requirement for procedural fairness by the presence of the criminal organisation public interest monitor ("the COPIM"), nor by the ability of the Supreme Court of Queensland to determine the weight to be given to declared criminal intelligence, nor by the width of the discretion allowed to the Supreme Court of Queensland in making a declaration of a criminal organisation or a control order or other order under the COA. The criminal intelligence provisions are saved from incompatibility with Ch III of the Constitution only by the capacity for the Supreme Court of Queensland to stay a substantive application in the exercise of inherent jurisdiction in a case where practical unfairness becomes manifest.
>
> 209. … It is not enough that a decision reached by an unfair process be "correct" in the result. The relevant inquiry is always "what procedures should have been followed?", never "what decision should the decision-maker have made[?]" or "what reasons did the decision-maker give for the conclusion reached[?]"[6]. The application of the principle to a court is stronger because the appearance of a fair hearing in a court and the maintenance of confidence in the curial process are constitutionally mandated.

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[6] *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 97 [19].

> 210. Yet another solution is suggested to lie in the width of the discretion allowed to the Supreme Court of Queensland in making a declaration of a criminal organisation or a control order, or a public safety order or a fortification removal order. This, on analysis, is only a slight variation of the suggestion that the solution lies in the ability to determine the weight to be given to declared criminal intelligence. It admits of the same principled response. A discretion as to the result is no cure for a flaw in the process.
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> 211. To attempt to overcome a want of procedural fairness in a court by relying on the court to compensate in the way the court reasons to a decision is, in the long run, self-defeating. The attempted resolution leverages off the institutional integrity of the court. The problem is that the appearance, if not the actuality, of that institutional integrity will not endure if there is manifest unfairness in the procedure of the court.

The variance in these judgments suggests that there is no single recipe for legislation allowing for control orders to be made without the respondent being able to challenge the evidence upon which they are based. Courts will look very closely at each aspect of the process to reach an understanding to the resulting totality and whether the role that is assigned to a court is compatible with its institutional integrity.