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The High Court and the constitutional limits of anti-gang laws: in summary

by Gareth Griffith

1. Introduction

On 8 October 2014 the High Court handed down its decision in *Tajjour v NSW* [2014] HCA 35 (*Tajjour*)¹ in which the offence of consorting in s 93X of the *Crimes Act 1900* (NSW) was held to be constitutionally valid. Specifically, it was found not to contravene the implied freedom of political communication under the Commonwealth Constitution. *Tajjour* is the latest in a series of cases relating to what can be described as anti-gang legislation in Australia.

The purpose of this e-brief is to update and summarise what has been a contentious and difficult area of the law for this and other States. It builds on earlier Research Service publications, notably e-brief 6/2012 “[Crimes \(Criminal Organisations Control\) Bill 2012: the constitutional issues](#)” and Issues Backgrounder 5/2013 “[Anti-gang laws in Australia](#)”. Note that only those legislative developments which have resulted in High Court cases are dealt with in this paper.

2. Legislative and case law history in summary

Over the years many laws have been passed aimed at controlling the activities of criminal gangs, including bikie gangs. The constitutional validity of several of these laws have been challenged, with the decisions of the High Court stemming primarily from the line of judicial reasoning associated with *Kable v DPP (NSW)* (1996) 189 CLR 51, which holds that, further to Chapter III of the Commonwealth Constitution (The Judicature), a State legislature cannot confer on a State court a function which would substantially impair its institutional integrity.

For example, Western Australia passed the *Corruption and Crime Commission Act 2003*, Part 4 of which provided for the issuing of a fortification removal notice and for review of that decision by the Supreme Court; by s76(1), in hearings before the Supreme Court, the Commissioner of Police could identify

information that was for the court's use only and was to be kept out of the public domain.

The validity of that provision was upheld by the High Court in [Gypsy Jokers Motorcycle Club Inc v Commissioner of Police](#) (2008) 234 CLR 532 [2008] HCA 4. In that case, a fortification warning notice had been issued in respect to a clubhouse that had a concrete front wall, surveillance cameras, steel doors and modified timber doors.

The High Court held, in respect to s 76(2), that it was for the Supreme Court, not for the Police Commissioner, to determine whether disclosure of information provided by the Commissioner might prejudice police operations. Section 76(2) did not therefore render unexaminable by the Supreme Court the decision of the Commissioner. It did not direct the Supreme Court how to exercise its jurisdiction so as to impair the character of the Court as independent and impartial.

Similar issues were at stake in [K-Generation Pty Limited v Liquor Licensing Court](#) (2009) 237 CLR 501 [2009] HCA 4 where it was decided that the requirement for South Australian courts to maintain the confidentiality of criminal intelligence about an applicant for a liquor licence did not diminish their integrity as impartial and independent courts.²

Issues concerned with judicial power arising from the *Kable* doctrine were also to the fore in [International Finance Trust Co Ltd v NSW Crime Commission](#) (2009) 261 ALR 220; [2009] HCA 49 where a majority of the High Court held that s 10 of the *NSW Criminal Assets Recovery Act 1990* was invalid. Justices Gummow and Bell interpreted s 10 as requiring the Supreme Court to make an ex parte (that is, in the absence of the affected party)³ sequestration of property in defined circumstances; like Justice Heydon, Justices Gummow and Bell concluded that s 10 was “repugnant to the judicial process in a fundamental degree”.⁴ The decision resulted in the amendment of the Act by the *Criminal Assets Recovery Amendment (Unexplained Wealth) Act 2010*.

The *Kable* doctrine was again at issue in relation to South Australia's [Serious and Organised Crime \(Control\) Act 2008](#). One feature of the law was that it provided the Attorney General with the power to make declarations against organisations, representing a risk to public safety, and whose members associated for the purpose of engaging in serious criminal activity; by s 14(1) once such a declaration was made, upon the application of the Police Commissioner, the Magistrates Court was required to make control orders against the organisation's members.

In [South Australia v Totani](#) (2010) 242 CLR 1, [2010] HCA 39 the High Court, by majority, held that s 14(1) was invalid. French CJ commented:

Section 14(1) impairs the decisional independence of the Magistrates Court from the executive in substance and in appearance in areas going to personal liberty and liability to criminal sanctions which lie at the heart of the judicial function.

The same line of reasoning, derived from *Kable*, informed the High Court's decision in [Wainohu v State of NSW](#) (2011) 278 ALR 1 [2011] HCA 24 in

which the High Court found the NSW *Crimes (Criminal Organisations Control) Act 2009* to be invalid. 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.

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.

Following the decision in *Wainohu*, the *Crimes (Criminal Organisations Control) Act 2012* was passed, effectively re-enacting the 2009 legislation but establishing an obligation on judges to provide reasons for making or refusing to make a declaration. Under the 2012 Act, 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)

As explained in [Issues Backgrounder 5/2013](#):

Later that year, a further Bill was introduced to amend the Act to provide a process for the recognition in NSW of declarations and control orders made in other jurisdictions. However, in March 2013, this Bill was withdrawn and the *Crimes (Criminal Organisations Control) Amendment Bill 2013* was introduced. The 2013 Bill made amendments to the *Crimes (Criminal Organisations Control) Act 2012*, which brought it into line with the *Criminal Organisation Act 2009* (Qld), the validity of which had been upheld by the High Court in *Pompano*.

The *Criminal Organisation Act 2009* (Qld) provided a "court based" model under which the Commissioner of Police must apply to the Supreme Court for a declaration that an organisation is a 'criminal organisation', as well as to apply for a control order in respect to a member of such an organization. Reflecting on *Condon v Pompano Pty Ltd* [2013] HCA 7,⁵ Professor Cheryl Saunders [wrote](#):

The majority reasons of Justices Hayne, Crennan, Kiefel and Bell essentially upheld the legislation on the basis that, as they construed it, the Supreme Court retained the capacity to act 'fairly and impartially': In doing so, the majority emphasised certain features of the challenged scheme as significant in evaluating the validity of the process as a whole, including the

'detailed particulars' that the Commissioner was required to provide in seeking a declaration of a 'criminal organisation' all of which (although minus the 'criminal intelligence') was available to the respondent, and the obligation of the Supreme Court to balance 'unfairness to a respondent' in dealing with an application for a declaration of criminal intelligence.

Subsequent to the decision in [Pompano](#), the NSW *Crimes (Criminal Organisations Control) Act 2012* now provides that the Police Commissioner may apply to the Supreme Court for a declaration that a particular organisation is a criminal organisation (section 5). Once such a declaration has been made regarding an organisation, the Commissioner may apply to the Supreme Court for control orders to be made regarding people that the Court is satisfied are a part of a declared organisation. The Act also provides for the recognition of relevant declarations and orders made interstate (see Part 3A).

3. The Crimes Amendment (Consorting and Organised Crime) Act 2012

In addition to the above developments, in February 2012 legislation was introduced in NSW in the form of the *Crimes Amendment (Consorting and Organised Crime) Act 2012* to insert a new Division 7 in Part 3A of the *NSW Crimes Act 1900*; Division 7 is headed "Consorting".

In the [second reading speech](#) for the legislation the then Attorney General, Greg Smith, commented:

The Government is determined to ensure that the NSW Police Force has adequate tools to deal with organised crime, and this bill represents part of a suite of reforms aimed at achieving that. The bill ...modernises the offence of consorting, as well as extending and clarifying its application.⁶

The 2012 Act repealed s 546A of the *Crimes Act*, which had provided for an offence of "habitually" consorting with persons who have been convicted of indictable offences. The section was said to be difficult to use, in part because there was no statutory guidance as to what constitutes "habitual consorting".

In its place, new section 93W defines "consort" to mean "consort in person or by any other means, including by electronic or other form of communication." It also defines "convicted offender" to mean "a person who has been convicted of an indictable offence." Sections 93X(1)(a) and (b) provide that a person who "habitually consorts with convicted offenders," and who "consorts with those convicted offenders having been given an official warning in relation to each of those convicted offenders" is guilty of an offence carrying a maximum penalty of imprisonment for 3 years and/or a fine of 150 penalty units. Sections 93X(2)(a) and (b) provide that a person does not habitually consort with convicted offenders unless they "consort with at least 2 convicted offenders (whether on the same or separate occasions)" and "the person consorts with each convicted offender on at least 2 occasions".

The term "official warning" is defined in s 93X(3)(a) and (b) as a warning given orally or in writing by a police officer both that "a convicted offender is a convicted offender" and that "consorting with a convicted offender is an offence." Section 93Y provides that it is a defence to the offence of

consorting if the “defendant satisfies the court that the consorting was reasonable in the circumstances”. Section 93Y contains a list of what reasonable circumstances might be, for example that the defendant was consorting with family members (s 93Y(a)), or the consorting occurs in the course of training or education (s 93Y(b)). The Attorney General explained:

The bill also modernises the offence of consorting by directing police on what relationships should be exempt. The existing offence has been criticised for its potential application to everyday, innocent relationships which should not be the subject of prosecution. The bill will amend the Act to specify certain relationships which may be raised as a defence to a prosecution. The exemptions include associations with family members, consorting in the course of lawful employment, or business, training and education, the provision of health services, legal advice and in the context of lawful custody or complying with a court order. These terms are not further defined, as for the defence to be made out the defendant must establish that the consorting was reasonable in the circumstances. Consorting with extended family may therefore be reasonable in circumstances where the defendant is heavily reliant on, or lives in a community based on, extended kinship. It may not however be reasonable in other situations. The onus will be on the defendant to bear and one for the court to determine on a case-by-case basis.⁷

4. *Tajjour v NSW* [2014]

In *Tajjour* a number of questions were before the Full Court of the High Court, foremost of which was whether s 93X of the *Crimes Act 1900* was invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to sections 7 and 24 of the Commonwealth Constitution?

This was the second occasion in less than a year when the validity of NSW legislation had been challenged on these grounds, the first being the decision of the High Court in December 2013 in *Unions NSW v NSW* [2013] HCA 58. In that case the High Court ruled that sections 96D and 95G(6) of the *Election and Disclosures Amendment Act 2012* (NSW) were invalid.⁸

In *Tajjour* the opposite finding was reached by a majority comprising of Justices Hayne, Crennan, Kiefel, Bell and Keane JJ; Justice Gageler concluded that s 93X was invalid to the extent that it applied to associations “for a purpose of engaging in communication or governmental or political matter”, but that the section is severable and therefore to “be read down” so as not to apply in those circumstances;⁹ Chief Justice French was in dissent.

The Chief Justice outlined the law as it relates to the implied freedom of political communication as follows:

32. The implied freedom of communication on governmental or political matters defines a limit on the legislative power of the Commonwealth, State and Territory Parliaments and informs the common law of Australia. The questions to be asked in determining whether an impugned law exceeds that limit were settled in *Lange v Australian Broadcasting Corporation*, and modified in *Coleman v Power*. They were recently restated in *Unions NSW v New South Wales*. They are:

1. Does the impugned law effectively burden the freedom of political communication either in its terms, operation or effect?
2. If the provision effectively burdens the freedom, is the provision reasonably appropriate and adapted, or proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative government?

33. In considering each question, it is necessary to bear in mind that the implied freedom operates as a limit upon legislative power, not as a source of individual rights or freedoms. As five Justices of this Court said in *Unions NSW*: "The central question is: how does the impugned law affect the freedom?"¹⁰

The joint judgment of Justices Crennan, Kiefel and Bell in *Tajjour* stated that the above question is central for the first limb of the *Lange* test; central to the second limb is the question of the "extent" to which the legislative provision burdens the implied freedom, referred to as the "test of proportionality".¹¹ This "proportionality analysis"¹² first "requires identification of the legislative purpose of s 93X and the means by which it is sought to be achieved"; a rational connection between the two" must also be established.¹³

In the view of the joint judgment, such a connection applied in respect to s 93X, where the legitimate end was the prevention of crime, to be achieved by means of preventing association between convicted offenders themselves and with others, thereby making it "more difficult to organise criminal activities and enlist others to participate in such activities".¹⁴ On that basis:

Neither the purpose of s 93X nor the means by which it is sought to be achieved can be said to be incompatible with the maintenance of representative and responsible government.¹⁵

The joint judgment then asked whether the "means chosen by the legislature are proportionate to the purpose pursued".¹⁶ It was said that:

The relevant enquiry identified in *Unions NSW* is whether there are alternative, reasonably practicable means which are capable of achieving that purpose and which are less restrictive in their effect upon the freedom. This second enquiry under the second limb of the *Lange* test may be described, in a shorthand way, as the test of "reasonable necessity".¹⁷

The main hypothetical alternative considered in the joint judgment was the suggested inclusion of "conspiring for the purpose of communication on government or political matters" in the list of defences in s 93Y. Justices Crennan, Kiefel and Bell responded:

Putting aside difficulties in drafting a defence of that kind, such a defence would be easily claimed but difficult to investigate, test or challenge, both factually and legally. This would be especially so if the prosecution were required to negative the claim once raised. In reality, the defence would create a gap which is readily capable of exploitation. In these circumstances, it cannot be said that s 93X would operate as effectively with the hypothetical defence.¹⁸

After further inquiry, the conclusion was reached that:

No reasonable and equally practicable alternatives having a lesser effect on the freedom have been identified. A conclusion that [s 93X](#) goes no further than is reasonably necessary in order to achieve its objective is therefore open.¹⁹

Only then did the joint judgment turn to the question of the “extent of the effect” of s 93X on the implied freedom, in respect to which it found that:

Enquiry as to whether a burden is undue or as to the importance of a legislative purpose is necessitated only when the burden effected by the legislation is substantial. The legislation now under consideration is unlikely to have that effect. Section 93X is not directed to the freedom and its effect upon the freedom is incidental. Any limitation on the freedom would only occur in the course of what would qualify as habitual consorting.²⁰

For Justice Keane, the text, history and purpose of anti-consorting laws indicate that s 93X does not extend to social interactions which “are confined to communications on political or governmental matters”,²¹ for the reason that such interactions could not be characterised as “consorting”. Notwithstanding those difficult cases where it might be hard to draw a clear line, s 93X was said to only operate:

upon social interactions arranged by or with persons who have been convicted of an indictable offence, and which, by reason of the companionship so engendered, are apt to have criminogenic tendencies.²²

Conversely, in dissent Chief Justice French was of the opinion that:

Section 93X and its associated provisions, read in the light of judicial exegesis of earlier consorting provisions in New South Wales and other States, extend to habitual consorting for innocent purposes. There is no express textual basis for excluding consorting for the purpose of communications on governmental or political matters.²³

The Chief Justice accepted that s 93X serves a legitimate end,²⁴ but that, by the “breadth of its application to entirely innocent habitual consorting, is not appropriate and adapted reasonably” to serve its legitimate end,²⁵ specifically in “a manner that is compatible with the maintenance of the constitutionally prescribed system of representative government”.²⁶

Other grounds of invalidity were also put to the High Court, none of which found any judicial support; notably submissions based on a free-standing implied freedom of association under the Commonwealth Constitution; and the argument that State legislative power is limited by the right of freedom of association guaranteed under the International Covenant on Civil and Political Rights (ICCPR).

5. Conclusion

As noted at the outset, the purpose of this e-brief has only been to update and summarise what has been a contentious and difficult area of the law for this and other States. With the earlier High Court decision in *Pompano* and the subsequent amendment of the NSW *Crimes (Criminal Organisations Control) Act 2012* it would seem that challenges, based on the “Kable” principle, to those aspects of the State’s anti-gang laws concerned with the

making of control orders have reached the end of their course. Likewise, the decision in *Tajjour* suggests that challenges to the State's anti-gang laws founded on the implied freedom of political communication will not be reopened before the High Court in the foreseeable future. But that is not to say that all aspects of such laws will go unchallenged; for example, it is possible that the High Court will be asked to rule on the validity of unexplained wealth laws or Queensland's mandatory sentencing regime under the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013*.²⁷

¹ The full name of the case is *Tajjour v NSW; Hawthorne v NSW; Forster v NSW*.

² It was argued that s 28A of the *Liquor Licensing Act 1997* (SA) infringed the principle of open justice.

³ For a more detailed account see the High Court [summary](#).

⁴ Gummow and Bell JJ at paras [95]-[98]; Heydon J at paras [155]-[165]. Making up the majority was Chief Justice French who held that s 10 of the Act was invalid in so far as it conferred power on the Commission to effectively choose to require the Supreme Court to hear and determine an application for a restraining order without notice [56]-[59].

⁵ The full name of the case is *Organised Crime Control and the Promise of Procedural Fairness: Condon v Pompano Pty Ltd*.

⁶ *NSWPD*, 14 February 2012, p 46.

⁷ *NSWPD*, 14 February 2012, p 46.

⁸ See e-brief 2/2014 "The High Court's decision in the electoral funding law case" by Lenny Roth.

⁹ *Tajjour*, paras [188] [178].

¹⁰ *Tajjour*, paras [32-33] (notes omitted).

¹¹ *Tajjour*, paras [127-129].

¹² *Tajjour*, para [131]; the test is not to be confused with its US counterpart.

¹³ *Tajjour*, para [110].

¹⁴ *Tajjour*, para [111]; see also Hayne J [78]

¹⁵ *Tajjour*, para [112].

¹⁶ *Tajjour*, para [113].

¹⁷ *Tajjour*, para [113].

¹⁸ *Tajjour*, para [121]. Other hypothetical measures were discussed at paras 122-124. See also the views of Justice Hayne who stated that "the engagement of s 93X does not depend on the reason or purpose for the consorting" [88]. He continued: "It follows that a consorting law which provided for a general "reasonable excuse" defence, or for an exception for political communication (by qualifying the content of the offence or providing a defence), would differ radically from s 93X (as qualified by s 93Y). It would shift the focus of the present law from the fact of association in proscribed circumstances to what is said or done during the act of association or to the purpose or reason for the act of association. Neither the sufficiency of the purpose or reason for, nor the relevance of what was said or done in the course of, association with persons of the designated class, would depend upon the acts that constitute the consorting falling within any of the circumstances described in s 93Y. Investigation, prosecution and enforcement of such a law would differ markedly from the equivalent steps taken in relation to s 93X. And the same observations apply, with greater force, to a law which required proof of criminal purposes" [para 89].

¹⁹ *Tajjour*, para [125].

²⁰ *Tajjour*, para [133].

²¹ *Tajjour*, para [239].

²² *Tajjour*, para [236].

²³ *Tajjour*, para [27].

²⁴ *Tajjour*, para [42].

²⁵ *Tajjour*, para [45].

²⁶ *Tajjour*, para [47].

²⁷ See L Roth, [Mandatory Sentencing Laws](#), NSW Parliamentary Research Service, e-brief 1/2014.

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