HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

THE STATE OF SOUTH AUSTRALIA APPELLANT

AND

SANDRO PETER TOTANI & ANOR RESPONDENTS

South Australia v Totani [2010] HCA 39
11 November 2010
A1/2010

ORDER

1. *Grant of special leave expanded to include, within the orders appealed from, the order of Bleby J made on 28 September 2009.*

2. *Proposed further amended notice of appeal treated as filed in the appeal.*

3. *Appeal dismissed with costs.*

On appeal from the Supreme Court of South Australia

Representation

M G Hinton QC, Solicitor-General for the State of South Australia with G J Parker for the appellant (instructed by Crown Solicitor (South Australia))

B W Walker SC with S J Doyle for the respondents (instructed by Caldicott and Co Barristers and Solicitors)

Interveners

S J Gageler SC, Solicitor-General of the Commonwealth with A M Dinelli intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia and R M Mitchell SC intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor (WA))

M G Sexton SC, Solicitor-General for the State of New South Wales with J G Renwick intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW)) at the hearing on 20 and 21 April 2010

J G Renwick intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW)) at the hearing on 17 June 2010

P M Tate SC, Solicitor-General for the State of Victoria with K L Walker intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

W Sofronoff QC, Solicitor-General of the State of Queensland with G J D del Villar and A D Keyes intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Solicitor (Qld)) at the hearing on 20 and 21 April 2010

P J Davis SC with G J D del Villar and A D Keyes intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Solicitor (Qld)) at the hearing on 17 June 2010

M P Grant QC, Solicitor-General for the Northern Territory with S L Brownhill intervening on behalf of the Attorney-General for the Northern Territory (instructed by Solicitor for the Northern Territory)

CATCHWORDS

South Australia v Totani

Constitutional law (Cth) – Judicial power of Commonwealth – Constitution, Ch III – Vesting of federal jurisdiction in State courts – *Serious and Organised Crime (Control) Act* 2008 (SA) ("Act") – Section 10(1) of Act permits Attorney-General to make declaration in respect of organisation, if satisfied members associate for purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity, and organisation represents risk to public safety and order – Section 14(1) of Act provides Magistrates Court of South Australia ("Court") must, on application by Commissioner of Police, make control order (contravention of which is a crime) imposing restrictions on freedom of association of defendant if satisfied defendant is member of declared organisation under s 10(1) – Section 35(1) of Act creates offence of associating with member of declared organisation or person the subject of control order on not less than six occasions during 12 month period – Whether making control order requires determination by Court of what defendant has done or may do, or any determination of criminal guilt – Effect of Attorney-General's declaration on adjudicative process – Whether Court enlisted to implement legislative and executive policy – Whether task given to Court repugnant to, or incompatible with, institutional integrity.

Words and phrases – "control order", "institutional integrity", "judicial power", "member of declared organisation", "serious criminal activity".

Constitution, Ch III.
Serious and Organised Crime (Control) Act 2008 (SA), ss 10(1), 14(1), 17, 19, 22, 35, 41.

FRENCH CJ.

Introduction

1 Courts and judges decide cases independently of the executive government. That is part of Australia's common law heritage, which is antecedent to the Constitution and supplies principles for its interpretation and operation[1]. Judicial independence is an assumption which underlies Ch III of the Constitution, concerning the exercise of the judicial power of the Commonwealth. It is an assumption which long predates Federation. Sir Francis Forbes, the first Chief Justice of New South Wales, stated the principle in uncompromising terms in 1827 in a letter to the Under-Secretary of State for War and the Colonies[2]:

> "His Majesty may remove the judges here, and so may the two Houses of Parliament at home; but the judicial office itself stands uncontrolled and independent, and bowing to no power but the supremacy of the law."

It is a requirement of the Constitution that judicial independence be maintained in reality and appearance for the courts created by the Commonwealth and for the courts of the States and Territories[3]. Observance of that requirement is never more important than when decisions affecting personal liberty and liability to criminal penalties are to be made. Its application is in issue in this appeal, which concerns the validity of a provision of the *Serious and Organised Crime (Control) Act* 2008 (SA) ("the SOCC Act"). The objects of the SOCC Act include the disruption and restriction of the activities of organisations involved in serious crime and of the activities of their members and associates and the protection of the public from violence associated with such organisations[4].

2 The Attorney-General for the State of South Australia is given power by s 10 of the SOCC Act to make a declaration in respect of an organisation on the

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1 Dixon, "Marshall and the Australian Constitution", (1955) 29 *Australian Law Journal* 420 at 424-425.

2 Bennett (ed), *Some Papers of Sir Francis Forbes*, (1998) 134 at 143.

3 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ; [2004] HCA 31; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 552-553 [10] per Gummow, Hayne, Heydon and Kiefel JJ; [2008] HCA 4; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 363 [81] per Gaudron J; [2000] HCA 63.

4 SOCC Act, s 4(1), the text of which appears in the judgment of Hayne J at [160].

basis that its members are involved in "serious criminal activity"[5] and that it represents a risk to public safety and order in South Australia. Such a declaration is administrative in character. It has no text or content but does have legal consequences.

3 One of the legal consequences of a declaration is to be found in s 14(1) of the SOCC Act, which imposes on the Magistrates Court of South Australia an obligation, on application by the Commissioner of Police ("the Commissioner"), to make a control order against a member of a declared organisation. Such an order places, and results in, restrictions upon the freedom of association and communication of the person to whom it applies and others who might wish to associate or communicate with him or her. The Full Court of the Supreme Court of South Australia, by majority, held the sub-section, and a control order made under it, to be invalid[6].

4 The decision of the Full Court was correct. Section 14(1) requires the Magistrates Court to make a decision largely pre-ordained by an executive declaration for which no reasons need be given, the merits of which cannot be questioned in that Court and which is based on executive determinations of criminal conduct committed by persons who may not be before the Court. The SOCC Act thereby requires the Magistrates Court to carry out a function which is inconsistent with fundamental assumptions, upon which Ch III of the Constitution is based, about the rule of law and the independence of courts and judges. In that sense it distorts that institutional integrity which is guaranteed for all State courts by Ch III of the Constitution so that they may take their place in the integrated national judicial system of which they are part. This appeal, by the State of South Australia against the decision of the Full Court, should be dismissed with costs.

Procedural history

5 On 14 May 2009, the Attorney-General for South Australia published in the *South Australian Government Gazette* ("the Gazette") a declaration pursuant to s 10 of the SOCC Act. The declaration was "about the Finks Motorcycle Club operating in South Australia (including but not limited to: the Finks MC, Finks M.C. Incorporated, Finks M.C. INC and the Finks)" ("the Club").

6 On 25 May and 4 June 2009, the Commissioner applied to the Magistrates Court (Civil Division) in Adelaide under s 14 of the SOCC Act for control orders

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5 A defined term: see n 10 below.

6 *Totani v South Australia* (2009) 105 SASR 244.

against Donald Brian Hudson and Sandro Totani, alleging each was a member of a declared organisation, namely the Club.

7 On 25 May 2009, the Magistrates Court made a control order against Mr Hudson prohibiting him, inter alia, from "[a]ssociating with other persons who are members of declared organisations" and from "[p]ossessing a dangerous article or a prohibited weapon (within the meaning of section 15 of the *Summary Offences Act 1953*)". The prohibition was subject to an exception relating to political party meetings which is not material for present purposes. The order contained a statement that the ground upon which it had been issued was that:

> "The defendant is a member of a declared organisation, namely the Finks Motorcycle Club operating in South Australia (including but not limited to: the Finks MC, Finks M.C. Incorporated, Finks M.C. INC and the Finks)."[7]

No control order has yet been made against Mr Totani.

8 On 26 May 2009, Messrs Hudson and Totani commenced their proceedings in the Supreme Court of South Australia. On 3 June 2009, Mr Hudson filed, in the Magistrates Court, a notice of objection under s 17 of the SOCC Act seeking an order, inter alia, that the control order be revoked as unconstitutional.

9 On 3 July 2009, Bleby J in the Supreme Court proceedings reserved four questions for consideration by the Full Court. The questions and the answers, delivered by majority judgment of the Full Court (Bleby and Kelly JJ, White J dissenting) on 25 September 2009, are set out in the judgment of Hayne J[8]. The effect of the answers was that the Full Court found s 14(1) not to be a valid law of the State of South Australia and the control order in respect of Mr Hudson to be "void and of no effect". The Full Court ordered that the costs of the reference be costs in the cause.

10 On the same day that the Full Court delivered its judgment, the Magistrates Court, in light of the judgment, made an order revoking the control order it had made against Mr Hudson. This rather anticipated the finalisation of the Supreme Court proceedings by Bleby J. On 28 September 2009, Bleby J made declarations as to the invalidity of s 14(1) and of the control order against Mr Hudson and ordered that the State pay his and Mr Totani's costs of the action.

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7 This statement was said to exclude information classified by the Commissioner as criminal intelligence.

8 Judgment of Hayne J at [155].

11 On 12 February 2010, special leave was granted to the State of South Australia to appeal to this Court from the whole of the judgment and order of the Full Court given and made on 25 September 2009.

SOCC Act

12 The Commissioner may apply to the Attorney-General, under s 8 of the SOCC Act, for a declaration under Pt 2 in relation to an organisation[9]. Section 10(1) empowers the Attorney-General, on the application of the Commissioner, to make such a declaration if the Attorney-General is satisfied that:

> "(a) members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity[10]; and
>
> (b) the organisation represents a risk to public safety and order in this State".

It is sufficient for the purposes of s 10(1) that the Attorney-General be satisfied that the members of an organisation who are associating for purposes related to serious criminal activity constitute a significant group within the organisation numerically or in terms of their influence[11]. Such purposes need not be the only purposes for which members of the organisation associate[12].

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9 An "organisation" is defined in s 3 as "any incorporated body or unincorporated group (however structured), whether or not the body or group is based outside South Australia, consists of persons who are not ordinarily resident in South Australia or is part of a larger organisation".

10 The term "serious criminal activity" is defined in s 3 as "the commission of serious criminal offences". Such offences are defined in s 3 as "indictable offences (other than indictable offences of a kind prescribed by regulation)" or "summary offences of a kind prescribed by regulation". Regulation 4 of the Serious and Organised Crime (Control) Regulations 2008 (SA) prescribes offences under the *Controlled Substances Act* 1984 (SA); the *Criminal Law Consolidation Act* 1935 (SA); the *Explosives Act* 1936 (SA); the *Firearms Act* 1977 (SA); the *Lottery and Gaming Act* 1936 (SA); the *Summary Offences Act* 1953 (SA); the Explosives Regulations 1996 (SA); and the Explosives (Fireworks) Regulations 2001 (SA).

11 SOCC Act, s 10(4)(a).

12 SOCC Act, s 10(4)(c).

13 Matters to which the Attorney-General may have regard in considering whether or not to make a declaration include information suggesting that a link exists between the organisation and serious criminal activity. He may also have regard to the criminal convictions of its current or former members and of persons who associate or have associated with its members[13]. Submissions received from members of the public[14] and any other matter the Attorney-General considers relevant may be taken into account[15]. If the Attorney-General is provided with information classified by the Commissioner as "criminal intelligence", it may not be disclosed to any person except to a person conducting a review of the operation of the Act under Pt 6 or a person to whom the Commissioner authorises its disclosure[16].

14 In answer to questions from this Court, the State of South Australia accepted that, before making a declaration, the Attorney-General would have to be satisfied that a significant group of members of the organisation had committed or conspired to commit one or more indictable offences or prescribed summary offences or committed accessorial offences. In the alternative, it acknowledged the practical reality that almost invariably the Attorney-General would have to be satisfied that a member or members of the organisation had committed one or more identified crimes.

15 The Attorney-General is not required to provide any grounds or reasons for making a declaration other than to a person conducting a review under Pt 6 if that person so requests[17].

16 A declaration has an immediate legal effect upon members of the public and members of the declared organisation. Section 35 makes it an offence for a person to associate, on not less than six occasions during a period of 12 months, with a person who is a member of a declared organisation[18]. A maximum penalty of imprisonment for five years is imposed for the offence[19]. The verb "associate"

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13 SOCC Act, s 10(3)(a) and (b).

14 The Attorney-General is required by s 9(b) to invite submissions from members of the public in relation to the application.

15 SOCC Act, s 10(3)(e) and (f).

16 SOCC Act, s 13(2).

17 SOCC Act, s 13(1).

18 SOCC Act, s 35(1)(a).

19 SOCC Act, s 35(1).

is widely defined in s 35(11)(a) to include "communicating … by letter, telephone or facsimile or by email or other electronic means". Importantly, the offence provision also applies in relation to association with a person the subject of a control order[20]. The generality of the provision means that it also applies to association between members of a declared organisation. Certain classes of association are to be disregarded for the purposes of s 35 unless the prosecution proves that the association was not reasonable in the circumstances[21]. These include associations between close family members[22].

17 Part 3 of the Act provides for control orders to be made by the Magistrates Court of South Australia[23]. The critical provision of Pt 3 is s 14, which provides in sub-s (1):

> "The Court must, on application by the Commissioner, make a control order against a person (the ***defendant***) if the Court is satisfied that the defendant is a member of a declared organisation."

The grounds of an application under s 14(1) must be verified by affidavit[24]. In such an application the affidavit need not establish more than the existence of a declaration about an organisation and the defendant's membership of that organisation. As appears below, the statutory concept of membership is very broad. Section 14(2) provides for discretionary control orders to be made in circumstances other than those covered by s 14(1)[25].

18 Section 14(5)(b) defines the minimum content of a control order against a member of a declared organisation. It requires that, except as specified in the control order, the Court must prohibit him or her from associating with other persons who are members of declared organisations and from possessing a

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20 SOCC Act, s 35(1)(b).

21 SOCC Act, s 35(6).

22 SOCC Act, s 35(6)(a) and (11)(b). A "close family member" is defined to include a spouse or a former spouse, a person who is or has been in a "close personal relationship" (as defined in s 11 of the *Family Relationships Act* 1975 (SA)), a parent or a grandparent, a brother or a sister and a guardian or a carer.

23 The relevant provisions of Pt 3 refer to "the Court", which is defined in s 3 as the Magistrates Court of South Australia.

24 SOCC Act, s 14(4).

25 The text of s 14(2) appears in the judgment of Crennan and Bell JJ at [404].

dangerous article or a prohibited weapon[26]. In addition, pursuant to s 14(5)(a), the control order may prohibit the defendant from associating or communicating with specified persons or persons of a specified class or from entering or being in the vicinity of specified premises or premises of a specified class. I agree with Hayne J[27] that the Court's power to make exceptions to the minimum content of a control order required by s 14(5)(b) could not be used to make a control order without content. I agree also with Kiefel J that the discretion conferred on the Court does not significantly enlarge its function under s 14(1) and s 14(5)(b)[28].

19 The making of a control order enlivens the prohibition in s 35 against others associating with the defendant[29]. That prohibition is congruent with the prohibition which applies because the defendant is a member of a declared organisation[30]. Under s 22, it is also an offence, punishable by a term of imprisonment not exceeding five years, to contravene or fail to comply with a control order.

20 In s 6 of the Act it is said to be "the intention of the Parliament that this Act apply within the State and outside the State to the full extent of the extra-territorial legislative capacity of the Parliament". While the effect of this provision was not explored on the hearing of the appeal, it indicates a legislative intention that the offence provisions, including s 35, should apply to persons anywhere in Australia communicating or associating with a member of a declared organisation or with a person the subject of a control order[31].

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26 Within the meaning of s 15 of the *Summary Offences Act* 1953 (SA). The text of s 14(5)(b) appears in the judgment of Hayne J at [171].

27 Judgment of Hayne J at [172].

28 Judgment of Kiefel J at [459].

29 SOCC Act, s 35(1)(b).

30 SOCC Act, s 35(1)(a).

31 As to extraterritorial legislative competence of State Parliaments see *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 354 [40] per Gleeson CJ and Heydon J, 388-389 [154]-[159] per Gummow J (Hayne J agreeing at 449 [375]), 482-483 [465]-[466] per Callinan J; [2005] HCA 44; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 22-26 [7]-[16] per Gleeson CJ; [2002] HCA 27; and see generally Carney, *The Constitutional Systems of the Australian States and Territories*, (2006), Ch 7; Twomey, *The Constitution of New South Wales*, (2004) at 53-56.

21 A control order may be issued on an application made without notice to any person[32]. The State of South Australia correctly disclaimed any suggestion that the Magistrates Court was obliged to hear such an application without notice to the affected party.

22 In the making and application of a control order the concept of membership of an organisation has particular significance. The definition of "member" in s 3 of the SOCC Act is non-exhaustive[33]. It includes "an associate member or prospective member"[34], "a person who identifies himself or herself, in some way, as belonging to the organisation"[35] and "a person who is treated by the organisation or persons who belong to the organisation, in some way, as if he or she belongs to the organisation"[36].

23 The obligation imposed upon the Magistrates Court to make a control order is not conditional upon proof of any involvement by the defendant in any criminal conduct. Nor is the Court's obligation conditional upon proof of any past or prospective association between the defendant and any person who has engaged in criminal conduct. It is not necessary that the defendant regards himself or herself as a member of the declared organisation so long as the organisation treats him or her as a member.

24 Section 14(6) specifies matters to which the Court must have regard in considering the prohibitions that may be included in a control order under s 14(1)[37]. Section 14(7) confers power to make consequential or ancillary orders. The verb "associate" is defined non-exhaustively in s 14(8):

> "For the purposes of this section, a person may ***associate*** with another person by any means including communicating with that person by letter, telephone or facsimile or by email or other electronic means."

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32 SOCC Act, s 14(3).

33 The full definition appears in the judgment of Hayne J at [161].

34 SOCC Act, s 3 (definition of "member", par (b)(i)).

35 SOCC Act, s 3 (definition of "member", par (b)(ii)).

36 SOCC Act, s 3 (definition of "member", par (b)(iii)).

37 The full text of s 14(6) appears in the judgment of Kiefel J at [455].

25 A person served with a control order[38] may lodge a notice of objection with the Magistrates Court[39]. The Magistrates Court must consider whether, in the light of the evidence presented by both the Commissioner and the objector, "sufficient grounds existed for the making of the control order"[40]. It may confirm, vary or revoke the control order[41]. It may specify, subject to such conditions as it thinks fit, that the defendant is not prohibited from associating with a particular member or members of a declared organisation[42]. In their application to a control order against a member of a declared organisation, the words "sufficient grounds" suggest a wider basis for objection than actually exists. In such a case the debate at the objection hearing is likely to be confined to those aspects of the control order which are in the discretion of the Court under s 14. The Commissioner or an objector may appeal to the Supreme Court against a decision of the Magistrates Court on a notice of objection[43]. Such an appeal lies as of right on a question of law and with permission on a question of fact[44].

26 There is a wide-ranging privative provision, s 41. Section 41(1) precludes proceedings for judicial review, declaratory or injunctive relief, writs, orders or other remedies in respect of various things done under, or purportedly done under, the SOCC Act including decisions and declarations. As the State of South Australia accepted, the application of s 41(1) to decisions or declarations "purportedly" under the Act must be read in light of what was said in *Kirk v Industrial Court (NSW)*[45]. State legislative power does not extend to depriving a State Supreme Court of its supervisory jurisdiction in respect of jurisdictional error by the executive government of the State, its Ministers or authorities[46]. It may be accepted, therefore, that s 41(1) would not prevent review for jurisdictional error of the Attorney-General's decision to declare an organisation.

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38 The control order is not binding until served in one of the ways specified in s 16: see s 16(4).

39 SOCC Act, s 17.

40 SOCC Act, s 18(1).

41 SOCC Act, s 18(2).

42 SOCC Act, s 18(3).

43 SOCC Act, s 19(1).

44 SOCC Act, s 19(2).

45 (2010) 239 CLR 531; [2010] HCA 1.

46 *Kirk* (2010) 239 CLR 531 at 581 [99]-[100].

27 Section 41(2) precludes a challenge in any proceedings to the "validity and legality of a declaration under Part 2". The State of South Australia submitted that this sub-section would not preclude collateral challenge, in proceedings for a control order, to the declaration upon which the application for the control order was based. A challenge to the validity of the declaration would lie, it was said, because an invalid declaration would not have been made "under Part 2". Accepting that self-serving concession, the practical scope of challenge to the declaration would be limited. It would be limited because the Commissioner, in applying for a control order, has to do no more to prove the declaration than to produce the relevant entry in the Gazette. The Attorney-General in making the declaration is under no obligation to give reasons, although in this case he chose to do so. Short of what might be characterised as a "fishing" subpoena, the materials on which the declaration was based would not be before the Magistrates Court. To the extent that they included information classified by the Commissioner as "criminal intelligence", access to them would be constrained by the provisions of s 21 of the SOCC Act[47]. I agree also with the observations of Gummow and Hayne JJ in relation to the availability of judicial review of declarations made under s 10[48].

28 The limited and difficult avenues for challenge to the making of the declaration do not materially alter the nature of the conditions which enliven the obligation to make a control order imposed on the Magistrates Court by s 14(1). The dominance of the executive declaration in the outcome of a control order application is what was intended by the proponents of the SOCC Act and is what, subject to its validity, it achieved.

Historical and contemporary analogues

29 The Attorney-General in his Second Reading Speech stated the general effect of the SOCC Act when he said[49]:

> "This legislation grants unprecedented powers to the police and the Attorney-General to combat serious and organised crime."

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47 The text of s 21 appears in the judgment of Hayne J at n 288.

48 Judgments of Gummow J at [128] and Hayne J at [193]-[195].

49 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 21 November 2007 at 1806.

30 The SOCC Act, in effect, empowers the executive government to restrict the exercise of the common law freedoms of expression and assembly[50] by members of declared organisations, persons the subject of control orders and members of the public who might wish to communicate or meet with them. It authorises the imposition of restrictions regardless of whether the persons affected by them have ever engaged in, or are ever likely to engage in, criminal conduct of any kind or have actively associated with, or are likely to associate with, persons who have engaged or might at some time in the future engage in criminal conduct[51].

31 The effect of the SOCC Act on personal freedoms was a matter for consideration by the South Australian Parliament which enacted it. Its merit as a legislative measure is not a matter for this Court to judge[52]. Applying the "principle of legality", courts will, of course, construe statutes, where constructional choices are open, so as to minimise their impact upon common law rights and freedoms[53]. That principle, well known to the drafters of legislation, seeks to give effect to the presumed intention of the enacting Parliament not to interfere with such rights and freedoms except by clear and

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50 See *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105 at 126-127 [34] per Lord Bingham of Cornhill; *Evans v New South Wales* (2008) 168 FCR 576 at 594-596 [72]-[77]; Fellman, *The Constitutional Right of Association*, (1963) at 87-101; Keith, *Constitutional Law*, 7th ed (1939) at 454-456; Jarrett and Mund, "The Right of Assembly", (1931) 9 *New York University Law Quarterly Review* 1 at 2-10; Jennings, "Current Comment – The Right of Assembly in England", (1931) 9 *New York University Law Quarterly Review* 217 at 218-221.

51 Such matters may be relevant and taken into account by the Commissioner in the exercise of the discretion to seek a control order and in the exercise by the Court of its discretion to specify exceptions to the minimum conditions of the order pursuant to s 14(5)(b).

52 A restraint applicable to this Court and to all courts: *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 126 per Rich J; [1925] HCA 53, citing *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at 118 per Lord Macnaghten.

53 *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1990] HCA 24; *Coco v The Queen* (1994) 179 CLR 427 at 436-437 per Mason CJ, Brennan, Gaudron and McHugh JJ; [1994] HCA 15; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21] per Gleeson CJ; [2004] HCA 40; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 520 [47] per French CJ; [2009] HCA 4.

unequivocal language for which the Parliament may be accountable to the electorate. Save to the extent that it imposes something approaching a formal requirement of clear statutory language, the principle of legality does not constrain legislative power. Whether, beyond that imposition, State legislative power is constrained by rights deeply rooted in the democratic system of government and the common law[54] was a question referred to but not explored in *Union Steamship Co of Australia Pty Ltd v King*[55]. Whatever the answer to the unexplored question, it is self-evidently beyond the power of the courts to maintain unimpaired common law freedoms which the Commonwealth Parliament or a State Parliament, acting within its constitutional powers, has, by clear statutory language, abrogated, restricted or qualified[56]. That having been said, a constitutionally supported freedom of association has been suggested in dicta in this Court as an incident of the implied freedom of political communication[57]. That suggestion may draw some support from the historical connection between freedom of association and the right to petition Parliament

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54 See the cautionary discussion in Zines, *The High Court and the Constitution*, 5th ed (2008) at 592-595 and dicta in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 687 per Toohey J; [1991] HCA 32; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 69 per Deane and Toohey JJ; [1992] HCA 46.

55 (1988) 166 CLR 1 at 10; [1988] HCA 55. Without resolving the unexplored question, this Court held just-terms compensation for the acquisition of property by a State not to constitute such a right in *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 410 [14] per Gaudron, McHugh, Gummow and Hayne JJ; [2001] HCA 7.

56 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 71-76 per Dawson J; [1996] HCA 24; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 590 [14] per Gleeson CJ; [2004] HCA 46. The rejection of common law constraints upon parliamentary supremacy in *Pickin v British Railways Board* [1974] AC 765 does not resolve the question for Australia whether there are fundamental common law rights and freedoms which inform constitutional constraints.

57 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 91 per Toohey J, 116 per Gaudron J, 142 per McHugh J; [1997] HCA 27; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 234 [148] per Gummow and Hayne JJ; [2004] HCA 41; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 212 per Gaudron J, 231-232 per McHugh J; [1992] HCA 45; and see Gray, "Due process, natural justice, Kable and organisational control legislation", (2009) 20 *Public Law Review* 290 at 303-305. As to an implied freedom of association and the *Kable* doctrine, see Lindell, "The Australian Constitution: Growth, Adaptation and Conflict – Reflections About Some Major Cases and Events", (1999) 25 *Monash University Law Review* 257 at 278.

under s 5 of the *Bill of Rights*[58]. No issue arose in this appeal concerning any implied constitutional freedom of association. Nor did any issue arise in relation to the interaction between s 92 of the Constitution and the restrictions on communication imposed by reason of the extended definition of "associate"[59]. On the other hand, the extent of the intrusions upon personal freedom effected by a control order is relevant to the characterisation of the duty imposed upon the Magistrates Court under s 14(1) of the Act and to whether, contrary to assumptions reflected in Ch III of the Constitution, s 14(1) removes or impairs that independence from the executive that is a defining characteristic of courts of law in Australia.

32 The SOCC Act is not without historical analogues. It takes its place in a long history of laws concerned to prevent or impede criminal conduct by imposing restrictions on certain classes or groups of persons and on their freedom of association. Some such laws have been described generically as vagrancy and consorting laws. Vagrancy laws, which can be traced back to the 14th century in England, were concerned to identify inchoate criminality and prevent criminal conduct by the regulation of persons defined by such terms as "rogues", "vagabonds" and "sturdy beggars"[60]. A 19th-century consolidating statute, the *Vagrancy Act* 1824 (UK)[61], was the model for vagrancy laws in Australia and New Zealand.

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58 1 Wm & Mar Sess 2 c 2; see Handley, "Public Order, Petitioning and Freedom of Assembly", (1986) 7 *Journal of Legal History* 123 at 138-141.

59 SOCC Act, ss 14(8) and 35(11). See, eg, in relation to a State law restricting the influx of criminals, *R v Smithers; Ex parte Benson* (1912) 16 CLR 99; [1912] HCA 96. See also *Gratwick v Johnson* (1945) 70 CLR 1 at 12-15 per Latham CJ, 17 per Starke J, 19-20 per Dixon J; [1945] HCA 7; *Buck v Bavone* (1976) 135 CLR 110 at 136-137 per Murphy J; [1976] HCA 24; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 580-581 per Murphy J; [1986] HCA 60; *Cole v Whitfield* (1988) 165 CLR 360 at 393; [1988] HCA 18; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 81-83 per Deane and Toohey JJ; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 192-195 per Dawson J; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 307-308 per Mason CJ; [1994] HCA 44; *AMS v AIF* (1999) 199 CLR 160 at 179 [45] per Gleeson CJ, McHugh and Gummow JJ, 211-217 [152]-[165] per Kirby J, 248-249 [276]-[277] per Callinan J; [1999] HCA 26.

60 39 Eliz c 4 (1597); 13 Geo II c 24 (1740); 17 Geo II c 5 (1744). See Holdsworth, *A History of English Law*, 3rd ed (1945), vol 4 at 392-401. An abbreviated history of English vagrancy laws is provided by Scott LJ in *Ledwith v Roberts* [1937] 1 KB 232 at 270-275.

61 5 Geo IV c 83.

33 There have also been examples in the history of English law of statutes restricting freedom of association of persons or members of organisations deemed socially undesirable or thought to pose a threat to social order[62]. However, direct inspiration for consorting laws in the Australian States came from the *Police Offences Amendment Act* 1901 (NZ), which created the offence of habitually consorting with reputed thieves, prostitutes or persons without visible means of support[63]. The offence was described by Mason J in *Johanson v Dixon*[64] as "an Australasian contribution to the criminal law". South Australia, in 1928, was the first Australian jurisdiction to introduce an habitual consorting offence that depended upon the idea of guilt by association[65]. The other States for the most part followed suit over the next decade[66]. In each of the States, when consorting laws were enacted they were justified as a mechanism for the reduction of crime and for dealing with criminal gangs[67]. Concerns that they

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62 An early example was Statute 5 Eliz c 20 (1562), which punished those found in the company of gypsies. The *Public Order Act* 1936 (UK) prohibited the wearing of political uniforms and the formation of quasi-military organisations. It was directed at Sir Oswald Mosley and the British Union of Fascists: see "Public Order and the Right of Assembly in England and the United States: A Comparative Study", (1938) 47 *Yale Law Journal* 404 at 404-406. See also the examples given by Hayne J at [235].

63 Elements of vagrancy laws in the United Kingdom and the Australian colonies and States foreshadowed consorting laws by prohibiting keepers of public houses from allowing common prostitutes and reputed thieves to assemble at their premises: 13 & 14 Vict c 33 (1850), s 103; *General Police and Improvement (Scotland) Act* 1862 (25 & 26 Vict c 101), s 337; *Habitual Criminals Act* 1869 (Imp) (32 & 33 Vict c 99), s 10; *Prevention of Crimes Act* 1871 (Imp) (34 & 35 Vict c 112), s 10; *Vagrancy Act* 1835 (NSW), s 2; *Police Act* 1863 (SA), s 56(7); *Police Offences Statute* 1865 (Vic), s 35(iv); *Police Act* 1892 (WA), s 65(7).

64 (1979) 143 CLR 376 at 382-383; [1979] HCA 23.

65 *Police Act Amendment Act* 1928 (SA), s 5.

66 *Vagrancy (Amendment) Act* 1929 (NSW), s 2(b); *Police Offences (Consorting) Act* 1931 (Vic), s 2; *Vagrants, Gaming, and Other Offences Act* 1931 (Q), s 4(1)(v); *Police Offences Act* 1935 (Tas), s 6; *Police Act Amendment Act* 1955 (WA), s 2.

67 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 1929 at 682; Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 10 November 1931 at 4092; Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 October 1931 at 1418; Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 25 August 1955 at 328.

might impinge on innocent members of the community were expressed in opposition to such laws[68]. Consorting did extend to innocent association with proscribed classes of persons such as reputed thieves or known prostitutes or persons who had been convicted of having no visible lawful means of support[69]. However, unlike the provisions of the SOCC Act providing for ministerial declarations and judicial control orders, the vagrancy and consorting laws created offences, based upon norms of conduct, which did not depend upon the prior existence of an executive or judicial order.

34 A conceptual ancestor of the modern control order, referred to by Gleeson CJ in *Thomas v Mowbray* under the general rubric of Blackstone's "preventive justice", was the "ancient power of justices and judges to bind persons over to keep the peace"[70]. Gummow and Crennan JJ pointed out that the jurisdiction to bind over could be exercised in respect of a risk or threat of criminal conduct against the public at large and was not dependent upon a conviction[71]. As their Honours said[72]:

> "The matters of legal history … do support a notion of protection of public peace by preventative measures imposed by court order, but falling short of detention in the custody of the State."

35 The State of South Australia relied upon the analogy between the control order and orders binding persons by recognisance to keep the peace. It referred to the *Summary Procedure Act* 1921 (SA), which confers power upon courts to make restraining orders against persons where there is "a reasonable apprehension" that the person may behave in an intimidating or offensive manner or cause personal injury or damage to property[73]. An important feature of such orders, which distinguishes them from the control order under the SOCC Act, is that they depend upon judgments to be made by the court about the conduct and apprehended conduct of the defendant. No such judgment conditions the

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68 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 1929 at 683; Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 10 November 1931 at 4097.

69 *Johanson* (1979) 143 CLR 376.

70 (2007) 233 CLR 307 at 329 [16]; [2007] HCA 33. See *Devine v The Queen* (1967) 119 CLR 506 at 513-514 per Windeyer J; [1967] HCA 35.

71 (2007) 233 CLR 307 at 357 [120].

72 (2007) 233 CLR 307 at 357 [121].

73 *Summary Procedure Act* 1921 (SA), s 99; see also s 99AA.

obligation to make a control order under s 14(1) of the SOCC Act even though it may have a part to play in relation to the conditions which are imposed. On this matter I agree also with the observations of Kiefel J[74].

36 Commonwealth legislation directed at certain classes of organisation regarded as seditious, subversive or revolutionary has included the *Unlawful Associations Act* 1916 (Cth)[75], provisions of the *Immigration Act* 1901 (Cth) relating to the deportation of members of revolutionary organisations[76] and Pt IIA of the *Crimes Act* 1914 (Cth). The provisions of Pt IIA declare associations which advocate or encourage the overthrow, by revolution, sabotage, force or violence, of the Constitution or the established government of the Commonwealth or a State to be unlawful associations[77]. Part IIA also provides for the Attorney-General to make an application to the Federal Court for a declaration that a body is an unlawful association[78]. These provisions have been little used[79].

37 In recent years a range of statutory mechanisms have been adopted in Australia and in other countries to meet the wider challenge of organised crime, which sometimes operates at a national and international level. Two such mechanisms are civil and criminal assets forfeiture. Civil assets forfeiture was considered in *International Finance Trust Co Ltd v New South Wales Crime Commission*[80]. The mechanism under consideration in this case is intended to be preventative. It strikes at the freedom of association of members of criminal organisations and at participation in the activities of such organisations. A longstanding example of legislation directed at participation in organised

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74 Judgment of Kiefel J at [473]-[474].

75 Considered in *Pankhurst v Kiernan* (1917) 24 CLR 120; [1917] HCA 63.

76 *Immigration Act* 1901 (Cth), s 8AA (inserted by the *Immigration Act* 1925 (Cth)); as to the validity of this provision see *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36.

77 *Crimes Act* 1914 (Cth), s 30A(1)(a).

78 *Crimes Act* 1914 (Cth), s 30AA.

79 Douglas, "Keeping the Revolution at Bay: The Unlawful Associations Provisions of the Commonwealth *Crimes Act*", (2001) 22 *Adelaide Law Review* 259; Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report No 104, (2006) at 86-100. See also *R v Hush; Ex parte Devanny* (1932) 48 CLR 487; [1932] HCA 64.

80 (2009) 240 CLR 319 at 344-345 [25]-[29] per French CJ; [2009] HCA 49.

criminal activity in the United States is Ch 96 of Title 18 of the United States Code, entitled "Racketeer Influenced and Corrupt Organizations"[81]. International support for domestic laws directed at criminal organisations is reflected in Art 5 of the United Nations Convention against Transnational Organized Crime (2000)[82], which provides for the criminalisation of active participation in an "organized criminal group". Examples of legislation directed to participation and membership are to be found, inter alia, in the United Kingdom[83], Canada[84] and New Zealand[85].

38 A number of Australian States and Territories have enacted legislation specifically directed against participation in criminal organisations[86]. A meeting of the Standing Committee of Attorneys-General in April 2009 agreed that States and Territories should consider introducing legislative measures including "consorting or similar provisions that prevent a person associating with another person who is involved in organised criminal activity as an individual or through an organisation"[87]. In 2010, the Parliament of the Commonwealth enacted Pt 9.9 of the *Criminal Code* (Cth) ("the Code"), which creates offences relating to association in respect of serious criminal activity and support for "criminal organisations"[88]. There is no provision for declarations and control orders in Pt 9.9.

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81 18 USC §§1961-1968 (2006), replicated in many States of the USA; see generally Mecone, Shapiro and Martin, "Racketeer Influenced and Corrupt Organizations", (2006) 43 *American Criminal Law Review* 869.

82 2225 UNTS 209 (opened for signature 12 December 2000, entered into force 29 September 2003). Australia signed the Convention on 13 December 2000 and became a party to it on 27 May 2004.

83 *Serious Crime Act* 2007 (UK), Pt 1. In s 5, provision is made for serious crime prevention orders restricting, inter alia, the means by which a person communicates or associates with others.

84 *Criminal Code* RSC 1985, c C-46, s 467.11 (which creates the offence of participating in or contributing to any activity of a criminal association).

85 *Crimes Act* 1961 (NZ), s 98A.

86 *Crimes (Criminal Organisations Control) Act* 2009 (NSW); *Serious Crime Control Act* 2009 (NT); *Criminal Organisation Act* 2009 (Q).

87 Australia, Standing Committee of Attorneys-General, Communiqué, 16-17 April 2009 at 8.

88 Introduced into the Code by the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2)* 2010 (Cth).

39 The Code makes provision for the executive listing of "terrorist organisations" by regulation and for the making, by courts, of control orders against participants in such organisations or for the prevention of terrorist acts[89]. The nature of the power conferred upon the Federal Magistrates Court to make such orders was considered in *Thomas v Mowbray*. The regime created by the Code is significantly different from that created by s 14(1) of the SOCC Act[90]. Importantly, the Code does not purport to impose any obligation upon a court to make a control order upon the basis of an executive determination or otherwise. Whether a control order is made or not is in the discretion of the court[91]. The court cannot make such an order unless it is satisfied, on the balance of probabilities, that to do so would substantially assist in preventing a terrorist act or that the person in question has provided training to, or received training from, a listed terrorist organisation. The issues in *Thomas v Mowbray* were not the issues before this Court in this appeal. They were whether the power conferred on a court by Div 104 of the Code was judicial power, whether the Code authorised its exercise in a manner contrary to Ch III and whether there was a head of legislative power to support it.

40 There are differences between the provisions of the SOCC Act relating to declarations and control orders and analogous provisions in other State and Territory jurisdictions. In New South Wales and the Northern Territory declarations of organisations are made on the application of the Commissioner of Police by a judge declared by the Attorney-General, with the judge's consent, to be an "eligible Judge"[92]. Beyond drawing attention to these provisions, it is not necessary for present purposes to express any view on whether eligible judges act as personae designatae or discharge an administrative rather than judicial function in making such declarations[93]. The Commissioner of Police may also

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89 Code, Divs 102 and 104.

90 The submission of the Solicitor-General for New South Wales, that it was difficult to tell the difference between the two regimes, must be rejected.

91 Code, s 104.4.

92 *Crimes (Criminal Organisations Control) Act* 2009 (NSW), ss 5, 6 and 9; *Serious Crime Control Act* 2009 (NT), ss 12, 13 and 14.

93 As to the use of federal judges as personae designatae to exercise non-judicial functions compatible with their judicial role, see *Hilton v Wells* (1985) 157 CLR 57; [1985] HCA 16; *Grollo v Palmer* (1995) 184 CLR 348; [1995] HCA 26. The application of compatibility requirements to State judges acting persona designata was raised by McHugh J in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 117-118 and variously discussed in Campbell, "Constitutional Protection of State Courts and Judges", (1997) 23 *Monash University Law Review*

(Footnote continues on next page)

apply to the Supreme Court in both of those jurisdictions for interim control orders or control orders which that Court has a discretion to grant or refuse[94]. The *Criminal Organisation Act* 2009 (Q) provides for the Supreme Court, on the application of the Commissioner of Police and in its discretion, to declare organisations and to make control orders[95].

41 As appears from the preceding, the SOCC Act does not introduce novel or unique concepts into the law in so far as it is directed to the prevention of criminal conduct by providing for restrictions on the freedom of association of persons connected with organisations which are or have been engaged in serious criminal activity. The area of constitutional scrutiny in this appeal is the interaction between the Attorney-General's executive declaration of an organisation and the conditional obligation imposed upon the Magistrates Court to make a control order on the application of the Commissioner. It was the constitutional propriety of that interaction which concerned the Full Court of the Supreme Court of South Australia.

The decision of the Full Court

42 In the Full Court, Bleby J, with whom Kelly J agreed[96], summed up his opinion of the operation of s 14(1) of the SOCC Act as follows[97]:

> "Thus it can be seen that the process of depriving a person of their right to and freedom of association on pain of imprisonment for up to five years, although formally performed by a State court which exercises federal jurisdiction, is in fact performed to a large extent by a member of the Executive Government in a manner which gives the appearance of being done by the court. But the process is devoid of the fundamental protections which the law affords in the making of such an order, namely, the right to have significant and possibly disputed factual issues

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397 at 413-415; Carney, "*Wilson & Kable*: The Doctrine of Incompatibility – An Alternative to Separation of Powers?", (1997) 13 *Queensland University of Technology Law Journal* 175 at 191; Johnston and Hardcastle, "State Courts: The Limits of *Kable*", (1998) 20 *Sydney Law Review* 216 at 229-230.

94 *Crimes (Criminal Organisations Control) Act* 2009 (NSW), ss 14, 19 and 21; *Serious Crime Control Act* 2009 (NT), s 25.

95 *Criminal Organisation Act* 2009 (Q), ss 10 and 18.

96 (2009) 105 SASR 244 at 305 [277].

97 (2009) 105 SASR 244 at 283 [166].

> determined by an independent and impartial judicial officer and the right to be informed of and to answer the case put against the person."

His Honour characterised s 14(1) of the SOCC Act as requiring the Magistrates Court to "act without question on a declaration which represents the finding of the Attorney-General on matters critical to the making of the control order, and without the right to a fair hearing"[98]. He held that the "unacceptable grafting of non-judicial powers onto the judicial process in such a way that the outcome is controlled, to a significant and unacceptable extent, by an arm of the Executive Government … destroys the court's integrity as a repository of federal jurisdiction"[99].

43 Bleby J attached weight to the requirement of the SOCC Act that the most complex factual matters to be established before a control order could be made were to be determined by the Attorney-General[100]. I agree with Hayne J that the question whether the Magistrates Court is required by s 14(1), in appearance or reality, to act as an instrument of the executive is not determined by a comparison of the respective size or complexity of the tasks undertaken by the executive and the judicial branches of government. Rather it depends upon the nature of the relationship that the SOCC Act establishes between those two branches[101]. The proposition embodied in the second ground of appeal raised by the State of South Australia and set out below is correct but does not lead to a determination of the appeal in favour of the State.

44 Bleby J also placed reliance on the fact that the Attorney-General, in making a declaration, could act upon information classified by the Commissioner as "criminal intelligence", which information could not be disclosed to anyone, including a defendant to a s 14(1) application, without the authority of the Commissioner[102]. His Honour drew a distinction between these matters and the criminal intelligence provisions considered in *K-Generation Pty Ltd v Liquor Licensing Court*[103], holding that the protections which preserved the legislation in that case were absent from the SOCC Act[104]. I agree, however, with Gummow J

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98 (2009) 105 SASR 244 at 283 [167].

99 (2009) 105 SASR 244 at 281 [157].

100 (2009) 105 SASR 244 at 280 [154]-[155].

101 Judgment of Hayne J at [199]-[200].

102 (2009) 105 SASR 244 at 282 [164].

103 (2009) 237 CLR 501.

104 (2009) 105 SASR 244 at 282 [163].

that the distinction drawn by Bleby J between s 21(2) of the SOCC Act and the like provisions in question in *K-Generation Pty Ltd* should be rejected[105].

45 In dissent, White J held that the jurisdiction of the Magistrates Court was not so subordinated to the decision-making power of the executive, and its manner of exercise not so directed, that the Court's independence and capacity to act impartially was impaired[106]. His Honour had regard to the matters upon which the Magistrates Court had to adjudicate in an application under s 14(1), including the fact of the defendant's membership of the organisation[107], the content of the control order[108] and the matters listed in s 14(6)[109]. His Honour also had regard to the need for the Magistrates Court to take into account the freedoms protected in s 4(2) relating to advocacy, protest, dissent and industrial action[110]. His Honour concluded that it could not reasonably be said that s 14(1) directed the Magistrates Court in an impermissible way as to the manner and outcome of the exercise of its jurisdiction. The obligation to make a control order with a specified minimum outcome was not in context sufficient to warrant that conclusion[111].

Grounds of appeal

46 In its proposed further amended notice of appeal the State of South Australia asserted that the Full Court misapplied the principle recognised in *Kable v Director of Public Prosecutions (NSW)*[112] and erred by:

1. having regard to the process by which the legislature chose to select a particular fact (the declaration of the Club), proof of which, to the satisfaction of the Magistrates Court to the required standard, along with other facts, served as the trigger for a legislatively prescribed consequence;

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105 Judgment of Gummow J at [121]-[125].

106 (2009) 105 SASR 244 at 305 [273].

107 (2009) 105 SASR 244 at 287 [190].

108 (2009) 105 SASR 244 at 288 [192]-[193].

109 (2009) 105 SASR 244 at 288-289 [195].

110 (2009) 105 SASR 244 at 289 [196].

111 (2009) 105 SASR 244 at 291 [207].

112 (1996) 189 CLR 51.

2. drawing a comparison between the significance and complexity of the functions conferred by the SOCC Act on the Magistrates Court and those conferred by the Act on the Attorney-General; and

3. having regard to whether the functions conferred by the Act on the Attorney-General, as opposed to those conferred on the Magistrates Court, might offend the *Kable* doctrine.

47 It is useful, before turning to the merits of the appeal, to review the way in which Ch III of the Constitution rests upon assumptions about the continuing existence and essential characteristics of State courts as part of a national judicial system and the implications that this Court has drawn from those assumptions. The assumptions are historical realities and not the product of judicial implication.

State courts exercising federal jurisdiction – an economical proposal

48 Early drafts of the Australian Constitution prepared by Andrew Inglis Clark and Charles Kingston proposed distinct State and federal judicatures. In that respect, they followed the United States model subject to Inglis Clark's "innovation", which provided that the Federal Supreme Court should hear appeals from all final judgments of the Supreme Courts of the States[113].

49 The proposal that the Parliament should be able to invest State courts with federal jurisdiction did not emerge until the 1897 session of the Australasian Federal Convention in Adelaide. It appears to have been inspired by concerns raised in the Judiciary Committee of the Convention about the cost of establishing federal courts. A telegram exchange ensued between Josiah Symon, the chairman of the Committee, James Walker, a member of the Committee, and Sir Samuel Griffith, who was in Brisbane in April 1897 when the proposal was raised. Griffith gave it his blessing by telegram[114].

50 In his written critique of the 1897 draft Constitution, Griffith described the proposed power to invest State courts with federal jurisdiction as "[a]n important and valuable alteration in substance", one which would "obviate the immediate necessity of establishing Federal Circuit Courts"[115]. An emphasis on economy

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113 Williams, *The Australian Constitution: A Documentary History*, (2005) at 69.

114 Joyce, *Samuel Walker Griffith*, (1984) at 204-205; La Nauze, *The Making of the Australian Constitution*, (1972) at 130-131.

115 Williams, *The Australian Constitution: A Documentary History*, (2005) at 622.

was apparent from Symon's explanation, to the 1898 session of the Convention at Melbourne, of the rationale for using State courts[116]:

> "The method adopted in the United States of having circuit courts, and so on, all over the country has been wiped out here, so that the Federal Parliament may save that expense, and the Parliament has been given power to vest the judicial control of matters not to be dealt with by the High Court in the state courts."

As La Nauze observed[117]:

> "Thus was born, out of practical considerations rather than high constitutional theory, what a famous Chief Justice of the High Court of Australia was to describe in characteristic language as the 'autochthonous expedient of conferring federal jurisdiction on State courts'."

One does not look first to overarching principles of constitutionalism as a source of the limitations on State legislative power which have been expounded under the general rubric of the "*Kable* doctrine". Rather, it is necessary to focus upon the text and structure of Ch III and the underlying historically based assumptions about the courts, federal and State, upon which the judicial power of the Commonwealth can be conferred. It is in the need for consistency with those assumptions that the implied limitations find their source.

51 The linkage between assumptions about courts at the time of Federation and the national character of the Australian judiciary was foreshadowed in the commentary offered by Quick and Garran on s 77 in 1901[118]:

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116 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 31 January 1898 at 298.

117 La Nauze, *The Making of the Australian Constitution*, (1972) at 131. The "characteristic language" of Sir Owen Dixon appeared in the joint judgment in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268 per Dixon CJ, McTiernan, Fullagar and Kitto JJ; [1956] HCA 10; see also *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 110 per McHugh J, 139-140 per Gummow J, and the references to the economic imperative of the autochthonous expedient in Zines, *Cowen and Zines's Federal Jurisdiction in Australia*, 3rd ed (2002) at 195, citing *The Commonwealth v Limerick Steamship Co Ltd* (1924) 35 CLR 69 at 90 per Isaacs and Rich JJ; [1924] HCA 50 and Bailey, "The Federal Jurisdiction of State Courts", (1940) 2 *Res Judicatae* 109.

118 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 804.

> "It is noteworthy that in this section, as elsewhere in the Constitution, the judicial department of the Commonwealth is more national, and less distinctively federal, in character, than either the legislative or the executive departments. The High Court, as has already been pointed out …, is not only a federal, but a national court of appeal; it has appellate jurisdiction in matters of the most purely provincial character as well as in matters of federal concern. Confidence in the integrity and impartiality of the Bench prevents any jealousy or distrust of this wide federal jurisdiction; *and the same confidence makes it possible to contemplate without misgiving the exercise of federal jurisdiction by State courts* – subject, of course, to the controlling power of the Federal Parliament." (emphasis added)

52 It is appropriate in this context to refer to the status of the Magistrates Court of South Australia as a court of the State.

The Magistrates Court of South Australia

53 At the time of the Convention Debates in 1891 and 1897-1898 each of the Australian colonies had a two- or three-tiered judicial system with a Supreme Court at its apex. Each of the colonies had an active magistracy as part of that system. After 1850 the paid magistracy began to be regarded in most jurisdictions as made up of "officials who were basically judicial-style functionaries"[119]. Nevertheless persons could be appointed as magistrates who were not qualified lawyers and not all magistrates were independent of administrative control by heads of department of the executive government. As Gummow, Hayne and Crennan JJ pointed out in *Forge v Australian Securities and Investments Commission*, Justices of the Peace and stipendiary magistrates formed part of the colonial and State public services and were subject to disciplinary and like procedures applicable to public servants generally[120]. This was perhaps an example of the general proposition that their Honours advanced that[121]:

> "History reveals that judicial independence and impartiality may be ensured by a number of different mechanisms, not all of which are seen, or need to be seen, to be applied to every kind of court … The independence and impartiality of inferior courts, particularly the courts of summary jurisdiction, was for many years sought to be achieved and enforced chiefly by the availability and application of the Supreme Court's

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119 Castles, *An Australian Legal History*, (1982) at 327.

120 (2006) 228 CLR 45 at 82 [82]; [2006] HCA 44.

121 (2006) 228 CLR 45 at 82-83 [84].

> supervisory and appellate jurisdictions and the application of the apprehension of bias principle in particular cases."

54 From 1985 all appointments of magistrates were made from the ranks of qualified practitioners[122]. Justice Thomas accurately characterised the Australian magistracy when he wrote in 1991[123]:

> "Clearly the Magistrates' Courts are simply the courts of first instance in the judicial structure throughout Australia."

As a general proposition magistrates courts are courts of the States for the purpose of receiving federal jurisdiction[124]. This is true of the Magistrates Court of South Australia.

55 The history of the magistracy in South Australia dates back to 1837[125]. In 1982, King CJ said of the magistracy[126]:

> "Every consideration which renders a judiciary independent of the government, essential to the proper functioning of society under the rule of law, is as valid in relation to the magistracy as to the other two tiers of the judiciary."

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122 Thomas, "The Ethics of Magistrates", (1991) 65 *Australian Law Journal* 387 at 389.

123 Thomas, "The Ethics of Magistrates", (1991) 65 *Australian Law Journal* 387 at 389.

124 As to the characterisation of members of the Federal Magistrates Court as Justices of a court created by the Parliament under s 72 of the Constitution, see *Re Bryant; Ex parte Guarino* (2001) 75 ALJR 478 at 480 [13] per Hayne J; 178 ALR 57 at 60; [2001] HCA 5.

125 The history of the magistracy beginning in 1837 with the creation of Courts of General or Quarter and Petty Sessions was set out at length in *R v Moss; Ex parte Mancini* (1982) 29 SASR 385 at 397-421 per Wells J. See also Lowndes, "The Australian Magistracy: From Justices of the Peace to Judges and Beyond", 74 *Australian Law Journal* 509 (Part I); 592 (Part II).

126 *R v Moss; Ex parte Mancini* (1982) 29 SASR 385 at 389.

56 The Magistrates Court of South Australia was established by the *Magistrates Court Act* 1991 (SA)[127]. It is a court of record[128], divided into criminal and petty sessions divisions and three civil divisions[129]. The three civil divisions are "General Claims", "Consumer and Business" and "Minor Claims". The Court has defined civil, criminal and petty sessions jurisdictions[130] and "any jurisdiction conferred on it by statute"[131]. The rules of the Court may assign particular statutory jurisdictions conferred by or under another Act either to the Civil (General Claims) Division or to the Criminal Division of the Court[132]. There is provision for appeals from the Court to the Supreme Court of South Australia[133] and for reservation of questions of law arising in a civil action (except a minor civil action) for determination by the Supreme Court[134].

57 The Magistrates Court participates in the State Courts Administration Council pursuant to the *Courts Administration Act* 1993 (SA). The members of the Court are not members of the Public Service[135]. White J said in *Frederick v South Australia*[136]:

> "The effect of the regime arising from the *Magistrates Act*, the *Magistrates Court Act*, and the [*Courts Administration Act*] is that magistrates are judicial officers who, as one would expect, exercise their judicial functions independently of the Executive."

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127 *Magistrates Court Act* 1991 (SA), s 4.

128 *Magistrates Court Act*, s 5. See *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 454-456 per Barton J; [1918] HCA 56.

129 *Magistrates Court Act*, s 7(1).

130 *Magistrates Court Act*, ss 8, 9 and 9A.

131 *Magistrates Court Act*, s 10(1).

132 *Magistrates Court Act*, s 10(2). Rules of the Court are made by the Chief Magistrate, the Deputy Chief Magistrate and any two or more other magistrates: s 49(2).

133 *Magistrates Court Act*, s 40.

134 *Magistrates Court Act*, s 41.

135 See *Public Sector Act* 2009 (SA), s 24.

136 (2006) 94 SASR 545 at 597 [222]. The *Magistrates Act* referred to was the *Magistrates Act* 1983 (SA).

His Honour's remarks and the legislative framework which he considered are to be understood against an historical background in which magistrates in South Australia, like magistrates in the other States of Australia, had been members of the Public Service and often subject, in administrative matters, to the same heads of department as prosecuting counsel appearing before them[137].

58 There is no doubt, and it was not contended otherwise, that the Magistrates Court of South Australia is a court in which the Parliament of the Commonwealth can invest federal jurisdiction under s 71 of the Constitution. Nor is there any doubt, and it was not contended otherwise, that a member of the Magistrates Court is a judge for the purposes of s 79 of the Constitution, which provides that "[t]he federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes"[138]. In 2008 there were no fewer than 72 Commonwealth statutes which conferred jurisdiction on the Magistrates Court of South Australia[139]. Established as a court by the State, the Magistrates Court cannot be deprived by the State "of those minimum characteristics of the institutional independence and impartiality identified in the decisions of this Court"[140]. For, as appears below, the continuing existence of those characteristics is an assumption which underlies Ch III of the Constitution.

Constitutional assumptions about courts

59 The essentials of the British justice system travelled to and settled in the Australian colonies long before the Federation movement began. The courts of Britain's colonies, including the Australian colonies[141]:

> "in exercising their power to hear and determine, … did so in the manner of their judicial counterparts in the place of the law's origin".

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137 (2006) 94 SASR 545 at 597 [223].

138 See *Clark v Federal Commissioner of Taxation* (2008) 171 FCR 1 at 9 [35] per Branson and Sundberg JJ.

139 *Clark v Federal Commissioner of Taxation* (2008) 171 FCR 1 at 3 [8] per Branson and Sundberg JJ.

140 *K-Generation Pty Ltd* (2009) 237 CLR 501 at 544 [153] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ.

141 McPherson, *The Reception of English Law Abroad*, (2007) at 405.

As Windeyer J said in *Kotsis v Kotsis*[142]:

> "The nature of a court and the functions of court officers were matters that were well known in England long before the Australian colonies began. The meaning of the word 'court' has thus come to us through a long history; and it is by the light of that that it is to be understood in ss 71, 72 and 73 of the Constitution."

60 The 19th-century understanding of a "court of justice", extant at the time of the drafting of the Constitution, was explained in part in the frequently cited judgment of Fry LJ in *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson*[143]. His Lordship spoke of "the fairness and impartiality which characterize proceedings in Courts of justice, and are proper to the functions of a judge"[144]. He described courts as "for the most part, controlled and presided over by some person selected as specially qualified for the purpose" and said "they have generally a fixed and dignified course of procedure, which tends to minimise the risks that might flow from [their] absolute immunity"[145]. The application of that concept to courts contemplated as repositories of the judicial power of the Commonwealth was accepted by Isaacs and Rich JJ in *Waterside Workers' Federation of Australia v J W Alexander Ltd*, citing Fry LJ in connection with the proposition that[146]:

> "the Federal Constitution is specific that judicial power shall be vested in Courts, that is, Courts of law in the strict sense".

The understanding of what constitutes "Courts of law" may be expressed in terms of assumptions underlying ss 71 and 77(iii) in relation to the courts of the States.

61 There are three overlapping assumptions which, as a matter of history and as a matter of inference from the text and structure of Ch III, underlie the adoption of the mechanism reflected in s 77(iii) of the Constitution. The first is the universal application throughout the Commonwealth of the rule of law, an assumption "upon which the Constitution depends for its efficacy"[147]. The

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142 (1970) 122 CLR 69 at 91; [1970] HCA 61.

143 [1892] 1 QB 431.

144 [1892] 1 QB 431 at 447.

145 [1892] 1 QB 431 at 447.

146 (1918) 25 CLR 434 at 467.

147 *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [61] per Gummow and Crennan JJ; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322

(Footnote continues on next page)

second is that the courts of the States are fit, in the sense of competent, to be entrusted with the exercise of federal jurisdiction. As Professor Sawer observed[148]:

> "The State Supreme Courts were of a very high and uniform calibre – a situation in marked contrast with that which obtained in the United States shortly after its establishment – and there was no substantial ground for fearing that they would be biased or parochial in their approach to federal questions."

The generality of the wording of ss 71 and 77(iii) indicates that the assumption of competence extends to all courts of the States, albeit the supervisory role of the Supreme Courts, as was submitted by the Solicitor-General of the Commonwealth, reinforces the independence and impartiality of inferior State courts and contributes to the fulfilment of the constitutional imperative recognised in *Kable*[149].

62 The third assumption is that the courts of the States continue to bear the defining characteristics of courts and, in particular, the characteristics of independence, impartiality, fairness and adherence to the open-court principle. This formulation is deliberately non-exhaustive. In considering the attributes of courts contemplated by Ch III of the Constitution it is necessary to bear in mind the cautionary observation of Gummow, Hayne and Crennan JJ in *Forge* that[150]:

> "It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court."

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at 351 [30] per Gleeson CJ and Heydon J; [2005] HCA 44; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J; [1951] HCA 5.

148 Sawer, *Australian Federalism in the Courts*, (1967) at 20-21. And see *The Federalist*, No 81 (attributed to Hamilton), in *The Federalist*, (1788), vol 2, 310 at 317.

149 For example, *Fingleton v Christian Ivanoff Pty Ltd* (1976) 14 SASR 530, in which the Full Court of the Supreme Court of South Australia held a special magistrate disqualified from hearing a complaint because, after a departmental rearrangement, the magistrate and the solicitor appearing on the complaint were both in the same department of the Public Service with the same departmental head.

150 (2006) 228 CLR 45 at 76 [64].

Nevertheless, as their Honours added[151]:

> "An important element, however, in the institutional characteristics of courts in Australia is their capacity to administer the common law system of adversarial trial. Essential to that system is the conduct of trial by an independent and impartial tribunal."

At the heart of judicial independence, although not exhaustive of the concept, is decisional independence from influences external to proceedings in the court, including, but not limited to, the influence of the executive government and its authorities[152]. Decisional independence is a necessary condition of impartiality. Procedural fairness effected by impartiality and the natural justice hearing rule lies at the heart of the judicial process[153]. The open-court principle, which provides, among other things, a visible assurance of independence and impartiality, is also an "essential aspect" of the characteristics of all courts, including the courts of the States[154].

63 The Convention Debates reveal implicit reflection on the principle of separation of powers in the context of a provision, later omitted, which would have barred any person holding judicial office from being appointed to or holding any executive office[155]. The limited record of consideration of judicial independence by delegates to the Convention otherwise centred around debate about the mechanism for the removal of federal judges. A leading contributor in this respect was the South Australian Charles Kingston. He spoke of his desire "to preserve intact the absolute independence of the judges, both in relation to the Federal Executive and the Federal Parliament; that they may have nothing to hope for, and nothing to fear either; and that in doing their duty they may feel

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151 (2006) 228 CLR 45 at 76 [64] (footnote omitted).

152 As to the multiple location of judicial decisional independence in separation-of-powers protections providing for "judicial independence" and within the rubric of "due process" and "the rule of law", see Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process*, (2009) at 8.

153 For a recent discussion of the natural justice hearing rule in this context, see *International Finance Trust Co Ltd* (2009) 240 CLR 319 at 379-384 [139]-[150] per Heydon J.

154 *Russell v Russell* (1976) 134 CLR 495 at 520 per Gibbs J; see also at 505 per Barwick CJ, 532 per Stephen J; [1976] HCA 23.

155 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 1 February 1898 at 356, 358-359, 361, 363, 368, 371, 372.

secure in their office"[156]. The absence of any recorded debate about the principle of independence enunciated by Kingston indicates that it was uncontroversial. The historical record does not indicate that the members of the Convention expressly adverted to the broader concept of the separation of judicial power in their debates[157]. However, that does not detract from the conclusion that the Constitution was framed on the basis of common assumptions, at least among lawyers of the day, about the nature of courts and their independence in the discharge of judicial functions.

64 The assumption of the continuity of the defining characteristics of the courts of the States as courts of law is supported by ss 106 and 108 of the Constitution, which, by continuing the constitutions and laws of the former colonies subject to the Constitution of the Commonwealth, continued, inter alia, the courts of the colonies and their various jurisdictions. That continuity could accommodate the extension, diminution or modification of the organisation and jurisdiction of courts existing at Federation, the creation of new courts and the abolition of existing courts (other than the Supreme Courts). Those powers in State legislatures are derived from the constitutions of the States. Until 1986, they were also derived from s 5 of the *Colonial Laws Validity Act* 1865 (Imp)[158]. Since 1986, they can be derived from s 2(2) of the *Australia Acts*[159].

65 The assumption that all Australian courts would retain the defining characteristics of courts of law after Federation is also implicit in covering cl 5 of the Constitution[160], which provides that "[t]his Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth". Those words represent what Quick and Garran called "a

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156 *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 20 April 1897 at 947; see also at 949 (Isaacs); *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 1 February 1898 at 361 (Downer).

157 Wheeler, "Original Intent and the Doctrine of the Separation of Powers in Australia", (1996) 7 *Public Law Review* 96 at 99-103; Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process*, (2009) at 59.

158 28 & 29 Vict c 63.

159 *Australia Act* 1986 (Cth); *Australia Act* 1986 (UK); and the *Australia Acts (Request) Act* 1985 of each of the States.

160 Section 5 of the *Commonwealth of Australia Constitution Act* 1900 (Imp) (63 & 64 Vict c 12).

distinctly national feature of the Constitution"[161]. Within their jurisdictions the courts of the States had, by operation of covering cl 5, "jurisdiction to declare and apply the laws of the Commonwealth in all cases in which the judicial power of the Commonwealth is not necessarily exclusive of the judicial power of the States"[162]. Whether covering cl 5 also provides a source of authority for judicial review of the validity of legislation need not be explored here[163].

66 There was at Federation no doctrine of separation of powers entrenched in the constitutions of the States. Unsuccessful attempts to persuade courts of the existence of such a doctrine[164] were made in New South Wales[165], Western Australia[166] and South Australia[167] in the 1960s and 1970s, and Victoria[168] in 1993, relying, inter alia, upon the decision of the Privy Council in *Liyanage v The Queen*[169]. The absence of an entrenched doctrine of separation of powers

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161 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 353.

162 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 620 [26] per Gleeson CJ, Gummow and Hayne JJ; [2008] HCA 28, quoting Inglis Clark, *Studies in Australian Constitutional Law*, (1901) at 177.

163 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1125; [1907] HCA 76; *Kingston v Gadd* (1901) 27 VLR 417 at 426 per Williams J, 428 per Holroyd J; *Commissioner of Taxes v Parks* [1933] St R Qd 306; and see Dixon, "Marshall and the Australian Constitution", (1955) 29 *Australian Law Journal* 420 at 425; Sawer, *Australian Federalism in the Courts*, (1967) at 76; cf Lindell, "Duty to Exercise Judicial Review", in Zines (ed), *Commentaries on the Australian Constitution*, (1977) 150 at 185-186; Thomson, "Constitutional Authority for Judicial Review: A Contribution from the Framers of the Australian Constitution", in Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide*, (1986) 173 at 188-192.

164 See, generally, Carney, *The Constitutional Systems of the Australian States and Territories*, (2006) at 344-349, discussing the five cases next footnoted.

165 *Clyne v East* (1967) 68 SR (NSW) 385; *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372.

166 *Nicholas v Western Australia* [1972] WAR 168.

167 *Gilbertson v South Australia* (1976) 15 SASR 66.

168 *Collingwood v Victoria [No 2]* [1994] 1 VR 652.

169 [1967] 1 AC 259.

under the constitutions of the States at Federation and thereafter does not detract from the acceptance at Federation and the continuation today of independence, impartiality, fairness and openness as essential characteristics of the courts of the States. Nor does the undoubted power of State Parliaments to determine the constitution and organisation of State courts detract from the continuation of those essential characteristics. It is possible to have organisational diversity across the Federation without compromising the fundamental requirements of a judicial system.

The diversity of State courts

67 Griffith CJ said in *Federated Sawmill, Timberyard and General Woodworkers' Employes' Association (Adelaide Branch) v Alexander* ("the *Sawmillers' Case*") that "when the Federal Parliament confers a new jurisdiction upon an existing State Court it takes the Court as it finds it, with all its limitations as to jurisdiction, unless otherwise expressly declared"[170]. The proposition in the *Sawmillers' Case*, as developed in later decisions of this Court including *Le Mesurier v Connor*[171], recognised that the Parliaments of the States retain the legislative power to determine the constitution of their courts and the organisational arrangements through which they will exercise their jurisdiction and powers[172]. As Gummow, Hayne and Crennan JJ said in *Forge*[173]:

> "The provisions of Ch III do not give power to the federal Parliament to affect or alter the constitution or organisation of State courts."

68 The statement made by Griffith CJ in the *Sawmillers' Case* should not be over-generalised. As Gaudron J explained in *Kable*, it was "a vastly different statement from the unqualified proposition that the Commonwealth must take a State court as it finds it"[174]. The Parliament of a State does not have authority to enact a law which deprives a court of the State of one of its defining characteristics as a court, or impairs one or more of those characteristics. The

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170 (1912) 15 CLR 308 at 313; [1912] HCA 42.

171 (1929) 42 CLR 481; [1929] HCA 41.

172 *Le Mesurier* (1929) 42 CLR 481 at 495-496 per Knox CJ, Rich and Dixon JJ; *Adams v Chas S Watson Pty Ltd* (1938) 60 CLR 545 at 554-555 per Latham CJ; [1938] HCA 37; *Peacock v Newtown Marrickville and General Co-operative Building Society No 4 Ltd* (1943) 67 CLR 25 at 37 per Latham CJ, McTiernan J agreeing; [1943] HCA 13.

173 (2006) 228 CLR 45 at 75 [61] (footnote omitted).

174 (1996) 189 CLR 51 at 102.

statement in *The Commonwealth v Hospital Contribution Fund* about the unrestricted legislative competency of the States in relation to the composition, structure and organisation of their courts "as appropriate vehicles for the exercise of invested federal jurisdiction"[175] must be read in the light of *Kable* and those decisions which further explain the principles which it enunciated. The point was made by Gummow J in *Kable*[176], commenting on the decision in *Le Mesurier*:

> "But this decision did not determine that a State legislature has power to impose upon the Supreme Court of that State functions which are incompatible with the discharge of obligations to exercise federal jurisdiction, pursuant to an investment by the Parliament of the Commonwealth under s 77(iii) of the Constitution."

That limitation on State legislative power nevertheless makes ample allowance for diversity in the constitution and organisation of courts.

Application of the principles

69 The text and structure of Ch III of the Constitution postulate an integrated Australian court system for the exercise of the judicial power of the Commonwealth with this Court at its apex[177]. There is no distinction, so far as concerns the judicial power of the Commonwealth, between State courts and federal courts created by the Parliament[178]. The consequences of the constitutional placement of State courts in the integrated system include the following:

1. A State legislature cannot confer upon a court of a State a function which substantially impairs its institutional integrity and which is therefore incompatible with its role as a repository of federal jurisdiction[179].

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175 (1982) 150 CLR 49 at 61 per Mason J; [1982] HCA 13.

176 (1996) 189 CLR 51 at 137.

177 *Kable* (1996) 189 CLR 51 at 101 per Gaudron J, 114 per McHugh J, 138-143 per Gummow J.

178 *Kable* (1996) 189 CLR 51 at 101 per Gaudron J, 115 per McHugh J, 143 per Gummow J.

179 *Kable* (1996) 189 CLR 51 at 96 per Toohey J, 103 per Gaudron J, 116-119 per McHugh J, 127-128 per Gummow J; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [15] per Gleeson CJ.

2. State legislation impairs the institutional integrity of a court if it confers upon it a function which is repugnant to or incompatible with the exercise of the judicial power of the Commonwealth[180].

3. The institutional integrity of a court requires both the reality and appearance of independence and impartiality[181].

4. The principles underlying the majority judgments in *Kable* and further expounded in the decisions of this Court which have followed after *Kable* do not constitute a codification of the limits of State legislative power with respect to State courts. Each case in which the *Kable* doctrine is invoked will require consideration of the impugned legislation because[182]:

> "the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes".

For legislators this may require a prudential approach to the enactment of laws directing courts on how judicial power is to be exercised, particularly in areas central to the judicial function such as the provision of procedural fairness[183] and the conduct of proceedings in open court. It may also require a prudential approach to the enactment of laws authorising the executive government or its authorities effectively to dictate the process or outcome of judicial proceedings.

5. The risk of a finding that a law is inconsistent with the limitations imposed by Ch III, protective of the institutional integrity of the courts, is particularly significant where the law impairs the reality or appearance of the decisional independence of the court.

The validity of s 14(1) of the SOCC Act falls for consideration against that background.

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180 *Kable* (1996) 189 CLR 51 at 103 per Gaudron J, 134 per Gummow J; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617 [101] per Gummow J, 628 [141] per Kirby J.

181 *Forge* (2006) 228 CLR 45 at 77 [66] per Gummow, Hayne and Crennan JJ, citing *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 345 [7]-[8] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

182 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 618 [104] per Gummow J.

183 *International Finance Trust Co Ltd* (2009) 240 CLR 319.

70 The Solicitor-General for South Australia submitted that the true question in determining whether legislation "impairs" or "detracts from" the institutional integrity of a State court is whether that court no longer satisfies the constitutional description "court of a State". He reformulated the question as: "[D]oes a State Court exercising the impugned function nevertheless bear sufficient relation to a court of a state within the meaning of the Constitution?"[184] However, the true question is not whether a court of a State, subject to impugned legislation, can still be called a court of a State nor whether it bears a sufficient relation to a court of a State. The question indicated by the use of the term "integrity" is whether the court is required or empowered by the impugned legislation to do something which is substantially inconsistent or incompatible with the continuing subsistence, in every aspect of its judicial role, of its defining characteristics as a court. So much is implicit in the constitutional mandate of continuing institutional integrity. By way of example, a law which requires that a court give effect to a decision of an executive authority, as if it were a judicial decision of the court, would be inconsistent with the subsistence of judicial decisional independence[185].

71 It has been accepted by this Court that the Parliament of the Commonwealth may pass a law which requires a court exercising federal jurisdiction to make specified orders if some conditions are met even if satisfaction of such conditions depends upon a decision or decisions of the executive government or one of its authorities[186]. The Parliament of a State may enact a law of a similar kind in relation to the exercise of jurisdiction under State law. It is also the case that "in general, a legislature can select whatever factum it wishes as the 'trigger' of a particular legislative consequence"[187]. But these

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184 Adopting the language in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 278 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

185 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 232-233 [208] per Gummow J; [2000] HCA 62. In relation to a federal court, such a law would also offend constitutional separation-of-powers principles applicable to courts created by the Commonwealth: see *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 264 per Mason CJ, Brennan and Toohey JJ, 270-271 per Deane, Dawson, Gaudron and McHugh JJ; [1995] HCA 10.

186 *Palling v Corfield* (1970) 123 CLR 52 at 58-59 per Barwick CJ, 62-63 per McTiernan J, 64-65 per Menzies J, 65 per Windeyer J, 66-67 per Owen J, 68-70 per Walsh J, 70 per Gibbs J; [1970] HCA 53; *International Finance Trust Co Ltd* (2009) 240 CLR 319 at 352 [49] per French CJ.

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

powers in both the Commonwealth and the State spheres are subject to the qualification that they will not authorise a law which subjects a court in reality or appearance to direction from the executive as to the content of judicial decisions. In *International Finance Trust Co Ltd* this Court held invalid a law of the State of New South Wales which imposed upon the Supreme Court of New South Wales a process which, at the option of the executive, in substance required[188]:

> "the mandatory ex parte sequestration of property upon suspicion of wrong doing, for an indeterminate period, with no effective curial enforcement of the duty of full disclosure on ex parte applications".

72 It follows from what has already been said in these reasons, and is reflected in the decisions of this Court, that one of the characteristics required of all courts capable of exercising the judicial power of the Commonwealth (including the courts of the Territories) is that they be, and appear to be, independent and impartial tribunals[189]. Forms of external control of courts "appropriate to the exercise of authority by public officials and administrators" are inconsistent with that requirement[190]. The requirement is not a judicially generated imposition. It derives from historically based assumptions about courts which were extant at the time of Federation.

73 It is not necessary, in this case or any other, to mediate the constitutional assumption of actual and apparent independence and impartiality through its effect upon "public confidence" in the courts. That is a criterion which is hard to define, let alone apply by reference to any useful methodology. It may be the case from time to time that a law which trespasses upon the independence and impartiality of a court will have substantial popular support. That is not the measure of its compliance with the requirements of the Constitution. Were it otherwise, the strength of the protections for which the Constitution provides could fluctuate according to public opinion polls. The rule of law, upon which the Constitution is based, does not vary in its application to any individual or group according to the measure of public or official condemnation, however justified, of that individual or that group. The requirements of judicial independence and impartiality are no less rigorous in the case of the criminal or

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188 (2009) 240 CLR 319 at 366 [97] per Gummow and Bell JJ, French CJ agreeing at 356 [58]; see also at 386 [159]-[160] per Heydon J.

189 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 552-553 [10] per Gummow, Hayne, Heydon and Kiefel JJ.

190 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [10] per Gummow, Hayne, Heydon and Kiefel JJ.

anti-social defendant than they are in the case of the law-abiding person of impeccable character. In any event, as has been pointed out, the effect of the control order under challenge in this case reaches beyond Mr Hudson. It potentially touches members of the public at large and well beyond the boundaries of South Australia.

74 The question in the present case is whether s 14(1) of the SOCC Act requires the Magistrates Court of South Australia to do something which is not consistent with the assumption of independence and impartiality of courts underlying Ch III of the Constitution. As Gummow J observes in his reasons, the question directs attention to the practical operation of s 14(1) and the significance for that practical operation of the Attorney-General's declaration under s 10(1)[191].

75 Section 14(1) of the SOCC Act confers upon the Magistrates Court the obligation, upon application by the Commissioner, to make a control order in respect of a person by reason of that person's membership of an organisation declared by the Attorney-General. The declaration rests upon a number of findings including, in every case, a determination by the Attorney-General that members of the organisation, who need not be specified, have committed criminal offences, for which they may never have been charged or convicted. The findings, of which the Magistrates Court may be for the most part unaware and which in any event it cannot effectively or readily question, enliven, through the declaration which they support, the duty of the Court to make control orders against any member of the organisation in respect of whom the Commissioner makes an application. That is so whether or not that member has committed or is ever likely to commit a criminal offence. Membership of a declared organisation is not made an offence by the SOCC Act.

76 The control order involves a serious imposition upon the personal liberty of the individual who is the subject of the control order and subjects him or her to criminal penalties for breach of the order. It enlivens restrictions upon members of the public limiting their capacity to communicate with the person the subject of the control order. Breaches of those restrictions are criminal offences. A person exposed to such a restriction and to criminal liability for its breach may be an entirely law-abiding citizen unlikely, on any view, to engage in contravention of the law. The control order is an order of the kind which, in its effect upon personal liberty, is ordinarily within the domain of judicial power. I should add that I agree with the reasons of Gummow J for rejecting the submission by the State of Western Australia that the validity of s 14(1) is supported by the proposition that the State of South Australia could have vested the power to make a control order in the Attorney-General himself[192].

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191 Judgment of Gummow J at [138].

192 Judgment of Gummow J at [146]-[148].

77 Submissions made by the State of South Australia identified findings which the Magistrates Court would have to make before issuing a control order under s 14(1). Those submissions sought to effect a kind of forensic inflation of the function of the Court under s 14(1) in aid of the characterisation of that function as "a genuine adjudicative process". The following points were made:

1. Section 14(1) of the SOCC Act directs the Magistrates Court to make a control order *only* when satisfied of specified matters, namely, that there has been a declaration with respect to the organisation in question pursuant to s 10(1) and that the defendant is a member of that organisation.

2. The defendant may collaterally challenge the Attorney-General's declaration.

3. The Court is required to satisfy itself that the person is a member of a declared organisation. It must consider affidavit material presented by the Commissioner and choose whether or not to act on the basis of that evidence, applying the civil standard of proof. That material is testable and the defendant may adduce evidence to the contrary.

4. To the extent that the Commissioner relies upon criminal intelligence to prove membership, the Court and the defendant are entitled to insist upon strict proof that the material has been properly so classified. The admission of such material and the weight to be given to it is a matter for the Court.

5. The Court has discretion to compose the content of a control order and make ancillary or consequential orders pursuant to s 14(5).

It was submitted, having regard to the above matters, that the Court, exercising its power under s 14(1), undertakes a genuine adjudicative process free from any interference from the executive. Reliance was also placed upon the availability of the objection procedure and the Court's discretion in framing a control order in that context.

78 The fact that the impugned legislation provides for an adjudicative process does not determine the question whether it impairs the institutional integrity of the Magistrates Court by impairing the reality or appearance of judicial decisional independence. The laws held invalid in *Kable* and *International Finance Trust Co Ltd* both allowed for an adjudicative process by the court to which they applied.

79 The submission of the State of South Australia rightly identified the question of membership of a declared organisation as "[t]he central issue raised

by an application for a control order". Although it was acknowledged that membership may be easy to prove with the practical result that the making of a control order would be inevitable, it was said not to follow that this would always be the case. It could not be said, so the argument went, that the outcome of the Commissioner's application would be directed.

80 In submissions made on behalf of Messrs Totani and Hudson, emphasis was placed on the standard of proof in an application for a control order, which, by virtue of s 5 of the SOCC Act, is the balance of probabilities. But that is not determinative or even more than marginally relevant to any consideration of the relationship between the executive declaration and the making of a control order, which is under scrutiny in the present case.

81 The submissions made on behalf of the State of South Australia did not, with respect, diminish the dominance of the executive act of declaration of an organisation and the findings of fact behind it in determining for all practical purposes the outcome of the control order application. While it is true that membership can be contested, the breadth of the definition of "member" is such that, given any evidential basis for the contention that the defendant is a member, the practical burden of disproof is likely to fall upon the defendant.

82 Section 14(1) represents a substantial recruitment of the judicial function of the Magistrates Court to an essentially executive process. It gives the neutral colour of a judicial decision to what will be, for the most part in most cases, the result of executive action. That executive action involves findings about a number of factual matters including the commission of criminal offences. None of those matters is required by the SOCC Act to be disclosed to the Court, nor is the evidence upon which such findings were based. In some cases the evidence, if properly classified as "criminal intelligence", would not be disclosable. Section 14(1) impairs the decisional independence of the Magistrates Court from the executive in substance and in appearance in areas going to personal liberty and the liability to criminal sanctions which lie at the heart of the judicial function. I agree with the conclusion of Gummow J[193], Crennan and Bell JJ[194] and Kiefel J[195] that s 14(1) authorises the executive to enlist the Magistrates Court to implement decisions of the executive in a manner incompatible with that Court's institutional integrity. I agree also with the conclusion reached by Hayne J about the operation of s 14(1) in permitting the executive to enlist the Magistrates Court for the purpose of applying special restraints to particular individuals identified by the executive as meriting application for a control

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193 Judgment of Gummow J at [149].

194 Judgment of Crennan and Bell JJ at [436].

195 Judgment of Kiefel J at [481].

order[196] and the repugnancy of that function to the institutional integrity of the Court.

83 In the exercise of the function conferred on it by s 14(1), the Magistrates Court loses one of its essential characteristics as a court, namely, the appearance of independence and impartiality. In my opinion, s 14(1) is invalid.

Conclusion

84 The grant of special leave should be expanded to include the order of Bleby J made on 28 September 2009. The appeal should be dismissed with costs.

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196 Judgment of Hayne J at [236].

85 GUMMOW J. The objects of the *Serious and Organised Crime (Control) Act* 2008 (SA) ("the Act") as stated in s 4 are as follows:

> "(1) The objects of this Act are –
>
> (a) to disrupt and restrict the activities of –
>
> (i) organisations involved in serious crime; and
>
> (ii) the members and associates of such organisations; and
>
> (b) to protect members of the public from violence associated with such criminal organisations.
>
> (2) Without derogating from subsection (1), it is not the intention of the Parliament that the powers in this Act be used in a manner that would diminish the freedom of persons in this State to participate in advocacy, protest, dissent or industrial action."

86 The Act will expire on 4 September 2013 (s 39). It is the intention of the Parliament that the Act apply within South Australia and beyond it to the full extent of the extra-territorial legislative capacity of the Parliament (s 6). The legislative power of the Parliament extends to the making of laws that have extra-territorial operation: *Australia Act* 1986 (Cth), s 2(1).

87 Both respondents appear to be residents of South Australia and not to be residents of any other State. But it should be noted that were they residents of another State, any proceeding between them and South Australia in the courts of that State would, if the proceeding answered the constitutional criterion of a "matter", have engaged federal jurisdiction pursuant to s 75(iv) and s 77(iii) of the Constitution and s 39 of the *Judiciary Act* 1903 (Cth).

The course of the litigation

88 There is before this Court an appeal by the State of South Australia ("the State") from a decision of the Full Court of the Supreme Court of South Australia delivered on 25 September 2009[197]. By majority (Bleby and Kelly JJ; White J dissenting) the Full Court answered in the negative the reserved question "Is s 14(1) of the Act a valid law of the State of South Australia?" The reasons of the majority were given by Bleby J.

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197 *Totani v South Australia* (2009) 105 SASR 244.

89 The Full Court answered in the affirmative the further reserved question whether the "control order" purportedly made by the Magistrates Court of South Australia ("the Magistrates Court" or "the Court") under s 14(1) of the Act on 25 May 2009 in respect of the second respondent (Mr Hudson) was void and of no effect. The Magistrates Court has since revoked that control order in light of the Full Court's decision. However, the second respondent takes no point that the appeal by the State to this Court in the Supreme Court proceeding is moot[198]. An application to the Magistrates Court for a control order in respect of the first respondent (Mr Totani) had been made on 4 June 2009 but was adjourned by reason of the Supreme Court proceeding and has not been dealt with by the Magistrates Court.

90 The proceedings in the Magistrates Court, as noted above, did not involve the exercise of federal jurisdiction. But the separate proceeding in the Supreme Court which challenged the validity of s 14(1) was a matter arising under the Constitution or involving its interpretation[199].

91 On 28 September 2009, Bleby J made final orders which disposed of the proceeding in the Supreme Court in accordance with the answers which had been given to the questions of law reserved for consideration by the Full Court. The State should have special leave to appeal also (upon the same grounds of appeal) against the orders of Bleby J made on 28 September 2009. The initial grant of special leave should be expanded accordingly.

92 It will be apparent from the statement of objects in s 4 that the legislature took the view that the disruption and restriction of freedom of association between members and associates of bodies involved in serious crime was in the public interest. There is some, but not general[200], support in this Court for the proposition that the Constitution necessarily implies freedom from laws which prevent association between persons for the purposes of communication with respect to government and political matters[201]. However, even if the Act did operate to burden such freedom, the question would arise whether its provisions were reasonably appropriate and adapted to serve the legitimate legislative end of

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198 Cf *Croome v Tasmania* (1997) 191 CLR 119 at 125-128, 136-138; [1997] HCA 5.

199 Constitution, s 76(i); *Judiciary Act* 1903 (Cth), s 39.

200 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 234 [148] per Gummow and Hayne JJ, 306 [364] per Heydon J; [2004] HCA 41.

201 Statements in earlier authorities were collected by McHugh J in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 225 [114]; see also at 278 [286] per Kirby J.

protecting members of the public from violence associated with such organisations[202].

93 The successful attack on validity was put on another and quite distinct basis which has a surer footing in the decisions of this Court. The majority of the Full Court held that the jurisdiction conferred on the Magistrates Court by s 14(1) of the Act required that Court to act in a fashion incompatible with the proper discharge of its judicial responsibilities and its institutional integrity[203]. The foundation of the dissenting reasons of White J was that the area of decision making entrusted by s 14(1) was not so subordinate to that of the executive and the manner of its exercise was not so directed that there was impairment of the independence of the Magistrates Court and its capacity to act impartially[204].

94 The case put in this Court by the State for validity of s 14(1) of the Act was supported by interventions by the Attorneys-General of New South Wales, Victoria, Queensland, Western Australia and the Northern Territory and by a limited intervention by the Attorney-General of the Commonwealth.

95 For the reasons which follow, which are not co-extensive with those of the Full Court, the appeal should be dismissed.

Control orders

96 Part 3 (ss 14-22) of the Act is headed "Control orders". The central provisions are found in s 14. It is important for what follows in these reasons to compare and contrast s 14(1) and s 14(2). Both provisions confer jurisdiction on "the Court" (defined as "the Magistrates Court" in s 3) to make orders on application by the Commissioner of Police ("the Commissioner").

97 However, the nature of the jurisdiction conferred by s 14(1) differs in several significant respects from that conferred by s 14(2). First, on a s 14(1) application the Court "must" make an order if satisfied of one matter, namely, that the defendant is a member of an organisation which has been declared by the Attorney-General under s 10(1). On the other hand, not only does s 14(2) require satisfaction of more complex criteria, it uses the term "may" to confer a

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202 See *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 201 [42] per Gleeson CJ.

203 (2009) 105 SASR 244 at 283 [167].

204 (2009) 105 SASR 244 at 305 [273].

discretion rather than a power with a duty to exercise it if the requisite satisfaction is attained by the Court[205].

98 Secondly, the factum upon which the sub-sections operate, the Court's satisfaction, differs significantly between s 14(1) and s 14(2).

99 The satisfaction required for the operation of s 14(2)(b) is that the defendant "engages, or has engaged, in serious criminal activity" and regularly associates with other such persons. Section 14(2)(a)(ii) stipulates satisfaction of engagement in serious criminal activity and regular association with members of a declared organisation. That requirement of past or present engagement by the defendant in serious criminal activity is not repeated in s 14(1). (Section 14(2)(a)(i) differs from the balance of s 14(2) by fixing upon membership of a declared organisation and is closer to s 14(1), although it also requires regular association with members.) There is no challenge to the validity of s 14(2).

100 In what follows in these reasons, much turns upon the imperative direction to the Court by use of the term "must" coupled with the absence in s 14(1) of a requirement respecting criminal activity by the defendant and the focus of s 14(1) merely upon membership by the defendant of a body which the Attorney-General has classified as a "declared organisation". The respondents submit that it is the anterior classification by the executive branch, represented by the Attorney-General, which drives the curial process under s 14(1).

101 It is the validity only of s 14(1) which is in contention. Section 14(1) states:

> "The Court must, on application by the Commissioner, make a control order against a person (the ***defendant***) if the Court is satisfied that the defendant is a member of a declared organisation."

A member may be an "associate member" or "prospective member", or a person who identifies himself or herself, in some way, as belonging to the organisation in question, or a person who is treated by the organisation or its members, in some way, as if belonging to the organisation (s 3). Of this membership the Court must be satisfied to engage s 14(1). But it attains such satisfaction upon the prior determination by the Attorney-General that the organisation is a declared organisation.

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205 Cf *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 302 [28]; [2007] HCA 28.

102 The Commissioner may apply for a control order, and a control order may be issued, without notice to any person (s 14(3)). Any question of fact arising in a s 14(1) proceeding is to be decided on the balance of probabilities (s 5). A control order is not binding on the defendant until served on the defendant in accordance with s 16 of the Act (s 16(4)).

103 Section 14(5)(b) requires that if the defendant is a member of a declared organisation, the control order *must* prohibit the defendant, except as may be specified in the order, from "associating with other persons who are members of declared organisations" and from possessing a dangerous article or a prohibited weapon within the meaning of s 15 of the *Summary Offences Act* 1953 (SA).

104 A control order *may* prohibit the defendant from associating or communicating with specified persons or persons of a specified class, from entering or being in the vicinity of specified premises or premises of a specified class, or from possessing specified articles or articles of a specified class (s 14(5)(a)). In considering the imposition of these prohibitions the Court must have regard to, inter alia, whether the defendant's behaviour or history of behaviour suggests a risk of engagement in serious criminal activity, and the assistance the order might give in preventing such engagement by the defendant (s 14(6)(a), (b)). For the purposes of s 14, the defendant may "associate" by any means, including any electronic means (s 14(8)).

105 A person who contravenes or fails to comply with a control order is guilty of an offence, the maximum penalty for which is imprisonment for five years (s 22(1)). It also is an offence for a person, on not less than six occasions during a period of 12 months, to associate with a person who is the subject of a control order (s 35(1)(b)), if the first person knew or was reckless as to the fact that the second person was so subject (s 35(2)). Some forms of association, including those between "close family members", are to be disregarded unless the prosecution proves that the association was not reasonable in the circumstances (s 35(6)).

Declared organisations

106 Several points should be noted here. First, the Act does not make membership of a declared organisation an offence. Secondly, the existence of the declared organisation itself is not proscribed by the Act as, for example, was sought to be achieved by ss 4, 6 and 7 of the *Communist Party Dissolution Act* 1950 (Cth)[206]. Thirdly, a control order must be made under s 14(1) against a member regardless of whether that person engages or has engaged in serious

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206 See *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 3-5; [1951] HCA 5.

criminal activity or is likely to do so. Fourthly, as Crennan and Bell JJ emphasise in their reasons, the requirement that the Court have regard to the matters listed in pars (a)-(e) of s 14(6) is attached to s 14(1) only in a limited sense; the requirement does not qualify the obligation to make a control order and operates at the next stage when the Court is considering the particular prohibitions to be included in that order.

107 As already remarked, the organisation, of which membership by the defendant is found by the Court under s 14(1), must be a declared organisation, and the Court is required to act upon a declaration made by the Attorney-General under Pt 2 (ss 8-13) of the Act. An organisation may be an incorporated body or an unincorporated group and may be part of a larger organisation; it may be based outside the State or consist of persons not ordinarily resident in the State (s 3).

108 Part 2 of the Act is headed "Declared organisations". Section 10(1) is an important provision. It empowers the Attorney-General to make a declaration as follows:

> "If, on the making of an application by the Commissioner under this Part in relation to an organisation, the Attorney-General is satisfied that –
>
> (a) members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and
>
> (b) the organisation represents a risk to public safety and order in this State,
>
> the Attorney-General may make a declaration under this section in respect of the organisation."

The phrase "serious criminal activity" means "the commission of serious criminal offences", which may, however, include summary offences prescribed by regulation (s 3)[207].

109 The satisfaction of the Attorney-General requires the formation of an opinion formed reasonably upon the material before the Attorney-General[208]. However, the State accepts that it would be enough for the Attorney-General to

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207 See Serious and Organised Crime (Control) Regulations 2008 (SA), reg 4.

208 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 150 [34]; [2000] HCA 5; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 558 [33]; [2008] HCA 4.

be satisfied that a member or members of the organisation, but not necessarily the member against whom the Commissioner later seeks a control order under s 14(1), has or have committed a criminal offence.

110 The result is that in such a case s 14(1) then would oblige the Court to impose significant restraints upon the defendant, under pain of criminal sanction, and upon criteria which do not require past or threatened contraventions by the defendant of any anterior legal norm.

111 It may be noted that, as Bleby J recognised in his reasons[209], had the Act been a federal law then the making of a declaration by the Attorney-General under s 10(1), taken together with the requirement that the Magistrates Court make a control order under s 14(1) if satisfied of the defendant's membership of a declared organisation, may have involved the exercise of judicial power by the Attorney-General. The presence of s 14(1), like the presence of the provisions in *Brandy v Human Rights and Equal Opportunity Commission*[210] providing for the registration and enforcement of the Human Rights and Equal Opportunity Commission's determinations in the Federal Court, would give to the Attorney-General's declaration the necessary binding and enforceable effect so as to involve the exercise of judicial power by the Attorney-General. If the Attorney-General's task had involved the exercise of the judicial power of the Commonwealth questions would have arisen of the validity of any federal law to the effect of s 10(1) and s 14(1) of the Act. But the Act is a State law.

112 The issues on this appeal, as refined in argument emphasising the driving force for the curial process in s 14(1) as the anterior classification by the Attorney-General, do, however, bear some relationship to those in *Brandy*. The registration and review procedures by the Federal Court, for which Pt III of the *Racial Discrimination Act* 1975 (Cth) provided, were said by the defendants to require an independent exercise of judicial power for effect to be given to determinations by the Human Rights and Equal Opportunity Commission. But it was held in *Brandy* that the presence of the review provisions did not save the legislative scheme from invalidity[211].

113 Before returning to consider the respondents' submissions something first should be said respecting the facts, the provisions made by the Act for objections and appeals, and the reasons of the majority in the Full Court.

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209 (2009) 105 SASR 244 at 280-281 [157].

210 (1995) 183 CLR 245 at 259-260, 269; [1995] HCA 10.

211 (1995) 183 CLR 245 at 261-264, 270-271.

The Finks Motorcycle Club

114 On 14 May 2009 the then Attorney-General of the State, acting upon application made by the Commissioner, made a declaration under s 10(1) of the Act with respect to the Finks Motorcycle Club. The Act imposes upon the Attorney-General no requirement to give reasons but the declaration was preceded by detailed reasons contained in 204 paragraphs. They included reference to "criminal intelligence" provided by the Commissioner and upon which the Attorney-General relied.

115 The control order subsequently made in respect of Mr Hudson declared the satisfaction of the Magistrates Court that he was a member of a declared organisation, namely the Finks Motorcycle Club. The order went on to impose upon Mr Hudson prohibitions expressed as follows:

> "1. Associating with other persons who are members of declared organisations;
>
> UNLESS
>
> - the association occurs between members of a registered political party (within the meaning of the *Electoral Act 1985* or the *Commonwealth Electoral Act 1918* of the Commonwealth (as the case requires)) at an official meeting of the party, or a branch of the party, and you have provided the Officer in Charge of the State Intelligence Branch of the South Australia Police with notice in writing of the time, date and place of the association, to be received at 60 Wakefield Street Adelaide, SA, 5000 no less than 48 hours before such association.
>
> AND
>
> 2. Possessing a dangerous article or a prohibited weapon (within the meaning of section 15 of the *Summary Offences Act 1953*)."

Objections and appeals

116 Section 17 of the Act confers a right of objection upon a person upon whom a control order was served. Within 14 days of service of the order or such longer period as the Magistrates Court allows, a notice of objection may be lodged with that Court and it is then to be served upon the Commissioner. Section 18(1) states:

> "The [Magistrates] Court must, when determining a notice of objection, consider whether, in the light of the evidence presented by both the Commissioner and the objector, sufficient grounds existed for the making of the control order."

On hearing the objection the Magistrates Court is empowered by s 18(2) to confirm, vary or revoke the control order and to make any other orders of a kind which could have been made by it when making the control order.

117 Section 19 provides for an appeal to the Supreme Court against a decision of the Magistrates Court on a notice of objection. An appeal might be brought as of right by the Commissioner or the objector on a question of law, but only with the permission of the Supreme Court on a question of fact (s 19(2)). On appeal the Supreme Court is empowered by s 19(5) to confirm, vary or reverse the decision under appeal and to make any consequential or ancillary order.

118 On application by the Commissioner or the defendant, the Magistrates Court may vary or revoke a control order (s 20(1)). However, an application by the defendant requires the permission of the Court; this is to be granted only if the Court is satisfied that there has been a substantial change in the relevant circumstances since the order was made or last varied (s 20(2)). Further, an application by the defendant must be supported by oral evidence given on oath (s 20(4)).

119 Part 6 (ss 37-39) provides in s 37 for an annual review by a retired judicial officer appointed by the Attorney-General, to determine whether powers under the Act have been exercised "in an appropriate manner, having regard to the objects of [the Act]".

The reasoning of the majority of the Full Court

120 Bleby J (with whom Kelly J agreed) identified four matters or elements to be established before an order might be made by the Magistrates Court under s 14(1)[212]. These were: first, that members of the organisation, of which the defendant is alleged to be a member, associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; secondly, that this organisation represents a risk to public safety and order in the State; thirdly, the making of a declaration by the Attorney-General; and fourthly, membership by the defendant of the organisation the subject of that declaration. The first two matters were relatively more significant and factually complex, but they needed only to be established to the satisfaction of the Attorney-General for a declaration to have been made under s 10(1). The Magistrates Court was required to address the last two matters for itself, but as to the first two matters was obliged to act upon what had been the satisfaction of the Attorney-General.

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212 (2009) 105 SASR 244 at 279-280 [150]-[152].

121 Bleby and Kelly JJ based their decision respecting the invalidity of s 14(1) upon three considerations. These were that[213]: (i) the most significant and essential findings of fact to be established to obtain a control order against a particular individual were made not by a judicial officer but by the Attorney-General; (ii) the findings of the Attorney-General about these matters were not reviewable; and (iii) it was open to the Attorney-General to have regard to "criminal intelligence" without the protections which saved from invalidity the legislation considered in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*[214] and *K-Generation Pty Ltd v Liquor Licensing Court*[215].

122 Proposition (i) may be accepted and requires further consideration. The State challenges propositions (ii) and (iii). I begin with proposition (iii). This fixes attention upon s 21(2) of the Act.

123 Section 21(2) is directed to the courts determining the proceedings it describes. It reads:

> "In any proceedings relating to the making, variation or revocation of a control order, the court determining the proceedings –
>
> (a) must, on the application of the Commissioner, take steps to maintain the confidentiality of information properly classified by the Commissioner as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives; and
>
> (b) may take evidence consisting of, or relating to, information that is so classified by the Commissioner by way of affidavit of a police officer of or above the rank of superintendent."

124 Section 21(2) is drawn in terms which resemble s 28A(5) of the *Liquor Licensing Act* 1997 (SA), a provision construed in *K-Generation*. The reasoning which in that case led to the conclusion that s 28A(5) did not operate to deny to the Licensing Court the constitutional character of an independent and impartial tribunal[216] applies to s 21(2). It does so with the added force supplied by the use

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213 (2009) 105 SASR 244 at 280-281 [155]-[157], 282-283 [164]-[165].

214 (2008) 234 CLR 532.

215 (2009) 237 CLR 501; [2009] HCA 4.

216 (2009) 237 CLR 501 at 529-532 [87]-[99], 539-543 [135]-[149], 576-580 [257]-[259].

in s 21(2) of the phrase "properly classified", not found in the earlier legislation considered in *K-Generation*.

125 I conclude that proposition (iii) in the reasoning of the Full Court, with respect to "criminal intelligence", should not be accepted. I turn then to consider proposition (ii), respecting the absence of judicial review.

126 Reference first should be made to s 41(2). This is directed specifically to s 10(1) declarations, stating:

> "The validity and legality of a declaration under Part 2 cannot be challenged or questioned in any proceedings."

The State submitted that on an application to the Magistrates Court under s 14(1) for a control order, the tender of a s 10(1) declaration could be challenged by analogy to the challenge to the validity of a warrant. But the authorities establish that validity of a warrant depends on the regularity of its issue, not the sufficiency of the material which supported the application for its issue[217].

127 Further, counsel for the respondents submitted that s 41(2) prevents the Magistrates Court on a s 14(1) application from canvassing in any way the validity of a s 10(1) declaration. Counsel contended that to read the phrase "a declaration under Part 2" as excluding "a purported declaration" would render the sub-section otiose and self-defeating. That submission should be accepted. But there remains scope for judicial review by the Supreme Court.

128 Section 41(1) is a broadly drawn privative clause which would apply to a declaration by the Attorney-General under s 10(1) and a control order made by the Magistrates Court under s 14(1). However, in its application to a s 10(1) declaration, it is now clear that s 41(1) is ineffective to deny the supervisory jurisdiction of the Supreme Court in respect of jurisdictional error by the Attorney-General[218]. Further, as was emphasised in *Kirk v Industrial Court (NSW)*[219], in the present state of authority in this Court it is not possible to attempt to mark the metes and bounds of jurisdictional error. The statement by the Full Court majority of proposition (ii) thus is too wide. Further, with respect to control orders, s 41(1) is subject to the express provision for review and appeal made by ss 17 and 19 of the Act, to which reference has been made above.

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217 *McArthur v Williams* (1936) 55 CLR 324 at 365-366; [1936] HCA 10; *Ousley v The Queen* (1997) 192 CLR 69 at 80, 87, 103, 126; [1997] HCA 49.

218 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [99], 585 [113]; [2010] HCA 1.

219 (2010) 239 CLR 531 at 573-574 [71]-[73].

129 In addition, the respondents emphasise their submission that s 14(1) is invalid whatever the measure of review of control orders; their primary submission is that a control order regularly made in accordance with the Act lacks legal efficacy because s 14(1) is invalid and confers no authority whatsoever. Indeed the respondents' case is that it is precisely the operation of s 14(1) according to its terms which crosses the line of legislative validity.

The involvement of the Attorney-General

130 It is convenient now to return to proposition (i) in the reasoning of the Full Court majority. This fixes upon the fact finding and determination of the Attorney-General as providing the significant integer for the decision the Court must make if satisfied as to the membership of the defendant.

131 In *Thomas v Mowbray*[220] Gummow and Crennan JJ said of Ch III of the Constitution that it gives practical effect to the assumption of the rule of law in the development of a free and confident society, an assumption upon which the Constitution depends for its efficacy. Also in *Thomas v Mowbray*[221] in a passage repeated by French CJ in *International Finance Trust Co Ltd v New South Wales Crime Commission*[222], Gummow and Crennan JJ accepted that legislation which requires a court exercising federal jurisdiction to depart in a significant degree from the methods and standards which have characterised the exercise of judicial power in the past may be repugnant to Ch III. The unique and essential function of the judicial power is the quelling of controversies between individuals, between government and individuals, and between governments, and whether relating to life, liberty or property, "by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion"[223].

132 Further, in *Gypsy Jokers*[224], Gummow, Hayne, Heydon and Kiefel JJ accepted as a general proposition that legislation which purports to direct the

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220 (2007) 233 CLR 307 at 342 [61]; [2007] HCA 33. See also the remarks of Gleeson CJ and Heydon J in *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351-352 [30]; [2005] HCA 44.

221 (2007) 233 CLR 307 at 355 [111].

222 (2009) 240 CLR 319 at 353 [52]; [2009] HCA 49.

223 *Fencott v Muller* (1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ; [1983] HCA 12.

224 (2008) 234 CLR 532 at 560 [39]. See also *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 669 [47]; [2007] HCA 14.

courts as to the manner and outcome of the exercise of their jurisdiction is apt impermissibly to impair the character of the courts as independent and impartial tribunals. This reasoning was applied in *International Finance Trust Co Ltd*[225].

133 There is, however, a distinction between a legislative grant of jurisdiction and a legislative direction to the courts as to the manner and outcome of the exercise of the jurisdiction. This point was made by Brennan, Deane and Dawson JJ, with the concurrence of Gaudron J, in *Chu Kheng Lim v Minister for Immigration*[226]. It is true also that a law such as s 14(1) of the Act, which confers upon a court a power with a duty to exercise it if the court decides that the conditions attached to the power are met, on that ground alone is not to be classified as a legislative attempt to direct the outcome of the exercise of jurisdiction[227].

134 However, questions of this nature, to adapt the words of Windeyer J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*[228], inevitably attract consideration of predominant characteristics together with comparison with the historic functions and processes of courts of law. Consideration of the predominant characteristics of a law involves attention not only to its form but also to its practical operation and, as it has been said[229], to its "pith and substance". Hence, perhaps, the later statement by Mason J that the notion of the usurpation of judicial power is not susceptible of precise and comprehensive definition[230].

135 Mason J also indicated that the mere circumstance that a statute affects rights in issue in pending litigation does not involve any invasion of the judicial power[231]. The dispute in the present appeal concerning s 14(1) does not concern

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225 (2009) 240 CLR 319 at 360 [77].

226 (1992) 176 CLR 1 at 36-37, 53; [1992] HCA 64.

227 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 360 [77].

228 (1970) 123 CLR 361 at 394; [1970] HCA 8.

229 *Liyanage v The Queen* [1967] 1 AC 259 at 290.

230 *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 249-250; [1973] HCA 63.

231 *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 250. See also *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 96; [1986] HCA 47; *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 562-564 [17]-[20]; [1998] HCA 54.

the operation of legislation upon pre-existing rights and liabilities to be enforced in pending litigation. Nor does s 14(1) itself merely alter what otherwise would be the rules of evidence by which the facts in issue are to be determined. The validity of a law of that description was upheld in *Nicholas v The Queen*[232].

136 Under various laws of the Commonwealth there arise "matters" within the meaning of s 76(ii) of the Constitution in which the significant element is some anterior decision or determination not made in the exercise of the federal judicial power. Examples are the enforcement in the State and Territory courts of foreign arbitral awards[233], the registration in the Federal Court and State and Territory Supreme Courts of foreign judgments[234], and the curial effect given to determinations of the Superannuation Complaints Tribunal established by the legislation upheld in *Attorney-General (Cth) v Breckler*[235]. The State legislation, the validity of which was upheld in *Re Macks; Ex parte Saint*[236], created new rights and liabilities by reference to earlier ineffective judgments of federal courts, but did not change the character of those judgments and did not impermissibly interfere with the anterior judicial process.

137 The factum, upon which turned the operation of the State legislation upheld in *Fardon v Attorney-General (Qld)*[237], was the status of the respondent to the Attorney-General's application as a prisoner presently detained upon conviction for an offence of a certain nature. But I noted that validity may well have been imperilled by the legislative choice of a factum of some other character[238].

138 Moreover, in *Nicholas*[239] I left for subsequent consideration the validity of a law deeming to exist any ultimate fact (including a state of affairs or vital circumstance) which is an element of the offence charged. This invites closer attention to the practical operation of s 14(1) of the Act and the significance of the Attorney-General's anterior determination under s 10(1).

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232 (1998) 193 CLR 173; [1998] HCA 9.

233 *International Arbitration Act* 1974 (Cth), s 8.

234 *Foreign Judgments Act* 1991 (Cth), s 6.

235 (1999) 197 CLR 83 at 110-111 [42]-[45]; [1999] HCA 28.

236 (2000) 204 CLR 158; [2000] HCA 62.

237 (2004) 223 CLR 575; [2004] HCA 46.

238 (2004) 223 CLR 575 at 619 [108].

239 (1998) 193 CLR 173 at 236 [155]-[156].

Section 14(1) is invalid

139 The making of a control order under s 14(1) against a defendant is not an adjudication of the criminal guilt of that person. But the order is made in aid of the important legislative objective spelled out in s 4(1) of protecting members of the public from violence associated with organisations involved in "serious crime", and the order creates a norm of conduct breach of which is attended by the criminal sanction in s 22. Further, it is the executive branch which not only initiates the process of the Magistrates Court, by the Commissioner making the application, but also has by its own processes under Pt 2 already achieved the result that there exists a vital circumstance, the existence of a declaration by the Attorney-General, upon which the Court now must act. The Court must be satisfied of the membership of the defendant, but, as already explained in these reasons, the defendant need not have engaged or be likely to engage in criminal activity.

140 The operation of s 14(1) may be contrasted with that of the legislation the validity of which was upheld in *Thomas v Mowbray*. Section 104.4 of the *Criminal Code* (Cth) required, among other matters, that the court be satisfied on the balance of probabilities that the making of the interim control order "would substantially assist in preventing a terrorist act" or that the person in question had "provided training to, or received training from, a listed terrorist organisation", these being offences under ss 101.1 and 102.5 of the *Criminal Code*. There was no anterior determination by the executive branch which was an essential element in the curial decision. The same is true of s 18 of the *Criminal Organisation Act* 2009 (Q), to which the Solicitor-General of that State referred. It conditions the power of the court upon its satisfaction that the respondent engages in, or has engaged in, serious criminal activity.

141 The respondents submit that s 14(1) presents a case for invalidity stronger than that which succeeded in *Kable v Director of Public Prosecutions (NSW)*[240]. In *Kable*[241] McHugh J said of the jurisdiction conferred on the Supreme Court of New South Wales by the *Community Protection Act* 1994 (NSW) that it was:

> "hardly distinguishable from those powers and functions, concerning the liberty of the subject, that the traditions of the common law countries have placed in Ministers of the Crown so that they can be answerable to Parliament for their decisions".

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240 (1996) 189 CLR 51; [1996] HCA 24.

241 (1996) 189 CLR 51 at 122.

His Honour added that the Supreme Court was not called upon to determine any contest as to whether the defendant had breached any law or other legal obligation; that being "the benchmark of an exercise of judicial power"[242].

142 The place of s 14(1) in the scheme of the Act is that it supplements the exercise by the Attorney-General of the politically accountable function conferred by Pt 2 with respect to the declaration of organisations. But that supplementation involves the conscription of the Magistrates Court to effectuate that political function. This is achieved by obliging the Magistrates Court to act upon the declaration by the executive, by making a control order in respect of the defendant selected by the Commissioner, subject only to the satisfaction of the Magistrates Court that the defendant is a member of the declared organisation. It is the declaration by the executive which provides the vital circumstance and essential foundation for the making by the Magistrates Court of the control order.

143 The Solicitor-General for South Australia relied upon the range of matters to which the Magistrates Court was to have regard in considering the scope of the prohibitions imposed in each particular case by the control order (s 14(6)). But the primary requirement is that there must be a prohibition upon association with other members, except as may be specified in the order (s 14(5)).

144 For these reasons, which develop proposition (i) upon which the Full Court majority founded their decision, s 14(1) of the Act requires the Magistrates Court to depart in a significant degree from the methods and standards which characterise the exercise of judicial power. A federal law in these terms would be repugnant to Ch III of the Constitution.

145 But the Act is State legislation. As Callinan and Heydon JJ explained in *Fardon*[243]:

> "Although the test, whether, if the State enactment were a federal enactment, it would infringe Ch III of the Constitution, is a useful one, it is not the exclusive test of validity. It is possible that a State legislative conferral of power which, if it were federal legislation, would infringe Ch III of the Constitution, may nonetheless be valid. Not everything by way of decision-making denied to a federal judge is denied to a judge of a State. So long as the State court, in applying legislation, is not called upon to act and decide, effectively as the alter ego of the legislature or the executive, so long as it is to undertake a genuine adjudicative process and so long as its integrity and independence as a court are not compromised,

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242 (1996) 189 CLR 51 at 122.

243 (2004) 223 CLR 575 at 655-656 [219].

then the legislation in question will not infringe Ch III of the Constitution."

146 Counsel for Western Australia submitted that the respondents could have had no complaint if the Act had vested in the executive of South Australia both the function of declaring organisations under Pt 2 and that of making control orders under Pt 3. This was said to follow from the proposition that it is open to a State legislature to authorise a body other than a court to exercise judicial power. A corollary was said to be that a State law may authorise a body other than a court to punish criminal guilt by ordering the detention of the person[244].

147 These are large propositions for an intervener to advance and appear to go outside the contest between the immediate parties[245]. It is sufficient here to make two observations. As a general proposition, State legislatures may confer judicial powers on a body that is not a "court of a State" within the meaning of s 77(iii) of the Constitution[246]. But that does not involve acceptance of the corollary respecting enforcement of the criminal law.

148 The submissions by Western Australia appeared to be directed to support an argument that because South Australia could have legislated in terms which did not seek to conscript any court of that State, but had not done so, there was a diminished case for the application of what was called the *Kable* doctrine. With some cogency, the respondents countered that consideration of what may or may not be the greater liberty of legislative action at the State rather than federal level serves to strengthen, not weaken, the constitutional rationale for the *Kable* doctrine.

149 This Court should accept the submission by the respondents that the practical operation of s 14(1) of the Act is to enlist a court of a State, within the meaning of s 77(iii) of the Constitution, in the implementation of the legislative policy stated in s 4 by an adjudicative process in which the Magistrates Court is called upon effectively to act at the behest of the Attorney-General to an impermissible degree, and thereby to act in a fashion incompatible with the proper discharge of its federal judicial responsibilities and with its institutional integrity. Section 14(1) is invalid.

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244 Cf *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 600 [40].

245 See *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 544 [155].

246 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 544 [153].

Orders

150 There should be an expanded grant of special leave to include within the orders appealed from the orders of Bleby J made on 28 September 2009. The entire appeal should be dismissed with costs.

151 HAYNE J. Section 10(1) of the *Serious and Organised Crime (Control) Act* 2008 (SA) ("SOCCA") provides that:

> "If, on the making of an application by the Commissioner [of Police for South Australia] under [Pt 2 of SOCCA] in relation to an organisation, the Attorney-General is satisfied that—
>
> (a) members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and
>
> (b) the organisation represents a risk to public safety and order in this State,
>
> the Attorney-General may make a declaration under this section in respect of the organisation."

Section 14(1) of SOCCA provides that:

> "The [Magistrates Court of South Australia] must, on application by the Commissioner, make a control order against a person (the ***defendant***) if the Court is satisfied that the defendant is a member of a declared organisation."

On 14 May 2009, the Attorney-General for South Australia made a declaration about "the Finks Motorcycle Club operating in South Australia (including but not limited to: the Finks MC, Finks M.C. Incorporated, Finks M.C. INC and the Finks)" under Pt 2 of SOCCA.

152 The Attorney-General published reasons for making the declaration. Those reasons described the application made by the Commissioner and the steps that the Attorney-General had taken after the application was received. Those steps included sending letters, by registered post, to the individuals who were thought to be members of the organisation. The letters stated that the application had been made, and invited the recipients to instruct a solicitor to look at the application and so much of the supporting statutory declaration as was not classified as criminal intelligence or would not ground a claim for public interest immunity. Not every letter that was sent reached the intended recipient.

153 After the declaration was made, the Commissioner of Police applied to the Magistrates Court for a control order under s 14(1) of SOCCA directed to the second respondent in this appeal, Mr Hudson. The application was not served on Mr Hudson. The magistrate, being satisfied, on the balance of probabilities[247],

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247 Section 5 of the *Serious and Organised Crime (Control) Act* 2008 (SA) ("SOCCA") provides that:

(Footnote continues on next page)

that Mr Hudson was a member of a declared organisation (the Finks Motorcycle Club operating in South Australia), made a control order. By that order (made on 25 May 2009), Mr Hudson was prohibited from associating with other persons who are members of declared organisations (unless, in effect, the association occurred between members of a registered political party and not less than 48 hours prior notice was given to police). The order also prohibited Mr Hudson from possessing a dangerous article or a prohibited weapon within the meaning of s 15 of the *Summary Offences Act* 1953 (SA). Shortly after being served with the order, Mr Hudson gave notice of objection. A control order was also sought against the first respondent, Mr Totani, but the application for that control order was stayed pending the determination of these proceedings. Following the determination of the proceedings in the Supreme Court, to which reference will next be made, the Magistrates Court revoked the control order against Mr Hudson.

154 Mr Hudson and Mr Totani instituted a proceeding in the Supreme Court of South Australia claiming a declaration that Pts 2 and 3 of SOCCA are, or in the alternative, s 14(1) of that Act is, "invalid and inoperative". In their statement of claim, each of Mr Hudson and Mr Totani described himself as "a member of the Finks Motorcycle Club Incorporated operating in South Australia".

155 Pursuant to s 49 of the *Supreme Court Act* 1935 (SA) and r 294 of the Supreme Court Civil Rules 2006 (SA), Bleby J reserved for consideration of the Full Court four questions:

> "(1) Is section 10(1) of [SOCCA] a valid law of the State of South Australia?
>
> (2) Is the declaration by the Attorney-General referred to in paragraph 6 of the Statement of Claim void and of no effect?
>
> (3) Is section 14(1) of [SOCCA] a valid law of the State of South Australia?
>
> (4) Is the control order in respect of Hudson made on 25 May 2009 void and of no effect?"

> "(1) Any question of fact to be decided by a court in proceedings under this Act is to be decided on the balance of probabilities.
>
> (2) This section does not apply in relation to proceedings for an offence against this Act."

By majority (Bleby and Kelly JJ, White J dissenting), the Full Court determined[248] that it was not necessary to answer either question (1) (about the validity of s 10(1)) or question (2) (about the validity of the declaration made by the Attorney-General), but answered the other two questions. Question (3) (Is section 14(1) of the Act a valid law of the State of South Australia?) was answered "No". Question (4) (Is the control order in respect of Hudson made on 25 May 2009 void and of no effect?) was answered "Yes".

156 The Full Court having answered in this way the questions reserved, Bleby J made final orders disposing of the proceedings instituted by Mr Totani and Mr Hudson by declaring that s 14(1) of SOCCA is invalid and inoperative, and that the control order against Mr Hudson made on 25 May 2009 is invalid and of no effect. The State was ordered to pay the plaintiffs' costs of the action.

157 By special leave, the State appeals to this Court against the orders of the Full Court answering the questions reserved. Attention being drawn in argument to the fact that Bleby J had made orders finally disposing of the action, the State sought special leave to appeal against those orders. That leave should be granted, and the initial grant of special leave enlarged accordingly. The control order against Mr Hudson having been revoked, the only relief which the State seeks in this Court concerns the answer given by the Full Court to question (3), about the validity of s 14(1) of SOCCA, and the declaration made by Bleby J in consequence of that answer.

158 The determinative issue in the appeal is whether s 14(1) of SOCCA is beyond the legislative power of the State of South Australia, on the ground that it infringes the limitation on State legislative power identified in *Kable v Director of Public Prosecutions (NSW)*[249]. That issue should be determined in favour of the respondents. Section 14(1) of SOCCA is invalid.

159 To identify the particular issues that arise in this matter, it is necessary to say something more about the provisions of SOCCA.

Relevant provisions of SOCCA

160 Although ss 10(1) and 14(1) of SOCCA were the central focus of argument in the proceedings in the Supreme Court and in the appeal to this Court, account must be taken of a number of other provisions of the Act. First, s 4 provides the objects of the Act. It provides that:

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248 *Totani v South Australia* (2009) 105 SASR 244.

249 (1996) 189 CLR 51; [1996] HCA 24.

"(1) The objects of this Act are—

(a) to disrupt and restrict the activities of—

(i) organisations involved in serious crime; and

(ii) the members and associates of such organisations; and

(b) to protect members of the public from violence associated with such criminal organisations.

(2) Without derogating from subsection (1), it is not the intention of the Parliament that the powers in this Act be used in a manner that would diminish the freedom of persons in this State to participate in advocacy, protest, dissent or industrial action."

161 Both the terms "organisation" and "member" (in relation to an organisation) are given extended meanings by s 3 of the Act. "[O]rganisation" is defined as:

"any incorporated body or unincorporated group (however structured), whether or not the body or group is based outside South Australia, consists of persons who are not ordinarily resident in South Australia or is part of a larger organisation".

Section 3 provides that "member", in relation to an organisation:

"includes—

(a) in the case of an organisation that is a body corporate—a director or an officer of the body corporate; and

(b) in any case—

(i) an associate member or prospective member (however described) of the organisation; and

(ii) a person who identifies himself or herself, in some way, as belonging to the organisation; and

(iii) a person who is treated by the organisation or persons who belong to the organisation, in some way, as if he or she belongs to the organisation".

162 It will be observed that the definition of "organisation" extends to bodies or groups "based outside South Australia", and to bodies or groups consisting of persons who are not ordinarily resident in South Australia. Section 6 of SOCCA

reinforces what may otherwise follow from these extraterritorial features of the definition of "organisation" by providing that it "is the intention of the Parliament that this Act apply within the State and outside the State to the full extent of the extra-territorial legislative capacity of the Parliament".

163 Part 2 of SOCCA (ss 8 - 13) deals with "declared organisations". Section 3 defines a "declared organisation" as "an organisation subject to a declaration by the Attorney-General under section 10". Section 8(1) permits the Commissioner of Police to apply to the Attorney-General for a declaration in respect of an organisation. Section 8(2) specifies the form and content of such an application. The application must be in writing[250], identify the organisation in respect of which the declaration is sought[251], set out the grounds on which the declaration is sought[252], set out the information supporting the grounds on which the declaration is sought[253], set out details of any previous application for a declaration in respect of the organisation and the outcome of that application[254], and be supported by a statutory declaration from the Commissioner, or statutory declarations from other senior police officers[255], verifying the contents of the application[256].

164 If the Commissioner makes an application for a declaration, the Attorney-General must publish a notice in the Gazette and in a newspaper circulating throughout the State, specifying that an application has been made, and inviting members of the public to make submissions to the Attorney-General in relation to the application within 28 days of the date of publication of the notice[257]. Section 10(2) forbids the making of a declaration before the period for making submissions in relation to it has expired. Section 10(3) identifies a number of different matters to which the Attorney-General may have regard in considering whether or not to make a declaration.

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250 s 8(2)(a).

251 s 8(2)(b).

252 s 8(2)(c).

253 s 8(2)(d).

254 s 8(2)(e).

255 Defined in s 3 as police officers of or above the rank of inspector.

256 s 8(2)(f).

257 s 9.

165 It will be recalled that s 10(1) permits the Attorney-General to make a declaration under s 10 if satisfied of two matters. The matters of which the Attorney-General is to be satisfied are first, that "members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity" and second, that "the organisation represents a risk to public safety and order in this State". Further content is given to the first matter by s 10(4). That provides, in effect, that the Attorney-General may be satisfied of the first matter, whether or not *all* of the organisation's members associate for that purpose; whether or not members associate for the purpose of organising, planning, facilitating, supporting or engaging in the *same* serious criminal activities; and whether or not the members also associate for *other* purposes. If the Attorney-General is not satisfied that *all* members associate for the purpose identified in s 10(1), the Attorney must be satisfied that those members who do associate for that purpose "constitute a significant group within the organisation, either in terms of their numbers or in terms of their capacity to influence the organisation or its members"[258].

166 If the Attorney-General makes a declaration under s 10, s 13(1) provides that the Attorney is not required to provide any grounds or reasons for the declaration other than on the request of a person conducting a review in accordance with the provisions of Pt 6. (That Part provides for annual review and report as to the exercise of powers under the Act[259], for a review of the operation and effectiveness of the Act as soon as practicable after the fourth anniversary of its commencement[260] and for the Act to expire five years after the date of its commencement[261].) The Attorney-General was not bound to give any reasons for declaring the Finks to be a declared organisation, let alone the comprehensive reasons that were in fact given.

167 Two consequences follow from declaring an organisation to be a declared organisation. First, the provisions of Pt 3 of SOCCA, concerning control orders, may be engaged, and the Commissioner of Police may apply for a control order against a member of the organisation. Secondly, provisions of Pt 5 of SOCCA, dealing with offences, will also be engaged. But making a declaration has no consequence for the organisation itself. If incorporated, the organisation continues in existence. If it owns or uses property, the use and ownership of that property is unaffected.

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258 s 10(4)(a).

259 s 37.

260 s 38.

261 s 39.

168 It is necessary to say something more about both the provisions relating to control orders and the provisions creating offences under SOCCA.

Control orders

169 As is apparent from what has already been said in these reasons, if the Magistrates Court is satisfied that a person against whom the Commissioner of Police seeks a control order is a member of a declared organisation, s 14(1) of SOCCA requires that the Court make a control order against that person. Section 14(2) provides that a control order may also be made in certain other circumstances. Those include[262] where the defendant has been a member of a declared organisation, or engages, or has engaged, in serious criminal activity, and (in either case) "regularly associates with members of a declared organisation" or[263] where the defendant engages, or has engaged, in serious criminal activity and regularly associates with other persons who engage, or have engaged, in serious criminal activity. It will not be necessary to explore in any detail all of the circumstances in which a control order may be made. It is enough to focus principal attention upon those which applied in the case of Mr Hudson: the Magistrates Court being satisfied that he is a member of a declared organisation. The only challenge to validity that is presently under consideration is to the validity of s 14(1).

170 Section 14(3) provides that a control order may be issued on an application made without notice to any person. As noted earlier, the order made against Mr Hudson was obtained without notice to him. The grounds of an application for a control order must be verified by affidavit[264].

171 Section 14(5) deals with what may, and what must, be the content of a control order. In the case of a defendant who is a member of a declared organisation, s 14(5)(b) provides that a control order:

> "must prohibit the defendant from—
>
> (i) associating with other persons who are members of declared organisations; and
>
> (ii) possessing—
>
> (A) a dangerous article; or

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262 s 14(2)(a).

263 s 14(2)(b).

264 s 14(4).

(B) a prohibited weapon,

(within the meaning of section 15 of the *Summary Offences Act* 1953),

except as may be specified in the order".

172 The operation of the exception provided by the last eight words of s 14(5)(b) was discussed in the course of argument. It was rightly accepted by the Solicitor-General for South Australia that the exception could not be engaged so as to negate the command of s 14(5)(b) by giving it an operation that would permit the Magistrates Court to make a control order without content. There must be, so the Solicitor-General for South Australia submitted, a minimum content in a control order. But that minimum content was not identified. In the end, argument proceeded on the footing that s 14(5)(b) required the Magistrates Court to frame a control order against a person found to be a member of a declared organisation in a way that prohibited the defendant from associating with any person who is a member of any declared organisation unless the person was specifically identified in the control order as excepted from its operation.

173 Section 14(8) identifies what is meant by a person "associating" with another. It provides that:

> "For the purposes of this section, a person may ***associate*** with another person by any means including communicating with that person by letter, telephone or facsimile or by email or other electronic means."

174 Section 16(1) provides that, subject to some limited exceptions, a control order must be served on the defendant personally. Section 16(4) provides that:

> "A control order is not binding on the defendant until it has been served on the defendant in accordance with this section."

175 A person on whom a control order has been served may, within a limited time, lodge a notice of objection with the Magistrates Court[265]. Section 18 regulates the determination of an objection. The central task of the Court is identified by s 18(1) as being to "consider whether, in the light of the evidence presented by both the Commissioner and the objector, sufficient grounds existed for the making of the control order". In the case of a control order made under s 14(1), the focus of attention in an objection hearing would be whether the Magistrates Court had sufficient grounds to conclude that "the defendant is a member of a declared organisation". As will later be explained, the Solicitor-General for South Australia accepted that, in objection proceedings, a

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265 s 17(1).

defendant could mount a collateral challenge to the validity of the Attorney-General's declaration of the organisation as well as challenge the finding of membership.

176 The objection procedure constitutes the gateway to an appeal to the Supreme Court. Section 19(1) provides that the Commissioner or an objector may appeal to the Supreme Court against a decision of the Magistrates Court on a notice of objection. An appeal lies as of right on a question of law, and with permission on a question of fact[266].

Offences

177 Contravention of, or failure to comply with, a control order is an offence punishable by imprisonment for up to five years[267]. What amounts to contravention or failure is to be determined in accordance with s 22(2), which provides that:

> "A person does not commit an offence against this section in respect of an act or omission unless the person knew that the act or omission constituted a contravention of, or failure to comply with, the order or was reckless as to that fact."

178 Part 5 of SOCCA (ss 35 - 36) deals with offences. Section 35 creates offences of a kind identified by the heading to the section as "[c]riminal associations". A person who associates, on not less than six occasions during a period of 12 months, with a person who is either a member of a declared organisation, or the subject of a control order, is guilty of an offence punishable by imprisonment for up to five years[268]. A person does not commit that offence unless[269]:

> "on each occasion on which it is alleged that the person associated with another, the person knew that the other was—
>
> (a) a member of a declared organisation; or
>
> (b) a person the subject of a control order,

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266 s 19(2).

267 s 22(1).

268 s 35(1).

269 s 35(2).

or was reckless as to that fact".

179 Section 35(6) identifies a number of forms of association that are to be disregarded for the purposes of s 35, unless the prosecution proves that the association was not reasonable in the circumstances. The associations to be disregarded include associations between close family members, and associations occurring in the course of a lawful occupation, business or profession. In addition, a court hearing a charge of an offence against s 35 may determine that an association is to be disregarded if the defendant proves that he or she had a reasonable excuse for the association[270]. But the provision permitting courts to take this step does not apply to an association if, at the time of the association, the defendant was a member of a declared organisation, was subject to a control order, or had a criminal conviction (whether against the law of South Australia or of another jurisdiction) of a kind prescribed for the purposes of s 35(3).

180 There are several observations to make about these offence provisions. First, it is important to recognise that the control order itself imposes a number of disadvantages upon the person who is subject to it. Describing the disadvantages imposed by a control order as "penal" or "punitive" may distract attention from what it is that the order does, by obliging debate about the definition of terms like "penal" or "punitive". That debate need not be explored. What matters for present purposes is that a control order affects a defendant by limiting that defendant's freedom. The offence which is created by s 22, of contravening or failing to comply with a control order, is an offence which, upon proof, will lead to punishment of the offender. But the punishment thus imposed by a court is for failure to comply with the curially determined and imposed restrictions on freedom that are set out in the control order.

181 Secondly, it is important to recognise that the operation of ss 22 and 35 overlaps. Both sections operate to proscribe association with members of a declared organisation. Both could apply to the conduct of a person who is a member of a declared organisation.

182 Section 14(5)(b)(i) requires the Magistrates Court to prohibit a defendant who is a member of a declared organisation from associating with other persons who are members of declared organisations. It follows that s 22, in effect, makes it an offence for a member of a declared organisation who is the subject of a control order to associate with any member of any declared organisation. An offence is committed under s 22 *every* time a person subject to a control order associates with a member of a declared organisation.

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270 s 35(7).

183 Section 35 is directed more generally. Sub-sections (1) and (2) deal with association with a person who is a member of a declared organisation and association with a person who is the subject of a control order. Those sub-sections provide, in effect, that it is an offence for *any* person to associate with a member of a declared organisation, or a person who is the subject of a control order, on not less than six occasions during a period of 12 months, if that person knew, on each occasion, that the other was a member of a declared organisation or the subject of a control order, or was reckless as to that fact.

184 Section 35 can thus be seen to create an offence that is very like consorting offences of the kind considered in *Johanson v Dixon*[271]. Section 35 makes repeated association with members of a declared organisation a crime. By contrast, s 22 makes *any* association in breach of a control order a crime, but applies only to a person in respect of whom the Magistrates Court has made a control order.

185 The third feature to notice about the offence provisions of SOCCA is that s 35 makes a very wide range of conduct criminal. Section 35(6) provides that some forms of association will be disregarded for the purposes of the section, "unless the prosecution proves that the association was not reasonable in the circumstances". Those forms of association include associations between close family members, and associations "occurring in the course of a lawful occupation, business or profession". But noticeably absent from the exceptions is any that would cover everyday forms of association that would be constituted by communications between friends outside immediate family and work.

186 The fourth, and final, point to make about the offence provisions is that, because the only provision which is challenged in these proceedings is s 14(1), the only aspects of the offence provisions which are brought into question are those which are engaged by the making of a control order under s 14(1). Thus, to take only one example, the operation of s 35(1)(a) (prohibiting association with a member of a declared organisation on not less than six occasions) is not challenged in, or affected by the outcome of, this litigation.

187 Before further identifying the issues that arise in the appeal, it is convenient to deal with the Full Court's decision.

The Full Court's decision

188 A critical step in the reasoning of Bleby J, with whose reasons Kelly J agreed[272], depended upon comparing the nature and extent of the roles performed

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271 (1979) 143 CLR 376; [1979] HCA 23.

272 (2009) 105 SASR 244 at 305 [277].

first by the Attorney-General, and then by the Magistrates Court, that would culminate in the making of a control order. Bleby J concluded[273] that four elements had to be established to obtain a control order:

(a) members of the organisation of which the defendant to the application for a control order is alleged to be a member associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity;

(b) the organisation in question represents a risk to public safety and order in South Australia;

(c) the making of the declaration; and

(d) membership by the defendant of the organisation the subject of the declaration.

As Bleby J pointed out[274], the third and fourth elements must be established to the satisfaction of the Court, but the first two elements are to be established[275] to the satisfaction of the Attorney-General. Bleby J described[276] the first two elements as "the most factually complex matters that have to be established". Thus, his Honour continued[277]:

> "[t]he relatively much more significant and complex factual inquiry is removed from the court to the Attorney-General. The Attorney-General is not subject to or bound by the rules of evidence or any standard of proof. He can act on whatever information he pleases and give it whatever weight he pleases."

189 The second important element in the reasoning of Bleby J was, as he put it[278]: "[t]he Attorney-General's findings are unreviewable[279]. They are, in effect,

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273 (2009) 105 SASR 244 at 280 [152].

274 (2009) 105 SASR 244 at 280 [153].

275 (2009) 105 SASR 244 at 280 [154].

276 (2009) 105 SASR 244 at 280 [154].

277 (2009) 105 SASR 244 at 280 [155].

278 (2009) 105 SASR 244 at 280 [155].

279 SOCCA, s 41.

binding on the court." What Bleby J characterised[280] as the requirement of SOCCA for the Magistrates Court "to act on what is, in effect, the certificate of the Attorney-General that elements 1 and 2 are proved, with no ability to go behind that certificate" was[281] "sufficient to undermine the institutional integrity of the court, as the most significant and essential findings of fact are made not by a judicial officer but by a Minister of the Crown". The Act required, in his Honour's opinion[282], "the integration of the administrative function with the judicial function to an unacceptable degree which compromises the institutional integrity of the court" with the result that the outcome of the judicial process "is controlled, to a significant and unacceptable extent, by an arm of the Executive Government which destroys the court's integrity as a repository of federal jurisdiction".

190 Two elements of the reasoning of Bleby J require separate consideration: first, the conclusion that the decision of the Attorney-General, to make a declaration under s 10, is not reviewable, and secondly, that a comparison of the "size" or "complexity" of the task of the Attorney-General under s 10 and the task of the Magistrates Court under s 14(1) is useful.

Declaration reviewable?

191 The conclusion that the decision of the Attorney-General to declare an organisation to be a "declared organisation" is unreviewable should not be accepted. To explain why that is so, it is necessary to consider the meaning and operation of s 41 of SOCCA. That section provides:

> "(1) Except as otherwise provided in this Act, no proceeding for judicial review or for a declaration, injunction, writ, order or other remedy may be brought to challenge or question—
>
> (a) a decision, determination, declaration or order under this Act or purportedly under this Act; or
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> (b) proceedings or procedures under this Act or purportedly under this Act; or
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> (c) an act or omission made in the exercise, or purported exercise, of powers or functions under this Act; or

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280 (2009) 105 SASR 244 at 280 [155].

281 (2009) 105 SASR 244 at 280 [156].

282 (2009) 105 SASR 244 at 280-281 [157].

(d) an act, omission, matter or thing incidental or relating to the operation of this Act.

(2) The validity and legality of a declaration under Part 2 cannot be challenged or questioned in any proceedings.

(3) The validity and legality of a control order or a public safety order cannot be challenged or questioned in proceedings for an offence against this Act."

192 In this Court, the Solicitor-General for South Australia submitted[283] that a defendant to an application for a control order may collaterally challenge the Attorney-General's declaration. He also accepted that the Supreme Court of South Australia had jurisdiction to grant relief in the nature of certiorari to quash any declaration purportedly made under s 10 which was made in excess of jurisdiction.

193 The first of these submissions, about collateral challenge, treated s 41(2) of SOCCA as controlling any challenge to the validity or legality of a declaration made under Pt 2. Although not expressed in these terms, the submission appeared to proceed from the premise that the specific provisions of s 41(2), dealing with the validity and legality of a declaration under Pt 2, should be treated as applicable even if the more generally expressed prohibitions in s 41(1) might otherwise be capable of application[284]. It is not necessary, however, to examine whether that construction of s 41 should be adopted. It is sufficient, for present purposes, to observe that, whether or not the Attorney-General's declaration can be the subject of collateral challenge in objection proceedings in the Magistrates Court, judicial review of the Attorney-General's decision will be available in the Supreme Court[285].

194 Because the power given to the Attorney-General by s 10 of SOCCA depends upon the Attorney-General being satisfied of certain matters, judicial

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283 Referring in this connection to *Ousley v The Queen* (1997) 192 CLR 69; [1997] HCA 49.

284 cf *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 583-590 [43]-[61]; [2006] HCA 50; *Downey v Trans Waste Pty Ltd* (1991) 172 CLR 167; [1991] HCA 11; *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672; [1979] HCA 26; *R v Wallis* ("the *Wool Stores Case*") (1949) 78 CLR 529; [1949] HCA 30; *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7; [1932] HCA 9.

285 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; [2010] HCA 1.

review of the Attorney-General's decision, on grounds other than want of procedural fairness, would be governed by the principles described by Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*[286]. As Dixon J said in *Avon Downs*, with particular reference to a question depending upon the satisfaction of the Commissioner of Taxation[287]:

> "If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law."

195 The forensic difficulties of mounting such a challenge to the decision of the Attorney-General to make a declaration under s 10 of SOCCA would be very large. Those difficulties would be compounded if, as may well be the case, not all of the information before the Attorney-General could be inspected by the party seeking judicial review. To the extent to which the Attorney-General acted upon criminal intelligence, s 21[288] of SOCCA would appear, on its face, to

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286 (1949) 78 CLR 353; [1949] HCA 26.

287 (1949) 78 CLR 353 at 360.

288 Section 21 provides:

> "(1) No information provided by the Commissioner to a court for the purposes of proceedings relating to the making, variation or revocation of a control order may be disclosed to any person (except to the Attorney-General, a person conducting a review under Part 6, a court or a person to whom the Commissioner authorises its disclosure) if the information is properly classified by the Commissioner as criminal intelligence.

(Footnote continues on next page)

preclude a court from making that material available to the applicant for judicial review. In addition, the Attorney-General may act upon information in respect of which it would be proper for the Attorney to claim public interest immunity from production. In such circumstances, for an applicant for judicial review to show that the Attorney-General's decision was affected by some mistake of law, or that the Attorney-General took some extraneous reason into consideration, or excluded from consideration a factor which should affect the determination, would be very difficult. But the decision is not unexaminable for jurisdictional error. And, as the Solicitor-General for South Australia also accepted, it could be challenged for want of procedural fairness.

196 These conclusions, about the availability of judicial review of the validity of a declaration made under s 10, do not decide the inquiry about the validity of s 14(1). One reason that the availability of judicial review does not conclude the inquiry is exposed by considering the relationship between the two steps of making a declaration under s 10 and making an order under s 14(1).

197 The first step, of making a declaration under s 10, directs attention to the activities of individuals. It then requires a conclusion about the organisation of which those individuals are members. The second step, of making an order under s 14(1), directs attention to membership of a declared organisation. It does not direct any attention to any past or future activity of any person, be it a person whose activities were examined when considering whether to make a declaration under s 10, or any other person. The second step, of making an order under s 14(1), does not direct attention to any feature of the organisation other than its being a declared organisation. The subject of inquiry at the second step, of making an order under s 14(1), can thus be seen to be different, and disconnected, from the subject of inquiry at the earlier step of making an order under s 10. The only link between the two steps (under s 10 and s 14(1)) is provided by the identification of the defendant to an application for a control order as a member of a declared organisation. That the declaration relied on as founding the application has been properly made does not bear upon the issue of membership which the Magistrates Court is required to determine.

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(2) In any proceedings relating to the making, variation or revocation of a control order, the court determining the proceedings—

(a) must, on the application of the Commissioner, take steps to maintain the confidentiality of information properly classified by the Commissioner as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives ...".

198 In these circumstances, the validity of s 14(1) is best examined on the assumption that the relevant declaration of an organisation has been properly made.

Comparison of the "size" or "complexity" of the tasks

199 One other matter, taken up in the reasons of Bleby J, may also be put aside from consideration. It may be right, in the present case, to say that the task which the Attorney-General undertook in determining whether to declare the Finks to be a declared organisation was much more factually complex than the inquiry which the Magistrates Court had to undertake in determining whether Mr Hudson was a member of that organisation. It may very well be that a similar comparison could be made in most, if not all, cases in which there has been, first, a decision by the Attorney-General to declare an organisation, and secondly, a decision by the Magistrates Court whether a person is a member of a declared organisation. It is greatly to be doubted, however, that comparison of the size or complexity of the respective tasks is useful in determining whether the relevant provisions of SOCCA are valid.

200 The conclusion reached by Bleby J[289] that "[i]n a very real sense the court is required to '[act] as an instrument of the Executive'[290]" depends, for its force, not upon comparison of the respective size or complexity of the tasks undertaken by the executive and the judicial branches of government, but upon the nature of the relationship that the legislation establishes between the two branches of government.

The principle in *Kable*

201 Section 106 of the Constitution provides that "[t]he Constitution of each State of the Commonwealth shall, *subject to this Constitution*, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State" (emphasis added). The reference in s 106 to "subject to this Constitution" is important. *Kable* dealt with one respect in which the Constitutions of the States are affected by the federal Constitution: the legislative powers of the States are not unlimited. The relevant limitation is not one which follows from any separation of judicial and legislative functions under

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289 (2009) 105 SASR 244 at 280 [156].

290 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63]; [2006] HCA 44.

the Constitutions of the States[291]. Rather, it is a consequence that follows from Ch III establishing, in Australia, "an integrated Australian legal system, with, at its apex, the exercise by this Court of the judicial power of the Commonwealth"[292].

202 The immediate focus in *Kable* was upon State legislation which sought to impose, on a State court, powers or functions repugnant to, or incompatible with, the exercise by State courts of the judicial power of the Commonwealth[293]. The jurisdiction to be exercised under the Act in question in *Kable* was, by its "very nature ... incompatible with the exercise of judicial power"[294]. The incompatibility with, or repugnancy to, judicial process lay in the procedures laid down by the legislation for the further incarceration of Mr Kable. Those procedures were incompatible with, or repugnant to, the exercise of judicial power because, apart from certain well-recognised exceptions[295], "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt"[296]. In *Kable*, the Act in question drew in "the Supreme Court of a State as an essential and determinative integer of a scheme whereby, by its order, an individual is incarcerated … otherwise than for breach of the criminal law"[297]. It thereby "sapped to an impermissible degree" the Supreme Court's appearance of institutional impartiality[298].

203 In *Fardon v Attorney-General (Qld)*[299], the Court considered the application of these principles to State legislation providing more generally for a

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291 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 95 per Toohey J.

292 (1996) 189 CLR 51 at 143 per Gummow J.

293 (1996) 189 CLR 51 at 104 per Gaudron J.

294 (1996) 189 CLR 51 at 95 per Toohey J.

295 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27-29; [1992] HCA 64.

296 (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ.

297 (1996) 189 CLR 51 at 133 per Gummow J.

298 (1996) 189 CLR 51 at 133-134 per Gummow J.

299 (2004) 223 CLR 575; [2004] HCA 46.

system of preventive detention: the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Q). The Court distinguished *Kable* and held the Act to be valid.

204 In *Fardon*, Gummow J made[300] a number of points about the principle for which *Kable* is authority. They serve to identify a number of issues that fall for consideration in this matter. First, it was a particular combination of features of the New South Wales Act in issue in *Kable* that led to its invalidity: "[t]hese included the apparent legislative plan to conscript the Supreme Court of New South Wales to procure the imprisonment of the appellant by a process which departed in serious respects from the usual judicial process"[301].

205 Secondly, the essential notion about which the principle in *Kable* hinges "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"[302].

206 Thirdly, an important indication that a particular law is repugnant to, or incompatible with, that institutional integrity is "that the exercise of the power or function in question is calculated, in the sense of apt or likely, to undermine public confidence in the courts exercising that power or function"[303]. But perception as to the undermining of public confidence "is an indicator, but not the touchstone, of invalidity; the touchstone concerns institutional integrity"[304].

207 Finally, as is the case in other areas of constitutional doctrine[305], "the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes"[306].

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300 (2004) 223 CLR 575 at 617-619 [100]-[105].

301 (2004) 223 CLR 575 at 617 [100].

302 (2004) 223 CLR 575 at 617 [101].

303 (2004) 223 CLR 575 at 617 [102].

304 (2004) 223 CLR 575 at 618 [102].

305 (2004) 223 CLR 575 at 618 [103].

306 (2004) 223 CLR 575 at 618 [104].

208 As Gummow J also pointed out in *Fardon*[307], the proposition stated by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration*[308], that "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt", was applied as a step in the reasoning in *Kable* of Toohey J[309] and Gummow J[310], and was reflected in the reasoning of Gaudron J[311] and McHugh J[312]. But as Gummow J also pointed out in *Fardon*[313], the expression of a constitutional principle in this form has a number of indeterminacies. First, there is the difficulty of identifying the beneficiary of the principle as "a citizen". Secondly, there are difficulties associated with the phrase "criminal guilt". As was pointed out in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*[314], the litigious world cannot be neatly divided into only two parts: one civil, the other criminal.

209 Having regard to these matters, Gummow J proffered[315], as a formulation of the relevant principle derived from Ch III, "that, the 'exceptional cases' aside, the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts".

210 The reference, in this formulation of principle, to adjudication of criminal guilt "for past acts" takes account of what was held in *Polyukhovich v The Commonwealth* (*War Crimes Act Case*)[316]. It is a formulation which omits

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307 (2004) 223 CLR 575 at 611 [77].

308 (1992) 176 CLR 1 at 27.

309 (1996) 189 CLR 51 at 97-98.

310 (1996) 189 CLR 51 at 131-132.

311 (1996) 189 CLR 51 at 106-107.

312 (1996) 189 CLR 51 at 121-122.

313 (2004) 223 CLR 575 at 611-613 [78]-[84].

314 (2003) 216 CLR 161 at 198-199 [114]; see also at 172-173 [29]; [2003] HCA 49.

315 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 612 [80].

316 (1991) 172 CLR 501; [1991] HCA 32.

reference to detention being "penal or punitive in character"[317]. Instead, by describing the relevant principle by reference to involuntary detention, attention is directed to what has happened, rather than to any attempted characterisation of the effect of, or the purpose that may lie behind, the detention.

211 It is to be observed, however, that all of the circumstances considered in *Chu Kheng Lim* and *Fardon*, in which there can be the involuntary detention of a citizen, whether within or without the class of "exceptional cases", depend for their engagement upon one or more factors specific to the person who is to be detained.

212 Section 14(1) of SOCCA does not provide for involuntary detention of any person. It provides for other restrictions on the freedom of the person who is the subject of a control order. But, as the decision in *International Finance Trust Co Ltd v New South Wales Crime Commission*[318] demonstrates, the limitation on State legislative power that was identified in *Kable* is not confined to legislation imposing or resulting in involuntary detention. It is a limitation whose roots lie deeper than particular issues presented by questions of involuntary detention. Those roots lie in the Constitution's establishment of an integrated legal system. And the principle which is supported by those roots directs attention to repugnancy to, or incompatibility with, the constitutional integrity of State courts. Questions of repugnancy or incompatibility are not necessarily confined to cases where there is involuntary detention. And in the end, no party or intervener in this appeal submitted to the contrary.

213 Section 14(1) of SOCCA requires the Magistrates Court, if it is satisfied that the defendant is a member of a declared organisation, to order other, lesser restrictions of the defendant's freedom than involuntary detention. One of those restrictions may be largely dismissed from further consideration: the requirement that a control order prohibit the defendant from possessing articles of a kind whose possession, without lawful excuse, is an offence under s 15 of the *Summary Offences Act* 1953. That aspect of the control order does no more than require the defendant to obey the law. Rather, in considering the validity of s 14(1), attention must focus upon the requirement that a control order limit the defendant's freedom of association by prohibiting the defendant from associating with *any* member of *any* declared organisation, apart, perhaps, from a person specifically excepted from the reach of the order by exercise of the power under s 14(5)(b). The possibility of exercise of the power to make an exception under s 14(5)(b) may be put aside from further consideration. The validity of the legislation is to be determined by reference to its intended legal and practical

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317 *Fardon* (2004) 223 CLR 575 at 612 [81].

318 (2009) 240 CLR 319; [2009] HCA 49.

operation. And although the focus of attention will necessarily fall upon the limitations that a control order imposes on the freedom of the person who is subject to the order, the nature and effect of those limitations must be understood in the light of the offence provisions of s 35. More particularly, it is important to recall that it is a crime for anyone who knows of a control order to associate with the subject of that order six or more times in 12 months, unless their association falls within one of the specified exceptions mentioned in s 35(6).

214 As the statement of objects of SOCCA, set out in s 4, makes plain, one of the principal objects of the Act is "to disrupt and restrict" the activities of organisations involved in serious crime. Section 14(1) evidently seeks to contribute to that object by restricting the freedom of association of members of declared organisations. It does that, however, by requiring the Magistrates Court to make an order that prohibits a defendant associating with *any* member of *any* declared organisation.

215 Several aspects of the prohibition contemplated by s 14(1) are important. First, and foremost, the prohibition is to be imposed by reason of membership of a declared organisation, regardless of whether the Attorney-General has found that the defendant is one of those members of the organisation who associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity. And, of course, that question is not asked in the proceedings in the Magistrates Court. It follows that the freedom of association of a defendant may be restricted where neither the executive nor the judicial branch has made any determination about what he or she has done, intends to do, or is likely to do in connection with "serious criminal activity". That is, the disadvantages imposed by an order are imposed regardless of what the person disadvantaged has done, intends to do, or may do.

216 Secondly, the restriction on association that is to be imposed under s 14(1) is a restriction on association, not only with other members of the organisation of which the defendant is a member, but also with the members of any other declared organisation. When regard is had to the fact that "member" includes not only those who see themselves as members of a particular organisation, but also those whom the organisation treats as members, the reach of the prohibition effected by a control order made under s 14(1) can be seen to extend well beyond any disruption or prevention of anticipated conduct *by the defendant* which would fall within the criterion which authorised the Attorney-General to make a declaration under s 10.

217 Next, it is important to notice that the prohibition on association, which is effected by a control order, prohibits association between members of an organisation whose continued existence is not made unlawful, whether by SOCCA or by any other law. And a control order prohibits association between a person who is a member of a declared organisation and any member of any

other declared organisation although the continued existence of those other organisations is not made unlawful.

218 Although s 14(1) of SOCCA requires the Magistrates Court to determine any controversy about whether the defendant is a member of a declared organisation, it does not require the Court to ascertain, declare or enforce the rights or liabilities of the parties to the application for a control order as those rights and liabilities exist at the time the proceedings are instituted[319]. Rather, s 14(1) obliges the Magistrates Court to make an order which for the most part creates new obligations. (The qualification, "for the most part", is made necessary by the requirement for the control order to prohibit possession of offensive weapons.) It is the new obligations created by the order (including the obligation to refrain from associating with certain persons) with which s 22 engages to make the breach of the obligations a crime.

219 The fact that a relevant obligation finds its immediate origin in a court order is an unremarkable consequence of the exercise of many forms of judicial power. But the creation and imposition of that obligation depends, in every case, upon the court's ascertainment of rights or liabilities, or upon its determination that the order will conduce to future conformity with rights and liabilities. When a court awards judgment for damages, or other forms of final relief, it does so as a remedy for a breach of rights. When a court punishes a person convicted of crime, it does so in consequence of adjudication of guilt for past acts. When a court orders an injunction, it does so to prevent future contravention of existing rights. And, as will later be further explained, when a court makes an order to prevent future wrongdoing, it does so on *its* assessment of the connection between the order proposed and past or future conduct of the person to be restrained, or on its assessment of the connection between the order and a combination of past and possible future acts. Section 14(1) of SOCCA does not operate in any of these ways.

220 It is well-established that, in considering the judicial power of the Commonwealth, the "concept [of judicial power] seems … to defy, perhaps it were better to say transcend, purely abstract conceptual analysis"[320]. And although this Court has identified factors to be taken into account in assessing what is judicial power, "no single combination of necessary or sufficient factors

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319 *R v Kirby; Ex parte Boilermakers' Society of Australia* ("the *Boilermakers' Case*") (1956) 94 CLR 254 at 281; [1956] HCA 10.

320 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394 per Windeyer J; [1970] HCA 8.

identifies what is judicial power"[321]. A distinction, often offered[322] in connection with the discussion of the judicial power of the Commonwealth, seeks to differentiate between the determination of rights and liabilities and the creation of rights and liabilities, the former being identified as typical of judicial power and the latter as indicating that the power engaged is non-judicial. But as decisions like *R v Davison*[323] show, the absence of any dispute about existing rights and liabilities does not, of itself, entail the conclusion that there is no exercise of the judicial power of the Commonwealth. And as one writer has recently suggested[324], "[t]he guiding principle of rights-determination versus rights-creation has proved to be imprecise and malleable". It is, none the less, both right and important to observe that the determination of rights and liabilities lies at the heart of the judicial function, and that the creation of rights and liabilities lies at the heart of the legislative function.

221 Of course, it is also important to recognise that there can be no direct translation of what has been said about issues that arise directly under Ch III to the present case. This case is concerned with a limitation on State legislative power that does not follow from any separation of judicial and legislative functions under the Constitutions of the States; the limitation follows from Ch III establishing an integrated legal system with, at its apex, this Court exercising the judicial power of the Commonwealth.

222 Section 14(1) of SOCCA exhibits three, connected, features that are critical to consideration of its validity. First, the court that makes an order under s 14(1) does not ascertain, declare or enforce any right or liability that exists at the time the proceedings are instituted. Secondly, the court's order creates new and particular restrictions on association. The restrictions are particular in two respects. They are particular in that they are directed only to the defendant in question. They are also particular in that they do not reflect, let alone give effect to, any more general legislative proscription of any and every act of association between or with members of a declared organisation. Thirdly, the court must make the order against the particular defendant, without the court making any inquiry for itself about what the subject of the order has done, or may do in the

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321 *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 577 [93]; [2008] HCA 2.

322 *Australian Boot Trade Employés Federation v Whybrow & Co* (1910) 10 CLR 266; [1910] HCA 8; *Boilermakers' Case* (1956) 94 CLR 254 at 281.

323 (1954) 90 CLR 353; [1954] HCA 46.

324 Stellios, *The Federal Judicature: Chapter III of the Constitution* (2010) at 207 [4.162].

future, or any inquiry about what the executive may have concluded that the subject of the order has done, or may do in the future.

223 Section 14(1) of SOCCA thus stands in sharp contrast with the provisions of the *Criminal Code* (Cth) that were in issue in *Thomas v Mowbray*[325]. Provisions of Div 104 of Pt 5.3 of the *Criminal Code* permitted the making of control orders in relation to a person in certain circumstances. Those circumstances included the issuing court being satisfied that "making the order would substantially assist in preventing a terrorist act" or that the person against whom the order was to be made was a person who "has provided training to, or received training from, a listed terrorist organisation"[326]. Moreover, s 104.4(1)(d) of the *Criminal Code* provided that an issuing court may make a control order of the kind in issue in *Thomas v Mowbray* "*only if* ... satisfied ... that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act" (emphasis added).

224 Unlike s 14(1) of SOCCA, the provisions of the *Criminal Code* in issue in *Thomas v Mowbray* thus required the issuing court to be satisfied either that the person against whom the order was to be made *had engaged* in particular past conduct, or that the order would have an *identified consequence*. The past conduct in issue under the *Criminal Code* provisions was conduct which the *Criminal Code* made unlawful. The relevant consequence (of protecting the public from a terrorist act) had to be related directly to the defendant (as did the fact of past conduct), because a control order could be made only if each particular aspect of the proposed order (as it operated against the defendant) was both reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act. And, as explained in *Thomas v Mowbray*[327], other forms of preventive order, like apprehended violence orders, depend upon inquiries no different in substance from those that were required under the provisions in issue in that case.

225 In summary, then, s 14(1) requires the Magistrates Court to perform functions that have the following characteristics:

(a) upon application by the Executive, the Magistrates Court must make a control order against a person who is shown to be a member of a declared organisation;

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325 (2007) 233 CLR 307; [2007] HCA 33.

326 s 104.4(1)(c).

327 (2007) 233 CLR 307 at 328-329 [16], 347-348 [79].

(b) a control order imposes significant restrictions on the defendant's freedom of association, over and above the restrictions that are generally applicable to others dealing with members of declared organisations;

(c) a control order must be imposed without any judicial determination (and without the need for any executive determination) that the defendant has engaged, or will or may engage, in criminal conduct;

(d) a control order will preclude the defendant's association with others in respect of whom there has been no judicial determination (and without the need for any executive determination) that those others have engaged, or will or may engage, in criminal conduct;

(e) a control order creates new norms of conduct, contravention of which is a crime;

(f) making a control order neither depends upon, nor has the consequence of, ascertaining, declaring or enforcing any existing right or liability, whether of the defendant, any other member of the subject organisation, the subject organisation itself, or any other organisation (declared or not).

226 All of these features of the task that is given to the Magistrates Court are important to the conclusion that performance of that task is repugnant to, or incompatible with, the institutional integrity of the Court. The task is repugnant to, or incompatible with, the institutional integrity of the Court because the Court is enlisted, by the Executive, to make it a crime, for particular persons upon whom the Executive fixes, to associate together when, but for the Court's order, the act of association (as distinct from repeated and persistent associations of the kind with which s 35 deals) would not be a crime. Those whom the Executive chooses, for the compulsory imposition of a special regime by order of the Magistrates Court, must be drawn from a group determined by the Executive to be an organisation that "represents a risk to public safety and order in [the] State"[328]. But it is no part of the function of the Magistrates Court under SOCCA to determine what the particular defendant has done, or may do in the future. The Court is required to act on the assumption that "membership" of a declared organisation requires imposition of limitations on the freedom of the defendant which are not otherwise imposed, when the legislation does not make either the fact of membership of the organisation, or the continued existence of the organisation, unlawful. That is, upon the motion of the Executive, the Court is required to create new norms of conduct, that apply to a particular member of a class of persons who is chosen by the Executive, on the footing that the

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328 s 10(1)(b).

Executive has decided that some among the class (who may or may not include the defendant) associate for particular kinds of criminal purposes. It is not the business of the courts, acting at the behest of the executive, to create such norms of conduct without inquiring about what the subject of that norm has done, or may do in the future. To be required to do so is repugnant to the institutional integrity of the courts. It is desirable to amplify a number of aspects of these points.

227 In considering the nature of the task that s 14(1) requires the Magistrates Court to perform, it is important to recall that, as Kitto J said in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*[329]:

> "[A] judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to *the existence of a right or obligation*, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist. It is right, I think, to conclude from the cases on the subject that a power which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified." (emphasis added)

228 Section 14(1) of SOCCA does not permit or require the Magistrates Court to determine the existence of any right or obligation. The Court is required to make a control order without enquiring how, if at all, that order will contribute to the legislative object of disrupting the criminal activities of identified groups, or the criminal activities of any individual. The obligations which are created by the Court's order are not imposed on account of what the person against whom the order is directed has done, will do, or may do.

229 It is next important to recognise that the Court must act at the behest of the Executive. It is the Executive which chooses whether to apply for an order, and the Executive which chooses the members of a declared organisation that are to be made subject to a control order. So long as the person named as a defendant falls within the definition of "member", the Court cannot refuse the Executive's application; the Court must make a control order. That the Court must decide

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329 (1970) 123 CLR 361 at 374-375.

whether the defendant falls within the definition of "member" does not detract from the conclusion that the Court is acting at the behest of the Executive. In that regard, it is to be recalled that, under the legislation considered in *Kable*, and held to be beyond the legislative power of the State, the Supreme Court of New South Wales had to be satisfied[330] that Mr Kable was "more likely than not to commit a serious act of violence", and that it was "appropriate, for the protection of a particular person or persons or the community generally" that he be held in custody. Yet the conclusion was reached[331] that, under the legislation in issue in *Kable*, "[t]he judiciary is apt to be seen as but an arm of the executive which implements the will of the legislature". The same observation is to be made about s 14(1) of SOCCA.

230 The courts are not to be used as an arm of the Executive to make unlawful the association between individuals when their associating together is not otherwise a crime, where such prohibition is to be imposed without any determination that the association of the *particular* individuals has been, will be, or even may be, for criminal purposes.

The significance of "membership"

231 Membership of an organisation, affiliation with that organisation, or association with one or more of its members does not in every case demonstrate support for all of the aims or purposes of the group, or all of the methods that it uses to achieve its aims or purposes. It may, perhaps it often does, at least if membership of the group is sought out and maintained. But the conclusion is not inevitable, and is all the harder to draw as the premise for it varies from active membership, through affiliation, to mere association with members. And it is to be recalled that the definition of "member" in s 3 of SOCCA is so wide that it would readily embrace many cases beyond those in which a person actively seeks out and maintains formal membership of the relevant organisation. It is not to be assumed that the organisations that are intended to be the subject of declarations under SOCCA will be ordered according to the standards applicable to a listed public company, or that membership of the relevant body can be determined with the certainty that might be possible under corporations legislation. The extended definition of "member" given in SOCCA reflects that fact. But by doing so, it brings persons within the reach of s 14(1) in respect of whom a finding of membership will do no more than show that the defendant has associated with persons who, in turn, associate with persons who the Attorney-General has concluded associate with each other for criminal purposes.

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330 *Community Protection Act* 1994 (NSW), s 5(1).

331 (1996) 189 CLR 51 at 134.

232 A central and informing principle of criminal liability in Australia, as elsewhere[332], is that guilt is personal and individual. The debates about the ambit of doctrines of complicity and joint enterprise[333] demonstrate the continued vitality and importance of the principle by seeking to chart one boundary to it. That guilt is personal and individual is intrinsic in the notion of the rule of law. As Dixon J said in *Australian Communist Party v The Commonwealth*[334], one of the assumptions in accordance with which the Constitution is framed is the rule of law. It was on that footing ("[i]n such a system") that he concluded[335] that:

> "it would be impossible to say of a law of the character [then in issue], which depends for its supposed connection with the power upon the conclusion of the legislature concerning the doings and the designs of the bodies or person to be affected and affords no objective test of the applicability of the power, that it is a law upon a matter incidental to the execution and maintenance of the Constitution and the laws of the Commonwealth".

That is, the legislative determination, recorded in the recitals to the *Communist Party Dissolution Act* 1950 (Cth), that the Communist Party "also engages in activities or operations designed to bring about the overthrow or dislocation of the established system of government of Australia", did not conclude the issue about engagement of the defence power.

233 As has later been observed, by reference to this aspect of the decision of Dixon J in the *Communist Party Case*, "Ch III gives practical effect to the assumption of the rule of law upon which the Constitution depends for its efficacy"[336]. And the implication which was drawn from Ch III in *Kable*, about the legislative power of the States, is also to be seen as giving practical effect to the same assumption. But that then invites attention to what the rule of law requires.

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332 Sayre, "Criminal Responsibility for the Acts of Another", (1930) 43 *Harvard Law Review* 689 at 717; *Schneiderman v United States* 320 US 118 at 136 (1943); *Knauer v United States* 328 US 654 at 669 (1946); *Kotteakos v United States* 328 US 750 at 772 (1946).

333 *McAuliffe v The Queen* (1995) 183 CLR 108; [1995] HCA 37; *Gillard v The Queen* (2003) 219 CLR 1; [2003] HCA 64.

334 (1951) 83 CLR 1 at 193; [1951] HCA 5.

335 (1951) 83 CLR 1 at 193.

336 *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [61]; see also *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351-352 [30]; [2005] HCA 44.

234 The legislature has not chosen to make the fact of membership of a declared organisation a crime. It has not made that kind of legislative judgment, spoken of in decisions of the Supreme Court of the United States concerning legislation directed against the Communist Party or its members[337], that seeks to bridge the gap that may exist between membership of an organisation and personal possession of particular purposes or characteristics. And although the legislature may be said to have acted on the footing that the gap between identifying the purposes and conduct of some members of a group, and attributing those purposes to all the group's members, should be ignored, it has not attributed, and could not attribute, guilt of specific crime (past or future) to any, let alone all, members of an organisation that is declared under s 10. As was said in one of the United States cases[338], dealing with the activities of those identified as Communists, "[t]he designation of Communists as those persons likely to cause political strikes is not the substitution of a semantically equivalent phrase". So too here, the identification of an organisation as including, even being constituted by, persons who "associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity"[339] does not entail that every individual who falls within the extended definition of "member" in relation to that organisation necessarily has those purposes or characteristics. And it does not entail that every individual who falls within the definition of "member" has committed, or will commit, any crime. Yet the Magistrates Court is required, by s 14(1), to impose disadvantageous consequences upon any person who falls within that extended definition of "member", regardless of what the person has or has not done, and regardless of what purposes that person has had, or may now or later harbour, for having a connection with the organisation.

235 History, including recent history, provides many examples of legislative attempts to suppress associations thought, at the time, to pose some danger to the common good. In the late 18th century, 39 Geo III c 79 was enacted, as its long title said, "for the more effectual Suppression of Societies established for Seditious and Treasonable Purposes; and for better preventing Treasonable and Seditious Practices". Less than 20 years later, 57 Geo III c 19 was enacted "for the more effectually preventing Seditious Meetings and Assemblies" and to suppress and prohibit "certain Societies or Clubs calling themselves *Spenceans* or

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337 For example, *American Communications Association v Douds* 339 US 382 at 391 (1950); *United States v Brown* 381 US 437 at 455 (1965).

338 *United States v Brown* 381 US 437 at 455 (1965).

339 s 10(1)(a).

Spencean Philanthropists"[340]. A century and a half later, in Australia and elsewhere, legislation was enacted, and existing legislation administered, to bring an end to the existence of the Communist Party, and to disadvantage those who were identified as its supporters[341].

236 The legislation now in issue does not go down the path of seeking to outlaw particular organisations, or kinds of organisation. SOCCA does not make membership of any organisation (declared or not) a crime. It does not dissolve any organisation, or seek to forfeit or deal with any property that an organisation may own, use or occupy. What s 14(1) does is permit the Executive to enlist the Magistrates Court to create new norms of behaviour for those particular members who are identified by the Executive as meriting application for a control order. They are to be subjected to special restraint, over and above the limitations that the Act imposes on the public at large, not for what they have done or may do, and not for what any identified person with whom they would associate has done or may do, but because the Executive has chosen them. That function is repugnant to the institutional integrity of the Court that is required to perform it.

237 Section 14(1) is invalid. The appeal should be dismissed with costs.

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340 s 24.

341 *Communist Party Dissolution Act* 1950 (Cth); *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1; *Bridges v Wixon* 326 US 135 (1945); *United States v Lovett* 328 US 303 (1946).

238 HEYDON J. I dissent.

The mischief and its solution

239 In 2007, at least according to the then Attorney-General for the State of South Australia[342]:

> "outlaw motorcycle gangs remain prominent within the criminal class of South Australia and continue to expand. [Police] intelligence indicates that outlaw motorcycle gang members are involved in many and continuing criminal activities including murder; drug manufacture, importation and distribution; fraud; vice; blackmail; intimidation of witnesses; serious assaults; the organised theft and re-identification of motor vehicles and motorcycles; public disorder offences; firearms offences; and money laundering."

But it was not just the seriousness of the crimes that troubled the Attorney-General. He went on[343]:

> "Although comprising a small proportion of the state's population, outlaw motorcycle gang members and associates commit a disproportionate number of serious crimes. Outlaw motorcycle gang crime affects all levels of society. It is varied in scope, expertise, sophistication and influence. Incidents in which outlaw motorcycle gang members and their associates are suspected of involvement … pose a risk to public safety. Outlaw motorcycle gangs are increasingly infiltrating legitimate industries and using professionals to insulate their criminal activity from law enforcement."

On 14 May 2009 the Attorney-General laid before the House of Assembly a document giving his reasons for making a s 10 declaration in relation to the motorcycle club of which the respondents allegedly are members. In it he stressed the club's capacity to instil fear into the public and to induce the withdrawal of criminal allegations against its members[344].

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342 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 21 November 2007 at 1805.

343 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 21 November 2007 at 1805.

344 "Serious and Organised Crime (Control) Act 2008: Application for Declaration Regarding the Finks M.C. – Reasons of the Honourable M J Atkinson MP, Attorney-General", 14 May 2009 at [195]-[198]. The role of s 10 declarations in the legislative scheme is discussed below at [249].

240 South Australia aspires to government by the rule of law. A government seeking to foster the rule of law has a primary duty to preserve the safety of persons within the Queen's peace, and to preserve the government itself, from criminal violence and other criminal activities. It is a legitimate expectation of the governed that their government will fulfil that duty. The legislation under challenge in this case is the *Serious and Organised Crime (Control) Act* 2008 (SA) ("the impugned Act"). The impugned Act was enacted on the initiative of an executive which believed that it was not enough merely to respond to crime after it had occurred, by seeking to attribute fault and dispense punishment or order reparation. That executive thought that measures were necessary to forestall what it saw as very serious and socially damaging crimes. It thought that failure to implement those measures would be an abdication from duty. Like Coke, it thought that "preventing justice excelleth punishing justice."[345] It sought to combine established techniques to meet modern problems. The measures employed in the impugned Act had the object of protecting the public from violence at the hands of organisations involved in serious crime by disrupting and restricting the activities of those organisations (s 4(1))[346]. That object was to be accomplished by rendering it difficult for the members to associate with other members or certain non-members.

241 McHugh J has said that "there is no reason to doubt the authority of [a] State to make general laws for preventive detention when those laws operate in accordance with the ordinary judicial processes of the State courts."[347] The preventive techniques of the impugned Act are much milder than preventive detention. The question of their constitutional validity is a very significant one.

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345 *The Second Part of the Institutes of the Laws of England*, (1797) at 299.

346 Section 4(1) provides:

> "The objects of this Act are –
>
> (a) to disrupt and restrict the activities of –
>
> (i) organisations involved in serious crime; and
>
> (ii) the members and associates of such organisations; and
>
> (b) to protect members of the public from violence associated with such criminal organisations."

347 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 121; [1996] HCA 24.

The significance of the case

242 Most crime in Australia is, so far as it can be, investigated, prosecuted and punished by the States. Many of their officials are responsible for preserving public order. Some of them pursue that responsibility by keeping legislation relating to crime under constant review. Of course in a federal system it is the unhappy fate of legislatures, federal or State, and the electors who elected them, sometimes to have their desires thwarted when it becomes necessary for a court to hold that legislation reflecting those desires is constitutionally invalid. But if officials and legislators see it as their duty to procure legislation to prevent crime, to obstruct those endeavours by invalidating it is a serious step.

243 It is a serious step partly because there are very limited respects in which the Constitution explicitly prohibits a State from enacting legislation. Section 107 of the Constitution preserves "[e]very power of the Parliament of a Colony" which has become a State, unless that power is exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State by the Constitution. Thus s 52(i) gives the Commonwealth exclusive power to legislate with respect to the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes. Section 52(ii) gives the Commonwealth exclusive power to legislate with respect to public service departments, the control of which was transferred to the Executive Government of the Commonwealth pursuant to s 69. Section 52(iii) gives the Commonwealth exclusive power to legislate with respect to other matters declared by the Constitution to be within the exclusive power of the Parliament. Of these other matters there are well-known examples. Section 90 deprives the States of power to impose duties of customs and excise, and to grant bounties on the production or export of goods. Section 92 prevents the States from making laws protective of their trade. Section 111 provides that if a State surrenders part of its territory to the Commonwealth, upon acceptance by the Commonwealth, that part becomes subject to the exclusive jurisdiction of the Commonwealth. Section 114 prevents the States from raising or maintaining naval or military forces or imposing any tax on Commonwealth property without the consent of the Commonwealth. Section 115 prevents the States from coining money and from making anything but gold or silver coin legal tender in payment of debts. Section 117 prevents a State from discriminating against residents of other States. Section 109 does not prevent a State from enacting legislation, but it renders State legislation inoperative to the extent of its inconsistency with valid Commonwealth legislation for so long as the inconsistency continues.

244 To that list of express limitations on State legislative power must be added various limitations arising out of constitutional implications, some rather recently perceived. One of these concerns the freedom of political communication – for

90 years unrecognised, then the subject of wide claims[348], now much reduced in scope[349]. Another concerns "due process", which at one stage showed a little vigour[350] but is apparently dormant, at least under that name, though perhaps only for a time. Another is the "*Kable* doctrine"[351], invoked in this case.

245 Lawyers commonly think that the *Kable* doctrine has had a beneficial effect on some legislation. But it is a doctrine which intermediate appellate courts have found difficult to understand[352]. Many constitutional scholars have welcomed it. But not all[353]. No counsel has ever sought leave to argue that *Kable's* case be overruled. Hence it must be faithfully applied, whatever its meaning. That meaning remains controversial. Some aspects of its reasoning are now given less significance than formerly, others more. For example, the decision itself turned on the legislative requirement of detention without proof of criminal guilt. That requirement is not sufficient for invalidity[354]. There are statements in *Kable's* case indicating that the jurisdiction conferred on State

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348 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; [1992] HCA 45.

349 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; [1997] HCA 25.

350 Wheeler, "The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia", (1997) 23 *Monash University Law Review* 248.

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

352 *R v Moffatt* [1998] 2 VR 229 at 237 and 249; *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* (2000) 181 ALR 694 at 724 [169].

353 Twomey, *The Constitution of New South Wales*, (2004) at 187 and 194; Winterton, "Justice Kirby's Coda in Durham", (2002) 13 *Public Law Review* 165 at 167-168; Winterton, "Australian States: Cinderellas No Longer?", in Winterton (ed), *State Constitutional Landmarks*, (2006) 1 at 5 and 14-17.

354 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 657 [225]; [2004] HCA 46; *Thomas v Mowbray* (2007) 233 CLR 307 at 331 [19]; [2007] HCA 33.

courts must not damage "public confidence" in them[355]. But that damage is not now seen as a criterion of invalidity, merely an indication of it[356].

246 Speaking very generally, the meaning of the *Kable* doctrine and other constitutional implications affecting the States must in part be limited by the lack of restrictions on State legislative power to be found in the express terms of the Constitution. The Constitution must be read as a whole. It would be surprising if the quite wide field left for State legislatures by the relatively precise express prohibitions were to be radically constricted by somewhat general implications. It would also be surprising if the role of the States as jurisdictions in which experiment may be conducted and variety may be observed were to be significantly reduced by doctrines resting on opinions – which are very likely to be divergent – about the fitness of a State court to exercise federal jurisdiction.

247 Government seeks to achieve its goals by many non-coercive techniques. But if they fail, in the end, at least in many fields, government depends on the exercise of coercive power. The States have routinely adopted the practice of resting their coercive power in important matters on the procurement of court orders. An implication like the *Kable* doctrine, which centres on the structure and functions of State courts, is therefore capable of being peculiarly damaging to the States. That is one reason why this is an extremely important appeal. Another is that its dismissal is likely to tempt the States into legislating to exert their coercive power through means other than their courts[357]. If legislation of

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355 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 98, 107-108, 117-119, 121 and 133. See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 363 [81]; [2000] HCA 63; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 162 [27]; [2004] HCA 31.

356 *Nicholas v The Queen* (1998) 193 CLR 173 at 197 [37] and 275-276 [242]; [1998] HCA 9; *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181 at 191 [26]; [2004] HCA 9; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617-618 [102] (see also at 593 [23] and 629-630 [144] (3)); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 122 [194] and 149 [274]; [2006] HCA 44. See also Handsley, "Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power", (1998) 20 *Sydney Law Review* 183. The concept of "public confidence" is much talked of in legal circles, and not only in relation to the present field, but its merits may be doubted. The great confidence which sections of the German public had in some of their courts in the last decade of the Third Reich was not creditable to either the public or the courts.

357 See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 121; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 586 [2] and 600 [40]; *Thomas v Mowbray* (2007) 233 CLR 307 at 329 [17].

that kind is valid, the outcomes it generates are less likely to be congenial to civil liberties than legislation employing the courts[358]. If legislation of that kind is not valid, the capacity of the States to fulfil their obligations to protect their residents is severely impaired. Either way the rule of law is significantly diminished.

248 It is understandable that the respondents, and indeed many other people, find the policy of the impugned Act unsatisfactory. But it is trite to say that neither the unsatisfactoriness nor the unpopularity of legislative policy is a ground of legislative invalidity. If it were, "the judiciary's collective reputation for impartiality would quickly disappear."[359] In *Fardon v Attorney-General (Qld)* McHugh J said[360]:

> "That which judges regard as repugnant to the judicial process may be no more than a reflection of their personal dislike of legislation that they think unjustifiably affects long recognised rights, freedoms and judicial procedures. State legislation that requires State courts to act in ways inconsistent with the traditional judicial process will be invalid only when it leads to the conclusion that reasonable persons might think that the legislation compromises the capacity of State courts to administer invested federal jurisdiction impartially according to federal law. That conclusion is likely to be reached only when other provisions of the legislation or the surrounding circumstances *as well as* the departure from the traditional judicial process indicate that the State court might not be an impartial tribunal that is independent of the legislative and the executive arms of government."

In this case that conclusion should not be reached.

The respondents' argument in a nutshell

249 The respondents' argument centred on the Magistrates Court of South Australia ("the Magistrates Court"). The argument was that the independence of the Magistrates Court from the Executive, and its impartiality towards the Executive, had been used by the legislature to cloak the fact that the real decision underlying the making of a control order by the Magistrates Court under s 14(1)[361] of the impugned Act was the decision of the Executive to make a

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358 *Thomas v Mowbray* (2007) 233 CLR 307 at 329 [17].

359 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 593 [23] per Gleeson CJ.

360 (2004) 223 CLR 575 at 601 [42] (emphasis in original).

361 Section 14(1) provides:

(Footnote continues on next page)

declaration in respect of the organisation under s 10(1)[362]. The respondents contrasted the role of the Magistrates Court, which "issues the control order with the draconian consequences that follow from it", with the traditional role of a criminal court, which "adjudges guilt and punishes." The respondents submitted that while the Magistrates Court makes an order, and breach of that order is rendered a crime by s 22, it does not adjudge guilt. The respondents then said that the issuing of the control order stemmed from nothing which the Magistrates Court did beyond finding membership and dealing with the supposedly minor matters involved in s 14(5)(b) and (6)[363]. The respondents said that the "real bulk

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> "The Court must, on application by the Commissioner, make a control order against a person (the ***defendant***) if the Court is satisfied that the defendant is a member of a declared organisation."

362 Section 10(1) provides:

> "If, on the making of an application by the Commissioner under this Part in relation to an organisation, the Attorney-General is satisfied that –
>
> (a) members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and
>
> (b) the organisation represents a risk to public safety and order in this State,
>
> the Attorney-General may make a declaration under this section in respect of the organisation."

363 Section 14(5) provides:

> "A control order –
>
> …
>
> (b) if the defendant is a member of a declared organisation, must prohibit the defendant from –
>
> (i) associating with other persons who are members of declared organisations; and
>
> (ii) possessing –
>
> (A) a dangerous article; or
>
> (B) a prohibited weapon,

(Footnote continues on next page)

of the reason why somebody should be the subject of a control order is supplied entirely by the Executive determination [under s 10] in which nothing that passes muster as real procedural fairness contributes, [and] in which nothing which passes as practicable or worthwhile judicial review is available".

250 Each proposition in those submissions is flawed.

251 In part the flaws in the respondents' arguments stemmed from the respondents' contention that the application of the *Kable* doctrine was a matter of fine degree calling for a minute search of the legislation for the slightest deviation from a pure model of curial process. In this and other respects, the respondents appealed to the rule of law, and would have shunned Lenin's system of government, described by that statesman as "the government of force, unrestrained by any laws". It was thus paradoxical that they acted on another of Lenin's pronouncements: "the worse things are, the better the circumstances". They concentrated on a remorseless attempt to demonstrate the frightfulness of the legislation by construing it favourably to ease of conviction and adversely to constitutional validity. In this attempt they persistently ignored the contrary

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(within the meaning of section 15 of the *Summary Offences Act 1953*),

except as may be specified in the order."

Section 14(6) provides:

"In … considering the prohibitions that may be included in a control order under subsection (1) … the Court must have regard to the following:

(a) whether the defendant's behaviour, or history of behaviour, suggests that there is a risk that the defendant will engage in serious criminal activity;

(b) the extent to which the order might assist in preventing the defendant from engaging in serious criminal activity;

(c) the prior criminal record (if any) of the defendant and any persons specified in the application as persons with whom the defendant regularly associates;

(d) any legitimate reason the defendant may have for associating with any person specified in the application;

(e) any other matter that, in the circumstances of the case, the Court considers relevant."

principles of statutory construction[364]. They invited the hearer again and again to shrink in civilised disgust and loathing from each supposed disregard for orthodox judicial procedures. The problem is that there was very little departure from those procedures.

252 In part the flaws in the respondents' arguments lay in improbable assumptions about the *Kable* doctrine which would invalidate not just the impugned Act, but a large quantity of legislation which has never before been questioned. That would be a surprising outcome.

253 In part the flaws in the respondents' arguments arose because they exaggerated freedom of association. That is a very important freedom. It is reflected in, for example, the existence of institutions and practices which are fundamental to the day-to-day control of excessive state and private power. A list of examples would include political parties; ad hoc groups of people concerned about particular problems; deputations to legislatures, government officials and business executives; trade unions; business and professional associations; churches; ex-soldiers' organisations; lodges; associations of former pupils; clubs and societies of all kinds; meetings (public and private); parades; demonstrations; and indeed families. The list is not usually thought to include institutions like the price-fixing associations of cartelists, or associations between trade union officials for the purpose of committing torts, or criminal gangs. As Barwick CJ said[365]:

> "To outlaw fraudulent or deceitful practices is but to secure freedom of trade and commerce as that freedom is understood in organized and civilized societies. To prevent cornering, restriction of competition in a society based on free competition in trade, or monopolization, particularly where disproportionate strength or advantage is the source of the power or ability to corner, restrict or monopolize, again … is compatible with freedom of trade in such a society and laws providing means of such prevention can be regarded as regulatory in nature, and dependent on the length of their reach and the nature of their provisions, may well be regarded as compatible with the guaranteed freedom."

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364 For the principles in relation to ease of conviction, see *Krakouer v The Queen* (1998) 194 CLR 202 at 223 [63]; [1998] HCA 43. For the principles in relation to constitutional validity, see *New South Wales v The Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 161-162 [355]; [2006] HCA 52.

365 *Samuels v Readers' Digest Association Pty Ltd* (1969) 120 CLR 1 at 19-20; [1969] HCA 6.

In the same way, prevention of criminal association secures freedom of association. But however important freedom of association is, as Gummow and Hayne JJ pointed out in *Mulholland v Australian Electoral Commission*[366], while "freedom of association to some degree may be a corollary of the freedom of communication formulated in *Lange v Australian Broadcasting Corporation*[367]", there "is no such 'free-standing' right to be implied from the Constitution." At times the respondents' submissions seemed to assume that there is.

254 The majority of the court below (Bleby and Kelly JJ), whose reasoning the appellant challenges in this appeal, will be referred to as "the Full Court". The key strands in the reasoning of the Full Court and the corresponding submissions of the respondents were numerous. They were detailed. In many respects they were subtle. It therefore takes time to explain why, with unfeigned respect, it is necessary to disagree with them. As is customary in analysing the application of the *Kable* doctrine to a particular piece of legislation, the strands were combined and rearranged to form a variety of patterns. Those strands can be divided into six groups, several of which seek to demonstrate in detail a considerable departure in the Magistrates Court from what McHugh J called "the traditional judicial process"[368]. Before examining other aspects of them, it is desirable to consider generally how far the impugned Act departed from that traditional process.

Procedure in the Magistrates Court

255 The legislative conferral of jurisdiction on an established court brings with it the usual incidents of that court's exercise of jurisdiction, in the absence of contrary language[369]. The impugned Act contains no contrary language of any significance in relation to the Magistrates Court.

256 The Magistrates Court is established by s 4 of the *Magistrates Court Act* 1991 (SA) ("the Magistrates Court Act"). By s 5 of that Act, it is a court of record. By s 10(1) of that Act, the Magistrates Court has any jurisdiction conferred on it by statute. Section 14(1) of the impugned Act confers on the

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366 (2004) 220 CLR 181 at 234 [148]; [2004] HCA 41.

367 (1997) 189 CLR 520.

368 See above at [248].

369 *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW* (1956) 94 CLR 554 at 560; [1956] HCA 22; *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486 at 491 [7]; [2006] HCA 38; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 555 [19]; [2008] HCA 4.

Magistrates Court jurisdiction to hear and determine an application for a control order. Subject to contrary legislation, s 49(1) of the Magistrates Court Act provides for the making of rules, inter alia, regulating the practice and procedure of the Court (s 49(1)(c)), imposing on the parties mutual obligations of pre-trial disclosure of evidence (s 49(1)(ca)) and regulating the form in which evidence is taken or received by the Court (s 49(1)(d)). Pursuant to s 49(1), both the Magistrates Court of South Australia Rules 1992 (SA) ("the Criminal Rules") and the Magistrates Court (Civil) Rules 1992 (SA) ("the Civil Rules") have been made. By s 10(2) of the Magistrates Court Act, the rules may assign a particular statutory jurisdiction to the Civil (General Claims) Division of the Court. The s 14 jurisdiction has been so assigned by r 4.06 of the Criminal Rules. Section 11(2) of the Magistrates Court Act makes the Chief Magistrate responsible for the administration of the Court. Hence it makes the Chief Magistrate responsible for determining which magistrates sit in the Civil (General Claims) Division, and which of these are to hear applications under the impugned Act.

257 Applications under s 14 of the impugned Act are made in accordance with the Civil Rules. Section 14(4) adopts a conventional procedure – verification of the grounds of an application for a control order by affidavit. Rule 37A(1) provides for an application to be filed using Form 38. It must contain the grounds on which the application is made. By r 37A(2), the affidavit accompanying the application must, if the applicant seeks leave to have it heard ex parte, set out the reasons for that course. Section 14(1) is conventional in placing the legal burden of proof on the Commissioner of Police ("the Commissioner"). There is nothing in the legislation to suggest that that burden shifts in any sense at all. Applications under s 14 are civil proceedings. The legislation adopts a conventional standard of proof for civil proceedings – satisfaction on the balance of probabilities (s 5(1)). As the Full Court rightly held[370], the protective principles discussed in *Briginshaw v Briginshaw*[371] apply. The respondents suggested that the filing of an affidavit verifying the grounds, as distinct from simply filing an affidavit, was sinister. There is no reason to suppose that it is. It is permissible for the Commissioner to file whatever other affidavits are necessary to prove membership and other relevant matters, and for the defendant to file affidavits to the contrary. Both parties can call oral evidence.

258 In *International Finance Trust Co Ltd v New South Wales Crime Commission*[372], legislation was struck down because it compelled a court to

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370 *Totani v South Australia* (2009) 105 SASR 244 at 252-253 [23].

371 (1938) 60 CLR 336; [1938] HCA 34.

372 (2009) 240 CLR 319; [2009] HCA 49.

proceed ex parte and provided no practical means by which an ex parte order could be dissolved. That is a state of affairs which is completely antithetical to the nature of a court. Section 14 of the impugned Act does not compel the Magistrates Court to proceed ex parte. Although it gives it power to do so (s 14(3)), two factors suggest that ex parte hearings will be relatively exceptional, and, as is usual in courts, will take place only in special circumstances such as urgency. One factor is the requirement for reasons to be stated in an affidavit to support a request for leave to have a s 14 application heard ex parte. The other is the serious indirect consequences of a control order both for the defendant (s 22) and for those who wish to associate with the defendant (s 35). In any case, the power to proceed ex parte is a traditional judicial power, and the grant of it by s 14(3) is not antithetical to the exercise of judicial power[373]. Section 14 does not relieve the Commissioner from the duty to make full disclosure to the Magistrates Court if an ex parte application is made.

259 There is power for a defendant to secure a further hearing by lodging a notice of objection within 14 days of service of the control order or such longer period as the Magistrates Court may allow (s 17). At that hearing, the objector may call further evidence (s 18). The same standard procedural and evidentiary provisions apply as apply in relation to s 14 hearings. Proceedings after a notice of objection must be inter partes (ss 17-18). An independent assessment of the evidence and the issues is to take place. The assessment is not confined to matters within the discretion of the Magistrates Court, ie those relating to the form of the order (under s 14(5)(b) and (6)), and of consequential or ancillary orders (under s 14(7)): it extends to the non-discretionary question whether the order should have been made at all – that is, whether the defendant was a member of the declared organisation. It is likely that a notice of objection will be employed where the Magistrates Court proceeds ex parte, or in a fashion so highly expedited as to cause the objector to believe that fuller evidence could be filed at the objection hearing. It is also likely that in those circumstances the Magistrates Court will follow the practice of courts generally, namely to hear and decide the objection hearing expeditiously, for a control order, even though it stands for only a short period, may operate adversely to the interests of a defendant and possible associates by reason of ss 22 and 35.

260 From the decision on a notice of objection an appeal to the Supreme Court lies as of right on a question of law, and by leave on a question of fact (s 19). It is likely that that too will be heard expeditiously. A control order may also be varied or revoked if there has been a substantial change in the relevant

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373 *Thomas v Mowbray* (2007) 233 CLR 307 at 355 [112]; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 348 [39], 364 [89] and 385 [154].

circumstances (s 20(2)). If made by the defendant, the application for variation or revocation must be supported by oral evidence on oath (s 20(4)).

261 Questions of how evidence is to be adduced in proceedings under ss 14, 18 and 20 are left to the Magistrates Court. It may be adduced by both the Commissioner and the defendant. It may be tested in cross-examination. The general rules of evidence are applicable in the Magistrates Court, and in s 14 proceedings in particular: *Evidence Act* 1929 (SA), s 5. Rule 19 of the Civil Rules establishes a conventional regime for the reception of affidavit evidence. Subject to contrary order, r 19(5) establishes as a general rule that a deponent must speak from personal knowledge. One entirely standard exception to this is contained in r 19(4): in interlocutory proceedings statements on information and belief may be received. The weight of evidence received is for the Magistrates Court to assess. Like all courts, it will conduct that assessment aided by the rules of evidence and its own institutional experience.

262 The parties before the Magistrates Court are entitled to legal representation. The Magistrates Court is bound by the rules of natural justice. Hence, unless the proceedings are ex parte, it is obliged to hear what the parties or their representatives wish to submit about anything relevant to the making of a decision about whether a control order should be made, and, subject to the question of "criminal intelligence"[374], it is obliged not to decide the proceedings on a point adverse to one party without notice to that party.

263 Do ss 14-18 and 20-21 prevent the Magistrates Court from answering the description of a "court" within the meaning of Ch III of the Constitution on the ground that it departs too far from ordinary judicial processes? No. Sections 14-18 and 20-21 do not require the Magistrates Court to depart from the methods which have characterised judicial activities in the past[375]. Subject to particular points made by the Full Court and by the respondents yet to be considered, it must be concluded that the Magistrates Court as such – in its composition, structure and standard methods of operation applicable to proceedings under s 14 – possesses the defining characteristics of a court[376]. It will be seen that those particular points do not disturb that conclusion.

264 It is a conclusion which poses difficulties for the respondents. For in the case of a body like the Magistrates Court, which otherwise has the defining

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374 See below at [297].

375 *Thomas v Mowbray* (2007) 233 CLR 307 at 355 [111].

376 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63].

characteristics of a court, it is wrong lightly to reach the conclusion that it lacks the "minimum requirements of independence and impartiality."[377] The legislative conferment on a court of a particular function is not invalid unless that function "*substantially* impairs [the court's] institutional integrity"[378]. The legislation struck down in *Kable's* case was "extraordinary"[379] and "almost unique"[380]. So was the legislation in the only other case in this Court in which the *Kable* doctrine was successfully invoked[381]. The *Kable* doctrine is attracted "only in very limited circumstances"[382] and in "rare situations"[383]. It is "of very limited application."[384] "State legislation must have a quite exceptional character" to contravene it[385]. The legislation must generate "repugnancy to or incompatibility with that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system."[386] It must be "repugnant to the judicial process in a fundamental degree."[387] Just as State legislation compelling a departure to a significant degree from traditional methods and standards in carrying out judicial functions may be invalid, the

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377 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 67 [41] per Gleeson CJ; see also at 76 [64].

378 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [15] per Gleeson CJ (emphasis added).

379 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 98 per Toohey J; see also at 134 per Gummow J.

380 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 601 [43] per McHugh J.

381 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

382 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 598 [37] per McHugh J.

383 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 560 [63] per McHugh J; [1999] HCA 27.

384 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 601 [43] per McHugh J.

385 *R v Whyte* (2002) 55 NSWLR 252 at 272 [133] per Spigelman CJ.

386 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617 [101] per Gummow J.

387 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 132 per Gummow J. See also *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 367 [98].

absence of significant departure from those methods and standards points to validity.

265 The respondents submitted that the minimum requirements of independence and impartiality are not met if the court's power of decision is so subordinate, directed and circumscribed that it cannot be said to be acting impartially; and that s 14(1) so compromised the Magistrates Court's appearance of independence from the Executive as to render it unsuitable for the exercise of federal judicial power.

266 What, then, were the strands of reasoning which led the respondents to submit and the Full Court to conclude that these unusual circumstances were established?

First strand: section 10 findings unreviewable

267 *The Full Court's first strand.* The first strand in the Full Court's reasoning ran along the following lines. The "Attorney-General's findings [in making a declaration under s 10] are unreviewable." There is "no ability to go behind [the Attorney-General's] certificate."[388] It is "in effect … binding on the [Magistrates Court]."[389] The interaction between s 10 and s 14 was seen as analogous to the referral by a court of the task of making findings to a non-judicial officer whose decision "would be final, not reviewable and binding on the court."[390] The "[Magistrates Court] must act [on the declaration] without question"[391]. The Full Court rested these propositions on s 41 of the impugned Act[392]. Their correctness depends on what is meant by "unreviewable".

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388 *Totani v South Australia* (2009) 105 SASR 244 at 280 [155].

389 *Totani v South Australia* (2009) 105 SASR 244 at 280 [155].

390 *Totani v South Australia* (2009) 105 SASR 244 at 280 [156].

391 *Totani v South Australia* (2009) 105 SASR 244 at 283 [167].

392 *Totani v South Australia* (2009) 105 SASR 244 at 280 [155] n 74. Section 41 is set out above in the reasons of Hayne J at [191]. The Attorney-General's Second Reading Speech said of it:

> "A privative clause will try to protect the Attorney-General's decision from the full rigour of judicial review.
>
> I do not hold out much hope of this preventing all judges substituting their own decisions on declared organisations for those of the elected Government." (South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 21 November 2007 at 1807.)

(Footnote continues on next page)

268 *Reviewable for jurisdictional error?* It is likely that by "unreviewable" the Full Court meant "unreviewable for jurisdictional error". If so, those propositions are incorrect for the reasons explained in *Kirk v Industrial Court (NSW)*[393]. Section 41 does not remove the supervisory jurisdiction of the Supreme Court for jurisdictional error including breaches of the obligation to give procedural fairness. In this Court the respondents treated the Full Court's error about judicial review as being without significance. That contrasts with the approach successfully urged on the Full Court, which saw the supposed lack of judicial review as fatal.

269 It is true that invoking judicial review is not made easy: the Attorney-General is not required to give reasons for the declaration (s 13(1)), criminal intelligence[394] supplied by the Commissioner to the Attorney-General cannot be made available to the claimant for review (s 13(2)), and public interest immunity may be claimable by the Attorney-General for other material. The absence of a duty on the Attorney-General to give reasons scarcely deprives the Magistrates Court of institutional integrity: in this respect s 13(1) of the impugned Act simply follows the common law[395]. The duty of the Attorney-General to preserve criminal intelligence may create difficulties in relation to a subpoena seeking material capable of being tendered in evidence to demonstrate a lack of jurisdiction in the Attorney-General. But the rule restricting access to criminal intelligence overlaps with similar common law rules of public interest immunity[396]. The general problem exists in many fields in

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One can sympathise with the Attorney-General for having this thought, if not with the decision to express it and the form in which it was expressed. Think of it always. Speak of it never.

393 (2010) 239 CLR 531 at 580-581 [98]-[100] and 585 [113]; [2010] HCA 1. The Full Court's error in this respect is of the most excusable kind; its decision was delivered more than four months before *Kirk's* case was decided.

394 The expression "criminal intelligence" is defined in s 3 as meaning:

> "information relating to actual or suspected criminal activity (whether in this State or elsewhere) the disclosure of which could reasonably be expected to prejudice criminal investigations, to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement or to endanger a person's life or physical safety".

395 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656; [1986] HCA 7.

396 *Marks v Beyfus* (1890) 25 QBD 494.

relation to documents for which public interest immunity may be claimed without depriving the court of capacity to entertain administrative law challenges[397]. Section 13(2), like s 21(1) and (2)(a), considered below[398], is simply an illustration of the difficulty created by the existence of immunities or privileges from production. The form which these immunities or privileges take represents the result of legislative or judicial choices between conflicting interests or principles. This Court itself has gone so far as to strike the balance between the public interest in clients being able to have confidential consultations with lawyers and the interests of accused persons in seeking to raise a reasonable doubt about their guilt by holding that there is no common law right in an accused person to the production of, or access to, documents protected by legal professional privilege[399]. In some other jurisdictions, legislation came into force around that time which took a different course (*Evidence Act* 1995 (Cth), s 123 and *Evidence Act* 1995 (NSW), s 123). If the choice this Court made is open to a court administering the common law, it is hard to see why the legislative choice reflected in ss 13(2) and 21 is a ground of constitutional invalidity.

270 In any event, a subpoena seeking production of documents which were before the Attorney-General when consideration was being given to the making of the declaration would not be set aside if it had a legitimate forensic purpose. While the party issuing the subpoena could not look at criminal intelligence, the court could examine the relevant material to see whether it was in fact criminal intelligence, for s 13(2) prohibits disclosure of it to "any person", but not to a court[400].

271 The respondents submitted that seeking review for jurisdictional error would be a very difficult and unproductive enterprise. The enterprise is difficult, but not necessarily unproductive. It may be that strait is the gate, and narrow is the way, and few there be that find it. That is a common feature of attempts to obtain judicial review of administrative action. But a person bringing a claim that the Attorney-General has acted beyond the power conferred by s 10 can do so without hindrance from s 41. The Full Court's excessive discounting of possible judicial review is revealed by its description of the Attorney-General's

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397 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 550-551 [5], 556 [24] and 595 [179]-[180].

398 At [280]-[281].

399 *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121, particularly at 132-142 per Deane J; [1995] HCA 33.

400 *Canadian Pacific Tobacco Co Ltd v Stapleton* (1952) 86 CLR 1 at 6; [1952] HCA 32. See also [280]-[283] below.

declaration as a "certificate". There is no statutory warrant for this dismissive expression. Its use reveals an erroneous assumption that the Magistrates Court proceedings are no more than a mere formality.

272 Is an application for prerogative relief to the Supreme Court the only route to a successful claim that the Attorney-General has acted beyond power? Or is it also possible to launch what was perhaps unhappily called a "collateral" challenge in the s 14 proceedings in the Magistrates Court? It is not necessary to answer the second question. Even if the only route to a challenge is via the Supreme Court, the first strand in the Full Court's reasoning is unsustainable.

273 *Merits review?* If by "unreviewable" the Full Court meant "incapable of examination on the merits", it is true that a s 10 declaration is unreviewable. But that cannot affect constitutional validity. Until quite recently the examination of administrative action on the merits was extremely rare, and even now it is a creature of statute[401].

Second strand: Attorney-General's freedom from the rules of evidence

274 *The Full Court's second strand.* The second strand in the Full Court's reasoning was that, unlike the Magistrates Court under s 14(1), the Attorney-General under s 10 "is not subject to or bound by the rules of evidence or any standard of proof. He can act on whatever information he pleases and give it whatever weight he pleases."[402] To this the respondents added submissions resting on the vagueness of s 10(3), turning on links with, involvement in, or association with, serious criminal activity, as distinct from particular criminal acts[403]. They pointed to the inherent unreliability of the

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401 See, eg, the *Administrative Appeals Tribunal Act* 1975 (Cth).

402 *Totani v South Australia* (2009) 105 SASR 244 at 280 [155]; see also at 282 [164].

403 Section 10(3) provides:

> "In considering whether or not to make a declaration under this section, the Attorney-General may have regard to any of the following:
>
> (a) any information suggesting that a link exists between the organisation and serious criminal activity;
>
> (b) any criminal convictions recorded in relation to –
>
> (i) current or former members of the organisation; or
>
> (ii) persons who associate, or have associated, with members of the organisation;

(Footnote continues on next page)

material on which the Attorney-General might rely – for it might be untested material received from informants, in circumstances where there was no-one to act as contradictor. They noted that s 10(3)(f) permits the Attorney-General to have regard to any other matter which the Attorney-General considers relevant.

275 *Errors in the second strand.* This reasoning is incorrect in several respects.

276 First, there is a legislative requirement that the Attorney-General be "satisfied". That legislative requirement puts limits on the information to which the Attorney-General can have regard. It also prevents the Attorney-General from whimsically attaching weight, or lack of weight, to particular items of information. It calls for actual persuasion of the existence of the state of affairs described in s 10(1), arrived at reasonably on the material before the Attorney-General[404].

277 Secondly, if the implications of the duty to be satisfied are left aside, and if it is assumed (but not decided) that s 10 confers on the Attorney-General the capacity to act on "any standard of proof" without being bound by the "rules of evidence", then the Attorney-General could place the burden of demonstrating that the conditions referred to in s 10(1) do not exist on those against whom the

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(c) any information suggesting that –

(i) current or former members of the organisation; or

(ii) persons who associate, or have associated, with members of the organisation,

have been, or are, involved in serious criminal activity (whether directly or indirectly and whether or not such involvement has resulted in any criminal convictions);

(d) any information suggesting that members of an interstate or overseas chapter or branch of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity;

(e) any submissions received from members of the public in relation to the application in accordance with section 9;

(f) any other matter the Attorney-General considers relevant."

404 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 150 [34]; [2000] HCA 5.

allegations are made. A legislative provision of that kind binding a court is not constitutionally invalid[405]. A provision of that kind in legislation applying not to a court, but to a member of the executive, cannot on that ground alone be invalid either. Section 10 does not create any conclusive presumption[406]. It does not deem an element of the offence to be proved[407]. It does not require findings on the basis of a legislative conclusion which is unexaminable judicially[408]. The impugned Act makes it an offence to associate on not less than six occasions during a period of twelve months with a person who is a member of a declared organisation (s 35(1)(a)) or the subject of a control order (s 35(1)(b)). But the existence of a declared organisation – a necessary precondition for guilt – is not something which is deemed. The question whether the organisation was validly declared is not unexaminable judicially[409]. The existence of a declared organisation, and the facts on which the jurisdiction to declare an organisation depends, are not facts invented by the legislature[410].

278 Thirdly, it is commonplace for legislation to give a court the power or the duty to make an order on proof of a conclusion which flows from findings by the court *and* a decision by the executive or the legislature[411]. In those instances, it is also commonplace for the decision of the executive or the legislature to be

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405 *R and Attorney-General (Commonwealth) v Associated Northern Collieries* (1911) 14 CLR 387 at 404; [1911] HCA 73; *The Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1 at 12; [1922] HCA 31; *Williamson v Ah On* (1926) 39 CLR 95; [1926] HCA 46; *Orient Steam Navigation Co Ltd v Gleeson* (1931) 44 CLR 254 at 259-260, 262-263 and 264; [1931] HCA 2; *Milicevic v Campbell* (1975) 132 CLR 307 at 316, 318-319 and 320-321; [1975] HCA 20; *Nicholas v The Queen* (1998) 193 CLR 173 at 189-190 [24] and 235-236 [153]-[156]; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 600-601 [41]; *Thomas v Mowbray* (2007) 233 CLR 307 at 356 [113].

406 See *Williamson v Ah On* (1926) 39 CLR 95 at 108 and 117; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 704; [1991] HCA 32; *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 185; [1995] HCA 23.

407 *Nicholas v The Queen* (1998) 193 CLR 173 at 236 [156] and 238 [162].

408 *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 214; [1982] HCA 23.

409 See above at [267]-[272].

410 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 704.

411 See below at [326]-[339].

arrived at without being subject to the rules of evidence and by reference to very general criteria on material possessing variable standards of reliability.

279 Fourthly, it is no criticism of s 10(3)(f) that it permits the Attorney-General to take into account any relevant matter. It would be more surprising if that officer could not do so.

Third strand: lack of access to "criminal intelligence"

280 *The Full Court's third strand.* The third strand in the Full Court's reasoning is that the Attorney-General "may act on information classified by the Commissioner of Police as 'criminal intelligence' which information may not, in effect, be disclosed to anyone, least of all to the defendant to a s 14(1) application, without the authority of the Commissioner."[412] That is true because of s 13(2). But the Full Court and the respondents went on to say that whether information deemed by the Commissioner to be "criminal intelligence" is actually something which "properly amounts to criminal intelligence cannot be determined by a court."[413] The Full Court considered that the protections which preserved the legislation under consideration in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*[414] and *K-Generation Pty Ltd v Liquor Licensing Court*[415] were "notably absent."[416]

281 *Difficulties in the third strand.* This third strand in the Full Court's reasoning, too, has difficulties. The definition of "criminal intelligence" in s 3 of the impugned Act is in substance identical to the definition in s 4 of the *Liquor Licensing Act* 1997 (SA), which was under consideration in the *K-Generation* case[417]. The duty imposed by s 21(2)(a) of the impugned Act on courts in proceedings relating to the making, variation or revocation of control orders is to maintain the confidentiality of information "properly classified by the Commissioner as criminal intelligence."[418] The duty imposed by s 28A(5) of the

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412 *Totani v South Australia* (2009) 105 SASR 244 at 282 [164].

413 *Totani v South Australia* (2009) 105 SASR 244 at 282-283 [165].

414 (2008) 234 CLR 532.

415 (2009) 237 CLR 501; [2009] HCA 4.

416 *Totani v South Australia* (2009) 105 SASR 244 at 283 [165].

417 The definition in s 3 of the impugned Act (see above at [269] n 394) added to the end of the definition considered in the *K-Generation* case the words "or to endanger a person's life or physical safety".

418 Section 21(1) provides:

(Footnote continues on next page)

legislation under consideration in the *K-Generation* case was identical, except that the word "properly" was absent. Despite that absence, this Court held that the definition of "criminal intelligence" meant that it was necessary for the relevant court, in the face of a challenge as to whether material answered the definition, to be "satisfied that facts existed sufficient to found the expectation of the prejudicial consequences spelt out in the definition; or, that the classification was 'objectively correct'."[419] The Court therefore held that the relevant court would not have been obliged to accept that the information classified by the Commissioner as criminal intelligence in fact answered that description. The insertion into s 21(2)(a) of the impugned Act of the word "properly" means, a fortiori, that the Magistrates Court would not have been obliged to accept that the information classified by the Commissioner as "criminal intelligence" in fact answered that description.

282 Section 13(2) of the impugned Act, like s 28A(5) of the legislation in the *K-Generation* case, does not contain the word "properly". But by parity with this Court's reasoning on s 28A(5), whether the Commissioner's decision to classify material as criminal intelligence was affected by jurisdictional error could be tested in a court despite s 41[420]. It was therefore not correct for the Full Court to have said that whether information described as "criminal intelligence" in truth "properly amounts to criminal intelligence cannot be determined by a court."

> "No information provided by the Commissioner to a court for the purposes of proceedings relating to the making, variation or revocation of a control order may be disclosed to any person (except to the Attorney-General, a person conducting a review under Part 6, a court or a person to whom the Commissioner authorises its disclosure) if the information is properly classified by the Commissioner as criminal intelligence."

Section 21(2) provides:

> "In any proceedings relating to the making, variation or revocation of a control order, the court determining the proceedings –
>
> (a) must, on the application of the Commissioner, take steps to maintain the confidentiality of information properly classified by the Commissioner as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives".

419 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 542 [143] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ. See also at 523-524 [58]-[63] per French CJ and 576 [257] per Kirby J.

420 See above at [267]-[272].

Nor was it correct to say that the protections which preserved the legislation in the *K-Generation* case are "notably absent".

283 In the *Gypsy Jokers* case the relevant provision was s 76(2) of the *Corruption and Crime Commission Act* 2003 (WA). It prevented disclosure of information identified by the Commissioner of Police as confidential "if its disclosure might prejudice the operations of the Commissioner". The majority of the Court construed s 76(2) as meaning that it was for the Supreme Court to determine upon evidence provided to it whether the disclosure of the information might have the prejudicial effect spoken of[421]. Again, as the Magistrates Court here can determine whether information classified as "criminal intelligence" meets that description, it is not correct to say that the protections which preserved the legislation in the *Gypsy Jokers* case are "notably absent" either.

Fourth strand: no procedural fairness

284 *The Full Court's fourth strand.* The fourth strand in the Full Court's reasoning rested on the contention that the process by which a s 14 control order was made was "devoid of … fundamental protections". These protections were[422]:

> "the right to have significant and possibly disputed factual issues determined by an independent and impartial judicial officer and the right to be informed of and to answer the case put against the person."

In short, it was said, there was no "right to a fair hearing"[423]. The exclusion of the right rendered the Magistrates Court incapable of acting in a manner compatible with the proper discharge of judicial responsibility, and severely impaired its institutional integrity[424].

285 *"The stuff of nightmares".* The Full Court relied on the proposition that "a denunciation on grounds that are not disclosed is the stuff of nightmares."[425] It quoted those words as used by Lord Hope of Craighead in *Secretary of State for*

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421 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 558 [33].

422 *Totani v South Australia* (2009) 105 SASR 244 at 283 [166].

423 *Totani v South Australia* (2009) 105 SASR 244 at 283 [167].

424 *Totani v South Australia* (2009) 105 SASR 244 at 282 [162].

425 *Totani v South Australia* (2009) 105 SASR 244 at 281 [160].

the Home Department v AF (No 3)[426]. He attributed them to Lord Scott of Foscote in *A v Secretary of State for the Home Department*[427]. Lord Scott said:

> "Indefinite imprisonment in consequence of a denunciation on grounds that are not disclosed and made by a person whose identity cannot be disclosed is the stuff of nightmares, associated *whether accurately or inaccurately* with France before and during the Revolution, with Soviet Russia in the Stalinist era and now associated … with the United Kingdom." (emphasis added)

Lord Scott's proposition, notable for its cautious unwillingness to prejudge the French and Soviet dictators, was much more specific than Lord Hope's. It is important to preserve a sense of proportion. Perhaps the present state of affairs in South Australia has its dolorous aspects. But life in the Athens of the South now is very different from life in the Athens of the North when delations were common while Tiberius ruled the Roman Empire. And it is very different from life in the Union of Soviet Socialist Republics in the days when "the wonderful Georgian" was responsible for administering the bill of rights provisions contained in the 1936 Constitution, and Harold Laski was "lecturing about the beauties of the Russian system"[428].

286 *Procedural fairness in relation to the Attorney-General: before the declaration.* One idea underlying the Full Court's reasoning was that even if in the s 14 control order proceedings there was a right to a fair hearing on the issue of whether the defendant was a member of a declared organisation (either when the order was made or after objection pursuant to ss 17-18), in the process by which the Attorney-General decided to make a s 10 declaration there was not.

287 The respondents submitted that there was no right in an organisation or a member to be heard at all. They submitted that there was no requirement on the Commissioner to rely only on admissible evidence. They also submitted that there was no provision requiring that the persons likely to be affected by the declaration should have any useful material served on them. This was so despite the fact that s 35(1)(a) caused serious consequences to flow even without control orders being made.

288 The Solicitor-General for the State of South Australia correctly contended that the rules of procedural fairness applied in relation to the making of a

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426 [2009] 3 WLR 74 at 105 [83]; [2009] 3 All ER 643 at 673.

427 [2005] 2 AC 68 at 148-149 [155].

428 Kresge and Wenar (eds), *Hayek on Hayek: An Autobiographical Dialogue*, (1994) at 82.

declaration; that the Attorney-General was obliged to provide to the organisation the adverse material on which the Commissioner was inviting reliance (apart from criminal intelligence); and that if the application relied on the activity of particular individuals, they had a right to be notified of that fact and a right to answer material adverse to them.

289 Because the making of a declaration under s 10 has the potential to affect the interests of relevant organisations and their members, there is a duty of procedural fairness to the organisation and its members unless the legislation excludes it[429]. The legislation does not exclude it. Section 8 provides that an application by the Commissioner to the Attorney-General for a declaration under s 10 must, inter alia, identify the organisation against which the declaration is sought (s 8(2)(b)), the grounds on which it is sought (s 8(2)(c)), and the information supporting those grounds (s 8(2)(d)). Section 9 provides that the Attorney-General must then publish a notice in the Gazette and in a newspaper circulating throughout the State specifying that the application had been made (s 9(a)) and inviting the public to make submissions to the Attorney-General within 28 days of the publication of the notice (s 9(b)).

290 While it may be that not all organisations in relation to which the Commissioner seeks a declaration have members who associate for the purpose of engaging in serious criminal activity, it is likely that some do. It is also likely that the Commissioner will believe in the existence of reasonable grounds for suspecting that all do: for a Commissioner who seeks a declaration without having that belief would be committing a grave abuse of office, which cannot be presumed. It is not easy to effect formal service on organisations of those kinds, let alone on all their members. Section 9(a) offers a reasonably realistic practical alternative, for it gives those who wish to know an opportunity to find out what is going on.

291 Section 10(3)(e) provides that in considering whether to make a declaration, the Attorney-General "may" have regard to any submissions received from members of the public in relation to the s 9 notice. The respondents stressed the word "may". But in context that word does not negate a duty. It follows from the right under s 9(b) to make submissions before the declaration is made, and the duty under s 10(2) not to make a declaration before the period for making submissions provided in s 9(b) has expired, that there is a duty to take them into account. Otherwise the grant of the s 9(b) right and the imposition of the s 10(2) duty would be pointless.

292 The respondents also stressed the absence of a requirement for the s 9(a) notice to specify the s 8(2)(c) grounds and the s 8(2)(d) information. But there is

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429 *Annetts v McCann* (1990) 170 CLR 596 at 598; [1990] HCA 57.

nothing to stop that material being requested. The right to make submissions entails a right to make properly informed submissions. A duty to supply the material, if requested, may be inferred from the fact that its refusal would deprive members of the public of their s 9(b) right to make properly informed submissions. There is also a duty on the Attorney-General to inform, so far as possible, both the organisation and persons named adversely in the material relied on by the Commissioner (unless it constitutes criminal intelligence)[430]. The interests of those persons would be affected if their conduct caused the Attorney-General to make a declaration in relation to the organisation of which they were members.

293 The respondents submitted that there were no obligations of procedural fairness in relation to s 10 because if they existed the process would be unworkable: many people would have the capacity to have declarations set aside as beyond jurisdiction if they were not consulted. This is a curious and mercurial submission. For the purposes of the first strand in the Full Court's reasoning, the respondents said powers of administrative challenge were very narrow; for the present purpose they said they were broad. On the one hand they said s 10 excluded procedural fairness; on the other hand they said if procedural fairness were given, its operation was impractical. The respondents' submission was that the absence of procedural fairness – either because it is excluded or because practical opportunities were not given – was fatal to constitutional validity. In assessing the submission it would have been of interest to hear the respondents' contention on what scheme could have overcome this flaw. There was no contention of this kind.

294 *Procedural fairness in relation to the Attorney-General: after the declaration.* The respondents criticised s 11. Although it requires the Attorney-General to publish notice of any declaration under s 10 in the Gazette and in a newspaper circulating throughout the State, there was no obligation to notify the organisation or any of its members about the declaration. In reality, the organisation is likely to find out quickly. Its capacity to notify its own members is much greater than that of the Attorney-General.

295 *Procedural fairness in relation to the Attorney-General: an alternative answer.* Contrary to what has just been said, even if the Attorney-General has no duty to tell the organisation or affected members what is put against it or them when the declaration is applied for, even if it has no right to answer, and even if it has no right for any answer it gives to be considered, s 14 would not be invalid. If the Full Court's reasoning were sound, it would affect the validity of a great deal of legislation which lacks any of the safeguards to be found in ss 8-13. That

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430 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 95-96 [15]-[17]; [2005] HCA 72.

is because, as White J said[431], it is not uncommon for statutes to permit the executive to decide one ingredient in prohibited conduct, leaving it to the courts to decide others. The effect is to narrow the area of decision-making otherwise open to the courts by withdrawing that ingredient from their consideration and to deprive affected persons of the right to consideration by an independent and impartial judicial officer of that ingredient. Yet these statutes are not usually thought to be constitutionally invalid[432].

296 *Procedural fairness in the Magistrates Court: access to materials before the Attorney-General.* So far as procedural fairness in the Magistrates Court is concerned, the Full Court said that when the Commissioner makes an application for a control order under s 14(1), there is no duty on the Commissioner to provide to the defendant the materials which were before the Attorney-General when the Attorney-General made the declaration. The Solicitor-General for the State of South Australia did not dispute that. As discussed above[433], it would, however, be open to the defendant to obtain the relevant materials (apart from criminal intelligence) in the ordinary way by subpoena in the course of a challenge on the grounds of jurisdictional error, and in the course of an endeavour to negate membership of the declared organisation. In an ex parte application under s 14 the Commissioner would be obliged to reveal materials relevant to membership to the Magistrates Court, and this would result in them becoming available to the defendant at the notice of objection hearing.

297 *Procedural fairness in the Magistrates Court: access to "criminal intelligence".* In the Magistrates Court, criminal intelligence might be relevant to the question whether a person is a member of a declared organisation. The effect of s 21(1) and (2)(a) is that criminal intelligence might be employed without the defendant or the defendant's representatives being made aware of what it is. There are three answers to this difficulty. First, as noted earlier[434], in the *K-Generation* case[435] this Court upheld the validity of s 28A(1) and (5)(a) of the relevant South Australian legislation, which were in the same terms as s 21(1) and (2)(a), save that "properly" appears before "classified" in each of the latter provisions. The Court pointed to the possibility of a challenge to the Police Commissioner's classification of material as "criminal intelligence", to the absence of legislative direction of a particular outcome and to the capacity of

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431 *Totani v South Australia* (2009) 105 SASR 244 at 303-304 [268]-[270].

432 See below at [326]-[339].

433 See [269].

434 See above at [280]-[283].

435 (2009) 237 CLR 501 at 542-543 [144]-[149].

parties other than the Commissioner to put submissions. Each of those considerations applies here. Secondly, to modify something said in the *K-Generation* case[436], the potential that the s 21(2) procedure has for serious effects is reduced by the fact that a decision by the Commissioner to make a s 21(2)(a) application itself may greatly reduce the chance of "criminal intelligence" being decisive, because, in at least some cases, the Magistrates Court may feel disinclined to place weight on material which the Commissioner's application has prevented the defendant being able to test, or even see. Thirdly, as noted above in relation to s 13(2), the difficulty created by s 21 is inherent in any regime, common law or statutory, for striking a balance between interests in confidentiality and other interests[437].

298 *General fairness of initial Magistrates Court proceedings: the respondents' arguments.* It is convenient to deal with some submissions of the respondents about the general fairness of proceedings in the Magistrates Court and the Supreme Court.

299 First, the respondents complained that, as with all other questions of fact to be decided by the Magistrates Court under the impugned Act, s 14 questions are to be decided on the civil standard (the balance of probabilities), not the criminal standard (beyond reasonable doubt). This is not significant. It was a factor against validity in *Kable's* case, but it may be doubted very strongly whether the outcome would have been different if the criminal standard had applied there. As McHugh J said later[438]:

> "State legislation may alter the burden of proof and the rules of evidence and procedure in civil and criminal courts in ways that are repugnant to the traditional judicial process without compromising the institutional integrity of the courts that must administer that legislation."

And changes to the conventional burden and standard of proof do not usually affect constitutional validity[439].

300 The respondents submitted that applications for a control order will perhaps often proceed ex parte. That means that offences against s 35 could be committed before service of the control order and that a defendant against whom the control order was made could commit a criminal offence under s 22 after

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436 (2009) 237 CLR 501 at 543 [148].

437 See above at [269].

438 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 601 [41].

439 See above at [277].

service and before being able to have a notice of objection under ss 17-18 heard. The submission exaggerates the likely frequency of ex parte applications for control orders[440]. The submission that offences against s 35 could be committed even before the control order was served does not take into account s 35(2), requiring the prosecution to establish that the accused had knowledge that the person associated with was the subject of a control order. And it does not take account of the fact that s 16(4) provides that a control order is "not binding" on the defendant until served, and that it is not until then that the defendant is "a person … the subject of a control order" under s 35(1). The submission that offences under s 22 could be committed from the moment of service and before ss 17-18 proceedings could be constituted and heard is only sound in relation to defendants who contravene or fail to comply with the control order knowing that their act or omission constitutes a contravention of, or a failure to comply with, it or reckless as to that fact (s 22(2)). Yet there is no injustice in contempt proceedings against persons for breach of an ex parte injunction which took place before there was time to have the injunction dissolved, and those persons cannot avail themselves of anything as beneficent as s 22(2).

301 The respondents submitted that there is no requirement that the defendant be provided with a copy of the s 14(4) affidavit verifying the grounds of an application for a control order. But the legislation takes the Magistrates Court as it finds it. Rule 37A(3) of the Civil Rules provides: "On the filing of an application to commence an action under the [impugned Act], the Registrar must list it for a directions hearing at the earliest possible time." Rule 37A(4) provides: "The Court may give directions as to service and as to any other matter." There is no reason to suppose that, except in ex parte applications or where criminal intelligence is concerned, any affidavit intended to be relied on will not ordinarily be served in advance, whether pursuant to directions or not. Any other notion is antithetical to the idea of inter partes proceedings.

302 The respondents complained that s 21(2)(b) compelled the Magistrates Court to receive inadmissible evidence in the form of "criminal intelligence"[441]. This is not so. If criminal intelligence does not contain inadmissible hearsay, and it is otherwise admissible, it may be received. If it does contain inadmissible hearsay, or material inadmissible by reason of other rules of the law of evidence, that part of the material is not to be received. In the court below, the respondents relied on s 21(2)(b) for a contrary conclusion, and both the Full Court and White J agreed[442]. As the respondents pointed out, the appellant did not

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440 See above at [258].

441 For the definition of "criminal intelligence" see [269] n 394 above.

442 *Totani v South Australia* (2009) 105 SASR 244 at, respectively, 286 [183], 271 [98] and 301 [256].

challenge that conclusion. Despite that concession, the conclusion does not follow from s 21(2)(b). That provision is permissive in allowing proof of criminal intelligence by affidavit rather than oral evidence. But it does not create an exception to the rule against hearsay not known to the general law.

303 The respondents relied on the possibility, unresolved in the court below and not the subject of full argument either there or in this Court, that s 14 proceedings are interlocutory, thus permitting affidavit evidence based on information and belief. Even if they are, the Magistrates Court is less likely to place weight on evidence given on information and belief where better was available[443].

304 *General fairness of Magistrates Court proceedings under ss 17-20: the respondents' arguments.* The respondents then turned to ss 17-18 (providing a defendant with the means of objecting to control orders already made), s 19 (giving powers of appeal to the Supreme Court against a decision of the Magistrates Court on a notice of objection), and s 20 (giving the Magistrates Court power to vary or revoke a control order on proof of a substantial change in the relevant circumstances). The respondents put four submissions about these provisions.

305 The first submission was that they were no substitute for an opportunity to be heard by and to place material before the Attorney-General before a declaration was made. But there is an opportunity for affected persons to be heard by and to place material before the Attorney-General before a declaration is made. There is also a duty on that officer to consider what is put[444].

306 The second submission was that these provisions were no substitute for an opportunity to be heard by and to place material before the Magistrates Court before a control order was made. That opportunity exists as well, except in what is likely to be the relatively rare cases of ex parte applications.

307 The third submission was that ss 17-18 did not alter the unsatisfactory nature of s 14(1) proceedings because the objection procedure under ss 17-18 placed the legal burden of proving a basis for varying or revoking the control order on the objector, and that an order could only be revoked if one of the matters required to be established under s 14(1) is disproved. But ss 17-18 do not place the burden of proof on the objector. Section 14(1) makes it plain that the burden of proving that the defendant is a member of a declared organisation rests on the Commissioner. And s 18(1) provides:

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443 See above at [297].

444 See above at [286]-[293].

> "The Court must, when determining a notice of objection, consider whether, in the light of the evidence presented by both the Commissioner and the objector, sufficient grounds existed for the making of the control order."

As has been held in relation to similar legislation, that does not relieve the Commissioner of the burden of showing that sufficient grounds did exist for the making of the control order[445]. It is true that s 18(3)(b) imposes on the defendant a burden of satisfying the Magistrates Court that there is good reason why he or she should be allowed to associate with a particular member or members of a declared organisation. But that only goes to the question of what form the order should take, not to the question whether it should have been made at all.

308 The fourth submission was that appeals and applications to vary or revoke the control order were defective because there could be no full examination and no "full judicial review" of whether the s 10 declaration should have been made. There is much legislation analogous to s 10 of which that is true without its affecting validity[446].

Fifth strand: significant, complex, major role for the Attorney-General but not the Court

309 *The Full Court's fifth strand.* The fifth strand in the Full Court's reasoning and the corresponding submissions of the respondents contrasted the complexity of the Attorney-General's role in deciding whether to declare an organisation under s 10(1) with the role of the Magistrates Court in deciding whether a person was a member of a declared organisation under s 14(1). The Full Court said that the Attorney-General, not the Magistrates Court, conducts the "relatively much more significant and complex factual inquiry"[447]. The "most significant and

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445 *Osenkowski v Magistrates Court of South Australia* (2006) 96 SASR 456 at 467 [30] and 472 [55], construing s 74BF(2) of the *Summary Offences Act* 1953 (SA): there is close correspondence between s 74BF(2)-(3) and s 18(1)-(2). The respondents drew attention to the word "existed" in s 18(1), in contrast to "exist" in s 74BF(2). The difference is insignificant.

446 See below at [327]-[338].

447 *Totani v South Australia* (2009) 105 SASR 244 at 280 [155]. See also at 280 [154].

essential findings of fact are made not by a judicial officer but by a Minister of the Crown."[448] They were "the major elements"[449]. This meant that the:

> "process of depriving a person of their [sic] right to and freedom of association on pain of imprisonment for up to five years [under ss 22 and 35], although formally performed by a State court which exercises federal jurisdiction, is in fact performed to a large extent by a member of the Executive Government in a manner which gives the appearance of being done by the court."[450]

The effect of s 14(1) was "that the court must act without question on a declaration which represents the finding of the Attorney-General on matters critical to the making of the control order"[451].

310 The respondents submitted that the Magistrates Court's task is "relatively limited or formal", and "peripheral or incidental". They submitted that control orders "will generally flow almost as a matter of course". They submitted that the Magistrates Court had to do little more than satisfy itself of the defendant's membership of the declared organisation, that this led "readily to the appearance, if not the reality, of the Court's role being confined to the implementation of the Attorney-General's decision rather than any independent decision of its own", and that it gave "rise to an appearance of the Court acting as an instrument of the political arm of government (and in particular, the Executive determination manifest in the [s] 10(1) declaration)." These submissions must be rejected.

311 *Declaration and membership are equally important.* These passages wrongly suggest that it is only the declaration which is important. This is not so. The declaration is no more important or essential in the making of the control order than the finding of membership. The distinction between the question whether the declaration should be made and the question whether a person is a member is not analogous to the distinction between the major premise and the minor premise in a syllogism. Even if it were, like the major and the minor premise, both the fact of the declaration and the existence of membership are necessary to the conclusion to which they lead. Neither is sufficient. Neither has predominating significance. It is true, as the Full Court said, that the matters

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448 *Totani v South Australia* (2009) 105 SASR 244 at 280 [156].

449 *Totani v South Australia* (2009) 105 SASR 244 at 280 [156].

450 *Totani v South Australia* (2009) 105 SASR 244 at 283 [166].

451 *Totani v South Australia* (2009) 105 SASR 244 at 283 [167].

underlying the declaration are "critical to the making of the control order"[452]. But so are the matters underlying proof of membership of the declared organisation.

312 *Membership may not be a simple issue.* The fifth strand exaggerates the Attorney-General's role in another way. The Full Court saw four elements as necessary for a control order: first, satisfaction of the criterion in s 10(1)(a); secondly, satisfaction of the criterion in s 10(1)(b); thirdly, proof of the making of the declaration about the organisation; fourthly, proof of membership of the declared organisation. The Full Court saw the first two elements as being complex and significant. It saw the third as generally formal. That leaves only the fourth for the Magistrates Court. This oversimplifies the matter in several respects.

313 For one thing, the Full Court's last question – membership – is not necessarily simple or brief. It is true that the matters relevant to the making of a declaration may often be more complex than the matters relevant to finding membership. The legislative scheme may contemplate that this potential for complexity makes the Attorney-General a more rational person to select as decision-maker on s 10(1) issues than the members of the Magistrates Court. That is because the Attorney-General provides a single answer to the threshold question posed by s 10, rather than a series of potentially conflicting decisions by individual magistrates; is perhaps more capable of assessing risks to "public safety and order in the State"; and is perhaps more capable of handling criminal intelligence. But whether or not the circumstances make the Attorney-General a more rational person to select as a decision-maker on s 10(1) issues, it does not follow that resolution of those issues is invariably more important, essential, significant, complex or major than s 14 issues. This is partly because membership may be a very informal matter in relation to some organisations. It is partly because of the extreme and ill-defined width of the definition of "member" in s 3 to include an "associate" member, a "prospective" member, a person who "identifies himself or herself, in some way, 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 he or she belongs to the organisation"[453]. There is considerable room for debate on the application of the

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452 *Totani v South Australia* (2009) 105 SASR 244 at 283 [167].

453 Section 3 provides that "member" includes:

> "(a) in the case of an organisation that is a body corporate – a director or an officer of the body corporate; and
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> (b) in any case –
>
> (i) an associate member or prospective member (however described) of the organisation; and

(Footnote continues on next page)

statutory definition. There is also room for extensive factual inquiry. Often membership will be incapable of proof by simple means like tendering a membership roll or a document evidencing payment of a subscription. The structure of serious criminal gangs may exhibit considerable variety. Membership may be both fluid and clandestine. Proof of membership is thus a task which may be neither easy nor simple.

314 *Complicating effect of the discretions and orders.* For another thing, although under s 14 the Magistrates Court has a duty, not a discretion, to make the control order, and although under s 14(5)(b) the control order must prohibit the defendant from associating with other persons who are members of declared organisations and from possessing a dangerous article or a prohibited weapon, there is a discretion to omit or modify those prohibitions by reason of the tailpiece to the paragraph – "except as may be specified in the order"[454]. In exercising the discretion under s 14(5)(b), the Magistrates Court must take into account four specific matters under s 14(6)(a)-(d), as well as any other relevant matter (s 14(6)(e))[455]. The Magistrates Court also has a discretion in relation to the making of consequential or ancillary orders (s 14(7)). These discretions add to the potential complexity of its task. And the precise form of the orders is of considerable significance to each particular defendant.

315 Finally, s 15 requires the Magistrates Court to specify the grounds on which the control order has been made (s 15(1)(d)) without including criminal intelligence (s 15(2)). Section 15 thus creates another source of complexity in the Magistrates Court's task.

316 To treat most of the work involved in deciding whether to grant a control order as being done by the Attorney-General, with the Magistrates Court having only a formal and subsidiary role, is completely unrealistic. The discretionary decisions which the Magistrates Court must make under s 14(5)(b), (6) and (7), and its duty under s 15(1)(d), call for the specific attention of the Magistrates Court and no-one else. Not one of the various possible outcomes will have been dictated by the Executive.

(ii) a person who identifies himself or herself, in some way, as belonging to the organisation; and

(iii) a person who is treated by the organisation or persons who belong to the organisation, in some way, as if he or she belongs to the organisation".

454 See below at [362]-[365].

455 See above at [249] n 363.

317 In relation to the s 14(5)(b) discretion, by reason of the factors to which the Magistrates Court is required by s 14(6) to have regard, it is relevant for the Magistrates Court to consider the many circumstances in the personal life of the defendant and in the personal lives of those in the defendant's circle – the educational needs of the defendant or the defendant's family, the need to obtain health services, the defendant's employment position, the defendant's habits in relation to communicating with family members and friends, the defendant's practices in relation to social, religious, political and recreational affairs – all the many ways in which and the purposes for which human beings associate so far as they may relate to the defendant. It is also relevant under s 14(5)(b) to consider the extent to which the members of the declared organisation associate for the purpose of organising, planning, facilitating or engaging in serious criminal activity, and the extent to which it represents a risk to public safety and order in South Australia. The Magistrates Court is bound to act on a valid declaration in the sense that if membership is proved the control order must be made, but it is not bound to accept the Attorney-General's estimate of the preconditions which led to the declaration being made. The reasons for the s 10 declaration may relate to a condition of affairs which significantly predates the time when the s 14(1) application for a control order is made to the Magistrates Court, and they will not necessarily be focused on the particular position of the defendant (s 14(6)(a)-(b)) and the defendant's associates, whether regular (s 14(6)(c)) or potential (s 14(6)(d)). As White J said, the Attorney-General's declaration is not the equivalent of a court order. It founds no res judicata. It creates no issue estoppel. While the Magistrates Court cannot disagree with an intra vires decision of the Attorney-General to make a s 10(1) declaration, it can, for s 14(5)(b) purposes, reach a different assessment of the strength and nature of the factors referred to in s 10(1)[456].

318 The s 10(1) declaration can be made even though organising, planning, facilitating, supporting or engaging in serious criminal activity is not the organisation's sole purpose. The declaration can be made even though many of the members may not be involved in serious criminal activity. It can be made even though many members present no risk to public safety or order at all. The Magistrates Court has to assess the extent of the risk that the particular defendant will engage in serious criminal activity and the risk that the particular persons who are regular associates of the defendant will do so. These are tasks which are in no way foreclosed by the Attorney-General's conclusion that other persons have behaved or threatened to behave in a fashion which justified the Attorney-General's finding that the s 10(1) conditions were satisfied.

319 The Attorney-General's declaration is a necessary but not sufficient condition for the grant of a control order. Apart from s 35(1)(a), it is the control

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456 *Totani v South Australia* (2009) 105 SASR 244 at 289-290 [198]-[199].

orders which will effectuate the statutory object of disrupting the activities of declared organisations, their members and associates, and in effectuating that object the precise form of each order will be vitally important. Some defendants may be small fry, and narrow control orders will suffice for them. The circumstances of others may call for much more extensive control orders. And the interests in free association of both defendants and the many people with whom they may associate have to be taken into account.

320 An inter partes hearing under s 14 or s 18 is likely to involve controversy in relation to both evidence and argument. The serious consequences of a control order both for the defendant (s 22) and for those who wish to associate with the defendant (s 35) would suggest that the Magistrates Court is obliged to search for cogent evidence about all aspects of the order sought, to undertake a genuinely evaluative and adjudicative exercise, and not to act nonchalantly, lightly or without careful consideration of the significance of what is being done[457]. Those conclusions also flow from the difficulties that lie in the path of a defendant who wishes to apply for a variation or revocation of a control order. That application cannot be made without the Magistrates Court's leave, and leave is only to be granted if the Magistrates Court is "satisfied there has been a substantial change in the relevant circumstances since the order was made or last varied" (s 20(2)). In short, the Court does not operate as a rubber stamp for the Attorney-General's opinion. It is engaged in a sensitive, difficult and potentially complex task of great importance for civil liberty. That is a task at the heart of the judicial function, not at or beyond its periphery.

321 *Lack of authority.* There is a further matter which casts doubt on the fifth strand of the Full Court's reasoning. Even if, in the process which leads to a control order, the Executive is given a larger or more complicated job to perform than the Magistrates Court, neither the Full Court nor the respondents pointed to any part of the *Kable* line of authorities which saw that circumstance as bringing State legislation within the *Kable* doctrine.

Sixth strand: grafting of administrative functions onto judicial functions

322 *The Full Court's sixth strand.* The sixth strand in the Full Court's reasoning characterised the Attorney-General's role in deciding to make a declaration as administrative, and the Magistrates Court's role in deciding to make a control order as judicial.

> "It is the integration of the administrative function with the judicial function *to an unacceptable degree* which compromises the institutional integrity of the [Magistrates Court]. … It is the *unacceptable* grafting of

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457 *Totani v South Australia* (2009) 105 SASR 244 at 290 [201] per White J.

> non-judicial powers onto the judicial process in such a way that the outcome is controlled, to a significant and *unacceptable* extent, by an arm of the Executive Government which destroys the [Magistrates Court's] integrity as a repository of federal jurisdiction."[458]

The Full Court said that the making of the control order by the Magistrates Court was a process "in fact performed to a large extent by a member of the Executive Government in a manner which gives the appearance of being done by the [Magistrates Court]."[459] The Full Court said that:

> "the judicial function actually performed by the Magistrates Court is significantly impaired in a manner which is incompatible with its institutional integrity. The difficulty is not removed by providing a right of appeal to this Court. The Attorney-General's *certificate* is equally binding on this Court which has its own institutional integrity impaired in the same way."[460]

323 *Questions about the Full Court's reasoning.* Why does s 10 "significantly" impair the judicial function of the courts, and why does it do so to the point of being "incompatible" with their "institutional integrity"? Because, according to the Full Court, s 10 entails an "unacceptable grafting" of non-judicial powers onto the judicial process. Why is that unacceptable? Because it controls the outcome to a "significant and unacceptable extent". To say that the control exists to an "unacceptable extent" or to an "unacceptable degree" implies that control to a less significant extent or a less extreme degree would be acceptable. What is the test for dividing one "extent" or "degree" from another? And how is the court's integrity as a repository of *federal* (as distinct from non-federal) jurisdiction affected?

324 Another series of questions arises from the fact that within quite broad limits legislatures can validly determine whether a particular power is to be exercised by the legislature, the executive or the judiciary. In *Thomas v Mowbray*, Gleeson CJ gave examples of how allocations of power made at one time and one place have been made differently at later times or other places[461]. Why then is it not possible for judicial powers affecting a particular problem to be exercisable after a process divided between the judiciary and one of the other organs of government? In particular, why is that not possible in relation to State

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458 *Totani v South Australia* (2009) 105 SASR 244 at 280-281 [157] (emphasis added).

459 *Totani v South Australia* (2009) 105 SASR 244 at 283 [166].

460 *Totani v South Australia* (2009) 105 SASR 244 at 283 [167] (emphasis added).

461 (2007) 233 CLR 307 at 326-327 [12].

institutions, which are not subject to the strict federal separation of powers doctrine?

325 *No false appearances.* The Full Court said that the making of the control order by the Magistrates Court was a process "in fact performed to a large extent by a member of the Executive Government in a manner which gives the appearance of being done by the [Magistrates Court]"[462]. This pays no attention to the clear division of function between what the Attorney-General does and what the Magistrates Court does. Attention to that division negates any misleading appearance that the Magistrates Court makes the s 10 declaration. The impugned Act is not a "legislative decree" by which the Attorney-General's acts are "passed off" as a judgment of the Magistrates Court[463]. The impugned Act does not "deem" the Attorney-General's s 10 declaration to have been made by the Magistrates Court and it does not "confer validity" on it[464].

326 *Duty of court to act on finding by executive coupled with finding of its own.* A circumstance relevant not only to the sixth strand in the Full Court's reasoning, but to some others[465], is as follows. There are many examples of statutes, Commonwealth and State, which resemble the impugned Act. They are statutes which provide for a non-curial decision made by the executive which, when taken with other matters found by a court in proceedings initiated by the executive, obliges the court to make orders. The maker of the non-curial decision might be the executive when it makes regulations under a statute, or when it acts under some power conferred by statute or regulation. This type of legislation confers on the executive the power to assign a particular legal status or character to persons, substances, places or other things and it confers on the court a duty to make a decision, after arriving at additional factual conclusions, as to the commission, for example, of a crime.

327 *Controlled Substances Act.* White J gave an illustration: the *Controlled Substances Act* 1984 (SA) ("the Controlled Substances Act"). Section 32 creates offences concerning trafficking in a "controlled drug". That expression is not defined by reference to specified characteristics, the evidence of which in relation to a particular substance is considered by the court from case to case. Instead, it is defined in s 4 to mean "a drug of dependence" or any other "substance declared

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462 *Totani v South Australia* (2009) 105 SASR 244 at 283 [166].

463 The quoted words are those of Hayne and Callinan JJ in *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 285 [366]; [2000] HCA 62.

464 The quoted words are those of Stephen J in *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 243; [1973] HCA 63.

465 See above at [278] and [295] and below at [340]-[345].

by the regulations to be a controlled drug for the purposes of" that Act. And "drug of dependence" is defined to be "a poison declared by the regulations to be a drug of dependence"[466].

328 *Environment Act.* The Solicitor-General of the State of Queensland gave an example depending not on regulations, but on Ministerial instruments. Section 178(1) of the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) ("the Environment Act") imposes on the Minister a duty, by instrument published in the Gazette, to establish a list of threatened species divided into six categories: extinct, extinct in the wild, critically endangered, endangered, vulnerable and conservation dependent. Those categories are defined in s 179. Thus a "native species" may be listed as "vulnerable" only if it is not "critically endangered" or "endangered" and is "facing a high risk of extinction in the wild in the medium-term future, as determined in accordance with the prescribed criteria": s 179(5). Regulation 7.01 of the Environment Protection and Biodiversity Conservation Regulations 2000 prescribes five criteria, satisfaction of any of which would justify listing. The first is that the native species has undergone, is suspected to have undergone, or is likely to undergo in the immediate future, a substantial reduction in numbers. The second is that its geographic distribution is precarious for the survival of the species and is limited. The third is that the estimated total number of mature individuals is limited and either evidence suggests that the number will continue to decline at a substantial rate, or the number is likely to continue to decline and its geographic distribution is precarious for its survival. The fourth is that the estimated total number of mature individuals is low. The fifth is that the probability of its extinction in the wild is at least 10 percent in the medium-term future. Assessment of whether any of the criteria are satisfied would obviously require expert analysis and receipt by the Minister of expert advice. The Environment Act envisages a complicated listing process, involving the formal obtaining of scientific advice from a Threatened Species Scientific Committee established under s 502 of the Environment Act before a native species can be listed as a "threatened species" because it is "vulnerable": Pt 13, Div 1, subdiv AA. Section 196(1) provides that a person is guilty of an offence if the person "takes an action" and the action results in the death of a "member" of a listed threatened species. In relation to whether the dead thing is a member of a listed threatened species, the offence is one of strict liability: s 196(2).

329 The Solicitor-General of the State of Queensland submitted that this legislation divided the relevant tasks between the Minister and the criminal court. He submitted that the task of deciding whether something should be listed as a threatened native species is, to borrow the language of the Full Court, "removed

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466 *Totani v South Australia* (2009) 105 SASR 244 at 303-304 [269].

from the court to the [Minister]"[467]. All that the criminal court has to determine is whether an "action" of the accused resulted in the death of something which was on the list in a Commonwealth area: s 196(1). Once the criminal court makes positive findings on these topics, it is obliged to find the accused guilty of the offence. Yet it could not be suggested that for that reason the imposition of the s 196 duty on the court involves "the unacceptable grafting of non-judicial powers onto the judicial process in such a way that the outcome is controlled … which destroys the court's integrity as a repository of federal jurisdiction."[468] Nor could it be suggested that "the legislation provided for the required elements to be proved on application to the court, but that the court was to refer the findings on the major elements to a non-judicial officer, acting without any judicial safeguards"[469].

330 *Customs Act.* The Solicitor-General of the State of Queensland gave another example of an executive decision which furnished the basis for a criminal conviction. Section 233(1)(b) of the *Customs Act* 1901 (Cth) ("the Customs Act") renders it an offence to import "prohibited imports". The offence is one of strict liability: s 233(1AB). The Customs Act itself does not describe what goods are "prohibited imports". That is a matter left to the Executive acting by regulation pursuant to s 50 of the Customs Act. The sole role of the court is to determine whether the accused has imported the goods. Yet it could not be said, the Solicitor-General of the State of Queensland rightly submitted, that a law requiring a finding of guilt if a court makes a finding of importation of prohibited goods is invalid because the task of deciding which goods will be prohibited from being imported is left to the executive.

331 *Drugs Misuse Act.* Yet another example given by the Solicitor-General of the State of Queensland was the *Drugs Misuse Act* 1986 (Q) ("the Drugs Misuse Act"). Section 5 provides that a person who carries on the business of unlawfully trafficking in a dangerous drug is guilty of a crime. Section 6(1) provides that a person who unlawfully supplies a dangerous drug to another, whether or not such other person is in Queensland, is guilty of a crime. Section 8 provides that a person who unlawfully produces a dangerous drug is guilty of a crime. Section 9 provides that a person who unlawfully has possession of a dangerous drug is guilty of a crime. In each case "unlawfully" means without authorisation, justification or excuse by law (s 4). Section 4 defines "dangerous drug" as, inter alia, a thing specified in the Drugs Misuse Regulation 1987 or something derived from or similar to it.

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467 *Totani v South Australia* (2009) 105 SASR 244 at 280 [155].

468 *Totani v South Australia* (2009) 105 SASR 244 at 281 [157].

469 *Totani v South Australia* (2009) 105 SASR 244 at 280 [156].

332 *The Full Court's distinction between s 14 and the Controlled Substances Act.* The Full Court dealt with White J's example by stating that a s 10 declaration was not equivalent to the prescription by regulation of a particular drug as a "controlled drug" for the purpose of s 32 of the Controlled Substances Act. The Full Court said: "That involves the prescription by regulation of certain identified substances and quantities for the purpose of that section. The Attorney-General's role under s 10 … involves the assessment of and making a judgment about human behaviour and its effects."[470]

333 By those words the Full Court probably had in mind s 10(1)(b), which refers to an organisation representing "a risk to public safety and order". The Full Court may also have been referring to s 10(1)(a), which refers to assessing both an action and a purpose – the action of associating for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity.

334 The Solicitor-General of the State of Queensland correctly submitted that it is not possible to discern differences between the Controlled Substances Act and the impugned Act. Under one Act a drug is proscribed by regulation because of an executive judgment about the actions of a drug and the predicted effect of those actions upon people. Under the other Act an organisation is declared by the Attorney-General because of an executive judgment about the actions of the members of that organisation, which can only act through or by its members, and the predicted effect of their actions upon people. Each decision may involve elaborate technical inquiries of experts. Each may require the detailed examination of complicated facts and the need to draw inferences from them. Each may involve reliance on information that would not be admissible as evidence. Each is ultimately concerned with the safety of human beings.

335 In any event, as the Solicitor-General for the Northern Territory submitted, "assessments of and judgment about human behaviour and its effects" are not within the exclusive province of the judiciary. An executive or legislative determination that a particular crime should attract a particular maximum penalty involves assessing and making a judgment about human behaviour and its effects as much as a decision by a sentencing judge in a particular case.

336 *The respondents' distinction between s 14 and other legislation.* How did the respondents deal with the examples posed by the Solicitor-General of the State of Queensland? They submitted that:

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470 *Totani v South Australia* (2009) 105 SASR 244 at 281 [158].

> "there is a greater risk of impairment of the requisite appearance of institutional separation and independence between the Executive and the Court where the Court's role is essentially one of determining whether a person fits within a class of persons which the Executive has determined meets the statutory criteria (and is thus worthy of the consequences that follow), than there is where the Court's role is to determine whether a particular person has engaged in proscribed conduct (even if the Executive has a role in determining what that proscribed conduct is)."

This reasoning rests on a false distinction. It wrongly assumes that proof of membership is merely proof of a particular status and involves no conduct. It is true that a person can be a member of an organisation without doing anything. Many clubs have passive members who do nothing but pay the subscriptions (if any) and leave their name on the books (if any). But the organisations with which s 10 is concerned are likely to have many members whose membership is evidenced by their engaging in a great deal of conduct. Paragraph (b) of the definition of "member" contemplates this[471], for when persons identify themselves as belonging to an organisation they engage in conduct. And treatment of persons by the organisation or its members as if they belong to the organisation involves conduct. The role of the Magistrates Court under s 14 thus involves determination of whether a particular person has engaged in conduct.

337 The respondents submitted that s 196 of the Environment Act and s 233 of the Customs Act were distinguishable from the impugned Act. The former two items of legislation left it to the court to decide whether persons had engaged in conduct deserving of consequences (taking an action resulting in the death of a species determined by the Executive, or importing goods determined by the Executive). This, according to the respondents, meant that the legislation was less apt to be perceived as requiring the relevant court merely to give effect to an executive determination in respect of a particular person or classes of person, and hence less likely to give rise to an appearance of impaired independence. Why? As the respondents would frame it, the issue is whether there is an appearance of impaired independence. If that appearance exists, does it matter whether the court's independence appears to be impaired in relation to one issue rather than another? The respondents' submission seizes on an apparent difference between the subject to which s 10 is directed and the subjects to which the other legislation is directed, and erects that difference into a touchstone of constitutional validity. If legislation is to be invalidated because, in allocating decisions about some elements in a crime to the executive and some to the courts, it appears to impair judicial independence, why does it matter which elements are committed to the executive? The alleged appearance of impaired judicial independence remains.

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471 For the text see above at [313] n 453.

338 If the Full Court's reasoning were sound, the South Australian, Commonwealth and Queensland legislation just discussed would be invalid. Now it is not true that everything is for the best in the best of all possible worlds. And the mere existence of legislation does not automatically make it valid. But if a legal doctrine supposedly invalidates such common types of legislation as those just described, widely thought to be within the range of legitimate legislative choice, a significant question mark arises over the reasoning by which it was applied. The doctrine in question here is the Full Court's suggestion that there is something novel and impermissible about legislation like s 14, which provides, if the Magistrates Court makes particular findings of fact in combination with earlier conclusions by the Executive, for orders to be made that can lead to the commission of criminal offences against s 22 and s 35. But ss 10, 22 and 35(1)(b) are analogous to the provisions in the South Australian, Commonwealth and Queensland legislation described above so far as they create crimes. In each instance, as with s 14, a court was given a *duty* – not a discretion – to make an order if a non-curial decision has been made and the court finds that a particular fact exists. The relevant provisions in those pieces of legislation are not invalid. Nor is s 14.

339 The *Kable* doctrine is not infringed by legislation requiring the court to make an order if certain conditions are met[472]. Nor is it infringed if among those conditions is a particular decision by the executive. As the Solicitor-General for the State of New South Wales pointed out, this Court has held that a Commonwealth legislative requirement that a Ch III court act on the basis of a state of affairs determined by a person who is not a court, for example a member of the executive, does not offend Ch III[473]. A fortiori, a State legislative

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472 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 352 [49], 360 [77], 372-373 [120]-[121] and 386 [157].

473 *Palling v Corfield* (1970) 123 CLR 52 at 58-59, 62, 64-65, 67 and 69-70; [1970] HCA 53. The decision was not challenged by counsel for the appellant in *Kable's* case nor overruled by the majority, though it was cited by Dawson J (dissenting): (1996) 189 CLR 51 at 88, n 151. See also *Ex parte Coorey* (1944) 45 SR (NSW) 287 at 298 per Jordan CJ: "[The Commonwealth] Parliament may provide that the prior determination by [an administrative person] of a matter of fact shall be an essential ingredient of the coming into existence of a new right or liability." This, too, was not overruled in *Kable's* case. See also *Thomas v Mowbray* (2007) 233 CLR 307, discussed below at [356]-[357].

requirement that a State court act on the basis of a state of affairs determined by the executive cannot offend the *Kable* doctrine, which rests on Ch III[474].

Impact of the legislative examples on other strands

340 *Complex executive decision/simple curial decision.* Thus these legislative examples have demonstrated fallacy in the sixth strand of the Full Court's reasoning. They also demonstrate fallacies in elements of other strands as well. One element in the fifth strand concentrated on the supposed contrast between the "relatively much more … complex factual inquiry"[475] under s 10, involving "possibly disputed factual issues"[476], on the one hand, and the simpler task under s 14[477]. Similar contrasts can exist between the role of the Executive in making regulations under the Controlled Substances Act and the role of a criminal court under s 32. They can exist between the role of the Ministerial instrument made under s 178(1) of the Environment Act and the role of a criminal court under s 196. They can exist between the role of the Executive in making regulations under s 50 of the Customs Act to identify prohibited imports and the role of the criminal court under s 233. They can exist between the role of the Executive in making regulations for the purpose of the definition of "dangerous drug" in s 4 of the Drugs Misuse Act and the role of the criminal court under ss 5, 6, 8 and 9.

341 *Significant executive decision/insignificant curial decision.* Another element in the fifth strand also concerned the balance between the Attorney-General's decision under s 10 and the Magistrates Court's decision under s 14[478]. The Full Court saw the s 10 inquiry as a "relatively much more significant … factual inquiry"[479], as one which caused the s 14 outcome to be "controlled … to a significant … extent"[480], and as one which caused the Magistrates Court's function under s 14 to be "in fact performed to a large extent by a member of the

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474 *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 561-562 [13]-[14]; [1998] HCA 54; *Baker v The Queen* (2004) 223 CLR 513 at 526 [22]-[23]; [2004] HCA 45.

475 *South Australia v Totani* (2009) 105 SASR 244 at 280 [155].

476 *South Australia v Totani* (2009) 105 SASR 244 at 283 [166].

477 Above at [249] n 361.

478 Above at [249] n 362.

479 *Totani v South Australia* (2009) 105 SASR 244 at 280 [155].

480 *Totani v South Australia* (2009) 105 SASR 244 at 281 [157].

Executive Government"[481]. Depending on the circumstances of a particular case, these characterisations can be true. And depending on the circumstances of a particular case, they can be true of the other items of legislation just identified. That does not make any of the legislation unconstitutional.

342 *Appearance of the court being the executive.* An element of the sixth strand was that the s 14 function was one which gave only "the appearance of being done by the court."[482] Again, if that is true in any sense, it could be said to exist in relation to the other pieces of legislation. But they are not invalid, and it is not true. Assuming that a central vice to which the *Kable* doctrine is directed is conscripting or recruiting the court so as to give the appearance that the judicial process is merely an extension of the executive's function, it is not a vice to be found in s 14. The Magistrates Court does not sanction the merits of the Attorney-General's decision to make a declaration, any more than the courts that apply drug legislation sanction the merits of the decision by the executive or the legislature that a particular drug is dangerous – a topic on which opinions can differ widely. The courts must act on the relevant decision unless it is set aside as being beyond jurisdiction, but that does not mean they give the decision their imprimatur.

343 *Procedural fairness.* The fourth strand was the Full Court's contention that both s 10 and s 14 are inconsistent with duties of procedural fairness. But a person charged with trafficking in a controlled drug contrary to s 32 of the Controlled Substances Act is not able to challenge the conclusions of fact which underlay the decision of the Executive to make a regulation declaring a particular substance to be a controlled drug, to have those issues heard before an independent and impartial judicial officer, to be informed of the "case" and to answer the "case". The same is true of a person charged with taking an action resulting in the death of a member of a listed threatened species contrary to s 196(1) of the Environment Act in relation to the question of whether the species should have been listed. It is true of a person charged with importing a prohibited import contrary to s 233 of the Customs Act on the question whether the import should have been prohibited. It is true of a person charged with criminal offences against the Drugs Misuse Act in relation to dangerous drugs on the question whether the drugs should have been declared dangerous.

344 Section 10 of the impugned Act is actually much less inimical to procedural fairness than the other legislation described. While defendants to s 14 proceedings for a control order cannot challenge the declaration (save for jurisdictional error), they can, if they keep their eyes open, learn that the

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481 *Totani v South Australia* (2009) 105 SASR 244 at 283 [166].

482 *Totani v South Australia* (2009) 105 SASR 244 at 283 [166].

Attorney-General is considering a declaration, seek the material before the Attorney-General, make submissions to the Attorney-General before the declaration is made, and expect the Attorney-General to take their submissions into account. None of the other Acts described have these beneficial characteristics. This invalidates the respondents' submission that s 14 obliged the Magistrates Court to enforce as if it were its own judgment an executive determination under s 10 which was at odds with the fundamentals of the judicial process. It is true that the s 10 process is not a judicial process. But it is far from wholly lacking in the safeguards which characterise the judicial process. More importantly, the Magistrates Court was not compelled to enforce the s 10 declaration: it was compelled to make a control order, but only if it made a finding of membership, and the form of the control order rested on various discretionary considerations[483].

345 *Unreviewability.* The second strand was the Full Court's reliance on the unreviewability of the Attorney-General's decision to declare an organisation. It can be "reviewed" in a strict sense of that word for jurisdictional error[484]. But in a looser sense it cannot be "reviewed" by appeal or "merits review". The same is true of the executive decisions in the legislation which has been analysed above. They can be challenged if they are beyond the power conferred by the legislation under which they are made. But appeals and merits review are not available. Most executive decisions are "unreviewable" in that sense, unless they fall within relatively recent Commonwealth or State legislation of the type exemplified by the *Administrative Appeals Tribunal Act* 1975 (Cth). That circumstance does not make the legislation invalid under the *Kable* line of cases.

Is this appeal on all fours with *Kable's* case?

346 It is now necessary to deal with certain arguments of the respondents which extend beyond the Full Court's six strands.

347 *The Kable reasoning.* The respondents submitted that the impugned Act was analogous to the legislation in *Kable's* case, particularly as analysed by McHugh J[485]. His Honour held that that legislation compromised the institutional impartiality of the Supreme Court of New South Wales for the following reasons. It was ad hominem legislation: it had the object of keeping Gregory Wayne Kable in gaol, not because of the manslaughter for which he had been convicted but because of another serious act of violence which the Executive Government

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483 See above at [314]-[320] and [362]-[366].

484 See above at [267]-[272].

485 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 119-124.

and the legislature feared he might carry out in the future (see ss 3 and 5). It sought:

> "to ensure, so far as legislation can do it, that the appellant will be imprisoned by the Supreme Court when his [current sentence] expires. It makes the Supreme Court the instrument of a legislative plan, initiated by the executive government, to imprison the appellant by a process that is far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person."[486]

The devisers of the plan must have seen as minimal the risk of the plan failing. Section 5 of the relevant Act gave the Supreme Court "power" to detain Gregory Wayne Kable if satisfied on reasonable grounds that he was more likely than not to commit a serious act of violence and that it was appropriate, for the protection of a particular person or persons or the community generally, that he be held in custody. In substantial respects the Supreme Court was compelled to receive material whether it complied with the rules of evidence or not (s 17). Section 7 gave the Supreme Court power to make interim detention orders for a period not exceeding three months pending the making of a s 5 order of detention for six months – without the need to satisfy the s 5 criteria and without granting any capacity to appeal. The relevant Act declared the proceedings to be civil proceedings even though the Supreme Court was not asked to determine the existing rights and liabilities of any party or parties. Proceedings under the relevant Act bore very little resemblance to the ordinary processes and proceedings of the Supreme Court. The jurisdiction of the Supreme Court was purely executive in nature. The relevant Act asked the Supreme Court to "speculate whether, on the balance of probabilities, it is more likely than not [that Gregory Wayne Kable] will commit a serious act of violence."[487] In view of the notorious difficulty in predicting dangerousness, the Supreme Court could make only "an informed guess"[488]. McHugh J quoted the observation of a commentator on similar Victorian legislation: "It would take a brave Supreme Court judge to find that the case for placing [the defendant] in preventive detention had not been made out." It brought the process and the courts which administered it into public disrepute because it gave the impression that the judiciary was ratifying a political decision that one man should be incarcerated without findings of criminal conduct, and this created the impression in the public mind that the

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486 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 122 per McHugh J; see also at 99 per Toohey J, 106-108 per Gaudron J and 131-134 per Gummow J.

487 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 122-123 per McHugh J.

488 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 123.

judiciary was simply an arm or an instrument of the Executive implementing the will of the legislature[489].

348 The writer whom McHugh J quoted seemed to doubt the existence of any brave Supreme Court judges in Victoria. Experience does not support that doubt. In any event it was unfortunate and inconvenient for this reasoning that after the initial s 5 order was made against Gregory Wayne Kable, and after an appeal to the Court of Appeal failed, "a brave Supreme Court judge" in the person of Grove J declined to make another s 5 order[490]. Thus the risk of the Supreme Court thwarting the intention of the officials and legislators to keep Gregory Wayne Kable locked up turned out to be much greater than minimal.

349 *The Kable reasoning distinguished.* But putting these considerations on one side, how does the *Kable* reasoning apply to the impugned Act? The impugned Act is not ad hominem, and that was a crucial factor for all the majority Justices in *Kable's* case[491]. A law of general application which provided for restrictions on liberty for preventive purposes and which, unlike the legislation in *Kable's* case, did not dictate the outcome in particular cases, could not have had an impact on the actual or perceived impartiality or independence of the Supreme Court of New South Wales. Section 14 is a law of general application which provides for restrictions on association for preventive purposes and does not dictate the outcome in particular cases. Unlike the *Kable* legislation, s 14 is "a carefully calculated legislative response to a general social problem"; it was the absence of that feature in the *Kable* legislation that highlighted its ad hominem nature[492]. The respondents submitted that the

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489 *R v Moffatt* [1998] 2 VR 229 at 237 per Winneke P, explaining the reasoning in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 134. See also *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63].

490 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 109. McHugh J also specifically endorsed the independence and impartiality with which Levine J and the Court of Appeal conducted the proceedings which led to the High Court appeal: at 123.

491 (1996) 189 CLR 51 at 98-99 per Toohey J, 108 per Gaudron J, 121-122 per McHugh J and 125 per Gummow J. That the ad hominem character of the legislation was central to its invalidity was stressed by all members of the majority in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [16], 595-596 [33], 601-602 [43], 617 [100], 647 [196] and 658 [233].

492 The quoted words are those of Sir Maurice Byers QC, counsel for the appellant in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 62: see *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 614-615 [91].

impugned Act did have an "ad hominem … flavour" because the s 10 declaration narrowed the class of persons to be subjected to s 14(1) orders: but the potential number and width of the classes was great – as great as the number and width of the organisations capable of answering the description in s 10(1).

350 Although the *Kable* doctrine has not been limited to incarceration[493], the present legislation is not concerned with total restraints on liberty of that kind, but with a control order restraining freedom of association. As Gummow and Crennan JJ said in *Thomas v Mowbray*[494]: "Detention in the custody of the State differs significantly in degree and quality from what may be entailed by observance of an interim control order." The control order in that case contained restrictions on communicating or associating with specified individuals[495], and s 14(5)(a)(i) of the impugned Act contemplates the same types of restriction.

351 The respondents submitted that there was an analogy with *Kable's* case in that imprisonment was a possible, though non-immediate, consequence of the control order. In the case of s 22 violations, however, the outcome of imprisonment is a matter within the defendant's control, and in the case of s 35(1)(b) violations it is within the control of the defendant and the associate. The outcome of imprisonment was not within the control of Gregory Wayne Kable.

352 Although the civil standard of proof applies under both regimes, in contrast to *Kable's* case the conventional rules of evidence apply to s 14 proceedings in every other respect. Unlike the proceedings before the Supreme Court under the *Kable* legislation, proceedings under the impugned Act are almost identical to the ordinary processes and proceedings of the Magistrates Court[496].

353 Although s 5 of the *Kable* legislation called for predictions about the future in relation to dangerousness, s 10 of the impugned Act deals largely with present and past facts: it asks "for what purpose *do* members associate?" and "*does* the organisation represent a risk to the public?" And s 14 deals with present facts – "*is* the defendant a member?" It is true that in considering the

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493 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

494 (2007) 233 CLR 307 at 356 [116].

495 *Thomas v Mowbray* (2007) 233 CLR 307 at 339 [49]. For the relevant provision, s 104.5(3)(e) of the *Criminal Code* (Cth), see at 501 [574], n 778, and for the relevant part of the actual order see at 493-494 [554].

496 See above at [255]-[263].

form of the control order, the Magistrates Court must consider at least two future matters pursuant to s 14(6)(a) and (b). But it could not fairly be said that the Magistrates Court is asked merely to speculate, or to act only on an "informed guess". It is a common function of courts to reach a predictive conclusion about risk – for example, in relation to the protection of children[497], the assessment of damages for personal injury[498] and the assessment of damages for loss of a chance in commercial cases[499]. The processes of assessing risk and predicting how far something will prevent a future outcome have not invalidated legislation in cases subsequent to *Kable's* case[500]. In *Kable's* case reference was made to the fact that the process did not involve adjudication of guilt for a criminal offence[501], but this is not a sufficient condition of invalidity, because the process in *Fardon v Attorney-General (Qld)*[502] did not involve the adjudication of guilt for a criminal offence either.

354 The commonplace stipulation as one condition for the Magistrates Court's s 14(1) order of the making of a declaration about a state of affairs by the Executive does not mean that the Magistrates Court is doing the Executive's bidding[503]. The impugned Act does not reflect a legislative or executive plan to secure a pre-determined result, because the Magistrates Court exercises an independent function in determining whether the criteria for a control order are made out, and exercises discretions in determining the content of a control order. The Executive has no control over it in those crucial respects.

355 The respondents submitted that s 14(1) of the impugned Act is a stronger candidate for invalidity than s 5 of the *Kable* legislation in two respects. The first is that while s 14 is mandatory once the conditions for a control order are satisfied, s 5 "required the Court to exercise its judgment" – it "bestowed a discretion upon the court by evaluation of matters that had to do with prediction of future criminal conduct." That distinction is questionable: this Court's view

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497 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 657 [225].

498 *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638; [1990] HCA 20.

499 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332; [1994] HCA 4.

500 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 657 [225]; *Thomas v Mowbray* (2007) 233 CLR 307 at 331 [19].

501 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 97, 106-107, 120 and 132.

502 (2004) 223 CLR 575.

503 See [326]-[339].

that the legislative scheme reflected a plan to ensure that Gregory Wayne Kable remained imprisoned must rest on the construction of the words "may order" in s 5(1) as "must order". The second reason submitted by the respondents was that s 14 did not require any past criminal conduct on the part of the defendant, while in *Kable's* case s 5 "was predicated only upon the past and future conduct of the defendant." That is not significant, because the purpose of the impugned Act is to disrupt and restrict the activities of organisations involved in serious crimes, as well as their members and associates, and this depends on breaking up connections between potentially wide classes of members and associates who might be involved in criminal activity in future – whether or not they have been in the past. On the other hand, the *Kable* legislation was of an entirely different kind, having the narrow purpose of stopping one man committing crimes.

356 Section 14, far from being indistinguishable from the State legislation struck down in *Kable's* case, is very close to the Commonwealth legislation upheld in *Thomas v Mowbray*[504]. Section 104.4(1)(c) of the *Criminal Code* (Cth) permitted an interim control order to be obtained against a person ex parte if, among other things, the court was satisfied on the balance of probabilities that (i) making the order would substantially assist in preventing a terrorist act (a future state of affairs) *or* (ii) the person had provided training to or received training from a listed terrorist organisation (a past event). The legislation also required the court to be satisfied that the order was reasonably necessary, adapted and appropriate for the purpose of protecting the public from a terrorist act (s 104.4(1)(d)). A list of terrorist organisations was set out in the Criminal Code Regulations 2002 (Cth) made under the *Criminal Code*. The identification of terrorist organisations was thus a decision made by the Governor-General on the advice of the Executive – with many fewer safeguards than those which exist in ss 8-13 of the impugned Act. As is the case with s 21 of the impugned Act in relation to criminal intelligence, information provided in support of the application for an interim control order could be withheld from the person against whom the order was made in the interests of national security (s 104.5(2A)). If an interim control order were made, a hearing could subsequently take place at which the court could confirm, vary or revoke the order (s 104.14). The majority held that this regime did not offend Ch III.

357 In both that case and this, an anterior determination by the Executive is part of the scheme (s 10(1)/reg 4A). In both cases past events are involved (becoming a member and the matters listed in s 14(6)(a) and (c)/providing or receiving training pursuant to s 104.4(1)(c)(ii)). In both cases an assessment of future conduct is involved (s 14(6)(a) and (b)/s 104.4(1)(c)(i)). In both cases the order is to be adapted to the particular circumstances (s 14(5)(b) and (6)/s 104.4(1)(d)). In both cases the process involves no adjudication of criminal

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504 (2007) 233 CLR 307.

guilt. It may be said that the primary difference between s 14(1) and s 104.4 is that s 14(1) creates a duty on the Magistrates Court to make a control order if satisfied of proof of the elements referred to in s 14(1), while s 104.4(1) (commencing: "The … court may") creates only a discretion; the s 104.4(1)(d) factors go to the question of whether an order should be made at all, while the s 14(6) factors go only to the form of the order. However, this alone is not repugnant to Ch III[505]. Why, then, is s 104.4 valid but not s 14(1)? The supposed distinction between mandatory s 14(1) orders and discretionary s 104.4 orders is insubstantial. First, as noted earlier[506], though s 14(1) is mandatory, the operation of s 14(6) can make particular orders quite narrow. Secondly, there is only a limited sense in which interim control orders can be called discretionary. They cannot be refused on a whim. Provided the conditions referred to in s 104.4(1) are satisfied and the considerations referred to in s 104.4(2) and (3) are taken into account, an interim control order should flow as of course unless some special reason to the contrary exists. Thus it is not true to say that the court always has a discretion to grant the order, because in certain circumstances it will have a duty to do so. When that duty arises, the court will be required to act on an anterior determination by the Executive. It is true that the arguments advanced by the respondents in the present case were not advanced in *Thomas v Mowbray*. Yet if the court's function in relation to an anterior determination of the Executive is fatal to validity on the ground that it removes one of the essential characteristics of a Ch III court, it is surprising that this striking phenomenon was not observed by any of the 15 barristers involved in *Thomas v Mowbray* or their instructing solicitors.

The respondents' remaining submissions

358 *The argument.* Finally, the respondents pointed out that the focus of s 10 is on the organisation – the purposes of the organisation (which need not be the dominant purposes) and the risks it presented to public safety and order – not the wrongdoing of individuals. But the effect of the impugned Act is to curtail significantly the freedom of association enjoyed by individuals. It does so only by reference to future harm, not to whether or not a particular member or associate had engaged in any criminal conduct before the making of the control order. The respondents then submitted that it was repugnant to the institutional integrity of the Magistrates Court for it to grant a control order forbidding a defendant who is a member of a declared organisation from associating with a member of that or another declared organisation, when that conduct was not in breach of an antecedently existing legal norm, when membership of the declared

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505 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 352 [49], 360 [77], 372-373 [120]-[121] and 386 [157].

506 At [314]-[320]. See also below at [361]-[365].

organisation or organisations was not of itself unlawful, when there was no existing controversy or dispute requiring resolution, and when the Magistrates Court made no inquiry into what the defendant had done in the past or might do in the future, with the result that the association between individuals is made criminal where it would not otherwise be a crime. The argument must be rejected for the reasons advanced by the Solicitor-General of the State of Queensland. Those reasons were substantially to the following effect.

359 *Past criminal conduct of members before s 10 declaration.* The respondents submitted that it was possible for a control order to be made without any particular member of the declared organisation or associate of a member having engaged in any criminal conduct. That submission is incorrect. It is extremely unlikely that an organisation could be declared unless the Attorney-General was satisfied that at least one member of the organisation had committed a crime. In view of the definition of "serious criminal activity" (which means the commission of serious criminal offences) and "criminal intelligence" (which means information relating to "actual or suspected criminal activity"), it would be difficult to conclude that the "purpose" and the "risk" referred to in s 10(1) existed without reaching that state of satisfaction.

360 If members associate for the purpose of organising, planning or engaging in serious criminal activity, it is not hard to infer that they are guilty of conspiracy to commit offences. If members associate for the purpose of facilitating or supporting serious criminal activity, it is not hard to infer that they are guilty of aiding, abetting, counselling or procuring the commission of offences. Even if for some reason in isolated instances this is not so, the Attorney-General's satisfaction could only be achieved if inferences could be drawn from the commission of crimes by a member or members. In each case the members in the above categories must be sufficiently numerous or otherwise significant to make the organisation a risk to public safety and order. And since "serious criminal activity" is defined in s 3 as "the commission of serious criminal offences", in the plural, it is not enough that there be a single conspiracy or act of secondary participation. The Attorney-General is entitled to take into account that best evidence of past criminal activity – convictions of current or former members of the organisations and convictions of persons who associate, or have associated, with members (s 10(3)(b)). Of course the satisfaction of criminality may be based upon the Attorney-General's own view of the facts: it does not depend upon there having been any conviction by a court.

361 *Magistrates Court's duty to restrict defendant's freedom of association without any duty to inquire into defendant's past conduct?* The next flaw in the respondents' submission is the contention that the Magistrates Court is required to issue the control order *without inquiring into what the defendant has done*. The contention takes no account of the fact that the Magistrates Court is obliged to inquire into one thing the defendant has done – become a member of a declared organisation. A declared organisation is, to put it shortly, a criminal

gang. Although it is possible to be a member of a declared organisation without having committed any crimes, it is not, depending on what the member knew, creditable to be a member of such an organisation.

362 There is a further flaw. It is true that the Magistrates Court is under a duty to make a control order against a member even if the member has not committed any crimes. The form of that order is another matter. Although s 14(5)(b)(i) provides that where the defendant is a member of a declared organisation, the control order "must prohibit" the defendant from "associating with other persons who are members of declared organisations", that duty is subject to the concluding words of s 14(5)(b) – "except as may be specified in the order." The discretionary judicial power conferred on the Magistrates Court by s 14(5) is to be construed without making implications or imposing limitations not found in the express words[507]. And Parliament is not to be taken by s 14(5)(b)(i) to have deprived persons of fundamental rights without using clear, unmistakable and unambiguous language[508]. There is no such language, and the last eight words are the opposite of that language. The Magistrates Court's power to leave out the terms described in s 14(5)(b)(i) negates any duty to impose them.

363 Various matters of fact in s 14(6) are relevant to whether there should be a specification in the order to the contrary of s 14(5)(b)(i). It is not the case, contrary to the respondents' submission, that the Magistrates Court is forbidden to inquire into these various matters of fact. On the contrary, it is required to do so. Section 14(6)(a) obliges the Magistrates Court, in considering the prohibitions "that may be included" in a control order, to have regard to whether the defendant's *behaviour*, or *history of behaviour*, suggests that there is a risk that the defendant will engage in serious criminal activity. Section 14(6)(b) obliges the Magistrates Court to have regard to the extent to which the order might assist in preventing the defendant from engaging in serious criminal activity. And s 14(6)(c) obliges the Magistrates Court to have regard to the prior criminal record (if any) of the defendant and any persons specified in the application as persons with whom the defendant regularly associates[509].

364 In view of these provisions, it is open to the Magistrates Court to conclude that no prohibition on a defendant's freedom of association, whether of the

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507 *Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; [1994] HCA 54; *CDJ v VAJ* (1998) 197 CLR 172 at 185-186 [53] and 201 [110]; [1998] HCA 67.

508 *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18; [1990] HCA 24; *Coco v The Queen* (1994) 179 CLR 427 at 437-438; [1994] HCA 15.

509 See above at [249] n 363.

s 14(5)(b)(i) kind or any other kind, is warranted given the negligible risk that the defendant will engage in serious criminal activity by reason of the past record of the defendant and the defendant's regular associates. One object of the impugned Act is to protect members of the public from violence associated with criminal organisations. It would not advance that object to make a prohibition under s 14(5)(b)(i) if any association between the defendant and others carries no risk of violence to the public. It follows that the Magistrates Court is not required to grant a control order without inquiry into what the defendant has done or may do. The opposite is the case: the Magistrates Court cannot grant a control order without making that inquiry.

365 The respondents submitted that it was not possible to frame a control order which had no prohibition on association without draining the notion of "control order" of content in defiance of the duty to make one created by s 14(1). The Solicitor-General for the State of South Australia accepted that it would not be possible to make a "control order" having no content; but the respondents' submission goes too far. The principles of construction referred to above[510] mean that if there is a choice between a construction protecting liberty and a construction by which it was obligatory for a control order to prohibit association, the former construction must be preferred so long as the control order has some content. This difficulty in the impugned Act can be palliated by limiting the control order to the matters in s 14(5)(b)(ii) (thus creating no problems in relation to association under s 22).

366 The respondents otherwise offered no answer to the submissions of the Solicitor-General of the State of Queensland, save to rely on s 35. The respondents submitted that even if the terms of the control order were:

> "significantly confined under s 14(5)(b), other persons would be subject to criminal sanctions if they were to associate with the defendant contrary to the terms of s 35 … even if the defendant's control order had exceptions in respect of certain other members of the declared organisation".

This answer goes beyond the submission under consideration, which concentrated on the criminalisation of the defendant's conduct, not that of other people. There is an imperfect meshing between s 14 and s 35. But the worst that can be said of the s 35 problem is that, like the problem of whether or not a control order can have very limited content, it is the kind of legislative disharmony which will very often be thrown up by an appeal like the present in which eight teams of sharp-witted lawyers spend many days analysing legislation in their preparation and presentation of argument. Perhaps there was an oversight. Perhaps there was a blunder. It is difficult to imagine that the

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510 At [251] n 364 and [362] n 508.

Executive will prosecute a person for contravention of s 35(1)(b) by association with a person subject to a control order, being a control order which does not prevent the latter person from associating with the former. A prosecution of that kind would be vulnerable to dismissal as an abuse of process. Difficulties of this kind, like the problem concerning whether a control order can have very limited content, cannot support a conclusion of constitutional invalidity.

367 *Magistrates Court's duty to restrict defendant's right of association without any duty to inquire into the defendant's future conduct?* Contrary to the relevant submission, at least pars (a) and (b) of s 14(6) create a duty on the Magistrates Court to inquire into the defendant's future conduct. The requirement in the legislation under consideration in *Fardon v Attorney-General (Qld)*[511] that possibilities in relation to future conduct be considered before the preventive detention could be terminated did not invalidate it.

368 *No breach of an existing norm and no existing controversy.* If it were essential to validity that the conduct forbidden by the control order be conduct in breach of an existing norm, and that the order be made in an existing controversy, much legislation would be invalid. It is true that the absence of any controversy or dispute requiring resolution was pointed to in *Kable's* case to demonstrate how little resemblance the proceedings contemplated by the legislation there under consideration bore to the ordinary processes and proceedings of the Supreme Court of New South Wales[512]. That conclusion will not hold for the s 14(1) proceedings in this case, which are closely similar to the ordinary processes and proceedings of the Magistrates Court[513].

369 In general, "a legislature can select whatever factum it wishes as the 'trigger' of a particular legislative consequence"[514]. That is so even when the trigger is a finding by the executive that a state of affairs exists which does not involve any actual or threatened contravention by the defendant of a legal norm of conduct. And it is so even when the trigger is an order in legal proceedings not involving any actual or threatened contravention by the defendant of a legal norm of conduct. The respondents attempted to create a universal proposition out of what was said in *Kable's* case. That universal proposition would render unconstitutional legislation permitting or compelling orders to be made even though this was not necessary to resolve a controversy or dispute. The attempt encounters the difficulties discussed by Dixon CJ and McTiernan J in *R v*

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511 (2004) 223 CLR 575.

512 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 122.

513 See above at [255]-[263].

514 *Baker v The Queen* (2004) 223 CLR 513 at 532 [43].

Davison[515]. They were dealing with a contention that "judicial power" depended on certain elements which included the existence of a controversy between subjects or between the Crown and a subject, and on the determination of existing rights as distinct from the creation of new ones. They said:

> "It may be said of each of these various elements that it is entirely lacking from many proceedings falling within the jurisdiction of various courts of justice in English law. In the administration of assets or of trusts the Court of Chancery made many orders involving no *lis inter partes*, no adjudication of rights and sometimes self-executing. Orders relating to the maintenance and guardianship of infants, the exercise of a power of sale by way of family arrangement and the consent to the marriage of a ward of court are all conceived as forming part of the exercise of judicial power as understood in the tradition of English law. Recently courts have been called upon to administer enemy property. In England declarations of legitimacy may be made. To wind up companies may involve many orders that have none of the elements upon which these definitions insist. Yet all these things have long fallen to the courts of justice. To grant probate of a will or letters of administration is a judicial function and could not be excluded from the judicial power of a country governed by English law."

370 After *Kable's* case, McHugh J wrote to the same effect in *Fardon v Attorney-General (Qld)*[516]. He said that even if legislation does not require the court to determine:

> "an actual or potential controversy as to existing rights or obligations[517] … that does not mean that the Court is not exercising judicial power. The exercise of judicial power often involves the making of orders upon determining that a particular fact or status exists. It does so, for example, in the cases of matrimonial causes, bankruptcy, probate and the winding up of companies."

In those instances the courts change the legal rights of individuals: they do not merely declare those rights.

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515 (1954) 90 CLR 353 at 368; [1954] HCA 46.

516 (2004) 223 CLR 575 at 596-597 [34]. Cf *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 106, 122 and 142.

517 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 375 per Kitto J; [1970] HCA 8.

371 Far from being alien to traditional curial functions, the form of preventive justice found in a control order under s 14 has close analogies with some traditional forms of preventive justice which apply even where there is no adjudication of past criminal guilt, no breach of an existing norm, and no controversy about those questions. It is convenient to list some examples, particularly examples affecting freedom of association.

372 One example is an order by justices binding over a citizen to keep the peace even though that citizen has not yet committed any crime[518]. In Coke's words, it is "for prevention of … offences before they be done"[519]. The defendant can be bound over to keep the peace where the risk of violence apprehended is not violence by the defendant, but violence directed against the defendant[520]. That is, it is not only that the defendant need not have committed a crime in the past; it is not even necessary that there be apprehension that the defendant will commit a crime in future. These forms of preventive detention were well known at the time of Federation, both as part of English law and as part of the law of the colonies[521]. They were adopted in the *Judiciary Act* 1903 (Cth), s 81.

373 Another example is a condition restricting a person to whom bail is granted from associating with others, for example, witnesses. Thus the *Bail Act* 1982 (WA) provides that the discretion to grant or refuse bail depends, inter alia, on whether an accused who is not kept in custody may commit an offence, endanger the safety, welfare or property of any person, interfere with witnesses or obstruct the course of justice (Sched 1 Pt C cl 1(a)(ii)-(iv)). It also grants power to impose conditions to ensure that those things do not happen (Sched 1

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518 *Thomas v Mowbray* (2007) 233 CLR 307 at 347-348 [79] and 356-357 [116]-[121]. See also *R v Sandbach; Ex parte Williams* [1935] 2 KB 192 at 196 (quoting Blackstone: "This preventive justice consists in obliging those persons, whom there is probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour"); *R v County of London Quarter Sessions Appeals Committee; Ex parte Metropolitan Police Commissioner* [1948] 1 KB 670 at 673-676; *Devine v The Queen* (1967) 119 CLR 506 at 513-514; [1967] HCA 35.

519 Cited in *R v County of London Quarter Sessions Appeals Committee; Ex parte Metropolitan Police Commissioner* [1948] 1 KB 670 at 677.

520 *Percy v Director of Public Prosecutions* [1995] 1 WLR 1382 at 1391-1392; [1995] 3 All ER 124 at 130-131.

521 See, for example, *The Justices Procedure Amendment Act* 1883-4 (SA), ss 16 and 28.

Pt D cl 2(2)(b)-(d)). That is, it has the character of ensuring not only that the accused is available to face trial and does not interfere with that trial, but also that the accused is prevented from committing various crimes, whether or not that accused committed any crime in the past.

374 There are numerous examples of legislation permitting the grant of injunctions in the nature of an apprehended violence order which may significantly restrict a person's freedom of association with others and which do not necessarily require prior criminal conduct as a condition of their grant[522]. The *Family Law Act* 1975 (Cth), s 68B, permits a court to grant injunctions for the welfare of a child, the child's parents and other specified people, including injunctions restraining the defendant from entering or remaining in a place of residence, employment or education of the child. Section 114 contains similar powers in relation to certain proceedings between the parties to a marriage. The *Summary Procedure Act* 1921 (SA), s 99, gives the Magistrates Court power to make an order restraining the defendant as the Magistrates Court considers necessary or desirable in order to prevent the defendant from causing personal injury or damage to property or behaving in an intimidating or offensive manner. Section 99AA of that Act gives the Magistrates Court power to make an order restraining certain classes of defendant from loitering near children, using the internet or owning, possessing or using a device capable of being used to gain access to the internet. Sections 4 and 5(2)(a)-(e) of the *Domestic Violence Act* 1994 (SA) give the Magistrates Court power to make a domestic violence restraining order prohibiting the defendant from being in particular premises and locations, from approaching a family member and from contacting a family member or any other person at a place where a family member resides or works. Section 16 of the *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) gives power to make an apprehended domestic violence order and s 18 gives power to make an apprehended personal violence order. Section 35(2)(a)-(c) gives power to impose in each order prohibitions or restrictions on the defendant's ability to approach the protected person and on access by the defendant to particular places. The *Domestic and Family Violence Act* (NT) gives power to grant domestic violence orders (s 18), which can include orders requiring the defendant not to reside in or enter premises occupied by a protected person (s 22). Sections 11A and 11B of the *Restraining Orders Act* 1997 (WA) give a court power to make a violence restraining order in relation to acts of family and domestic violence. Section 13(2)(a)-(d) gives power to include in a violence restraining order restraints on approaching certain premises or persons, or communicating with certain persons. Section 36(1) gives the court power to make a misconduct restraining order against intimidatory or offensive behaviour. Section 36(2)(a)-(d) gives power to include in a misconduct restraining order restraints of the same kind as are referred to in s 13(2)(a)-(d). Sections 4, 4A and

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522 *Thomas v Mowbray* (2007) 233 CLR 307 at 328-329 [16]-[17] and 347-348 [79].

5(1)(a)-(d) of the *Crimes (Family Violence) Act* 1987 (Vic) give power to make an intervention order restricting access by the defendant to the aggrieved family member or to particular locations.

375 Another category consists of enactments criminalising association with persons who may not have committed crimes. They have been quite common. Their enforcement has not been seen as compromising courts in any way, let alone in ways relevant to the *Kable* doctrine. Although sometimes the legislation turned on consorting with convicted persons, it often made or makes it an offence habitually to consort with reputed thieves or criminals or known prostitutes[523]. A person can be a reputed thief or a reputed criminal without actually being a thief or a criminal, and a person can be a known prostitute without having committed a criminal offence. In *Johanson v Dixon*[524] Mason J said that the gist of the offence in the Victorian legislation under consideration was "habitual association with persons who fall into the designated classes, whether the association is for unlawful purposes or not." Two of the three designated classes were reputed thieves or known prostitutes. The offence did not require any prior convictions or misconduct on the part of the defendant. Mason J went on to say that the policy of the legislation "was designed to inhibit a person from habitually associating with persons of the three designated classes, because the association might expose that individual to temptation or lead to his involvement in criminal activity"[525] – even if the individual had never succumbed to temptation in the past, or been involved in criminal activity in the past. Section 35 of the impugned Act replaced a provision of this kind – s 13 of the *Summary Offences Act* 1953 (SA), which rendered it an offence habitually to consort with reputed thieves, prostitutes or persons having no lawful visible means of support. It is a novel suggestion that legislation which attempts to forestall and prevent crime before it is committed by persons who might be likely to do so if they associate together (whether or not those persons have committed crimes in the past) is constitutionally invalid.

376 Then there are examples of preventive justice where, although the conduct to be prevented is in breach of an antecedently existing legal norm and there is controversy about whether it will take place, there is no need to prove any past breach of that norm. They include the following. The *Trade Practices Act* 1974 (Cth) provides for the grant of an injunction if the court is satisfied that a person

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523 See *Vagrants, Gaming and Other Offences Act* 1931 (Q), s 4(1)(b) and (e) (repealed); *Police Offences Act* 1935 (Tas), s 6; *Summary Offences Act* (NT), s 56(1)(i).

524 (1979) 143 CLR 376 at 384; [1979] HCA 23.

525 (1979) 143 CLR 376 at 385.

is proposing to engage in conduct that would constitute a contravention of various provisions of that Act, whether or not the person has previously engaged in conduct of that kind: s 80(1) and (4)(b). Sections 475(1) and 479(1)(b) of the Environment Act give a similar power in relation to persons who propose to engage in conduct consisting of an act or omission that contravenes that Act or the regulations made under it. In s 1324(1) and (6)(b) of the *Corporations Act* 2001 (Cth) there is a similar power in relation to contraventions of that Act.

377 A further category comprises rules of law which provide for the grant of warrants to arrest debtors to prevent them leaving a State[526] or which restrain them from removing property situated in the State[527], whether or not any crime or civil wrong has been proven. A related example is s 1323(1)(j) and (k) of the *Corporations Act* 2001 (Cth). Those provisions empower certain courts to make orders requiring a person to surrender his or her passport and prohibiting that person from leaving the jurisdiction while an investigation is carried out in relation to a possible (but not proven) contravention of that Act by the person.

378 Finally, asset preservation orders in the nature of *Mareva* injunctions may be granted against persons who are not alleged to have committed, or to be about to commit, any crime or civil wrong, like banks complying with the lawful directions of customers. So far as these orders are based on statutes, the constitutional validity of these statutes has never been doubted. So far as these orders rest on judge-made doctrines, those doctrines have never been criticised along the lines of the respondents' arguments.

379 The Solicitor-General for the State of South Australia was accordingly correct to submit that Australian courts have exercised powers restricting freedom of association otherwise than as an incident of a finding of criminal guilt and even though there is no adjudication of existing rights and liabilities between parties. They have done so in many circumstances, and for a long time. In *Thomas v Mowbray*[528] Gleeson CJ said that restraints on liberty can be imposed, whether or not they involve detention in custody, independently of adjudging and punishing criminal guilt. He pointed out that *Fardon v Attorney-General (Qld)*[529] was an example of State legislation validly providing for preventive detention in custody pursuant to judicial order. The submission of the plaintiff in *Thomas v Mowbray* that legislation protecting the public peace by preventive measures falling short of detention in the custody of the State but imposed by court order

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526 *Restraint of Debtors Act* 1984 (WA), ss 5 and 6.

527 *Restraint of Debtors Act* 1984 (WA), ss 17 and 19.

528 (2007) 233 CLR 307 at 330 [18].

529 (2004) 223 CLR 575.

was repugnant to Ch III was rejected[530]. The like submission by the respondents in the present appeal must be rejected too.

380 Unless the Constitution renders all preventive (as distinct from punitive) measures invalid, which is not a proposition for which any argument or authority could be or was advanced, it is not an objection that a particular defendant to control order proceedings has not committed any crime. This possibility is inherent in the notion of preventive justice.

381 The making of a declaration under s 10 does not immediately result in any person committing an offence. It does create the possibility of a control order being made against members, breach of which is criminal under s 22. They can avoid that outcome by ceasing to be members. It also means that people who associate with members of a declared organisation in the manner described in s 35(1)(a) may commit a crime. They can avoid that outcome by not doing so, or availing themselves of the exceptions set out in s 35(6). Interference with freedom of association is not a light matter, but it is inevitable in legislation the purpose of which is to disrupt and restrict the activities of organisations involved in serious crime, their members and their associates.

382 *Is controlling freedom of association exclusively judicial in character?* Perhaps underlying the arguments of the respondents under consideration are the dicta of Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration*[531]. They said:

> "There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth. … [Chapter] III of the Constitution precludes the enactment … of any law purporting to vest any part of that function in the Commonwealth Executive.
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> … It would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. The reason why that is so is that, putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is penal or punitive in

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530 (2007) 233 CLR 307 at 357 [121].

531 (1992) 176 CLR 1 at 27; [1992] HCA 64.

> character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt."

The exceptions referred to were the gaoling of accused persons pending trial, detaining those suffering from mental or infectious illnesses, punishment for contempt of Parliament, punishment for breach of military discipline, and detention of aliens in relation to the determination of their immigration status, pending possible removal. To this list may be added the detention of persons against whom extradition proceedings are pending without any prima facie finding that the extradition offence alleged against that person had been committed[532].

383 These dicta in relation to involuntary detention in custody validly existing only as an incident of judging and punishing criminal guilt do not apply in terms to restrictions on freedom of association falling short of detention. No extension of the dicta was made to anti-terrorist control orders[533]. Nor was it made to the process of depriving professional persons of liberty to carry on a profession without proof of any offence – a deprivation which can be more damaging than a restraint on association[534]. The extension should not be made here, particularly in view of the unresolved questions to which the dicta have given rise[535].

Conclusion

384 Taken individually, the arguments of the respondents are inadequate to sustain the orders made in the court below. Sometimes when arguments, each of which in isolation is inadequate to achieve a goal, are taken together, the goal is achieved. That is not so in this appeal.

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532 *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614; [2006] HCA 40.

533 *Thomas v Mowbray* (2007) 233 CLR 307.

534 *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at 358-360 [17]-[21] and 378-379 [96]-[97]; [2007] HCA 23.

535 For example, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 55; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 110; [1997] HCA 27; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 648-649 [258]; [2004] HCA 37; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 25 [59]; [2004] HCA 49. Cf *Al-Kateb v Godwin* (2004) 219 CLR 562 at 612-614 [137]-[140]; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 608-614 [68]-[88].

Orders

385 Question 3 of the questions reserved to the Supreme Court of South Australia should be answered "Yes". The grant of special leave to appeal should be extended. The appeal should be allowed. The respondents should pay the appellant's costs in this Court and in the Supreme Court of South Australia.

386 CRENNAN AND BELL JJ. The *Serious and Organised Crime (Control) Act* 2008 (SA) ("the Act") provides for a control order to be made against a person by a Magistrates Court[536] if the court is satisfied, on the balance of probabilities, that the defendant is a member of a declared organisation. A declared organisation is an organisation which is the subject of a declaration by the Attorney-General. In this case, the Attorney-General made a declaration in relation to the organisation known variously as the Finks Motorcycle Club, the Finks MC, Finks M.C. Incorporated, Finks M.C. INC and the Finks ("the Finks").

387 On 25 May 2009 the Magistrates Court of South Australia made a control order on an ex parte application by the Commissioner of Police in respect of the second respondent, Donald Brian Hudson. The control order was made under s 14(1) of the Act. The application for a control order was supported by 14 affidavits of police officers, some of whom deposed to both direct observations of and contact with Mr Hudson, and others of whom deposed to the rules, structure, modus operandi and membership of the Finks and the identification of members of the Finks.

388 The control order prohibited Mr Hudson from associating with other persons who were members of the declared organisation, the Finks (unless the association occurred between members of a registered political party at an official meeting of the party, or a branch of the party, and no less than 48 hours notice had been given to the police). Mr Hudson was also prohibited from "[p]ossessing a dangerous article or a prohibited weapon (within the meaning of section 15 of the *Summary Offences Act 1953*)."

389 On 26 May 2009 the control order was served on Mr Hudson in accordance with s 16(1) of the Act. On 26 May 2009, the respondents to the appeal filed a summons and statement of claim commencing proceedings in the Supreme Court of South Australia contending that s 14(1) of the Act "impairs the institutional integrity of the Magistrates Court of South Australia, contrary to the requirements of Chapter III of the Constitution." Mr Hudson filed a notice of objection under s 17 of the Act on 3 June 2009.

390 On 3 July 2009, pursuant to s 49 of the *Supreme Court Act* 1935 (SA) and r 294 of the Supreme Court Civil Rules 2006, Bleby J reserved four questions, set out in the reasons of Hayne J[537], for the consideration of the Full Court of the Supreme Court of South Australia ("the Full Court") on the facts stated.

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536 Section 3 of the Act states: "***Court*** means the Magistrates Court".

537 Reasons of Hayne J at [155].

391 At the time of the reservation of the four questions for the consideration of the Full Court, Mr Hudson's objection had not been heard in the Magistrates Court. Immediately after the determination of the reserved questions by the Full Court, the Magistrates Court revoked the control order against Mr Hudson.

392 On 4 June 2009, the Commissioner of Police applied to the Magistrates Court for a control order in respect of the first respondent, Sandro Peter Totani. The hearing of that application was adjourned on Mr Totani's motion. At the time when the abovementioned questions were reserved the Commissioner's application had not been dealt with.

393 It is uncontested that both respondents are and have at all material times been members of the Finks.

394 The course of the proceedings before the Full Court, the Full Court's answers to reserved questions numbered (3) and (4), and the orders made, have been described in the reasons of others[538]. The State of South Australia ("the State") appeals to this Court from the decision of the Full Court made on 25 September 2009[539]. On 28 September 2009 Bleby J made final orders in the proceedings in the Supreme Court in accordance with the orders made in the Full Court. We agree with French CJ, Gummow, Hayne and Kiefel JJ that the State should have special leave to appeal against the orders of Bleby J of 28 September 2009.

395 The only question before this Court is whether s 14(1) of the Act is valid. The State contends that s 14(1) is within the legislative power of the State, whereas the respondents contend that s 14(1) exceeds the legislative power of the State by reference to the principles identified in *Kable v Director of Public Prosecutions (NSW)*[540]. For the reasons which follow we agree with the conclusions of French CJ, Gummow, Hayne and Kiefel JJ that s 14(1) of the Act is invalid and that the appeal should be dismissed.

Legislative scheme in respect of control orders

396 In the relevant Second Reading Speech, the Minister, the Hon Mr Atkinson, stated that "*outlaw motorcycle gang members* are involved in many

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538 Reasons of French CJ at [9]; reasons of Gummow J at [88]-[89]; reasons of Hayne J at [155].

539 *Totani v South Australia* (2009) 105 SASR 244.

540 (1996) 189 CLR 51; [1996] HCA 24.

and continuing criminal activities including murder; drug manufacture, importation and distribution; fraud; vice; blackmail; intimidation of witnesses; serious assaults; the organised theft and re-identification of motor vehicles and motorcycles; public disorder offences; firearms offences; and money laundering"[541] (emphasis added).

397 It is important to note in relation to control orders that being a member of a motorcycle gang is not "outlawed" – membership is not made a criminal offence. Further, motorcycle gangs which are "declared organisations"[542] under the Act (a process referred to below) are not "outlawed" under the legislative scheme – no civil or criminal sanctions are applied to them.

398 The objects of the Act are set out in s 4(1):

> "(a) to disrupt and restrict the activities of –
>
> (i) organisations involved in serious crime; and
>
> (ii) the members and associates of such organisations; and
>
> (b) to protect members of the public from violence associated with such criminal organisations."

399 It is not necessary to set out all the details of the legislative scheme designed to achieve those objects because this task has been undertaken in the reasons of others. The aspects of the legislation which we would wish to emphasise for the purposes of these reasons include the following.

400 Section 10(1) (to be found in Pt 2 of the Act) permits the Attorney-General to make a declaration under that section if the Attorney-General is satisfied that "members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity" (s 10(1)(a)) and that "the organisation represents a risk to public safety and order in this State" (s 10(1)(b)).

401 In considering whether or not to make a declaration under s 10(1) the Attorney-General may have regard to a number of matters set out in s 10(3)(a) to (f). Those matters include any information suggesting that a link exists between the organisation and serious criminal activity; any criminal convictions recorded

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541 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 21 November 2007 at 1805.

542 Defined in s 3 of the Act.

in relation to current or former members of the organisation, or persons who associate, or have associated, with members of the organisation; or any information suggesting that current or former members of the organisation, or persons who associate, or have associated, with members of the organisation, have been, or are, involved in serious criminal activity (whether directly or indirectly and whether or not such involvement has resulted in any criminal convictions) (s 10(3)(a), (b) and (c)).

402 Section 10(4)(a) provides that the Attorney-General may be satisfied that members of an organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity, whether or not all the members associate for such purpose, provided that the Attorney-General is satisfied that such members as do associate for such purpose are a "significant group" within the organisation, "either in terms of their numbers or in terms of their capacity to influence the organisation or its members". The Attorney-General is also entitled to take into account any information suggesting that members of an interstate or overseas chapter or branch of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity (s 10(3)(d)). The number and range of matters which the Attorney-General may take into account shows the extent of fact-finding undertaken by the Attorney-General for the purposes of the legislative scheme. The making of a declaration does not affect the continuation, or the activities, of a declared organisation.

403 Section 14(1), the key provision, provides:

"The Court must, on application by the Commissioner, make a control order against a person (the ***defendant***) if the Court is satisfied that the defendant is a member of a declared organisation."

404 Section 14(2) also provides for the making of a control order:

"The Court may, on application by the Commissioner, make a control order against a person (the ***defendant***) if the Court is satisfied that –

(a) the defendant –

(i) has been a member of an organisation which, at the time of the application, is a declared organisation; or

(ii) engages, or has engaged, in serious criminal activity,

and regularly associates with members of a declared organisation; or

(b) the defendant engages, or has engaged, in serious criminal activity and regularly associates with other persons who engage, or have engaged, in serious criminal activity,

and that the making of the order is appropriate in the circumstances."

405 It will be noted that a control order "must" be made under s 14(1) if the court is satisfied that the defendant is a member of a declared organisation, whereas the court has a discretion under s 14(2). Secondly, the adjudicative process under s 14(1) is confined to determining that the defendant is a member of a declared organisation, whereas the adjudicative process under s 14(2) may involve considerations of whether the defendant engages in or has engaged in serious criminal activity. Thirdly, the considerations to which the court must have regard in respect of making a control order under s 14(2) can only be taken into account under s 14(1) when the court is considering the prohibitions to be included in a control order (s 14(6)).

406 Section 14(5)(b) sets the minimum conditions of a control order under s 14(1):

"(5) A control order –

(a) …

(b) if the defendant is a member of a declared organisation, must prohibit the defendant from –

(i) associating with other persons who are members of declared organisations; and

(ii) possessing –

(A) a dangerous article; or

(B) a prohibited weapon,

(within the meaning of section 15 of the *Summary Offences Act 1953*),

except as may be specified in the order."

Section 14(6) provides:

"In considering whether or not to make a control order under subsection (2) or in considering the prohibitions that may be included in a control order under subsection (1) or (2), the Court must have regard to the following:

(a) whether the defendant's behaviour, or history of behaviour, suggests that there is a risk that the defendant will engage in serious criminal activity;

(b) the extent to which the order might assist in preventing the defendant from engaging in serious criminal activity;

(c) the prior criminal record (if any) of the defendant and any persons specified in the application as persons with whom the defendant regularly associates;

…"

407 In relation to the requirement of s 14(1) that the court be satisfied that the defendant is a member of a declared organisation, s 3 defines member widely:

"***member***, in relation to an organisation, includes –

(a) in the case of an organisation that is a body corporate – a director or an officer of the body corporate; and

(b) in any case –

(i) an associate member or prospective member (however described) of the organisation; and

(ii) a person who identifies himself or herself, in some way, as belonging to the organisation; and

(iii) a person who is treated by the organisation or persons who belong to the organisation, in some way, as if he or she belongs to the organisation".

408 Legal obligations flow from the making of a control order under s 14(1). Contravention of, or a failure to comply with, a control order is an offence attracting a maximum penalty of five years imprisonment (s 22). Section 35 deals with "Criminal associations" and, subject to limited exceptions in s 35(6), provides for offences analogous to what were once known as consorting offences[543], also punishable by up to five years imprisonment.

409 Section 41 contains a privative clause.

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543 Formerly in s 13 of the *Summary Offences Act* 1953 (SA).

The Full Court

410 Bleby J (with whom Kelly J agreed[544]) concluded that the jurisdiction conferred on the Magistrates Court by s 14(1) of the Act required the court to act in a manner incompatible with its institutional integrity[545]. Specifically, the court was required to act on findings made by the Executive on matters which were critical to the making of a control order. This constrained the capacity of the court to act judicially with the result that the court did not satisfy the constitutional requirements of independence and impartiality.

411 In considering the jurisdiction conferred on the court under s 14(1), Bleby J said that four elements must be established in order to obtain a control order under s 14(1)[546]:

(1) Members of the organisation of which the defendant to a s 14(1) application is alleged to be a member associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity.

(2) The organisation of which the defendant to a s 14(1) application is alleged to be a member represents a risk to public safety and order in the State.

(3) The making of a declaration under s 10(1).

(4) Membership by the defendant of the same organisation as is the subject of the s 10(1) declaration.

412 Bleby J then said[547]:

> "The effect of [the Act] is therefore that the Magistrates Court is required by the Act to act on what is, in effect, the certificate of the Attorney-General that elements 1 and 2 are proved, with no ability to go behind that certificate. The relatively much more significant and complex factual inquiry is removed from the court to the Attorney-General. The Attorney-General is not subject to or bound by the rules of evidence or

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544 (2009) 105 SASR 244 at 305 [277].

545 (2009) 105 SASR 244 at 280-281 [155]-[157], 283 [166]-[167].

546 (2009) 105 SASR 244 at 279 [150], 280 [152].

547 (2009) 105 SASR 244 at 280 [155]-[156].

> any standard of proof. He can act on whatever information he pleases and give it whatever weight he pleases. …
>
> In a very real sense the court is required to '[act] as an instrument of the Executive'."

413 White J, in dissent, found that the decision making entrusted to the court was not so subordinate to that of the Executive, nor was its manner of exercise so directed, that the court's independence and capacity to act impartially is impaired[548].

414 The reasoning of the majority on this aspect of the case is to be preferred.

415 The majority's conclusion was also based on the proposition that "[t]he Attorney-General's findings are unreviewable"[549] under s 41 of the Act. It has been demonstrated by each of Gummow and Hayne JJ that such a proposition is too widely stated, especially in the light of this Court's decision in *Kirk v Industrial Court (NSW)*[550]. We agree with their Honours and have nothing to add.

416 The majority also identified a third basis in support of their conclusion that s 14(1) was invalid. This was that the provisions of the Act concerning "criminal intelligence" operated so as to impermissibly impair the court's independence and impartiality[551]. We agree with Gummow J's reasons for rejecting that proposition and have nothing to add.

The Finks as a "declared organisation"

417 It was not contended by the parties that the Attorney-General had failed to comply with any necessary procedural requirement under the Act. Indeed, as recognised by the Full Court, the Attorney-General went further than was required by the Act, by publishing and tabling on 14 May 2009 in the House of Assembly some 53 pages of reasons for making the declaration. Those reasons referred to criminal intelligence, redacted pursuant to s 13(2), upon which the Attorney-General had relied in making the declaration.

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548 (2009) 105 SASR 244 at 305 [273].

549 (2009) 105 SASR 244 at 280 [155].

550 (2010) 239 CLR 531; [2010] HCA 1.

551 (2009) 105 SASR 244 at 282-283 [164]-[165].

418 The reasons of the Attorney-General detailed the process of investigation and public consultation which had been undertaken prior to him making an assessment as to whether the requirements of s 10 were satisfied. The Attorney-General was satisfied on the balance of probabilities that the Finks was an organisation, that the members of the organisation associated for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity, and that the organisation represented a risk to public safety and order in the State. The Attorney-General recorded that the effect of s 10(3), described above in these reasons, was that the rules of evidence did not apply to the tasks he was required to undertake for the purposes of making the declaration, and that members of South Australia Police were entitled to rely upon hearsay, and second- and third-hand hearsay, in respect of the evidence put before him.

Submissions

419 The respondents submitted that in conferring judicial power to make a control order, s 14(1) of the Act required the power to be exercised in a manner which is incompatible with the exercise of federal judicial power and the institutional integrity of the court. The respondents submitted that the control orders authorised by s 14(1) are imposed after a process which requires the court to act merely to implement executive policy decisions, contrary to the authority of *Kable*[552], and that a control order so imposed operates to significantly interfere with a person's ordinary right or freedom of association.

420 It was accepted that a State court may be required to act on the basis of a factum determined by the Executive and that that, without more, does not impermissibly impair the institutional integrity of the court[553]. A factum determined by the Executive may support the institutional integrity of the court. However, *Kable* might apply if the court's adjudicative powers are confined so as to merely implement an executive or legislative determination[554]. It should also be noted that an exercise of judicial power may involve the making of orders upon determining that a particular status exists, as occurs in proceedings in

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552 (1996) 189 CLR 51.

553 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 352 [49] per French CJ; [2009] HCA 49.

554 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 233 [208] per Gummow J; [2000] HCA 62.

matrimonial causes, bankruptcy or probate, or concerning the winding up of companies[555].

421 In answer to the respondents' submission that s 14(1) required the court to act merely to implement executive policy decisions, the appellant contended that the legislation did not offend against the principles established in *Kable*. Section 14(1) was characterised as part of a preventative legislative scheme, as identified in the objects set out in s 4 of the Act, similar, it was said, to that which was upheld by this Court in *Thomas v Mowbray*[556]. The appellant submitted that s 14(1) was a provision of a familiar kind and that it is permissible for a State legislature to confer a power with a duty to exercise it if the court decides that the conditions attached to the power are satisfied[557]. The appellant also contended that the adjudicative role under s 14(1) was genuine and not merely formal. Rights to object to a control order (s 17), a right of appeal (s 19) and a right to apply to vary or revoke a control order (s 20) were also relied on. It was accepted by the respondents that before making a control order, the court was not only required to determine whether the defendant is a member of a declared organisation, but was also required to determine the validity of the application before it, and the sufficiency of the grounds.

422 The appellant's case, that s 14(1) of the Act was valid, was supported by interventions by the Attorneys-General of New South Wales, Victoria, Queensland, Western Australia and the Northern Territory, and by a limited intervention by the Attorney-General of the Commonwealth.

The exercise of judicial power

423 The Constitution does not contain express guarantees of personal liberty which would have placed limitations on State legislatures[558]. Rather, the protection of personal liberty was left to the rule of law[559], described by Dixon J

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555 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 597 [34] per McHugh J; [2004] HCA 46.

556 (2007) 233 CLR 307; [2007] HCA 33.

557 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 360 [77] per Gummow and Bell JJ, 372-373 [120]-[121] per Hayne, Crennan and Kiefel JJ.

558 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 61 per Dawson J; [1997] HCA 27.

559 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 8 February 1898 at 664-691.

in *Australian Communist Party v The Commonwealth* as an assumption, in accordance with which the Constitution is framed[560]. In *Al-Kateb v Godwin*, which concerned a federal provision for administrative detention of unlawful non-citizens, Gleeson CJ said "personal liberty is the most basic" human right or freedom[561]. Whilst interference with the freedom to associate with others is distinguishable from detention in custody, it nevertheless operates as a significant restriction on personal liberty. In the context of the judicial power of the Commonwealth, the separation of judicial functions from other functions of government has been said to advance "two constitutional objectives: the guarantee of liberty and, to that end, the independence of Ch III judges."[562] As explained by Gummow and Crennan JJ in *Thomas v Mowbray*[563]:

> "[Chapter] III gives practical effect to the assumption of the rule of law upon which the Constitution depends for its efficacy."

424 In harmony with the Constitution, conclusions about whether legislation conflicts with constitutional requirements, which turn on the nature of judicial power, or its usurpation[564], or which are directed to the effect of legislation on the

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560 (1951) 83 CLR 1 at 193; [1951] HCA 5; see also Dixon, "The Common Law as an Ultimate Constitutional Foundation", in *Jesting Pilate*, (1965) 203. See, subsequently, *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [31] per Gleeson CJ, 513 [103] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ; [2003] HCA 2.

561 (2004) 219 CLR 562 at 577 [19]; [2004] HCA 37.

562 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ; [1996] HCA 18; see also *R v Davison* (1954) 90 CLR 353 at 380-381 per Kitto J; [1954] HCA 46; *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1 at 11 per Jacobs J; [1977] HCA 62; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 109 [40] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [1999] HCA 28; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 612 [137] per Gummow J.

563 (2007) 233 CLR 307 at 342 [61].

564 *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501; [1991] HCA 32; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; [1992] HCA 64; *Thomas v Mowbray* (2007) 233 CLR 307.

institutional integrity of a court[565], commonly subsume consideration of the effect of the legislation on personal liberty.

425 In *Kable*[566] limitations on the powers of State legislatures were identified by reference to the establishment by the Constitution of an integrated Australian court system, which contemplates the exercise of federal jurisdiction by State courts and has, at its apex, this Court exercising the judicial power of the Commonwealth[567]. There is a limit on State legislatures, derived from Ch III of the Constitution, which concerns the conferral on State courts of powers or functions repugnant to the exercise of the judicial power of the Commonwealth.

426 *Kable* concerned a power conferred on a State court by the legislature of New South Wales[568] to order preventative detention of a specified person in circumstances where no breach of the law was alleged against the person and there was no determination of guilt. In finding that the legislation was incompatible with the institutional integrity of the court, because of the nature of the task which the legislature required the court to perform, it was said that powers conferred by State legislatures on State courts must be compatible with the exercise of the judicial power of the Commonwealth[569]. Such powers should not lead to a conclusion that a State court was not independent of the Executive Government of the State[570] and should not jeopardise the integrity of a court or sap the appearance of a court's institutional impartiality[571]. State courts depend for their integrity on acting in accordance with the judicial process[572]. These various statements underpin a conclusion that powers and functions conferred on State courts must be compatible with a State court's constitutional position as a potential repository of federal judicial power. Of particular importance to this case is the recognition in *Kable* of the interests of litigants in having issues

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565 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

566 (1996) 189 CLR 51.

567 (1996) 189 CLR 51 at 101-103 per Gaudron J, 111, 114 per McHugh J, 138, 143 per Gummow J.

568 *Community Protection Act* 1994 (NSW), ss 3, 5.

569 (1996) 189 CLR 51 at 98 per Toohey J, 103 per Gaudron J.

570 (1996) 189 CLR 51 at 117, 121, 124 per McHugh J, 134 per Gummow J.

571 (1996) 189 CLR 51 at 133-134 per Gummow J.

572 (1996) 189 CLR 51 at 107 per Gaudron J.

determined by judges independent of the legislature and the Executive[573] and in accordance with "ordinary judicial processes"[574].

427 Since *Kable*, it has been said often that to answer the constitutional description of "courts", in terms of Ch III, a court must satisfy minimum requirements of independence and impartiality[575]. It has also been accepted that "legislation which requires a court exercising federal jurisdiction to depart to a significant degree from the methods and standards which have characterised judicial activities in the past may be repugnant to Ch III."[576]

428 Legislation which draws a court into the implementation of government policy, by confining the court's adjudicative process so that the court is directed or required to implement legislative or executive determinations without following ordinary judicial processes, will deprive that court of the characteristics of an independent and impartial tribunal – "those defining characteristics which mark a court apart from other decision-making bodies"[577]. Such legislation would render that court an unsuitable repository of federal jurisdiction.

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573 (1996) 189 CLR 51 at 98 per Toohey J.

574 (1996) 189 CLR 51 at 121 per McHugh J; see also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 362 [80] per Gaudron J; [2000] HCA 63; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 655 [219] per Callinan and Heydon JJ.

575 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29]; [2004] HCA 31; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 67-68 [41] per Gleeson CJ; [2006] HCA 44; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 552 [10] per Gummow, Hayne, Heydon and Kiefel JJ; [2008] HCA 4.

576 *Thomas v Mowbray* (2007) 233 CLR 307 at 355 [111] per Gummow and Crennan JJ, repeated in *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 353 [52] per French CJ. See also *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 607 per Deane J.

577 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63], 78 [68] per Gummow, Hayne and Crennan JJ. See also *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 560 [39] per Gummow, Hayne, Heydon and Kiefel JJ.

429 In seeking to resolve the question of the validity of s 14(1) of the Act, it is instructive to consider *Fardon v Attorney-General (Qld)*[578] and *Thomas v Mowbray*[579] in a little detail. *Fardon* concerned a law of general application which empowered a court to order continuing detention of a prisoner, in the interests of community protection, after the expiry of the prisoner's sentence[580]. The power to make the order was conditioned on the court determining whether a prisoner was a serious danger to the community in that there was an unacceptable risk that the prisoner would commit a serious sexual offence if released from custody. As noted by McHugh J[581]:

> "the Court [was required] to adjudicate on the claim by the Executive that a prisoner is 'a serious danger to the community' in accordance with the rules of evidence and 'to a high degree of probability'."

The court had a substantial discretion as to whether or not to make the order, or an alternative supervision order. The legislative requirements, imposing ordinary judicial processes on the court, supported the conclusion that in exercising the power the court was not acting as a mere instrument of government policy[582]. The legislation was held to be compatible with the institutional integrity of the court and its constitutional position as a potential repository of federal judicial power.

430 *Thomas v Mowbray*[583] concerned a power to make an interim control order for the prevention of a terrorist act[584]. Under the *Criminal Code* (Cth), membership of a terrorist organisation is an offence punishable by a term of imprisonment of 10 years[585], and training or receiving training from a terrorist

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578 (2004) 223 CLR 575.

579 (2007) 233 CLR 307.

580 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Q), ss 5, 8, 13.

581 (2004) 223 CLR 575 at 602 [44].

582 (2004) 223 CLR 575 at 592 [19] per Gleeson CJ, 602 [44] per McHugh J, 614-617 [90], [93]-[99], 621 [116] per Gummow J, 655 [219], 657 [225] per Callinan and Heydon JJ.

583 (2007) 233 CLR 307.

584 *Criminal Code* (Cth), Ch 5, Pt 5.3, Div 100, Div 104 subdiv B, ss 101.1, 101.4.

585 Defined in s 102.1(1); offence set out in s 102.3(1).

organisation is an offence punishable by a term of imprisonment of 25 years[586]. The court's power to make the control order was conditioned on it being satisfied, on the balance of probabilities, that the making of the order would substantially assist in preventing a terrorist act, or that the person against whom the order was sought has provided training to, or received training from, a listed terrorist organisation[587]. In addition, the court was required to be satisfied, on the balance of probabilities, "that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act."[588] There was a burden of proof on the applicant for a control order in respect of these conditions. The court had a discretion whether to revoke or vary or confirm the interim order. The power to make an interim control order involved following ordinary judicial processes, which countered any suggestion that the court making the order was to act as a mere instrument of government policy[589]. The legislation was held not to be repugnant to Ch III.

431 The powers to make preventative orders in each of *Fardon* and *Thomas v Mowbray* were conferred on the respective courts in a manner which was compatible with an exercise of federal judicial power. Preventative orders were made in each of those cases following ordinary judicial processes, which gave the persons to whom such orders were directed the protections inherent in those processes.

Section 14(1)

432 The Magistrates Court of South Australia[590] is a court of a State within the meaning of s 77(iii) of the Constitution.

433 A control order made under the Act has as its purposes disrupting and restricting the activities of members of organisations involved in serious crime and protecting members of the public from the violence associated with such organisations. The Executive, through the Commissioner of Police, is the

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586 Defined in s 102.1(1); offence set out in s 102.5(1) and (2).

587 Section 104.4(1)(c).

588 Section 104.4(1)(d).

589 (2007) 233 CLR 307 at 335 [30] per Gleeson CJ, 355-356 [112]-[113] per Gummow and Crennan JJ.

590 Established by the *Magistrates Court Act* 1991 (SA), s 4.

applicant for a control order[591]. The court's power to grant a control order under s 14(1) is conditioned upon two matters, the existence of a declaration by another member of the Executive, the Attorney-General, that the declared organisation is a serious criminal organisation, and the court's determination of the defendant's status as a member of the declared organisation.

434 Making the control order does not involve any finding of criminal guilt. The power to make a control order is not conditioned on any assessment by the court of whether, by reason of the defendant's status or by reason of past or threatened conduct of the defendant (whether criminal or in breach of the peace), the defendant poses a risk to public safety and order. The power to make[592] a control order is also not conditioned on any satisfaction of the court as to whether the defendant engages in or has engaged in serious criminal activity[593] or whether the defendant's past or threatened conduct poses a risk that the defendant will engage in serious criminal activity or whether, and to what extent, the making of a control order may substantially assist in preventing the defendant from engaging in serious criminal activity. In these respects the power to make a control order can be distinguished from the power to make a control order of the type considered in *Thomas v Mowbray*.

435 By reference to the past activities of members of the declared organisation (which do not necessarily include the defendant), it is the Attorney-General's declaration which provides the essential foundation for the making of the control order. The substantive considerations relevant to whether the making of a control order was reasonably necessary for, or reasonably adapted to, achieving the objects of the Act are matters set out in s 10(1)(a) and (b) of the Act, which have been determined by the Attorney-General before the Commissioner of Police makes an application to the court for a control order. No discretion is given to the court[594]. In this context, the appellant relied on the court's discretion to vary or revoke the order (s 20). However, a defendant may only apply to vary or revoke the order with the permission of the court, which is conditional on the court's satisfaction that there has been a "substantial change in the relevant circumstances since the order was made". Upon the Attorney-General's declaration and a determination by the court of the defendant's status as a member of a declared organisation, the court must impose a control order which

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591 The application for the order in respect of Mr Hudson was made ex parte.

592 As distinguished from the power to impose conditions under s 14(5) of the Act.

593 Cf s 14(2).

594 Cf *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 and *Thomas v Mowbray* (2007) 233 CLR 307.

must, as a minimum, prohibit association with other members of declared organisations, except as specified in the order[595]. The power to prohibit association with other members of declared organisations is not conditioned on any satisfaction of the court that such other members of declared organisations engage in, or have engaged in, serious criminal activity.

436 These considerations show that, in conferring a power on the court to make control orders under s 14(1), the State requires the court to exercise judicial power to make a control order after undertaking an adjudicative process that is so confined, and so dependent on the Executive's determination in the declaration, that it departs impermissibly from the ordinary judicial processes of an independent and impartial tribunal. Specifically, s 14(1) operates to draw the court into the implementation of the legislative policy expressed in the objects of the Act. The conditions upon which the court must make a control order require the court to give effect to the determination of the Executive in the declaration (which implements the legislative policy), without undertaking any independent curial determination, or adjudication, of the claim or premise of an application for a control order by the Commissioner of Police, that a particular defendant poses risks in terms of the objects of the Act. This has the effect of rendering the court an instrument of the Executive, which undermines its independence. Section 14(1) requires the Magistrates Court of South Australia to act in a way which is incompatible with its constitutional position and the proper discharge of federal judicial responsibilities, and with its institutional integrity.

Conclusion

437 Section 14(1) is invalid. We agree with the orders proposed by Gummow J.

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595 Section 14(5)(b). Note that such an order must also prohibit possession of a dangerous article or a prohibited weapon, except as specified in the order.

438 KIEFEL J. In our society it is assumed that, subject only to limitations which may be imposed by the law, each person is free to associate with another. The *Serious and Organised Crime (Control) Act* 2008 (SA) ("the Act") contains provisions which have as their purpose the restriction of the ability of certain persons, identified by the Attorney-General, to associate with others. The question raised in these proceedings concerns the participation required, by s 14(1) of the Act, of the Magistrates Court of South Australia ("the Court") in achieving that objective. The question is whether the role and function given to the Court by that provision is incompatible with its role as a court which may, from time to time, exercise federal jurisdiction within the integrated Australian court system provided for by the Constitution[596]. It would be so incompatible if it compromises the institutional integrity of the Court, as explained in *Kable v Director of Public Prosecutions (NSW)*[597].

439 A majority of a Full Court of the Supreme Court of South Australia (Bleby and Kelly JJ, White J dissenting) gave answers to questions reserved to the effect that s 14(1) of the Act was not valid and a control order made with respect to the second respondent was void and of no effect[598]. Bleby J subsequently made final orders, in the nature of declarations, in the proceedings. The control order was later revoked by the Magistrates Court. The issue on the appeal therefore concerns the validity of s 14(1).

440 The State of South Australia appeals, by special leave, from the orders containing the answers and seeks special leave to appeal from the final orders made. In my view, that leave should be granted and the initial grant expanded. The appeal should be dismissed with costs, for the reasons which follow.

The facts

441 It was not in dispute in the proceedings before the Full Court of the Supreme Court of South Australia, by way of questions reserved, that the respondents were members of the Finks Motorcycle Club. The Club had been made the subject of a declaration by the Attorney-General for South Australia, on the application of the Commissioner of Police, and was therefore a "declared organisation" for the purpose of the Act. The declaration was made under s 10(1)

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596 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 102-103 per Gaudron J, 138, 143 per Gummow J; [1996] HCA 24.

597 (1996) 189 CLR 51.

598 *Totani v South Australia* (2009) 105 SASR 244.

of the Act. The Commissioner subsequently applied for and obtained a control order against the second respondent from the Court[599].

442 The control order was made under s 14(1) of the Act, which requires that:

> "The Court must, on application by the Commissioner, make a control order against a person (the ***defendant***) if the Court is satisfied that the defendant is a member of a declared organisation."

The order prohibited the second respondent from associating with other persons who are members of declared organisations. Such a prohibition is required by s 14(5)(b)(i) of the Act. The order contained one exception to that prohibition, namely an association occurring between members of a registered political party in particular circumstances and subject to certain conditions as to notification. The making of the order had the further consequence, by reason of s 35(1)(b) of the Act, that it would be an offence for any other person to associate with the second respondent on six or more occasions in a 12 month period, subject to the exceptions listed in s 35(6).

A court's institutional integrity

443 In *Forge v Australian Securities and Investments Commission*[600], Gummow, Hayne and Crennan JJ explained that a court may be said to lack institutional integrity when it no longer exhibits, in some relevant respect, those defining characteristics which set courts apart from other decision-making bodies. Their Honours acknowledged that it is not possible to make some all-encompassing statement of the minimum defining characteristics of a court[601]. Nevertheless, consideration might be given, in the first place, to what is usually involved in a judicial process. Although it is equally difficult to state all the respects in which the institutional integrity of a court may be seen to be compromised, perceptions of a court as independent and impartial must be taken as essential to its integrity[602].

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599 The application for an order against the first respondent was adjourned.

600 (2006) 228 CLR 45 at 76 [63]; [2006] HCA 44.

601 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [64]; see also *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [30]; [2004] HCA 31; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 552-553 [10] per Gummow, Hayne, Heydon and Kiefel JJ; [2008] HCA 4.

602 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 67-68 [41] per Gleeson CJ, 76 [64] per Gummow, Hayne and Crennan JJ; *Gypsy*

(Footnote continues on next page)

444 In general terms, courts are understood to have an adjudicative role, the essential function of judicial power being the quelling of controversies[603] and the ascertainment and determination of rights and liabilities[604]. Controversies to be resolved may involve questions or issues arising under statutes. The process involved, in the exercise of judicial power, is as stated in the often-quoted passage by Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*[605]:

> "the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist."

445 The process usually undertaken by courts raises questions about the role given to the Court by the Act. Its determination, of the fact of membership only, stands in contrast with that of the Attorney-General. The Attorney-General considers the activities of members of an organisation and whether those activities warrant the making of a declaration concerning the organisation, thus exposing its members to a control order and other restrictions imposed by the Act. The Court's limited determination does not explain the need for a control order, yet it was clearly considered to be important that the Court be seen to participate in the process of attaching adverse consequences to the fact of membership.

446 The making of the order raises a further question, about the law that the Court is applying. It is a feature of this legislation that it does not proscribe any organisation and does not make membership of any organisation declared by the Attorney-General unlawful. It is in this context that the Court's control order assumes some importance, in achieving the restriction of association of those to whom the declaration is directed. Consideration of these matters leads to the more fundamental question about the role assigned to the Court and its relationship with legislative and executive aims.

Jokers Motorcycle Club Inc v Commissioner of Police (2008) 234 CLR 532 at 552-553 [10] per Gummow, Hayne, Heydon and Kiefel JJ.

603 *Fencott v Muller* (1983) 152 CLR 570 at 608; [1983] HCA 12.

604 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 281; [1956] HCA 10.

605 (1970) 123 CLR 361 at 374; [1970] HCA 8.

The statutory scheme

Objects

447 The objects of the Act, as declared by s 4(1), are:

"(a) to disrupt and restrict the activities of –

(i) organisations involved in serious crime; and

(ii) the members and associates of such organisations; and

(b) to protect members of the public from violence associated with such criminal organisations."

448 It may be observed that par (b) contains the more general object. It assumes some importance in the submissions for South Australia, which seek to explain the control order made by the Court by reference to this object. Paragraph (a) refers to the means to be adopted in achieving the object in par (b). A control order may be said to effect restrictions on the activities of members of such organisations, and therefore to disrupt the organisation's criminal activities, assuming of course that the organisation is involved in criminal activities and, more particularly, assuming that the person the subject of the control order is involved in such activities.

449 It was explained in the second reading speech[606] that the targets of the legislation are motorcycle gangs and their associates, because these groups were considered to commit a disproportionate number of serious crimes. But the legislation is not expressed to refer to such groups. The only limitation with respect to its application is the expressed intention that the Act not be used "in a manner that would diminish the freedom of persons in this State to participate in advocacy, protest, dissent or industrial action."[607] Otherwise the Act may extend to any organisation identified by the Attorney-General as a declared organisation, upon application by the Commissioner of Police and upon the information provided by the Commissioner. An organisation is defined to include both incorporated bodies and unincorporated groups[608].

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606 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 21 November 2007 at 1805.

607 *Serious and Organised Crime (Control) Act* 2008 (SA), s 4(2).

608 *Serious and Organised Crime (Control) Act* 2008, s 3, definition of "organisation".

450 As will be explained, the only determination of fact concerning the possible involvement of members of an organisation in criminal activities is made by the Attorney-General and it may have nothing to say about the defendant to an application for a control order. The Court is given no role to determine whether that person has any connection with criminal activities before it makes a control order.

The declaration

451 The first step towards restricting association between the members of an organisation and other persons is the declaration made by the Attorney-General. The Attorney-General may make a declaration with respect to an organisation if the Attorney is satisfied, in terms of s 10(1), that:

> "(a) members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and
>
> (b) the organisation represents a risk to public safety and order in this State".

In considering whether to make a declaration the Attorney-General is entitled to have regard to information suggesting a link between the organisation, or its members, and serious criminal activity[609]. Such information may extend to submissions from the public[610]. The Attorney-General may be satisfied that members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity, whether or not only some of the members do so and whether or not the members also associate for other purposes[611]. A declaration may therefore be made where the information provided by the Commissioner of Police suggests that only some members are associated with criminal activity.

452 By itself, the Attorney-General's declaration carries no legal consequences for either the organisation or its members. As earlier mentioned, the Act does not proscribe an organisation the subject of a declaration, nor is membership of such an organisation made an offence. The declaration serves the purpose of identifying persons to whom other provisions of the Act will apply. It identifies persons who may be the subject of an application for a control order under

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609 *Serious and Organised Crime (Control) Act* 2008, s 10(3).

610 In response to a public invitation under *Serious and Organised Crime (Control) Act* 2008, s 9.

611 *Serious and Organised Crime (Control) Act* 2008, s 10(4).

s 14(1), on the basis of their membership of an organisation. A "member" is widely defined. It includes an associate member or prospective member; a person who identifies himself or herself, in some way, as belonging to the organisation; and a person who is treated by the organisation as if he or she belongs to it[612]. The declaration also serves to identify persons with whom others may not associate, on account of their membership of a declared organisation, if membership is proved. Section 35(1)(a) (as set out later in these reasons) makes it an offence to associate with them. But it is the purpose of identifying persons as possible subjects for a control order which is directly relevant in these proceedings.

The s 14(1) control order

453 It is no part of the Court's function under s 14(1) to inquire into the participation of the defendant to an application for a control order in any criminal activities. It is obliged to make a control order without any determination other than whether that person's membership of a declared organisation has been proved.

454 The role of the Court under s 14(1) is to be distinguished from, and contrasted with, that given to the Court by s 14(2). Pursuant to s 14(2) the Court is not obliged to make a control order. It may do so when a person has been a member of a declared organisation, or engages or has engaged in serious criminal activity, and regularly associates with members of a declared organisation. It may also do so where it is shown that the person engages or has engaged in serious criminal activity and regularly associates with other persons who engage or have engaged in such activity. Moreover, the Court is entitled, under s 14(2), to consider the appropriateness of a control order in the circumstances pertaining to the person.

455 Section 14(6) requires the Court, when considering whether to issue a control order under s 14(2) or the prohibitions to be included in an order, to have regard to the following matters:

> "(a) whether the defendant's behaviour, or history of behaviour, suggests that there is a risk that the defendant will engage in serious criminal activity;
>
> (b) the extent to which the order might assist in preventing the defendant from engaging in serious criminal activity;

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612 *Serious and Organised Crime (Control) Act* 2008, s 3, definition of "member".

(c) the prior criminal record (if any) of the defendant and any persons specified in the application as persons with whom the defendant regularly associates;

(d) any legitimate reason the defendant may have for associating with any person specified in the application;

(e) any other matter that, in the circumstances of the case, the Court considers relevant."

456 Section 14(6) is also expressed to apply to the prohibitions which may be included in a control order under s 14(1). However, as will be explained, because of the provisions of s 14(1) and (5)(b), s 14(6) only provides the Court with a basis for adding further prohibitions to those which automatically follow upon the making of a control order under s 14(1). Section 14(6) does not permit the Court to consider the above factors in connection with whether to make a control order, nor does it permit the Court to limit the order to prohibitions that are necessary in the circumstances of the case.

457 The only matter which is the subject of a determination by the Court before a control order is made under s 14(1), apart from the existence of the declaration, is whether the defendant is a member of the organisation the Attorney-General has identified in the declaration. Where the Court finds that the defendant is a member, as defined, s 14(5)(b) requires that a control order *must* prohibit the defendant from associating with other persons who are members of declared organisations[613] "except as may be specified in the order."

458 The Solicitor-General for South Australia submitted that the exception provided by s 14(5)(b) allows the Court to reach a conclusion as to the content of a control order made under s 14(1), based upon what is reasonably required, appropriate and adapted to achieve the object of the legislation. A provision such as that described by the Solicitor-General, which incorporates aspects of the principle of proportionality, was a feature of the legislation in *Thomas v Mowbray*[614], but no such provision appears in this Act. Moreover, the Act does not allow the Court to undertake such a process.

459 Section 14(5)(b) forecloses the prospect of excepting any member of a declared organisation from the operation of a control order made under s 14(1). These persons must be made the subject of the prohibitions outlined in s 14(5)(b). A possible use of the exception, one which would not negate the

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613 And from possessing a dangerous article or a prohibited weapon: *Serious and Organised Crime (Control) Act* 2008, s 14(5)(b)(ii).

614 (2007) 233 CLR 307; [2007] HCA 33; *Criminal Code* (Cth), s 104.4(1)(d).

prohibition in s 14(5)(b), may be to except some type of association. The order made in the present case provides an example. It excepts associations for political purposes. However, the exceptions which might be made cannot significantly enlarge the function of the Court under s 14(1) and (5)(b). These provisions do not permit the Court to consider the case at hand or the involvement of the particular defendant in criminal activities.

460 The Solicitor-General for South Australia submitted that s 14(6) could be used so that, when a control order is made under s 14(1), the order could "be tailored to meet the circumstances of the individual and the part they play within the organisation that is declared", thereby indicating a greater role for the Court in its determinations. It is difficult to see how this can be so, given that s 14(5)(b) provides the minimum content for an order under s 14(1), regardless of the matters listed under s 14(6).

461 Clearly, the matters referred to in s 14(6) may be considered and applied in the way described by the Solicitor-General when an order is made under s 14(2). But it does not seem possible that such considerations could be applied to alter, or negate, the prohibition required by s 14(5)(b). In the context of an order made under s 14(1), it would seem that s 14(6) could only apply to any *further* prohibitions sought by the Commissioner of Police[615].

462 The making of a control order under s 14(1) exposes the person subject to it to punishment for any disobedience of its terms, either by way of contempt or by reason of s 22(1), which renders it an offence to contravene or fail to comply with such an order. This offence carries a maximum penalty of five years imprisonment[616]. However, a control order is productive of serious disadvantage for the person subject to it from the moment it is made. The making of a control order, without more, prevents that person from associating with anyone who falls within the definition of a "member" of a declared organisation. It has the further effect of preventing others from associating with that person, by reason of s 35(1)(b). Section 35(1) provides:

> "A person who associates, on not less than 6 occasions during a period of 12 months, with a person who is –
>
> (a) a member of a declared organisation; or

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615 Which may be made under *Serious and Organised Crime (Control) Act* 2008, s 14(5)(a).

616 So long as the person knew that the act or omission constituted a contravention of, or failure to comply with, the order, or was reckless as to that fact: *Serious and Organised Crime (Control) Act* 2008, s 22(2).

(b) the subject of a control order,

is guilty of an offence." (emphasis added)

This offence also carries a maximum penalty of imprisonment for five years.

463 A person may be taken to "associate" with another person by any means of communication[617]. Only certain associations, such as those between "close family members"[618], and those for professional, business, educational, rehabilitation and some other purposes, are exempt from the operation of s 35[619].

Summary

464 The scheme of the Act may be summarised as follows. On the application of the Commissioner of Police, the Attorney-General, if satisfied of a link between some persons connected with an organisation and crime, may make a declaration affecting the organisation as a whole. By that means, each person coming within the wide definition of a "member" of that organisation is liable, upon proof of their membership by the Commissioner of Police, to have a control order made against them, prohibiting their association with other members of the organisation and severely curtailing the ability of other persons to associate with them. The Court, although having determined nothing about the activities of members of the organisation and nothing about whether the defendant to the application has had any connection with criminal activities, is obliged by the Act to make an order, containing the prohibition referred to, the making of which has the effect of further restricting that person's association with others. The Court is obliged to do so although membership of the organisation, declared or otherwise, is not made unlawful by the Act. As was acknowledged in the second reading speech, the legislation "grants unprecedented powers to the police and the Attorney-General", yet itself imposes "no direct punishment on an organisation or its members."[620] It is the Court that might be seen to provide for some such effect upon the members.

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617 *Serious and Organised Crime (Control) Act* 2008, s 35(11)(a).

618 Defined by *Serious and Organised Crime (Control) Act* 2008, s 35(11)(b).

619 *Serious and Organised Crime (Control) Act* 2008, s 35(6).

620 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 21 November 2007 at 1806, 1807.

The role of the Court

465 It has already been observed that the determination made by the Court under s 14(1) is very limited – to a factual finding about a defendant's membership of an organisation identified by the Attorney-General as a declared organisation. The Solicitor-General of Queensland, which intervened in the proceedings, pointed out that it is not uncommon for legislation to involve antecedent decision-making by the Executive, to which a court gives effect in later proceedings. In such cases the Executive's determination may be of a more detailed and complex nature than that of a court.

466 An example provided of such legislation was the *Customs Act* 1901 (Cth), under which it is an offence to import "prohibited imports"[621]. The offence is one of strict liability[622]. All goods which are the subject of the prohibition are identified by executive determination[623]. The court's role is to determine whether such goods have been imported. Such a determination may not always be a simple matter. Nevertheless, the point is made.

467 It may be accepted that a quantitative comparative assessment of a court's role against another's may not be particularly useful in resolving questions about whether the court's institutional integrity is compromised. A court may have regard to facts established by others, and its role may be more limited, yet that role may still be readily identifiable as involving an independent judicial function, as is the case in the example given. But the example also invites a comparison with the role given to the Court by s 14(1), a comparison which highlights important features of that role. The Court, acting under s 14(1), is not involved in a determination as to whether an offence has been committed. There is no offence to which its processes are directed; yet it is obliged to make an order, the nature of which suggests that some such process has been undertaken. Far from explaining the role of the Court under s 14(1), this comparison raises questions about it.

468 Other examples may be given of legislation whereunder courts may give effect to anterior decision-making not involving a judicial function[624], but they are not apposite to the role assigned to the Court by s 14(1). The Act does not go so far as to require the recognition of, or that effect be given to, the Attorney-General's declaration by the Court. More relevant is the discrete task the Court is

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621 *Customs Act* 1901 (Cth), s 233.

622 *Customs Act* 1901, s 233(1AB).

623 By regulation, under *Customs Act* 1901, s 50.

624 See reasons of Gummow J at [136].

given, one which may be seen to involve something of a traditional judicial function, because it involves a determination of something about a person prior to an order being made.

469 An order of a court may be understood as the end of the court's process, as was explained by Kitto J in the *Tasmanian Breweries Case*, in which the law is applied to the facts as found. But the limited process which precedes the making of an order under s 14(1) does not disclose the basis for an order of a kind which restricts a person's ability to associate. It is not obvious what legal criterion the Court can be said to be applying when making an order under s 14(1). There is no offence to which it is directed, no "law" by which a rule of conduct or the existence of a duty is stated[625]. Absent any illegality attaching to membership of an organisation declared by the Attorney-General, it is difficult to see how a control order can be explained as resulting from the Court's processes.

470 Prior to the making of the order under s 14(1), there was no restriction upon the second respondent's ability to associate with others to which the Court could give effect. It was the Court's order which created the restriction, but not in response to a breach, by the second respondent, of any law. The Court effects the restriction at the direction of the legislature and with respect to a person who is identified by reference to the Attorney-General's declaration. The Court's order can only be accounted for by reference to the obligation cast upon it by s 14(1). The fulfilment of that obligation fills the legislative gap which exists because there is no offence. It gives effect to the outcome sought with respect to each member of the organisation the subject of the Attorney-General's declaration.

Preventive orders

471 The Solicitor-General for South Australia submitted that it is not necessary that a court deal with an offence when it makes an order restricting freedom of association. It was pointed out that, historically, courts have made orders in the nature of involuntary detention, without the person subject to the order having committed any offence.

472 In *Chu Kheng Lim v Minister for Immigration*[626] it was said that the involuntary detention of a citizen is penal or punitive and can occur only as an incident of the exclusively judicial function of adjudicating and punishing criminal guilt[627]. The statements in *Lim* were made subject to certain exceptions,

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625 *The Commonwealth v Grunseit* (1943) 67 CLR 58 at 82; [1943] HCA 47.

626 (1992) 176 CLR 1; [1992] HCA 64.

627 (1992) 176 CLR 1 at 27.

namely, where a citizen is detained, involuntarily, in custody pending trial and in cases involving mental illness or infectious disease, but it may be that they require the further qualifications suggested by Gummow J in *Fardon v Attorney-General (Qld)*[628]. In particular, some difficulty may attend questions about whether an order effects a punishment, but it is not necessary to consider such questions in this case.

473 It may be accepted that the courts have exercised powers to restrict the liberty of persons, in certain circumstances, without an offence having been committed and without having made a determination about the person's past conduct. Orders by which a person is bound over to keep the peace provide an example. They are of long standing and may be considered the origin of modern apprehended violence orders ("AVOs")[629]. Binding over orders were described by Blackstone as expressions of "preventive justice"[630] that look to the possible future conduct of a person. In *Chu Shao Hung v The Queen*[631] Kitto J explained that this ancient power of magistrates required for its exercise some conduct which, although not actually contrary to law, was *contra bonos mores*. It was a power to oblige those persons, of whom there was probable ground to suspect future misbehaviour, "to give full assurance to the public" that such offence as was apprehended would not happen[632].

474 It may be observed that such orders differ from the orders made under s 14(1) in at least two respects: the former orders were directed to an obligation, at common law, to keep the peace in the interests of and for the protection of society; and they were the result of a process which might clearly be described as a judicial function. As was observed by Gummow and Crennan JJ in *Thomas v Mowbray*[633], it was necessary, in asking the Federal Magistrates Court to exercise that preventive jurisdiction, to place before it material which enabled it to

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628 (2004) 223 CLR 575 at 611-612 [78]-[80]; [2004] HCA 46.

629 As Gleeson CJ observed in *Thomas v Mowbray* (2007) 233 CLR 307 at 328-329 [16].

630 Blackstone, *Commentaries on the Laws of England*, 15th ed (1809), bk 4, c 18 at 251.

631 (1953) 87 CLR 575 at 589-590; [1953] HCA 33, referring to Blackstone, *Commentaries on the Laws of England*, 15th ed (1809), bk 4, c 18 at 256 and *R v Sandbach; Ex parte Williams* [1935] 2 KB 192 at 197 per Humphreys J.

632 Blackstone, *Commentaries on the Laws of England*, 15th ed (1809), bk 4, c 18 at 251.

633 (2007) 233 CLR 307 at 357 [120].

conclude that, in the absence of an order, there would be a breach of the peace. The Act here in question contains no antecedent obligation to which the order may be directed and allows no consideration by the Court of the need for an order. Binding over orders are therefore an imperfect analogy with control orders under s 14(1).

475 The legislation in *Fardon v Attorney-General (Qld)* furnishes another example of a preventive order made by a court, for the protection of the public, in accordance with its statutory objective. The question raised by the statute in that case was whether there was "an unacceptable risk that the prisoner will commit a serious sexual offence" if he was released into the community[634] and it was a question to be answered by the Supreme Court of Queensland. The Supreme Court could make an order only on the basis of acceptable, cogent evidence which satisfied it to a high degree of probability[635]. Its role clearly involved a judicial process and its resulting order was explicable on that basis. There was nothing to suggest that the Supreme Court was to act "as a mere instrument of government policy"[636] or "that the jurisdiction conferred is a disguised substitute for an ordinary legislative or executive function."[637] The institutional integrity of the Supreme Court could not be said to have been compromised by the legislation.

476 The legislation with which the Federal Magistrates Court was concerned in *Thomas v Mowbray* involved the making of orders directed to the protection of society. It may also be contrasted with the legislation here in question. The legislation in *Thomas v Mowbray* permitted the making of an interim control order by a court if it was satisfied of certain matters, including that the making of the order would substantially assist in preventing a terrorist act or that the person to be subjected to the order had provided training to, or received training from, a listed terrorist organisation[638]. Under the *Criminal Code* (Cth) it was an offence to be a member of a terrorist organisation[639] or to train or receive training from such an organisation[640]. The Federal Magistrates Court determined matters

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634 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Q), s 13(2).

635 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 13(3).

636 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 592 [19] per Gleeson CJ.

637 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 597 [34] per McHugh J.

638 *Criminal Code*, s 104.4(1)(c).

639 *Criminal Code*, s 102.3(1).

640 *Criminal Code*, s 102.5(1) and (2).

necessary to these offences. It was not obliged to make an interim control order but, if it did so, it was required to ensure that the restrictions, prohibitions and obligations to be imposed upon the person by the order were proportionate to the purpose of protecting the public from a terrorist attack, as earlier mentioned[641]. These are matters proper and usual to a judicial process. They may be contrasted with the role assigned to the Court by s 14(1).

477 The submissions for South Australia sought to align the order made under s 14(1) and the process in which the Court is involved, by reference to the objects section of the Act and its stated purpose of the protection of the public from violence associated with criminal organisations[642].

478 It is possible that a control order made against a member of a declared organisation might assist in the achievement of this purpose, but this does not mean that it is correct to characterise the Court's role and the processes it undertakes by reference to that purpose. The Court's determinations under s 14(1) have nothing to say about whether the purpose might be achieved in a particular case. No regard may be had by the Court to a defendant's history or the prospect that he or she may have been, or might in the future be, involved in criminal activities. Its order is not explicable on this basis. It can only be understood to proceed upon some unstated assumption concerning all persons who are identified by the Attorney-General's declaration and by reference to the obligation cast upon the Court to make an order with respect to a person so identified.

Conclusion

479 In *Fardon v Attorney-General (Qld)*[643], Gummow J referred to a statement in *Mistretta v United States*[644] as relevant to the principle in *Kable*. It is apposite to this case. It is that the reputation of the judicial branch may not be borrowed by the legislative and executive branches "to cloak their work in the neutral colors of judicial action."

480 It is to be inferred from the Act that it is the aim of the Executive that all persons identified by the declaration made by the Attorney-General are to have their liberty to associate restricted. This is the end which the declaration serves but to which it cannot give effect. The Court is directed to bring this result

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641 *Criminal Code*, s 104.4(1)(d).

642 *Serious and Organised Crime (Control) Act* 2008, s 4(1)(b).

643 (2004) 223 CLR 575 at 615 [91].

644 488 US 361 at 407 (1989).

about. Its action, in making the order, gives the appearance of its participation in the pursuit of the objects of the Act. Properly understood, however, the making of the order serves to disguise an unstated premise and the lack of any illegality attaching to membership of a declared organisation.

481 It follows that s 14(1) involves the enlistment of the Court to give effect to legislative and executive policy. It impinges upon the independence of the Court and thereby undermines its institutional integrity. Section 14(1) is invalid.