



HIGH COURT OF AUSTRALIA

11 November 2010

STATE OF SOUTH AUSTRALIA v TOTANI & ANOR [2010] HCA 39

The High Court today held s 14(1) of the *Serious and Organised Crime (Control) Act 2008 (SA)* ("the Act") and a control order made under it constitutionally invalid.

In December 2008, the South Australian Commissioner of Police applied to the Attorney-General for South Australia for a declaration under s 10(1) of the Act in respect of the Finks Motorcycle Club Inc. Section 10(1) of the Act empowers the Attorney-General to make a declaration if he is satisfied that the members of an organisation associate for the purposes of organising, planning, facilitating, supporting or engaging in serious criminal activity and the organisation represents a risk to public safety and order in South Australia. The term "serious criminal activity" is defined to mean the commission of indictable offences or certain summary offences prescribed by regulation.

On 14 May 2009, the Attorney-General made the declaration sought by the Commissioner. Eleven days later, the Commissioner applied to the Magistrates Court of South Australia for a control order against Donald Hudson under s 14(1) of the Act. Mr Hudson was not notified of the application and was not required to be notified. The Attorney-General later applied for a control order against Sandro Totani. Section 14(1) requires the Magistrates Court, on application by the Commissioner, to make a control order against a person if the Court is satisfied that the person is a member of a declared organisation. A "member" is defined to include an associate or prospective member, a person who identifies as belonging to the organisation and a person who is treated by the organisation or persons who belong to the organisation, in some way, as if the person belongs to the organisation. By virtue of s 35 of the Act, any person who associates on six or more occasions during a period of 12 months with a member of a declared organisation or a person the subject of a control order made under s 14(1) is guilty of an offence punishable by imprisonment for up to five years.

The Magistrates Court made a control order in respect of Mr Hudson, prohibiting him from associating with other persons who are members of declared organisations and from possessing a dangerous article or prohibited weapon. Mr Hudson and Mr Totani then commenced proceedings in the Supreme Court of South Australia seeking a declaration that s 14(1) of the Act was invalid. The Supreme Court held that the sub-section was not valid and that the control order made in respect of Mr Hudson was void. The State of South Australia appealed against this decision to the High Court.

The High Court determined that s 14(1) was invalid. A majority of the Court considered that the provision authorised the executive to enlist the Magistrates Court in implementing decisions of the executive and that the manner in which that occurred was incompatible with the Magistrates Court's institutional integrity. In making a declaration under s 10(1) in respect of an organisation, the Attorney-General needed only to be satisfied that a member or members of the organisation committed a criminal offence. Those members did not necessarily include a person against whom the Commissioner of Police later sought a control order under s 14(1). As a result, s 14(1)

would oblige the Magistrates Court to impose serious restraints on a person's liberty whether or not that person had committed or was ever likely to commit a criminal offence.

The Court dismissed South Australia's appeal and ordered it to pay the costs of Mr Totani and Mr Hudson.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*