HIGH COURT OF AUSTRALIA

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

ASSISTANT COMMISSIONER MICHAEL JAMES CONDON — APPLICANT

AND

POMPANO PTY LTD & ANOR — RESPONDENTS

Assistant Commissioner Michael James Condon v Pompano Pty Ltd
[2013] HCA 7
14 March 2013
B59/2012

ORDER

The questions asked by the parties in the Special Case dated 26 October 2012 and referred for consideration by the Full Court be answered as follows:

Question 1

Is s 66 of the Criminal Organisation Act, *by requiring the Court to hear an application that particular information is criminal intelligence without notice of the application being given to the person or organisation to which the information relates, invalid on the ground that it infringes Chapter III of the* Constitution*?*

Answer

No.

Question 2

Is s 70 of the Criminal Organisation Act*, by requiring the Supreme Court to exclude all persons other than those listed in s 70(2) from the hearing of an application for a declaration that particular information is criminal intelligence, invalid on the ground that it infringes Chapter III of the* Constitution*?*

Answer

No.

Question 3

Is s 78 of the Criminal Organisation Act*, by requiring a closed hearing of any part of the hearing of the substantive application in which the court is to consider declared criminal intelligence, invalid on the ground that it infringes Chapter III of the* Constitution*?*

Answer

No.

Question 4

Is s 76 of the Criminal Organisation Act*, by providing that:*

(a) an informant who provides criminal intelligence to an agency may not be called or otherwise required to give evidence;

(b) an originating application and supporting material need not include any identifying information about an informant; and

(c) identifying information can not otherwise be required to be given to the court,

invalid on the ground that it infringes Chapter III of the Constitution*?*

Answer

No.

Question 5

Is s 10 of the Criminal Organisation Act*, insofar as it requires the Court to have regard to information that is declared criminal intelligence which a respondent or a respondent's legal representative has not heard or received because of the effect of ss 66, 70, 76, 77, 78, 82 and 109 of the* Criminal Organisation Act*, and when read with ss 63(5), 64(2), 64(8), 65(4), 71(2) and 80(2), invalid on the ground that it infringes Chapter III of the* Constitution*?*

Answer

No.

Question 6

Is s 10(1)(c) of the Criminal Organisation Act *invalid on the ground that it infringes Chapter III of the* Constitution *because of the nature of the judgment that it requires the Court to make?*

Answer

No.

Question 7

Is s 9 of the Criminal Organisation Act*, when read with s 8(5) and s 106, invalid on the ground that it infringes Chapter III of the* Constitution*?*

Answer

No.

Question 8

Who should pay the costs of the special case?

Answer

The respondents.

Representation

W Sofronoff QC, Solicitor-General of the State of Queensland with G J D del Villar for the applicant (instructed by Crown Law (Qld))

B W Walker SC with A J Kimmins and P Kulevski for the respondents (instructed by Potts Lawyers)

Interveners

J T Gleeson SC, Acting Solicitor-General of the Commonwealth with N J Owens and D M Forrester for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

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

W Sofronoff QC, Solicitor-General of the State of Queensland with G J D del Villar for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

M P Grant QC, Solicitor-General for the Northern Territory with R H Bruxner for the Attorney-General for the Northern Territory, intervening (instructed by Solicitor for the Northern Territory)

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

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

R M Mitchell SC with F B Seaward for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

CATCHWORDS

Assistant Commissioner Michael James Condon v Pompano Pty Ltd

Constitutional law – Constitution, Ch III – Institutional integrity of State courts – Section 10(1) of *Criminal Organisation Act* 2009 (Q) ("Act") allowed Supreme Court of Queensland on application of commissioner of police service to declare organisation "criminal organisation" – Where criminal organisation application supported by "criminal intelligence" – Sections 66 and 70 of Act required closed criminal intelligence hearing with no notice given to respondents – Section 78(1) of Act required Supreme Court to close part of criminal organisation hearing when criminal intelligence considered – Whether provisions of Act denied procedural fairness to respondents to criminal organisation application – Whether provisions of Act repugnant to or inconsistent with continued institutional integrity of Supreme Court – Whether question of organisation being "unacceptable risk to the safety, welfare or order of the community" suitable for judicial determination – Whether ss 9 and 106 of Act prevented Supreme Court from extending time for respondents to file response to criminal organisation application.

Words and phrases – "closed hearing", "continued institutional integrity", "criminal intelligence", "criminal organisation", "procedural fairness", "unacceptable risk to the safety, welfare or order of the community".

Constitution, Ch III.
Criminal Organisation Act 2009 (Q), ss 8-10, 63-66, 70, 71, 76-78, 80, 82, 106.

FRENCH CJ.

Introduction

1 At the heart of the common law tradition is "a method of administering justice."[1] That method requires judges who are independent of government to preside over courts held in public in which each party has a full opportunity to present its own case and to meet the case against it. Antithetical to that tradition is the idea of a court, closed to the public, in which only one party, a government party, is present, and in which the judge is required by law to hear evidence and argument which neither the other party nor its legal representatives is allowed to hear.

2 The common law informs the interpretation of the Constitution and statutes made under it. It carries with it the history of the evolution of independent courts as the third branch of government and, with that history, the idea of a court, what is essential to that idea, and what is not.

3 The common law may be changed or abrogated by parliaments. The courts must apply the laws enacted by the parliaments. However, where the Constitution limits legislative powers and the purported exercise of those powers is challenged, the courts must also decide whether those limits have been exceeded. Their decisions will be informed by the text of the Constitution, implications drawn from it, and principles derived from the common law.

4 This Court has been asked to determine whether provisions of the *Criminal Organisation Act* 2009 (Q) ("the COA"), a law of the State of Queensland, exceed constitutional limits. The limits derive from Ch III of the Constitution. State and Territory legislatures cannot confer or impose upon State or Territory courts functions which substantially impair their defining or essential characteristics as courts. The Queensland law, which is said to exceed those constitutional limits, is directed to the disruption and restriction of the activities of criminal organisations and their members and associates. It imposes upon the Supreme Court of Queensland requirements for closed hearings and the use of secret evidence known only to the judge and one of the parties, being the government party, which seeks to tender it. The provisions which are challenged concern the use, in proceedings under the COA, of information designated "criminal intelligence" and the way in which the Supreme Court is required to decide whether information falls into that category. The question going to validity is whether those provisions of the COA substantially impair the defining or essential characteristics of the Supreme Court of Queensland as a court.

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1 Goodhart, "What is the Common Law", (1960) 76 *Law Quarterly Review* 45 at 46.

5 Like most cases about constitutional limits the answer is not black and white. The deeply rooted common law tradition of the open court, presided over by an independent judge according procedural fairness to both parties, is adapted to protect the public interest in cases such as those involving national security, commercially sensitive documents and the protection of police informants. Similarly, the constitutional limits do not prevent parliaments from making laws for the protection of the public interest in such areas.

6 For the reasons that follow, the impugned provisions of the COA do not substantially impair the essential characteristics of the Supreme Court of Queensland. That is to say, they have not been shown to transgress constitutional limits.

Procedural background

7 The COA provides for "the making of declarations and orders for the purpose of disrupting and restricting the activities of organisations involved in serious criminal activity, and of their members and associates"[2].

8 On 1 June 2012, the Assistant Commissioner of the Queensland Police Service filed an application in the Supreme Court under s 8 of the COA seeking a declaration under s 10 that the Finks Motorcycle Club, Gold Coast Chapter and Pompano Pty Ltd, said to be "part of" that Chapter (together "the organisation"), constitute a criminal organisation. A list of persons said to constitute the current members of the Gold Coast Chapter was set out in the application together with a list of former members and nominee members, and of the office-bearers and shareholders of Pompano Pty Ltd. The application was supported by 135 affidavits.

9 The application was required by s 8 of the COA to state the grounds upon which the declaration was sought[3] and information supporting those grounds[4]. It was required to be accompanied by any affidavit the applicant intended to rely on at the hearing of the application[5]. The grounds on which the declaration was sought were:

> "a. The organisation consists of a group of more than three people based inside Queensland;

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2 COA, long title. See also the stated objects in s 3(1).

3 COA, s 8(2)(c).

4 COA, s 8(2)(d).

5 COA, s 8(3).

b. The members associate for the purposes of engaging in or conspiring to engage in serious criminal activity as defined in ss 6 and 7 of the *Criminal Organisation Act* 2009;

c. The organisation is an unacceptable risk to the safety, welfare and order of the community."

10 Information supporting the grounds of the application was set out at length. The first part of the information consisted of a list of members, nominee members and former members of the Gold Coast Chapter, each of whom was said to have a criminal history in Queensland and/or other parts of Australia. The next part of the application set out information, under a heading which read:

> "The members associate for the purpose of engaging in or conspiring to engage in serious criminal activity and the Organisation is an unacceptable risk to the safety, welfare and order of the community."

That information consisted of a list of members of the Gold Coast Chapter with details of their criminal convictions. Those convictions were for offences said to have been committed singly or in combination with others.

11 At par 613 of the application, the following statement appeared:

> "Information supporting the grounds of this application is also contained in information which has been declared criminal intelligence."

"Criminal intelligence" is defined in s 59 of the COA:

> "(1) ***Criminal intelligence*** is information relating to actual or suspected criminal activity, whether in the State or elsewhere, the disclosure of which could reasonably be expected to—
>
> (a) prejudice a criminal investigation; or
>
> (b) enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement; or
>
> (c) endanger a person's life or physical safety.
>
> (2) Criminal intelligence may be information that the commissioner has obtained through the police service or from an external agency."

12 Prior to the filing of the application on 1 June 2012, the applicant had applied ex parte to the Supreme Court, under s 63 of the COA, for a declaration, under s 72, that particular information was "criminal intelligence" within the

meaning of s 59. As required by ss 66 and 70 of the COA, the Supreme Court considered that application without notice to the respondents and in a "special closed hearing". A person appointed as a kind of statutory "amicus curiae" under s 83 of the COA and designated as the criminal organisation public interest monitor ("the COPIM") attended at the hearing[6]. That attendance was permitted by s 70 of the COA. The COPIM made submissions. The Supreme Court made the declaration sought. All or part of the information, the subject of the declaration, is relied upon in support of the grounds of the substantive application.

13 The substantive application for a declaration that the respondents are a criminal organisation is pending. Two particular provisions of the COA, in issue in these proceedings, will affect the conduct of that application. They are:

- Section 76, which provides that an informant who has furnished criminal intelligence to a relevant agency cannot be called or otherwise required to give evidence although an affidavit must be filed by an officer of the relevant agency containing specified information about the informant, a statement that the officer believes that the relevant intelligence is reliable, and the reasons for that belief.

- Section 78, which requires that the Supreme Court order that any part of the hearing of the substantive application in which declared criminal intelligence is to be considered is to be a closed hearing to the extent provided under that section, which would exclude the respondents and their legal representatives but not the applicant or the COPIM.

14 The respondents raised contentions about the validity of a number of the provisions of the COA, which have been referred to. On 5 October 2012, so much of the application as concerned the validity of provisions of the COA was removed into this Court pursuant to s 40(1) of the *Judiciary Act* 1903 (Cth) by order of this Court (French CJ and Crennan J)[7].

15 On 26 October 2012, Kiefel J referred for hearing by a Full Court, an agreed Special Case setting out questions for determination by the Court.

The questions in the Special Case

16 The questions in the Special Case are as follows:

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6 The functions of the COPIM are described at [52] of these reasons.

7 [2012] HCATrans 242.

"i. Is s 66 of the *Criminal Organisation Act*, by requiring the Court to hear an application that particular information is criminal intelligence without notice of the application being given to the person or organisation to which the information relates, invalid on the ground that it infringes Chapter III of the *Constitution*?

ii. Is s 70 of the *Criminal Organisation Act*, by requiring the Supreme Court to exclude all persons other than those listed in s 70(2) from the hearing of an application for a declaration that particular information is criminal intelligence, invalid on the ground that it infringes Chapter III of the *Constitution*?

iii. Is s 78 of the *Criminal Organisation Act*, by requiring a closed hearing of any part of the hearing of the substantive application in which the court is to consider declared criminal intelligence, invalid on the ground that it infringes Chapter III of the *Constitution*?

iv. Is s 76 of the *Criminal Organisation Act*, by providing that:

(a) an informant who provides criminal intelligence to an agency may not be called or otherwise required to give evidence;

(b) an originating application and supporting material need not include any identifying information about an informant; and

(c) identifying information can not otherwise be required to be given to the court,

invalid on the ground that it infringes Chapter III of the *Constitution*?

v. Is s 10 of the *Criminal Organisation Act*, insofar as it requires the Court to have regard to information that is declared criminal intelligence which a respondent or a respondent's legal representative has not heard or received because of the effect of ss 66, 70, 76, 77, 78, 82 and 109 of the *Criminal Organisation Act*, and when read with ss 63(5), 64(2), 64(8), 65(4), 71(2) and 80(2), invalid on the ground that it infringes Chapter III of the *Constitution*?

vi. Is s 10(1)(c) of the *Criminal Organisation Act* invalid on the ground that it infringes Chapter III of the *Constitution* because of the nature of the judgment that it requires the Court to make?

vii. Is s 9 of the *Criminal Organisation Act*, when read with s 8(5) and s 106, invalid on the ground that it infringes Chapter III of the *Constitution*?

viii. Who should pay the costs of the special case?"

It is necessary now to have regard to particular features of the COA.

Nature and validity of the power to declare a criminal organisation

17 The power of the Supreme Court to make a declaration that an organisation is a criminal organisation is conferred upon it by s 10(1) of the COA, which provides:

> "The court may make a declaration that the respondent is a criminal organisation if the court is satisfied that—
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> (a) the respondent is an organisation; and
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> (b) members of the organisation associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity[8]; and
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> (c) the organisation is an unacceptable risk to the safety, welfare or order of the community."

The grounds set out in s 10(1) were reproduced, in substance, as the grounds of the application in this case. Information to which the Supreme Court must have regard when considering whether or not to make a declaration is set out in s 10(2). That includes "information" suggesting that a link exists between the organisation and serious criminal activity[9]. It also includes any convictions of current or former members of the organisation[10].

18 The declaration may be made whether or not the respondent is present or makes submissions[11]. It is not necessary that the Supreme Court be satisfied that

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8 "Serious criminal activity" is a term defined by reference to the commission of serious criminal offences in and outside Queensland: COA, s 6. "Serious criminal offences" are indictable offences punishable by imprisonment for at least seven years, offences against the COA and offences against specified sections of the *Criminal Code* (Q) set out in Sched 1 to the COA: COA, s 7.

9 COA, s 10(2)(a)(i).

10 COA, s 10(2)(a)(ii).

11 COA, s 10(3).

all members of the organisation associate for the purposes of engaging in, or conspiring to engage in, serious criminal activity[12]. The Supreme Court may act on the basis of satisfaction that only some of the members associate for the purposes mentioned in s 10(1)(b). A declaration remains in force for five years unless sooner revoked[13].

19 The Supreme Court is empowered to revoke a declaration on an application which may be made by the Commissioner at any time or by the criminal organisation or a member of the criminal organisation at least three years after the declaration is made[14]. No more than two such applications can be made on behalf of the organisation or its members during the first five years after the declaration is made[15]. The only ground upon which a declaration may be revoked under s 13 of the COA is the Supreme Court's satisfaction that there has been a substantial change in the nature or membership of the organisation to the extent that its members no longer associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity and to the extent that the organisation no longer represents an unacceptable risk to the safety, welfare and order of the community[16]. That is not to say that the inherent powers of the Supreme Court to revoke its own orders under certain circumstances are excluded. Those powers are discussed later in these reasons.

20 The respondents challenge the validity of s 10(1)(c), which requires that before the Supreme Court may make a declaration under s 10 it must be satisfied that the organisation the subject of the proposed declaration is "an unacceptable risk to the safety, welfare or order of the community." The challenge to s 10(1)(c) effectively calls into question the validity of s 10.

21 Section 10(1)(c) was said by the respondents to require a policy assessment devoid of adequate legal standards or criteria capable of judicial application to established facts. It thereby lacked a "hallmark of the judicial process". The respondents submitted that the application of the criterion in s 10(1)(c) did not involve the exercise of judicial power. The Supreme Court was being asked to act as an "administrative commission of inquiry" rather than to undertake a judicial function. It would be identified with the Executive Government of the State in a way that was incompatible with its institutional

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12 COA, s 10(4).

13 COA, s 12(1).

14 COA, s 15(1).

15 COA, s 15(2).

16 COA, s 13(9).

integrity as a court upon which federal judicial power could be conferred. That submission should not be accepted and the answer to question (vi), to which it was directed, should be "no".

22 The first point, and there was no submission to the contrary, is that there is no implication to be drawn from Ch III of the Constitution that State courts are subject to the full doctrine of separation of powers[17]. Various attempts to argue in State courts for separation of powers doctrines derived from State Constitutions have failed[18]. The conferral upon the Supreme Court of a State of a non-judicial function is not sufficient to cause the Supreme Court to be identified with the Executive Government of the State. In any event, the power conferred upon the Supreme Court of Queensland by s 10(1) of the COA is a power which, when exercised by a court, can properly be characterised as judicial. The conferring upon a court of such a power is not of itself likely to impair the defining characteristics of the court. That observation does not involve any assumption that State judicial power is defined in the same terms as Commonwealth judicial power or that its scope is larger. That question was not debated[19].

23 The criterion of "unacceptable risk to the safety, welfare or order of the community" prescribed by s 10(1)(c) is evaluative and purposive. It does not leave the Supreme Court free to characterise as "unacceptable" any level of risk

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17 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 65 per Brennan CJ, 79 per Dawson J, 92–94 per Toohey J, 103–104 per Gaudron J, 109–110 per McHugh J; [1996] HCA 24; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 573 [69]; [2010] HCA 1; *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 87 ALJR 162 at 175 [57] per Hayne, Crennan, Kiefel and Bell JJ; 293 ALR 450 at 466; [2012] HCA 58.

18 *Clyne v East* (1967) 68 SR (NSW) 385; *Nicholas v Western Australia* [1972] WAR 168; *Gilbertson v South Australia* (1976) 15 SASR 66; *Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372; *City of Collingwood v Victoria [No 2]* [1994] 1 VR 652; see generally Carney, *The Constitutional Systems of the Australian States and Territories*, (2006) at 344–349.

19 It was argued in *In re Judiciary and Navigation Acts* (1921) 29 CLR 257; [1921] HCA 20 that the advisory opinions jurisdiction invalidly conferred upon this Court involved judicial power but not the judicial power of the Commonwealth. Ultimately the case was resolved by reference to the concept of a matter, see *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 274; [1956] HCA 10; Stellios, "Reconceiving the Separation of Judicial Power", (2011) 22 *Public Law Review* 113 at 117–119.

which it chooses. In applying s 10(1)(c), the Supreme Court will necessarily have regard to the objects of the COA, which include the disruption and restriction of the activities of organisations involved in serious criminal activity[20]. While s 10(1)(b) requires the Supreme Court to consider the present activities of the respondent organisation, s 10(1)(c) is prospective. The Supreme Court in applying it in light of the objects of the COA will assess, as an important if not dominant component of risk, the likelihood that the organisation and its members will be involved in serious criminal activity in the future. The term "unacceptable" has a function similar to that of the term "substantial" in other statutory settings. It imports a requirement that the likelihood of continuing involvement by the organisation in serious criminal activity is not trivial or transient.

24 The criterion in s 10(1)(c) for the exercise of the power conferred by s 10(1) is imprecise but that does not deprive it of the character of judicial power. As the plurality said in *Baker v The Queen*[21]:

> "There are numerous authorities rejecting submissions that the conferral of powers and discretions for exercise by imprecisely expressed criteria do deny the character of judicial power and involve the exercise of authority by recourse to non-legal norms."

The same point was made in *Thomas v Mowbray*[22] about the criterion for the imposition of an interim control order under the *Criminal Code* (Cth), which required a judgment that the order would "substantially assist in preventing a terrorist act"[23]. Broadly stated standards are commonplace in statutes and in the common law and, as Professor Zines observed[24] in a passage quoted in *Thomas*:

> "Given a broad standard, the technique of judicial interpretation is to give it content and more detailed meaning on a case to case basis."

Section 10 is not invalid by reason of s 10(1)(c) and that paragraph is not invalid.

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20 COA, s 3(1).

21 (2004) 223 CLR 513 at 532 [42]; [2004] HCA 45.

22 (2007) 233 CLR 307; [2007] HCA 33.

23 (2007) 233 CLR 307 at 323 [1].

24 Zines, *The High Court and the Constitution*, 4th ed (1997) at 195 cited in *Thomas v Mowbray* (2007) 233 CLR 307 at 351 [91] per Gummow and Crennan JJ; see also at 334 [28] per Gleeson CJ, 507 [595] per Callinan J as to criteria involving risk assessments.

25 In considering the other questions in the Special Case, it is necessary to have regard to what is at stake for the respondents. A declaration that an organisation is a criminal organisation does not have any coercive operation. However, such a declaration, if made, would have significant legal consequences for the organisation and its members.

Legal consequences of a criminal organisation declaration

26 A declaration that an organisation is a criminal organisation enlivens or informs the exercise of powers conferred on the Supreme Court to make coercive orders under the COA and in particular control orders, public safety orders and fortification removal orders. An outline of the nature of those orders and their connection to a criminal organisation declaration under s 10 follows.

27 Part 3 of the COA provides for control orders. The Commissioner may apply for a control order against a person under s 16. The Supreme Court may make such an order if it is satisfied that the respondent in relation to whom the application is made[25]:

> "(a) is, or has been, a member of a criminal organisation; and
>
> (b) engages in, or has engaged in, serious criminal activity; and
>
> (c) associates with any person for the purpose of engaging in, or conspiring to engage in, serious criminal activity."

Alternatively, the Supreme Court can make a control order against a person who is not a member of a criminal organisation but engages in, or has engaged in, serious criminal activity and associates with any member of a criminal organisation for the purpose of engaging in, or conspiring to engage in, serious criminal activity[26]. The content of the control order is found in the conditions imposed on the respondent by the Supreme Court pursuant to s 19 including, as a mandatory condition, a prohibition on the respondent from associating with any person who is a member of a criminal organisation[27]. On its face, s 19, read with s 10, has the effect that the content of that prohibition, effected by a control order, expands whenever another organisation is declared to be a criminal organisation.

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25 COA, s 18(1).

26 COA, s 18(2).

27 COA, s 19(5)(a).

28 Part 4 of the COA provides for the Supreme Court to make a public safety order for a person or a group of persons if satisfied that their presence at premises or an event, or within an area, poses a serious risk to public safety or security and that making the order is appropriate in the circumstances[28]. A mandatory relevant consideration is whether the respondent is or has been a member of a criminal organisation, or associates, or has associated, with a member of a criminal organisation[29]. A public safety order may prohibit the respondent from entering or remaining in stated premises or in a stated area or attending or remaining at a stated event[30].

29 Part 5 of the COA provides for fortification removal orders. The respondent to an application for such an order must be a person or organisation who is, alone or with others, an occupier of the fortified premises[31]. One of the criteria enlivening the discretion of the Supreme Court to make a fortification removal order is that the fortified premises are owned or habitually occupied or used by a criminal organisation or a member, prospective member, or an associate of a criminal organisation[32].

30 A declaration under s 10 provides a foundation for orders to be made under the COA which significantly affect the common law freedoms of individuals and the interests of the organisation to which the declaration applies. In the ordinary course procedural fairness would require that the organisation be given the opportunity to know and be able to answer all the allegations and evidence and submissions which are put forward to support such a declaration[33]. Nevertheless, in respect of evidence declared by the Supreme Court to be "criminal intelligence", the COA diminishes the procedural protections ordinarily

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28 COA, s 28(1).

29 COA, s 28(2)(b).

30 COA, s 29(2).

31 COA, s 41(2).

32 COA, s 43(1)(b)(ii).

33 *Kioa v West* (1985) 159 CLR 550 at 629 per Brennan J; see also at 569 per Gibbs CJ, 582 per Mason J, 602 per Wilson J, 633 per Deane J; [1985] HCA 81; *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ; [1990] HCA 57. See also *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 61 [51] per McHugh, Gummow and Hayne JJ; [2005] HCA 50; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 258 [11]; [2010] HCA 23.

attendant upon the reception of evidence[34]. The COA mandates an ex parte application and a special closed hearing to determine whether information should be declared criminal intelligence and closed hearings excluding respondent organisations where criminal intelligence is subsequently tendered.

The criminal intelligence application

31 The objects of Pt 6 of the COA, which provides for criminal intelligence declarations, are set out in s 60. They are to:

> "(a) allow evidence that is or contains criminal intelligence to be admitted in applications under this Act without the evidence—
>
> (i) prejudicing criminal investigations; or
>
> (ii) enabling the discovery of the existence or identity of confidential sources of information relevant to law enforcement; or
>
> (iii) endangering anyone's life or physical safety; and
>
> (b) prohibit the unlawful disclosure of particular criminal intelligence."

32 The definition of "criminal intelligence" has been set out earlier. The COA provides for the Commissioner to apply to the Supreme Court for a declaration that particular information is criminal intelligence[35]. The Supreme Court may make such a declaration if so satisfied[36]. That power is discretionary. In exercising that discretion the Supreme Court may have regard to whether the possible adverse outcomes of disclosure of the evidence mentioned in s 60(a) outweigh any unfairness to a respondent[37]. Section 66 requires that application for a declaration that information is criminal intelligence be made without notice to any person or organisation to which the information relates. Section 70 requires that the application be heard in a closed court. The validity of ss 66 and 70 is the subject of questions (i) and (ii) in the Special Case.

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34 A diminution which was described in the Explanatory Notes to the Criminal Organisation Bill 2009 as a "necessary abrogation of natural justice": Queensland, Legislative Assembly, Criminal Organisation Bill 2009, Explanatory Notes at 3.

35 COA, s 63(1).

36 COA, s 72(1).

37 COA, s 72(2).

33 The Supreme Court must order that any part of the hearing of a substantive application under the COA in which declared criminal intelligence is to be considered, must be a closed hearing to the extent provided by s 78 of the COA[38]. The validity of ss 78 and 76, which respectively put in place procedures to protect such information and the identities of informants providing it, is challenged in questions (iii) and (iv) in the Special Case. The validity of s 10 is challenged in question (v) insofar as it may be taken to require the Court to have regard to declared criminal intelligence in deciding whether or not to make a declaration that an organisation is a criminal organisation.

34 The respondents put a rather tangential argument that the provisions of the COA relating to criminal intelligence would allow material which is not admissible evidence to be put before the Supreme Court in a substantive application under the COA. However, as appears below and subject to one qualification, the rules of evidence are generally applicable in substantive proceedings under the COA.

Application of the rules of evidence

35 In support of their argument that the COA abrogated the rules of evidence, the respondents pointed to s 10(2), which requires the Supreme Court, in an application for a criminal organisation declaration, to have regard to certain "information" before the Supreme Court[39] and "anything else the court considers relevant."[40] The submission appeared to be linked to question (v) in the Special Case although the focus of that question is upon the requirement, said to flow from s 10(2), that the Supreme Court have regard to declared criminal intelligence which neither the respondents nor the respondents' legal representative would have heard or received. The applicant submitted that the rules of evidence apply on the hearing of such an application.

36 The reference in s 10(2) to "information" to which the Supreme Court must have regard is to be read in the light of ss 8(3) and 107(1) of the COA. Section 8(3) requires that an application for a criminal organisation declaration be accompanied by "any affidavit the commissioner intends to rely on at the hearing of the application." Section 107(1) requires that an affidavit relied on in an application under the COA "may only contain a matter if direct oral evidence of the matter would be admissible." That requirement is qualified in one respect by s 107(2). An affidavit authorised under s 61 that has been admitted in evidence in an application for a criminal intelligence declaration "may also be

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38 COA, s 78(1).

39 COA, s 10(2)(a).

40 COA, s 10(2)(b).

admitted in evidence in the proceedings for the substantive application." Section 61 provides that an affidavit relied upon by the Commissioner in an application for a criminal intelligence declaration may contain statements based on information and belief if the deponent states the sources of the information and the grounds for the belief. The section removes a bar to admissibility that would otherwise exist by reason of the hearsay nature of such evidence. It does not overcome the requirement that the evidence be relevant. It does not require the Supreme Court to admit such an affidavit. Indeed, the leave of the Supreme Court would be required before the Commissioner could rely upon such an affidavit. That requirement is imposed by r 395 of the Uniform Civil Procedure Rules 1999 (Q) ("the UCPR"), which apply in relation to applications made to the Supreme Court under the COA to the extent that they are consistent with the COA[41].

37 Rule 395 of the UCPR allows a party in a proceeding before the Supreme Court, with the leave of the Court, to rely on evidence given or an affidavit filed in another proceeding or at an earlier stage of the same proceeding. Nothing in the COA excludes the application of that rule. The leave requirement imposed by r 395 is, on its face, applicable to the use, in a criminal organisation declaration application, of an affidavit used in a criminal intelligence declaration application. Section 107(2) does not overcome that requirement, dealing as it does only with the admissibility of such affidavits where they contain hearsay evidence. The Supreme Court, when hearing an application for a criminal organisation declaration, may have regard to the probative value of the hearsay material contained in such an affidavit and the unfairness, if any, worked by admitting it. Even if such an affidavit were admitted the Supreme Court would still have to determine what, if any, weight was to be given to it.

38 The objects of Pt 6 of the COA, relating to criminal intelligence, are stated in s 60 in terms of the admission of "evidence" in applications under the COA. The COA does not, as a general proposition, displace the operation of the rules of evidence in an application for a declaration that an organisation is a criminal organisation. Nor should it be taken, in the absence of clear words, to displace the inherent powers of the Supreme Court.

The inherent powers and the UCPR

39 The *Supreme Court Constitution Amendment Act* 1861 (Q) established the Supreme Court of Queensland as "a Court of Civil and Criminal Jurisdiction which Court shall be a Court of Record." The *Supreme Court Act* 1863 (Q) ("the 1863 Act") declared that the Court had all the jurisdiction formerly exercised by the Supreme Court of New South Wales within the territory of the Colony of

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41 COA, s 101.

Queensland. The 1863 Act was replaced by the *Supreme Court Act* 1867 (Q) which, by s 21, provided that the Supreme Court would "have the same jurisdiction power and authority as the Superior Courts of Common Law and the High Court of Chancery in England". That jurisdiction and those powers continue[42]. In addition, the *Constitution of Queensland* 2001 (Q) provides that the Supreme Court is "the superior court of record in Queensland and the supreme court of general jurisdiction in and for the State"[43]. It has "all jurisdiction necessary for the administration of justice in Queensland"[44] and, subject to the Commonwealth Constitution, has "unlimited jurisdiction at law, in equity and otherwise."[45]

40 The jurisdiction of the Supreme Court defined by the *Supreme Court of Queensland Act* 1991 (Q) and the *Constitution of Queensland* incorporates, by reference, the inherent jurisdiction of the Courts of Common Law and Chancery, which is "the inherent power necessary to the effective exercise of the jurisdiction granted."[46] That is not to say that statutory incorporation of those powers was necessary. Menzies J observed in *R v Forbes; Ex parte Bevan*[47] that the inherent jurisdiction is "the power which a court has simply because it is a court of a particular description."[48] Dawson J, who reproduced that description

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42 The jurisdiction and powers are continued by operation of s 11(1) of the *Supreme Court of Queensland Act* 1991 (Q). That Act was amended by s 181 of the *Civil Proceedings Act* 2011 (Q) following the repeal of the *Supreme Court Act* 1995 (Q) by s 211 of the 2011 Act. Section 11(1) of the 1991 Act provides that the Supreme Court "retains all the jurisdiction and power that may have been derived from the 1995 Act or any of the Acts referred to in the 1995 Act."

43 *Constitution of Queensland* 2001 (Q), s 58(2)(a).

44 *Constitution of Queensland* 2001 (Q), s 58(1).

45 *Constitution of Queensland* 2001 (Q), s 58(2)(b).

46 *Keramianakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268 at 280 [36]; [2009] HCA 18.

47 (1972) 127 CLR 1; [1972] HCA 34.

48 (1972) 127 CLR 1 at 7.

in *Grassby v The Queen*[49], acknowledged the "elusive" character of inherent jurisdiction, but said[50]:

> "it is undoubtedly the general responsibility of a superior court of unlimited jurisdiction for the administration of justice which gives rise to its inherent power. In the discharge of that responsibility it exercises the full plenitude of judicial power."

His Honour observed of the Supreme Court of New South Wales, in terms applicable to the Supreme Court of Queensland[51]:

> "Although conferred by statute, its powers are identified by reference to the unlimited powers of the courts at Westminster."

41 The inherent jurisdiction of superior courts of record was described in Master Jacob's frequently cited Hamlyn lecture on the topic as something which flows from the essential character of such courts[52]:

> "the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute."

Another explanation proffered in another influential article is that "inherent powers arise at common law when they are necessary if the court or tribunal in question is to be able to manage its activities appropriately."[53]

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49 (1989) 168 CLR 1; [1989] HCA 45.

50 (1989) 168 CLR 1 at 16, Mason CJ and Brennan J agreeing at 4, Toohey J agreeing at 21, Deane J relevantly agreeing at 5. The same passage was approved in *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 451 [50] per Gaudron, Gummow and Callinan JJ; [1999] HCA 19.

51 (1989) 168 CLR 1 at 16.

52 Jacob, "The Inherent Jurisdiction of the Court", (1970) 23 *Current Legal Problems* 23 at 27, cited by the Supreme Court of Canada in *MacMillan Bloedel Ltd v Simpson* [1995] 4 SCR 725 at 749–750 [30] per Lamer CJ. See also *Whan v McConaghy* (1984) 153 CLR 631 at 642 per Brennan J; [1984] HCA 22; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 476 per McHugh JA; *R v Moke* [1996] 1 NZLR 263 at 267.

42 The extent, if any, to which the inherent powers of the Supreme Courts of the States are protected from statutory derogation by Ch III of the Constitution, was not in issue in these proceedings[54]. However, the nature and purpose of those powers indicate that they are not, as a rule, displaced or abrogated by general words in a statute nor by statutory provisions or rules which overlap with them. Rich J said in *Cameron v Cole*[55]:

> "in the absence of clear words, a statute should not be treated as depriving a court of the inherent jurisdiction possessed by every court to ensure that trials before it are conducted in accordance with the principles of natural justice."

Early in the life of this Court Griffith CJ remarked that[56]:

> "Rules and forms of procedure are not ends in themselves, but means to an end, which is the attainment of justice."

It follows from that uncontroversial proposition, as Mr Keith Mason observed in an article on the topic of inherent jurisdiction in the *Australian Law Journal*[57]:

> "that the mere fact that a statute or rule of court addresses itself in a particular way to a particular matter does not usually exclude by implication a superior court's wider inherent powers relating to that matter if they are appropriate."

43 The inherent powers relevant to these proceedings include the power of the Supreme Court to prevent abuse of its processes by revoking an ex parte order against a party when the party seeking the order has failed to discharge its

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53 Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings", (1997) 113 *Law Quarterly Review* 120 at 127.

54 See Lacey, "Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the Constitution", (2003) 31 *Federal Law Review* 57; Beck, "What is a 'Supreme Court of a State'?", (2012) 34 *Sydney Law Review* 295; see also *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 296–298 [124]–[135] per Kirby J; [2006] HCA 27.

55 (1944) 68 CLR 571 at 589; [1944] HCA 5.

56 *Union Bank of Australia v Harrison, Jones & Devlin Ltd* (1910) 11 CLR 492 at 504; [1910] HCA 44.

57 Mason, "The Inherent Jurisdiction of the Court", (1983) 57 *Australian Law Journal* 449 at 457; see also authorities there cited.

obligation of full disclosure[58]. It was not in dispute that if, in the course of a substantive application under the COA in which reliance was placed upon criminal intelligence, it emerged that there had not been full disclosure by the applicant, the Supreme Court could revoke its ex parte declaration.

44 The question whether a court has inherent power to call witnesses of its own motion without the consent of the parties in civil and criminal cases has been the subject of consideration in a number of decisions of this Court and other Australian courts. The existence of the power has fallen for consideration in the framework of the adversary or accusatorial system of justice. The essential feature of that system was described in the 8th Australian edition of *Cross on Evidence* as[59]:

> "the questioning of witnesses by the parties or their representatives, summoned for the most part by them, and called mainly in the order of their choice before a judge acting as umpire rather than as inquisitor."

It is not necessary to explore decisions on the question or the current position in civil and criminal cases[60]. Where, however, a statute requires the Supreme Court to undertake an ex parte inquisitorial process, the Supreme Court, unless and to the extent precluded by the statute[61], will retain its inherent power to control that process in order to avoid its abuse and to avoid injustice. That power will extend to the calling of a witness or witnesses necessary to ensure that so far as practicable the Supreme Court is not acting upon information which is incomplete in some important respect.

45 In any event, r 391 of the UCPR provides that the Supreme Court may "by order and on its own initiative, call a person before it as a witness in a

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58 As to the obligation of full disclosure see *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679 at 681–682 per Isaacs J; [1912] HCA 72.

59 *Cross on Evidence*, 8th Aust ed (2010) at [17070].

60 See *Titheradge v The King* (1917) 24 CLR 107; [1917] HCA 76; *Shaw v The Queen* (1952) 85 CLR 365 at 379 per Dixon, McTiernan, Webb and Kitto JJ; [1952] HCA 18; *R v Apostilides* (1984) 154 CLR 563 at 575 per Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ; [1984] HCA 38; *R v Soma* (2003) 212 CLR 299 at 309 [29] per Gleeson CJ, Gummow, Kirby and Hayne JJ; [2003] HCA 13. See generally Sheppard, "Court Witnesses—A Desirable or Undesirable Encroachment on the Adversary System?", (1982) 56 *Australian Law Journal* 234.

61 Whether such a preclusion gives rise to a question of validity is not considered in these reasons.

proceeding."[62] The Supreme Court may give directions about the examination, cross-examination and re-examination of such a witness[63]. There is nothing in the COA to exclude the exercise of the application of that rule in the special closed hearings and closed hearings for which the COA provides. As noted earlier, the UCPR apply to applications in the Supreme Court under the COA to the extent that they are consistent with it[64]. The subsistence of the inherent and rules-based powers is relevant to the question whether the impugned provisions of the COA impair the defining and essential characteristics of the Supreme Court. That question must be answered by considering those provisions in the common law and statutory context in which they operate.

46 An aspect of the inherent jurisdiction relevant, in a different way, to the constitutional question is the group of powers that courts have to order that all or part of a case be heard in camera, to prohibit publication of part of the proceedings, and to privately inspect documents the subject of a claim for public interest immunity[65]. The existence of that group of inherent powers suggests that statutory analogues will not readily be regarded as impairing the defining or essential characteristics of the courts to which those analogues apply. The provisions of the COA relating to an application for a criminal intelligence declaration are analogous to those common law powers.

47 A requirement for special closed hearings in which evidence can be received in the absence of a party and its representatives travels beyond the procedures developed for determining public interest immunity claims at common law in the exercise of inherent powers. A majority of the Supreme Court of the United Kingdom in *Al Rawi v Security Service*[66] found such a requirement proposed by a trial court, coupled with a direction for the appointment of a special advocate, to be a bridge too far. A trial court (in the exercise of civil jurisdiction) was held not to have inherent power to direct a closed material procedure in which evidence relevant to the claim, but involving national security concerns, would be tendered by the defendant government party

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62 UCPR, r 391(1).

63 UCPR, r 391(2).

64 COA, s 101.

65 *Sankey v Whitlam* (1978) 142 CLR 1 at 43 per Gibbs ACJ, 63–64 per Stephen J, 98–99 per Mason J; [1978] HCA 43; *The Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 616–617 per Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ; [1993] HCA 24; *Hogan v Hinch* (2011) 243 CLR 506 at 541–542 [46] per French CJ; [2011] HCA 4.

66 [2012] 1 AC 531.

to the court in the absence of the plaintiffs. Lord Dyson observed that the inherent power of the courts had underpinned the development of procedural innovations such as Mareva injunctions, Anton Piller orders and the mechanism for determining public interest immunity claims. However, subject to established and limited exceptions, those powers could not be used by a court[67]:

> "to regulate its own procedures in such a way as will deny parties their fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice."

48 The respondents cited *Al Rawi* in support of the proposition that the task undertaken by the Supreme Court under the COA does not involve the exercise of judicial power because the process applied is not recognisable as a traditional judicial process and the risk assessment which the Supreme Court is required to undertake is an executive rather than judicial function. For the reasons already given, the last mentioned submission cannot be accepted.

49 Nor does *Al Rawi* provide an answer to the constitutional questions raised in the Special Case. It is not necessary to decide whether the Supreme Courts of the States and Territories have an inherent power to direct a closed material procedure of the kind considered in that case. Consideration of that question may involve consideration of the constitutional relationships between the courts of the States and the State Parliaments in a context materially different from that applicable in *Al Rawi.* No party to these proceedings suggested that they do. No party pointed to anything in the inherent powers which could be regarded as an analogue of the special closed hearing procedure for which the COA provides in relation to the receipt of criminal intelligence in substantive applications. However, the absence of such an analogue does not determine the constitutional questions about the statutory procedure.

50 The proposed closed material procedure rejected by the Supreme Court in *Al Rawi* involved the appointment of a special advocate to represent the interests of absent plaintiffs. The COA provides an imperfect analogue to that office in the form of the COPIM, which is considered next.

The COPIM

51 The office of the COPIM is created by Pt 7 of the COA. The role of the COPIM was described in the Explanatory Notes to the Criminal Organisation

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67 [2012] 1 AC 531 at 575 [22].

Bill as "in the nature of *amicus curiae*" who would "assist the court in making a decision as an independent and impartial tribunal."[68]

52 The functions of the COPIM as set out in s 86 of the COA are to "monitor" applications to the Supreme Court for a criminal organisation order or for its variation or revocation[69], to monitor each criminal intelligence application[70] and "to test, and make submissions to the court about, the appropriateness and validity of the monitored application."[71] At any hearing for an application at which the COPIM appears, the applicant is required to furnish the COPIM, as soon as reasonably practicable, with "all material given by the applicant to the court."[72] That obligation does not extend to material disclosing any identifying information about an informant[73]. The COPIM is obliged to keep the material secure and return it to the applicant[74]. The COPIM is entitled to access to a record or transcript of a record of a hearing at which the COPIM appears[75]. At a hearing the COPIM may, for the purpose of testing the appropriateness and validity of the application, "present questions for the applicant to answer"[76], "examine or cross-examine a witness"[77] and make submissions to the Supreme Court about the appropriateness of granting the application[78]. The COPIM is not permitted to make a submission while a respondent or legal representative of a respondent is present[79] and may be excluded from the hearing, in the Supreme Court's discretion, while a respondent

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68 Queensland, Legislative Assembly, Criminal Organisation Bill 2009, Explanatory Notes at 3.

69 COA, s 86(a).

70 COA, s 86(b).

71 COA, s 86(c).

72 COA, s 88(1).

73 COA, s 88(2).

74 COA, s 88(4).

75 COA, s 88(5).

76 COA, s 89(2)(a)(i).

77 COA, s 89(2)(a)(ii).

78 COA, s 89(2)(b).

79 COA, s 89(3).

or a legal representative of a respondent is present[80]. There is no express prohibition upon communication between the respondent's legal representative and the COPIM to better inform the COPIM for the purpose of the discharge of his or her functions in proceedings under the COA which affect the interests of the respondent.

53 There are prohibitions affecting the ability of a lawyer appointed as COPIM to act for organisations or individuals who are or have been respondents to applications under the COA, in proceedings in which the COPIM obtained criminal intelligence about the organisation or the individual[81]. The COPIM must prepare an annual report to the Minister about the performance of the COPIM's functions under the COA[82]. The COPIM's performance is subject to review by a parliamentary committee which also has the function of examining each annual report[83].

54 As appears from the above, the COPIM does not act as an advocate for the interests of any respondent to applications in which the COPIM may be required to appear. The position of the COPIM resembles, to a very limited extent, that of the specially appointed advocates used in some jurisdictions in which closed ex parte hearings are held by courts or tribunals under statutory authority to consider material, the disclosure of which might prejudice national security, criminal investigations, or the identity and safety of informants, or otherwise be contrary to the public interest.

Closed ex parte hearings and special advocates

55 Statutory mechanisms, providing for closed ex parte hearings and specially appointed advocates, have been applied to courts and tribunals in the United Kingdom and Canada and have been considered by the European Court of Human Rights ("the European Court"). Examples of legislation containing such provisions were submitted to the Court by the Commonwealth. Reference to judicial consideration of those mechanisms may bear upon the normative question of whether the provisions in the COA for closed ex parte hearings, coupled with the use of the COPIM, constitutes an impermissible departure from the defining characteristics of the Supreme Court. It is, however, necessary in referring to those examples and judgments of other courts about them to do so

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80 COA, s 89(4).

81 COA, s 90.

82 COA, s 92.

83 COA, s 91(1).

with caution having regard to their different constitutional and statutory settings[84].

56 In Canada in the 1980s special advocates were appointed administratively by the Security Intelligence Review Committee ("the SIRC"), a statutory body which reviewed deportation orders made on national security grounds[85]. The history of the SIRC is set out in the judgment of McLachlin CJ in *Charkaoui v Canada (Citizenship and Immigration)*[86]. The non-citizen applying for review would be represented by the special advocate during parts of a hearing from which the non-citizen was excluded because evidence said to be confidential for national security reasons was being tendered. At the conclusion of the closed hearing the non-citizen would be readmitted and be provided with a summary setting out the gist of the evidence without disclosing sensitive material. The SIRC procedure was given glancing endorsement by the European Court in *Chahal v United Kingdom*[87]. The Court commented that[88]:

> "This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice." (footnote omitted)

57 As a result of the *Chahal* decision, the Special Immigration Appeals Commission ("the SIAC") was established in the United Kingdom as a superior court of record[89]. Its jurisdiction covered appeals against adverse immigration decisions involving national security issues. The Lord Chancellor was authorised to make rules enabling proceedings before the SIAC to take place in the absence

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84 The transnational migration and mutations of the special advocate concept are discussed in Jenkins, "There and Back Again: The Strange Journey of Special Advocates and Comparative Law Methodology", (2011) 42 *Columbia Human Rights Law Review* 279.

85 *Immigration Act* 1985, RSC 1985, c I-2, s 39.

86 [2007] 1 SCR 350 at 392–395 [71]–[75].

87 (1996) 23 EHRR 413.

88 (1996) 23 EHRR 413 at 469 [131]. The Court held that an administrative process for appeals from immigration decisions using a ministerial advisory panel with no right of representation did not comply with Art 5(4) of the European Convention on Human Rights.

89 *Special Immigration Appeals Commission Act* 1997 (UK), ss 1(1), 1(3).

of the appellant and the appellant's legal representatives[90]. The legislation also provided for the appointment of a person to represent the interests of the appellant in such proceedings[91]. The person so appointed was "not ... responsible" to those whom he or she was appointed to represent[92]. Appeals lay to the Court of Appeal on questions of law[93]. A number of statutes providing for closed ex parte hearings and the use of special advocates have been enacted in the United Kingdom[94].

58 Both Canada and the United Kingdom have enacted statutes providing for the detention of persons on national security grounds but denying full disclosure of those grounds to the persons detained. In cases concerning the consistency of those provisions with human rights guarantees of a fair trial, the presence of a special advocate has been accorded some significance.

59 *Charkaoui*[95] involved a challenge, based on s 7 of the Canadian Charter of Rights and Freedoms[96], to provisions of the *Immigration and Refugee Protection Act* ("the IRPA")[97]. The IRPA provided for a ministerial certificate authorising the detention of foreign nationals or permanent residents on national security grounds. The Act provided a procedure for judicial review of the certificate but

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90 *Special Immigration Appeals Commission Act* 1997 (UK), s 5(3)(b).

91 *Special Immigration Appeals Commission Act* 1997 (UK), s 6(1).

92 *Special Immigration Appeals Commission Act* 1997 (UK), s 6(4).

93 *Special Immigration Appeals Commission Act* 1997 (UK), s 7. In the Court of Appeal in *Al Rawi v Security Service* the Master of the Rolls assumed that the Court of Appeal would have the same power to adopt the closed hearing and special advocate procedure as the SIAC had: [2012] 1 AC 531 at 552 [59] per Lord Neuberger MR.

94 Examples are cited in *R v H* [2004] 2 AC 134 at 149–150 [21] per Lord Bingham.

95 [2007] 1 SCR 350.

96 Section 7 of the Canadian Charter of Rights and Freedoms states:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

97 SC 2001, c 27.

required the judge to hear the application in a closed court in the absence of the applicant. The Chief Justice, in delivering the judgment of the Court, said[98]:

> "the secrecy required by the scheme denies the named person the opportunity to know the case put against him or her, and hence to challenge the government's case. This, in turn, undermines the judge's ability to come to a decision based on all the relevant facts and law."

60 The Court held that the procedure infringed s 7 of the Charter and could not be justified under s 1 of the Charter. In so concluding, the Court referred to "less intrusive alternatives" and, in particular, the use of special advocates by the SIRC and in the operation of the SIAC in the United Kingdom. The Chief Justice adopted an observation in an academic article that[99]:

> "special advocates constitute one example of an approach that is a more proportionate response to reconciling the need to keep some information secret and the need to ensure as much fairness and adversarial challenge as possible."

61 Whether closed ex parte hearings and specially appointed advocates were compatible with the right to a fair hearing under Art 6(1) of the European Convention on Human Rights was considered by the House of Lords in *Home Secretary v MB*[100]. The case concerned provisions of the *Prevention of Terrorism Act* 2005 (UK) under which the Secretary of State could apply to a court to make control orders against persons suspected of involvement in terrorist activity. Rules made under the Act provided for non-disclosure of material upon which applications for such orders were based. Accepting that specially appointed advocates could help to enhance the measure of procedural justice available under such a system, Lord Bingham quoted Lord Woolf CJ's observation in *R (Roberts) v Parole Board*[101] that[102]:

> "The use of [a specially appointed advocate] is ... never a panacea for the grave disadvantages of a person affected not being aware of the case against him."

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98 [2007] 1 SCR 350 at 390 [65].

99 [2007] 1 SCR 350 at 398 [82] citing Roach, "Ten Ways to Improve Canadian Anti-Terrorism Law", (2006) 51 *Criminal Law Quarterly* 102 at 120.

100 [2008] AC 440.

101 [2005] 2 AC 738 at 776 [60].

102 [2008] AC 440 at 479–480 [35].

A majority of the House concluded that there was no rigid principle that closed hearings coupled with special advocates would invariably breach the right to a fair hearing. It was necessary in each individual case to consider whether the party excluded from the hearing had been offered "a substantial measure of procedural justice"[103].

62 *Charkaoui* and *MB* were decided in 2007. In 2009, the European Court considered the use of closed hearings and special advocates in *A v United Kingdom*[104]. It made reference to the two decisions of the Supreme Court of Canada and the House of Lords. This was the first case in which the Court was required to consider whether the use of special advocates to counter-balance procedural unfairness caused by lack of full disclosure in national security cases was compatible with Art 6. The Court unanimously declined to endorse the approach taken in *MB*, holding that an irreducible minimum of disclosure was necessary to satisfy the requirements of a fair trial. The special advocate would not overcome the unfairness caused by lack of full disclosure unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate[105].

63 As a result of the decision of the European Court in *A*, the use of special advocates in closed hearings was reconsidered by the House of Lords in *Home Secretary v AF (No 3)*[106]. Their Lordships accepted the approach taken by the European Court. Lord Phillips, who delivered the leading judgment, acknowledged that the European Court[107]:

> "has now made clear that non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him, at least where he is at risk of consequences as severe as those normally imposed under a control order."

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103 A term derived from *Chahal v United Kingdom* (1996) 23 EHRR 413 at 469 [131] and invoked in *Home Secretary v MB* [2008] AC 440 at 481–482 [41] per Lord Bingham, 488–489 [66] per Baroness Hale, 493–494 [81] per Lord Carswell, 497–498 [90] per Lord Brown.

104 (2009) 49 EHRR 29.

105 (2009) 49 EHRR 29 at 720 [220].

106 [2010] 2 AC 269.

107 [2010] 2 AC 269 at 356 [65].

However, in *Tariq v Home Office*[108] the Supreme Court of the United Kingdom held that a closed material procedure with special advocates, used in employment tribunals to deal with evidence involving national security, was in principle compatible with Art 6 of the European Convention. Moreover, it was not necessary, under Art 6, for a person to be provided with sufficient information about the allegations against him or her to enable the person to give effective instructions to a legal representative or to a special advocate[109]. A distinction was drawn between cases involving the liberty of the subject and those which do not. In the former case[110]:

> "If the special advocate is unable to perform his function in any useful way unless the detainee is provided with sufficient information about the allegations to enable him to give effective instructions to the special advocate, then there must be disclosure to the detainee of the gist of that information".

64 There is an overlap between the question in these proceedings whether a closed material procedure impairs a defining characteristic of the court utilising it and the question agitated in the European Court and the House of Lords and the Supreme Court of the United Kingdom whether such a procedure is consistent with a fair hearing under Art 6. The greater the degree of procedural unfairness and of curial secrecy which is mandated by a statute, the greater the risk that the statute will impair defining characteristics of the court required to implement that unfairness and secrecy.

65 The impugned provisions of the COA involve the use of the COPIM whenever the Supreme Court of Queensland is required to conduct closed ex parte hearings. While the provisions of the COA relating to the COPIM adopt a fairly minimalist approach to the protection of the respondent's interests, compared to the special advocate provisions mentioned in the preceding examples, they are relevant to the effect of the impugned provisions of the COA on the ability of the Supreme Court to provide procedural fairness.

The issues

66 The following issues emerged from the questions in the Special Case:

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108 [2012] 1 AC 452.

109 [2012] 1 AC 452 at 500 [69] per Lord Mance, 507 [83] per Lord Hope, 507–508 [85] per Lord Brown, 523 [137] per Lord Kerr, 523 [138] per Lord Dyson.

110 [2012] 1 AC 452 at 524 [143] per Lord Dyson.

1. The effects of the COA, on the defining characteristics of the Supreme Court, insofar as it requires that an application for a declaration of criminal intelligence be heard ex parte in a closed court, the use of declared criminal intelligence in a closed court in substantive proceedings coupled with the exclusion of the respondent in that part of the proceedings, and the non-identification and non-compellability of informants providing such intelligence (questions (i) to (v)).

2. The nature of the function conferred on the Supreme Court in determining whether to make a criminal organisation declaration and whether that function is compatible with its institutional integrity (question (vi)).

3. The effect on procedural fairness of the limited time within which a respondent is required to file a reply to an application for a criminal organisation declaration (question (vii)).

The applicable principles

67 The respondents invoke the general principle, established in decisions of this Court, that a State legislature cannot confer upon a court of a State a function which impairs its institutional integrity and which is therefore incompatible with the role of that court as a repository of federal jurisdiction[111]. The "institutional integrity" of a court is said to be distorted if it no longer exhibits in some relevant aspect the defining characteristics which mark a court apart from other decision-making bodies[112]. The defining characteristics of courts include[113]:

- the reality and appearance of decisional independence and impartiality[114];

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111 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 96 per Toohey J, 106 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; [2004] HCA 46.

112 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63]–[64] per Gummow, Hayne and Crennan JJ; [2006] HCA 44; *Wainohu v New South Wales* (2011) 243 CLR 181 at 208–209 [44] per French CJ and Kiefel J; [2011] HCA 24.

113 *Wainohu v New South Wales* (2011) 243 CLR 181 at 208–209 [44] per French CJ and Kiefel J and authorities there cited.

114 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 343 [3] per Gleeson CJ, McHugh, Gummow and Hayne JJ, 373 [116] per Kirby J; [2000] HCA 63; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 152 [3] per Gleeson CJ, 163 [29] per McHugh, Gummow, Kirby, Hayne,

(Footnote continues on next page)

- the application of procedural fairness;
- adherence as a general rule to the open court principle[115];
- the provision of reasons for the courts' decisions[116].

Those characteristics are not exhaustive. As Gummow, Hayne and Crennan JJ said in *Forge v Australian Securities and Investments Commission*[117]:

> "It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. The cases concerning identification of judicial power reveal why that is so."

68 The defining or essential characteristics of courts are not attributes plucked from a platonic universe of ideal forms. They are used to describe limits, deriving from Ch III of the Constitution, upon the functions which legislatures may confer upon State courts and the commands to which they may subject them. Those limits are rooted in the text and structure of the Constitution informed by the common law, which carries with it historically developed concepts of courts and the judicial function. Historically evolved as they are and requiring application in the real world, the defining characteristics of courts are not and cannot be absolutes. Decisional independence operates within the framework of the rule of law and not outside it[118]. Procedural fairness, manifested in the requirements that the court be and appear to be impartial and that parties be heard by the court, is defined by practical judgments about its content and application which may vary according to the circumstances. Both the open court principle and the hearing rule may be qualified by public interest

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Callinan and Heydon JJ; [2004] HCA 31; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 77 [66] per Gummow, Hayne and Crennan JJ; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [10] per Gummow, Hayne, Heydon and Kiefel JJ; [2008] HCA 4.

115 *Dickason v Dickason* (1913) 17 CLR 50; [1913] HCA 77; *Russell v Russell* (1976) 134 CLR 495 at 520 per Gibbs J; [1976] HCA 23; *Scott v Scott* [1913] AC 417.

116 *Wainohu v New South Wales* (2011) 243 CLR 181 at 213–215 [54]–[56] per French CJ and Kiefel J and authorities there cited.

117 (2006) 228 CLR 45 at 76 [64].

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

considerations such as the protection of sensitive information and the identities of vulnerable witnesses, including informants in criminal matters.

69 As is the case in other common law jurisdictions, the common law and statute law of Australia provide examples of circumstances in which the open court principle and the hearing rule have been qualified or partially abrogated. Gibbs J in *Russell v Russell*[119] acknowledged that "there are established exceptions to the general rule that judicial proceedings shall be conducted in public"[120]. His Honour observed, in reasoning adopted by the plurality in *Hogan v Hinch*[121], that the category of such exceptions is not closed to the legislature and that[122]:

> "The need to maintain secrecy or confidentiality, or the interests of privacy or delicacy, may in some cases be thought to render it desirable for a matter, or part of it, to be held in closed court."

70 The ordinary rule of open justice in the courtroom may give way to the need for confidentiality in order to avoid prejudice to the administration of justice in cases in which publicity would destroy the subject matter of the litigation[123]. A statutory provision preventing disclosure to a party and restricting, for use by the court only, information which might prejudice police operations was held valid in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*[124]. It was for the court to determine whether disclosure of the information might cause the asserted prejudice[125]. The restriction on the disclosure of the information in such a case was described by the plurality as "an outcome comparable with that of the common law respecting public interest

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119 (1976) 134 CLR 495.

120 (1976) 134 CLR 495 at 520.

121 (2011) 243 CLR 506.

122 (2011) 243 CLR 506 at 553–554 [90] quoting *Russell v Russell* (1976) 134 CLR 495 at 520 per Gibbs J.

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

124 (2008) 234 CLR 532.

125 (2008) 234 CLR 532 at 558 [33] per Gummow, Hayne, Heydon and Kiefel JJ.

immunity, but with the difference that the Court itself may make use of the information in question."[126] As Crennan J said[127]:

> "the availability and accessibility of all relevant evidence in judicial proceedings is not absolute."

71 Where a statute mandates that certain evidence used in a judicial proceeding will not be made available to one of the parties and procedural fairness is thereby qualified, the cautionary observation in *Gypsy Jokers* is applicable[128]:

> "As a general proposition, it may be accepted that legislation which purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction would be apt impermissibly to impair the character of the courts as independent and impartial tribunals." (footnote omitted)

72 While judgments as to validity will turn upon particular features of the impugned legislation, it is important to bear in mind that such judgments cannot be vehicles for imposing institutional uniformity on State judicial systems. The Parliaments of the States retain the legislative power to determine the constitution of their courts and the organisational arrangements through which those courts will exercise their jurisdiction and powers[129].

Criminal intelligence declaration—nature and validity

73 The first element of the enquiry to be undertaken by the Supreme Court in an application for a criminal intelligence declaration is to determine whether the information, the subject of the application, is criminal intelligence as defined in s 59. Having regard to the definition of "criminal intelligence" in that section, the enquiry, as noted earlier, is analogous to that which courts have traditionally undertaken in the exercise of their inherent powers to determine whether material sought by a party to a proceeding under subpoena or discovery or some other

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126 (2008) 234 CLR 532 at 559 [36].

127 (2008) 234 CLR 532 at 597 [189].

128 (2008) 234 CLR 532 at 560 [39] per Gummow, Hayne, Heydon and Kiefel JJ.

129 *Le Mesurier v Connor* (1929) 42 CLR 481 at 495–496 per Knox CJ, Rich and Dixon JJ; [1929] HCA 41; *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 at 47; [1943] HCA 13.

court process, should not be produced in the public interest. In *The Commonwealth v Northern Land Council*[130] the plurality said[131]:

> "If inspection of documents is necessary to determine the question of immunity … it ought to be carried out by the court before ordering production for inspection by a party." (footnote omitted)

74 The duty of a court to inspect privately documents for which immunity from production is claimed and the circumstances in which that duty arises have been discussed in various decisions of this and other courts. It is not necessary to canvass them in these reasons[132]. Such decisions have been concerned with the process by which a court decides whether or not documents for which immunity is claimed should be produced to a party calling for them. The analogy relevant for present purposes is found in the ex parte feature of that process. The party resisting production will know what is in the documents. The party calling for them will not. The court will decide. Sometimes, but not always, the court will decide, with the assistance of the legal representative of the party calling for production, subject to directions or undertakings as to non-disclosure.

75 In determining an application for a criminal intelligence declaration under the COA, the Supreme Court must first determine whether the criteria in s 59 are satisfied. They are important and substantive criteria which are not to be satisfied by pro forma affidavits containing conclusionary statements. The importance of the Supreme Court's judgment about them lies in its consequences for the conduct of subsequent substantive applications which, as pointed out earlier, may have significant legal effects upon the common law freedoms of many individuals and the property rights of organisations.

76 While hearsay evidence is admitted by virtue of s 61 of the COA, consistently with the practice of the courts in relation to interlocutory applications, the weight to be given to such evidence will be a matter for the Supreme Court in determining whether it can be relied upon to support the findings necessary to enliven the power to make a criminal intelligence declaration. The power conferred by s 72 to make the declaration is discretionary and the Supreme Court is required to balance the outcomes of disclosure of the

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130 (1993) 176 CLR 604.

131 (1993) 176 CLR 604 at 620 per Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ.

132 See eg *Sankey v Whitlam* (1978) 142 CLR 1 at 42 per Gibbs ACJ, 62 per Stephen J; *The Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 617; *Alister v The Queen* (1984) 154 CLR 404 at 414–415 per Gibbs CJ, 431 per Murphy J, 453 per Brennan J; [1984] HCA 85.

evidence against the unfairness that a criminal intelligence declaration will work on a prospective respondent. To some extent that consideration will be hypothetical. The Supreme Court will not necessarily know of the organisations or individuals against whom the criminal intelligence will be used in substantive applications under the COA. Nor will it necessarily know what significance the declared criminal intelligence may have against other evidence tendered in a substantive application.

77 The Supreme Court, in determining an application for a declaration that information is criminal intelligence, is assisted by the COPIM. The COPIM is under no legal duty to represent the interests of potential respondents to substantive applications in which the criminal intelligence may be used. Nevertheless, in making submissions as to the appropriateness or validity of the application, the COPIM will be bound to do so by reference to the statutory criteria upon which the Supreme Court must act. The COPIM's submissions may also direct attention to any apprehended failure on the part of the applicant to comply with its duty of disclosure and may propose to the Supreme Court that a witness or witnesses should be called by the applicant or by the Supreme Court itself.

78 The effect of Pt 6 of the COA upon the normal protections of procedural fairness is significant. On the other hand, the Supreme Court performs a recognisably judicial function in determining an application under that Part. It is not able to be directed as to the outcome. It retains significant inherent powers and its powers under the UCPR in relation to the proceedings. The process is analogous in some respects to that used in the determination of public immunity claims in the exercise of the inherent power of the Supreme Court. The provisions of Pt 6 relating to an application for a criminal intelligence declaration do not impair the essential and defining characteristics of the Supreme Court so as to transgress the limitations on State legislative power derived from Ch III of the Constitution.

79 Some contrast and comparisons may be made with State legislation the subject of two decisions of the High Court in recent years. One of those was *International Finance Trust Co Ltd v New South Wales Crime Commission*[133]. The vice of s 10 of the *Criminal Assets Recovery Act* 1990 (NSW), held invalid in that case, was that it mandated the "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."[134] Release from such an order was conditioned upon "proof of a negative proposition of

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133 (2009) 240 CLR 319; [2009] HCA 49.

134 (2009) 240 CLR 319 at 366 [97] per Gummow and Bell JJ.

considerable legal and factual complexity."[135] In that case orders made under the impugned provision had an immediate legal effect upon the absent and unknowing respondent's property rights. By way of contrast, a declaration that information is criminal intelligence does not have immediate legal operation although it has legal consequences for the use of that information in later substantive proceedings.

80 In *K-Generation Pty Ltd v Liquor Licensing Court*[136] this Court was concerned with s 28A of the *Liquor Licensing Act* 1997 (SA), which required the Licensing Court of South Australia to take steps to maintain the confidentiality of information which was criminal intelligence. The plurality noted that the Licensing Court[137]:

- could determine whether or not information constituted criminal intelligence;
- could itself question the evidence in closed session;
- could take into account evidence led by other parties and any limited form of cross-examination on relevant affidavits;
- could decide to place little weight on criminal intelligence having regard to the fact that the affected party had no opportunity to see it or test it.

In the result, the plurality held that the section[138]:

> "did not operate to deny to the Licensing Court the constitutional character of an independent and impartial tribunal".

There is nothing in the decision in *K-Generation* which requires a conclusion that the provisions of the COA relating to a criminal intelligence declaration have such an effect upon the Supreme Court of Queensland.

81 For the preceding reasons questions (i) and (ii) in the Special Case should be answered in the negative.

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135 (2009) 240 CLR 319 at 367 [97] per Gummow and Bell JJ.

136 (2009) 237 CLR 501; [2009] HCA 4.

137 (2009) 237 CLR 501 at 543 [148] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ.

138 (2009) 237 CLR 501 at 543 [149] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ.

Closed ex parte hearings within a substantive application

82 The respondents challenged provisions of the COA relating to the tender and use of criminal intelligence in substantive proceedings under the COA. It is in that respect that the COA most directly affects the mechanisms for the protection of procedural fairness and the application of the open court principle, that are the hallmarks of the judicial process. The issue is raised in questions (iii) and (v) in the Special Case, which principally concern ss 78 and 10 of the COA read together.

83 Before considering the operation of s 78, it is necessary to refer to the statutory framework which the COA applies to all proceedings for applications to the Supreme Court under the Act and for appeals and reviews relating to any order under the COA. The effect of s 108 of the COA is that all proceedings under the COA are closed to members of the public including the media. To ensure that hearings under the COA are "closed" the Supreme Court is required to exclude all persons other than the Commissioner, the other party to the proceeding or, if it be an organisation or group of persons, the nominee of that organisation or group, the legal representatives of the Commissioner and the other party, the COPIM, any witness who is giving evidence and court staff[139]. The same restrictions apply to appeals to the Court of Appeal. Further, s 109 provides that access to a transcript of a hearing under the COA can only be gained upon application to the Commissioner[140] on payment of the prescribed fee[141]. The Commissioner must grant an application under that section "as soon as practicable."[142] No plausible explanation was offered, and none appears from the COA, for these remarkable constraints. They affect not just proceedings before judges of the Supreme Court hearing substantive applications under the COA, but also the Court of Appeal hearing appeals from the decisions of those judges. The validity of ss 108 and 109 was not in issue in these proceedings. However, s 108 is part of an overall statutory scheme of which the challenged provision, s 78, is part. The relationship between the two provisions appears from s 108(7), which provides:

"This section does not apply to a closed hearing under section 70 or 78."

That is to say, the more restrictive hearing regimes imposed by ss 70 and 78 will subsume the restrictions imposed by s 108. The effect of s 78 in this case would

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139 COA, s 108(5).

140 COA, s 109(3) read with s 109(1).

141 COA, s 109(4).

142 COA, s 109(5).

be to exclude the respondents and their legal representatives from any part of the pending application in which criminal intelligence is to be considered.

84 The respondents submitted that the statutory denial to the Supreme Court of any discretion to balance the demands of secrecy with the respondents' legitimate interests to ensure that adverse evidence was properly tested, was repugnant to the judicial process. The absence of any such discretion was said to distinguish s 78 from the provision whose validity was upheld in *K-Generation*. The respondents further submitted that the role of the COPIM offered no substantive protection having regard to the prohibition against the COPIM making submissions in the presence of a respondent or the respondent's legal representative and the absence of any process for allowing the respondent or the respondent's legal representative to make representations to the COPIM.

85 The applicant, in supporting the statutory procedures, set out a number of options open to the legislature in devising a process for dealing with criminal intelligence. One option would have allowed limited disclosure to one side of the record. Another, that which was adopted, provided for the use of material on the basis that there would be no disclosure at all to one side of the record. An option not considered in the applicant's submissions was to confer a discretion on the Supreme Court to determine whether limited disclosure to the legal representatives of one party was appropriate.

86 The applicant correctly submitted that each of the options which it canvassed involved some prejudice to somebody. The applicant also correctly submitted that that consequence was not an invalidating attribute of the provisions of the COA relating to the use of criminal intelligence. That a law imposes a disadvantage on one party to proceedings in order to restrict, mitigate or avoid damage to legitimate competing interests does not mean that the defining characteristics of the court required to administer such a law are impermissibly impaired. Such a law was held valid in *K-Generation*[143].

87 The question of validity requires attention to the features of the statutory scheme taken as a whole. Factors tending to support validity in this case include:

1. The making of the criminal organisation declaration involves the exercise of judicial power.

2. The Supreme Court has a discretion to refuse to exercise its power to make a declaration even if satisfied of the matters which enliven that power.

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143 (2009) 237 CLR 501 at 515 [22] per French CJ, 543 [148] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ.

3. The criteria of which the Supreme Court must be satisfied before making a declaration depend upon the Supreme Court's own assessment of the evidence before it.

4. As the applicant accepted, the application for the declaration must set out all the grounds on which the declaration is sought and the information supporting those grounds. The grounds which must be disclosed include those which are based on criminal intelligence, albeit the application is not required to disclose the content of information relied upon which is the subject of a criminal intelligence declaration.

5. The COA does not abrogate the power of the Supreme Court under r 161 of the UCPR or otherwise under the inherent power of the Supreme Court to order that the applicant provide particulars of its grounds for making the application.

6. The COA does not prevent the Supreme Court from having regard to degrees of unfairness to the respondent in determining whether or not to accept criminal intelligence tendered in the course of the substantive hearing.

7. The COPIM provides a limited measure of redress for the imbalance between the parties in respect of the use of criminal intelligence.

8. The Supreme Court in a special closed hearing, during the hearing of a substantive application, may call witnesses and the COPIM may examine or cross-examine them[144].

9. The rules of evidence apply to the proceedings subject to the provisions of ss 107(2) and 61 of the COA, considered earlier in these reasons.

88 Understandably the respondents placed great emphasis on the provision for special closed hearings and the secrecy attaching to criminal intelligence tendered to the Supreme Court. Those provisions undoubtedly represent incursions upon the open court principle and procedural fairness. The Supreme Court, however, retains its decisional independence and the powers necessary to mitigate the extent of the unfairness to the respondent in the circumstances of the particular case. It retains the responsibility to determine what weight, if any, to give to criminal intelligence and, in particular, hearsay evidence relating to information provided by informants. The power of the Supreme Court to control its own proceedings in order to avoid unfairness also suggests that it would have a discretion to refuse to act upon criminal intelligence where to do so would give rise to a degree of unfairness in the circumstances of

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144 UCPR, r 391(1) and COA, s 89(2)(a)(ii).

the particular case which could not have been contemplated at the time that the criminal intelligence declaration was made.

89 Despite the incursions on the open court principle and the normal protections of procedural fairness effected by the impugned provisions of the COA, they do not so impair the essential or defining characteristics of the Supreme Court as a court as to be beyond the legislative power of the Queensland Parliament. The impugned provisions are valid. The answer to each of questions (iii) and (v) in the Special Case is "no".

The anonymous informant—COA, s 76

90 The respondents submitted that s 76, read with a number of other provisions of the COA, established a regime in which evidence derived from informants could be used in an application for a criminal organisation declaration in circumstances where neither the Supreme Court nor the respondent to the application had a proper basis to evaluate that evidence or a proper opportunity to test it.

91 The statutory scheme relating to the use of information derived from informants includes the following elements:

- in an application for a criminal intelligence declaration where information has been provided by an informant, the informant need not be identified in the application or supporting affidavits[145];

- the informant cannot be called to give evidence or otherwise required to give evidence[146];

- where information provided to a relevant agency by an informant is the subject of a criminal intelligence declaration, the Commissioner must file an affidavit sworn by an officer of the relevant agency setting out, inter alia, his or her honest and reasonable belief that the information provided is reliable and the reasons for that belief[147]. The officer is also required to provide information about the informant including the informant's criminal history without identifying the informant;

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145 COA, s 63(5).

146 COA, s 64(2).

147 COA, s 64(3) and (4).

- the informant cannot be called or otherwise required to give evidence in substantive proceedings under the COA[148];

- in any such substantive proceeding the Commissioner must file an affidavit by the officer of the relevant agency complying with the requirements of such affidavits in criminal intelligence declaration proceedings[149].

92 The provisions relating to information provided by informants place a respondent at a forensic disadvantage. However, the Supreme Court has the discretion to accept or reject or to give little weight to information provided by an informant. In so doing it may take account of unfairness flowing from the anonymity of the informant, the informant's unavailability for cross-examination and the hearsay character of evidence derived from the informant. The provisions relating to informant evidence do not impair the defining or essential characteristics of the Supreme Court. Question (iv) in the Special Case should be answered "no".

The time for response—procedural unfairness?

93 The respondents submitted that ss 9 and 106 of the COA are invalid to the extent that they prevent the Supreme Court extending the time for a respondent to file its response to an application under s 8. Section 9(3) requires the respondent to file a response to an application for a criminal organisation declaration at least five business days before the return date. Section 9(4) requires that the response be accompanied by any affidavit that the respondent intends to rely on at the hearing of the application. Section 106 provides that the applicant in a proceeding under the COA may apply to the Supreme Court for the extension of a return date currently applying to the application. The Supreme Court may grant such an application on the conditions which it considers appropriate[150].

94 The short answer to that submission is that the impugned provisions do not exclude the power of the Supreme Court to extend the times fixed under the COA for the filing of a response to an application for a declaration of an organisation. The answer to question (vii) in the Special Case is "no".

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148 COA, s 76(2).

149 COA, s 76(3).

150 COA, s 106(3).

Conclusion

95 Questions (i) to (vii) in the Special Case should each be answered "no". The respondents should pay the costs of the Special Case.

HAYNE, CRENNAN, KIEFEL AND BELL JJ.

The issues

96 The Special Case agreed by the parties to this proceeding asked whether certain provisions[151] of the *Criminal Organisation Act* 2009 (Q) ("the CO Act") are invalid because they, or any of them, infringe Ch III of the Constitution. The Special Case is agreed in proceedings brought in the Supreme Court of Queensland, and removed in part into this Court, to declare the second respondent, the Finks Motorcycle Club, Gold Coast Chapter, a criminal organisation under the CO Act. The first respondent, Pompano Pty Ltd, is said to be part of that organisation.

97 As developed in argument, the chief issue was whether s 10 of the CO Act, which permits the Supreme Court of Queensland on application by the Commissioner of the Queensland Police Service ("the Commissioner") to declare an organisation to be a "criminal organisation", is invalid because the procedures prescribed by the CO Act for the Supreme Court to decide whether to make a declaration impair the institutional integrity of that Court. The principal submission of the respondents, who alleged invalidity, was that the institutional integrity of the Supreme Court is impaired because the CO Act permits the Court to receive and act upon material which must not be disclosed to a respondent to an application for a declaration or to any representative of the respondent.

98 The material that must be kept from the respondent to an application for a declaration is referred to in the CO Act as "criminal intelligence". Criminal intelligence is information that relates to actual or suspected criminal activity. Information of that kind must be kept from a respondent if the Supreme Court declares it to be criminal intelligence and that declaration cannot be made unless the Court is satisfied that disclosure of the information could reasonably be expected to prejudice a criminal investigation, enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement or endanger a person's life or physical safety.

99 The respondents raised two other issues but these were treated as subsidiary to the issue just described. The first was that the CO Act requires the Supreme Court to decide, in determining whether to declare an organisation to be a criminal organisation, whether that organisation is "an unacceptable risk to the

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151 ss 9, 10 (and, in particular, s 10(1)(c)), 66, 70, 76 and 78.

safety, welfare or order of the community"[152]. Is that a question suitable for judicial determination? The second was that the CO Act gives a respondent to an application for a declaration that it is a criminal organisation little time to respond to that application. Does that require such a departure from judicial processes that it impairs the institutional integrity of the Supreme Court?

The CO Act

100 The CO Act provides[153] that the Supreme Court of Queensland, on application by the Commissioner[154], may declare an organisation[155] to be a "criminal organisation" if the Court is satisfied that some of the organisation's members "associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity"[156] and the organisation is "an unacceptable risk to the safety, welfare or order of the community"[157]. In considering whether to make a declaration, the Court must[158] have regard to various matters, including information before the Court "suggesting current or former members of the organisation have been, or are, involved in serious criminal activity, whether directly or indirectly and whether or not the involvement resulted in convictions"[159].

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152 s 10(1)(c).

153 s 10.

154 s 8.

155 Defined in the dictionary to the CO Act (Sched 2) as any incorporated or unincorporated group of three or more persons, however it is structured, whether based inside or outside the State or consisting of persons ordinarily resident inside or outside the State.

156 s 10(1)(b); see also s 10(4).

157 s 10(1)(c).

158 s 10(2).

159 s 10(2)(a)(iii).

101 If an organisation is declared to be a criminal organisation under the CO Act, the Supreme Court may, if certain conditions are met, make[160] control orders for members of the organisation and persons who associate with members. Control orders may prohibit[161] the person subject to the order from doing various things, including associating with members of any declared criminal organisation or with other controlled persons[162] and applying for or undertaking stated employment[163]. That an organisation has been declared to be a criminal organisation is also relevant for the making of other orders under the CO Act[164].

102 Some attention was given in argument to what information the Commissioner must provide as part of an application for a declaration under s 10 of the CO Act. As argument developed it became apparent that there was little if any difference on this question between the parties. It is therefore not necessary to trace the development of this aspect of the argument; it is enough to state the relevant conclusions.

103 The CO Act requires[165] the application to state (among other things) the grounds on which the declaration is sought and the information supporting the grounds. The application must[166] be accompanied by any affidavit the Commissioner intends to rely on at the hearing of the application. In combination, these provisions require the Commissioner to tell the respondent[167] the whole of the case which the Commissioner seeks to make in support of the application for a declaration. That is, the Commissioner must identify, in detail, the information upon which the Commissioner will seek to rely to satisfy the Supreme Court of the three criteria for making a declaration which are identified in s 10(1): that the respondent is an organisation; that members of the

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160 s 18.

161 s 19.

162 s 19(2)(a) and (b).

163 s 19(2)(h).

164 See ss 28 (public safety orders) and 43 (fortification removal orders).

165 s 8(2)(c) and (d).

166 s 8(3).

167 See s 8(5)(c) (service of application and accompanying affidavits).

organisation associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity; and that the organisation is an unacceptable risk to the safety, welfare or order of the community.

104 Section 10(2) provides that "[i]n considering whether or not to make a declaration, the court must have regard to" certain kinds of information before the Court as well as "anything else the court considers relevant". The specific matters identified in s 10(2) include not only such matters as any conviction of any current or former members of the organisation but also "information suggesting current or former members of the organisation have been, or are, involved in serious criminal activity, whether directly or indirectly and whether or not the involvement resulted in convictions"[168]. Again, if the Commissioner intends to rely on information of the kind just described, the initiating application and accompanying affidavits must give the respondent notice of that intention and particulars of the criminal activity that it is alleged has occurred or is occurring.

105 The respondents' challenge to the validity of provisions of the CO Act must be determined on the basis of this construction of ss 8 and 10. On this construction, the Commissioner must give, in the application for a declaration that an organisation is a criminal organisation, and the affidavits accompanying the application, detailed particulars of what is alleged against the respondent organisation and how the Commissioner puts the case for making a declaration.

106 The respondents directed much attention to those provisions of the CO Act which deal with "criminal intelligence". It is necessary to examine those provisions in some detail.

Criminal intelligence

107 The Commissioner may rely on[169] "criminal intelligence" in support of an application for a declaration of an organisation as a criminal organisation. Section 59(1) of the CO Act provides that:

> "***Criminal intelligence*** is information relating to actual or suspected criminal activity, whether in the State or elsewhere, the disclosure of which could reasonably be expected to—

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168 s 10(2)(a)(iii).

169 See ss 60(a), 75 and 78.

(a) prejudice a criminal investigation; or

(b) enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement; or

(c) endanger a person's life or physical safety."

108 The elements of this definition require some elucidation. First, "criminal intelligence" is "information relating to actual or suspected criminal activity". The expression "criminal activity" is not defined in the Act. It should be read as requiring the identification of specific criminal offences. This construction follows naturally from the words of the definition and is reinforced by consideration of other provisions of the CO Act. "Serious criminal activity" is defined in s 6 as a "serious criminal offence" or an act done or omission made outside Queensland that, if done or made in Queensland, would have been or would be a serious criminal offence. "Serious criminal offence" is defined in s 7 as an indictable offence punishable by at least seven years' imprisonment or an offence against either the CO Act itself or certain specified provisions of the *Criminal Code* (Q).

109 Second, the other element of the definition of "criminal intelligence" is that it must be information "the disclosure of which could reasonably be expected" to have one of three consequences: (a) prejudice to a criminal investigation (which should be read as referring only to a *continuing* criminal investigation); (b) enabling the discovery of the existence or identity of "a confidential source of information relevant to law enforcement"; or (c) endangering a person's life or physical safety. It was not and could not be disputed that there is an evident public interest in the avoidance of all of these consequences. It was submitted by the respondents, however, that avoiding these consequences could not justify requiring a court to proceed to decide a case affecting the interests of a person on the basis of material which that person neither knows of nor has had a chance to answer. It will be necessary to return to that general proposition later in these reasons.

110 The Commissioner may apply[170] to the Supreme Court for a declaration that particular information is criminal intelligence. The Commissioner's criminal intelligence application must be decided[171] before any substantive application in

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170 s 63(1).

171 s 67.

which it is to be relied on. The Court must[172] consider the criminal intelligence application without notice of it having been given to any person other than the "criminal organisation public interest monitor" (or "COPIM") appointed under s 83(1) of the CO Act. If the Court declares the information to be criminal intelligence, and the information is relied on in support of an application to have an organisation declared a criminal organisation, the Court must[173] "order any part of the hearing of the substantive application in which the declared criminal intelligence is to be considered ... to be a closed hearing" and must[174] exclude from that part of the hearing everyone except the Commissioner, the Commissioner's legal representatives and nominees, a police officer, an officer from an agency from which the Commissioner obtained any of the declared criminal intelligence, the COPIM and the court staff necessary for the hearing.

111 A deal of attention was given in argument to three questions about the operation of the criminal intelligence provisions of the CO Act. What role does the COPIM have? Can the respondent to an application to have it declared a criminal organisation apply for discharge or variation of any prior order declaring information to be criminal intelligence? Can the Supreme Court make any order which would give a representative of the respondent to an application to have it declared a criminal organisation access to declared criminal intelligence? Each is, of course, a question of very great importance to the application of the CO Act. It is not necessary, however, to answer any of them in dealing with the respondents' central complaint that the impugned provisions of the CO Act deny procedural fairness to a respondent to an application for a declaration that it is a criminal organisation.

112 No party or intervener submitted that, in the hearing of a criminal intelligence application, the COPIM could or would stand in the shoes of any organisation which the Commissioner either had already applied, or may later apply, to have declared a criminal organisation. Nor was it submitted that the COPIM could or would stand in the shoes of any such organisation's representative. So, for example, it was not submitted that the COPIM could seek or obtain any instructions about the matters the subject of the criminal intelligence application. The CO Act provides no foundation for treating the

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172 s 66.

173 s 78(1).

174 s 78(2).

COPIM's task as extending so far[175]. Even if it did, it must be recognised that no substantive application may have been instituted when application is made to declare information to be criminal intelligence. Accordingly, the class of persons interested in the uses to which declared criminal intelligence may be put in connection with a substantive application may be unknown and unknowable when a criminal intelligence application is made.

113 No party or intervener submitted that any power the Supreme Court has to discharge or vary a criminal intelligence declaration could constitute more than a limited qualification to the general rule established by the CO Act that declared criminal intelligence must be kept secret from the respondent to an application for a substantive declaration. The qualification would be limited in the sense that the submissions appeared to contemplate the Supreme Court exercising a power to discharge or vary a criminal intelligence declaration only where the defining conditions in s 59(1) no longer exist.

114 Finally, no argument was advanced or available[176] for severing or reading down the CO Act to enable the Supreme Court to give representatives of a respondent organisation access to declared criminal intelligence. And even if, as the applicant submitted, the CO Act could be construed as not preventing the Supreme Court from exercising some discretionary power to direct that declared criminal intelligence be revealed to a representative of the respondent to an application for a declaration of that respondent as a criminal organisation, the validity of the impugned provisions must be determined on the footing that the provisions regulating the use of declared criminal intelligence may, and at least commonly will, be applied according to their terms. The basic principle underpinning the relevant provisions of the CO Act is that declared criminal intelligence is not to be revealed to the respondent or any representative of the respondent[177].

115 None of the three questions debated in argument about the operation of the criminal intelligence provisions must be answered in order to decide the validity of s 10.

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175 See, for example, ss 86 (the COPIM's functions), 89 (appearance and role of the COPIM at hearing) and 90 (restrictions on legal practice during and after appointment as the COPIM).

176 See, for example, *Wainohu v New South Wales* (2011) 243 CLR 181 at 228 [102]; [2011] HCA 24.

177 See, for example, ss 60, 65, 66, 70, 77, 78, 82 and 90.

The foundation of the case for invalidity

116 There is a more fundamental reason why consideration of the arguments alleging invalidity does not call for these questions to be answered. The arguments that the CO Act's provisions dealing with criminal intelligence render s 10 invalid, though expressed in various ways, depended upon one central proposition: that Ch III of the Constitution puts beyond the legislative power of a State *any* enactment that would permit a State Supreme Court to decide a disputable issue by reference to evidence or information of which one party does not know and to which that party can have no access whether personally or by a representative.

117 The proposition admitted of no exception. Although reference was made to the special procedures that have long been adopted by State and other courts in dealing with matters such as evidence of trade secrets and some kinds of evidence in cases concerning children, these procedures were treated as depending upon the courts' power (perhaps obligation) to permit access to the relevant material by at least the legal representatives of the parties. And inferentially if not explicitly, much of the argument appeared to proceed from the premise that cases of the kind described constitute a closed class of limited qualifications to an adversarial system to which no legislative addition could validly be made.

118 That revelation of criminal intelligence could reasonably be expected to have consequences contrary to the public interest was treated as irrelevant to the issue of validity. The argument for invalidity asserted that in deciding any dispute a State Supreme Court *must always* follow an adversarial procedure by which parties (personally or by their representatives) know of *all* of the material on which the Court is being asked to make its decision. Otherwise, so it was asserted, there would be such a departure from procedural fairness that the institutional integrity of the Supreme Court would be impaired.

119 Several observations must be made about this central proposition. First, it is absolute. Second, because it is absolute, it entrenches a particular form of adversarial procedure as a constitutionally required and defining characteristic of the State Supreme Courts. Third, as will be seen, it seeks to found this result not in any particular constitutional text but in what is said to be the logical consequence of earlier decisions of this Court.

120 Examination of this central proposition, which underpinned the argument for invalidity, will demonstrate that it cannot be adopted.

121 It is convenient to begin that examination by considering some earlier decisions of this Court and the principles which they applied.

The applicable principles

122 The argument for invalidity depended upon the application of principles first stated in *Kable v Director of Public Prosecutions (NSW)*[178] and later considered and applied in several cases including, in particular, *Fardon v Attorney-General (Qld)*[179], *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*[180], *K-Generation Pty Ltd v Liquor Licensing Court*[181], *International Finance Trust Co Ltd v New South Wales Crime Commission*[182], *South Australia v Totani*[183] and *Wainohu v New South Wales*[184].

123 The relevant principles have their roots in Ch III of the Constitution. As Gummow J explained[185] in *Fardon*, the State courts (and the State Supreme Courts in particular) have a constitutionally mandated position in the Australian legal system. Once the notion is rejected, as it must be, that the Constitution "permits of different grades or qualities of justice"[186], and it is accepted that the State courts have the constitutional position that has been described, it follows that "the Parliaments of the States [may] not legislate to confer powers on State courts which are *repugnant to or incompatible with* their exercise of the judicial power of the Commonwealth"[187] (emphasis added). As Gummow J further

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178 (1996) 189 CLR 51; [1996] HCA 24.

179 (2004) 223 CLR 575; [2004] HCA 46.

180 (2008) 234 CLR 532; [2008] HCA 4.

181 (2009) 237 CLR 501; [2009] HCA 4.

182 (2009) 240 CLR 319; [2009] HCA 49.

183 (2010) 242 CLR 1; [2010] HCA 39.

184 (2011) 243 CLR 181.

185 (2004) 223 CLR 575 at 617-619 [100]-[105].

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

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

pointed out[188], and as is now the accepted doctrine of the Court[189], "the essential notion is that of repugnancy to or incompatibility with that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system".

124 Three further points must be made about this "essential notion". First, "the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes"[190]. Second, the repugnancy doctrine "does not imply into the Constitutions of the States the separation of judicial power mandated for the Commonwealth by Ch III"[191]. Third, content must be given to the notion of institutional integrity of the State courts, and that too is a notion not readily susceptible of definition in terms which will dictate future outcomes.

125 Something more must be said about the second and third points. Independence and impartiality are defining characteristics of all of the courts of the Australian judicial system[192]. They are notions that connote separation from the other branches of government, at least in the sense that the State courts must be and remain free from external influence[193]. In particular, the courts cannot be required to act at the dictation of the Executive[194]. In this respect, clear parallels

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188 (2004) 223 CLR 575 at 617 [101].

189 See, for example, *Fardon* (2004) 223 CLR 575 at 591 [15], 593 [23] per Gleeson CJ, 598-599 [37] per McHugh J, 648 [198] per Hayne J, 655-656 [219] per Callinan and Heydon JJ.

190 *Fardon* (2004) 223 CLR 575 at 618 [104] per Gummow J.

191 *Fardon* (2004) 223 CLR 575 at 614 [86] per Gummow J.

192 See, for example, *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 343 [3], 363 [81]; [2000] HCA 63; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 152-153 [3], 163 [29]; [2004] HCA 31; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 67-68 [41], 76 [64], 77 [66]; [2006] HCA 44; *Gypsy Jokers* (2008) 234 CLR 532 at 552-553 [10].

193 See, for example, *Kable* (1996) 189 CLR 51 at 98 per Toohey J, 119 per McHugh J, 133-134 per Gummow J; *Bradley* (2004) 218 CLR 146 at 163 [30].

194 See, for example, *Totani* (2010) 242 CLR 1 at 52 [82], 67 [149], 92-93 [236], 160 [436], 173 [481].

can be drawn with some aspects of the doctrines that have developed in relation to federal courts. But because the separation of judicial power mandated by Ch III does not apply in terms to the States, and is not implied in the constitutions of the States, there can be no direct application to the State courts of all aspects of the doctrines that have been developed in relation to Ch III. More particularly, the notions of repugnancy to and incompatibility with the continued institutional integrity of the State courts are not to be treated as if they simply reflect what Ch III requires in relation to the exercise of the judicial power of the Commonwealth.

126 Two related consequences follow from these propositions and should be noted. First, in applying the notions of repugnancy and incompatibility it may well be necessary to accommodate the accepted and constitutionally uncontroversial performance by the State courts of functions which go beyond those that can constitute an exercise of the judicial power of the Commonwealth. Second, the conclusions reached in this matter cannot be directly translated and applied to the exercise of the judicial power of the Commonwealth by a Ch III court. As pointed out by this Court in *Bachrach (HA) Pty Ltd v Queensland*[195], the "occasion for the application of *Kable* does not arise" if the impugned State law would not offend Ch III had it been enacted by the Commonwealth Parliament for a Ch III court. But because "[n]ot everything by way of decision-making denied to a federal judge is denied to a judge of a State"[196], that a State law does not infringe the principles associated with *Kable* does not conclude the question whether a like Commonwealth law for a Ch III court would be valid. It is not necessary for the resolution of this case to pursue those matters further.

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195 (1998) 195 CLR 547 at 562 [14]; [1998] HCA 54. See also, for example, *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181 at 186 [10]; [2004] HCA 9; *Baker v The Queen* (2004) 223 CLR 513 at 526-527 [22]-[24]; [2004] HCA 45.

196 *Fardon* (2004) 223 CLR 575 at 656 [219].

Some earlier decisions

127 There are four instances where this Court has found State legislative provisions to be repugnant to or incompatible with the institutional integrity of State courts: *Kable*[197], *International Finance*[198], *Totani*[199] and *Wainohu*[200].

Kable

128 The *Community Protection Act* 1994 (NSW) empowered the Supreme Court of New South Wales to order the detention of a named person in prison for a specified period 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 the community generally, that he be held in custody. A majority of this Court held[201] the Act invalid. It is possible to discern several different strands in the reasoning in support of that conclusion but subsequent decisions of this Court demonstrate that, as already mentioned, the principle established in *Kable* is to be understood as founded on the notions of repugnancy to and incompatibility with institutional integrity.

129 For present purposes it is important to recognise that the conclusion in *Kable* proceeded from consideration of the whole of the Act in question and all of the features which it presented. In *Fardon*, Gummow J described[202] those features as including "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". In *Kable*, Gaudron J described[203] the processes for which the *Community Protection Act* provided as not involving "the resolution of a dispute between contesting

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197 (1996) 189 CLR 51.

198 (2009) 240 CLR 319.

199 (2010) 242 CLR 1.

200 (2011) 243 CLR 181.

201 (1996) 189 CLR 51 at 98-99 per Toohey J, 106-108 per Gaudron J, 124 per McHugh J, 144 per Gummow J.

202 (2004) 223 CLR 575 at 617 [100].

203 (1996) 189 CLR 51 at 106.

parties as to their respective legal rights and obligations" and as directing, in some circumstances, the Supreme Court to decide what order should be made under that Act "having regard to material which would not be admissible as evidence in legal proceedings". But neither of those features of the *Community Protection Act* can be considered separately from its other features and, in particular, its conscripting the Supreme Court to procure the imprisonment of a named person.

International Finance

130 A majority of the Court held s 10 of the *Criminal Assets Recovery Act* 1990 (NSW) ("the CAR Act") invalid. The CAR Act permitted a law enforcement authority to seek from the State Supreme Court, without notice to anyone, an order preventing any dealing with specified property. Section 10 provided that the Supreme Court must make that restraining order if a law enforcement officer suspected that the person who owned the property had committed any of a broad range of crimes, or the officer suspected that the property was derived from criminal activity, and the Court considered that there were reasonable grounds for the suspicion.

131 The central point which divided the Court was whether, and to what extent, the CAR Act prevented the Supreme Court from reviewing and reconsidering an order made ex parte under that section for what, in effect, was the sequestration of property. The majority construed[204] the Act as excluding that power and held that s 10 thus required the Supreme Court to make ex parte orders for the sequestration of property upon suspicion of wrongdoing, for an indeterminate period, with no effective curial enforcement of the duty of full disclosure on an ex parte application where the only possibility of release from the sequestration was upon proof of a complex negative proposition. Two members of the majority described[205] s 10 as engaging "the Supreme Court in activity which is repugnant in a fundamental degree to the judicial process as understood and conducted throughout Australia".

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204 (2009) 240 CLR 319 at 356 [58], [60] per French CJ, 364-367 [90]-[97] per Gummow and Bell JJ, 386 [160] per Heydon J.

205 (2009) 240 CLR 319 at 367 [98] per Gummow and Bell JJ; see also at 386-387 [161] per Heydon J.

Totani

132 The *Serious and Organised Crime (Control) Act* 2008 (SA) ("the SOC Act") stated its objects as including the disruption and restriction of the activities of organisations involved in serious crime. It provided for the State Attorney-General, on application by the Commissioner of Police, to make a declaration in relation to an organisation if satisfied that members of the organisation associated for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity. Section 14(1) of the SOC Act provided that, on application by the Commissioner of Police, the Magistrates Court of South Australia *must* make a control order against a person if satisfied that the person is a member of a declared organisation.

133 By majority, this Court held[206] s 14(1) invalid because it authorised the Executive to enlist the Magistrates Court to implement the decisions of the Executive in a manner repugnant to or inconsistent with its continued institutional integrity. Whether and why an organisation should be declared was a matter for the Executive; the only question to be determined by the Magistrates Court was whether a person was a member of a declared organisation. As Crennan and Bell JJ put it[207], the SOC Act, and s 14(1) in particular, had "the effect of rendering the [Magistrates] Court an instrument of the Executive".

Wainohu

134 The long title of the *Crimes (Criminal Organisations Control) Act* 2009 (NSW) ("the CCOC Act") said that it was enacted "to provide for the making of declarations and orders for the purpose of disrupting and restricting the activities of criminal organisations and their members". It provided for judges of the Supreme Court of New South Wales who gave their consent to be declared to be eligible judges for the purposes of Pt 2 of the CCOC Act. It empowered the Commissioner of Police to apply to an eligible judge for an order declaring an organisation to be a declared organisation for the purposes of the CCOC Act.

135 A majority of this Court held[208] the CCOC Act invalid because it exempted eligible judges from any duty to give reasons in connection with the

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206 (2010) 242 CLR 1 at 52 [82] per French CJ, 67 [149] per Gummow J, 92-93 [236] per Hayne J, 160 [436] per Crennan and Bell JJ, 173 [481] per Kiefel J.

207 (2010) 242 CLR 1 at 160 [436].

208 (2011) 243 CLR 181 at 219-220 [68]-[70] per French CJ and Kiefel J, 228 [104] per Gummow, Hayne, Crennan and Bell JJ.

making or revocation of a declaration of an organisation as a declared organisation. It was this feature of the CCOC Act, rather than any more general question about whether the task performed by an eligible judge was performed as persona designata, or whether the task could be characterised as judicial or administrative, that was critical to the conclusion that the CCOC Act was repugnant to or incompatible with the continued institutional integrity of the Supreme Court.

The submissions alleging invalidity

136 Those alleging invalidity placed heavy emphasis on the cases that have just been discussed. Their arguments proceeded from the premise that proceedings for a declaration of an organisation as a criminal organisation "are not proceedings otherwise known to the law"[209]. While recognising that proceedings for a declaration of an organisation are not criminal, they submitted that "they form the basis of a process that is predominantly criminal in nature" because of the consequences that may follow from declaring an organisation to be a criminal organisation. They submitted that the ex parte processes required for determination of an application for a criminal intelligence declaration were not relevantly different from those examined in *International Finance* because the declaration would remain in force until revoked and could not effectively be challenged by the person or organisation to whom it related[210]. And they further submitted that, by denying the Supreme Court hearing an application to declare an organisation as a criminal organisation any discretion to balance the demands of secrecy about criminal intelligence with "the respondent's legitimate interest to ensure that any adverse evidence is properly tested", the CO Act compromises the Supreme Court's ability "to ensure, so far as practicable, fairness between the parties"[211].

137 As these submissions demonstrate, it is readily possible to take statements made in previous cases in explaining why the legislation under consideration in each was invalid and, by joining them together in a logical sequence, argue that the relevant provisions of the CO Act are invalid. But the constitutional validity of one law cannot be decided simply by taking what has been said in earlier decisions of the Court about the validity of other laws and assuming, without

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209 cf *Kable* (1996) 189 CLR 51 at 106 per Gaudron J.

210 cf *International Finance* (2009) 240 CLR 319 at 354-355 [54]-[56] per French CJ, 364 [89] per Gummow and Bell JJ, 385 [155], 386 [159]-[160] per Heydon J.

211 *International Finance* (2009) 240 CLR 319 at 355 [55] per French CJ.

examination, that what is said in the earlier decisions can be applied to the legislation now under consideration. The critical questions are whether and why what has been said can be applied. Judge Henry Friendly was surely right to warn[212] against "the domino method of constitutional adjudication ... wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation". And as Judge Friendly pointed out more than once[213], by reference to the writings of Judge Cardozo[214], great care must be exercised in "pushing a principle to 'the limit of its logic'". Care must be exercised lest taking what has been said in explanation of the decisions in other cases about other legislation to its apparently logical end sever the applicable principle from its constitutional roots.

138 Because the CO Act provides for the Supreme Court to follow novel procedures with respect to criminal intelligence, it is no doubt possible to say of them that they depart from hitherto established judicial processes. But the central question is whether the CO Act's provisions about the declaration and subsequent use of declared criminal intelligence are repugnant to or incompatible with the continued institutional integrity of the Supreme Court. The fact that the procedures prescribed by the Act are novel presents the question. Novelty does not, without more, supply the answer to that question. More detailed analysis is necessary.

The case for invalidity

139 Invalidity was said to follow from the requirement that the Supreme Court exclude the respondent organisation and its representatives from the hearing of a criminal intelligence application and from any parts of a hearing of a substantive application in which declared criminal intelligence is to be considered. The CO Act requires[215] the Supreme Court to hear a criminal intelligence application in a "[s]pecial closed hearing" and further requires[216] the Court to order *any* part

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212 Friendly, "The Bill of Rights as a Code of Criminal Procedure", (1965) 53 *California Law Review* 929 at 950.

213 See, for example, Friendly, "The Bill of Rights as a Code of Criminal Procedure", (1965) 53 *California Law Review* 929 at 950; Friendly, "'Some Kind of Hearing'", (1975) 123 *University of Pennsylvania Law Review* 1267 at 1300-1301.

214 *The Nature of the Judicial Process*, (1921) at 51.

215 s 70.

216 s 78.

of the hearing of a substantive application in which declared criminal intelligence is to be considered to be a closed hearing. The respondent organisation and its representatives are not permitted[217] to attend closed hearings. This exclusion was said to constitute a radical departure from accepted judicial process and require denial of procedural fairness to the respondent. Before considering this submission it is necessary to notice what was not submitted and then to address, and reject, two points that were made in argument.

140 First, those alleging invalidity did not submit that the CO Act enlists or conscripts the Supreme Court to do the Executive's bidding. That is, those alleging invalidity did not submit that the CO Act trenches upon the independence of the Supreme Court.

141 Second, those alleging invalidity did not submit that it was beyond legislative power to require the Supreme Court to consider in private a criminal intelligence application or so much of a substantive application as concerned declared criminal intelligence. Invalidity of the relevant provisions of the CO Act was not said to follow from creation of these legislatively mandated exceptions to the general rule that the Supreme Court conduct open and public hearings.

142 Third, subject to the questions presented by the operation of the criminal intelligence provisions, those alleging invalidity did not submit that an application for a declaration of an organisation as a criminal organisation would proceed in the Supreme Court in a manner differing in any relevant respect from what, in *Re Nolan; Ex parte Young*, Gaudron J rightly described[218] as the general features of the judicial process:

> "open and public enquiry (subject to limited exceptions), the application of the rules of natural justice, the ascertainment of the facts as they are and as they bear on the right or liability in issue and the identification of the applicable law, followed by an application of that law to those facts".

143 It was submitted, however, that requiring the Court to decide whether the respondent organisation is "an unacceptable risk to the safety, welfare or order of

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217 ss 70(2) and 78(2).

218 (1991) 172 CLR 460 at 496; [1991] HCA 29. See also *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [56] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [1999] HCA 9; *Fardon* (2004) 223 CLR 575 at 615 [92] per Gummow J.

the community"[219] presents a question that is not suitable for judicial determination. That submission should not be accepted. Its acceptance would be contrary to the decisions in *Fardon*[220] and *Thomas v Mowbray*[221] and the reasoning that underpinned them. To determine whether a disfavoured status should be accorded to an organisation based on an assessment of what its members have done, are suspected of having done, and may do in the future is not different in any relevant way from the tasks held to be validly assigned to courts by the legislation in issue in those cases. Courts are often called on to make predictions about dangers to the public[222].

144 One other consideration should be examined but may then be put aside. The respondents submitted that the criminal intelligence provisions expand "the nature of the evidence beyond what would ordinarily be admissible". That submission should not be accepted. The criminal intelligence provisions of the CO Act do not provide for the reception in evidence of information that would otherwise be irrelevant or inadmissible. They provide for conditions which permit the tendering of evidence which would not otherwise have been adduced. This point requires some explanation.

145 Section 60 of the CO Act records that the objects of Pt 6 (which deals with criminal intelligence) include allowing "evidence that is or contains criminal intelligence to be admitted in applications under this Act without the evidence" having the consequences stated in the definition[223] of "criminal intelligence": prejudicing a criminal investigation, enabling the discovery of the existence or identity of a confidential source of information relevant to law enforcement or endangering anyone's life or physical safety. The criminal intelligence provisions of the CO Act assume that, but for their enactment, information which could be declared criminal intelligence would not be available for use by the

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219 s 10(1)(c).

220 (2004) 223 CLR 575 at 593 [22] per Gleeson CJ, 605-606 [60], 619 [108] per Gummow J, 657-658 [225]-[228] per Callinan and Heydon JJ.

221 (2007) 233 CLR 307 at 327-329 [15]-[16], 334 [28] per Gleeson CJ, 355 [109]-[110] per Gummow and Crennan JJ, 507-508 [595]-[596] per Callinan J; [2007] HCA 33.

222 *Thomas v Mowbray* (2007) 233 CLR 307 at 334 [28].

223 s 59(1).

Supreme Court in deciding whether to declare an organisation to be a criminal organisation.

146 Why is that assumption made? That members of a respondent organisation have engaged in, or are suspected of having engaged in, criminal activity is relevant[224] to whether an organisation should be declared to be a criminal organisation and evidence of those matters could be tendered in admissible form.

147 The assumption must accordingly be understood as made on the basis that, but for the criminal intelligence provisions of the CO Act, an applicant for a declaration of an organisation as a criminal organisation would not advance the material in evidence when doing so could reasonably be expected to have one of the adverse consequences referred to in the definition of criminal intelligence. As noted earlier, the avoidance of each of those consequences is in the public interest.

148 If, in litigation not governed by the CO Act, a party sought to adduce evidence of information that would meet the definition of criminal intelligence, the Commissioner may very well be able to resist its production on public interest immunity grounds. In determining that claim, the court could examine[225] documents not shown to one party for the purpose of ruling on that claim. And if that objection were to be upheld, the material could not be received in evidence[226]. But in a case of the kind just described, it would be the Commissioner who would seek to keep the information secret. The CO Act seeks to permit the Commissioner to use it. It does that by providing for the reception of evidence of information which is relevant to the issue and which, but for those provisions, would not be advanced only because of the adverse consequences that could reasonably be expected to follow from its tender. The criminal intelligence provisions do not provide for the reception of evidence that would otherwise be irrelevant or inadmissible. They provide for the admission of evidence which would otherwise not be adduced.

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224 See s 10(2)(a)(iii) in relation to "serious criminal activity".

225 *Sankey v Whitlam* (1978) 142 CLR 1 at 46; [1978] HCA 43; *Alister v The Queen* (1984) 154 CLR 404; [1984] HCA 85.

226 *The Commonwealth v Northern Land Council* (1993) 176 CLR 604; [1993] HCA 24.

Gypsy Jokers and *K-Generation*

149 It is convenient to begin consideration of the submissions about procedural fairness by reference to this Court's decisions in *Gypsy Jokers* and *K-Generation*, in each of which (unlike the cases discussed earlier) at least a majority of the Court upheld the legislation in question.

150 In *Gypsy Jokers*, the Court considered the validity of s 76(2) of the *Corruption and Crime Commission Act* 2003 (WA) ("the CCC Act"). Under the CCC Act, the Commissioner of Police could issue a "fortification removal notice" if the Commissioner reasonably believed that premises were heavily fortified and habitually used as a place of resort by members of a class a significant number of whom might reasonably be suspected to be involved in organised crime. A person to whom a notice of that kind was directed could apply to the Supreme Court of Western Australia for review of the notice. Section 76(2) of the CCC Act restricted the information available to an applicant for review by providing that the Commissioner could identify information provided to the Supreme Court as confidential "if its disclosure might prejudice the operations of the Commissioner". Information of that kind would then be for the Court's use *only*.

151 The validity of s 76(2) was challenged primarily on the ground that it imposed an impermissible legislative direction and form of executive control over the exercise by the Supreme Court of its jurisdiction. The challenge failed. A majority of the Court held[227] that, on its proper construction, s 76(2) required the Supreme Court to decide for itself whether the disclosure of the information alleged to be confidential would prejudice the operations of the Commissioner.

152 The appellant in *Gypsy Jokers* also submitted that, by allowing only the Court to have access to information which was found to be properly claimed as confidential, s 76(2) was beyond power because it was repugnant to or inconsistent with the continued institutional integrity of the Court. Crennan J (with whom Gleeson CJ agreed) explicitly rejected[228] this submission. The plurality said[229] of the provision only that it had "an outcome comparable with

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227 (2008) 234 CLR 532 at 551-552 [7] per Gleeson CJ, 558 [30], [33], 561 [44] per Gummow, Hayne, Heydon and Kiefel JJ, 593-594 [170]-[174] per Crennan J.

228 (2008) 234 CLR 532 at 596 [183], 597 [191].

229 (2008) 234 CLR 532 at 559 [36] per Gummow, Hayne, Heydon and Kiefel JJ; see also at 550-551 [5] per Gleeson CJ.

that of the common law respecting public interest immunity, but with the difference that the Court itself may make use of the information in question". The plurality said nothing to indicate that s 76(2), by allowing only the Court to have access to the confidential information, might, on that account, be of doubtful validity. Rather, the plurality's conclusion in *Gypsy Jokers* proceeded from an acceptance that, as Crennan J rightly pointed out[230], "Parliament can validly legislate to exclude or modify the rules of procedural fairness".

153 The decision in *Gypsy Jokers* points firmly against accepting the central proposition advanced by those advocating invalidity of the CO Act. But lest it be said that the point was not dealt with expressly by a majority of the Court in *Gypsy Jokers*, it is as well to explore the issue further.

154 In *K-Generation*, this Court unanimously upheld the validity of s 28A of the *Liquor Licensing Act* 1997 (SA). That provision required, on application by the Commissioner of Police, the Liquor and Gambling Commissioner, the Licensing Court of South Australia and the Supreme Court of South Australia to take steps to maintain the confidentiality of information classified by the Commissioner as criminal intelligence. The Court held[231] that s 28A was not repugnant to or incompatible with the continued institutional integrity of the relevant South Australian State courts because the courts could determine for themselves both whether the information met the definition of criminal intelligence in the *Liquor Licensing Act* and what steps to take to maintain the confidentiality of the information.

155 The respondents submitted in this case that *K-Generation* can be distinguished because the CO Act prohibits the Supreme Court from giving a respondent (or a respondent's representative) access to criminal intelligence whereas the *Liquor Licensing Act* allowed the courts to decide what steps should be taken to maintain confidentiality. Even assuming that to be so (and as noted earlier, it is unnecessary to decide whether the Supreme Court could order that a respondent's representative have access to criminal intelligence), the relevant

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230 (2008) 234 CLR 532 at 595-596 [182], citing *The Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396 per Dixon CJ and Webb J (Taylor J agreeing); [1958] HCA 6; *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ; [1990] HCA 57; and *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 56 [24] per Gleeson CJ; [2005] HCA 50.

231 (2009) 237 CLR 501 at 531-532 [94]-[99] per French CJ, 542-543 [144]-[149] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ, 576-580 [257] per Kirby J.

provisions of the CO Act are not invalid by reason only of this difference. No member of the Court in *K-Generation* said that the State courts' ability to decide what steps to take to maintain confidentiality was necessary to validity. In *K-Generation*, the Court paid close attention to all of the relevant features of the *Liquor Licensing Act*, and a similarly close examination of the CO Act is required in this case.

Procedural fairness and the judicial process

156 The rules of procedural fairness do not have immutably fixed content. As Gleeson CJ rightly observed[232] in the context of administrative decision-making but in terms which have more general and immediate application, "[f]airness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice." To observe that procedural fairness is an essential attribute of a court's procedures is descriptively accurate but application of the observation requires close analysis of all aspects of those procedures and the legislation and rules governing them[233].

157 Consideration of other judicial systems may be taken to demonstrate that it cannot be assumed that an adversarial system of adjudication is the only fair means of resolving disputes. But if an adversarial system is followed, that system assumes, as a general rule, that opposing parties will know *what* case an opposite party seeks to make and *how* that party seeks to make it. As the trade secrets cases show, however, the general rule is not absolute. There are circumstances in which competing interests compel some qualification to its application. And, if legislation provides for novel procedures which depart from the general rule described, the question is whether, taken as a whole, the court's procedures for resolving the dispute accord both parties procedural fairness and avoid "practical injustice".

158 As noted at the outset of these reasons, the CO Act requires[234] the Commissioner to give, as part of the application for a declaration of an organisation as a criminal organisation, detailed particulars of both the grounds

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232 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37]; [2003] HCA 6.

233 See, for example, *RCB (as litigation guardian of EKV, CEV, CIV and LRV) v The Honourable Justice Forrest* (2012) 87 ALJR 1; 292 ALR 617; [2012] HCA 47.

234 s 8(2).

for making the declaration and the information supporting those grounds. The operation of the criminal intelligence provisions will prevent a respondent and the respondent's representatives knowing of one class of material that the Commissioner alleges supports the case for a declaration. In this respect the CO Act may be said to require departure from the usual incidents of an adversarial system of adjudication, but the nature and extent of that departure must be identified with some care.

159 The procedural unfairness which it was said was worked by the criminal intelligence provisions of the CO Act was identified as being the denial to the respondent of any opportunity to test the criminal intelligence. But three points must then be made.

160 First, if it is unfair to keep criminal intelligence from the respondent because the respondent cannot test its truth or reliability, it is not apparent how that unfairness could be cured by telling the respondent's lawyer that the applicant intends to rely on identified criminal intelligence. Yet argument of the present matter assumed that procedural fairness would be accorded if a lawyer representing a respondent organisation could be told what was the criminal intelligence upon which the applicant for a declaration relied.

161 If told of the content of criminal intelligence to be proved in support of an application for a declaration of an organisation as a criminal organisation, what could the respondent's lawyer do with that knowledge? The criminal intelligence is[235] information relating to actual or suspected criminal activity. The lawyer could not seek or obtain instructions from anyone about the factual assertions made in that criminal intelligence. The lawyer could not, without disclosing the existence or content of the information constituting the criminal intelligence, ask any member of the respondent to comment on what the lawyer had been told. The lawyer could assemble no ammunition to launch an attack upon the veracity of a confidential source alleged to have provided criminal intelligence without disclosing that source's existence[236]. Unlike the commonplace case of evidence of a secret process or other confidential commercial information, the lawyer could not look to some independent third party expert to provide in confidence the means of testing the evidence.

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235 s 59(1).

236 The CO Act also makes special provision for, and additional restrictions upon disclosure concerning, informants as defined in the dictionary to the Act (Sched 2): see, for example, ss 63(5), 64 and 76.

162 Second, s 72(2) of the CO Act expressly permits the Supreme Court, in exercising its discretion to declare information to be criminal intelligence, to have regard to whether the considerations of prejudice to criminal investigations, enabling discovery of the existence or identity of an informer or danger to anyone's life or physical safety "outweigh any unfairness to a respondent". No doubt it must be recognised that this discretion falls to be exercised before information is relied on for a substantive application[237], and thus must be exercised when all who may be affected by the information may not be identified or identifiable. But fairness to a respondent is a matter to which the Supreme Court may have regard in deciding whether to declare information to be criminal intelligence. In many cases, including those where the respondent to a substantive application is known or can be ascertained, it is a matter to which the Court would be bound to have regard.

163 The third point to be made is that the criminal intelligence provisions deny a respondent knowledge of *how* the Commissioner seeks to prove an allegation; they do not deny the respondent knowledge of *what* is the allegation that is made against it. As has already been shown, a respondent to an application for a declaration of an organisation as a criminal organisation, its representatives and those who are alleged to be its members will know from the application the case that the Commissioner seeks to make. If, as must always be the case, the Commissioner alleges that the organisation should be declared to be a criminal organisation because some or all of its members associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity, the Commissioner will have had to provide particulars of the activity upon which the Commissioner relies, of those who are alleged to have engaged in that activity and of whether those persons are alleged to be or to have been members of the organisation.

164 For all practical purposes, demonstration of association for the purposes described would be possible only if persons alleged to have then been members of the organisation were alleged to have engaged in relevant acts or omissions constituting serious criminal activity before the application for declaration of the organisation was made. Thus the Commissioner must allege and prove not only the occurrence of past serious criminal activity by persons who then were members of the organisation but also that members of the organisation associate for one or more of the identified purposes relating to that activity.

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237 s 67.

165 The criminal activity upon which the Commissioner relies could be demonstrated by proof of the previous prosecution and conviction of members for conduct constituting activity of the kind alleged. To the extent that it is, the respondent can dispute the conclusions which the Commissioner seeks to draw from those facts. (The respondent could also seek to dispute the fact that convictions were recorded but that possibility can be dismissed from consideration as unlikely to be practically relevant.) And to the extent that prior criminal activity is not established by proving the prior convictions of persons shown to have been members of the organisation at relevant times, the respondent, its members and its representatives would know that the case to be met is founded on assertions and allegations not yet made and established in a court.

166 In deciding any application for declaration of an organisation as a criminal organisation, the Supreme Court would know that evidence of those assertions and allegations that constituted criminal intelligence had not been and could not be challenged directly. The Court would know that the respondent and its members could go no further than make general denials of any wrongdoing of the kind alleged. What weight to give to that evidence would be a matter for the Court to judge[238].

167 Contrary to a proposition which ran throughout the respondents' submissions in this case, noticing that the Supreme Court must take account of the fact that a respondent cannot controvert criminal intelligence does not seek to deny the allegation of legislative invalidity by asserting that the Supreme Court can be "relied on" to remedy any constitutional infirmity or deficiency in the legislative scheme. Rather, it points to the fact that under the impugned provisions the Supreme Court retains its capacity to act fairly and impartially. Retention of the Court's capacity to act fairly and impartially is critical to its continued institutional integrity.

168 In this respect, it is useful to contrast the impugned provisions of the CO Act with the CCOC Act considered in *Wainohu.* It will be recalled that the CCOC Act provided that an eligible judge need not give reasons for declaring an organisation to be a declared organisation. That an eligible judge could choose to do so was not to the point[239]. The CCOC Act was held invalid as repugnant to

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

239 (2011) 243 CLR 181 at 220 [69] per French CJ and Kiefel J, 228 [103] per Gummow, Hayne, Crennan and Bell JJ.

or inconsistent with the institutional integrity of the Supreme Court of New South Wales. But in the present case, the CO Act does not in any way alter the duty of the Supreme Court to assess the cogency and veracity of the evidence that is tendered in an application for a declaration of an organisation as a criminal organisation.

169 When it is said, as it was in this case, that there has been a departure from hitherto accepted forms of procedure and thus a departure from accepted judicial process, the significance of providing for some novel procedure must be measured against some standard or criterion. Consideration of the continued institutional integrity of the State courts directs attention to questions of independence, impartiality and fairness. In cases where it is said that the courts have been conscripted to do the Executive's bidding, the principal focus will likely fall upon questions of independence and impartiality. But that is not and was not said to be this case. Where, as here, a novel procedure is said to deny procedural fairness, attention must be directed to questions of fairness and impartiality. Observing that the Supreme Court can and will be expected to act fairly and impartially points firmly against invalidity.

170 Contrary to the respondents' submissions, the decision of the Supreme Court of the United Kingdom in *Al Rawi v Security Service*[240] does not assist in resolving the constitutional issues at stake in this case. A majority of the Supreme Court held in that case that there is no inherent power for a court, in either a civil or criminal trial, to allow a procedure whereby one party and the court may rely upon material that cannot be disclosed to the other party or its legal representatives. The validity of that proposition need not be examined here. It is a proposition which does not bear at all upon the radically different question of the ambit of legislative power that is in issue here. That ambit is fixed in this case by the principles that have been discussed earlier in these reasons.

Sections 9 and 106

171 The second of the subsidiary arguments advanced against validity remains for consideration: that ss 9 and 106 of the CO Act are invalid to the extent to which they prevent the Supreme Court from extending the time for a respondent to file its response to an application for a declaration that it is a criminal organisation. The application must state[241] as the return date for the application a day within 35 days of its filing. Section 9(3) provides that the respondent must

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240 [2012] 1 AC 531.

241 s 8(5)(b).

file its response to an application at least five business days before the return date of the application. The response must be accompanied by any affidavit the respondent intends to rely on at the hearing[242]. Section 106(1) provides that the applicant may apply to the Supreme Court for an extension of the "return date currently applying to the application". The CO Act makes no express provision for the respondent to make any application for an extension of either the return date or the time fixed by s 9(3) for its filing a response and any affidavit on which it will seek to rely at the hearing.

172 Those supporting the validity of the relevant provisions submitted that they should not be construed as excluding the power of the Supreme Court to extend the times fixed under the CO Act as the times by which the respondent to an application for a declaration of an organisation must file its response or file affidavits on which it would seek to rely at the hearing. Those who challenged the validity of the provisions did not seek in the end to challenge those submissions. Given the well-established principle[243] that the CO Act should be read as taking the Supreme Court "as it finds it", neither s 9 nor s 106 should be read as disclosing a clear intention to prevent the Supreme Court from acting upon either a response filed later than the time fixed by the CO Act or an affidavit filed after a response was, or should have been, filed. The challenge to the validity of these provisions should be rejected.

Conclusion and orders

173 For these reasons, the impugned provisions of the CO Act are not repugnant to or inconsistent with the institutional integrity of the Supreme Court. The questions reserved for consideration should be answered accordingly. The respondents should pay the costs of the Special Case.

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242 s 9(4).

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

GAGELER J.

Introduction

174 French CJ has explained the provisions of the *Criminal Organisation Act* 2009 (Q) ("the COA"). He has set out the questions reserved by the parties for the consideration of the Full Court.

175 I agree with French CJ, for the reasons he gives, that s 9 of the COA is not invalid because it limits time to respond to an application under s 8 of the COA. I also agree with French CJ, for the reasons he gives, that s 10(1)(c) of the COA is not invalid because of the nature of the judgment it requires the Supreme Court of Queensland to make.

176 The other questions turn on the compatibility of "criminal intelligence" provisions of the COA with constitutionally mandated characteristics of the Supreme Court of Queensland. I agree with the answers of French CJ but propose to state my own view of what is required to achieve that compatibility.

177 My view, in short, is that Ch III of the Constitution mandates the observance of procedural fairness as an immutable characteristic of a Supreme Court and of every other court in Australia. Procedural fairness has a variable content but admits of no exceptions. A court cannot be required by statute to adopt a procedure that is unfair. A procedure is unfair if it has the capacity to result in the court making an order that finally alters or determines a right or legally protected interest of a person without affording that person a fair opportunity to respond to evidence on which that order might be made.

178 The criminal intelligence provisions of the COA have the potential to result – in some but not all cases – in the Supreme Court of Queensland making a declaration of a criminal organisation or a control order or other order without the organisation or individual affected being afforded a fair opportunity to respond to evidence on which the declaration or order might be made. The criminal intelligence provisions are not rendered compatible with the constitutional requirement for procedural fairness by the presence of the criminal organisation public interest monitor ("the COPIM"), nor by the ability of the Supreme Court of Queensland to determine the weight to be given to declared criminal intelligence, nor by the width of the discretion allowed to the Supreme Court of Queensland in making a declaration of a criminal organisation or a control order or other order under the COA. The criminal intelligence provisions are saved from incompatibility with Ch III of the Constitution only by the capacity for the Supreme Court of Queensland to stay a substantive application in the exercise of inherent jurisdiction in a case where practical unfairness becomes manifest.

179 What follows is an elaboration of that view.

Chapter III and procedural fairness

180 The structural separation of the judicial power of the Commonwealth by Ch III of the Constitution is "the bulwark of the [C]onstitution against encroachment whether by the legislature or by the executive"[244] and "the Constitution's only general guarantee of due process"[245]. Chapter III has the result that "[t]he guilt of the citizen of a criminal offence and the liability of the citizen under the law, either to a fellow citizen or to the State, can be conclusively determined only by a Ch III court acting as such, that is to say, acting judicially"[246].

181 Yet Ch III of the Constitution also adopts an "autochthonous expedient"[247]: it allows the separated judicial power of the Commonwealth to be vested in courts other than those created by the Commonwealth Parliament. All State and Territory courts are able to be vested by the Commonwealth Parliament with the judicial power of the Commonwealth. They are all "Ch III courts".

182 That structural expedient can function only if State and Territory courts are able to act "judicially". To be able to act judicially, a court must have institutional integrity: it must "be and appear to be an independent and impartial tribunal"[248].

183 There lies the essentially structural and functional foundation for the implication that has come to be associated with *Kable v Director of Public Prosecutions (NSW)*[249]. The implication is a practical, if not logical, necessity[250]. To render State and Territory courts able to be vested with the separated judicial power of the Commonwealth, Ch III of the Constitution preserves the

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244 *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 540; [1957] AC 288 at 315.

245 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580; [1989] HCA 12.

246 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580.

247 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268; [1956] HCA 10.

248 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 81 [78]; [2006] HCA 44; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29]; [2004] HCA 31.

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

250 *McGinty v Western Australia* (1996) 186 CLR 140 at 168-169; [1996] HCA 48.

institutional integrity of State and Territory courts. A State or Territory law that undermines the actuality or appearance of a State or Territory court as an independent and impartial tribunal is incompatible with Ch III because it undermines the constitutionally permissible investiture in that court of the separated judicial power of the Commonwealth.

184 The plurality in *Leeth v The Commonwealth*[251] anticipated the *Kable* implication in saying that "[i]t may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power"[252]. The plurality added that "the rules of natural justice are essentially functional or procedural" and that "a fundamental principle which lies behind the concept of natural justice is not remote from the principle which inspires the theory of separation of powers"[253]. "It is", of course, "a fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case."[254]

185 Two members of the majority in *Kable* specifically held that a function cannot be conferred on a court compatibly with Ch III if that function is "antithe[tical]" or "repugnant" to the "judicial process"[255], explained in *Bass v Permanent Trustee Co Ltd*[256] to require "that the parties be given an opportunity to present their evidence and to challenge the evidence led against them"[257]. That holding was subsequently applied by all members of the majority in *International Finance Trust Co Ltd v New South Wales Crime Commission*[258].

186 Justifications for procedural fairness are both instrumental and intrinsic. To deny a court the ability to act fairly is not only to risk unsound conclusions

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251 (1992) 174 CLR 455; [1992] HCA 29.

252 (1992) 174 CLR 455 at 470.

253 (1992) 174 CLR 455 at 470.

254 *Cameron v Cole* (1944) 68 CLR 571 at 589; [1944] HCA 5.

255 (1996) 189 CLR 51 at 106, 134.

256 (1999) 198 CLR 334; [1999] HCA 9.

257 (1999) 198 CLR 334 at 359 [56].

258 (2009) 240 CLR 319 at 352 [50], 354 [54], 363-364 [88], 367 [98], 379 [140], 386-387 [161]; [2009] HCA 49.

and to generate justified feelings of resentment in those to whom fairness is denied[259]. The effects go further. Unfairness in the procedure of a court saps confidence in the judicial process and undermines the integrity of the court as an institution that exists for the administration of justice[260].

187 The centrality of procedural fairness to institutional integrity is implicit in the description of the inherent jurisdiction of a superior court to stay proceedings on grounds of abuse of process as involving[261]:

> "the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people".

It is also implicit in the explanation that the inherent jurisdiction[262]:

> "extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness".

188 While the characteristics of a court as an independent and impartial tribunal defy exhaustive definition, there is no novelty in the proposition that those characteristics include that the court not be required by statute to adopt a procedure that is unfair[263]. Procedural fairness requires the avoidance of "practical injustice"[264]. It requires, at the very least, the adoption of procedures that ensure to a person whose right or legally protected interest may finally be altered or determined by a court order a fair opportunity to respond to evidence on which that order might be based.

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259 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 380-381 [143]-[144].

260 *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 351-352, 364, 369-370; [1986] HCA 39.

261 *Walton v Gardiner* (1993) 177 CLR 378 at 393; [1993] HCA 77, quoting *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536.

262 *Walton v Gardiner* (1993) 177 CLR 378 at 393.

263 *Nicholas v The Queen* (1998) 193 CLR 173 at 208-209 [74]; [1998] HCA 9.

264 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37]; [2003] HCA 6.

189 Does the proposition that a court cannot be required by statute to adopt a procedure that is unfair admit of exceptions? No authority compels the conclusion that it does.

190 In *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*[265], Crennan J (with whom Gleeson CJ agreed) stated that "Parliament can validly legislate to exclude or modify the rules of procedural fairness provided there is 'sufficient indication' that 'they are excluded by plain words of necessary intendment'"[266]. The joint majority judgment did not go that far[267]. The statement of Crennan J is to be read in a context in which her Honour went on to find in the statute in question "modification", not exclusion[268]. The statement was made with reference to *The Commissioner of Police v Tanos*[269] and *Annetts v McCann*[270]. In neither case was a constitutional issue raised. What in *Tanos* was described as the "deep-rooted principle of the law that before any one can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding he must be afforded an adequate opportunity of being heard" was said to be applicable "to proceedings in the established courts [as] a matter of course". The principle was held not to be displaced by the statute in question[271]. *Annetts v McCann* did not concern a court, but a coronial inquiry[272].

191 In *K-Generation Pty Ltd v Liquor Licensing Court*[273] the statute in question relevantly required no more than that a State court "take steps to maintain the confidentiality of information classified … as criminal intelligence"[274]. The plurality stressed the range of procedures that remained

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265 (2008) 234 CLR 532; [2008] HCA 4.

266 (2008) 234 CLR 532 at 595-596 [182] (citations omitted).

267 (2008) 234 CLR 532 at 559 [35]-[36].

268 (2008) 234 CLR 532 at 596 [183]; see generally at 595-597 [181]-[189].

269 (1958) 98 CLR 383 at 396; [1958] HCA 6.

270 (1990) 170 CLR 596 at 598; [1990] HCA 57.

271 (1958) 98 CLR 383 at 395-396.

272 See *Ammann v Wegener* (1972) 129 CLR 415 at 436; [1972] HCA 58.

273 (2009) 237 CLR 501; [2009] HCA 4.

274 Section 28A(5) of the *Liquor Licensing Act* 1997 (SA), quoted in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 541 [139].

available to provide procedural fairness[275]. Similar flexibility in the provision of procedural fairness was allowed by the "criminal intelligence" provisions in respect of which no constitutional difficulty was identified in *Wainohu v New South Wales*[276]. The Court did not in that case strain at the constitutional gnat of a statutory permission for a court not to give reasons only to swallow the constitutional camel of a statutory requirement for a court not to give procedural fairness.

192 Suggestions that there are exceptions to procedural fairness in the common practices of courts in Australia are unfounded. The suggested exceptions are more apparent than real. There are many instances in which a court may, or must, make ex parte orders; but invariably as a step in an overall process that, viewed in its entirety, entails procedural fairness. *International Finance* shows that a court cannot validly be required to make an ex parte restraining order within a statutory context which practically impedes the affected person from applying for discharge of that order[277]. There are then cases, of which claims for the protection of some intellectual property or for the determination of client legal privilege or public interest immunity are examples, where the usual practices of courts are adjusted to protect confidentiality at the heart of a right or interest in issue which would be destroyed were confidential information to be disclosed in the curial process. There are also instances in which specific evidence given to a court is withheld from a party to protect commercial confidentiality, to protect the safety of a witness or an informant, or for some other reason sufficiently supported by the interests of justice. All are examples of modifications or adjustments to ordinary procedures, invariably within an overall process that, viewed in its entirety, entails procedural fairness. They are not, as submitted on behalf of the Attorney-General for New South Wales, examples of the content of procedural fairness in a court being reduced to "nothingness"[278].

193 Practices of courts in the United Kingdom and Canada, to which the parties and some interveners referred, point in no different direction. The Supreme Courts of those countries have in recent years been called on to consider the compatibility of various forms of novel court procedures with constitutional or quasi-constitutional norms requiring that the determination of rights and obligations occur in a fair and public hearing before an independent

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275 (2009) 237 CLR 501 at 542-543 [145]-[147].

276 (2011) 243 CLR 181 at 193-194 [11]; [2011] HCA 24.

277 (2009) 240 CLR 319 at 356 [58], 366-367 [97]-[98], 386-387 [161].

278 Cf *R v Khazaal* [2006] NSWSC 1061 at [27]-[50].

and impartial tribunal[279]. Questions confronted have included: a non-citizen challenging executive detention on national security grounds being excluded from part of the hearing in which national security evidence is given[280]; control orders judicially reviewed on the basis of material not disclosed to the affected person[281]; a witness fearing intimidation giving anonymous evidence in a murder trial[282]; a race discrimination claimant being excluded from part of a hearing on grounds of national security[283]; and a Muslim witness in a sexual assault trial seeking to give evidence with her face covered by a niqab[284]. Questions of that nature, if they arise in Australia, are best left for consideration in concrete cases. What sufficiently emerges from their consideration by those other national Supreme Courts is a common approach that, while other interests may be balanced in fashioning a procedure appropriate to the context, the processes of a court, viewed as a whole, can never be unfair.

194 There should be no doubt and no room for misunderstanding. Procedural fairness is an immutable characteristic of a court. No court in Australia can be required by statute to adopt an unfair procedure. If a procedure cannot be adopted without unfairness, then it cannot be required of a court. "[A]brogation of natural justice", to adopt the language of the explanatory notes to the Bill for the COA[285], is anathema to Ch III of the Constitution.

195 Chapter III of the Constitution admits of legislative choice as to how, not whether, procedural fairness is provided in the exercise of a jurisdiction invested in, or power conferred on, a court. Procedural fairness can be provided by different means in different contexts and may well be provided by different

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279 Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950); s 7 of the Canadian Charter of Rights and Freedoms.

280 *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350.

281 *Home Secretary v MB* [2008] AC 440; *Home Secretary v AF (No 3)* [2010] 2 AC 269.

282 *R v Davis* [2008] AC 1128.

283 *Tariq v Home Office* [2012] 1 AC 452.

284 *R v S (N)* (2012) 290 CCC (3d) 404.

285 Queensland, Legislative Assembly, Criminal Organisation Bill 2009, Explanatory Notes at 3.

means in a single context[286]. The legislative choice as to how procedural fairness is provided extends to how procedural fairness is accommodated, in a particular context, to competing interests.

196 The limits of that legislative choice need not, and therefore ought not, now be explored. In particular, it is not now necessary or appropriate to determine the extent, if at all, to which the avoidance of practical injustice in a particular context might necessitate "[c]onfrontation and the opportunity for cross-examination"[287]. Resolution of that issue is not foreclosed either by the description in *Bass* of judicial process as requiring parties to have an opportunity "to challenge the evidence led against them"[288] or by the particular holdings in *Gypsy Jokers*, *K-Generation* and *Wainohu*.

197 To answer the abstract questions reserved by the parties for the consideration of the Full Court so far as they concern the compatibility of criminal intelligence provisions of the COA with Ch III of the Constitution, it is sufficient to accept, as a starting-point, what is implicit in s 72(2) of the COA and what is conceded by the Solicitor-General of Queensland: that the protection of declared criminal intelligence by the COA *may* be unfair to a respondent to a substantive application in which that criminal intelligence is relied on as evidence.

198 From that starting-point, it is sufficient to engage in an analysis that leads to the conclusion that nothing in the scheme of the COA or in procedural rules not excluded by the COA is necessarily sufficient to address that unfairness if it arises, but that the Supreme Court of Queensland retains inherent jurisdiction to stay a substantive application if unfairness becomes manifest. I now turn to that analysis.

The COA

199 The COA provides for a three-stage process. Stage one is the declaration of criminal intelligence. Stage two is the declaration of a criminal organisation. Stage three is the making of a control order, or a public safety order or a fortification removal order.

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286 *J v Lieschke* (1987) 162 CLR 447 at 457; [1987] HCA 4; *Coulter v The Queen* (1988) 164 CLR 350 at 356; [1988] HCA 3; *Western Australia v Ward* (1997) 76 FCR 492 at 496-499, 508.

287 *Lee v The Queen* (1998) 195 CLR 594 at 602 [32]; [1998] HCA 60.

288 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [56].

200 Stage one – the declaration of criminal intelligence – is anterior to the second and third stages. An application for a declaration of criminal intelligence must, by s 67, be decided before the information can be relied on in any substantive application. It must be decided in what ss 66 and 70 require to be a closed ex parte hearing. The requirement for the hearing to be ex parte does not of itself give rise to a want of procedural fairness. That is because a declaration of criminal intelligence has no consequences other than those given by the COA, being consequences only in respect of substantive applications under the COA. That is to say, a declaration of criminal intelligence at stage one has no effect on rights absent an application at stage two or stage three. The relevant question is then as to the effect on procedural fairness at that subsequent stage of the prior declaration of criminal intelligence.

201 The question for the Supreme Court of Queensland at stage one is whether or not to make a declaration of criminal intelligence. It is, by 72(1), one of discretion. By s 72(2) read with s 72(7), a relevant consideration in the exercise of that discretion is whether matters giving information the status of criminal intelligence under s 60(a)(i)-(iii) – that the admission of the information into evidence in substantive applications under the COA would prejudice criminal investigations, enable the discovery of the existence or identity of confidential sources of information relevant to law enforcement or endanger someone's life or physical safety – "outweigh any unfairness" to "a respondent to any existing or possible substantive application in which [that] information ... may be considered" at the second or third stage.

202 It is not difficult to see how unfairness to a respondent might arise. The protections afforded to declared criminal intelligence by ss 77 and 78 of the COA might well result in a particular respondent to a particular substantive application being left without any real practical opportunity to respond to declared criminal intelligence that is relied upon as evidence to establish one or more grounds for the making of the declaration or order. Other ways in which the statutory protection of declared criminal intelligence might give rise to practical injustice can be put to one side.

203 The Solicitor-General of Queensland is correct to accept that, despite the permissive language of s 72(2), the relevant consideration it sets out is a mandatory relevant consideration in the exercise of the discretion conferred by s 72(1). He is correct to concede that "having regard to Chapter III of the Constitution, the matters mentioned in s 60(a)(i) to (iii) could never outweigh the public interest in ensuring that all trials are fair trials". He is therefore correct to concede that the discretion conferred by s 72(1) could never be exercised to make a criminal intelligence declaration in the face of an assessment at the time of declaration that the admission of the declared criminal intelligence into evidence in a substantive application would cause unfairness to a respondent to that substantive application.

204 With one critical difference, the balancing required in the exercise of the discretion conferred by s 72(1) is not unlike the balancing required to determine public interest immunity at common law[289]. The critical difference is that the consequence of finding the balance in favour of making a declaration of criminal intelligence is not simply that the information is to be kept secret from a respondent but that the information may be deployed in secret against a respondent in a subsequent substantive application. Just as the balance would not favour public interest immunity in respect of information necessary to be disclosed in order fairly to dispose of proceedings[290], so s 72(1) would not be exercised to make a declaration in respect of information assessed at the time of the exercise of the discretion to be necessary to be disclosed for a respondent fairly to meet a substantive application.

205 Here is the difficulty. Inherent in the requirement of s 67 for the discretion conferred by s 72(1) always to be exercised in advance of a substantive application is that the assessment of unfairness has to be made as a prediction. What happens if the prediction turns out to be wrong? What happens, once criminal intelligence has been declared, if disclosure of the declared criminal intelligence turns out, in the events that subsequently occur, in truth to be necessary for a respondent fairly to meet a substantive application?

206 Alert to the difficulty, the Solicitor-General of Queensland volunteers a solution which he suggests is to be found in the Uniform Civil Procedure Rules 1999 (Q), which are applied by s 101 of the COA in relation to applications made under it "to the extent the rules are consistent with [the COA]". He suggests that a declaration of criminal intelligence, as an "order … made in the absence of a party", is an order which r 667(2)(a) allows to be set aside at any time. The problem with his suggestion is that such an application of r 667(2)(a) runs counter to s 73(2), which provides for a criminal intelligence declaration to remain in force until revoked, and to s 74(1), which provides for revocation only on application by the commissioner of the police service. The evident legislative design is that criminal intelligence, once declared, is to remain subject to the protections afforded by the COA until revocation on application by the commissioner. As French CJ points out[291], nothing in the COA displaces the inherent jurisdiction of the Supreme Court of Queensland, which includes power to dissolve a declaration of criminal intelligence for fraud or material non-disclosure. But the COA is inconsistent with any general ability of the Supreme Court of Queensland to set aside a declaration of criminal intelligence, on the application of a respondent to a substantive application or of its own motion.

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289 *Alister v The Queen* (1984) 154 CLR 404 at 412, 469; [1984] HCA 85.

290 *Al Rawi v Security Service* [2012] 1 AC 531 at 605 [140].

291 At [40]-[43].

207 The explanatory notes to the Bill for the COA suggest other solutions, taken up with varying degrees of enthusiasm by the Solicitor-General of Queensland and the interveners.

208 One solution is suggested to lie in the presence of the COPIM. Analogies are sought to be drawn to the position of special advocates appointed under various statutory regimes. The extent to which those analogies are complete need not be explored. The COPIM does not act as an advocate for a respondent to a substantive application. The COPIM is not required to act in the interests of a respondent. The presence of the COPIM doubtless adds to the integrity of the process. But it cannot cure a want of procedural fairness.

209 Another solution is suggested to lie in the ability of the Supreme Court of Queensland to determine the weight to be given to declared criminal intelligence. Procedural unfairness in an administrative process cannot be cured by a decision-maker choosing to ascribe no or little weight to adverse evidentiary material that has not been disclosed to a person whose rights or interests are affected by a decision. That is for a reason of principle[292]:

> "the necessity to disclose such material in order to accord procedural fairness is not based on answering a causal question as to whether the material did in fact play a part in influencing the decision, but rather on the appearance of a fair hearing and the maintenance of confidence in the administrative process and judicial review of it".

It is not enough that a decision reached by an unfair process be "correct" in the result. The relevant inquiry is always "what procedures should have been followed?", never "what decision should the decision-maker have made[?]" or "what reasons did the decision-maker give for the conclusion reached[?]"[293]. The application of the principle to a court is stronger because the appearance of a fair hearing in a court and the maintenance of confidence in the curial process are constitutionally mandated.

210 Yet another solution is suggested to lie in the width of the discretion allowed to the Supreme Court of Queensland in making a declaration of a criminal organisation or a control order, or a public safety order or a fortification removal order. This, on analysis, is only a slight variation of the suggestion that

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292 *NIB Health Funds Ltd v Private Health Insurance Administration Council* (2002) 115 FCR 561 at 583 [84], quoted in part in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 97 [19]; [2005] HCA 72.

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

the solution lies in the ability to determine the weight to be given to declared criminal intelligence. It admits of the same principled response. A discretion as to the result is no cure for a flaw in the process.

211 To attempt to overcome a want of procedural fairness in a court by relying on the court to compensate in the way the court reasons to a decision is, in the long run, self-defeating. The attempted resolution leverages off the institutional integrity of the court. The problem is that the appearance, if not the actuality, of that institutional integrity will not endure if there is manifest unfairness in the procedure of the court.

212 The procedural difficulty demands a procedural solution. There is a procedural solution. It is implicit in the acknowledgement by the Solicitor-General of Queensland that the use by the commissioner of declared criminal intelligence could in some circumstances amount to an abuse of process. The solution lies in the capacity of the Supreme Court of Queensland to stay a substantive application in the exercise of its inherent jurisdiction in any case in which practical unfairness to a respondent becomes manifest. The criminal intelligence provisions are saved from incompatibility with Ch III of the Constitution only by the preservation of that capacity.

Conclusion

213 The answer to each substantive question reserved is "no".

214 The answers to the questions reserved do not determine questions not reserved and not argued. They do not determine whether s 108 of the COA is valid in requiring a closed hearing.