IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

NO B59 OF 2012

BETWEEN: **ASSISTANT COMMISSIONER MICHAEL JAMES CONDON**
Applicant

AND: **POMPANO PTY LTD (ACN 010 634 689)**
First Respondent

FINKS MOTORCYCLE CLUB, GOLD COAST CHAPTER
Second Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Filed on behalf of the Attorney-General of the Commonwealth (Intervening) by:

Australian Government Solicitor
50 Blackall Street
Barton ACT 2600
DX5678 Canberra

Date of this document: 28 November 2012

Contact: Asaf Fisher / Andrew Buckland

File ref: 12062099
Telephone: 02 6253 7479 / 02 6253 7024
Facsimile: 02 6253 7303
E-mail: asaf.fisher@ags.gov.au / andrew.buckland@ags.gov.au

PART I PUBLICATION

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

PART II INTERVENTION

2. The Attorney-General of the Commonwealth (**Attorney-General**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART III LEAVE FOR INTERVENTION

3. Not applicable.

PART IV LEGISLATIVE PROVISIONS

4. The Attorney-General agrees that the relevant legislative provisions are those contained in Reprint No 1B of the *Criminal Organisation Act 2009* (Qld) (**Act**), which is attached to the Respondents' submissions and is the version of the Act currently in force.

PART V ARGUMENT

A SUMMARY

5. In summary, the Commonwealth submits:

   5.1. Ch III of the Constitution requires that all courts, as part of the integrated Australian judicial system, maintain their institutional integrity;

   5.2. the institutional integrity principle does not amount to the application of a strict separation of powers doctrine to the States;

   5.3. the institutional integrity of a court does require the maintenance of its essential or defining characteristics, which set it apart from other decision-making bodies;

   5.4. one such characteristic is that a court, when exercising judicial power, performs its functions in accordance with the traditional judicial process, including the requirements of procedural fairness;

   5.5. what procedural fairness requires in any particular case will depend on the nature of the proceedings, the interests in issue and the impact of the

proceedings on persons beyond the parties and indeed the public generally;

5.6. the performance of a court's functions in accordance with the traditional judicial process, may in appropriate circumstances accommodate closed hearings or ex parte hearings;

5.7. Parliament may prescribe how the requirements of procedural fairness are to be met in a given matter as part of the process of defining the jurisdiction of a court in that matter; and

5.8. the outer limits of a Parliament's power in this area may be expressed this way: the legislation should not go so far as to modify the court's traditional procedures and remove their flexibility to such a degree that the court is compelled not to act fairly in the face of relevant circumstances.

6. The Commonwealth submits that Question (vi) should be answered "no". The answers to Questions (i)-(v) will depend on a careful construction of the Act, both on its own and in the context of the broader principles of the judicial process under Queensland law. An available construction of the Act would see each of Questions (i) to (v) answered "no". No submissions are made in relation to Question (vii).

B THE SCOPE OF THE CHALLENGE TO THE ACT

7. While the reserved questions are limited to the validity of some *particular sections* of the Act on Ch III grounds, it is necessary to start with a *broader view* of the key objects of the Act and the structural means it adopts to effect its purposes. Within that broader perspective, the reserved questions may properly be situated and answered.[1]

Objects

8. The Act's broad objective is to disrupt and restrict the activities of organisations involved in serious criminal activity and of the members and associates of such organisations: s 3.

Structure

9. Three points concerning the structure of the Act should be noted. First, the Act is structured in a way that separates the determination of whether an organisation is a "criminal organisation" from the determination whether information is

---

[1] See the approach commended in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11] (Gummow, Hayne, Heydon and Kiefel JJ) ('*Gypsy Jokers*'); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 519 [46] (French CJ) ('*K-Generation*').

"criminal intelligence", and in turn from the proceedings in which control orders, public safety orders or fortification removal orders will be made under the Act.

10. Thus, Parts 3-5 of the Act provide for the making of three different types of substantive orders regulating the activities of persons who have a requisite connection to criminal activity or threats to public safety. They are: (i) control orders (Part 3, particularly s 18); (ii) public safety orders (Part 4, particularly s 28); (iii) and fortification removal orders (Part 5, particularly s 43).

11. The Act vests the power to make those orders in the Supreme Court of Queensland (**Court**), not the executive.[2] The Respondents do not assert any constitutional impediment per se to prevent a Ch III court – at Federal or State level – being vested with an original jurisdiction to make the type of declaratory orders in question here, as opposed to being limited to judicial review of an executive decision to make the type of order. One comes to two further structural aspects of the Act to find the Respondents' challenges.

12. The *second* structural aspect is that some of the criteria that the Court must or may consider in deciding whether to make any of the three orders hinge on the existence of a "criminal organisation": ss 18(1)(a), 18(2)(b), 28(2)(b), 43(1)(b)(ii). The Act has chosen to separate out as a discrete matter for the Court to determine whether a particular organisation should be declared as a criminal organisation for the purposes of the Act: see the definition of "criminal organisation" in the Dictionary, and the provisions of Part 2.

13. The legal technique operating here is a form of statutory estoppel.[3] A valid determination by the Court that an organisation meets the description of "criminal organisation" determines that question conclusively when the Court, in a later matter, considering whether to make any of the three types of orders, has to decide if a particular organisation is a "criminal organisation". The Court on the later occasion cannot re-open that question as the Act says it has been conclusively determined in the former matter.[4] The persons bound by the statutory estoppel include not just the organisation but members of the organisation and associates of such members: s 18(1)(a) and 18(2)(b). They form the statutory "privies" of the organisation.

14. The Respondents do not challenge per se the structural separation into two matters of the questions of "is this organisation a criminal organisation" and "should I make an order on that basis that it is a criminal organisation plus other relevant matters". A declaration that an organisation is a criminal organisation

---

2 Compare the scheme upheld in *Gypsy Jokers* (2008) 234 CLR 532 where the power to make the fortification removal order was vested in the executive and made the subject of statutory judicial review to a State Supreme Court.

3 See, e.g.., the position under the former *Bankruptcy Act 1869* (UK): *Ex parte Learoyd; in re Foulds* (1878) 10 Ch D 3.

4 There is a tightly controlled ability for the association or its members to apply for revocation of the declaration: ss 13-15.

under s 10, if valid and not revoked, thus operates on the rights of persons both presently and prospectively: presently, as it directly affects the reputation of the organisation and indirectly that of its known members and associates; prospectively, because in a later application for an order against that organisation, a member or associate, it will conclusively determine that particular question within the larger controversy.

15. The Respondents' challenge is in form a narrower one, namely that one of three cumulative criteria which the Court must be satisfied of as a jurisdictional fact under s 10(1) before it can come to exercise its discretion, strays too far into a policy exercise devoid of adequate legal standards. This challenge will be addressed below: **Section G**. If this challenge were good, and it is submitted it is not, it is difficult to see how any of Parts 3-5 could survive as they are so dependent on the concept of a criminal organisation as declared by the Court under Part 2.

16. The *third* relevant structural aspect of the Act is that in Part 6 it separates out as a further discrete, and indeed anterior, matter the question whether certain information which might be relevant in a substantive application under the Act has such a need to be kept from public view that it should be declared as "criminal intelligence".

17. This is a similar, but not identical, type of question that a court may consider in a public interest immunity claim. Similar in that there are two competing public interests involved: one that justice be done between the parties in a matter by all relevant evidence being before the Court; the second that the court process itself not be the cause of harm to the public interest by requiring or permitting the disclosure of information to one of the parties or the public generally which disclosure is of itself harmful.[5] The types of harm from disclosure are those identified in the objects provision of s 60, and are familiar from the public interest immunity arena.

18. The difference is that the end point of a successful public interest immunity claim will be that the balancing exercise leads to the evidence not being available to the court in the substantive application.[6] Here the whole point of Part 6 is for a balancing exercise to be done in advance, by the Court, under statutory conditions and discretion, allowing for two possible outcomes: either a declaration that it is criminal intelligence under s 72 (with the consequence that it may, but not must – see below – be received into evidence in the substantive application); or a refusal to make the declaration, leaving it to the applicant Commissioner to decide whether or not to rely on the material in any future application.

---

5 See, e.g. , *Alister v R* (1983) 154 CLR 404 at 408.

6 *Gypsy Jokers* (2008) 234 CLR 532 at 556 [24], 559 [36], 595 [178].

19. Ordinarily, a public interest immunity claim is heard as an ancillary application within or related to a substantive matter in which the potential evidence is sought to be inspected and possibly tendered. Often it is done by a different judge. Here, the criminal intelligence declaration is structurally separated from any substantive application. There may or may not be an identified substantive application on foot or proposed at the time: s 72(7). The declaration, if made, remains on foot, available to be utilised in any later relevant substantive application, until revoked: s 73.

20. A declaration under s 72 has an immediate or direct effect on legal rights in the limited sense of s 82. It also has a further prospective effect. That is, *should* a substantive application be brought, and *should* the applicant tender the intelligence as relevant evidence, and *should* the Court receive it into evidence, then ss 75-81 control how the intelligence may be disclosed and considered within the substantive hearing. If no relevant substantive application is brought, or the information is not tendered in it, the declaration has not affected anyone's rights (beyond s 82).

21. The Respondents do not assert that in principle Ch III precludes the separation of the "criminal intelligence" application from any substantive application, present or future, which might be brought under the Act. Nor do they assert that the nature of the function being exercised – an advance ruling on whether information with particular public interest claims to secrecy may be made available for potential admission in a subsequent matter calling for judicial resolution, but on protective terms – is other than judicial or properly conferrable on a Ch III court.

22. Instead the gravamen of their complaint – expressed in five ways – is that Parliament has gone too far in defining and controlling the disclosure which the Court is permitted to make of the secret information to a person against whom a substantive order is or might in the future be sought. To address these complaints it is necessary both to identify the constitutional principles involved (see **Section C** below) and to form a view on the proper construction of the Act in the context of the broader judicial process in Queensland (see **Sections D to F** below).

C INSTITUTIONAL INTEGRITY AND RELATED CHAPTER III PRINCIPLES

Ch III requires institutional integrity

23. Ch III of the Constitution requires that all courts, as part of the integrated Australian judicial system, maintain their institutional integrity. A court's institutional integrity may be impaired where "incompatible" functions are conferred on the court or its constituent judges. "Incompatibility" is determined by reference to the court's role, under Ch III, as a repository of federal jurisdiction and part of the national judicial system. This compatibility requirement is the

expression of a unifying constitutional principle developed by this Court first in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[7] and *Kable v Director of Public Prosecutions (NSW)*[8], and most recently in *Wainohu v New South Wales*.[9]

24. The institutional integrity of a court requires the maintenance of its essential or defining characteristics, which set it apart from other decision-making bodies.[10] In consequence of this principle, a State Parliament is limited in the functions it can confer on its courts, and in prescribing the manner in which those functions be performed.[11]

Institutional integrity does not amount to a strict separation of powers

25. The institutional integrity principle derived from Ch III does not operate as a "surrogate for the application of a separation of powers doctrine to the States",[12] thereby removing the greater flexibility[13] enjoyed by State Parliaments in relation to their State's institutional organisation than is constitutionally permissible at the Commonwealth level. This flexibility is nevertheless checked by the compatibility requirement.[14]

Factors relevant to compatibility

26. Incompatibility with institutional integrity is determined by reference to the court's role, under Ch III, as a repository of federal jurisdiction as part of the integrated national judicial system.

---

7 (1996) 189 CLR 1.

8 (1996) 189 CLR 51.

9 (2011) 243 CLR 181 ('*Wainohu*').

10 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne and Crennan JJ); *K-Generation* (2009) 237 CLR 501 at 530 [89] (French CJ), 571 [253] (Kirby J); *South Australia v Totani* (2010) 242 CLR 1 at 48 [70] (French CJ), 162 [443] (Kiefel J); *Wainohu* (2011) 243 CLR 181 at 208 [44] (French CJ and Kiefel J).

11 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 96 (Toohey J), 103 (Gaudron J), 116-119 (per McHugh J), 127-128 (Gummow J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [15] (Gleeson CJ) ('*Fardon*'); *Momcilovic v The Queen* (2011) 245 CLR 1 at 66 [93] (French CJ) ('*Momcilovic*').

12 *Wainohu* (2011) 243 CLR 181 at 212 [52] (French CJ and Kiefel J). See also *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319 at 354 [53] (French CJ) and *Fardon* (2004) 223 CLR 575 at 598 [36] (McHugh J).

13 In *Wainohu* (2011) 243 CLR 181 at 212 [52] (French CJ and Kiefel J), the freedom enjoyed by State Parliaments in relation to the organisation and arrangements of their State courts was noted as it was in *Momcilovic* (2011) 245 CLR 1 at 67 [94] (French CJ). Similarly, in *South Australia v Totani* (2010) 242 CLR 1 at 45 [66] (per French CJ) the Court referred to the "organisational diversity across the Federation" being capable of being maintained without "compromising the fundamental requirements of a judicial system"; see also [67]-[68]. In *K-Generation* (2009) 237 CLR 501 at 529 [88] (French CJ) the "institutional and procedural flexibility" enjoyed by State Parliaments, unparalleled at the Commonwealth level, was also noted.

14 See, e.g., *Gypsy Jokers* (2008) 234 CLR 532 in which Kirby J held at 577 [103] that while there "may be innovations and differences between courts" there are "limits upon permissible departures from the basic character and methodologies of a court".

27. Determining whether a particular function impairs the independence and impartiality of a State court (one of its constitutionally required characteristics) is an "evaluative process", which may involve "consideration of a number of factors".[15]

Traditional judicial process

28. The incompatibility principle produces the result that State Parliaments cannot deprive their courts of their essential or defining characteristics as "courts of the State". One such characteristic is that a court performs its functions in accordance with the traditional judicial process. An element of this process is that it be procedurally fair. The minimum requirements of "fairness" in a particular context will depend on the nature of the proceedings and the interests in issue.[16] For example, proceedings in which there is a public interest in prohibiting the disclosure of certain information to a party to the litigation or the public generally will shape the content of the requirements of procedural fairness in that context. Proceedings of such a character, and with such interests in issues, may produce the result that the disclosure of such information can be limited, even so that the information is not disclosed to the person against whom it is to be deployed.

29. In a particular context, it may be appropriate – and consistent with the requirements of procedural fairness – to conduct proceedings on an ex parte basis and without notice; to conduct closed hearings; and to limit the means by which a party can challenge the admissibility of or the use to be made of evidence.[17] In a particular case, whether the procedure prescribed – by the legislature or by the court – satisfies minimum requirements of procedural fairness will be a question of fact and degree, and will also be informed by the relevant safeguards that are in place. For example, it will be relevant to the question of incompatibility whether: (a) the court may apply the ordinary rules of evidence in considering the admissibility of the evidence; (b) the court retains a discretion not to receive into evidence information that is otherwise admissible on the basis of unfairness to a respondent, or that it is otherwise unsatisfactory or unsound; (c) the court applies ascertainable legal criteria and / or a principled discretion in balancing the demands of secrecy with a party's legitimate interests; (d) the court, in considering substantive orders, may take into account that it may not have heard all relevant arguments concerning the evidence; and (e) that requirements for reasons and the ordinary appellate processes are still available.

---

15 *K-Generation* (2009) 237 CLR 501 at 530 [90] (French CJ).

16 See, e.g., *RCB as litigation guardian of EKV, CEV, CIV and LRV v The Honourable Justice Colin James Forrest* [2012] HCA 47 at [42]

17 In a different context see *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), ss 26-7, 29, 31, 38F-38G, 38I and 38L; *Migration Act 1958* (Cth), ss 503B-503C; *Administrative Appeals Tribunal Act 1975* (Cth), ss 39A-39B. In relation to the constitutionality of those provisions of the *Administrative Appeals Tribunal Act*, see *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241 at 277 [151], 280 [171].

30. The content of the rules of procedural fairness may be dramatically reduced if the disclosure of information would damage the public interest. As McHugh J acknowledged, in the context of administrative tribunals, in *Johns v Australian Securities Commission*, the need to preserve confidentiality in the context of criminal investigations "does not exclude procedural fairness, but reduces its content, perhaps in some circumstances to nothing".[18]

31. The material in issue in the present case is information the disclosure of which could reasonably be expected to prejudice a criminal investigation, enable the discovery of a confidential source of information relating to law enforcement, or endanger a person's life or physical safety.[19] This is therefore information of a kind that has traditionally been the subject of public interest immunity claims. As noted in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*, "courts mould their procedures to accommodate ... public interest immunity".[20]

32. In resolving public interest immunity claims, the courts frequently inspect the documents over which public interest immunity is claimed, in circumstances where the parties and their legal representatives are not permitted to view the documents.[21]

33. Just as courts may inspect documents over which public interest immunity has been claimed, they may also receive and consider confidential affidavits in support of public interest immunity claims.[22]

34. It is thus not an essential attribute of judicial power, or an inflexible requirement of procedural fairness, that courts act only on the basis of information that has been disclosed to all of the parties. That is, this, like other aspects of procedural fairness, is not absolute.

35. This Court has regularly acknowledged that Parliament can modify the content of or exclude certain rules of procedural fairness by express words or necessary implication.[23] The critical question is whether any such legislation goes so far as to modify courts' traditional procedures, and denies them their traditional

---

18 (1993) 178 CLR 408 at 472. See also *Kioa v West* (1985) 159 CLR 550 at 615 (Brennan J); *R v Gaming Board; ex parte Banaim* [1970] 2 QB 417 at 431 (Lord Denning MR); *In re Pergamon Press* [1971] Ch 388; *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 at 323-324 (Mason, Wilson and Dawson JJ).

19 See s 59(1).

20 (2005) 225 CLR 88 at 98 [24] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

21 *Alister v R* (1984) 154 CLR 404; *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 620 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ); *R v Francis* (2004) 145 A Crim R 233 at 235 [14] and 237 [21] (Simpson J).

22 See *Meissner* (1994) 76 A Crim R 81 at 85 (Carruthers J); *Haj-Ismail v Minister for Immigration and Ethnic Affairs (No 2)* (1982) 64 FLR 112 at 124 (Lockhart J).

23 *Annetts v McCann* (1990) 170 CLR 596 at 598 (Mason CJ, Deane and McHugh JJ); *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396 (Dixon CJ and Webb J); *Gypsy Jokers* (2008) 234 CLR 532 at 595-596 [182] (Crennan J).

flexibility, to such an extent that the court is not capable of acting fairly in the particular circumstances.

36. A further example of safeguards that may be in place is the appointment of a "special counsel", being a party appointed by the court or given a right of appearance under legislation to advocate a particular interest. The criminal organisation public interest monitor (**COPIM**) established by Part 7 of the Act represents one such example. By reason of the ability of the COPIM to question witnesses and make submissions in relation to declared criminal intelligence, the COPIM is capable of providing real assistance to the Court in the testing and evaluation of evidence. It is increasingly common for legislative schemes conferring jurisdictions on courts that involve the consideration of secret or otherwise sensitive evidence to make provision for an office with similar features, functions and purposes as the COPIM.[24]

D CRIMINAL INTELLIGENCE APPLICATIONS

37. The submissions of the Applicant have pointed to a number of aspects of the construction of Part 6 within the broader judicial process. The following points may be added or emphasised.

38. The *first* point to note is that a criminal intelligence declaration does not impact upon the interests of a person or organisation (save in the s 82 sense) unless and until declared criminal intelligence is sought to be tendered in evidence against that person or organisation in a substantive application under the Act.

39. Criminal intelligence declarations are thus of a very different nature to the ex parte orders considered in *Thomas v Mowbray*[25] and *International Finance Trust Company Ltd v New South Wales Crime Commission*.[26] In both of those cases, the orders made ex parte were "orders with immediate effect upon the person or property of another".[27] It was that immediate, substantive, effect which made relevant considerations such as the availability of, or length of time before which there would be, a contested hearing for confirmation of the ex parte order.

---

24 See, e.g., *Police Powers and Responsibilities Act 2000* (Qld), ss 212-3, 328-9, 336-7, 344-5 and 742(2)(c); *Crime and Misconduct Act 2001* (Qld), ss 121-2, 148-9, and 326(1)(b); *Terrorism (Preventative Detention) Act* 2005 (Qld), ss 14, 16, 20, 24, 30 and 34; *Telecommunications Interception Act 2009* (Qld), ss 7-10 (preserved by *Telecommunications (Interception and Access) Act 1979* (Cth), ss 45 and 45A); *Racing Act 1958 (*Vic), s 35F; *Casino Control Act 1991* (Vic), s 74B; *Police Integrity Act 2008* (Vic) s 108; *Public Interest Monitor Act 2011* (Vic); *Special Immigration Appeals Commission Act 1997* (UK), *Special Immigration Appeals Commission (Procedure) Rules 2003* (UK), rr 34-36, and *Special Immigration Appeals Commission (Procedure) (Amendment) Rules 2007* (UK); *Terrorism Prevention and Investigation Measures Act 2011*, sch 4; *Immigration and Refugee Protection Act* SC *2001*, c 27 (Can)) (the constitutional validity of the security certificate regime was upheld in *Harkat v Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness* 2012 FCA 122) (the Canadian Supreme Court granted leave to appeal that decision on 22 November 2012: see Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness v Harkat, No. 34884); *Immigration Act 2009 (*NZ), ss 263-8.

25 (2007) 233 CLR 307 ('*Thomas*').

26 (2009) 240 CLR 319.

27 *International Finance Trust Company* (2009) 240 CLR 319 at 364 [89] (Gummow and Bell JJ).

40. *Secondly*, the s 72 court retains an important discretion, even if satisfied the material is "criminal intelligence", whether to make the declaration (and expose a respondent to the potential consequences in a later substantive application) or refuse it: see [18] above. The inability, by definition, of a respondent to put submissions on the material itself, because that would harm the public interests stated in s 60, can be brought to account in that discretion.

41. *Thirdly*, the s 72 court will otherwise approach its task in the usual judicial way, and will apply the balance of probabilities and sound principles of discretionary reasoning to its task.

42. *Fourthly*, an exercise of judicial power by the Court in deciding whether or not to make a declaration under s 72 is an order of the Court able to be appealed to the Queensland Court of Appeal and, by leave, to this Court.[28] If so, the Court of Appeal, and this Court, would be able to inspect the underlying material in determining if an appealable error occurred in making or not making the declaration.

43. Specifically, there is nothing in the Act evincing an intention to exclude the ordinary appellate processes of the Court.[29] Those ordinary appellate procedures would seem to be available as follows.

44. To the extent that criminal intelligence applications are regarded as independent proceedings, to which a respondent to a later substantive application is not a party, it should nonetheless be possible for a respondent to appeal from a decision that particular information is "criminal intelligence". That is because, in the event that a person directly affected by the order was not a party to the criminal intelligence application, the Court of Appeal may order that that person may appeal the decision under r 750(1) of the *Uniform Civil Procedure Rules 1999* (Qld). Equally, to the extent necessary, if appropriate, the Court of Appeal may permit an appeal to be brought outside the ordinary 28 day period under r 748 of the *Uniform Civil Procedure Rules 1999* (Qld).

45. To the extent that criminal intelligence applications are regarded as interlocutory steps in a substantive application (such as an application under s 8 of the Act), a party to the substantive application should be entitled to appeal the criminal intelligence declaration as part of any appeal from the decision in the substantive application, where the declaration affected the final result.[30]

46. *Fifthly*, the court deciding whether or not to grant the s 72 declaration is in no way relieved, or expressly prevented, by the Act from giving appropriate reasons

---

28 Cf. Respondents' Submissions at [28], that a criminal intelligence declaration is "unassailable".

29 *Supreme Court of Queensland Act 1991* (Qld), s 62; see also *Gypsy Jokers* (2008) 234 CLR 532 at 555 [19] (Gummow, Hayne, Heydon and Kiefel JJ).

30 *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 483 [6] (Gaudron, McHugh and Hayne JJ).

for the decision, reasons which could be redacted where necessary not to reveal the content of the intelligence.[31]

47. *Sixthly*, the way in which a criminal intelligence declaration may affect a person or organisation's interests (if at all) will depend on what happens if there is a substantive application under the Act in which the evidence is sought to be tendered.

48. As will be explained in the following section of these submissions, the Court, in exercising the substantive jurisdiction conferred by s 10, retains a series of discretions, functions and duties before it allows the information which has been declared criminal intelligence to be placed before it. It is wrong to focus on the procedures mandated for criminal intelligence applications divorced from the procedures applicable in substantive applications in which the interests of a respondent may be directly affected. These submissions now turn to that matter.

E CRIMINAL ORGANISATION APPLICATIONS

49. The Respondents submit that three features of the Act relating to an application for a declaration that a particular organisation is a "criminal organisation" infringe Ch III of the Constitution.

50. The first is the requirement of s 78 that a respondent and its legal representatives be excluded from a hearing whenever declared criminal intelligence is to be considered. In particular, the respondents contend that there is a "statutory denial to the Supreme Court of any discretion to balance the demands of secrecy with the respondent's legitimate interest to ensure that any adverse evidence is properly tested".[32]

51. The Court can only be regarded as having no discretion, however, if the requirement in s 78 is viewed in isolation to the procedure as a whole. The following construction submissions are offered.

52. The Act does not do away with the ordinary judicial process by which the Commissioner must tender into evidence all material (including "criminal intelligence"), upon which the Court is asked to make a s 10 order. The Act also does not remove a respondent's right to object to the material, and otherwise leaves the ordinary rules of evidence to apply. As a result, faced with an objection from a respondent, the Court may not receive the material as evidence unless it is satisfied that it complies with all relevant rules of evidence.

53. The Court will first examine whether the evidence complies with the formal requirements for admissibility. Even if the evidence does so comply, there

---

31 Cf. *Gypsy Jokers* (2008) 234 CLR 532 at 560 [40] (Gummow, Hayne, Heydon and Kiefel JJ) and 596 [185] (Crennan J).

32 Respondents' Submissions at [30].

appears scope under the laws of Queensland to object to at least some types of evidence on the ground of discretionary matters such as unfairness to the respondent.[33] At least in the case of the exclusionary discretion, absence of knowledge of the content of the evidence in question is unlikely to be an impediment to the making of the objection (and, indeed, may be a foundation of the objection[34]).

54. Any objection to evidence containing information declared to be criminal intelligence on the basis that its reception would be unfairly prejudicial to the respondent cannot, by definition, focus on the particular contents of the intelligence but could presumably cover in more general terms the types of matters open to the Court at the stage of the criminal intelligence application: ss 72(2) and (3).

55. The ability of a respondent to make the objection to admissibility is not foreclosed by the "closed court" provisions of s 78. The Court must be closed for the "consideration" of the declared criminal intelligence. "Consideration" would include the actual receipt of the material into evidence, examination and cross-examination of witnesses, and in due course the submissions on the actual content of the information. "Consideration" would not include the anterior stage of the applicant announcing it was moving to tender declared criminal intelligence and the argument whether to receive it.

56. It is beside the point that the Act denies to the Court some options that might otherwise have been open to it to address unfairness to a respondent (for example, by providing the evidence on a restricted basis to a respondent's legal advisors or other restricted regime). The limitation of the available options simply serves to define the particular nature of the unfairness to a respondent if the evidence were admitted, posing, one might think, a correspondingly higher bar to admissibility.

57. Further, the Respondents' suggestion that the judicial process inescapably requires the Court to be able to "balance" competing interests should be rejected. In *Hogan v ACC & Ors*[35] this Court rejected the notion that s 50 of the *Federal Court of Australia Act 1976* (Cth) involved a "balancing" exercise. The same may be said of the Federal Court's power under s 17(4) to order a closed court. The question under s 17(4) is whether the Court is satisfied that the presence of

---

33 In the circumstances obtaining in applications under the Act, information which is otherwise hearsay and tendered under s 92 of the *Evidence Act 1977* (Qld) is subject to a discretion enshrined in statute: s 98 of the *Evidence Act 1977* (Qld) (which permits the Court to exclude evidence if it would be "inexpedient in the interests of justice" to admit it). Whether there would be a discretion to refuse to admit otherwise relevant and admissible absent that statutory provision must be accepted to be unclear. It would depend, inter alia, on whether the proceedings were properly characterized as criminal (as to which see *R v Christie* [1914] AC 545 and *R v Swaffield* (1998) 192 CLR 159) or civil (as to which see *CDJ v VAJ (No 1)* (1998) 197 CLR 172 at 215 (note 106), or sui generis.

34 See in the context of the discretion under s 135 of the uniform *Evidence Acts*, e.g., *Commonwealth v McLean* (1996) 41 NSWLR 389 at 400-402.

35 (2010) 240 CLR 651.

specified persons (which could include a party) would be contrary to the interests of justice. If so satisfied, the Court does not have a "discretion" to refuse to make an order. Section 78 is a valid determination by Parliament that the interests of justice in the defined circumstances can be satisfied only by a closed court, but subject always to the surrounding protections noted above.

58. The second provision about which the Respondents complain in this context is s 76, which provides that an informant who is the source of declared criminal intelligence cannot be called or otherwise required to give evidence, and that identifying information about them cannot be given. In response:

58.1. *First*, once more, the fact that other evidence which may otherwise have been available to test evidence before the Court is not able to be adduced is a factor that the Court may take into account in determining whether to admit evidence of declared criminal intelligence sourced from an informant. The fact that the Court does not have discretion to permit such evidence to be called does not mean that the Court is powerless to deal with the situation thereby created.

58.2. *Secondly*, the fact that the Court may not have before it all relevant evidence, even critically important relevant evidence, does not mean that the procedure becomes repugnant to the judicial process.[36] Legislation prohibiting evidence from particular persons[37] or because of its particular character[38] is far from uncommon. And the common law has also recognised this position, for example, in suits for confidential information or over a patent.

58.3. *Thirdly*, the ability to confront an adverse witness is not absolute.[39] Like other features that ordinarily characterise a procedurally fair (civil or criminal) judicial process, the capacity to confront an adverse witness is merely one aspect of the general requirement of procedural fairness, which, for the reasons given in these submissions, is modified according to the circumstances of each case (and may be modified, within limits, by Parliament).[40]

---

36 *Gypsy Jokers* (2008) 234 CLR 532 at 556 [24] (Gummow, Hayne, Heydon and Kiefel JJ); *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 61 (Mason J).

37 See, e.g., *Evidence Act* 1995 (Cth) ss 14-19.

38 See, e.g., *Transport Safety Investigation Act 2003* (Cth), s 60, which was held to be valid in *Elbe Shipping SA v Giant Marine Shipping SA* (2007) 159 FCR 518. See also *Hinch v Hogan* (2011) 243 CLR 506 at 531 [21] in relation to a non-exhaustive list of circumstances in which the open justice principle is derogated from in order to "secure the proper administration of justice".

39 *DPP v Finn* (Ruling No 1) (2008) 186 A Crim R 235 at 237 [11]; *R v Cox* (2005) 165 A Crim R 326 at 328 [7]; *R v Goldman* (2004) A Crim R 40 at 48 [27] and 49 [32]; *R v Ngo* (2003) 57 NSWLR 55 at 69 [108] and [109]; *Jarvie v Magistrates' Court of Victoria* [1995] 1 VR 84 in particular at 89-91.

40 See, by way of example only, s 294A of *the Criminal Procedure Act 1986* (NSW), which prohibits an unrepresented accused in sexual offence proceedings from examining, cross-examining or re-examining the complainant, but provides for a person appointed by the court to conduct that examination. The constitutional validity of this provision was upheld in *R v MSK & MAK* (2004) 61 NSWLR 204, Mason P holding at 217 [60]-

59. The third provision about which the respondents complain is s 10, to the extent that it requires the Court have regard to evidence to which a respondent or its legal representatives have not had access. This complaint plainly builds on the complaints concerning ss 76 and 78 (in the sense that it is the consequence of the operation of those provisions).

60. The use by the Court of evidence given in accordance with the procedures of the Act may be seen to involve no repugnancy with the judicial process for the following reasons:

60.1. The starting point is that the application to be made under s 8 must state the grounds on which the declaration is sought, the grounds being distinguished from the supporting information (which may or may not include criminal intelligence). The respondent under s 10 will always know the case being made against it in terms of the grounds. The question is whether it must be entitled to know the content of every piece of evidence advanced in support of the grounds.

60.2. Even if evidence of declared criminal intelligence is admitted into evidence that does not mean that the Court is bound to accept its truth. The Court may inquire into and make its own assessment of that evidence,[41] and will give that evidence such weight as it considers appropriate.

60.3. Every respect in which a respondent is restricted or limited in its ability to test evidence, adduce evidence in response, or make submissions on evidence is a relevant matter to which the Court must have regard under s 10(2). The Court retains a true discretion whether to make the declaration, even if satisfied of the matters going to jurisdictional fact. It follows that reliance by an applicant on evidence of declared criminal intelligence will dramatically reduce the weight able to be attributed to that evidence, with the result that the more an application depends on it, the less likely it is to succeed.[42]

60.4. The fact that a court resolves a claim finally without one of the parties being shown some of the material relied on does not necessarily mean that the procedure adopted is inconsistent with the exercise of judicial power.[43] Although "the disposal of any point in litigation, without the fullest argument on behalf of the parties, is a course to which every court

---

[61] that the principle in *Kable* was not offended and noting, among other things, that "the accused person ... has the alternative right to use a court-appointed questioner in accordance with the statutory regime".

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

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

43 *Gypsy Jokers* (2008) 234 CLR 532 at 595 [180] – 597 [189] referring to what may occur in patent litigation or equitable confidence applications.

reacts adversely", it has never been held that courts, as a result, may never proceed in that fashion.[44]

60.5. Indeed the traditional equitable jurisdiction to give judicial advice to a trustee often proceeds both ex parte and in closed court, but subject to its own protections (such as the obligation of full disclosure). It is capable of affecting rights: the trustee who has made full disclosure and acts in good faith in accordance with the advice will not be personally liable, even if the action turns out to be a breach of trust.[45]

60.6. And as at the first stage, the decision either way under s 10 would be expected to be accompanied by reasons, redacted as necessary, and subject to full appellate review, with the appellate court able to inspect the criminal intelligence.

F CONSIDERATIONS RELEVANT TO BOTH TYPES OF APPLICATION

61. For the reasons given above (at [36]), the COPIM represents an additional means by which the requirements of procedural fairness are met in the context of the scheme established by the Act.

62. Decisions of United Kingdom courts on the use of special advocates in circumstances where a party is excluded from part of a hearing have emphasised that whether the role of the special advocate will ensure a fair trial will depend on a range of factors, including the "type" of proceedings (in particular, whether they concern the liberty of a person), the nature of the disclosure (if any) made to the excluded party (in particular, its specificity) and the centrality of the withheld material to the case made or decided against the party.[46]

63. The reasoning in those authorities confirms that the issues sought to be raised by this stated case need to be examined on a case-by-case basis. That is to say, that the question for the Court is: for a particular application on identified grounds, having regard to the role that particular criminal intelligence is said to play along with other evidence in establishing those grounds, and given the assistance the COPIM provided in that particular case, can the Court be satisfied of the jurisdictional facts stipulated in the legislation and, if so, how should it exercise its discretion? Under the procedures stipulated in the Act, the

---

44 *Alister v R* (1984) 154 CLR 404 at 469 (Gibbs CJ, Wilson, Brennan and Dawson JJ). See also *Nicopoulos v Commissioner for Corrective Services* (2004) 148 A Crim R 74 at 93 [92] (Smart AJ).

45 See, e.g. *Re Beddoe* [1893] 1 Ch 547 at 558 and 562. The jurisdiction is now largely statutory, but to the same effect. See, e.g., *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar, The Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand* (2006) 66 NSWLR 112 at 115 [8] ff (Beazley and Giles JJA).

46 Cf. the approaches of the House of Lords in *Secretary of State for the Home Department v MB* [2008] 1 AC 440, the European Court of Human Rights in *A v United Kingdom* (2009) 49 EHRR 29, and the subsequent approach of the House of Lords in *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269. See also the decision of the Supreme Court of the United Kingdom in *Tariq v Home Office* [2011] 1 AC 452.

Court can answer those questions without Parliament having compelled it to engage in an unfair process.

64. Finally, when reasons are given, in a criminal intelligence or criminal organisation application, they would be expected to convey an adequate account of the proceedings and the reasons underlying the orders, although without disclosing the content of the declared criminal intelligence and portions.[47] The reasons would be expected to indicate the extent to which the order, if made, depended on material not reproduced in them, and they could be expected to record in general terms the role of the COPIM in the treatment of such material.

10 65. Accordingly, if the Queensland law, when construed and situated within the broader legal process as offered above, would lead to Questions (i) to (v) of the stated case being answered "no", it becomes unnecessary to decide whether, under the *Kable* doctrine, State Parliaments have a greater latitude than the Commonwealth Parliament under Chapter III in situations like the present.[48]

G "UNACCEPTABLE RISK" AS A LEGAL CRITERION

66. From a variety of constitutional principles, it is established that when Parliament confers a jurisdiction and power on a court exercising Ch III power, the law must define adequate legal standards and criteria. This comes about either as an essential part of the exercise of judicial power under s 71 of the Constitution or
20 the defining of the jurisdiction of the court under s 77(i); or because it is not permissible to delegate to the court the essentially legislative task of determining the content of a law. These problems may be particularly acute where what is left to the court is essentially to formulate for itself what is the appropriate policy in a given area.[49]

67. Where a State Parliament seeks to confer on a State court a power that could not be conferred on a federal court for these reasons, the question becomes whether the court by exercising the power and being drawn into the making of policy judgments is compromised in its overall institutional integrity. In a related context, in *Momcilovic*, this Court split 4-3 on whether conferring a power on the
30 Supreme Court of Victoria to make declarations of incompatibility produced such a consequence.[50]

68. It is not necessary to determine whether, in the circumstances of the present case, there is any substantive difference between the tests applicable in relation

---

47 Cf. *Gypsy Jokers* (2008) 234 CLR 532 at 560 [40] (Gummow, Hayne, Heydon and Kiefel JJ) and 596 [185] (Crennan J).

48 Should it become necessary to decide, the Commonwealth submits that the starting point for any analysis is that "the Constitution does not permit of different grades or qualities of justice" (*Wainohu* (2011) 243 CLR 181 at 228 [105] and the cases cited there).

49 *Thomas* at 344 [71], 345 [72] and 354 [107] - 355 [110] (Gummow and Crennan JJ).

50 Cf *Momcilovic* (2011) 245 CLR 1 at 68 [97] (French CJ), 97 [188] (Gummow J), 123 [280] (Hayne J), 185 [457] (Heydon J), 229 [605] (Crennan and Kiefel JJ), at 241 [661] (Bell J).

to Commonwealth and State Parliaments. That is because s 10(1)(c) of the Act would be valid even if the question fell to be determined by reference to the Commonwealth test, namely, whether a law sufficiently supplied a "legal standard or criterion" governing the exercise of the jurisdiction (or, put differently, whether it constituted an attempt by Parliament to delegate the essentially legislative task of determining the content of a law).[51]

69. "Unacceptable risk" is a criterion capable of judicial application where there is sufficient guidance in its application in the particular statutory context. That is, it will be justiciable where the court is able to have regard to considerations "identifiable in the legislative scheme" or can "construct criteria for the exercise of the discretion in a legally principled way",[52] or where the "standards and principles .... have their source in the legislation".[53]

70. The use of the concept of "unacceptable risk" as a legal standard or criterion is not supplied only by legislation. Courts have themselves identified such a standard for the exercise of discretions. For example, in *M v M*, this Court held that custody of, or access to, a child should not be granted if doing so "would expose the child to an unacceptable risk of sexual abuse".[54] That judicially created standard was subsequently (in 1995)[55] enshrined in s 68K of the *Family Law Act 1975* (Cth), which in 2006 became s 60CG.[56]

71. The standard is also used in a variety of legislation, including legislation the validity of which has been specifically challenged, and upheld, on this point. To take an obvious example, in *Fardon*, this Court rejected a challenge to the constitutionality of s 13(2) of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) on the basis that the term "unacceptable risk" was uncertain or devoid of practical content.[57] As Gleeson CJ held, the phrase "is not devoid of content, and its use does not warrant a conclusion that the decision-making process is a meaningless charade".[58]

---

51 See, e.g., *Thomas* (2007) 233 CLR 307 at 344 [71].

52 *Yanner v Minister for Aboriginal and Torres Strait Islander Affairs* (2001) 108 FCR 543 at 545 [3] (Drummond J); see also 547 [11] (Kiefel J) ('*Yanner*').

53 *Civil Aviation Safety Authority v Boatman* (2004) 138 FCR 384 at 404 [58] (Stone J), citing *Yanner* at [3].

54 (1988) 166 CLR 69 at 78.

55 *Family Law Reform Act 1995* (Cth) s 31.

56 *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) Sch 1 it 9 (and see Sch 5 it 5, repealing Division 10 of Part VII which included s 68K).

57 See *Fardon* (2004) 223 CLR 575 at 589 [22] (Gleeson CJ), at 596 [34] (McHugh J), at 605 [60] and 619 [108] (Gummow J), at 657 [225] (Callinan and Heydon JJ).

58 *Fardon* (2004) 223 CLR 575 at 589 [22] (Gleeson CJ).

72. It is also relevant to observe that, in other contexts, courts are required to make an assessment of the nature of a specified risk and the consequences of that risk coming home, by reference to concepts such as "serious and imminent risk".[59]

73. In this regard, it is useful to recall the statement of Professor Zines, quoted with approval by Gummow and Crennan JJ in *Thomas*:[60]

> Any standard or criterion will have a penumbra of uncertainty under which the deciding authority will have room to manoeuvre – an area of choice and of discretion; an area where some aspect of policy will inevitably intrude. The degree of vagueness or discretion will be affected by what is conceived to be the object of the law and by judicial techniques and precedents. Given a broad standard, the technique of judicial interpretation is to give it content and more detailed meaning on a case to case basis. Rules and principles emerge which guide or direct courts in the application of the standard.

74. The correct approach to the construction of the meaning of the phrase in a particular context was demonstrated in the following passage of the judgment of Wheeler JA in *Director of Public Prosecutions (WA) v Williams*:[61]

> In my view, an "unacceptable risk" in the context of s 7(1) [of the *Dangerous Sexual Offenders Act* 2006 (WA)] is a risk which is unacceptable having regard to a variety of considerations which may include the likelihood of the person offending, the type of sexual offence which the person is likely to commit (if that can be predicted) and the consequences of making a finding that an unacceptable risk exists. That is, the judge is required to consider whether, having regard to the likelihood of the person offending and the offence likely to be committed, the risk of that offending is so unacceptable that, notwithstanding that the person has already been punished for whatever offence they may have actually committed, it is necessary in the interests of the community to ensure that the person is subject to further control or detention.

75. In other words, when asked to determine if the risk of an event occurring is "unacceptable" a court is required to identify (a) the nature of the risk, (b) the likelihood of the risk eventuating, (c) the likely consequences if the risk did eventuate, as against (d) the consequences that would flow from the finding that the risk was unacceptable. The "unacceptability" of a risk is, therefore, determined by having regard to the nature and extent of the risk, compared to

---

59 *Civil Aviation Act 1988* (Cth), s 30DB. And see *Civil Aviation Safety Authority v Boatman* (2004) 138 FCR 384.

60 *Thomas* (2007) 233 CLR 307 at 351 [91] (Gummow and Crennan JJ).

61 (2007) 35 WAR 297 at 312 [63].

the consequences of making the order sought. That is plainly a legal standard or criterion.

76. The following particular matters should be noted in relation to the Respondents' contentions:

76.1. *First*, it is not the case that the risk that the Court is required to assess under s 10(1)(c) is "unspecified".[62] Construed in context (including, inter alia, ss 3(1)(a), 10(1)(b), 10(2)(a)(i), (iii) and (iv)), the "risk to the safety, welfare or order of the community" to which s 10(1)(c) refers is plainly that posed by any "serious criminal activity" (as defined) of the organisation.

76.2. *Secondly*, the evidentiary matters to which the Court must have regard under sec 10(2)(a), along with the requirement that the Court consider any other relevant matter, confirm that which would follow from the fact that the jurisdiction is vested in a court in any event: that the Court must make its assessment of the nature and extent of the risk on the basis of "acceptable, cogent" evidence.[63] It is to these facts, as found by the Court, that the standard specified in s 10(1)(c) is applied.

76.3. *Thirdly*, the consequences to an organisation or other person by reason of the making of a declaration under s 10, against which the risk to the community is balanced, are fully specified in the Act. That is to say, the extent to which the making of the declaration would or may interfere with the rights or interests of any group or individual are fully articulated in the Act, and thus able to be taken into account by the Court in assessing whether or not the risk is "unacceptable". Moreover, any other relevant matter in relation to the consequences of making the declaration may be proven by the respondent, and must then be considered pursuant to s 10(2)(b).

76.4. *Fourthly*, it is wrong to suggest that the exercise of the jurisdiction conferred upon the Court by the Act involves any "excessive identification of the Judiciary with the policy aims of the Legislature and the Executive".[64] By implementing the policy of the Queensland Government, as and only as it has been enshrined in legislation, the Court does not become "identified" with that policy. As Gummow and Crennan JJ said in *Thomas*:[65]

> Where legislation is designed to effect a policy, and the courts then are called upon to interpret and apply that law, inevitably considerations of that policy cannot be excluded from the

---

62 Respondents' Submissions at [37].

63 Cf. s 13(3) of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) considered in *Fardon* (2004) 223 CLR 575.

64 Respondents' Submissions at [37].

65 *Thomas* (2007) 233 CLR 307 at 348 [81] (Gummow and Crennan JJ).

curial interpretative process. No principle of the separation of the judicial power from that of the other branches of government should foreclose that activity, for it is apt to lead to the just determination of controversies by the courts.

77. Question (vi) should therefore be answered "no".

PART VI ESTIMATED HOURS

It is estimated that no more than one hour will be required for the presentation of the oral argument of the Attorney-General.

Date of filing: 28 November 2012

10 .....
Justin Gleeson SC
Acting Solicitor-General of the Commonwealth
Telephone: 02 6141 4145
Facsimile: 02 6141 4149
Email: justin.gleeson@ag.gov.au

.....
Nicholas Owens
Telephone: 02 8257 2578
Facsimile: 02 9221 8387
20 Email: nowens@stjames.net.au

.....
Danielle Forrester
Telephone: 02 6141 4147
Facsimile: 02 6141 4149
Email: danielle.forrester@ag.gov.au

Counsel for the Attorney-General of the Commonwealth (Intervening)