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Crimes (Criminal Organisations Control) Bill 2012: the constitutional issues

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1 Introduction

On 15 February 2012 the NSW Attorney General, Greg Smith, introduced the Crimes (Criminal Organisations Control) Bill 2012 [**the 2012 Bill**] into the Legislative Assembly. The Bill was passed without amendment and transmitted to the Legislative Council on the same day.

2 The purpose of the 2012 Bill

As explained in the Explanatory Note for the Bill, the purpose of the legislation was to re-enact the *Crimes (Criminal Organisations Control) Act 2009* which was declared invalid by the High Court in *Wainohu v State of NSW* (2011) 278 ALR 1.

By reference to the *Kable* principle, which is discussed below, the 2009 Act was declared invalid on the basis that a Judge making a declaration under the Act that an organisation was a criminal organisation was not required to provide reasons for making the declaration. In the 2009 Act, s 13(2) provided:

> If an eligible Judge makes a declaration or decision under this Part, the eligible Judge *is not required to provide any grounds or reasons* for the declaration or decision (other than to a person conducting a review under section 39 if that person so requests. (emphasis added)

The reference to s 39 of the Act was to the statutory duty of the Ombudsman to scrutinise the exercise of powers conferred on police by the 2009 legislation.

Under the 2012 Bill, s 13(2) reads:

> If an eligible Judge makes or revokes a declaration under this Part or refuses an application under this Part, the eligible Judge is *required to provide reasons* for making or revoking the declaration or refusing the application. (emphasis added)

The Agreement in Principle speech stated that, as revised, s 13(2) would repair the "identified constitutional shortcomings". It was said that "The Government believes this will be sufficient to address the constitutional issues identified in the decision of the High Court". The same source went on to explain a further feature of the legislation, relating to the confidentiality of criminal intelligence:

> Now that eligible judges are to be required to give reasons for their decision to declare an organisation, steps have also been taken in the

> bill to clarify the extent of the confidentiality requirements under the new Act. Section 28 of the old Act requires a determining authority, that is, an eligible judge making a declaration or a court making a control order, to take steps to maintain the confidentiality of information that is properly classified by the Commissioner of Police as criminal intelligence. Criminal intelligence is material which, if disclosed, could prejudice criminal investigations, enable the discovery of the existence or identity of a confidential source of information or endanger a person's life or physical safety. It is proposed that section 28 will be amended to clarify that the requirement to take steps to maintain the confidentiality of the criminal intelligence will extend to the eligible judge's determination and, therefore, the reasons for the decision.

3 The Kable principle

Kable v DPP (NSW) (1996) 189 CLR 51 was a landmark case, the background to which was discussed in Briefing Paper 27/1996.[1] At issue in the case was the validity of the *Community Protection Act 1994* (NSW). The key finding was that the 1994 Act required the NSW Supreme Court to undertake a function that was incompatible with the integrity of the judiciary, thereby contravening Chapter III of the Commonwealth Constitution which requires the State courts vested with federal judicial power to keep themselves free of such incompatibility in order that they remain suitable receptacles of that power. The relevant test to be applied was that of incompatibility of function, understood in relation to the maintenance of public confidence in the integrity and independence of State courts vested with federal jurisdiction.

Key to this finding is s 71 of Chapter III of the Commonwealth Constitution which provides (in part):

> The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.

The constitutional principles associated with the *Kable* line of cases are as follows:

- A State court cannot undertake a function which is incompatible with its role under Chapter III of the Constitution
- All State courts are part of the integrated Australian court system. By s 73 of the Commonwealth Constitution, that integrated court system has at its apex the appellate jurisdiction of the High Court.
- A State legislature cannot confer on a State court a function which would substantially impair its institutional integrity, understood in terms of the defining characteristics of a court.[2]

In *Wainohu*, French CJ and Kiefel J explained:

> The term "institutional integrity", applied to a court, refers to its possession of the defining or essential characteristics of a court. Those characteristics include the reality and appearance of the court's independence and its impartiality. Other defining characteristics are the application of procedural fairness and adherence, as a general rule, to the open court principle. As explained later, it is

> also a defining characteristic of a court that it generally gives reasons for its decisions.[3]

In effect, for the institutional integrity of and public confidence in the courts to be maintained, judicial power must be exercised in accordance with the judicial process. In particular, courts exercising federal judicial power must be perceived to be free from legislative or executive interference. In *Wainohu*, Gummow, Hayne, Crennan and Bell JJ said that the constitutional principle established in *Kable* has:

> as its touchstone protection against legislative or executive intrusion upon the institutional integrity of the courts, whether federal or state. The principle applies throughout the Australian integrated court system because it has been appreciated since federation that the Constitution does not permit of different grades of qualities of justice.[4]

While *Kable* might be said to import a quasi-separation of powers doctrine into the State constitutions, it does not have as its source the doctrine of the separation of powers.[5] At its source, rather, is a concern for the guarding of institutional integrity by the maintenance of procedural due process.

4 The persona designata doctrine

The *Kable* case left several issues undecided, including the extent to which the incompatibility test could be applied to the *persona designata* doctrine at the State level. That doctrine applies usually where an individual judge is detached from the court to which he is appointed, for the purpose of acting in an administrative or executive capacity, as in the case of the appointment of a judge as a royal commissioner. In *Kable*, McHugh J observed that a State may confer executive functions on a State court judge as persona dsignata, but not if the appointment gave the appearance that "the court as an institution was not independent of the executive government".[6]

In *Wainohu*, French CJ and Kiefel J referred to McHugh J's views with approval, adding that:

> a function conferred upon a judge of a state court is incompatible with the role of the court under Ch III if the conferral and exercise of the function substantially impairs the institutional integrity of the court.[7]

5 Related statutes and cases

The Crimes (Criminal Organisations Control) Bill 2012 belongs to a broader context of law, one that encompasses statutes designed to control organised crime in other States, often referred to as "bikie" control orders legislation. The most notable examples of similar State legislation are:

- *Serious and Organised Crime (Control) Act 2008* (SA); and
- *Criminal Organisation Act 2009* (Qld).[8]

Section 14(1) of the South Australian Act was found to be invalid in *Totani v South Australia* (2010) 242 CLR 1. That section provided that the Magistrates Court of South Australia "must", on application by the Commissioner of Police, "make a control order against a person [the defendant] if the Court is satisfied that the defendant is a member of a declared organisation. This finding of invalidity in respect to s 14(1) rendered the Act inoperable. The Serious and Organised Crime (Control) (Miscellaneous) Bill 2012, introduced into the House of Assembly on 15

February 2012, is designed to overcome that invalidity. It adopts a version of the "eligible judge" model found in the NSW 2009 Act and 2012 Bill.

A different "court based" model was adopted in Queensland. There the Commissioner of Police must apply to the Supreme Court for a declaration that an organisation is a criminal organisation (s 8), as well as to apply for a control order in respect to a member of such an organisation (s 16). *Prima facie* this "court based" model would seem less problematic from the standpoint of the *Kable* principle.[9]

6 The Crimes (Criminal Organisations Control) Act 2009

In July 2010, the Acting Commissioner of Police for New South Wales applied to a judge of the Supreme Court of New South Wales for a declaration under Part 2 of the 2009 Act in respect of the Hells Angels Motorcycle Club in New South Wales. Under Part 2 of the Act, a judge who had been designated an "eligible Judge" by the Attorney-General could make a declaration in relation to an organisation. The eligible Judge had to be satisfied that the members of the organisation associated for the purposes of organising, planning, facilitating, supporting or engaging in serious criminal activity and that the organisation represented a risk to public safety and order in New South Wales. Section 13(2) of the Act provided that an eligible Judge had no obligation to provide reasons for making or refusing to make a declaration.

If a declaration was made in respect of an organisation, under Part 3 of the 2009 Act the Supreme Court was empowered, on the application of the Commissioner of Police, to make control orders against individual members of that organisation. A person the subject of a control order was referred to in the Act as a "controlled member". Under the Act it was an offence for controlled members of an organisation to associate with one another. They were also barred from certain classes of business and certain occupations.

Notwithstanding the alteration made to s 13(2) and certain other related revisions, the same basic scheme is in place under the 2012 Bill.

7 The *Wainohu* case

As summarised in the High Court media release of 23 June 2011, in *Wainohu* it was held by majority (Heydon J dissenting) that the 2009 Act was invalid:

> The Act provided that no reasons need be given for making a declaration. The jurisdiction of the Supreme Court to make control orders was enlivened by the decision of an eligible Judge to make a declaration. Six members of the High Court held that, in those circumstances, the absence of an obligation to give reasons for the declaration after what may have been a contested application was repugnant to, or incompatible with, the institutional integrity of the Supreme Court. Because the validity of other parts of the Act relied on the validity of Part 2, the whole Act was declared invalid.

For Gummow, Hayne, Crennan and Bell JJ the application of the *Kable* principle to the persona designata doctrine was central to their reasoning. They argued that, under the 2009 Act, judges were selected as the persons in whom the power to make declarations

under Part 2 was vested in order to use the confidence reposed in them as holders of judicial office.[10]

French CJ and Kiefel J observed that the 2009 Act created a connection between the non-judicial function conferred upon an eligible judge by Part 2 of the Act and the exercise of jurisdiction by the Supreme Court under Part 3 of the Act:

> This has the consequence that a judge of the Court performs a function integral to the exercise of jurisdiction by the Court, by making the declaration, but lacks the duty to provide reasons for that decision. The appearance of a judge making a declaration is thereby created whilst the giving of reasons, a hallmark of that office, is denied. These features cannot but affect perceptions of the role of a judge of the Court, to the detriment of the Court.[11]

As the above suggests, the test applied was a functional (not formalist) one, that is, whether the performance of a function would in fact impair the defining characteristics of a court and public confidence in the judicial process.[12] Thus, the issue was not whether an "eligible judge" could or could not be described as a *persona designata*. Rather, the requirements of compatibility:

> direct attention to the functions conferred upon the judge, the extent to which they are connected to or integrated with the exercise of the court's jurisdiction, and the degree of decisional independence enjoyed by the judge in the exercise of those functions.[13]

As summarised by the Australian Government Solicitor, Heydon J would have held the NSW Act to be valid including because:

- an eligible judge was likely to provide reasons wherever the interests of justice required it, even though there was no duty to do so;
- the declaration by an eligible judge as a designated person was an administrative decision and s 13(2) of the 2009 Act did no more than reflect the common law position that there is no general rule requiring that reasons be given for administrative decisions;
- the declaration by an eligible judge was not a step in the decision-making process of the executive government;
- the failure to give reasons in the making of a declaration under Part 2 of the 2009 Act, which did not itself affect rights, was not so significant as to impair the independence and impartiality of the eligible judge where the Supreme Court undertook an ordinary curial procedure before making a control order under Part 3 of the 2009 Act.[14]

8 Other issues in *Wainohu*

The dissenting judgment of Heydon J is a good guide to the other grounds upon which Wainohu sought to establish the invalidity of the 2009 Act. These included the arguments that:

- the rules of evidence need not be applied under s 13(1) of the 2009 Act;
- an eligible judge could take into account potentially irrelevant considerations under s 9(2) of the Act, which set out the information an eligible judge may have regard to when making a declaration;

- an interim control order might be made *ex parte*, without the member of the organisation being provided with prior notice or service of the application or the right to make submissions or adduce evidence.

Additional arguments related to the implied freedom of political communication and a further implied right to freedom of association. For Heydon J all these grounds failed to establish invalidity.

The same applied for Gummow, Hayne, Crennan and Bell JJ (French CJ and Kiefel J concurring) who noted that "The submissions should not be accepted…".[15] In respect to the implied right to freedom of association, they said that this "would only exist as a corollary to the implied freedom of political communication and the same test of infringement and validity would apply". They continued by stating that "the Act is not directed at political communication or association" and that, in respect to control orders, special provision for exemption was made by s 19(7) of the 2009 Act.[16] The same applies under the 2012 Bill.

9 Expert comments on the 2012 Bill

An article in the *Sydney Morning Herald* on 15 February 2012 referred to a number of expert comments on the 2012 Bill. According to the article:

> The barrister who led the challenge against the NSW laws said the changes did not seem to address all issues. Mark Robinson SC said the High Court had quashed the legislation after identifying one defect, but had not needed to rule on several other issues. He said the main issue appeared to be if the process involving Supreme Court judges "does not look like a Supreme Court, or takes away from its authority or its integrity".[17]
>
> He said the legislation stopped people who were not involved in criminal activities from talking to each other. "I can't see it's constitutionally authorised".

On the other hand, the article referred to the opinion of a law lecturer at the University of NSW, Nicola McGarrity, who reportedly said:

> ...it was likely the legislation "would pass constitutional muster" after amendments to require judges to give reasons for declaring a criminal organisation were made.[18]

10 Conclusion

There is no doubt that the 2012 Bill addresses the ground of invalidity identified in *Wainohu*. Other claimed grounds of invalidity were all rejected by the High Court. For those reasons, it would seem reasonable to assume the revised legislative scheme would survive constitutional challenge in the High Court. Whether that proves to be the case remains to be seen.

It might be said that, for the High Court, the challenge posed by legislation of this kind relates to its two-stage approach, one administrative but involving an "eligible judge", the other judicial; and, with it, the appearance and reality of the nexus between those stages and its implications for the institutional integrity of the court.

For the States, where the formal doctrine of the separation of powers as formulated federally in the *Boilermakers' case* (1957) 95 CLR 529 does not apply, the traditional view has been that the judges of the Supreme Court are free to act in persona designata roles. Such appointments

may now be subject to scrutiny further to the High Court's latest formulation of the *Kable* principle. Precisely in what direction and how far that principle will go will only be determined by future High Court decisions.

As to what is meant by "the essential characteristics of a court" and its institutional integrity, Steytler and Field comment that:

> no all-embracing statement or definition as to the minimum attributes of an independent and impartial tribunal is likely to be forthcoming. Rather, the courts are likely to approach the issue of incompatibility with institutional integrity by an evaluative process requiring consideration of a number of factors.[19]

1 There is a large body of academic literature on the case, including: HP Lee, "The Kable case: a guard-dog that barked but once?' in *State Constitutional Landmarks* edited by George Winterton, Federation Press 2006; F Wheeler, "The Kable doctrine and State legislative power over State courts" (2005) 20 *Australasian Parliamentary Review* 15.

2 In *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 a change in emphasis emerged when the High Court suggested that institutional integrity depended on the use of the words "court of a State" in s 77 of the Commonwealth Constitution: C Steytler and I Field, "The institutional integrity principle: where are we now, and where are we headed?" (2001) 35 *UWA Law Review* 227 at 233.

3 (2011) 278 ALR 1 at [44] (footnotes omitted).

4 (2011) 278 ALR 1 at [105].

5 (2011) 278 ALR 1 at [45].

6 (1996) 189 CLR 51 at 117-118.

7 (2011) 278 ALR 1 at [52]. The key cases on the persona designate doctrine are: *Grollo v Palmer* (1995) 184 CLR 348 and *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

8 See also the Criminal Organisations Control Bill 2011 (WA)

9 For a commentary on the legislation see - A Gray, "Constitutionality of criminal organization legislation" (2010) 17 *AJ Admin* 213.

10 (2011) 278 ALR 1 at [109].

11 (2011) 278 ALR 1 at [68].

12 (2011) 278 ALR 1 at [47].

13 (2011) 278 ALR 1 at [61]. In their joint judgment, Gummow, Hayne, Crennan and Bell JJ emphasised that the invalidity of the 2009 Act was based on its failure to impose a duty on the eligible judge to provide reasons or grounds for making a declaration that decided the Act's invalidity: [at 104].

14 Australian Government Solicitor, *Litigation Notes, Number 21*, 2 November 2011.

15 (2011) 278 ALR 1 at [110]; French CJ and Kiefel J concurred [72].

16 (2011) 278 ALR 1 at [112-113].

17 A Patty, 'National bikie laws the answer', *SMH,* 15 February 2012.

18 A Patty, 'National bikie laws the answer', *SMH,* 15 February 2012.

19 C Steytler and I Field, "The institutional integrity principle: where are we now, and where are we headed?" (2001) 35 *UWA Law Review* 227 at 234.

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