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Justice Alan Wilson, Chairperson
Taskforce into Organised Crime Legislation 2015
By email to: [redacted]

1 July 2015

Dear Justice Wilson

I am writing to make a submission to the Taskforce on Organised Crime Legislation, **Inquiry Area One**. In particular, this submission concerns paragraph 9 of the Taskforce Terms of Reference:

> 'The Taskforce will... have regard to the decisions of the High Court of Australia in the matters of *Kuczborski v The State of Queensland [2014] HCA 46* and *Assistant Commissioner Michael James Condon v Pompano Pty Ltd [2013] HCA 7*'

I **attach** for your information a copy of an article (forthcoming in the *University of Queensland Law Journal*) concerning the High Court's decision in *Kuczborski v The State of Queensland*. I would draw the Taskforce's attention to the following key points arising from that case:

1. The High Court made no decision as to the constitutional validity or otherwise of:
   a. The *Vicious Lawless Association Disestablishment Act 2013* (Qld)
   b. The *Bail Act 1980* (Qld) ss 6 or 16(3A)(a).
   c. The *Criminal Code* ss 72(2), 92A(4A), 320(2), 340(1A).

2. The High Court upheld the following provisions:
   a. The *Criminal Code* s 60A-60C.
   b. The *Liquor Act 1992* (Qld) ss 173EB-173ED.

3. The decision raises – but does not resolve – important questions as to the scope of the executive government's power to declare organisations. Justice Hayne (in dissent) suggested that the power was broad to the point of being effectively unreviewable. Justices Crennan, Kiefel, Gageler, and Keane indicated that the declaration power may be limited to the declaration of organisations engaged in serious criminal activity.

4. In the course of its reasons the Court identified that the impugned provisions were severe, even to the point of having a disproportionately harsh impact on citizens.

5. The High Court's decision to uphold certain provisions does not equate to a finding that these laws are necessary, effective, proportionate, or aligned with fundamental values such as equal justice or civil liberties.

6. The case may give rise to future litigation in the form of:
   a. A further constitutional challenge to those provisions that the Court did not address (for reasons of standing).
   b. Applications for judicial review of the exercise of the Attorney-General's power to declare criminal organisations.

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To provide further context to this decision and to assist the Taskforce, I also **attach** a copy of an article by myself and Professor George Williams AO (published in the *Melbourne University Law Review*). This article traces the spread of control orders across Australia and addresses Queensland's 2013 organised crime laws in that context. In addition to providing background information about other organised crime schemes in Australia and relevant High Court cases (including *Kuczborski v The State of Queensland* and *Assistant Commissioner Michael James Condon v Pompano Pty Ltd*), this article relevantly argues that:

1. A trend has occurred whereby organised crime laws have migrated between jurisdictions and these once-extreme measures have become normalised.

2. A similar trend may occur with respect to Queensland's 2013 laws.

3. The effectiveness of preventive organised crime schemes remains largely unproven and was not a relevant factor behind their spread across Australia.

I would welcome the opportunity to discuss these issues further with the Taskforce at your convenience.

Yours Sincerely,

Rebecca Ananian-Welsh
Lecturer

Attachments:

- Rebecca Ananian-Welsh, '*Kuczborski* v *Queensland* and the Scope of the *Kable* Doctrine' (2015) *University of Queensland Law Journal* (forthcoming).

- Rebecca Ananian-Welsh and George Williams, "The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' (2014) 38(2) *Melbourne University Law Review* 362.

KUCZBORSKI V QUEENSLAND AND THE SCOPE OF THE *KABLE* DOCTRINE

Rebecca Ananian-Welsh

Abstract

In the 2014 case of *Kuczborski v Queensland* (2014) 89 ALJR 59, the High Court upheld a suite of provisions politically aimed at destroying bikie gangs. This article outlines the High Court's decision in *Kuczborski* and considers its impact on the scope of the *Kable* doctrine. In particular, *Kuczborski* confirms that *Kable* cannot be relied upon as a source of implied rights protection for citizens – even when the laws in question are severe, or when the rights in issue relate to a fair trial. Nonetheless, the doctrine presents an important limit on government powers in the states and territories, provided that any *Kable* challenge is focussed squarely on the institutional integrity of the courts.

KUCZBORSKI V QUEENSLAND AND THE SCOPE OF THE *KABLE* DOCTRINE

Rebecca Ananian-Welsh*

I. Introduction

This article considers the impact of the High Court's findings in *Kuczborski v Queensland* ('*Kuczborski*')[1] on the scope of the *Kable* doctrine. In particular, *Kuczborski* confirms that *Kable* cannot be relied upon as a source of implied rights protection, even when those rights relate to a fair trial. Nonetheless, the doctrine presents an important limit on governmental powers in the states and territories – provided that any *Kable* challenge is focussed squarely on the 'essential aspect' of the doctrine, namely, the institutional integrity of state courts, and not on arguments pertaining to the severity of the laws or their impact on citizens.

In 1996, the High Court recognised a key limit on state legislative power when, in *Kable v Director of Public Prosecutions (NSW)* ('*Kable*'),[2] it held that the federal *Constitution* protects the institutional integrity of state courts. Two decades have passed since that landmark decision and appreciation of the *Kable* doctrine has gone through a number of phases.[3] At first the doctrine was heralded as an invaluable, substantive, principled

* Lecturer, TC Beirne School of Law University of Queensland. This article is based on a paper presented to the 2015 Gilbert + Tobin Centre of Public Law Constitutional Law Conference on 13 February 2015. I am grateful to Professor Sean Brennan and other members of the Gilbert + Tobin Centre for that opportunity, and to Kate Gover for her invaluable research assistance. All flaws and failings in this article are my own.

[1] (2014) 89 ALJR 59.

[2] (1996) 189 CLR 51.

[3] For discussion of these phases, see Sarah Murray, 'Australian State Courts and Chapter III of the Commonwealth Constitution – Interpretation and Re-Interpretation and the Creation of Australian Constitutional "Orthodoxy"' (2012) 24 *Journal of Constitutional History* 145; Gabrielle Appleby and John Williams, 'A New Coat of Paint: Law and Order and the Refurbishment of *Kable*' (2012) 40 *Federal Law Review* 1.

limit on legislative power.[4] Within ten years opinions had changed. In 2004, *Kable* was convincingly (and famously) disparaged as a 'constitutional guard dog that would bark but once'.[5] Despite these remarks, *Kable* challenges continued to be launched and, since 2009, the doctrine has undergone a reinvigoration. The guard dog has begun to bark again – though perhaps not as fiercely as once hoped.

One of the primary contexts in which this reinvigoration has played out is in challenges mounted by representatives of outlaw motorcycle gangs (or 'bikies') over the validity of state anti-organised crime measures.[6] The focus of this article is on the latest of these challenges, in which Stefan Kuczborski – a member of the Brisbane Chapter of the Hells Angels Motorcycle Club –argued that a suite of Queensland's anti-organised crime laws infringed the institutional integrity of Queensland courts. In this article I focus on the *Kable* aspects of the High Court's decision to uphold those laws, and only touch on the issues of standing and design of anti-organised crime laws raised therein.

The dynamic history of the *Kable* doctrine has left many wondering whether *Kable* is indeed a substantive limit on state legislative power capable of protecting equal justice, fair process, and other rule of law values. Or, is *Kable* a thin doctrine – only capable of preventing the most extreme infringements to judicial independence?[7] In *Kuczborski*,

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[4] See, eg, Anthony Mason, 'A New Perspective on Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1. For a review of the capacity of Chapter III of the *Constitution* to protect human rights, see George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) ch 9. See especially 325-8.

[5] *Baker v The Queen* (2004) 233 CLR 513, 535 (Kirby J). See also argument of Gageler J (then Senior Counsel representing the Australian Investment and Securities Commission) that any furtherance of the *Kable* rule was like asking the dog 'to turn on the family': Transcript of Proceedings, *Forge v Australian Securities and Investments Commission* [2006] HCATrans 25 (8 February 2006). For discussion of this phase, see Murray, above n 3, 148-9; Appleby and Williams, above n 3, 8-9.

[6] Appleby and Williams, above n 3.

[7] See, eg, Ibid 28; Rebecca Welsh, 'A Path to Purposive Formalism: Interpreting Chapter III for Judicial Independence and Impartiality' (2013) 39 *Monash University Law Review* 66, 94-5; Brendan Gogarty and Benedict Bartl, 'Tying *Kable* Down: The Uncertainty about the Independence and Impartiality of State Courts Following *Kable v DPP (NSW)* and Why it Matters' (2009) 32 *University of New South Wales Law Journal* 7; Chris Steytler and Iain Field, 'The "Institutional Integrity" Principle: Where Are We Now, and Where Are We Headed?' (2011) 35 *University of Western Australia Law Review* 227, 251-

the High Court has given some clarity to the scope of the *Kable* doctrine and emphasised its essential aspect – the institutional integrity of state courts. In this way, *Kuczborski* can assist advocates and scholars in properly and persuasively framing a *Kable* challenge.

I begin in Part II by placing *Kuczborski* within the broader context of *Kable* challenges to anti-organised crime laws, before turning to the impugned laws and the substance of Kuczborski's challenge in Parts III and IV. In Part V, I outline the High Court's findings in *Kuczborski*. I discuss the impact of this decision on the scope of the *Kable* doctrine in Part VI.

II. A Recent History of Bikies in the High Court

In many ways, *Kuczborski* is the latest bout in an ongoing tussle between state governments and bikies over the design of anti-organised crime laws. The key cases that fit this mould include the 2008 case of *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* ('*Gypsy Jokers*')[8] concerning the issuance of fortification removal notices by courts. *Gypsy Jokers* was followed in 2010 by *South Australia v Totani* ('*Totani*'),[9] in 2011 by *Wainohu v New South Wales* ('*Wainohu*')[10] and in 2013 by *Assistant Commissioner Condon v Pompano* ('*Pompano*').[11] All four of these challenges were mounted on *Kable* grounds.[12] Each involved representatives of motorcycle groups alleging that an aspect of the state's anti-organised crime laws

64; Scott Guy, 'The Constitutionality of the Queensland Criminal Organisation Act: *Kable*, Procedural Due Process and State Constitutionalism' (2013) 32 *University of Queensland Law Journal* 265, 270-1.

[8] (2008) 234 CLR 532.

[9] (2010) 242 CLR 1.

[10] (2011) 243 CLR 181.

[11] (2013) 252 CLR 38.

[12] For discussion of the High Court's findings in *Totani* and *Wainohu*, see Steytler and Field, above n 7, 240-6; Appleby and Williams, above n 3. For discussion of all three cases, see Rebecca Ananian-Welsh and George Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' (2014) 38(2) *Melbourne University Law Review* 362, 383-7.

conferred powers on the judicature that were incompatible with the fundamental independence or institutional integrity of the courts.[13] In *Totani* and *Wainohu* this argument was successful. In *Gypsy Jokers* and *Pompano* the legislation was upheld.[14]

Totani, *Wainohu* and *Pompano* concerned anti-organised crime control orders.[15] Such orders had been adapted to the organised crime context from federal anti-terrorism laws, after they were upheld by the High Court in 2007.[16] Like their anti-terrorism predecessors, anti-organised crime control orders allow a court to impose a potentially wide array of restrictions or obligations on a person on the basis of his or her association with a 'declared organisation'. Organisations may be 'declared' by the executive or the judiciary, but a court is always responsible for issuing the control order.[17]

In *Totani* and *Wainohu*, the control order provisions were struck down on *Kable* grounds. In *Totani*, invalidity was established on the basis that South Australian control order legislation *obliged* the Magistrates Court to issue an order upon finding an

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[13] For summary of the *Kable* doctrine, see *Kable* (1996) 189 CLR 51, 103 (Gaudron J). See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 ('*Fardon*'), 591 [15]–[18] (Gleeson CJ), 655 [219] (Callinan and Heydon JJ); *Kuczborski* (2014) 89 ALJR 59, 82-3 [102]-[106] (Hayne J).

[14] For a fuller discussion of these cases, see Appleby and Williams, above n 3, 13-26; Rebecca Ananian-Welsh, 'Secrecy, Procedural Fairness and State Courts' in Miiko Kumar, Greg Martin and Rebecca Scott-Bray (eds), *Secrecy, Law and Society* (Routledge, 2015) 120.

[15] Created by the *Serious and Organised Crime (Control) Act 2008* (SA), *Crimes (Criminal Organisations Control) Act 2009* (NSW), and *Criminal Organisation Act 2009* (Qld) respectively. *Gypsy Jokers* (2008) 234 CLR 532 concerned fortification removal notices issued under Part 4 of the *Corruption and Crime Commission Act 2003* (WA). For discussion, see Hugo Leith, 'Turning Fortification Removal Notices into Constitutional Bypasses: *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*' (2008) 36 *Federal Law Review* 251.

[16] *Thomas v Mowbray* (2007) 233 CLR 307. For discussion of that case, see Andrew Lynch, '*Thomas v Mowbray*: Australia's "War on Terror" Reaches the High Court' (2008) 32 *Melbourne University Law Review* 1182. On this 'migration' of control orders, see Ananian-Welsh and Williams, above n 12, 397-400.

[17] For example, organisations are declared by a judge in a personal capacity in the Northern Territory and by the Supreme Court in South Australia, New South Wales, Queensland, Victoria, and Western Australia. See *Serious Crime Control Act 2009* (NT) ss 6 (definition of 'eligible judge'), 14; *Serious and Organised Crime (Control) Act 2008* (SA) ss 3 (definition of 'Court'), 11; *Crimes (Criminal Organisations Control) Act 2012* (NSW) ss 3(1) (definition of 'Court'), 7; *Criminal Organisation Act 2009* (Qld) ss 10, 18, sch 2 (definition of 'Court'); *Criminal Organisations Control Act 2012* (Vic) ss 3(1) (definition of 'Court'), 19; *Criminal Organisations Control Act 2012* (WA) ss 3(1) (definition of 'Court'), 7. When the South Australian control order legislation was first enacted, the declaration was made by the Attorney-General. Following the High Court's decision in *Totani* (2010) 242 CLR 1, this process was relocated to the Supreme Court.

individual was a member of a declared organisation – the latter classification having been determined solely by the executive.[18] For a majority of the Court, this provision rendered the Supreme Court an instrument of the executive, thereby undermining its institutional integrity and falling foul of *Kable*.[19] The Court suggested that replacing the obligation on the Supreme Court with a discretion (ie, providing that the court 'may' issue the order, rather than 'must') would avoid incompatibility.[20]

In *Wainohu*, a similar control order scheme was struck down despite the Supreme Court maintaining an independent discretion whether to issue control orders over members of declared organisations. Under that scheme, the NSW Supreme Court was empowered to issue control orders over members of certain organisations, following a declaration of the organisation by a judge in his or her personal capacity. A majority of the High Court found that the Act as a whole violated the *Kable* doctrine.[21] The sole basis for invalidity was the removal of the judge's obligation to give reasons for his or her decision to declare an organisation. The giving of reasons was held to be an essential feature of the judicial institution and of institutional integrity, so that the removal of the obligation to give reasons was sufficient to violate *Kable*.[22] Also crucial to the Court's decision was the fact that declaration proceedings resembled open court, and that the judge's declaration involved important determinations of fact which enlivened the Supreme Court's jurisdiction to issue control orders.[23]

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[18] *Serious and Organised Crime Control Act* 2008 (SA) s 14(1); *Totani* (2010) 242 CLR 1, 21 (French CJ), 67 (Gummow J), 153, 159-60 (Crennan and Bell JJ), 171-2 (Kiefel J).
[19] *Totani* (2010) 242 CLR 1, 52 [82] (French CJ), 67 [149] (Gummow J), 93 [237] (Hayne J) 160 [436] (Crennan and Bell JJ), 173 [481] (Kiefel J).
[20] Ibid 56 (Gummow J), 88–89 (Hayne J), 160 (Crennan and Bell JJ).
[21] *Wainohu* (2011) 243 CLR 181, 210 [47], 219-20 [68]-[71] (French CJ and Kiefel J), 228-31 [104]-[109], [116] (Gummow, Hayne, Crennan and Bell JJ).
[22] Ibid 192, 215, 213, 219-20 (French CJ and Kiefel J). Cf Heydon J in dissent: 238-9.
[23] Ibid 192, 215, 218-20 (French CJ and Kiefel J). It was on this basis that the Court concluded s 13(2) effectively rendered the entire *Crimes (Criminal Organisations Control) Act* 2009 (NSW) invalid: 220 (French CJ and Kiefel J), 231 (Gummow, Hayne, Crennan and Bell JJ).

When the High Court upheld the *Criminal Organisation Act 2009* (Qld) in *Pompano*, it confirmed that Queensland had succeeded in designing *Kable* compliant control order laws. The provisions allowed for evidence to be withheld from the respondent and his or her representatives.[24] However, for a majority of the Court, any potential unfairness was capable of being remedied by an exercise of the judge's existing discretions.[25]

The focus of this article is on what happened next. After *Pompano* was handed down in 2012, the Newman government abandoned its only control order application. Attorney-General Jarrod Bleijie labelled control orders 'a failure'. They just weren't tough enough.[26] On 15 October 2013, between 2.30pm and 3am, the Newman government introduced, debated, and enacted a vast suite of new anti-bikie laws, namely, the *Vicious Lawless Association Disestablishment Act 2013* (Qld) ('*VLAD Act*'), the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) ('*Disruption Act*'), and the *Tattoo Parlours Act 2013* (Qld).[27] Rather than harness civil proceedings to restrain liberty – as control orders had done – these new laws returned focus to the criminal sphere. They imposed onerous mandatory sentences and created new offences aimed at 'destroying' bikie gangs.[28] It is this suite of laws that Hells Angel Stefan Kuczborski challenged in the High Court.

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[24] For broader analysis of the impact of the provisions on fair process, see Guy, above n 7.
[25] *Pompano* (2013) 252 CLR 38. French CJ suggested that the Supreme Court's existing discretion enabled the Court to 'refuse to act upon criminal intelligence where to do so would give rise to a degree of unfairness in the circumstances of the particular case': 80 [88]. Hayne, Crennan, Kiefel and Bell JJ suggested that the Supreme Court may attribute less weight to the secret evidence: 102-3 [166]–[168]. Gageler J concluded that the only effective means by which the Supreme Court might be able to counter any unfairness arising from the secret evidence would be to order a stay of proceedings: 115 [212].
[26] Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3114 (Campbell Newman), 3120 (Jarrod Bleijie). On the role of political rhetoric in the migration and escalation of anti-organised crime measures, see Ananian-Welsh and Williams, above n 12.
[27] Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3154-6 (Jarrod Bleijie).
[28] Brad Ryan and Simon Santow, 'Qld Government's tough anti-bikie laws passed after marathon debate in Parliament', *ABC News* (online), 17 October 2013 <http://www.abc.net.au/news/2013-10-16/qlds-tough-anti-bikie-laws-passed-after-marathon-parliament-/5025242>; Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3208, 3114 (Campbell Newman), 3248 (Jarrod Bleijie).

III. The Impugned Laws

The laws challenged by Kuczborski were numerous and complex. They included a number of new sentencing principles,[29] a change to the bail laws,[30] and seven new offences,[31] scattered across four different Acts. This vast set of provisions may be addressed in two categories: the sentencing and bail provisions, and the new offence provisions.[32]

A. Category One: Sentencing and Bail Provisions

The first of the sentencing and bail provisions is the notorious and dramatically titled *Vicious Lawless Association Disestablishment Act 2013* (Qld), more commonly referred to as the *VLAD Act*. In essence, the *VLAD Act* imposes an additional, mandatory, non-parole sentence on persons who meet three qualifications. First, the person has committed a declared offence.[33] A list of 70 declared offences is contained in the schedule to the *VLAD Act*. These offences range from murder to rape, child sex offences, wounding, drug trafficking, supply and possession, robbery, acts intended to cause grievous bodily harm, affray, and so on. The second qualification is that the offence was committed in a group of three or more.[34] Third, the person must be unable to prove that the group did not have a purpose of committing declared offences.[35] If

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[29] *Vicious Lawless Association Disestablishment Act 2013* (Qld) ss 7-9.
[30] *Bail Act 1980* (Qld) ss 16(3A)-(3D) as introduced by the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) s 4 and shortly thereafter amended by the *Criminal Law (Criminal Organisations Disruption) and Other Legislations Amendment Act 2013* (Qld) s 7.
[31] *Criminal Code Act 1899* (Qld) sch 1 (*'Criminal Code'*) ss 60A-60C as introduced by the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) s 42, and *Liquor Act 1992* (Qld) ss 173EB-173ED as introduced by the *Tattoo Parlours Act 2013* (Qld) s 75.
[32] This was the categorisation adopted by Bell J: *Kuczborski* (2014) 89 ALJR 59, 104 [263]. The joint judgment of Crennan, Kiefel, Gageler, and Keane JJ instead divided the sentencing provisions from the bail provisions to arrive at a total of three categories, namely, the sentencing provisions, the new offence provisions, and the *Bail Act* provisions: 87 [134]-[136].
[33] *Vicious Lawless Association Disestablishment Act 2013* (Qld) s 5(1)(a).
[34] Ibid ss 3 (definition of 'association'), 5(1)(b)-(c).
[35] Ibid s 5(2).

these three qualifications are met the person will not only be sentenced for the offence, but will face an additional mandatory sentence of 15 years imprisonment without parole.[36] If the person is a leader or authority figure within the group – a ringleader in a drug ring for example, or an office-holder in a bikie gang – then he or she will be sentenced for the offence, plus an additional mandatory sentence of 25 years imprisonment without parole.[37] Parole may be granted only at the (unreviewable) discretion of the Police Commissioner if the person cooperates with police and the Commissioner is satisfied that his or her cooperation is of significant use in a proceeding about a declared offence.[38]

The other provisions challenged by Kuczborski hinge on the concept of 'participants in a criminal organisation' ('PICOs').[39] The Criminal Code defines 'participant', in this context, broadly.[40] A participant is any person who is a director or officer of a criminal organisation, or who in any way asserts, declares, seeks, or advertises his or her association with a criminal organisation. Participants include those who have attended more than one gathering of such an organisation, or who participate or take part the affairs of a criminal organisation in any way.[41] The one stated exception from this broad notion is for lawyers acting in a professional capacity.[42]

The term 'criminal organisation' is defined much more narrowly. There are three ways that an organisation may be identified as a criminal organisation. The first two are

[36] Ibid ss 7(1)(a)-(b).
[37] Ibid ss 7(1)(a)-(c).
[38] Ibid s 9.
[39] Defined in *Criminal Code* s 60A(3).
[40] *Criminal Code* s 60A(3).
[41] Ibid s 60A(3)(d)-(e).
[42] Ibid s 60A(3).

through the courts and the third is by the executive government. These three pathways are provided in s 1 of the *Criminal Code* as follows:

> criminal organisation means—
>
> (a) an organisation of 3 or more persons—
>
> (i) who have as their purpose, or 1 of their purposes, engaging in, organising, planning, facilitating, supporting, or otherwise conspiring to engage in, serious criminal activity as defined under the *Criminal Organisation Act 2009*; and
>
> (ii) who, by their association, represent an unacceptable risk to the safety, welfare or order of the community; or
>
> (b) a criminal organisation under the *Criminal Organisation Act 2009*; or
>
> (c) an entity declared under a regulation to be a criminal organisation.[43]

The definition of criminal organisation under the *Criminal Organisation Act 2009* (Qld) is substantially identical to the definition outlined in sub-s (a) extracted above (making sub-s (b) somewhat obsolete).[44] Thus, a criminal organisation is either identified by a court following a determination that the organisation meets the criteria outlined above, or it is identified by the executive government as such in the relevant Regulation.

So one may surmise, with minimal generalisation, that a PICO is someone who is, or has been, or seeks to be, in any way associated with: a group of three of more people that has a purpose related to serious criminal activity and presents an unacceptable risk

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[43] Ibid s 1 (definition of 'criminal organisation').

[44] See *Criminal Organisation Act 2009* (Qld) ss 10(1)(b)-(c), sch 2 (definition of 'criminal organisation'). These provisions define a 'criminal organisation' as an organisation subject to a declaration by the court under the Act. A declaration may be made if the court finds that 'members of the organisation 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 or order of the community'.

to community safety, *or* with a group declared to be a criminal organisation by Regulation.

Once a person meets the criteria for being a PICO, for instance by attending two meetings of the Hells Angels Motorcycle Club, it appears that he or she will be 'marked for life' as a PICO.[45] It does not seem to matter whether the activity that makes a person a PICO took place before or after the introduction of the new offence provisions.[46]

To date, 26 organisations have been declared to be criminal organisations.[47] All of these organisations were declared under sub-s (c) extracted above. In respect of these declared criminal organisations, then Attorney-General Jarrod Bleijie said that the reasons behind the declarations may never be revealed to the public.[48]

Changes to the *Bail Act 1980* (Qld) ('*Bail Act*') brought about by the *Disruption Act*, reverse the presumption in favour of bail for PICOs.[49] A PICO will not be granted bail unless he or she can establish that his or her detention would be unjustified.[50] The *Disruption Act* also amends the *Criminal Code* to provide that being a PICO is an aggravating circumstance in sentencing for the offences of affray, misconduct in public office, grievous bodily harm, and assault.[51] This means that PICOs are subject to

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[45] *Kuczborski* (2014) 89 ALJR 59, 96 [209] (Crennan, Kiefel, Gageler and Keane JJ). Their Honours say that this would be an 'odd and undesirable outcome', though not one that would necessarily fall foul of the *Kable* doctrine: 96 [209].
[46] Ibid 96 [209] (Crennan, Kiefel, Gageler and Keane JJ).
[47] *Criminal Code (Criminal Organisations) Regulation 2013* (Qld) s 2.
[48] Marty Silk, 'Bikie Evidence to Be Secret Forever', *Brisbane Times* (online), 15 January 2014 <http://www.brisbanetimes.com.au/queensland/bikie-evidence-to-be-secret-forever-20140115-30vg3.html>.
[49] *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) s 4; *Bail Act 1980* (Qld) ss 6 (definition of 'participant'), 16(3A)(a).
[50] *Bail Act 1980* (Qld) s 16(3A(a).
[51] *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) ss 43-6; *Criminal Code* ss 72(2), 92A(4A), 320(2), 340(1A).

significantly higher maximum and minimum penalties for the commission of these four offences.[52]

The Hells Angels Motorcycle Club is a declared criminal organisation.[53] Kuczborski is a member of the Hells Angels Motorcycle Club, rendering him a PICO.[54] Therefore, Kuczborski is subject to a presumption against bail if he is charged with an offence, and the aggravating circumstance provisions apply to him is he is charged with affray, misconduct in public office, grievous bodily harm, or assault.

B. Category Two: New Offence Provisions

Kuczborski also challenged a range of provisions that created new offences. The majority of these provisions also hinge on the concept of a PICO. This second category of laws make it a criminal offence for PICOs to meet in a group of three or more in public,[55] go to prescribed places,[56] attend prescribed events,[57] and recruit to the 'criminal organisation'.[58] These offences are punished severely. Each carries a minimum sentence of six months in prison, and a maximum of three years.[59] It is a defence to these four offences to prove that 'the criminal organisation is not an

[52] *Criminal Code* ss 72(2), 92A(4A), 320(2), 340(1A). Specifically: The maximum penalty for affray is raised from one to seven years imprisonment, with a minimum penalty of six months imprisonment for PICOs. The maximum penalty for misconduct in relation to public office is raised from seven to fourteen years for PICOs. For grievous bodily harm, a minimum penalty of one year's imprisonment is imposed on PICOs, although the maximum penalty of fourteen years remains unchanged. Likewise, a minimum penalty of one year's imprisonment is imposed on PICOs who engage in serious assault against a police officer, although the maximum penalty of fourteen years remains unchanged.
[53] *Criminal Code (Criminal Organisations) Regulation 2013* (Qld) s 2.
[54] *Kuczborski* (2014) 89 ALJR 59, 64 [1] (French CJ), 75 [52] (Hayne J), 87 [133] (Crennan, Kiefel, Gageler and Keane JJ), 104 [267] (Bell J).
[55] *Criminal Code* s 60A.
[56] Ibid s 60B(1). 'Prescribed places' are declared under the *Criminal Code (Criminal Organisations) Regulations 2013* (Qld) s 3.
[57] Ibid s 60B(2).
[58] Ibid s 60C.
[59] Ibid ss 60A-60C

organisation that has, as one of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity'.[60]

In addition, the *Liquor Act 1992* (Qld) as amended by the *Tattoo Parlours Act 2013* (Qld), criminalises the display of a name, logo or anything that indicates association with a 'declared criminal organisation' on licensed premises.[61] The provisions expressly prohibit '1%' and '1%er' logos, commonly associated with members of outlaw motorcycle gangs.[62]

The offence of 'participants in criminal organisation being knowingly present in public places' has attracted particular controversy. In one highly publicised case, Sally Kuether, a librarian and community service award holder with no criminal history, was arrested for meeting her partner and a friend at a hotel for a drink. Kuether was wearing the insignia of the Life and Death Motorcycle Club, to which her partner and his friend allegedly belonged. The police arrested all three for commiting the offence of 'participants in a criminal organisation being knowingly present in public places' and for entering and remaining in a licensed premises wearing prohibited items, being Life and Death club vests.[63] The Police opposed bail and raided Kuether's home.[64] Following her release on bail, Kuether said to the media: 'I can't see what I've done wrong, all I did was have a beer with my partner and my mate'.[65] The more serious

[60] Ibid ss 60A(2), 60B(2), 60C(2).
[61] *Liqour Act 1992* (Qld) ss 173EA-173ED.
[62] Ibid. Currently, no other items have been prescribed under the *Liquor Regulation 2002* (Qld).
[63] Ibid ss 173EA, 173EC.
[64] Frank Robson, 'Crack down: Queensland's anti-bikie laws are resulting in some unusual arrests – and not just of bikies. Is the war on outlaw gangs backfiring?', *Sydney Morning Herald* (online), 14 June 2014 <http://www.smh.com.au/lifestyle/crack-down-20140613-39rul.html>.
[65] Brooke Baskin, 'Librarian and Accused Bikie Sally Louise Kuether Freed on Bail', *The Courier-Mail* (Brisbane), 31 January 2014, 3.

charges were eventually dropped against Kuether before the Brisbane Magistrates Court on 8 April 2015, although she was fined $150 for her breach of the *Liquor Act*.[66]

Because Kuczborski is a PICO, he is prohibited from meeting two or more other PICOs in public, from attending prescribed places (including the Hells Angels Clubhouse),[67] from attending prescribed events, from recruiting to the Hells Angels, and from wearing any logos or insignia of the Hells Angels – in addition to a range of other symbols, including the '1%' sign he has tattooed on his forearm – on licensed premises.

IV. Kuczborksi's Challenge

A. The Category One Provisions: A Question of Standing

The first issue that faced the High Court in Kuczborski's challenge to this suite of anti-bikie laws, was whether Kuczborski had sufficient standing to challenge the category one sentencing and bail provisions. The Court was unanimous in finding that he lacked standing to challenge these provisions.[68] Kuczborski had not been charged with any offence that would enliven these provisions. Nor did he express any wish or desire to commit an offence that would enliven the provisions (as the plaintiff had in *Croome v Tasmania*).[69] The provisions only created further liability as an 'extra incentive' to abide by existing laws[70] and therefore did not 'materially affect [his] legal position'.[71] Thus, a decision upholding or striking down the category one provisions would not

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[66] 'Anti-association charges dropped against first woman charged under Queensland's anti-bikie laws', *ABC News* (online), 8 April 2015 < http://www.abc.net.au/news/2015-04-08/a-librarian-who-was-charged-under-queenslands-antibikie-laws-ha/6377062>.
[67] Located at 3/31 Tradelink Drive, Hillcrest: *Kuczborski* (2014) 89 ALJR 59, 105 [275] (Bell J). This address was prescribed under s 3 of the *Criminal Code (Criminal Organisations) Regulations 2013* (Qld).
[68] Ibid 60 [17], [19], 71-2 [30], [34] (French CJ), 81-2 [99]-[100] (Hayne J), 89 [151], 92 [177]-[178], 94 [185], 103 [259] (Crennan, Kiefel, Gageler and Keane JJ), 106-7 [280], [283], [285] (Bell J).
[69] (1997) 191 CLR 119. Distinguished at: ibid 107 [283] (French CJ), 81-2 [99]-[100] (Hayne J), 92-3 [178]-[180] (Crennan, Kiefel, Gageler and Keane JJ), 107 [282]-[283] (Bell J).
[70] *Kuczborski* (2014) 89 ALJR 59, 92 [178] (Crennan, Kiefel, Gageler and Keane JJ).
[71] Ibid 89 [151] (Crennan, Kiefel, Gageler and Keane JJ).

impact Kuczborski's rights or liberties any more than it would impact the rights and liberties of all Queenslanders.[72] Moreover, there was no matter or dispute raised between parties with inherent standing – namely, the state and territory governments who had intervened in the case.[73] Kuczborski faced a united front of Solicitors-General in this dispute.[74]

On these bases the High Court held that there was no relevant 'matter' presented for the Court's determination and that Kuczborski lacked sufficient standing to challenge the sentencing and bail provisions.[75] Thus, the constitutional validity of the *VLAD Act*, the aggravating circumstance provisions, and the presumption in favour of bail for PICOs remain questions for another day. Moreover, the Court did not address the plaintiff's arguments that these provisions infringed a notion of equal justice as this argument had been limited to the category one laws.[76]

B. The Category Two Provisions

Kuczborski's standing to challenge the new offence provisions was uncontested. As a participant in a declared criminal organisation, Kuczborski was directly prohibited from engaging in a range of otherwise innocent activities, such as meeting other PICOs in

[72] Ibid 69 [18]-[19] (French CJ). See also 106 [278]-[280] (Bell J).
[73] That is, the Attorneys-General of the Commonwealth, New South Wales, the Northern Territory, South Australia, Victoria, and Western Australia. See ibid 67 [8] (French CJ). Cf, *Williams v Commonwealth* (2012) 248 CLR 156, 224 [111]-[112] (Gummow and Bell JJ), 240 [168] (Hayne J), 341 [475] (Crennan J), 361 [557] (Kiefel J).
[74] *Kuczborski* (2014) 89 ALJR 59, 88 [143] (Crennan, Kiefel, Gageler and Keane JJ).
[75] Ibid 108 [285] (Bell J). For discussion of 'matter' under s 76(i) of the *Constitution* and s 30(a) of the *Judiciary Act 1903* (Cth) see 65-6 [3]-[6] (French CJ).
[76] *Kuczborski* (2014) 89 ALJR 59, 88 [141], 90 [157] (Crennan, Kiefel, Gageler and Keane JJ). Only Hayne J addressed the plaintiff's equal justice arguments. However, his Honour found that the plaintiff had not established that participation in a criminal organisation is 'not a criterion which the legislature can adopt to identify certain persons as meriting different punishment'. His Honour also found that the plaintiff had not sufficiently linked the concept of equal justice to argue 'how the impugned provisions are repugnant to or incompatible with [the] institutional integrity' of state courts under the *Kable* doctrine: 83-4 [107]-[109].

public or entering licensed premises because of his clothing or his '1%' tattoo.[77] If charged with one of these offences, Kuczborski's only defence would be to prove that the organisation – the Hells Angels – had no criminal purpose.[78]

It is clear that the new offence provisions have a harsh impact. They single out one class of persons in society and place severe limitations on their conduct, movement, and associations. They impose serious penalties – such as between six months and three years' imprisonment for the mere act of meeting in a group of three or more in a public place, or going to a prescribed address or event that non-PICOs are free to attend.[79] These restrictions are imposed regardless of any suspicion of criminality, or past finding of guilt. In the absence of a Charter of Rights, Kuczborski lacked a mechanism to challenge the liberty-intrusive nature of these laws directly on that basis. The task that faced Kuczborski was to establish that these laws undermined the institutional integrity of Queensland courts and thereby violated the *Kable* doctrine. To establish this, Kuczborski's case needed to go beyond demonstrating the severity of the new offence provisions and – if that severity was at all relevant – to link it to the concept of institutional integrity. Kuczborski's case failed in drawing any such link or in establishing that the laws were incompatible with institutional integrity.[80]

Kuczborski's arguments ran along the following lines. He alleged that the new offence provisions were exceedingly broad. In particular he pointed to the broad meaning of participant and the opacity of the Attorney-General's power to declare criminal

[77] Ibid 72 [36] (French CJ), 81 [96] (Hayne J), 89 [152] (Crennan, Kiefel, Gageler and Keane JJ).
[78] *Criminal Code* ss 60A(2), 60B(3), 60C(2). This defence does not apply to the new offence under the *Liquor Act 1992* (Qld).
[79] Ibid s 60A(1).
[80] *Kuczborski* (2014) 89 ALJR 59, 96 [206]-[207], 98 [217] (Crennan, Kiefel, Gageler and Keane JJ).

organisations.[81] To this end he argued that the Beefsteak and Burgundy Club, the Australian Medical Association, even the Australian Bar Association, could be declared to be criminal organisations and their members and associates made subject to the harsh limitations on movement and association under the new offence provisions.[82]

Kuczborski alleged that the Attorney-General's power to declare organisations was not only opaque, but it was unreviewable. Justice Hayne agreed with this reasoning, noting that '[n]either the information on which the determination [that the organisation is a criminal organisation] was based nor the criteria applied in making it is known.'[83] However, the other judgments did not resolve the proper construction of the declaration power.[84]

Based on this framing of the laws, Kuczborski argued that the new offence provisions enlist courts to do the bidding of the executive. That is, to destroy organisations of the executive's choosing.[85] He further argued that the provisions effect a usurpation of judicial power, as the declaration by the Attorney-General is integral to the determination of criminal guilt or innocence.[86] Thirdly, he argued that the provisions cloak a fundamentally executive determination in the neutral colours of judicial action, thereby undermining the institutional integrity of the courts.[87]

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[81] Ibid 96-7 [206]-[211] (Crennan, Kiefel, Gageler and Keane JJ). In his dissenting judgment, Hayne J saw some merit in Kuczborski's argument: 84-5 [115]-[116].
[82] *Kuczborksi v Queensland* [2014] HCATrans 187 (2 September 2014) 887-8 (K C Fleming QC). See also *Kuczborski* (2014) 89 ALJR 59, 109 [294] (Bell J).
[83] *Kuczborski* (2014) 89 ALJR 59, 79 [84].
[84] Justices Crennan, Kiefel, Gageler, and Keane did suggest, in obiter dicta, that the declaration-making power may be narrower than the plain text might suggest: ibid 96-7 [210]-[215]. This view may imply that their Honours disagreed with the plaintiff's contention that an exercise of that power would be unreviewable. However, it cannot be said that the decisions resolve this issue at all. I return to this point below.
[85] *Kuczborski* (2014) 89 ALJR 59, 83 [107] (Hayne J), 88 [141] (Crennan, Kiefel, Gageler and Keane JJ).
[86] Ibid 100 [232] (Crennan, Kiefel, Gageler and Keane JJ).
[87] Ibid 84 [110] (Hayne J), referring to *Mistretta v United States* 488 US 361, 407 (1989).

Finally, Kuczborski argued that the defence – proving that the organisation has no criminal purpose – required an accused to establish an 'impossible negative proposition'[88] and did not remedy the challenges that the provisions pose to judicial independence and institutional integrity. Justice Bell surmised Kuczborski's arguments in the following concise passage:

> The plaintiff encapsulated his … argument as the conscription of the courts to do the legislature's and the executive's bidding by requiring the courts to treat certain individuals as 'participants in organised crime' while denying the courts the power to engage in a genuine adjudicative process as to whether the person before the court is in fact a 'participant in organised crime'.[89]

Kuczborski thus argued for an interpretation of the provisions whereby a Queensland court determining the guilt or innocence of an accused under the new offence provisions would be incapable of engaging in a genuine and independent adjudicative process. The court would be bound by the executive's declaration, which effectively resolved whether the person was a PICO. Following this, only the most minor determinations were left in the power of the court (for example, whether the person had attended the prescribed premises), and the accused would face an insurmountable task in attempting to establish the available defence. The plaintiff argued that this combination of factors caused impermissible damage to the institutional integrity of Queensland courts. These arguments were resoundingly unsuccessful.

[88] *Kuczborski* (2014) 89 ALJR 59, 73 [37] (French CJ).
[89] Ibid 109 [293].

V. The New Offence Provisions and *Kable*

The High Court issued four judgments in *Kuczborski*. Chief Justice French and Justices Hayne and Bell each wrote alone. Justices Crennan, Kiefel, Gageler, and Keane issued a joint judgment. Justice Hayne agreed with his fellow justices on most aspects of the case but issued a lone dissent, finding that the new offence provisions infringed the *Kable* doctrine on narrow grounds.[90]

A. Approaching the Kable *Doctrine*

The justices adopted distinct approaches to applying *Kable*. The *Kable* doctrine is presently one of the most litigated aspects of the Commonwealth *Constitution*, however its content and application remain fraught with uncertainty.[91] Clearly enough, the doctrine prohibits the conferral or regulation of court powers that violate the institutional integrity[92] or 'essential features' of a court.[93] However, judicial independence and institutional integrity are elusive concepts, particularly as the bases for assessments of constitutional validity.[94] And what are these 'essential' or 'defining' features of courts?[95] In order to give clarity to the content of institutional integrity,

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[90] Ibid 86 [125]-[126].

[91] Steytler and Field, above n 7; Welsh, above n 7, 90-3; Gabrielle Appleby, 'The High Court and *Kable*: A Study in Federalism and Human Rights Protection' (2015) 40(3) *Monash University Law Review* 673, 687-90. See also Jeffrey Goldsworthy's cogent arguments as to the implausible foundations of the *Kable* doctrine: Jeffrey Goldsworthy, '*Kable*, *Kirk* and Judicial Statesmanship' (2014) 40(1) *Monash University Law Review* 75.

[92] *Fardon* (2004) 223 CLR 575, 591 [15] (Gleeson CJ); *Kuczborski* (2014) 89 ALJR 59, 82 [102] (French CJ).

[93] *Wainohu* (2011) 243 CLR 181, 208-9 [44] (French CJ and Kiefel J); *Pompano* (2013) 252 CLR 38, 72 [68] (French CJ); Brendan Lim 'Attributes and Attribution of State Courts – Federalism and the *Kable* Principle' (2012) 40 *Federal Law Review* 31.

[94] Welsh, above n 7, 94-5; Appleby and Williams, above n 3, 28-9.

[95] 'It is neither possible nor profitable to attempt to make some all-embracing statement of the defining characteristics of a court. The cases concerning the identification of judicial power reveal why that is so': *Forge v Australian Investment and Securities Commission* (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ). See also *Pompano* (2013) 252 CLR 38, 72 [68] (French CJ); *Wainohu* (2011) 243 CLR 181, 208-9 [44] (French CJ and Kiefel J) in which their Honours identify the following characteristics, inter alia: institutional integrity, the reality and appearance of independence and impartiality, procedural fairness, the open court principle, and the giving of reasons; Luke Beck, 'What is a "Supreme Court of a State"?' (2012) 34 *Sydney Law Review* 294. For discussion of this approach to

claimants and courts have tended to harness verbal formulae drawn from key cases. In *Kuczborski*, this was reflected in the plaintiff's allegations that *Kable* was breached when the court was 'enlisted', its powers 'usurped', and judicial independence used as a 'cloak' for executive action. The enlistment of the courts to do the bidding of the executive had been crucial to the finding of invalidity in *Totani*;[96] the idea of usurpation had assisted the Court's determination in *Leeth v Commonwealth*;[97] and the metaphor of 'cloaking' was drawn from the US case of *Mistretta v United States*[98] and has been harnessed in a number of High Court cases, including *Fardon*.[99]

In their joint judgment, Crennan, Kiefel, Gageler and Keane JJ embraced the applicant's use of verbal formulae to give content to the *Kable* doctrine. In fact, their Honours utilised the phrases 'enlist', 'cloak', and 'usurp' as the basis of sub-headings in their judgment.[100] Their Honours dealt with each of these notions in turn, concluding that the independence and integrity of the Queensland judicature remained intact under the new offence provisions.

Chief Justice French and Hayne J, however, expressly rejected this approach to applying the *Kable* doctrine. For Hayne J, the *Kable* doctrine requires that courts 'grapple with that "essential notion" of repugnancy to or incompatibility with the

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Kable, see also Lim, above n 93; Suri Ratnapala and Jonathan Crowe, 'Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power' (2012) 36 *Melbourne University Law Review* 175, 178-81.

[96] (2010) 242 CLR 1, 52 [82] (French CJ), 67 [149] (Gummow J), 88 [226] (Hayne J), 173 [481] (Kiefel J).

[97] *Leeth v Commonwealth* (1992) 174 CLR 455, 469-70 (Mason CJ, Dawson and McHugh JJ).

[98] *Mistretta v United States* 488 US 361, 407 (1989).

[99] (2004) 223 CLR 575, 602 [44] (McHugh J), 614-5 [91] (Gummow J); *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 ('*Emmerson*'), 533 [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Grollo v Palmer* (1995) 184 CLR 348, 365-6 (Brennan CJ, Deane, Dawson and Toohey JJ), 377 (McHugh J), 392 (Gummow J); *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 9 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

[100] These sub-headings were: 'Enlisting judicial power' at 98 [219], 'Cloaking' at 99 [228], and 'Usurpation of judicial power' at 100 [232].

institutional integrity of the State courts'.[101] He said that the use of metaphors such as 'cloaking' can be no substitute for direct engagement with that essential notion, and warned: 'Conclusions cannot and must not be formed by reference only to particular verbal formulae'.[102] The Chief Justice expressly agreed with Hayne J's view in this respect, reinforcing the necessity that courts engage with the essential notion of institutional integrity that underlies *Kable*.[103]

B. A Usual Exercise of Judicial Powers

Despite this slight divergence of approach, the Court was unanimous in holding that the applicant's submissions were too broad to support a finding of invalidity. Each judgment pointed to the traditional role of courts as being to interpret and apply law as set down by the other branches of government.[104] These laws may be directed to a wide array of purposes, from deterring drug use to regulating road-usage, stopping domestic violence, or destroying bikie gangs. In applying the law as set down in Acts of parliament and in executive Regulations, the courts were not co-opted or enlisted to fulfil the whims of the political branches; nor did this amount to the political branches impermissibly cloaking their work in the neutral colours of judicial action. Rather, the courts were simply fulfilling their traditional role in accordance with the constitutional framework, the separation of powers, and the rule of law.[105]

Crucial to this reasoning was the fact that the court's role was undertaken in accordance with 'ordinary judicial process'.[106] The new offence provisions may have created

[101] *Kuczborski* (2014) 89 ALJR 59, 83 [106].
[102] Ibid 83 [105].
[103] Ibid 73 [38].
[104] Ibid 73 [40] (French CJ), 84 [111] (Hayne J), 99 [225]-[227] (Crennan, Kiefel, Gageler and Keane JJ), 111 [303] (Bell J).
[105] Ibid 73 [40] (French CJ), 89-90 [156] (Crennan, Kiefel, Gageler and Keane JJ).
[106] Ibid 96 [209], 98-9 [224], [230] (Crennan, Kiefel, Gageler and Keane JJ), 73-4 [40]-[41] (French CJ), 110-1 [296]-[297], [303], [305] (Bell J).

onerous limitations on movement and association, and stipulated a difficult avenue of defence, but the provisions left the criminal trial process intact.[107] The accused was innocent until proven guilty, the normal rules of evidence were retained, and the judge maintained his or her usual control of proceedings and ordinary discretions.[108]

C. The Breadth and Severity of the Provisions

As to the breadth of the laws, it seems that this issue was quite beside the point when it came to resolving whether the *Kable* doctrine had been violated. Justices Crennan, Kiefel, Gageler and Keane, observed that:

> [M]erely to point out the severity of the laws is not to articulate the connection between the novelty and breadth of the second category of impugned laws and the engagement of the *Kable* principle.[109]

Their Honours went on to cite *Magaming v The Queen*,[110] in which mandatory sentencing laws had withstood a *Kable* challenge, and state: 'to demonstrate that a law may lead to harsh outcomes, even disproportionately harsh outcomes, is not, of itself, to demonstrate constitutional validity'.[111]

Whilst the breadth of the laws was held to have no impact on their validity under the *Kable* doctrine, some of the justices nonetheless suggested how the executive power to declare criminal organisations (the 'declaration power') might be interpreted. In this respect their Honours expressed interesting, and divergent, views on the proper interpretation of that power. Justice Hayne reasoned that the declaration power was

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[107] Ibid 99 [230] (Crennan, Kiefel, Gageler and Keane JJ), 110-1 [296], [303] (Bell J).
[108] Ibid 73-4 [40]-[41] (French CJ), 99 [225]-[227] (Crennan, Kiefel, Gageler and Keane JJ), 102 [248] (Bell J).
[109] Ibid 96 [207].
[110] (2013) 252 CLR 381.
[111] *Kuczborski* (2014) 89 ALJR 59, 98 [217].

effectively untestable and unreviewable.[112] Justices Crennan, Kiefel, Gageler, and Keane, however, indicated that a far narrower view of that power was available. Their Honours favoured a highly contextual reading of the declaration power, taking into account its placement in the *Criminal Code* and the criteria by which an organisation could be declared by a court.[113] Looking to these factors, their Honours suggested that, despite its broad framing, the declaration power may in fact be limited to the declaration of organisations engaged in serious criminal activity (so, presumably neither the Australian Bar Association, the Australian Medical Association, nor the Beefsteak and Burgundy Club).[114] Ultimately, the proper interpretation and scope of this important power remains unsettled after *Kuczborski*. It may take an application for judicial review of an exercise of the declaration power to resolve its scope.

The scope of the declaration power did not impact the resolution of Kuczborski's *Kable* challenge. Justices Crennan, Kiefel, Gageler, and Keane indicated that regardless of the breadth of the impugned provisions, institutional integrity was preserved so long as ordinary judicial process was maintained.[115] Even a broad declaration power would fail to amount to a usurpation of judicial power. Rather, it would simply allow the executive to make a declaration that would then form a factum upon which the later exercise of judicial power would depend.[116] Justice Bell provided the apt example of executive identification of prohibited drugs as analogous to the declaration of criminal

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[112] Ibid 79 [84].
[113] Ibid 96-7 [210]-[215].
[114] Ibid. See also 109 [294] (Bell J), citing *Kuczborksi v Queensland* [2014] HCATrans 187 (2 September 2014) 887-8 (K C Fleming QC).
[115] *Kuczborski* (2014) 89 ALJR 59, 96 [206]-[209].
[116] Ibid 73-4 [40], [46] (French CJ).

organisations, each with onerous consequences under the criminal laws of Queensland and neither falling foul of the *Kable* doctrine.[117]

Similarly, for the majority justices, the practical difficulty of establishing the available defence did not support a finding of constitutional invalidity. Rather, the availability of a defence underscored the conformity of the proceedings with the hallmarks of the ordinary criminal trial.[118]

D. Justice Hayne's Dissenting Opinion

Justice Hayne issued a lone dissent and would have struck down the new offence provisions for violating the *Kable* doctrine. The basis for Hayne J's dissent, however, was narrow. As mentioned above, his Honour had eschewed the applicant's reliance on 'verbal formulae' and had agreed with his fellow judges in finding that Kuczborski's arguments were framed too broadly to establish repugnancy to, or incompatibility with, the institutional integrity of Queensland courts. However, for his Honour, the availability of three alternate avenues by which a criminal organisation could be identified – two judicial avenues and one executive – amounted to an impermissible 'assimilation' of judicial and executive powers.

Justice Hayne interpreted the declaration power to be effectively unreviewable. By contrast, the two avenues by which a court could identify a criminal organisation were open and subject to contest in open court proceedings governed by the usual rules of evidence and procedure. His Honour found that:

[117] Ibid 111 [303]. See also 86-7 [131] (Crennan, Kiefel, Gageler and Keane JJ).
[118] Ibid 73-4 [41] (French CJ),101-2 [239]-[248] (Crennan, Kiefel, Gageler and Keane JJ).

> By treating these three different paths to establishing what is a criminal organisation as legally indistinguishable, the Executive and the legislature seek to have an untested and effectively untestable judgment made by the political branches of government treated as equivalent to a judgment made in judicial proceedings conducted chiefly in public.[119]

His Honour reasoned that the provision of these three avenues by which a criminal organisation could be identified, impermissibly merged two distinct forms of judgment.[120] If a verbal formula was to be used, Hayne J elected the '*Mistretta* metaphor of cloaking' to say that 'by assimilating the two different kinds of judgment, each is cloaked in the dress of the other. The clothes do not fit'.[121]

Justice Hayne's reasons attach grave consequences to a relatively innocuous aspect of the legislation, and it must be admitted that his Honour's view is not easy to follow. The other justices did not share Hayne J's reading of the provisions. The Chief Justice, whose reasons most closely align with Hayne J's in other respects, directly attacked this basis for finding constitutional repugnancy. Chief Justice French saw no issue with the provision of three alternate pathways by which the factum of 'criminal organisation' might be identified. His Honour concluded that: 'Although the nomenclature of "criminal organisation" and the outcomes are the same, the pathways are distinct and do not have any legal effect upon each other'.[122]

Whilst there is no need for the Queensland government to respond to Hayne J's concerns, they could be addressed quite simply through legislative amendment. The process by which criminal organisations are identified could be moved into only the

[119] Ibid 85 [116].
[120] Ibid.
[121] Ibid 85 [117].
[122] Ibid 74 [46].

judicial arm or only the executive – as has always been the case in control order schemes in the Australian states and territories.[123] Alternately, the three avenues could be identically written with clear provision for the executive declaration to be open to review, whereby a court would be empowered to revisit the grounds on which the declaration had been made. Finally, the defence could be amended to be commensurate with the judicial criteria for declaration when the organisation has been declared by regulation. This final option would allow for the declaration to be tested in open court when the defence was invoked.

VI. *Kuczborski* and the Scope of *Kable*

Since 2009, the High Court has breathed new life into *Kable*, confirming that it has potential as a valuable and substantive limit on government power. However, these cases have also emphasised the limits of *Kable* and, thereby, the startling breadth of legislative and executive powers over state and territory courts. *Kuczborski* is emblematic of these two aspects of the *Kable* doctrine. In this Part, I use *Kuczborski* as a starting point to discuss four points regarding the scope of the *Kable* doctrine. Focussing in particular on the doctrine's capacity to protect civil liberties and fair process.

A. Institutional Integrity, Severity, and Disproportionality

Since its inception, *Kable* has been invoked as a shield against laws that are perceived as harsh. It is not fanciful to expect that a legislative scheme that violates rule of law values such as fair, equal, and open justice will undermine the integrity of a court applying that law.[124] This view of the *Kable* doctrine is reflected in the types of laws

[123] For summary, see Ananian-Welsh and Williams, above n 12.
[124] Guy, above n 7, 285.

that have been challenged under it. The vast majority of *Kable* challenges arise in the law and order context, where the rights and liberties of citizens are most critically at stake. *Kable*, *Fardon*, and the more recent case of *Pollentine v Bleijie* ('*Pollentine*')[125] involved challenges to the potentially indefinite detention of sex offenders at the conclusion of their sentences.[126] *Totani*, *Wainohu*, and *Pompano* each related to control order schemes, capable of imposing onerous restrictions and obligations on persons in the absence of criminal charge or guilt.[127] The case of *Magaming v The Queen*[128] involved the mandatory sentencing of people-smugglers,[129] *Emmerson*[130] concerned onerous asset forfeiture orders[131] - this list goes on. When a law involves state or territory courts in a scheme that infringes the rights and liberties of citizens, there is a good chance that a *Kable* challenge will be launched in an attempt to have the law read-down or overturned. *Kable*, it seems, has offered a potential avenue of constitutional protection for citizens from liberty-intrusive state and territory laws.[132]

In *Kuczborski*, the High Court sends a clear message that the role of the *Kable* doctrine is to protect the institutional integrity of courts, *not* the rights or liberties of citizens. Justices Crennan, Kiefel, Gageler, and Keane in particular drew a clear distinction between concerns over the severity and disproportionate impact of the law, and concerns for the institutional integrity of the courts.[133] This message aligns with earlier cases. In almost all of the cases listed immediately above, the laws were upheld. In

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[125] (2014) 88 ALJR 796.
[126] *Criminal Law Amendment Act 1945* (Qld) s 18.
[127] *Serious and Organised Crime (Control) Act 2008* (SA), *Crimes (Criminal Organisations Control) Act 2009* (NSW), and *Criminal Organisation Act 2009* (Qld) respectively.
[128] (2013) 252 CLR 381.
[129] *Migration Act 1958* (Cth) ss 233A, 233C, 236B.
[130] (2014) 88 ALJR 522.
[131] *Criminal Property Forfeiture Act* (NT) ss 44(1)(a), 94; *Misuse of Drugs Act* (NT) s 36A.
[132] Mirko Bagaric, 'Separation of Powers Doctrine in Australia: De Facto Human Rights Charter' (2011) 7(1) *International Journal of Punishment and Sentencing* 25.
[133] *Kuczborski* (2014) 89 ALJR 59, 96 [207], 98 [217].

Kable, *Totani*, and *Wainohu*, the laws were struck-down, but the grounds for invalidity did not relate to the impact of the law on individual rights or liberties.[134] Today, it can be confidently surmised that mandatory sentences,[135] potentially indefinite preventive incarceration,[136] preventive restraints on liberty under a control order,[137] and secret evidence[138] are compliant with the *Kable* protection for institutional integrity. These outcomes demonstrate the truth in McHugh J's statement in *Fardon* that:

> State legislation may require State courts to exercise powers and take away substantive rights on grounds that judges think are foolish, unwise, or even patently unjust. Nevertheless, it does not follow that, because State legislation required State courts to make orders that could not be countenanced in a society with a Bill of Rights, the institutional integrity of those courts is compromised.[139]

Against this backdrop it is unsurprising that Kuczborski's challenge failed, insofar as it relied upon establishing the severe and disproportionate impact of the anti-organised crime laws on citizens.

The acknowledgment that *Kable* is not a source of implied rights protection prompts one to query whether any legal (as opposed to political) shield exists from state or territory legislation that intrudes on basic rights and freedoms. Certainly the Victorian and ACT human rights Charters provide an avenue of legal recourse in those

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[134] For a summary of the findings in these cases (and others), see Rebecca Ananian-Welsh, 'Preventative Detention Orders and the Separation of Judicial Power' (2015) 38 *The University of New South Wales Law Journal* 756, 760-8.
[135] *Magaming v The Queen* (2013) 252 CLR 381.
[136] *Fardon* (2004) 223 CLR 575; *Pollentine* (2014) 88 ALJR 796.
[137] *Totani* (2010) 242 CLR 1; *Wainohu* (2011) 243 CLR 181; *Pompano* (2013) 252 CLR 38.
[138] *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 ('*K-Generation*'); *Gypsy Jokers* (2008) 234 CLR 532; *Pompano* (2013) 252 CLR 38.
[139] *Fardon* (2004) 223 CLR 575, 600-1 [41] (McHugh J).

contexts.[140] But for the rest of Australia this remains a vital question. One thing is sure, the High Court has clearly communicated that *Kable* is no shield for civil liberties.

Whilst *Kable* is no implied bill of rights, it may yet have some potential to shield the community from liberty-intrusive laws. This capacity rests entirely on the link that may be drawn between the impact of the law and the institutional integrity of the court. That is, it is not enough to establish the severity of a law – the crucial step is to demonstrate how that severity has a direct impact on the institutional integrity of the judiciary.[141] One facet of human rights that *Kable* may therefore be capable of protecting is the right of citizens to fair judicial process.[142]

B. Institutional Integrity and Judicial Process

In *Kuczborski*, as in other *Kable* cases,[143] the process by which the court exercised its powers was vital to the High Court's decision to uphold the new offence provisions.[144] Justice Bell emphasised that the court's powers at the trial of an accused under the new offence provisions 'are exactly the same as on the trial of an accused for any criminal offence'.[145] Justices Crennan, Kiefel, Gageler, and Keane similarly grounded their reasons in the statement that:

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[140] *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT); Appleby, above n 91, 697.
[141] *Kuczborski* (2014) 89 ALJR 59, 96 [206]-[207], 98 [217] (Crennan, Kiefel, Gageler and Keane JJ).
[142] Guy, above n 7, 284-5; Steytler and Field, above n 7, 255-9.
[143] See, eg, *Emmerson* (2014) 88 ALJR 522, 537 [57]-[60] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); Ratnapala and Crowe, above n 95, 194-200.
[144] *Kuczborski* (2014) 89 ALJR 59, 96 [209], 98-9 [224], [230] (Crennan, Kiefel, Gageler and Keane JJ), 73-4 [40]-[41] (French CJ), 110-1 [296]-[297], [303], [305] (Bell J).
[145] Ibid 110 [296].

> The only judicial activity which attends the enforcement of these laws is the *characteristically judicial process* of a criminal trial, upon which these laws do not trench.[146]

Their Honours concluded that 'so far as the *Kable* principle is concerned' even odd or undesirable outcomes arising from the legislation 'would be a consequence of the enforcement of the legislation by ordinary judicial processes', and therefore would not violate the *Constitution*.[147]

The Court's reasoning in *Kuczborski* indicates that institutional integrity requires that proceedings conform to ordinary judicial process, in this case, the usual and expected aspects of a criminal trial. The apparent implication of this is that *Kable* defends ordinary judicial process from legislative or executive interference. In the context of *Kable*'s 'post-2009 rejuvenation',[148] the High Court appeared to be (re)embracing the capacity for *Kable* to protect judicial process.[149] In 2013, Scott Guy surmised that the doctrine 'now affords a substantial degree of protection for State Supreme Courts and their procedural processes'.[150] The centrality of judicial process to institutional integrity has also been reflected in the case-law. In *Emmerson*, for example, asset forfeiture provisions survived constitutional challenge on the basis that the Northern Territory Supreme Court was able to conduct proceedings with 'ordinary judicial process', exercising its usual discretions and control of proceedings.[151] The High Court reached this finding despite the severe and arguably disproportionate impact on rights effected

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[146] Ibid 96 [209] (emphasis added).
[147] Ibid 99 [230].
[148] Murray, above n 3, 152.
[149] Appleby and Williams, above n 3, 28; Guy, above n 7; Steytler and Field, above n 7, 251; Bagaric, above n 132.
[150] Guy, above n 7, 285.
[151] (2014) 88 ALJR 522, 537 [57]-[60] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

by the legislation.[152] Moreover, the provisions *obliged* the Supreme Court to issue a far-reaching forfeiture notice, provided merely that the Director of Public Prosecutions could prove that the person had been subject to three drug-related prosecutions in 10-years.[153] In a joint judgment, French CJ, Hayne, Crennan, Kiefel, Bell, and Keane JJ, said that:

> A legislature which imposes a judicial function or an adjudicative process on a court, whereby it is essentially directed or required to implement a political decision or a government policy *without following ordinary judicial processes*, deprives that court of its defining independence and institutional impartiality.[154]

This approach indicates that institutional integrity is maintained regardless of the impact of a law on citizens' rights or liberties, provided that ordinary judicial process is preserved.[155] So what is ordinary judicial process? What elements of court process are enshrined through the *Kable* doctrine?[156]

One may argue that ordinary judicial process encompasses procedural fairness, thereby opening a pathway for *Kable* to protect the fairness of court proceedings.[157] This view is bolstered by the identification of procedural fairness as one of the 'defining and essential' characteristics of courts.[158] Whilst the close relationship between institutional

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[152] 'The provisions … do not cease to be laws with respect to the punishment of crime because some may hold a view that civil forfeiture of legally acquired assets is a harsh or draconian punishment': 541 [81] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
[153] *Misuse of Drugs Act* (NT) s36A, read together with *Criminal Property Forfeiture Act* (NT) s 94(1).
[154] (2014) 88 ALJR 522, 534 [44] (emphasis added). See also *Gypsy Jokers* (2008) 234 CLR 532, 560 [39] (Gummow, Hayne, Heydon and Kiefel JJ); *Totani* (2010) 242 CLR 1, 52-3 [82]-[83] (French CJ), 63 [132] (Gummow J), 82 [204], 88-9 [226] (Hayne J), 158 [428] (Crennan and Bell JJ).
[155] On the importance of maintaining ordinary judicial process, see also *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 (*'International Finance Trust'*), 355 [56] (French CJ), 366-7 [97]-[98] (Gummow and Bell JJ), 286-7 [159]-[161] (Heydon J).
[156] Other scholars have grappled with and criticised this question. See, eg, Gogarty and Bartl, above n 7; Anthony Gray, 'Constitutionally Protected Due Process and the Use of Criminal Intelligence Provisions' (2014) 37(1) *University of New South Wales Law Journal* 125, 130.
[157] Guy, above n 7, 293; Gray, above n 156; Ratnapala and Crowe, above n 95, 211-2.
[158] *Wainohu* (2011) 243 CLR 181, 208 (French CJ and Kiefel J); *Leeth v Commonwealth* (1992) 174 CLR 455, 469-70 (Mason CJ, Dawson and McHugh JJ); *International Finance Trust* (2009) 240 CLR

integrity and procedural fairness is clear, apparent infringements to fair process have been tolerated under the *Kable* doctrine. Ex parte proceedings,[159] secret evidence,[160] reversals of the onus of proof,[161] and decisions based on information that may avoid the rules of evidence[162] have all withstood *Kable* challenge – even where the power has resulted in severe incursions on rights or liberties.[163] Decisions of this nature led Heydon J to observe in *Totani* that the due process implications of the *Kable* were 'apparently dormant'.[164] In the earlier case of *Gypsy Jokers*, Kirby J similarly remarked that the *Kable* doctrine had been 'under-performing' in its capacity to protect fair process.[165]

Against this background it appears that the form of judicial process enshrined through the *Kable* doctrine may not extend to 'fair' process. That is to say, the *Kable* doctrine is not concerned with the degree of fairness afforded to the parties. Another way of framing this distinction may be drawn from Dawson J's observation in *Kruger v Commonwealth*, that: 'Chapter III may, perhaps, be regarded … as affording a measure of due process, but it is due process of a procedural rather than substantive nature'.[166]

319, 354-5 (French CJ), 379-80 (Heydon J); *Pompano* (2013) 252 CLR 38, 72 [68] (French CJ). As to the requirements of fair process in the Chapter III context, the High Court regularly harnesses the definition provided by Gaudron J in *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 quoted in, eg, *Fardon* (2004) 223 CLR 575, 615 [92] (Gummow J): '[Fair process involves] 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'.

[159] Provided that notice of the proceeding is provided to the respondent party: *International Finance Trust* (2009) 240 CLR 319, 355 [56] (French CJ); Ratnapala and Crowe, above n 95, 199-200.

[160] *K-Generation* (2009) 237 CLR 501; *Gypsy Jokers* (2008) 234 CLR 532; *Pompano* (2013) 252 CLR 38; Ananian-Welsh, above n 14; Greg Martin, 'Outlaw motorcycle Gangs and Secret Evidence: Reflections on the Use of Criminal Intelligence in the Control of Serious and Organised Crime in Australia' (2014) 36 *Sydney Law Review* 501.

[161] *Kuczborski* (2014) 89 ALJR 59, 101 [241]-[243] (Crennan, Kiefel, Gageler and Keane JJ) citing *Orient Steam Navigation Co Ltd v Gleeson* (1931) 44 CLR 254, 263 (Dixon J), *Nicholas v The Queen* (1998) 193 CLR 173 [24] (Brennan CJ).

[162] Martin, above n 160, 523-5.

[163] *Totani* (2010) 242 CLR 1; *Wainohu* (2011) 243 CLR 181; *Pompano* (2013) 252 CLR 38; *Emmerson* (2014) 88 ALJR 522; *Magaming v The Queen* (2013) 252 CLR 381; *Kuczborski* (2014) 89 ALJR 59.

[164] (2010) 242 CLR 1, 95.

[165] *Gypsy Jokers* (2008) 234 CLR 532, 563 (Kirby J).

[166] (1997) 190 CLR 1, 63 (Dawson J). See also Steytler and Field, above n 7, 256-7.

It follows that a more apt framing of the protection for judicial process arising from *Kable* is that it requires the maintenance of 'ordinary judicial process', rather than fair process or the more Americanised notion of 'due process'. This language of 'ordinary' process has been favoured in the most recent *Kable* cases, including *Kuczborski* and *Emmerson*.[167]

The maintenance of ordinary judicial process appears to overcome many (if not most) arguable affronts to the institutional integrity of courts. However, the precise aspects of ordinary judicial process that are protected through the *Kable* doctrine are difficult to define. The giving of reasons was identified as essential to institutional integrity in *Wainohu*.[168] More broadly, the application of rules of evidence,[169] the application of law to facts in issue,[170] the provision of a right of appeal,[171] provisions as to onus and standard of proof,[172] and the existence of appropriate discretions,[173] all seem to be important aspects of ordinary judicial process.[174] However, two trends have arisen in the case-law that together suggest that *Kable* has a thin capacity to protect even the ordinary, or procedural, aspects of judicial process.

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[167] *Kuczborski* (2014) 89 ALJR 59, 85 [116] (Hayne J), 96 [209], 100 [235] (Crennan, Kiefel, Gageler and Keane JJ), 111 [303] (Bell J); *Emmerson* (2014) 88 ALJR 522, 537 [57]-[60] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
[168] *Wainohu* (2011) 243 CLR 181, 192 [7], 213-5 [54]-[59] (French CJ and Kiefel J), 228 [104] (Gummow, Hayne, Crennan and Bell JJ).
[169] *Fardon* (2004) 223 CLR 575, 692 (Gleeson CJ), 596 (McHugh J), 656 (Callinan and Heydon JJ).
[170] *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 (Gaudron J); *Fardon* (2004) 223 CLR 575, 592 (Gleeson CJ); *K-Generation* (2009) 237 CLR 501, 512 (French CJ).
[171] *Fardon* (2004) 223 CLR 575, 617 (Gummow J), 658 (Callinan and Heydon JJ).
[172] Ibid 596 (McHugh J), 615-6, 620-1 (Gummow J); *International Finance Trust* (2009) 240 CLR 319.
[173] *Fardon* (2004) 223 CLR 575, 592 (Gleeson CJ), 596 (McHugh J), 656 (Callinan and Heydon JJ); *Wainohu* (2011) 243 CLR 181.
[174] Such lists have been attempted by, eg: Gray, above n 156, 133, 139; Guy, above n 7, 285; Steytler and Field, above n 7, 249.

First, the executive and legislature have wide powers to regulate core aspects of trial process, including the rules of evidence, sentencing principles, and the onus of proof.[175] As discussed above, the case-law indicates that this regulation may even bring about harsh or disproportionate effects without violating *Kable*. For instance, parliament may design a scheme that reverses the onus of proof,[176] assigns a disproportionate mandatory sentence,[177] and provides for evidence to be withheld from the respondent and his or her representative,[178] all in keeping with *Kable's* protection of ordinary judicial process.

Secondly, in certain cases the infringement of an aspect of ordinary judicial process has been overcome by the preservation of basic judicial discretions.[179] The foremost example of this is the case of *Pompano*, in which control order provisions were upheld despite the police being allowed to rely on secret evidence. Validity was grounded in the preservation of the court's overarching discretions and independent control of proceedings.[180] The High Court readily acknowledged that the provision for secret evidence was 'antithetical' to the traditional system of justice,[181] but nonetheless the judge's capacity to maintain fairness in other ways – such as by giving less weight to

[175] As to the onus of proof, see *Kuczborski* (2014) 89 ALJR 59, 101 [241]-[243] (Crennan, Kiefel, Gageler and Keane JJ), citing *Orient Steam Navigation Co Ltd v Gleeson* (1931) 44 CLR 254, 263 (Dixon J), *Nicholas v The Queen* (1998) 193 CLR 173, 189-90 [24] (Brennan CJ).
[176] Ibid.
[177] *Emmerson* (2014) 88 ALJR 522; *Magaming v The Queen* (2013) 252 CLR 381.
[178] *Pompano* (2013) 252 CLR 38.
[179] Gray, above n 156, 197. Cf *Wainohu* (2011) 243 CLR 181, in which the preservation of a discretion to give reasons was held *not* to remedy incompatibility arising from the explicit removal of the obligation on the judge to give reasons for his or her decision to declare an organisation: *Wainohu* (2011) 243 CLR 181, 213 [53], 219-20 [69] (French CJ and Kiefel J). See also Rebecca Welsh, ''Incompatibility' Rising?: Some Potential Consequences of *Wainohu v New South Wales*' (2011) 22 *Public Law Review* 259, 264-5.
[180] *Pompano* (2013) 252 CLR 38, 80 [88] (French CJ), 102-3 [166]–[168] (Hayne, Crennan, Kiefel and Bell JJ), 115 [212] (Gageler J).
[181] Ibid 46 [1] (French CJ). See also 106-8 [184]-[188] (Gageler J) and analysis in: Gray, above n 156, 139-53.

the untested evidence – overcame potential invalidity.[182] Whilst considerable weight is given to ordinary trial process in overcoming potential invalidity, these two trends suggest that *Kable* does not give rise to substantive or particularly reliable protections even for the basic procedural elements of ordinary judicial process.

It is difficult to reconcile the High Court's clear indications that ordinary judicial process and procedural fairness are protected, with the breadth of the legislative and executive interference with court processes that have been allowed.[183] One solution to this dilemma was posited by Wendy Lacey well before the resurgence of the *Kable* doctrine. Lacey's 'alternative approach' contends that *Kable* may not directly protect elements of judicial process – rather, the doctrine protects courts' inherent jurisdiction and capacity 'to ensure the integrity, efficiency and fairness of its process'.[184] This conception of *Kable* as a protection for the inherent jurisdiction of courts (rather than providing an avenue for rights-protection or an implied due process principle) has not been adopted in decisions of the High Court. However, it does make sense of the case-law. Lacey's approach maintains the crucial focus on the essential aspect of *Kable* – the institutional integrity of the courts. It accounts for the considerable weight given to the preservation of judicial discretions in maintaining constitutional validity,[185] and it sits comfortably with statements to the effect that a court cannot be *required* to exercise power in a manner that is inconsistent with procedural fairness.[186]

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[182] *Pompano* (2013) 252 CLR 38, 80 [88] (French CJ), 102-3 [166]–[168] (Hayne, Crennan, Kiefel and Bell JJ), 115 [212] (Gageler J). See text above n 25.
[183] For instance, Anthony Gray has argued that the factors relied upon by the High Court to uphold the use of secret evidence in judicial proceedings are inadequate: Gray, above n 156, 161.
[184] Wendy Lacey, 'Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the *Constitution*' (2003) 31 *Federal Law Review* 57, 59.
[185] See, eg, *Pompano* (2013) 252 CLR 38; Welsh, above n 7, 92.
[186] *Kable* (1996) 189 CLR 51, 98 (Toohey J); *Thomas v Mowbray* (2007) 233 CLR 307, 355 (Gummow and Crennan JJ); *Polyukovich v The Queen* (1991) 172 CLR 501, 607 (Deane J), 685 (Toohey J), 703 (Gaudron J); *Gypsy Jokers* (2008) 234 CLR 532, 560 [39] (Gummow, Hayne, Heydon and Kiefel JJ);

The relationship between the *Kable* doctrine and judicial process remains fraught and uncertain. *Kuczborksi* confirms that the preservation of ordinary judicial process plays a crucial role in maintaining constitutional validity. However, it will take future developments to clarify which aspects of judicial process are indeed protected under *Kable*, or whether the doctrine merely enshrines the inherent capacity of a court to effectively exercise its discretions and control proceedings before it.

C. Interpreting Executive Power

Justices Crennan, Kiefel, Gageler, and Keane upheld the impugned laws as compliant with the *Kable* doctrine, however in obiter dicta, their Honours suggested a very narrow and highly contextual reading of the executive government's declaration power – a fundamental aspect of the laws. These observations were unnecessary to the outcome of the case, but nonetheless their Honours dedicated five paragraphs of their judgment to elaborating this point.[187] This reflects a willingness on the part of the High Court to respond to broad executive powers by way of statutory interpretation – even where such interpretation is not required by Chapter III.

It is not possible to draw significant inferences from these obiter dicta statements. However, they suggest that the High Court was not blind to the severity of the laws at hand or their potential to impact the relationship between the executive and judicial arms of government. The narrow interpretation of the declaration power posited by Crennan, Kiefel, Gageler, and Keane JJ was not obvious on the face of the legislation, and it would provide a considerable limit on the potential breadth and impact of the new offence provisions. Their Honours seem to be opening a doorway to judicial review

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International Finance Trust (2009) 240 CLR 319, 360 [77] (Gummow and Bell JJ); *Totani* (2010) 242 CLR 1, 63 [132] (Gummow J).

[187] *Kuczborski* (2014) 89 ALJR 59, 96-7 [210]-[215].

of administrative action with one hand, even whilst closing the doorway to judicial review under the *Kable* doctrine with the other. This willingness to harness statutory interpretation to limit broad executive powers offers a potential counter-balance to the Court's aversion to harnessing *Kable* as a protection for citizens from liberty-intrusive laws.

D. Arguing a Kable *Case: Verbal Formulae and the Essential Notion*

Finally, the case of *Kuczborski* offers a valuable lesson in how *Kable* ought to be approached in legal argument. In the context of *Kable's* dynamic evolution, the already broad notion of institutional integrity has become further clouded. This has given rise to a temptation to deconstruct the *Kable* doctrine into clearer, more manageable tests. For instance, it can be difficult to determine whether an executive action impermissibly compromises judicial integrity, but much clearer to identify whether the executive is exercising control over the judiciary, usurping judicial powers, seeking to cloak a non-judicial decision in 'the neutral colours of judicial action', or has enlisted, conscripted or dictated to the court.

In *Kuczborski*, the High Court continues this trend of harnessing formulae to assist its determination of *Kable* validity. However, French CJ and Hayne J send a clear and crucial warning. Such formulae are merely helpful, they do not amount to tests for *Kable* validity and they cannot be allowed to replace the essential inquiry of whether a law is incompatible with or repugnant to the institutional integrity of the court.[188]

This point emphasises the pervasive flexibility of the *Kable* doctrine. As Gabrielle Appleby and John Williams have observed, this flexibility is required to support the

[188] *Kuczborski* (2014) 89 ALJR 59, 73 [38], [40] (French CJ), 83 [105]-[106] (Hayne J).

full-breadth of the *Kable* doctrine: 'If [*Kable*] is to be used as such a large umbrella, it must be capable of adapting to any type of measure that can be concocted by the states that makes incursions into the institutional integrity of the Court'.[189] However, this flexibility brings with it a lack of clarity, which in turn will continue to tempt advocates, scholars, and even judges to rely on verbal formulae. The tension between the approaches adopted in the joint judgment and in the judgments of French CJ and Hayne J in *Kuczborski*, reflects the ongoing challenge of maintaining the *Kable* doctrine's focus on a flexible, amorphous notion of 'institutional integrity', whilst allowing the doctrine to be refined by precedent.[190]

VII. Conclusion

The case of *Kuczborksi* does not dramatically alter the constitutional landscape or extend the *Kable* doctrine into new territory. However, it plays an important role in giving clarity to a dynamic constitutional principle.

The practical impact of the High Court's decision in *Kuczborski* is to uphold the new offences provisions enacted by the Queensland government in October 2013 as part of its war on bikie gangs. At the time of writing both South Australia and Western Australia have indicated that they are considering following Queensland's lead and enacting similar legislation.[191] Thus, *Kuczborski* has cleared a path for the migration of

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[189] Appleby and Williams, above n 3, 29.

[190] A tension reflected in the statement from *Pompano* (2013) 252 CLR 38 that 'the constitutional validity of one law cannot be decided by taking what has been said in earlier decisions of the court about the validity of other laws and assuming, without examination, that what is said in the earlier decisions can be applied to the legislation now under consideration': 94 [137] (Hayne, Crennan, Kiefel and Bell JJ).

[191] Sarah Vogler, 'Premiers Gang Up: Newman's War on Bikies Goes National', *Courier Mail* (Queensland), 25 August 2014, 1; Grant Taylor, 'Tough New Bikie Laws', *The West Australian* (Western Australia), 11 February 2015, 1; Sheradyn Holderhead, 'South Australia's anti-bikie laws toughened by Attorney-General John Rau', *The Advertiser* (online), 3 March 2015 <http://www.adelaidenow.com.au/news/south-australia/south-australias-anti-bikie-laws-toughened-by-attorney-general-john-rau/story-fni6uo1m-1227246407658>; James Hancock, 'SA keeping an eye on anti-bikie laws High Court ruling', *ABC News* (online), 14 November 2014, <

these measures across Australia – a trend that has already played out for anti-organised crime control orders.[192]

However, South Australia and Western Australia have displayed some hesitancy to adapt Queensland's laws to their own statute books. This may be a consequence of the many questions left unanswered in *Kuczborski*. Due to the plaintiff's lack of standing, the High Court did not rule on the validity of other key aspects of the Newman government's anti-bikie laws, including the imposition of 15 and 25 year mandatory sentences under the *VLAD Act*, the introduction of a presumption against bail for PICOs, and the aggravating circumstance provisions. The validity of these provisions remains unresolved. Moreover, the scope of the executive power to declare criminal organisations is *less* certain following *Kuczborski*. It may be that this power is effectively unbounded and unreviewable, as Hayne J suggested. However, the alternate interpretation put forward by Crennan, Kiefel, Gageler, and Keane JJ suggests a much narrower reading of that power. These divergent interpretations of the declaration power invite future applications for judicial review, that would subject these declarations to judicial and public scrutiny. It remains, however, that even if Hayne J's broad interpretation is favoured by the courts, the provisions are nonetheless compatible with Chapter III of the *Constitution*.

In terms of the *Kable* doctrine, *Kuczborski* marks a shift away from the optimism sparked by *Kable*'s post-2009 rejuvenation.[193] The case-law clearly demonstrates that *Kable* is no implied bill of rights or due process clause. It is true that the High Court

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http://www.abc.net.au/news/2014-11-13/sa-keeping-eye-on-anti-bikie-laws-high-court-ruling/5889836>.

[192] Ananian-Welsh and Williams, above n 12.

[193] Reflected in, eg: Bagaric, above n 132; Guy, above n 7, 285, 293; Steytler and Field, above n 7, 251; Appleby and Williams, above n 3, 28; Ratnapala and Crowe, above n 95, 211-2; Gray, above n 156.

has consistently recognised the centrality of procedural fairness to institutional integrity, but it has also upheld grave interferences with fairness as *Kable* compliant. Similarly, the preservation of 'ordinary' judicial process has been vital to maintaining constitutional validity in *Kuczborski* and other cases – prompting some to argue that 'procedural due process' has been elevated to a constitutional imperative.[194] But this too does not stand under the weight of precedent, as the High Court has also permitted extensive interference with fundamental aspects of 'ordinary' or 'procedural' judicial processes.[195] A more coherent approach (though not one expressly adopted by the High Court) is that *Kable* protects the inherent capacities of courts to protect their own processes, rather than enshrining particular facets of court process as such.[196]

This third conception of *Kable's* capacity to protect judicial process aligns with French CJ and Hayne J's warnings in *Kuczborski* that the focus of a *Kable* analysis must rest squarely on the institutional integrity of the court.[197] It also is reflected in Crennan, Kiefel, Gageler, and Keane JJ's clear statements that *Kable* has nothing to do with the impact of a law on civil liberties – even where that impact is severe or disproportionate.[198]

The dynamic history of the *Kable* doctrine has underscored its inherent flexibility and uncertainty.[199] However, by confirming that *Kable* focuses squarely on the courts *Kuczborski* can assist advocates and scholars in persuasively framing a *Kable* challenge and effectively testing the doctrine's potential as a substantive, principled limit on

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[194] *Kruger v Commonwealth* (1997) 190 CLR 1, 63 (Dawson J); Steytler and Field, above n 7, 256-7.
[195] Eg, *Pompano* (2013) 252 CLR 38; *Kuczborski* (2014) 89 ALJR 59, 101 [241]-[243] (Crennan, Kiefel, Gageler and Keane JJ). See also, discussion of the High Court's findings on secret evidence in: Ananian-Welsh, above n 14; Martin, above n 160.
[196] Lacey, above n 184. Cf *Wainohu* (2011) 243 CLR 181, as discussed in Welsh, ''Incompatibility' Rising?' above n 179, 264-5.
[197] *Kuczborski* (2014) 89 ALJR 59, 73 [38], [40] (French CJ), 83 [105]-[106] (Hayne J).
[198] Ibid 96 [207] (Crennan, Kiefel, Gageler and Keane JJ).
[199] Appleby, above n 91.

government power. As the *Kable* doctrine continues to evolve, attempts to harness its capacity to protect judicial process should focus on the court's inherent discretions and control of proceedings, rather than on the impact of the law on rights, liberties, fairness, or even the expected procedural elements of a trial. These notions may be protected under human rights Charters, as in Victoria and the ACT, but one ought not rely on *Kable* to give rise to similar protections.

THE NEW TERRORISTS: THE NORMALISATION AND SPREAD OF ANTI-TERROR LAWS IN AUSTRALIA

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Since September 11, Australia's federal Parliament has enacted a range of exceptional measures aimed at preventing terrorism. These measures include control orders, which were not designed or intended for use outside of the terrorism context. What has followed, however, has been the migration of this measure to new contexts in the states and territories, especially in regard to what some have termed the 'war on bikies'. This has occurred to the point that this measure, once considered extreme, has become accepted as a normal aspect of the criminal justice system, and has in turn given rise to even more stringent legal measures. This article explores the dynamic by which once-exceptional measures become normalised and then extended to new extremes. It explores these issues in the context of the role that constitutional values have played in this process.

CONTENTS

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I INTRODUCTION

The 'war on terror' that arose after the September 11 attacks in the United States triggered an expansion of international[1] and domestic legal frameworks[2] directed at the prevention of terrorism. Today, that conflict appears to be waning, but in many respects the expanded frameworks remain intact. This is enabling processes of 'normalisation' by which such measures come to be treated as unexceptional, rather than as extreme measures that ought to be strictly limited in their application. In this form, they are more readily adapted to other areas of the legal system. Outside of the anti-terror context, the now-normalised measures can give rise to even more extreme laws that further challenge fundamental values. In this sense the legal responses to the war on terror can continue indefinitely outside of the anti-terror context and have a permanent impact on constitutional values.

We explore this dynamic by focusing on an Australian case study, namely the migration of control orders from the anti-terror context to the body of legislation that has emerged in what might be called a 'war on bikies'.[3] Control orders are civil orders that empower courts to impose a wide range of restrictions and obligations on an individual, such as curfews, limits on

[1] For example, the United Nations Security Council's Resolution 1373 of 2001 has been described as Security Council 'legislation' on the basis of its unilateral, mandatory, general and novel nature: C H Powell, 'The United Nations Security Council, Terrorism and the Rule of Law' in Victor V Ramraj et al (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 19, 23, 29–30, citing SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/RES/1373 (28 September 2001). See also SC Res 1624, UN SCOR, 60th sess, 5261st mtg, UN Doc S/RES/1624 (14 September 2005).

[2] Andrea Bianchi, 'Security Council's Anti-Terror Resolutions and Their Implementation by Member States: An Overview' (2006) 4 *Journal of International Criminal Justice* 1044, 1051; George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136; Bernadette McSherry, 'Terrorism Offences in the *Criminal Code*: Broadening the Boundaries of Australian Criminal Laws' (2004) 27 *University of New South Wales Law Journal* 354; Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011); Kent Roach, 'The Criminal Law and Its Less Restrained Alternatives' in Victor V Ramraj et al (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 91.

[3] The earlier migration of control orders from the United Kingdom to Australia has been explored in, for example, Andrew Lynch, 'Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law' (2008) 8 *Oxford University Commonwealth Law Journal* 159; Andrew Lynch, Tamara Tulich and Rebecca Welsh, 'Secrecy and Control Orders: The Role and Vulnerability of Constitutional Values in the United Kingdom and Australia' in David Cole, Federico Fabbrini and Arianna Vedaschi (eds), *Secrecy, National Security and the Vindication of Constitutional Law* (Edward Elgar, 2013) 154; Lisa Burton and George Williams, 'What Future for Australia's Control Order Regime?' (2013) 24 *Public Law Review* 182.

communication, and the like, for the purpose of preventing future criminal acts. A person may be the subject of a control order, and therefore subject to a deprivation of liberty, without any finding that they have transgressed the law. In this way, control orders operate independently of any concept of guilt or innocence.

We begin in Part II by introducing Australia's response to the global threat of terrorism and the rhetoric of urgency, exceptionalism and war that attended the enactment of a host of anti-terror laws following the 9/11 attacks, including control orders. In Part III, we document the proliferation of control order-like schemes across Australia, tracing their migration from the anti-terror context to the fight against serious and organised crime. This process of migration and subsequent normalisation has not gone unnoticed. Writing in 2010, Gabrielle Appleby and John Williams observed the 'creep' of anti-terror laws to the law and order context,[4] and one of us writing with Nicola McGarrity said: 'counter-terrorism laws have become a permanent fixture of the legal landscape. … Over time, what were once seen as extraordinary laws have become accepted as "normal"'.[5]

Not only has the control order device itself migrated across contexts, but it has provided a vehicle for the more subtle migration of certain characteristic features of national security laws. Hence, the expanded use of secret evidence, crimes of association and preventive constraints on liberty have also gone through a similar process of normalisation.[6]

In Part IV, we explore more recent developments that signal the next phase of the migration and normalisation process. In the ongoing political race to be 'tough on crime', the adaption of once-extreme measures has given rise to the extension of these measures into new, even more extreme territory. In Part V, we reflect on this process of migration, normalisation and extension and examine the role played by constitutional values in both checking and facilitating such trends.

[4] Gabrielle Appleby and John Williams, 'The Anti-Terror Creep: Law and Order, the States and the High Court of Australia' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 150.

[5] Nicola McGarrity and George Williams, 'When Extraordinary Measures Become Normal: Pre-emption in Counter-Terrorism and Other Laws' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 131, 132.

[6] Ibid; Lynch, Tulich and Welsh, above n 3.

II Australia's War on Terror and Control Orders

A *Enacting Anti-Terror Laws*

Prior to 9/11 Australia had no national laws dealing specifically with terrorism. Since then, the Australian government has enacted more than 60 such laws,[7] an approach Kent Roach aptly described as one of 'hyper-legislation'.[8] Australia's national anti-terror laws are striking not just in their volume, but also in their scope.[9] They include provisions for warrantless searches,[10] the banning of organisations,[11] preventive detention,[12] and the secret detention and interrogation of non-suspect citizens by the Australian Security Intelligence Organisation ('ASIO').[13] The passage of these laws was eased by Australia's lack of a national bill or charter of rights. It was also assisted by a rhetoric of urgency and exceptionalism that enabled the laws' speedy enactment.

In March 2002, federal Attorney-General Daryl Williams introduced the first package of anti-terrorism legislation to parliament. In doing so, Mr Williams conceded that the measures being introduced were 'extraordinary'[14] but, he noted, 'so too is the evil at which they are directed'.[15] The federal government justified these measures by emphasising both the grave harm threatened by terrorism and the goal of terrorists to disrupt or even destroy government institutions. These two factors were harnessed to demonstrate why the existing criminal law provided an insufficient legal response to the problem of terrorism. Simply put, the state could not afford to wait until a terrorist act had been committed, but must prevent it from occurring in the first place. To this end, anti-terror laws aimed at the prevention of future acts of terror were introduced.[16]

[7] George Williams, 'The Legal Legacy of the "War on Terror"' (2013) 12 *Macquarie Law Journal* 3, 6–7; Williams, 'A Decade of Australian Anti-Terror Laws', above n 2, 1140–5.

[8] Roach, *The 9/11 Effect*, above n 2, 309.

[9] Williams, 'The Legal Legacy of the "War on Terror"', above n 7, 7–10; Williams, 'A Decade of Australian Anti-Terror Laws', above n 2, 1146–53.

[10] *Crimes Act 1914* (Cth) s 3UEA.

[11] Provided that the Attorney-General is satisfied on reasonable grounds that the organisation 'is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act' or 'advocates the doing of a terrorist act' (discussed further below): *Criminal Code Act 1995* (Cth) sch ('*Criminal Code* (Cth)') ss 102.1(2)(a)–(b).

[12] *Criminal Code* (Cth) div 105.

[13] *Australian Security Intelligence Organisation Act 1979* (Cth) pt III div 3.

[14] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1936.

[15] Ibid.

[16] See generally McGarrity and Williams, above n 5, 131.

The passage of the federal anti-terror control order provisions reflected this same approach. Control orders were introduced as part of a much larger package of legislation, the *Anti-Terrorism Act (No 2) 2005* (Cth), in the wake of the terrorist bombings in London in July 2005. This sizable statute also created preventative detention orders ('PDOs')[17] and updated sedition offences.[18] Attention was drawn to the London attacks, as well as to earlier bombings in Spain, Bali and the United States, throughout the course of its enactment.[19] These acts of terror, it was argued, highlighted the grave threat that faced Australians both at home and overseas and the pressing need to prevent future crimes of this nature. As Senator Stephen Conroy argued:

> the substance of legislation of this kind is a response to a new threat, not a response to community fear. Let me be clear: the threat of a terrorist attack in this country is real. This is not hyperbole or scaremongering. The events of New York, Madrid, London, Bali and Singapore ought to make it patently clear that no country is immune from the current danger.
>
> As I said earlier, suicide bombers pose a new and unique threat to the security of individual Australians. Terrorism poses a grave threat to the basic right to security of every individual in Australia. That is the context of the current debate.[20]

The Anti-Terrorism Bill (No 2) 2005 (Cth) was introduced into Parliament on 3 November 2005. It was accompanied by a statement by Attorney-General Philip Ruddock that 'the government would like all elements of the anti-terrorism legislation package to become law before Christmas'.[21] This abbrevi-

[17] *Criminal Code* (Cth) div 105, as inserted by *Anti-Terrorism Act (No 2) 2005* (Cth) sch 4 item 24.

[18] *Criminal Code* (Cth) div 80, as amended by *Anti-Terrorism Act (No 2) 2005* (Cth) sch 7 items 5–12.

[19] See, eg, Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 19 (George Brandis), 120 (Mark Bishop); see especially at 30, where Robert Hill said:

> Perhaps the government is focusing on the 88 innocent Australians who were killed while enjoying a holiday in Bali. … [I]nnocent Australians — men, women and children — who were slaughtered by those who sought to use them as political pawns in an international terrorist operation. The Australian government believes that we should do all within reason to protect Australians from this sort of threat. If it means that there will be a loss of some civil liberties, so be it.

See also Commonwealth, *Parliamentary Debates*, House of Representatives, 29 November 2005, 56 (Stuart Henry), 89 (Philip Ruddock).

[20] Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 129. At this time Conroy was Deputy Opposition Leader in the Senate.

[21] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 102.

ated process left little time for parliamentary scrutiny or deliberation, let alone close consideration by parliamentary committees. The Senate Legal and Constitutional Legislation Committee conducted an inquiry into the Bill, however this inquiry allowed only a 6-day period of calling for submissions, 3 days of hearings, and 10 days to prepare the final report.[22] The *Anti-Terrorism Act (No 2) 2005* (Cth) was passed on 7 December 2005.[23] In retrospect this urgency appears unjustified. The sedition provisions have never been used. PDOs were first used in September 2014, and the first control order was not issued until late 2006.[24]

At the time of enactment, concerns raised in relation to the derogation of anti-terror laws from basic constitutional and criminal justice principles were typically met by legislators on two fronts:

> First, using rhetoric such as the 'war on terror', they claimed that the threat posed by terrorism was both extraordinary *and* temporary.[25] As soon as the threat was eliminated — a question of 'when' and not 'if' — anti-terror laws would cease to be necessary and could be repealed.[26] Second, legislators distinguished between terrorism and 'ordinary' criminal activity.[27]

This is demonstrated in Mr Ruddock's statement introducing the Anti-Terrorism Bill (No 2) 2005 (Cth) to Parliament:

[22] Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005) 1. The Committee advertised for submissions on 5 November 2005 in *The Australian* newspaper. The deadline for submissions was set at 11 November 2005, to assist the committee to meet its reporting deadline of 28 November 2005. Three days of hearings were held in Sydney on Monday 14, Thursday 17 and Friday 18 November 2005.

[23] For discussion of the enactment of the *Anti-Terrorism Act (No 2) 2005* (Cth), see Williams, 'A Decade of Australian Anti-Terror Laws', above n 2, 1165.

[24] Andrew Lynch, Nicola McGarrity and George Williams, *Inside Australia's Anti-Terrorism Laws and Trials* (NewSouth Publishing, 2015) 133, 181. For discussion of the necessity and use of control orders and PDOs, see Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) 13–25, 38, 45.

[25] For a discussion of this in the United States context, see Lee Jarvis, 'Times of Terror: Writing Temporality into the War on Terror' (2008) 1 *Critical Studies on Terrorism* 245.

[26] This is evidenced in Australia by the inclusion, in some pieces of counter-terrorism legislation, including the control order regime, of sunset clauses or a requirement that a review be held after a specified period of time has elapsed, or both. However, such mechanisms may prove to be of limited effectiveness: Nicola McGarrity, Rishi Gulati and George Williams, 'Sunset Clauses in Australian Anti-Terror Laws' (2012) 33 *Adelaide Law Review* 307.

[27] McGarrity and Williams, above n 5, 131.

> [We all understand the proposition] that it is better that 10 guilty men go free than one innocent person be convicted. If you are going to extrapolate that to say that it is better that large numbers of civilians be killed by terrorist acts because we are unwilling to put in place measures that might reasonably constrain ... yes, control orders are new; they are very different. The burden of proof is different. It is certainly not within the criminal code as we would normally understand it, with the normal burdens of proof that follow, because what we are seeking to do is to protect people's lives from possible terrorist acts. ... Yes, we are dealing with something that is very different and that is not understood in the context of criminal law as we know it. But in our view the circumstances warrant it. That is the justification.[28]

Emphasising the unique nature of the terrorist threat served to justify the introduction of special anti-terror laws, with existing criminal laws being cast as inadequate to deal with the threat posed by terrorism. This form of justification also served to reassure people that the new laws would only be used in the anti-terror context.

B *Control Orders*

The control order provisions introduced into the *Criminal Code Act 1995* (Cth) sch ('*Criminal Code* (Cth)') div 104 can be used to impose far-reaching restrictions or obligations on an individual for the purpose of preventing terrorism. The terms of a control order may relate to the person's presence at certain places, contact with certain people, use of telecommunications or technology, possession of things or substances, activities, wearing of a tracking device, reporting to certain people at particular times and places, fingerprinting and photographing for the purpose of ensuring compliance with the order, and participation in consensual counselling or education.[29]

[28] Commonwealth, *Parliamentary Debates*, House of Representatives, 29 November 2005, 100–1; see also at 56–7 (Stuart Henry); Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 19 (George Brandis), 120 (Mark Bishop), 129 (Stephen Conroy). Also, for example, in introducing the Terrorism Legislation Amendment (Warrants) Bill 2005 (NSW) into the New South Wales Parliament, the Attorney-General of that State, Bob Debus, said:

> The threat posed by terrorism clearly poses unique challenges. ... General criminal activity has never aimed to perpetrate the mass taking of life, the widespread destruction of property, or the wholesale disruption of society in the way that terrorism does. The powers in the bill are not designed or intended to be used for general policing.

New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 June 2005, 16 940.

[29] *Criminal Code* (Cth) ss 104.5(3), 104.5(6).

Although the restrictions and obligations available under a control order fall short of imprisonment in a state facility, the orders may inhibit a person's liberty even to the point of imposing house arrest.[30]

Civil preventive orders were not unknown in Australia prior to the enactment of the *Anti-Terrorism Act (No 2) 2005* (Cth). The key instances of such orders involved the continued incarceration and supervised release of persons convicted of serious sex offences at the completion of their sentences.[31] Such orders could only be imposed on persons serving a term of imprisonment for a serious offence, and were contingent upon an assessment that the individual posed a continuing danger to the community. Control orders, on the other hand, exist entirely outside the criminal justice system. Control orders may be imposed on persons neither convicted of, nor even charged with, a criminal offence, and the orders are not directly concerned with the likelihood that the individual will commit serious offences in the future.

Control orders under div 104 of the *Criminal Code* (Cth) may be issued in respect of adults not suspected of involvement in criminal wrongdoing. A child aged 16 or 17 years may also be subject to an order if he or she is suspected of involvement in a terrorism-related crime.[32] The maximum duration of a control order is 12 months from the date the interim order is served on the person.[33] There are no limits on seeking consecutive control orders over an individual.[34]

Division 104 enables the Australian Federal Police ('AFP') to seek two kinds of orders from a federal court. With the consent of the Attorney-General, the AFP may first seek an interim control order from an issuing

[30] For criticism, see, eg, Paul Fairall and Wendy Lacey, 'Preventative Detention and Control Orders under Federal Law: The Case for a Bill of Rights' (2007) 31 *Melbourne University Law Review* 1072; Burton and Williams, above n 3.

[31] See, eg, *Community Protection Act 1994* (NSW), which was found invalid in *Kable v DPP (NSW)* (1996) 189 CLR 51; *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), which was found valid in *Fardon v A-G (Qld)* (2004) 223 CLR 575; *Serious Sex Offenders Monitoring Act 2005* (Vic), as repealed by *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 200. For discussion of these orders as contrasted to Australia's preventive anti-terror schemes, see Tamara Tulich, 'Prevention and Pre-emption in Australia's Domestic Anti-Terrorism Legislation' (2012) 1 *International Journal for Crime and Justice* 52.

[32] See *Criminal Code* (Cth) s 104.28.

[33] Ibid s 104.16(1)(d).

[34] Ibid s 104.5(2). In his 2012 report the Independent National Security Legislation Monitor ('INSLM') reasoned that the proceedings with respect to Joseph Thomas demonstrated that 'once a person has trained with a terrorist organisation that person will always meet the requirements for a [control order]': INSLM, above n 24, 24. This observation highlights the likelihood and ease with which consecutive control orders may be obtained.

court.[35] Interim orders are issued ex parte and without notice to the affected person. They may be issued where a court is satisfied, on the balance of probabilities, that the order would 'substantially assist in preventing a terrorist attack',[36] or 'that the person has provided training to … [or] received training from a listed terrorist organisation'.[37] In 2014, amendments to the control order provisions introduced further grounds on which an order may be issued, including where a person has engaged in a hostile activity in a foreign country, or has been convicted of a terrorism offence in Australia or a foreign country.[38]

Additionally, each term of the control order must be 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist attack'.[39] A distinctive quality of control orders is that the subject of an order need not have been found guilty of any criminal wrongdoing unless the control order is issued under the final ground which captures those convicted of terrorism offences. In this sense, control orders may provide an alternative, rather than an adjunct, to the criminal justice system.

If an interim control order is issued, the AFP must then elect whether to seek a confirmed control order. Confirmation proceedings take the form of an open and contested hearing before an issuing court, and will occur as soon as practicable (but at least 72 hours after the interim order is made, and at least 48 hours after the interim order is served on the person).[40] The same grounds for issuing control orders apply at both the interim and confirmation stages.[41]

The term 'listed terrorist organisation' is central to the grounds on which control orders may be issued. This phrase refers to organisations declared to be terrorist organisations by the Attorney-General, once he or she is satisfied on reasonable grounds that the relevant organisation is directly or indirectly

[35] Issuing courts are the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia: *Criminal Code* (Cth) s 100.1 (definition of 'issuing court'). The court receives the application in the same form it was presented to the Attorney-General, subject to any changes required by the Attorney-General, as well as information sworn by the applicant and the written consent of the Attorney-General: at s 104.3.

[36] Ibid s 104.4(1)(c)(i).

[37] Ibid s 104.4(1)(c)(ii).

[38] Ibid ss 104.4(1)(c)(iii)–(v). The additional grounds were introduced by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) and the *Counter-Terrorism Legislation Amendment Act (No 1) 2014* (Cth).

[39] *Criminal Code* (Cth) s 104.4(1)(d).

[40] Ibid ss 104.5(1A), 104.12(1)(a).

[41] See ibid ss 104.4(1)(c)–(d), 104.16(1)(a).

engaged in, preparing, planning, assisting in, fostering or advocating the performance of a terrorist act (whether or not the terrorist act has occurred or will occur).[42] Amendments to the *Criminal Code* (Cth) in 2002 created serious offences in connection with listed terrorist organisations, including support, membership and training offences.[43] It is also an offence to associate on two or more occasions with members, or with persons who promote or direct a listed terrorist organisation.[44] Penalties for these offences are severe, extending in some cases to imprisonment for up to 25 years.[45] The Attorney-General's decision to list a terrorist organisation is subject to review by the courts (on the basis of the legality but not the merits of the decision), by Parliament and its committees (on a discretionary basis) and by the Attorney-General.[46] A terrorist organisation may also be declared by a court, applying the same criteria as listed above, in the course of a criminal trial involving terrorism offences.[47] As will be seen below, this technique of pairing the executive designation of criminal organisations with novel offences and serious penalties has had a considerable influence on recent developments in criminal law reform in the states.

At each stage of the control order process, information may be withheld on the basis of national security concerns. For example, in obtaining written consent to request an interim control order, the AFP must provide the Attorney-General with certain background and supporting information including a summary of the grounds for making the interim order.[48] However, the legislation provides that information may be withheld from the summary of grounds if its disclosure would be 'likely to prejudice national security' within the meaning of the *National Security Information (Criminal and Civil*

[42] See ibid ss 100.1 (definition of 'listed terrorist organisation'), 102.1 (definition of 'terrorist organisation'). There are 10 organisations now officially listed, all of them Islamic-based and many of them Al Qa'ida-related: *Criminal Code Regulations 2002* (Cth) pt 2.

[43] *Security Legislation Amendment (Terrorism) Act 2002* (Cth) sch 1 item 4, inserting *Criminal Code* (Cth) ss 102.3–102.7.

[44] *Criminal Code* (Cth) s 102.8.

[45] See ibid div 102 sub-div B. On the difficulties in prosecuting terrorist organisation offences experienced in Australia's terrorism trials to 2010, see Nicola McGarrity, '"Testing" Our Counter-Terrorism Laws: The Prosecution of Individuals for Terrorism Offences in Australia' (2010) 34 *Criminal Law Journal* 92, 100, 126.

[46] Andrew Lynch, Nicola McGarrity and George Williams, 'The Proscription of Terrorist Organisations in Australia' (2009) 37 *Federal Law Review* 1, 10–12.

[47] Ibid 7.

[48] *Criminal Code* (Cth) s 104.2(3)(f). The AFP's request must also address: the proposed order, facts supporting the making of the order, and a history of control order and PDO proceedings in which the individual has been involved: see generally at s 104.2(3).

Proceedings) Act 2004 (Cth) ('*NSIA*').[49] Under the *NSIA*, 'likely to prejudice national security' is defined as 'a real, and not merely a remote, possibility that the disclosure will prejudice national security',[50] and 'national security' is broadly defined as 'Australia's defence, security, international relations or law enforcement interests'.[51] Information that is served on the person or relied upon in court may be withheld on the same grounds.[52] Additionally, information may also be withheld from the person if it is assessed as likely to be protected by public interest immunity, or if its disclosure would be likely to put at risk ongoing operations by law enforcement agencies or intelligence agencies, or the safety of the community, law enforcement officers or intelligence officers.[53]

Two individuals have been subject to control orders in Australia under div 104 of the *Criminal Code* (Cth): Joseph Thomas and David Hicks.[54] The former Independent National Security Legislation Monitor ('INSLM'), Bret Walker SC, reported that the AFP had, by the end of 2012, considered the commencement of control order proceedings against 23 other individuals. In almost half of these instances, the control order was considered as a response to there being insufficient evidence on which to prosecute the person for terrorism offences.[55] Despite the AFP electing not to seek a control order in these instances, the INSLM strongly criticised the possibility that a control order might be sought in such circumstances as being offensive to the rule of law.[56]

Joseph Thomas, known as 'Jihad Jack' in contemporary media, was an Australian citizen who travelled to Pakistan in 2001 where he undertook three months of paramilitary training with Al Qa'ida at the Al Farooq training camp.[57] Thomas was captured, imprisoned and interrogated in Pakistan before being returned to Australia. Upon his return in 2006, Thomas was charged with two counts of providing support to a terrorist organisation, each of

[49] Ibid s 104.2(3A).

[50] *NSIA* s 17.

[51] Ibid s 8.

[52] *Criminal Code* (Cth) s 104.12A(3)(a).

[53] Ibid ss 104.12A(3)(b)–(d).

[54] For discussion, see Burton and Williams, above n 3, 191–3.

[55] INSLM, above n 24, 13.

[56] Ibid 31.

[57] See *Thomas v Mowbray* (2007) 233 CLR 307, 310.

which led to an acquittal in the Supreme Court of Victoria.[58] In a step that Andrew Lynch suggested may be criticised as an instance of 'jurisprudential context-shopping',[59] less than two weeks after the acquittals, the AFP relied on the same evidence in order to obtain an interim control order against Thomas in the Federal Magistrates Court.[60]

A control order was issued in respect of Hicks upon the completion of his sentence for providing material support for terrorism handed down by United States Military Commission in 2007. Hicks pleaded guilty to this charge, which has since been held not to have been a valid offence under international law at the relevant time.[61] Prior to Hicks' Military Commission hearing he was held by United States forces at Guantánamo Bay for five years without charge.[62]

The control orders issued in respect of Thomas and Hicks required, in general terms, that the individual stay at his residence between midnight and 5:00 am or 6:00 am respectively, report to the police three times a week, not contact members of terrorist organisations, not use unapproved email, mobile phone or internet technology, not leave the country without permission, and not possess weapons or military training materials.[63] During Thomas' interim control order proceedings, Mowbray FM reportedly said that some of the requested restrictions were 'silly', such as the inclusion of Osama bin Laden's name on the list of individuals Thomas would be prohibited from contact-

[58] *DPP (Cth) v Thomas* [2006] VSC 120 (31 March 2006), cited in Andrew Lynch, '*Thomas v Mowbray*: Australia's "War on Terror" Reaches the High Court' (2008) 32 *Melbourne University Law Review* 1182, 1187. Thomas was convicted on two lesser charges of intentionally receiving funds from a terrorist organisation and possessing a falsified passport: see *Criminal Code* (Cth) s 102.6(1); *Passports Act 1938* (Cth) s 9A. Each of these convictions was quashed on appeal: *R v Thomas* (2006) 14 VR 475.

[59] Lynch, '*Thomas v Mowbray*', above n 58, 1188, quoting Lucia Zedner, 'Seeking Security by Eroding Rights: The Side-Stepping of Due Process' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing, 2007) 257, 265. See also Helen Fenwick, *Civil Liberties and Human Rights* (Routledge-Cavendish, 4th ed, 2007) 1340–2; INSLM, above n 24, 17.

[60] *Jabbour v Thomas* (2006) 165 A Crim R 32. The Federal Magistrates Court has since been renamed the Federal Circuit Court.

[61] *Hamdan v United States*, 696 F 3d 1238, 1251 (DC Cir, 2012) (Judge Kavanaugh).

[62] Hicks had been detained as a consequence of his involvement with Al Qa'ida forces in Afghanistan. The control order over Hicks expired in 2008. For critique, see Timothy L H McCormack, 'David Hicks and the Charade of Guantánamo Bay' (2007) 8 *Melbourne Journal of International Law* 273.

[63] *Jabbour v Thomas* (2006) 165 A Crim R 32, 43–6; *Jabbour v Hicks* (2007) 183 A Crim R 297, 309–11.

ing.[64] This original list of names totalled over 300 pages and was reduced to some 50 names in the eventual order.[65]

Only Hicks' control order was confirmed. The interim control order imposed upon Thomas did not reach confirmation stage because, before this could occur, Thomas commenced proceedings in the High Court challenging the constitutional validity of the scheme. This challenge had two parts. First, Thomas alleged that the provisions were beyond the constitutionally enumerated lawmaking powers of the federal government. Secondly, he argued that the provisions violated the strict separation of judicial power implied from ch III of the *Constitution*. The High Court had interpreted ch III to preclude non-judicial powers from being vested in federal courts (unless they were incidental or ancillary to a judicial function).[66] In the absence of a national bill or charter of rights, ch III has played an increasingly important role as a limit on government power, as well as a source of rights protection for citizens and states.[67] Thomas claimed that the power to issue control orders was not judicial in nature and therefore the provisions were invalid insofar as they vested that power in federal courts.

In 2007 in *Thomas v Mowbray*, Thomas' High Court challenge failed on both grounds[68] — subject to the strong dissenting opinions of Kirby J and Hayne J.[69] For a majority of the Court, div 104 was an appropriate use of the federal government's power to make laws with respect to the defence of the nation.[70] Their Honours also held that, while the power to issue control orders

[64] 'Thomas Control Order "Silly"', *The Age* (online), 31 August 2006 <http://www.theage.com.au/news/national/thomas-control-order-silly/2006/08/31/1156817006116.html>.

[65] See *Jabbour v Thomas* (2006) 165 A Crim R 32, 39 [56] (Mowbray FM), 45.

[66] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 271–2 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

[67] See George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 325–8; James Stellios, 'Reconceiving the Separation of Judicial Power' (2010) 22 *Public Law Review* 113, 119–20; George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (Federation Press, 1994) 185.

[68] (2007) 233 CLR 307.

[69] Though Hayne J agreed with the majority justices that the provisions were supported by s 51 of the *Constitution*: ibid 459–60 [444].

[70] See *Constitution* s 51(vi); *Thomas v Mowbray* (2007) 233 CLR 307, 324–6 [7]–[9] (Gleeson CJ), 359–64 [132]–[148] (Gummow and Crennan JJ), 449–60 [411]–[445] (Hayne J), 504–6 [585]–[590] (Callinan J); Lynch, '*Thomas v Mowbray*', above n 58, 1189–96; Hernan Pintos-Lopez and George Williams, '"Enemies Foreign and Domestic": *Thomas v*

differed from the traditional conception of judicial powers, it was nonetheless in keeping with the fundamental constitutional value of judicial independence, and was sufficiently analogous to other powers exercisable by courts so as to justify its classification as a valid judicial power.[71]

The decision in *Thomas v Mowbray* dealt with complex areas of Australian constitutional law. Our focus rests not with the decision itself, but with its aftermath. In particular, the decision has been used to provide legal authority for the notion that these kinds of preventive orders are in keeping with constitutional values. In this way, the case paved the way for the migration of control orders, as well as the related schemes of secret evidence and declared criminal organisations, beyond the anti-terror context.[72]

III CONTROL ORDERS MULTIPLIED: THE WAR ON BIKIES

Writing in 2002, Lucia Zedner and Janne Flyghed noted the potential for the migration of national security measures to the law and order context. For Zedner, the most serious threats to security provide 'the underlying rationale and licence for measures that tackle much lesser risks but pose no small threat to basic liberties'.[73] Flyghed similarly observed that once new coercive measures have been introduced to counteract extremely serious forms of crime, such as terrorism, 'there follows a slide towards their employment in connection with increasingly minor offences'.[74] Following the High Court's decision in *Thomas v Mowbray*, this slide began to play out across Australia.

When *Thomas v Mowbray* was handed down, political leaders in the Australian states had for some time been adopting hard-line, tough on crime policies. As Appleby and Williams observed:

> Being tough on law and order is important politically. Law and order consistently rates highly in surveys of community concerns, and receives a large

Mowbray and the New Scope of the Defence Power' (2008) 27 *University of Tasmania Law Review* 83.

[71] *Thomas v Mowbray* (2007) 233 CLR 307, 327–8 [15] (Gleeson CJ), 347–8 [78]–[79] (Gummow and Crennan JJ), 506–7 [591]–[596] (Callinan J). For discussion and critique of the case, see Denise Meyerson, 'Using Judges to Manage Risk: The Case of *Thomas v Mowbray*' (2008) 36 *Federal Law Review* 209; Lynch, '*Thomas v Mowbray*', above n 58; Christos Mantziaris, 'Commonwealth Judicial Power for Interim Control Orders — The Chapter III Questions Not Answered' (2009) 10 *Constitutional Law and Policy Review* 65.

[72] See Lynch, 'Control Orders in Australia', above n 3; Lynch, Tulich and Welsh, above n 3.

[73] Zedner, above n 59, 264.

[74] Janne Flyghed, 'Normalising the Exceptional: The Case of Political Violence' (2002) 13 *Policing and Society* 23, 28.

> amount of media coverage which tends to call for greater police presence, new offences and harsher sentences … The States undoubtedly perceive there to be a political need to respond to these calls.[75]

As a result, the decision in *Thomas v Mowbray*, and its validation of control orders as providing a permissible means of imposing harsh restrictions on 'would-be criminals', fell on fertile ground.

Within a year of *Thomas v Mowbray* giving the constitutional 'thumbs up' to control orders, the South Australian Parliament enacted the *Serious and Organised Crime (Control) Act 2008* (SA) ('*SOCCA*'). This statute was touted as an 'anti-bikie law' and marketed as part of the State's efforts to combat outlaw motorcycle gangs.[76] Whilst South Australian law already provided for criminal profits confiscation, fortification removal notices and regulations aimed at preventing bikies from working in certain industries, control orders marked a significant new step in Premier Mike Rann's 'highly successful policy platform' of taking a hard-line approach to law and order.[77]

In introducing the *SOCCA*, Rann not only adopted the legal model of anti-terror control orders but reproduced the same rhetoric of urgency, war and extreme threat to support the enactment of the measures. Legislation specifically modelled on the federal anti-terror laws was necessary according to Rann 'because [organised crime groups] are terrorists within our community'.[78] Denouncing bikie gangs as 'an evil within our nation', Rann claimed that the South Australian control order legislation would not only 'lead Australia in the fight against bikie gangs', but be the toughest in the world.[79]

The *SOCCA* draws directly upon the Commonwealth's national security laws — control orders for individuals are only made once their membership of, or association with, a 'declared organisation' is established. Both the process by which an organisation is declared and the basis on which the declaration can be issued resemble the federal provisions for listing terrorist organisations.[80] Under the *SOCCA* control order scheme as it was originally

[75] Appleby and Williams, 'The Anti-Terror Creep', above n 4, 151.

[76] See Gabrielle J Appleby and John M Williams, 'A New Coat of Paint: Law and Order and the Refurbishment of *Kable*' (2012) 40 *Federal Law Review* 1, 1–4.

[77] Ibid 3.

[78] ABC Radio National, 'South Australia's Plans to Obliterate Outlaw Bikie Gangs', *The Law Report*, 6 May 2008 (Mike Rann).

[79] 'SA Government to Ban Bikie Gangs', *The Sydney Morning Herald* (online), 20 November 2007 <http://www.smh.com.au/news/National/SA-government-to-ban-bikie-gangs/2007/11/20/1195321747018.html>.

[80] See generally *SOCCA* pt 2; *Criminal Code* (Cth) div 102.

introduced in 2008, organisations were declared by the South Australian Attorney-General, just as terrorist organisations are declared by the federal Attorney-General (in amendments discussed below, this process has since been moved to the judicial sphere).[81]

The basis for declaring a criminal organisation under the *SOCCA* is a finding that 'members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity' and 'the organisation represents a risk to public safety and order in [South Australia]'.[82] Similarly, a terrorist organisation may be declared on the basis that it is directly or indirectly engaged in, preparing, planning, assisting in, fostering or advocating the performance of a terrorist act.[83]

Both the *SOCCA* and the federal anti-terror control order schemes capture organisations that commit criminal acts, as well as those that engage in preparatory or supportive conduct towards the commission of those acts. The language of the two declaration schemes is not identical, but there is significant overlap in, for example, the references to 'advocating' and 'supporting', 'fostering' and 'facilitating', and 'preparing' and 'organising'. The *SOCCA*'s declaration scheme qualifies the basis on which an organisation may be declared by providing that the organisation must also pose a risk to public safety. However, this additional requirement would not be difficult to establish once the connection between the organisation and the commission of serious criminal acts is made out. The clearest distinction between declared criminal organisations and listed terrorist organisations is that the latter is concerned only with the commission of terrorist acts, whereas the former is concerned with the commission of serious crimes more broadly. In all, the declaration scheme in the *SOCCA* bears a strong resemblance to both the process and grounds by which terrorist organisations are declared under the *Criminal Code* (Cth).

While the declaration processes are much the same under the *SOCCA* and the federal anti-terror laws, the consequences are not. South Australia did not incorporate terrorist organisation-style offences — such as membership or

[81] *SOCCA* s 10; *Criminal Code* (Cth) ss 100.1 (definition of 'listed terrorist organisation'), 102.1(1) (definition of 'terrorist organisation'), 102.1(2). Declarations by the South Australian Attorney-General are made following an application by the Commissioner of Police. Under the federal scheme, the Attorney-General may act on his or her own initiative but, in practice, relies on advice from ASIO: Lynch, McGarrity and Williams, 'The Proscription of Terrorist Organisations in Australia', above n 46, 6.

[82] *SOCCA* s 11(1).

[83] *Criminal Code* (Cth) s 102.1(2).

promotion — but limited the relevance of the declarations to civil control order proceedings. It will be seen in Part IV that reforms in Queensland have now taken this extra step of importing organisation-based criminal offences.

The effect of bikie control orders under the *SOCCA* is to restrict members of declared organisations from associating with other members of the organisation or carrying on certain activities.[84] Like anti-terror control orders, a wide range of potential obligations and restrictions on a person's behaviour and associations may be imposed by a court, first in ex parte proceedings and then, if the person lodges an objection to the order, in a contested hearing.[85] The terms of a bikie control order may be broadly phrased, prohibiting a person from associating with a class of persons, or being in the vicinity of certain kinds of places, or carrying objects of a certain kind.[86] Breach of the terms of a control order has the potential to result in criminal prosecution and imprisonment.[87]

Secret evidence plays an integral part in both declaration and control order processes under the *SOCCA*. The Attorney-General was not required to provide reasons for his or her decision to declare an organisation.[88] Information provided to the Attorney-General that was classified by the Commissioner of Police as 'criminal intelligence' was not to be disclosed except to specifically authorised persons.[89] Criminal intelligence was defined as

> information relating to actual or suspected criminal activity (whether in [South Australia] or elsewhere) the disclosure of which could reasonably be expected to prejudice criminal investigations, to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement or to endanger a person's life or physical safety.[90]

[84] *SOCCA* ss 22(5), 22I(1). See also *Crimes (Criminal Organisations Control) Act 2012* (NSW) ss 26–7.

[85] *SOCCA* ss 22, 26–7.

[86] Ibid s 22(5).

[87] Ibid s 22I. See also *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 26.

[88] *SOCCA* s 13(1) (as originally enacted).

[89] Ibid s 13(2). The exceptions were for a person conducting a review of the legislation or a person specifically authorised by the Commissioner.

[90] Ibid s 3 (definition of 'criminal intelligence'). This definition is retained in the current version of *SOCCA*.

Criminal intelligence has a different focus to 'national security information' in the *NSIA*.[91] However, it bears close resemblance to other grounds on which information may be withheld from a person under div 104 of the *Criminal Code* (Cth), in particular where the information would be likely to put at risk ongoing law enforcement or intelligence operations, or risk the safety of the community, law enforcement officers or intelligence officers.[92]

Once the Commissioner has classified information as criminal intelligence, a court is empowered to assess whether the information was 'properly' so classified. High Court litigation in 2008 concerning Western Australian fortification removal notices issued in respect of bikie gang premises had determined that this form of discretionary judicial review is necessary to ensure the constitutional validity of secret evidence provisions.[93] If properly classified, the court is obliged to maintain the confidentiality of the information,[94] including by removing criminal intelligence information from the statement of the grounds on which the control order was issued.[95]

Criminal intelligence provisions generally involve a claim for secrecy being heard in closed proceedings from which the person and his or her representatives are excluded. If the application is successful, then the information may form a basis for the judge's determination but will still be withheld from the person and his or her representatives. Provisions of this kind strike the balance between the competing interests of secrecy and procedural fairness more heavily in favour of secrecy as, in effect, a party is no longer able to know or meet significant aspects of the case against him or her.

Increased reliance on secret evidence has been identified as an inevitable consequence of the intelligence-led approach adopted by many governments to meeting the threat of transnational terrorism following 9/11.[96] As state

[91] The definition was in fact adopted from South Australian laws also aimed at limiting the criminal conduct of bikie gangs and upheld as constitutionally valid in early 2009: see *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.

[92] *Criminal Code* (Cth) ss 104.12A(3)(c)–(d).

[93] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 560 [39] (Gummow, Hayne, Heydon and Kiefel JJ). See also *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638.

[94] *SOCCA* s 5A(1)(a).

[95] Ibid s 15(4).

[96] See Aileen Kavanagh, 'Special Advocates, Control Orders and the Right to a Fair Trial' (2010) 73 *Modern Law Review* 836, 837 (discussing United Kingdom); Kent Roach, 'The Eroding Distinction between Intelligence and Evidence in Terrorism Investigations' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 48 (discussing Canada and Australia).

control orders aimed at serious organised crime were adapted from the federal national security context, it is little surprise that secret evidence plays a key role in both declaration and control order processes. That said, removed from the national security context, it is less apparent why such a high and pervasive degree of secrecy is required, as opposed to existing principles and doctrines such as public interest immunity.[97]

The *SOCCA* was the first of many state organised crime control order schemes. Similar schemes have now been introduced in every state and territory but for Tasmania and the Australian Capital Territory.[98] Following the *SOCCA*'s enactment in 2008, the next year saw the introduction of the *Crimes (Criminal Organisations Control) Act 2009* (NSW), the *Serious Crime Control Act 2009* (NT) and the *Criminal Organisation Act 2009* (Qld), and in 2012 the *Criminal Organisations Control Act 2012* (WA) and the *Criminal Organisations Control Act 2012* (Vic) were enacted. The governments of Western Australia and Victoria delayed the commencement of their control order statutes so as to await High Court decisions on the validity of existing control order schemes, in the hope of designing 'challenge-proof' provisions.[99]

Each control order statute was supported by a 'tough on crime', 'war on bikies' rhetoric that emphasised the imminent threat posed by these groups. This was particularly the case with the earliest laws, the South Australian *SOCCA* and New South Wales *Crimes (Criminal Organisations Control) Act 2009* (NSW). In the parliamentary debates concerning these laws, the language of terror and terrorism was employed by governments, drawing

[97] See Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98 (2004) 379–80 [10.8].

[98] *Crimes (Criminal Organisations Control) Act 2012* (NSW); *Serious Crime Control Act 2009* (NT); *Criminal Organisation Act 2009* (Qld); *SOCCA*; *Criminal Organisations Control Act 2012* (Vic); *Criminal Organisations Control Act 2012* (WA).

[99] John Ferguson, 'Law Institute Questions "Challenge-Proof" Bikie Laws', *The Australian* (online), 15 November 2012 <http://www.theaustralian.com.au/national-affairs/state-politics/law-institute-questions-challenge-proof-bikie-laws/story-e6frgczx-1226516938560?nk=919c77607f3d36882bb447df540486d6>; 'State Targets Bikies with New Laws', *The West Australian* (online), 29 October 2013 <https://au.news.yahoo.com/thewest/latest/a/19591840/state-targets-bikies-with-new-laws/>. This intention was also flagged in the second reading speech for the Criminal Organisations Control Bill 2011 (WA): Western Australia, *Parliamentary Debates*, Legislative Council, 22 March 2012, 1149 (Michael Mischin):

> Given the financial and legal resources available to organised crime gangs, the government is fully aware that every step of this legislation is likely to be litigated, and possibly some parts subject to constitutional challenge. Given the onerous and time-consuming nature of such challenges, it is the government's intent with this bill that its key features be sufficiently targeted, stringent and varied to make the legislation a worthwhile tool for our state's police and prosecution authorities.

analogies between the bikie laws and anti-terror laws. Bikies' 'reign of terror' was referred to repeatedly throughout the debate concerning the New South Wales *Crimes (Criminal Organisations Control) Act 2009* (NSW), such as by Opposition Leader, and later Premier, Barry O'Farrell.[100] In the context of asking for more detailed scrutiny of the provisions and for the South Australian legislation to be more closely copied,[101] Greg Smith, later appointed New South Wales Attorney-General, emphasised that the 'extraordinary' powers in the statute were necessary to fight the 'war' on bikies. He said:

> In some ways this bill is akin to the terrorist legislation ... Something must be done in response to the recent crisis of lawlessness between comparatively small groups — almost a civil war. ...
>
> Being humble servants of this Parliament and the community, my leader and I will do our best. We do not oppose the legislation because it would be inappropriate to stop some action from being taken to end this current war. ...
>
> The Opposition wants to do what can lawfully be done to protect the community from gangs that are urban terrorists, which is why the Opposition will not oppose the conferring of extraordinary powers.[102]

The rhetoric of urgency was at times given additional support by outbreaks of violence at the hands of bikie gangs. The speedy enactment of the New South Wales legislation — the *Crimes (Criminal Organisations Control) Act 2009* (NSW) was introduced, debated and enacted on 2 April 2009 — was assisted by a violent episode at Sydney Airport, in which a clash between rival gangs resulted in a man being bashed to death.[103] Similar violent clashes in South Australia[104] and Queensland[105] helped to bring the 'war on bikies' to the forefront of political debate and provided a rationale for governments to implement tougher laws aimed at preventing future gang-related crime. Like Rann in South Australia, Western Australian Attorney-General Christian Porter lauded his State's *Criminal Organisations Control Act 2012* (WA), which

[100] New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 April 2009, 14 449–51.

[101] Ibid 14 455; see also at 14 464 (David Campbell).

[102] Ibid 14 455–6.

[103] Rebecca Welsh, '"Incompatibility" Rising? Some Potential Consequences of *Wainohu v New South Wales*' (2011) 22 *Public Law Review* 259, 259–60.

[104] Appleby and Williams, 'The Anti-Terror Creep', above n 4, 152, citing South Australia, *Parliamentary Debates*, Legislative Council, 7 May 2008, 2759 (M Parnell).

[105] Greg Stolz, 'Another Bikie Brawl on Gold Coast as Rivals Clash at Smoothie Shack at Nobbys Beach, Gold Coast', *The Courier-Mail* (online), 1 October 2013 <http://www.couriermail.com.au/news/queensland/another-bikie-brawl-on-gold-coast-as-rivals-clash-at-smoothie-shack-at-nobbys-beach-gold-coast/story-fnihsrf2-1226730295951>.

was described as the 'toughest ... in the country',[106] a claim that has since been taken up by Queensland.[107]

As control order schemes became more common, governments focused less on establishing a pressing need for these measures and instead invoked the existence of such laws in other jurisdictions both as a justification for like laws and as an argument for the state to avoid becoming a safe haven for bikie gangs. In this way, once control orders became accepted and no longer appeared to be extreme measures, the task for governments became one of bringing the laws of their state or territory into line with surrounding jurisdictions.[108]

Under the New South Wales, Queensland and Northern Territory statutes, as under the later Western Australian and Victorian statutes, the bases for declaring organisations, the nature of control orders and the provisions concerning criminal intelligence were much the same as in the South Australian *SOCCA*.[109] The key difference between the schemes existed at the declaration stage. In Queensland and Victoria organisations were declared by the

[106] 'Western Australia to Introduce Toughest Bikie Laws', *news.com.au* (online), 13 November 2011 <http://www.news.com.au/national/breaking-news/western-australia-to-introduce-toughest-bikie-laws/story-e6frfku9-1226193812926>.

[107] ABC Television, 'Queensland to Introduce the World's Toughest Bikie Laws', *Lateline*, 30 September 2013 (Jarrod Bleijie).

[108] See, eg, Ferguson, above n 99; Northern Territory, *Parliamentary Debates*, Legislative Assembly, 11 June 2009 (Delia Lawrie) <http://notes.nt.gov.au/lant/hansard/hansard11.nsf/WebbyDate?OpenView&Start=1&Count=300&Expand=6.3.2#6.3.2>:

> If interstate gangs relocate to the Northern Territory as a result of the tough stance taken in South Australia and New South Wales, it could be expected that illegal operations and violence would increase here. We are taking steps to ensure that the Northern Territory is not faced with similar problems.

See also Western Australia, *Parliamentary Debates*, Legislative Council, 22 March 2012, 1148 (Michael Mischin):

> Across Australia communities have had enough of these activities, and governments across the nation, both state and commonwealth, have acted using appropriately tough but highly targeted legislation. Whilst the introduction of this legislation in two other states, South Australia and New South Wales, has been the subject of successful challenges in the High Court, Western Australia has the advantage of the High Court decisions providing us here in Western Australia with guidance about the most constitutionally valid approach. More importantly, the New South Wales decision found that there is nothing constitutionally or legally objectionable about the principal underlying objectives of these laws.

[109] *Crimes (Criminal Organisations Control) Act 2009* (NSW) ss 9(1), 26–8; *Serious Crime Control Act 2009* (NT) ss 18, 27, 73; *Criminal Organisation Act 2009* (Qld) ss 10, 19, pt 6; *SOCCA* ss 5A, 11(1), 22; *Criminal Organisations Control Act 2012* (Vic) ss 19, 45, pt 4; *Criminal Organisations Control Act 2012* (WA) ss 13, 58, pt 5.

Supreme Court.[110] In New South Wales, the Northern Territory and Western Australia,[111] declarations were made by an 'eligible judge' or 'designated authority', being a judge or former judge acting in a personal capacity.[112] Only under the *SOCCA* were organisations declared by the Attorney-General. Beyond these differences, the schemes were largely identical insofar as they provided for secret criminal intelligence evidence throughout declaration and control order processes, and for wide-ranging preventive restraints on liberty to be ordered on the basis of a person's links to a declared organisation. The Victorian scheme — Victoria being the only jurisdiction to enact control order provisions and be subject to a human rights charter[113] — contains additional protections in the form of a special counsel to assist the respondent in respect of criminal intelligence applications.[114]

In developments that may have appeared surprising after *Thomas v Mowbray*, in 2010 and 2011 the High Court found that aspects of the South Australian and New South Wales control order schemes respectively, offended the constitutionally protected independence and integrity of state Courts. The High Court's reasons for striking down these laws did not relate to the vague or predictive criteria on which declarations or control orders are issued, the impact of the control orders on individual liberty or the schemes' provisions for secret evidence. As in *Thomas v Mowbray*, the issue concerned the separation of judicial power. Although the state court system does not observe the strict separation of powers that binds federal courts under the *Constitution*, state courts are not immune from its consequences as they are part of a

[110] *Criminal Organisation Act 2009* (Qld) ss 10, 18, sch 2 (definition of 'Court'); *Criminal Organisations Control Act 2012* (Vic) ss 3(1) (definition of 'Court'), 19.

[111] *Crimes (Criminal Organisations Control) Act 2009* (NSW) ss 5, 9; *Serious Crime Control Act 2009* (NT) ss 6 (definition of 'eligible judge'), 14; *Criminal Organisations Control Act 2012* (WA) ss 3(1) (definition of 'designation authority'), 13.

[112] This distinction is of integral importance in the Australian context, where the strict separation of judicial power prevents the conferral of non-judicial functions, such as the administrative task of declaring an organisation, on courts. Whilst this rule, derived from the *Constitution*, only prevents *state* courts from undertaking those non-judicial tasks that are incompatible with their independence and integrity, the rule accounts for parliaments' reticence to give the role to a court. For authority on these principles as they apply in the federal and state contexts respectively, see *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181. The New South Wales scheme has now been amended to vest the declaration role with the Supreme Court: see *Crimes (Criminal Organisations Control) Amendment Act 2013* (NSW).

[113] See *Charter of Human Rights and Responsibilities Act 2006* (Vic).

[114] *Criminal Organisations Control Act 2012* (Vic) s 71.

nationally integrated judicial system. A consequence of this is that state courts are able to exercise non-judicial power, but only insofar as this is not 'incompatible' with their fundamental independence and integrity.[115]

In *South Australia v Totani* ('*Totani*') the High Court held that s 14(1) of the *SOCCA* was invalid on the basis that it was incompatible with the independence and integrity of the South Australian Magistrates Court.[116] The Court's finding of incompatibility was derived solely from the *obligation* placed on the Magistrates Court to issue a control order against a person once the Court had determined that the person was a member of the declared organisation — the latter classification having been made by the Attorney-General. According to the High Court, this obligation impermissibly rendered the Magistrates Court an instrument of the executive government.[117] Whilst merely amending the *SOCCA* to replace the obligatory phrase 'must' with a discretionary 'may' might well have saved the provisions from invalidity, in response to the High Court's decision, the South Australian government amended the *SOCCA* to provide that declarations would be made by an 'eligible judge' acting in his or her personal capacity (as in the New South Wales, Western Australian and Northern Territory schemes).[118]

Notwithstanding the absence of any similar obligations being placed on the eligible judge or the Supreme Court under the New South Wales control order scheme, in *Wainohu v New South Wales* ('*Wainohu*') the High Court found that the *Crimes (Criminal Organisations Control) Act 2009* (NSW) was incompatible with judicial independence.[119] Like in *Totani*, the basis of this decision rested on a single provision. However, in *Wainohu* the High Court found that the entire statute, not merely the offending provision, was constitutionally invalid. The finding of invalidity stemmed from s 13(2), which removed the eligible judge's duty to give reasons for his or her decision to declare an organisation. A majority of the High Court held that the express removal of this obligation not only damaged the integrity of the judge, but ultimately damaged that of the Supreme Court in the subsequent control

[115] *Kable v DPP (NSW)* (1996) 189 CLR 51, 82 (Dawson J), 103 (Gaudron J). See also *Fardon v A-G (Qld)* (2004) 223 CLR 575, 591 [15]–[18] (Gleeson CJ), 655 [219] (Callinan and Heydon JJ); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 529 [84]–[85] (French CJ); *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 579–81 [94]–[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[116] (2010) 242 CLR 1.

[117] See, eg, ibid 21 [3]–[4] (French CJ).

[118] *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012* (SA) s 6.

[119] (2011) 243 CLR 181.

order proceedings to the point that the scheme as a whole was repugnant to the separation of judicial power.[120] The New South Wales government responded to the decision by amending the offending provision to require that reasons be given by the eligible judge for his or her decision to declare an organisation.[121]

By making findings of constitutional invalidity in *Totani* and *Wainohu*, the High Court indicated that control order schemes would need to be carefully drafted so as to comply with constitutional values. However, by grounding invalidity in very narrow bases that seemed to overlook some of the more troubling features of control order schemes (such as their imposition of preventive restraints on liberty on the basis of secret evidence and predictive, even vague, criteria), the Court also seemed to indicate that the control order framework was not necessarily at odds with these values. The states harnessed this latter suggestion and continued to implement control order schemes that were designed to address the points of invalidity without compromising the overall nature or impact of control orders. This was reflected, for example, in a statement by Western Australian Attorney-General Michael Mischin when he introduced that State's control order scheme to Parliament in 2012. For Mischin, the High Court in *Wainohu* 'found that there is nothing constitutionally or legally objectionable about the principal underlying objectives of these laws'.[122]

When Queensland's *Criminal Organisation Act 2009* (Qld) was challenged before the High Court in 2012, organised crime control order schemes had been enacted in almost every Australian state and territory, in addition to the federal anti-terror control orders. In fact, pressure was beginning to mount on the federal government to take control of the issue of organised crime from the states and to itself enact tough national anti-bikie laws.[123] It seemed well-

[120] Ibid 192 [6] (French CJ and Kiefel J), 229–30 [107]–[109] (Gummow, Hayne, Crennan and Bell JJ).

[121] *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 13(2).

[122] Western Australia, *Parliamentary Debates*, Legislative Council, 22 March 2012, 1148.

[123] Lanai Vasek, 'NSW Has Called on the Federal Government to Implement National Anti-Bikie Laws' *The Australian* (online), 13 January 2012 <http://www.theaustralian.com.au/news/nation/nsw-has-called-on-the-federal-government-to-implement-national-anti-bikie-laws/story-e6frg6nf-1226243540490>. In developments since then, Queensland and other states have resisted referring their powers in this respect to the federal government: Michael McKenna, 'Row Brews on Bikie Wealth Laws', *The Australian* (Sydney), 9 October 2013, 3. Nonetheless, the Abbott government has designed a policy to tackle crime which includes a range of measures aimed at organised and gang-related crime: Liberal Party of Australia, *The Coalition's Policy to Tackle Crime* (2013) 6–8.

established that the imposition of broad, preventive restraints on liberty on the basis of a person's relationship to a particular organisation, was constitutionally permissible. The fact that the declaration of an organisation could occur in secret, and that a court could impose a control order on the basis of untested evidence, also appeared to pose no problems of invalidity.

In *Assistant Commissioner Condon v Pompano Pty Ltd* ('*Pompano*') the High Court squarely faced the issue of secrecy in control order proceedings and upheld Queensland's *Criminal Organisation Act 2009* (Qld).[124] The case for invalidity in *Pompano* rested upon the assertion that withholding criminal intelligence evidence from the respondent amounted to a breach of procedural fairness and was, therefore, incompatible with the independence and integrity of the Supreme Court of Queensland. This argument failed.

The validity of the *Criminal Organisation Act 2009* (Qld) rested on the Supreme Court's capacity to independently review the secret classification of the evidence, and the lack of any obligations as to the use of that evidence. Additionally, validity flowed from the Supreme Court's retention of sufficient independence in declaration and control order proceedings to enable it to remedy any potential unfairness arising from the use of secret evidence.

French CJ suggested that the Supreme Court's existing discretion enabled the Court to 'refuse to act upon criminal intelligence where to do so would give rise to a degree of unfairness in the circumstances of the particular case'.[125] In a joint judgment, Hayne, Crennan, Kiefel and Bell JJ suggested that the Supreme Court could remedy potential unfairness by attributing less weight to the secret, and hence unchallenged, evidence.[126] Gageler J adopted the same general approach, but concluded that the only effective means by which the Supreme Court might be able to counter any unfairness arising from the secret evidence would be to order a stay of proceedings.[127] Therefore, for Gageler J, it was the Supreme Court's capacity to order a stay of proceedings that preserved the validity of the scheme.

The focus of the High Court's treatment of the tension between control orders and constitutional values rested squarely on the role of the courts, and not on the impact of the scheme on individuals. Discussion of principles such as open justice and procedural fairness was overshadowed by an emphasis on judicial power, traditions and independence. As such, no guiding principles

[124] (2013) 295 ALR 638.

[125] Ibid 666 [88].

[126] Ibid 684 [166]–[168].

[127] Ibid 694 [212].

with respect to minimum disclosure were developed beyond ensuring the court is capable of independently reviewing the basis of non-disclosure and the suggestion by Gageler J that a court may stay proceedings in certain circumstances. Likewise, the liberty-infringing nature of a control order proved largely irrelevant to the High Court's assessments of constitutional validity throughout the control order cases.[128] The protection of the rights of the person subject to the control order, the preservation of those qualities of the judicial process central to the integrity of the court, and the maintenance of the rule of law, therefore hinge entirely upon the judge's ability to exercise his or her inherent jurisdiction to maintain control of proceedings.

In the control order cases the High Court reinforced the importance of constitutional limits on state powers, prompting the South Australian and New South Wales governments to significantly enhance the involvement of the judiciary in declaration processes and other state and territory governments to reflect on how their control order provisions impact constitutional values. In fact, following *Pompano*, both New South Wales and South Australia further amended their control order schemes to mirror Queensland's *Criminal Organisation Act 2009* (Qld). Those States now require both declarations and control orders to be issued by the Supreme Court.[129] Despite these amendments, the cases reveal the limited potential for the High Court to restrict legislative innovation as governments try to outdo one another in being tough on crime. The grounds for invalidity were narrow and could be overcome without altering the nature or impact of control orders. In any event, in *Pompano*, the Court accepted the validity of state control orders, lending the framework the constitutional legitimacy that appeared to have been undermined by the findings of invalidity in *Totani* and *Wainohu*.

Following *Pompano*, the process of normalisation seemed to be complete in respect of bikie control orders. Declaration and control order schemes aimed at serious and organised crime have been enacted in most jurisdictions across Australia, and the prospect of a successful constitutional challenge no longer poses a significant threat. It did not take long, then, for a government to find further inspiration in the federal anti-terror laws and to once again

[128] Except to say it falls short of imprisonment in a state facility: see, eg, *Thomas v Mowbray* (2007) 233 CLR 307, 330 [18] (Gleeson CJ), 356 [116] (Gummow and Crennan JJ), 459 [444] (Hayne J); *Totani* (2010) 242 CLR 1, 83 [212] (Hayne J), 171 [474] (Kiefel J).

[129] *Crimes (Criminal Organisations Control) Act 2012* (NSW), as amended by *Crimes (Criminal Organisations Control) Amendment Act 2013* (NSW); *SOCCA*, as amended by *Serious and Organised Crime (Control) (Declared Organisations) Amendment Act 2013* (SA).

extend the bounds of preventive justice in order to lay claim to having the strongest laws and being the toughest on crime.

IV CONTROL ORDERS SURPASSED: NEW DIRECTIONS IN THE WAR ON BIKIES

After *Pompano*, the Queensland government abandoned its only control order application under the *Criminal Organisation Act 2009* (Qld). To date the provisions of the *Criminal Organisation Act 2009* (Qld) remain unused. A change in government in 2012 saw Queensland's control order scheme criticised as a failure and, under the leadership of Liberal National Party ('LNP') Premier Campbell Newman and Attorney-General Jarrod Bleijie, new measures were introduced under the banner of being the 'toughest' in the country and even the 'toughest in the world'.[130]

The reforms to the criminal justice system introduced by the Newman government are far-reaching. They include the introduction of mandatory minimum sentences for crimes such as child sex offences and graffiti,[131] reforms to allow the criminal histories of certain persons to be revealed to any entity (including the public),[132] unexplained wealth laws,[133] and a reform (since declared unconstitutional) to permit the Attorney-General to order the potentially indefinite incarceration of a person at the expiration of his or her sentence for sexual offences.[134] In addition to these measures, new anti-bikie laws were introduced and have formed a particularly controversial aspect of the Newman government's tough on crime policies.

In one week in October 2013 the Newman government enacted a suite of anti-bikie laws. These laws adopted and expanded the attributes of secrecy,

[130] See Jarrod Bleijie, 'How to Win War with Bikie Gangs', *The Australian* (Sydney), 20 December 2013, 10; Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3114 (Campbell Newman), 3120 (Jarrod Bleijie).

[131] *Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012* (Qld) s 7; *Criminal Law Amendment Act 2012* (Qld) ss 3, 7; *Criminal Law and Other Legislation Amendment Act 2013* (Qld) ss 47, 83; *Criminal Code (Criminal Organisations Disruption) Amendment Act 2013* (Qld) ss 43, 45, 46.

[132] *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld) s 123.

[133] *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013* (Qld).

[134] See *Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013* (Qld) s 6; *A-G (Qld) v Lawrence* (2013) 306 ALR 281. For further discussion of these reforms, see Andrew Trotter and Harry Hobbs, 'The Great Leap Backward: Criminal Law Reform with the Hon Jarrod Bleijie' (2014) 36 *Sydney Law Review* 1.

crimes of association and preventive restraints on liberty contained in control order schemes. In doing so, they harnessed other aspects of the federal anti-terror laws. As former detective Tim Priest argued:

> The Queensland government hopes its world-first legislation will succeed where other jurisdictions failed. ...
>
> Perhaps we need to treat certain groups of outlaw motorcycle gangs as domestic terrorists and treat them in the same manner as we treat political or religious terrorists in this country.
>
> Given the outstanding performance of ASIO and the various state counter-terrorism units in dealing with home-grown violent jihadists, maybe we need to bring the same methodology and legislation to fight this new domestic terror threat — the outlaw motorcycle gangs — before the problem is irreversible.[135]

As Priest's statement underscores, the rhetoric of urgency, grave threat and even terrorism supported the Newman government's implementation of new extreme measures. A closer look at two particularly controversial schemes — the *Vicious Lawless Association Disestablishment Act 2013* (Qld) ('*VLAD Act*') and the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) ('*CODA*') — reveals that both the processes by which these laws were introduced and the nature of the laws themselves bear striking resemblance to the federal and state control order schemes discussed above. This analysis suggests that these new measures reflect the next stage in the migration and normalisation of anti-terror laws in the organised crime context, namely, the extension of these measures to new extremes.

During the 15 October 2013 sitting of the Queensland Parliament, between 2:30 pm and 3:00 am, the *VLAD Act* and the *CODA* were introduced, debated and enacted.[136] The *VLAD Act* imposes mandatory minimum sentences of 15 or 25 years' imprisonment on 'vicious lawless associates' for the commission of 'declared offences', in addition to the sentences for the offences themselves.[137] The *CODA* imposes a range of reforms, including the

[135] Tim Priest, 'Bikies Find Money Talks', *The Australian* (Sydney), 18 October 2013, 10. See also Tim Priest, 'A Global Bikie War Is About to Land on Our Shores', *The Daily Telegraph* (online), 9 October 2013 <http://www.dailytelegraph.com.au/news/nsw/a-global-bikie-war-is-about-to-land-on-our-shores/story-fni0cx12-1226735021791?nk=6dfc7737d3d87b3748269b3f2d1e3a6f>. Tim Priest has been criticised for his views: see, eg, Miranda Devine, 'Injustice Rolls On — Over the Messenger', *The Sydney Morning Herald* (Sydney), 23 February 2006, 13.

[136] Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3158–269.

[137] See *VLAD Act* ss 3 (definition of 'declared offence'), 7(1).

criminalisation of three or more participants in a declared organisation meeting in public.[138] We return to the details of these schemes below.

At the time of enactment, there had been no public consultation in respect of these laws because, the government said, 'of the need to respond urgently to the significant public threat these associations pose in Queensland'.[139] The emphasis on urgency, war and threat that had supported the federal *Anti-Terrorism Act (No 2) 2005* (Cth), the *SOCCA* and New South Wales *Crimes (Criminal Organisations Control) Act 2012* (NSW), was now being employed to justify the rapid enactment of new extreme measures. As Peter Callaghan SC, the President of the Law and Justice Institute of Queensland, said: 'These laws are urgently needed, we are told, because this is nothing less than a war on bikies'.[140]

In the face of concerns raised by Callaghan and others with respect to the swift enactment of the laws and their impact on civil liberties, the government emphasised the extraordinary and unique threat posed by these groups and the 'war' in which the State was engaged. In the 15 October debate, the LNP member for Broadwater, Verity Barton, for instance, said:

> We have drawn a line in the sand. We have declared a war on bikies. Queenslanders want us to do something. Action needs to be taken and it is being taken. It has taken this government to stand up and introduce the right suite of legislation that we need to put a stop to these criminal motorcycle gangs.[141]

Barton's views echoed an advertising campaign funded by the Department of Justice and Attorney-General in the lead-up to the introduction to the laws. This campaign, which reportedly cost the Department almost $800 000, referred to bikie wars and gang violence, and emphasised that the government's 'tough new laws' were 'drawing a line' on criminal bikie gangs.[142] The

[138] *CODA* s 42, inserting *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code* (Qld)') s 60A.

[139] Explanatory Notes, Vicious Lawless Association Disestablishment Bill 2013 (Qld) 3.

[140] Peter Callaghan, 'Peter Callaghan, Head of Queensland Law and Justice Institute, Slams New Bikie Laws', *The Courier-Mail* (online), 15 October 2013 <http://www.couriermail.com.au/news/opinion/peter-callaghan-head-of-queensland-law-and-justice-institute-slams-new-bikie-laws/story-fnihsr9v-1226740346105?nk=b81ecbe800cf4ae2c15f60a68bacdb37>, quoted in Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3232–3 (Curtis Pitt). Pitt referred to the statement 'to ensure that we have on the parliamentary record at least one legal opinion — certainly not the opinion of the Attorney-General or someone who has been involved in the legislative drafting process': at 3232.

[141] Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3236.

[142] Amy Remeikis, 'Queensland Spends Big to Get Anti-Bikie Message Across', *The North West Star* (online), 20 October 2013 <http://www.northweststar.com.au/story/1852100/>; Terry

bikie laws that were enacted under this familiar banner of urgency, war and grave threat extend legal frameworks beyond the control order paradigm by adapting aspects of these civil orders to the criminal sphere.

The *VLAD Act* imposes a mandatory minimum sentencing regime on 'vicious lawless associates'. As French CJ and Hayne J later acknowledged, a person need not qualify as either vicious or lawless in order to be a vicious lawless associate under the *VLAD Act*.[143] In fact, for French CJ, '[t]he term "vicious lawless association", which appears in the title to the *VLAD Act*, ... is a piece of rhetoric which is at best meaningless and at worst misleads as to the scope and substance of the law'.[144]

A person qualifies as a vicious lawless associate if three conditions are met. First, he or she must participate in the activities of a group — that is, any legal or illegal group of three or more people.[145] Secondly, the person must commit a 'declared offence' whilst participating in, or for the purposes of, that group.[146] The schedule to the *VLAD Act* contains a list of 69 declared offences, including robbery, sexual and violent offences, possession of dangerous drugs or weapons, unlawful assembly, dangerous operation of a vehicle, obscene publications and exhibitions, bomb hoaxes, and money laundering.[147] Thirdly, the purposes of the group must include the commission of the declared offence. This final condition will be presumed and the onus rests with the person to prove that the group does not have the relevant purpose.[148] If these three conditions are met then the person will not only be sentenced according to the usual sentencing principles, but will face an *additional* mandatory minimum sentence of 15 years' imprisonment without parole.[149] Persons who are office bearers (a criterion that includes those who formally hold an office as well as those who those who assert, declare or advertise themselves as authority figures within the group) face an additional mandatory sentence of 10 years' — a total of 25 years' — imprisonment without parole.[150] Parole may

Goldsworthy, 'The Battle to Win Hearts and Minds in Queensland's Bikie War', *The Conversation* (online), 21 February 2014 <http://theconversation.com/the-battle-to-win-hearts-and-minds-in-queenslands-bikie-war-23283>.

143 *Kuczborski v Queensland* (2014) 314 ALR 528, 536 [13] (French CJ), 548 [67] (Hayne J).

144 Ibid 536 [14].

145 *VLAD Act* ss 3 (definition of 'association' para (d)), 5(1)(b).

146 Ibid ss 3 (definition of 'declared offence'), 5(1)(a), 5(1)(c).

147 Ibid sch 1.

148 Ibid s 5(2).

149 Ibid ss 7(1)(b), 8.

150 Ibid ss 3 (definition of 'office bearer'), 7(1)(c), 8.

be granted only at the (unreviewable) discretion of the Police Commissioner if the person cooperates with police and the Commissioner is satisfied that his or her cooperation is of significant use in a proceeding about a declared offence.[151]

The *VLAD Act* is politically aimed at bikie gangs,[152] but like the state control order schemes discussed in Part III, it clearly has the potential for a much broader reach.[153] Vicious lawless associates could include child pornography rings, thieves who work in groups, people who use or sell drugs in groups, drag racers, or a protest group that orchestrates an unlawful assembly or riot. A person who commits any one of the extensive list of declared offences in a group of three or more people will face the task of positively proving that the group did not have the purpose of committing the declared offence, or face 15 (or 25) years' imprisonment in addition to the usual sentence for the crime. In this context, the Police Commissioner's capacity to shorten that additional sentence in return for cooperation may appear irresistible.[154]

Although distinct from existing control order and terrorist organisation offences, the mandatory sentencing scheme under the *VLAD Act* rests on the same rationale that a person's links to a criminal group justify the imposition of significant restraints on his or her liberty. It is hard to say whether the mandatory term of imprisonment is an additional punishment on the basis of group membership — as Bleijie suggested when introducing the *VLAD Act* to Parliament and the High Court later indicated — or a preventive restraint on liberty.[155] The *VLAD Act* avoids the declaration process and directly penalises the group-based nature of a criminal offence, leaving the final decision as to a group's criminal nature with the court — as in terrorism prosecutions that

[151] Ibid s 9.

[152] See Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3115 (Jarrod Bleijie).

[153] See, eg, Charmaine Kane, 'VLAD Laws Target Non-Bikies for First Time', *ABC Gold Coast* (online), 27 March 2014 <http://www.abc.net.au/local/stories/2014/03/27/3973032.htm>.

[154] See Trotter and Hobbs, above n 134, 38.

[155] See *Kuczborski v Queensland* (2014) 314 ALR 528, 546 [57] (Hayne J), 568 [168] (Crennan, Kiefel, Gageler and Keane JJ). In introducing the *VLAD Act*, Bleijie labelled it a 'punishment regime' and referred to the mandatory sentence as 'extra punishment': Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3115. In a more nuanced description, Bleijie also said:

> The bill is intended to deter individuals from participating in these criminal organisations, encourage persons involved in such organisations to cooperate with law enforcement to avoid severe penalties, and break the morale of members in criminal motorcycle gangs.

allow for the ad hoc declaration of organisations by the judge. In this and other ways (such as through the mandatory nature of the sentences and the reversal of the onus of proof) the *VLAD Act* reflects the harnessing of community fear and the rhetoric of war to expand and challenge existing criminal justice frameworks.

The *CODA* compliments the *VLAD Act* by, among other things, creating a new criminal offence of '[p]articipants in a criminal organisation being knowingly present in public places'.[156] This offence is committed if three or more people are together in a public place and each of them is identifiable as a participant in a declared organisation. A person 'participates' in a declared organisation by, inter alia, in any way asserting or seeking membership of the organisation.[157] For example, a participant may be identified by saying he or she would like to be part of the organisation, or by carrying a card or wearing the insignia of the organisation. As under the original *SOCCA* control order scheme and the federal scheme for listing terrorist organisations, the *CODA* provides that organisations may be declared by the Attorney-General.[158] To date Bleijie has declared 26 such organisations.[159] These declarations are not subject to judicial review and are made in secret. Bleijie has stated that the reasons for his decisions to declare the organisations may never be made public.[160] The fact that the courts are kept out of the declaration process under the *CODA* distinguishes the declaration scheme from existing state and territory control order statutes. This approach also avoids many of the separation of powers issues that supported the High Court challenges in *Wainohu* and *Pompano*.

The punishment for committing the offence of 'participants in a criminal organisation being knowingly present in public places' is a mandatory minimum sentence of six months' imprisonment without parole.[161] A person

[156] *CODA* s 42, inserting *Criminal Code* (Qld) s 60A. The *CODA* and a related piece of legislation, the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld), contained a range of reforms including providing additional powers to the Crime and Corruption Commission and regulating the involvement of participants in criminal organisations in electrical, liquor, racing, tattoo, building, tow truck, pawnbroking, and other industries.

[157] *CODA* s 42, inserting *Criminal Code* (Qld) s 60A(3) (definition of 'participant' paras (b)–(c)).

[158] *CODA* s 49, inserting *Criminal Code* (Qld) s 708A.

[159] *Criminal Code (Criminal Organisations) Regulation 2013* (Qld) reg 2.

[160] Marty Silk, 'Bikie Evidence to Be Secret Forever', *Brisbane Times* (online), 15 January 2014 <http://www.brisbanetimes.com.au/queensland/bikie-evidence-to-be-secret-forever-20140115-30vg3.html>.

[161] *CODA* s 42, inserting *Criminal Code* (Qld) s 60A(1).

may defend the charge by proving that the declared organisation does not have a purpose of engaging in, or conspiring to engage in, criminal activity.[162]

The *CODA* has been applied in a number of instances. In one case Sally Kuether — a librarian, mother of three, and community service award holder with no criminal history — met her fiancé and his friend at a local hotel for a drink. Kuether was wearing the insignia of the Life and Death motorcycle gang, to which her fiancé and his friend allegedly belonged. The police arrested all three under the *CODA*, opposed bail and raided Kuether's home.[163] She now faces a mandatory minimum sentence of six months', and up to three years', imprisonment. Following her release on bail, Kuether said to the media: 'I can't see what I've done wrong, all I did was have a beer with my partner and my mate'.[164]

In 2014, Stefan Kuczborski, a member of the Hells Angels Motorcycle Club, challenged the constitutional validity of the *VLAD Act* and the *CODA*, as well as other aspects of the Newman government's anti-bikie laws, such as amendments to the *Liquor Act 1992* (Qld) and *Bail Act 1980* (Qld).[165] Kuczborski had not been charged with offences created by or invoking the impugned provisions. Nonetheless he argued that as a member of the Hells Angels (a declared organisation), he had an interest in the laws that surpassed that of the general public.

In *Kuczborski v Queensland* ('*Kuczborski*'), the High Court held that Mr Kuczborski lacked sufficient standing to challenge all but the *CODA* and amendments to the *Liquor Act 1992* (Qld) relating to the wearing of insignias or carrying certain items onto licensed premises.[166] As to these provisions, a majority of the Court (Hayne J dissenting) upheld their validity. For the majority justices, the creation of offences under the *CODA*, including the offence of 'participants in [a] criminal organisation being knowingly present in public places',[167] did not enlist the judiciary to give effect to parliamentary

[162] *CODA* s 42, inserting *Criminal Code* (Qld) s 60A(2).

[163] Frank Robson, 'Crack Down', *Sydney Morning Herald* (online), 14 June 2014 <http://www.smh.com.au/lifestyle/crack-down-20140613-39rul.html>.

[164] Brooke Baskin, 'Librarian and Accused Bikie Sally Louise Kuether Freed on Bail', *The Courier-Mail* (Brisbane), 31 January 2014, 3.

[165] In addition to the *VLAD Act* and the *Criminal Code* (Qld) ss 60A–60C, Kuczborski challenged the *Liquor Act 1992* (Qld) ss 173EB–173ED, the *Criminal Code* (Qld) ss 72(2), 92A(4A), 320(2) and 340(1A), and the *Bail Act 1980* (Qld) ss 16(3A)–16(3D).

[166] (2014) 314 ALR 528. See *Liquor Act 1992* (Qld) ss 173EB–173ED.

[167] *Criminal Code* (Qld) s 60A.

or executive intention,[168] or 'cloak the work of the legislature or executive in the neutral colours of judicial action',[169] or usurp judicial power.[170] Whilst the executive unilaterally declares which organisations are criminal organisations, this declaration alone is insufficient to establish criminal guilt. That all-important determination is made by a court according to ordinary judicial processes, considering each element of the offence as established by evidence and legal argument in an open hearing.[171] Thus, for the majority justices, the independence and institutional integrity of Queensland courts was preserved.

By this reasoning the High Court in *Kuczborski* gave constitutional legitimacy to schemes in which organisations are declared by the executive (as is the case under the federal anti-terrorism laws and the original *SOCCA*) by a secretive, unreviewable process. That declaration may give rise to criminal proceedings against affiliates of the organisation based on seemingly innocuous behaviour, such as meeting in public and wearing certain clothes or emblems, provided that the trial adheres to usual judicial processes and the independent discretion of the judge is maintained.

The *VLAD Act* and the *CODA* bear important similarities to control orders and federal anti-terrorism laws. Each hinges criminal consequences on a person's links to an organisation, rather than focusing on the conduct of the individual. This approach of attaching serious legal consequences to a person's mere involvement with a criminal organisation is characteristic of control orders. However, every control order scheme vested the final decisions as to whether to issue the order and the appropriate terms of the order with a court. Both the *VLAD Act* and the *CODA* remove the court's discretion in the latter respect by coupling notions of criminal organisations with mandatory sentencing.

The *VLAD Act* and the *CODA* adapt fundamental aspects of the control order paradigm to the criminal justice sphere, magnifying the severity of the provisions and their impact on traditional frameworks and fundamental values. The *CODA* harnesses the framework for declared organisations and the idea of placing significant restraints on a person's liberty on the basis of his or her connection with such an organisation. The *VLAD Act* expands this idea to declared offences, as well as drawing on the provisions of the *Criminal Code* (Cth) that allow courts to declare terrorist organisations in the context of

[168] *Kuczborski* (2014) 314 ALR 528, 577–8 [219]–[227] (Crennan, Kiefel, Gageler and Keane JJ).

[169] Ibid 579 [229]; see generally at 579 [228]–[231].

[170] Ibid 579–81 [232]–[238].

[171] Ibid 579–81 [230]–[238].

terrorism prosecutions. Like those ad hoc declarations, the *VLAD Act* envisages that criminal organisations can be identified and their members punished even when the Attorney-General did not declare the organisation earlier.

Whilst an attraction of control orders was their civil nature, and thus the avoidance of criminal burdens of proof,[172] the Newman government had moved the paradigm to the criminal sphere *and* avoided having to meet the criminal standard by reversing the onus of proof in crucial ways. Thus, control orders first emerged as an alternative to the criminal justice process, given concerns about that process, but are now being adapted and reintegrated within that criminal justice system in ways that throw up a range of new concerns.

The *VLAD Act* and the offence of participants meeting in public were just two facets of the Newman government's much broader scheme of tough anti-bikie laws.[173] In other reforms, abandoned in the lead-up to the state election in January 2015,[174] individuals imprisoned under the bikie laws would have been forced to wear fluorescent pink overalls in prison because, Newman said, '[w]e know that telling them to wear pink is going to be embarrassing for them'.[175] Moreover, imprisoned members of criminal organisations would also have been subject to 'criminal organisation segregation orders' requiring their separation from other prisoners — that is, solitary confinement.[176]

The Queensland Crime and Corruption Commission has been given additional powers to conduct closed, secret hearings into the range of issues referred to it (including organised crime, terrorist activity and other serious crime). At these hearings, individuals face mandatory minimum terms of imprisonment for refusing to answer a question or produce a thing without a

[172] See the INSLM's comments cited above about control orders being considered primarily in circumstances where there was insufficient proof upon which to mount a conviction: see above n 55 and accompanying text.

[173] See Trotter and Hobbs, above n 134, 3.

[174] 'Newman Tipped to Lose Seat Despite LNP Win', *Brisbane Times* (online), 22 July 2014 <http://www.brisbanetimes.com.au/queensland/newman-tipped-to-lose-seat-despite-lnp-win-20140722-zvrt9.html>; Amy Remeikis, 'Queensland State Election: Campbell Newman Promotes VLAD Laws', *Brisbane Times* (online), 7 January 2015 <http://www.brisbanetimes.com.au/queensland/queensland-state-election-2015/queensland-state-election-campbell-newman-promotes-vlad-laws-20150107-12jafx.html>.

[175] 'Pink for Punks: Queensland Plan to Embarrass Bikies in Jail', *The Guardian* (online), 21 October 2013 <http://www.theguardian.com/world/2013/oct/21/pink-for-punks-queensland-bikies>.

[176] *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld) s 14.

reasonable excuse.[177] Fear of retribution has been specifically excluded as a reasonable excuse in this context.[178] In addition, the Newman government's reforms prevent participants in criminal organisations from being employed in a range of positions, such as electricians, builders and tattoo artists,[179] and provide for the public disclosure of their criminal histories.[180] Indeed this disclosure is authorised in respect of anyone who has 'at any time been' a participant in a declared organisation.[181] These reforms build upon the idea of guilt by association established by the introduction and spread of control order schemes.

Andrew Trotter and Harry Hobbs have argued that Bleijie and Newman have orchestrated a 'great leap backward' for the criminal justice system in Queensland.[182] Their critique demonstrates the gravity of the reforms as viewed in a broad historical context. However, by looking at more recent history — since 9/11 — we can see that the roots of these reforms lie in federal anti-terror laws. Queensland has built upon and now significantly extended federal and state laws that began with the terrorist organisation offences enacted in 2002 and the *Anti-Terrorism Act (No 2) 2005* (Cth). Certainly the process by which the laws were enacted bears a strong resemblance to the Howard government's response of 'hyper-legislation' following 9/11, and the laws themselves build directly upon the declaration processes that migrated with control orders and the organisation offences that originally accompanied the federal terrorist organisation provisions.

V Normalisation and the Role of Constitutional Values

In the context of the global war on terror, the federal Parliament enacted a suite of exceptional measures aimed at preventing terrorism. These measures, including control orders and the declaration of terrorist organisations, were

[177] *Crime and Corruption Act 2001* (Qld) s 198(4), as inserted by *CODA* s 28. These terms are at the court's discretion for the first charge, two years and six months for the second, and five years for the third: *Crime and Corruption Act 2001* (Qld) s 199(8B), as inserted by *CODA* s 30.

[178] *Crime and Corruption Act 2001* (Qld) s 74(5A).

[179] *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld) pts 8, 14, 19.

[180] Ibid pt 13.

[181] Ibid s 123, inserting *Police Service Administration Act 1990* (Qld) s 10.2AAA (definition of 'current or former participant').

[182] Trotter and Hobbs, above n 134.

not designed or intended for implementation outside the terrorism context. The debate around the laws linked the schemes' exceptional nature with the extraordinary threat posed by terrorism. What has followed, however, is the steady migration of these measures to new contexts at the state and territory levels.

The processes of migration and normalisation described have been multi-dimensional. First, the control order paradigm itself migrated across contexts and jurisdictions. Anti-terror control orders became serious and organised crime control orders — in each case providing an alternative to the criminal justice system and permitting a wide range of potential obligations and restrictions to be placed on a person for the purpose of preventing criminal activity. This enabled control orders to evolve from an exceptional and extreme measure to an established paradigm of preventive justice. As a result it is well-accepted today, at least by the majority of Australia's Parliaments, that preventive restraints on an individual's liberty may be justifiably imposed by reference to that person's links to a widespread, amorphous threat, particularly one presented by fearsome groups such as terrorist cells or outlaw motorcycle gangs.

Secondly, more subtle aspects of the control order framework also migrated and normalised. By focusing on a person's association with a criminal organisation, control order schemes require companion processes by which those organisations may be identified. The first state control order scheme, the *SOCCA*, simply adapted the federal approach by which the Attorney-General declares terrorist organisations. Later schemes and amendments moved this process into the judicial sphere in order to provide a better safeguard and to align more closely with constitutional values, including the separation of judicial power that underpinned the High Court's decisions in *Totani* and *Wainohu*. The latest Queensland laws have shifted the responsibility for declaring organisations back to the Attorney-General, returning to the design of the original anti-terror laws. The scheme of ad hoc declarations by courts during terror trials has also been adapted. The scheme under the *VLAD Act* of imposing additional mandatory minimum sentences on persons who commit declared offences in groups reflects aspects of the federal anti-terror laws which allow courts to identify criminal organisations in the context of certain prosecutions. This suggests that the idea of declared organisations providing a precursor to proceedings against participants in those organisations has both migrated and normalised. However, the fact that different jurisdictions have adopted different approaches to reconciling the declaration process with the separation of powers indicates that no single model has been settled upon and that the design of declaration processes may continue to evolve.

The underlying rationale behind declaration proceedings has also undergone a process of normalisation. The declaration of organisations is linked strongly with the imposition of restraints on the liberties of persons linked to that organisation. In this way, the process embodies ideas of guilt by association — that certain people ought to be controlled and restricted simply because they associate with a certain group. In the control order schemes a person's links to a declared organisation prompt a potentially vast set of obligations and restrictions being imposed by the judiciary. The new Queensland laws are built upon the same rationale. However, these reforms harness this underlying notion to impose *criminal* sanctions that are largely determined by the executive. Thus, the normalisation of the rationale behind control orders has supported the extension of the notions of guilt by association and preventive justice from the civil to the criminal sphere.

In addition to the notions of declared organisations and control orders migrating across contexts, the secrecy that imbues each stage of the anti-terror framework has also spread. In order to combat future threats posed by complex criminal networks, the government has asserted time and time again that it must act in secret. Thus, the intelligence–evidence overlap and its consequence of greater secrecy in judicial proceedings, as observed by Roach and others in respect of anti-terror laws,[183] has now become a characteristic of organised crime laws across Australia. Instead of 'national security information' providing the basis of secrecy in declaration and control order proceedings, provisions in state and territory laws now routinely provide for 'criminal intelligence' to be withheld from the person and his or her representatives. A pervasive emphasis on secrecy is familiar in the national security context, but was relatively unheard of in the ordinary criminal justice system which is built upon fundamental principles such as open justice and adversarialism.

Finally, not only the laws themselves, but the *process* by which extreme measures are enacted, has migrated across contexts. The language employed to support the enactment of extreme anti-terror measures by the Howard government seems to have provided a template for the successful enactment of extreme organised crime measures in the states and territories. Emphasising the serious threat posed by feared groups and the need for urgent action, legislators push for an attenuated parliamentary process that may involve limited public consultation and scrutiny. The consistency with which phrases like 'war' and 'terror' have been used in support of these measures is striking.

[183] See above n 96 and accompanying text.

This rhetoric has clear roots in the anti-terror context, and has now been paired with the 'tough on crime', 'toughest in the country' and even 'toughest in the world' claims of state governments so as to facilitate the rapid enactment of organised crime measures. The longer term impact of the war on terror is clearly visible in the language that continues to surround the introduction and justification of extreme measures. Bikies, it would seem, are the new terrorists.

In these ways we have seen the migration and normalisation not only of exceptional laws, but also of their more subtle, inherent, aspects and even of the process by which they are introduced and enacted. In 2005, there was no reason to suspect that this process of migration of anti-terror laws, let alone their normalisation or extension, was intended or foreseen by political actors. How then did this unintended consequence occur?

There is little to suggest that the migration of control orders from the anti-terror to the organised crime context was a consequence of the measure being particularly effective at preventing crime. Only two anti-terror control orders have ever been issued, and only the control order over Hicks reached the confirmation stage. As Lynch argued, there were strong reasons to suspect that neither Hicks nor Thomas necessarily posed any danger to the Australian community or was likely to be contacted by a terrorist group.[184] In his 2012 report on the control order provisions and their use, the INSLM recommended that the provisions be repealed on the bases of their ineffectiveness and the availability of more appropriate intelligence gathering and criminal justice measures.[185] The INSLM observed that agencies preferred to pursue intelligence activities rather than control orders as 'surveillance surely promises better value for money'[186] and, he said, there is currently 'no ground to believe that [control orders] have any demonstrated efficacy as a preventive mechanism'.[187]

One demonstrated advantage of anti-terror control orders is that they enable prolonged preventive restraints on liberty to be placed on individuals in circumstances where there is insufficient evidence on which to prosecute the person for an offence. The INSLM's investigation revealed that this advantage is well-known to the AFP and has motivated 40 per cent of

[184] See Lynch, '*Thomas v Mowbray*', above n 58, 1187. Lynch refers to Thomas, but the point relates equally to Hicks.

[185] INSLM, above n 24, 43–4.

[186] Ibid 28.

[187] Ibid 38.

instances in which that organisation has considered seeking a control order.[188] This advantage may have appeared attractive to state and territory governments wishing to look tough on crime but remaining frustrated by the high thresholds and procedural safeguards of the criminal justice system.

A reason behind the migration of the control order paradigm seems also to lie in the interaction between the states' tough on crime policy platforms and High Court decisions that lent the schemes the appearance of constitutional legitimacy. The High Court's decision to uphold anti-terror control orders in *Thomas v Mowbray* kickstarted the migration of control order schemes and led to their normalisation and expansion. In *Thomas v Mowbray*, the High Court created a 'loaded weapon' of precedent that, as Jackson J famously warned in his dissenting opinion in *Korematsu v United States*, 'lies about ... ready for the hand of any authority that can bring forward a plausible claim of an urgent need'.[189] It did not take long for state and territory governments, driven by politically successful tough on crime policy platforms, to point to an urgent need to stop the 'urban terror' perpetrated by bikie gangs, and to take this loaded weapon in hand to fight a 'war on bikies'.

Following *Thomas v Mowbray*, control orders presented an attractive, and apparently constitutionally permissible, means of cracking down on feared groups within the community *before* crimes had necessarily been committed. In enacting these schemes, state and territory governments harnessed the rhetoric of urgency, war, terror and serious threat that had accompanied the enactment of the federal anti-terror laws and paired it with their longer-running tough on crime claims. Together these strategies served to justify the swift implementation of exceptional measures, and fed on community fear and concerns in order to attract popular support.

The later cases of *Totani* and *Wainohu* slowed this process of migration and normalisation by appearing to undermine the constitutional legitimacy of control orders. However, the cases only indicated that particular provisions were constitutionally repugnant. These provisions could be easily amended without impacting the overall aims or nature of control orders or declaration proceedings. The schemes as a whole, from their onerous potential to inhibit liberty to their severe impositions on fair process, seemed to be outside the concern of constitutional limits on government powers. Thus, these decisions only prompted state governments to experiment with their control order

[188] Ibid 13.

[189] 323 US 214, 246 (1944).

schemes, seeking to comply with constitutional principles whilst maintaining strong law and order policies.

This experience reveals the capacity for constitutional values to have a legitimising effect that facilitates the migration, normalisation and extension of exceptional measures across contexts. However, these values have also played an important role in checking this same process. Constitutional challenges followed each attempt by a government to use its control order provisions for the first time. Whilst the federal and Queensland control order schemes survived constitutional challenge, the South Australian and New South Wales schemes did not, prompting those governments to refine their approaches so as to better comply with the constitutionally mandated separation of judicial power. In fact, both the South Australian and New South Wales governments took significant steps to judicialise the declaration processes in each State, above and beyond what the High Court had indicated was required to remedy the causes of invalidity. The Western Australian government openly refrained from finalising its control order scheme until it could be sure that its provisions would comply with the High Court's guidance on valid control orders.[190] Despite the decisions in *Totani* and *Wainohu* resting on narrow grounds, the cases propelled governments to involve courts in declaration proceedings and to justify the schemes by reference to constitutional values.[191]

With the validation of Queensland's *Criminal Organisation Act 2009* (Qld) in *Pompano*, a template for valid provisions arose and Western Australia and Victoria let their 'challenge-proof' schemes commence with little need for the same emphasis on urgency or imminent threat. In fact, the adoption of control order schemes from 2012 no longer appeared particularly 'tough', but instead simply brought their laws into line with those of surrounding jurisdictions.

One might have expected that the migration and normalisation of control orders to the ordinary criminal law would have been cemented when *Pompano* was handed down in 2012; the control order paradigm had spread across

[190] Emily Moulton, 'WA Police and Perth Courts Have Greater Powers in Fight against Bikies', *Perth Now* (online), 29 October 2013 <http://www.perthnow.com.au/news/western-australia/wa-police-and-perth-courts-have-greater-powers-in-fight-against-bikies/story-fnhocxo3-1226749205819?nk=6dfc7737d3d87b3748269b3f2d1e3a6f>; Western Australia, *Parliamentary Debates*, Legislative Council, 22 March 2012, 1148–9 (Michael Mischin).

[191] See, eg, Northern Territory, *Parliamentary Debates*, Legislative Assembly, 11 June 2009 (Delia Lawrie) <http://notes.nt.gov.au/lant/hansard/hansard11.nsf/WebbyDate?OpenView&Start=1&Count=300&Expand=6.3.2#6.3.2>; Victoria, *Parliamentary Debates*, Legislative Assembly, 15 November 2012, 5070–3 (Robert Clark).

Australia and gained constitutional legitimacy. However, two factors complicated this situation and led to the next stage: that is, the expansion of the control order paradigm into new territory. First, the governments of most states and territories have continued to vie for the mantle of 'toughest on crime'.[192] This contest requires new reforms and innovations in order for each government to demonstrate that it is tougher, stronger and less tolerant of criminal behaviour as compared to both previous governments and the governments of surrounding jurisdictions. In addition, the effectiveness of control orders at preventing crime still has not been demonstrated — the provisions have failed to produce tangible, politically popular results in any jurisdiction. Without being able to point to past success, governments are driven to implement new reforms to exhibit their hard-line criminal justice policies.

This was the context in which the Newman government labelled control orders as a failure and introduced the 'toughest [laws] in the world' to fight its war on bikies.[193] The language of urgency, war and severe threat were again invoked, not only in parliamentary debate but in a widespread and costly advertising campaign. Even with the close of the global war on terror the Queensland government continued to invoke the language of terror and terrorism to support its suite of extreme measures.

Like the earlier control order cases, Kuczborski's challenge to the *VLAD Act*, the *CODA* and other aspects of the Newman government's anti-bikie laws drew upon the separation of judicial power. As the High Court was unanimous in its finding that Kuczborski lacked sufficient standing to challenge the *VLAD Act* and *Bail Act 1980* (Qld), the validity of these measures remains unresolved. However, the decision gives legitimacy to the *CODA* and to the anti-bikie provisions of the *Liquor Act 1992* (Qld). Past experience would suggest that a process of migration, normalisation and even extension of these extreme measures may soon follow. Indeed, there are hints that this process has already begun. Within weeks of the enactment of Queensland's new bikie laws, the Western Australian government introduced legislation criminalising participation in, and recruitment to, criminal organisations.[194] Each of these crimes is punishable by 5 years' imprisonment, which looks meagre in comparison to Queensland's harsh mandatory minimum terms of 15 or 25

[192] See, eg, Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3114 (Campbell Newman), 3120 (Jarrod Bleijie).

[193] Ibid 3114 (Campbell Newman).

[194] *Criminal Organisation Control Act 2012* (WA). See also Michael Mischin, 'Crackdown Set to Begin on WA's Criminal Gangs' (Media Statement, 29 October 2013).

years' imprisonment. Following the decision in *Kuczborski*, not only the Western Australian Attorney-General, but his counterparts in South Australia and the Northern Territory indicated that they would be considering the decision very carefully, with an eye to proposing tougher bikie laws in their own jurisdiction.[195]

Even without litigation, constitutional values have a crucial role to play in controlling the processes of migration and normalisation. The language of fairness, democracy and the rule of law featured heavily in the political debate and outcry over the anti-bikie laws, as reflected in Peter Callaghan's statement on the *VLAD Act*.[196] In a rare instance of opposition, some judges in Queensland have expressed their concerns with the new anti-bikie laws.[197] This prompted Chief Magistrate Tim Carmody, since appointed Chief Justice of Queensland, to publicly warn newly admitted magistrates that '[i]t is clearly wrong ... for judges to deliberately frustrate or defeat the policy goals of what they might personally regard as unfair ... laws'.[198]

Carmody's comments underscore the tension that exists for judges, and others, in weighing their fidelity to apparently competing constitutional values. On the one hand, the bikie laws challenge fairness, openness, proportionality, justice, judicial integrity, and the rule of law. On the other hand, they represent Parliament responding to a political issue by legislative means that, on present authorities, appear to be in keeping with the constitutional rules and principles enunciated by the High Court.

Now that the *CODA* has survived a constitutional challenge, it is very likely that Western Australia and other states and territories may well bring their laws into line with those of the Newman government. It appears that either a

[195] Cleo Fraser, 'States, NT May Adopt Qld Anti-Bikie Laws', *news.com.au* (online), 14 November 2014 <http://www.news.com.au/national/breaking-news/court-rejects-challenge-to-qld-bikie-laws/story-e6frfku9-1227122720200>.

[196] For instance:

> For example, it contains more provision for mandatory imprisonment — yet another attack on the concept of judicial discretion.
>
> A responsible debate would involve questions about respect for the separation of powers, evidence proving the need for such a provision, and whether any appeals against the inadequacy of sentences imposed on bikies have been lost.

Callaghan, above n 140, quoted in Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3232 (Curtis Pitt).

[197] See, eg, Justice Philip McMurdo, 'Statement by the Judicial Conference of Australia on the Queensland *Vicious Lawless Association Disestablishment Act 2013*' (Media Release, 24 October 2013).

[198] Sarah Vogler, 'Pull Your Heads In, Chief Judge Tells Colleagues', *The Courier-Mail* (Brisbane), 30 January 2014, 4.

strong assertion of constitutional values or a shift away from tough on crime policy platforms will be required in order to check the ongoing normalisation and expansion of extreme measures. In the absence of direct constitutional protection for rights or liberties — Australia being the only democratic nation without any form of national bill or charter of rights — and little indication of a waning in the tough on crime policies in the states, the trends observed in this paper may continue to evolve for some time.

VI CONCLUSION

In the years since 9/11, Australia has experienced significant shifts in its traditional legal frameworks. The federal government's 'hyper-legislative' response to the global war on terror has proven to be only the beginning of that shift. Through the interplay between hard-line law and order policy platforms in the states and territories and High Court cases that seemed to lend constitutional legitimacy to extreme measures, Australia has witnessed a multidimensional migration and normalisation of anti-terror laws to new contexts. Once a novel and exceptional measure, control orders have now been implemented in every state and territory but for the Australian Capital Territory and Tasmania, rendering those two jurisdictions outliers in terms of their criminal justice frameworks. This migration and normalisation of control orders has occurred in parallel to the spread of frameworks for declaring criminal organisations, secret evidence in judicial proceedings, and expanded notions of preventive justice and crimes of association. Even the process by which control orders were enacted, particularly the rhetoric that supported the rapid passage of the provisions, has been replicated across jurisdictions. The 'war on terror' has become a 'war on bikies', with bikies regularly labelled 'urban terrorists' and accused of perpetrating a reign of terror on the community.

Developments in Queensland demonstrate the next stage in the migration and normalisation process: namely, the extension of these measures to new extremes. The Newman government's anti-bikie laws are built upon the same underlying rationale as the anti-terror laws and subsequent control order schemes, and harness the same political rhetoric to garner community and political support. The unsuccessful constitutional challenge to some of those laws in *Kuczborski* may signal the continuation of a cycle by which extreme measures migrate, normalise and may even give rise to new extremes.

All this demonstrates how the rhetoric used initially to justify anti-terror laws such as control orders, including the notion of a temporary war in which extreme measures were justified, was misleading. With the end of the interna-

tional war on terror, the legal weapons deployed in aid of that conflict remain with us. The frameworks that extended into new territory to meet the threat of terror have become an established part of the legal landscape. Now these frameworks are being adapted to meet new threats — threats within the ordinary criminal justice sphere. With the benefit of hindsight we can see that during times of community fear, staunch adherence to fundamental values throughout the legislative process is imperative in protecting fundamental rights from long-term erosion.

This story of legitimisation, migration and normalisation highlights the difficult position of Australian courts in seeking to prevent constitutional values from legislative incursion. The High Court's approach, constrained as it is to structural judicial review based on legislative capacity and the separation of powers, has succeeded in preserving the judiciary's decisional independence — a government cannot force a judge's hand. However, the control order cases failed to address some of the clearest problems arising from the provisions and ultimately played a role in facilitating the migration and normalisation of once-extreme measures.

Without explicit protections for liberty or fairness in the *Constitution*, judges must rely on implications arising from the separation of judicial power (itself an implied doctrine) to preserve fundamental liberties and values. The control order cases demonstrate that the separation of powers is a far from perfect tool in the protection of basic rights. The High Court's focus on the independence with which these powers were exercised was inevitable, given the limited scope of Australia's judicially enforceable constitutional values, but ultimately proved distracting and tangential in light of the severe impositions on liberty and fairness effected by the schemes.[199] For example, in *Pompano* the Chief Justice recognised that secret criminal intelligence evidence was 'antithetical' to the 'method of administering justice' that lies at the heart of the common law tradition.[200] However, the Court was bound by existing precedent and by the *Constitution*'s focus on judicial independence, and so these unfair[201] provisions were upheld and thereby gained an appearance of constitutional legitimacy.

[199] See generally Williams and Hume, above n 67, 325–8.

[200] (2013) 295 ALR 638, 640 [1] (French CJ), quoting A L Goodhart, 'What Is the Common Law' (1960) 76 *Law Quarterly Review* 45, 46.

[201] *Pompano* (2013) 295 ALR 638, 692 [202] (Gageler J), though for Gageler J the provisions were saved by the capacity for the Court to order a stay of proceedings for want of fairness — an eventuality his Honour may have envisaged would not be rare.

Clearly, the Court's decision in *Kuczborski* has the capacity to facilitate the further migration and extension of extreme measures. But this decision has a limited scope and invites further litigation to test the *VLAD Act* and other aspects of the Newman government's suite of anti-bikie laws. Constitutional values playing out in the legal and political spheres may yet succeed in checking and even winding back the process of migration, normalisation and extension that has seen anti-terror laws adapted to the organised crime context. However, the High Court has little to work with in the absence of explicit constitutional protections for human rights or fair process.

Our analysis has focused on the Australian experience. It is coloured by the system of Australian federalism in which the states bear primary responsibility for law and order, and by the uncommon absence of a national bill or charter of rights. However, the processes of migration and normalisation discussed have global relevance.[202] The war on terror had a sweeping impact on legal frameworks. Indeed, Australia's original anti-terror control orders were adapted from the United Kingdom.[203] The United Kingdom's definition of terrorism has similarly migrated to Canada, Singapore, Israel and other jurisdictions, including Australia.[204] Within the United Kingdom the control order framework also underwent a process of migration with, for example, the enactment of serious crime control order schemes.[205] The tensions between constitutional values and preventive anti-terror measures have been experienced widely and have given rise to a substantial body of critique and jurisprudence. Within this broader context, the Australian experience provides a cautionary tale as to the potential for extreme measures to not only migrate and normalise, but to lead to new extremes within a relatively short

[202] See, eg, Laura K Donohue, 'Transplantation' in Victor V Ramraj et al (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 67.

[203] See generally Susan Donkin, *Preventing Terrorism and Controlling Risk: A Comparative Analysis of Control Orders in the UK and Australia* (Springer, 2014); Lynch, 'Control Orders in Australia', above n 3; Lynch, Tulich and Welsh, above n 3; Burton and Williams, above n 3.

[204] Roach, *The 9/11 Effect*, above n 2, 443. See also Clive Walker, 'The Reshaping of Control Orders in the United Kingdom: Time for a Fairer Go, Australia!' (2013) 37 *Melbourne University Law Review* 143.

[205] Roach, *The 9/11 Effect*, above n 2, 444. However, in the United Kingdom control orders were far more frequently used than in Australia, and have since been repealed and replaced with a similar scheme of Terrorism Prevention and Investigation Measures ('TPIMs'): see generally Clive Walker and Alexander Horne, 'The *Terrorism Prevention and Investigations Measures Act 2011*: One Thing but Not Much the Other?' [2012] *Criminal Law Review* 421; Helen Fenwick, 'Preventive Anti-Terrorist Strategies in the UK and ECHR: Control Orders, TPIMs and the Role of Technology' (2011) 25 *International Review of Law, Computers & Technology* 129.

timeframe. In this way, the war on terror can have an impact that transcends jurisdictional and contextual boundaries.