



Much ado about nothing? The future of 'bikies' control orders in Australia



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Postscript:

As at 6 March 2012, there were two further developments in Australia's 'bikies' control order legislation.

First, the *Crimes (Criminal Organisations Control) Bill 2012* is before the NSW Parliament. The only substantive change this draft legislation makes is to require judges in making declarations to give reasons for their decisions (s 13(2)).

Second, the *Serious and Organised Crime (Control) (Miscellaneous) Amendment Bill 2012* is before the SA Parliament. This draft legislation differs in a number of important respects from both the *Serious and Organised Crime (Control) Act 2008* and the 2011 Consultation Draft. In particular, the power to make declarations is given to 'eligible judges' (rather than the Attorney-General or the Supreme Court) and control orders 'may' be made (rather than 'must' or 'should').

Slide 1: What are the ‘bikies’ laws?

‘Bikies’ – a misnomer

Nicholas Cowdery has noted that the description of these laws as ‘bikies’ or ‘gang’ laws is incorrect: ‘This is not legislation directed, in terms, at ‘bikie gangs’ – it can apply to any organisation, defined in a manner to include any formal or informal grouping of persons, wherever it may be based and wherever those persons may reside’. Nevertheless, I’ll use this shorthand language for the purposes of this paper.

The origins of the ‘bikies’ laws

Closely modelled on the Cth anti-terror laws. Former SA Premier, Mike Rann, made this clear: ‘We’re allowing similar legislation to that applying to terrorists, because [bikies] are terrorists within our community’. The Cth anti-terror laws contain provisions for: (a) the Cth A-G to declare groups as terrorist organisations; and (b) courts to issue a CO where a person trained or received training from a listed terrorist organisation or making the CO would substantially assist in preventing a terrorist attack. The ‘bikies’ laws also adopt this two stage process (declarations and control orders). There are, however, many differences between the content of the ‘bikies’ laws and between these laws and the Cth regime.

‘Bikies’ laws enacted to date:

To date, ‘bikies’ legislation has been enacted in all but the ACT, Victoria and Tasmania.

1. *Serious and Organised Crime (Control) Act 2008 (SA)*

Part of this legislation was found unconstitutional in *Totani* (2011) (the first of the decisions I’ll be talking about today) – Consultation Draft of amending legislation introduced in mid-2011.

2. *Crimes (Criminal Organisations Control) Act 2009 (NSW)*

Legislation held to be unconstitutional in its entirety in *Wainohu* (2011) – government has indicated an intention to introduce new legislation.

3. *Criminal Organisation Act 2009 (Qld)*

Probably the model from a HR perspective (e.g. includes provisions for a Public Interest Monitor to be appointed where criminal intelligence can’t be disclosed to the defendant).

4. *Serious Crime Control Act 2009 (NT)*

This legislation was amended by the *Serious Crime Control Amendment Act 2011* (NT) after the decision in *Wainohu*.

5. *Criminal Organisations Control Bill 2011 (WA)*

Claimed by the WA Attorney-General, Christian Porter, to be the toughest organised crime laws in the

country. Introduces safeguards that avoid the constitutional problems with the SA and NSW Acts.

Slide 2: Clarification of the *Kable* doctrine

1. **Test is not whether the particular court in question continues to satisfy the definition of a ‘court’.**
2. **State legislature can’t give functions or powers to State courts that are incompatible with the exercise of federal judicial power.**
3. **Incompatibility means a substantial impairing of the institutional integrity of the court.**
4. **‘The term “institutional integrity,” applied to a court, refers to its possession of the defining or essential characteristics of a court’.**
5. **Not possible to define exhaustively the essential characteristics of a courts. However, they are ‘historical realities and not the product of judicial implications,’ and include: (a) independence; (b) impartiality; (c) procedural fairness; (d) open court principle; and (e) duty to give reasons.**

A continuing role for the ‘public confidence’ test?

The SA and NSW laws were challenged in *Totani* (2011) and *Wainohu* (2011) respectively on the basis of the *Kable* doctrine. Putting to one side what these decisions mean for the future of ‘bikies’ control orders in Australia, these decisions arguably also clarified the content of the *Kable* doctrine. That is, they explained in simple terms the extent to which the State legislatures are limited by Ch III of the Commonwealth Constitution in conferring functions on the State courts.

Gummow J at [103] in *Fardon* – ‘is an indicator, but not the touchstone of invalidity; the touchstone concerns institutional integrity’.

Stronger rejected of this as the test in *Totani* and *Wainohu*. See, for example, French CJ at [73] in *Totani* – ‘This is a criterion which is hard to defin, let alone apply by reference to any useful methodology. ... The rule of law, upon which the Constitution is based, does not vary in its application to any individual or group according to the measure of public or official condemnation, however, justified, of that individual or that group’.

However, the majority does accept that institutional integrity requires both the reality and appearance of the essential characteristics of the court. Therefore, there continue to be references to the ‘perception’ of the courts in these judgments. For example, ‘the performance of the function may affect perceptions of the judge, and of the court of which he or she is a member, to the detriment of that court’.

Slide 3: The decision in *Totani*

Challenged provision was s 14(1) of the *SOCCA*:

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

The meaning of ‘independence’

Was the Magistrates Court engaging in a genuine adjudicative exercise free from the direction of the executive branch of government?

High Court wasn’t concerned with the alternative mechanism for issuing a CO in s 14(2) (former members and non-members). Indeed, in May 2011, a control order was issued in relation to Jamie Brown under this subsection.

French CJ at [62] – ‘At its heart, although not exhaustive of the concept, is the notion of decisional independence from influences external to proceedings in the court, including, but not limited to, the influence of the executive government and its authorities’. At [69] – ‘The risk of a finding that a law is inconsistent with the limitations imposed by Ch III, protective of the institutional integrity of the courts, is particularly significant where the law impairs the reality or appearance of the decisional independence of the court’.

This requires a consideration of the whole of the Act (not just the CO process). Majority rejected the Full Court’s approach – quantitative analysis of the respective roles of the Attorney-General and the Magistrates Court. Rather, it is necessary to consider the relationship between the declaration and CO processes.

Declaration process

The Commissioner makes an application to the Attorney-General for a declaration. The Attorney-General must consider significant factual matters, such as whether a ‘significant group within the organisation’ are engaged in serious criminal activity. Making of a declaration has no immediate consequences (i.e. organisations are not banned and membership is not an offence). Only consequence is to enliven the duty of the Magistrates Court to make a CO. This meant that, in issuing a CO, the Magistrates Court was creating new rights and obligations rather than deciding a controversy about existing rights and obligations.

CO process

SA’s arguments about the discretion of the Magistrates Court were ‘inflated’. Mandatory to

make a control order if two conditions were satisfied. First, declaration has been made (of which

production of the *Gazette* is proof). Review of declaration for jurisdictional error permitted (as per *Kirk*). Practical difficulties in challenging the foundation of the Attorney-General's decision – absence of a duty to give reasons and criminal intelligence can't be disclosed. Second, if person is a 'member' of organisation. 'Member' is defined extremely broadly. In practical terms the defendant bears the burden of disproof.

No room for the Court to consider criminal history of the defendant. Other analogous orders all depend upon an assessment being made of the past or likely future conduct of the defendant.

Also limited discretion in deciding what orders to attach to a CO. Mandatory minimum conditions (unlike Cth anti-terror COs). These include significant restrictions on the freedom of association.

Hayne J pointed out the true extent of the executive's control over the CO process. 'That is, upon the motion of the Executive, the Court is required to create new norms of conduct, that apply to the particular member of a class of persons who is chosen by the Executive, on the footing that the Executive has decided that some among the class (who may or may not include the defendant) associate for particular kinds of criminal purposes'.

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4: Does the *Kable* doctrine apply to State judges appointed persona designata?

Declarations under the *CCOCA* were made by 'eligible judges' appointed in their personal capacity.

No previous consideration of the application of the *Kable* doctrine to State judges appointed persona designata. Consideration limited to federal judges.

States argued that there are no limitations on the appointment of State judges persona designata. This was accepted by Heydon J in dissent – 'do not explain how the carrying out by persons who are judges of State courts of non-judicial functions would cause the justice administered in those courts to be of inferior grade and quality, or would entail lower standards of independence and impartiality, or would undermine integrity'. Plaintiffs also seemed to have doubts, as their primary argument was that the power to make a declaration had been vested in the State courts and not in judges persona designata.

Majority held there is no rational reason why State judges should be treated differently from State courts in relation to the *Kable* doctrine. Question for both is whether a function impairs the institutional integrity of the State courts?

But majority recognised that there may be more leniency for State judges. It will be necessary to consider the connection between the non-judicial function of the eligible judge and the judicial process – 'A legislatively prescribed detachment of a State judge from his or her court when performing a non-judicial function may weigh in the balance against a finding of impairment of the institutional integrity of the court. Such a detachment may make is less likely that the exercise of the non-judicial function undermines the reality or appearance of the court as an institution independence of the executive government of the State (French CJ and Kiefel J in *Wainohu* at [50]).

Slide 5: Application of the *Kable* doctrine in *Wainohu*

It was accepted by all parties that the power to make a declaration was an administrative function. Was the conferral of this administrative function on 'eligible judges' incompatible with the exercise of federal judicial power?

Focus was on s 13(2) of the *CCOCA*:

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

Does the removal of a duty to give reasons in s 13(2) substantially impair the institutional integrity of the NSW courts?

1. Is the duty to give reasons an essential characteristic of the judicial process?

Yes (where the decision is a substantive one). Looked at previous decisions about judicial power, as well as the importance of reasons to the judicial process (e.g. establishment of fixed, intelligible rules; promotes good decision-making; and, assists in the determination of appeals).

Cf. Heydon J (in dissent): no common law duty to give reasons for administrative decisions; High Court has held that more important procedural rights (e.g. burden of proof) may be abrogated; failure to give reasons is less important in declaration / CO context than for criminal trials.

2. Does it matter that judges may *choose* to give reasons?

No. Joint judgment – 'Because there is no duty to do so, the possibility that a declaration would be made or revoked and no reasons given for the decision is not to be dismissed from consideration as some remote or fanciful possibility'. Cf. Heydon J (in dissent): 'In view of their traditions, customs and habits, there is every reason to suppose that they will give reasons wherever the interests of justice require it'.

3. Can the High Court's conclusion be reconciled with previous decisions?

This is tenuous. Telephone intercept warrants (upheld in *Grollo*) may be issued without reasons.

Joint judgment – issuing these warrants is a historical exception.

4. Relationship between the persona designata function and the issuing of COs by the courts.

As previously noted, where the administrative function is given to a judge persona designate, it is relevant to consider how closely connected that function is to the judicial process. Majority held that the connection was very close: (a) declaration is a condition precedent to the issuing of a CO; (b) eligible judges have secure tenure; (c) function of eligible judge is almost indistinguishable from the judicial process (i.e. decides a contested application re detailed factual matters); and, (c) very limited review of the declaration.

Therefore, '[t]he appearance of a judge making a declaration is thereby created whilst the giving of reasons, a hallmark of that office, is denied. These features cannot but affect perceptions of the role of a judge of the Court the detriment of the Court'.

Slide 6: Improving legislative drafting

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

There are five obvious options for legislative drafters:

1. Copy the Cth CO regime

The reason that I called this paper ‘much ado about nothing’ is because the High Court’s decisions reveal more about just how poorly drafted the original SA and NSW ‘bikies’ law were, than the protection of fundamental rights. I’m now going to discuss how easy it would be for legislative drafters to avoid the constitutional difficulties in *Totani* and *Wainohu*. By no means has the High Court signalled the end of ‘bikies’ control orders.

Majority of the High Court held in *Thomas v Mowbray* (2007) that the interim CO regime was constitutional. It is permissible to have ex parte proceedings and non-disclosure provisions for interim control orders, as long as a proper judicial process is attached to the confirmation process.

There is an increasing convergence of the tests regarding the vesting of non-judicial power in, or the manner in which judicial power must be exercised by, Federal and State courts. However, it remains the case, as stated by multiple judges in *Fardon* ([87] (Gummow J), [144] (Kirby J), and [219] (Callinan and Heydon JJ)) that legislation which validly bestows power on the Federal courts must be valid if adopted in the State context.

2. Adopt *CCOCA* (NSW) with amendments

Majority of the High Court in *Wainohu* (2011) said the legislation would be constitutional if it was amended to require eligible judges to give reasons for declaration decisions: ‘[T]he problem to which s 13 gives rise may ... be overcome by the imposition of an obligation on an eligible judge to provide reasons for the decision to make or refuse to make a declaration, or to revoke a declaration’.

Joint judgment looked at the available alternatives, i.e. the protection of sensitive material could be achieved if the duty to give reasons excluded such material. The other procedural issues raised by the applicant in relation to the declaration process – e.g. ex parte proceedings and non-disclosure of criminal intelligence – were given short shrift by the High Court. Both WA and the NT have learnt from the *Wainohu* experience and have included an express duty to give reasons for declaration decisions.

3. Distinguish eligible judges from the judicial process

The majority judgements in *Wainohu* held that the *Kable* doctrine applies regardless of whether the declaration power is vested in judges *persona designata* or in the courts. However, the reasoning in *Wainohu* is based on the close relationship between the function of eligible judges and the judicial process. Rebecca Welsh has suggested that this may lead to the ironic position where judges involved in schemes that are very removed from the judicial process will be upheld but those that lack all but one of the hallmarks of judicial process may be invalid. This might be the case if NSW was to make it possible to appoint and remove eligible judges at will (introduced as an amendment during parliamentary debate).

4. Adopt *SOCCA* (SA) with amendments

The SA government has released a consultation draft of an amending Bill:

- Gives the power to make declaration decisions to the Supreme Court rather than the Attorney-General.
- Provides that the Magistrates Court *should* (rather than *must*) issue a CO order if the person is a member of a declared organisation.

This legislation avoids the constitutional problems outlined in *Totani v SA* (2011). In fact, it probably goes further than *Totani* requires. The mandatory CO provision in the *SOCCA* was held to be invalid because the ‘decisional independence’ of the Magistrates Court was impaired by the combination of two factors: (a) Attorney-General made the critical decision to declare an organisation; and (b) discretion of Magistrates Court was limited to whether a person was a ‘member’ (defined broadly) and whether further conditions should be added to the minimum CO conditions set out in the legislation.

Removing *either* of these factors would have been sufficient to render the legislation constitutional.

5. Give power to make COs to the executive

Traditional view is that judicial power (including the issue of a CO) may be vested in the State executive. However, Gummow J in *Totani* does not accept that a State law may authorise a non-judicial body to punish guilt by ordering the detention of the person. COs are not equivalent to detention therefore this problem probably doesn’t arise.

Slide 7: The normalisation of exceptional measures

The decisions in *Totani* and *Wainohu* are (understandably, given the nature of the Cth Constitution) are more concerned with judicial process than with fundamental human rights. They don't deal with the question of whether the States *should* enact 'bikies' COs.

Control orders and other anti-terrorism measures were justified after 9/11 on the basis that they were exceptional (and temporary) measures needed to respond to an exceptional threat. Many would argue that even in this environment, they were not justified.

What the bikies laws provide an example of is the extremely concerning 'seepage' of these exceptional measures into the ordinary criminal context, without adequate consideration of whether they will work and whether they are necessary to deal with the threat of serious organised crime groups.

In my opinion, no person should be deprived of his or her liberty (whether or not it amounts to 'detention' in the technical sense) without a judicial finding of criminal guilt unless there is a strong case to justify it.

We already have a plethora of laws on the statute books across Australia dealing with organised criminal activity. Laws prohibiting the substantive acts (e.g. drug trafficking and money laundering). And laws prohibiting consorting. These laws are far more targeted to the criminal activity than are the 'bikies' control orders. What then is the justification for the 'bikies' COs?

I'll leave you with this thought from prominent defence barrister, Phillip Boulton SC, in March 2009:

'I'm not sure that this particular measure is going to have any real effectiveness. If these people who are shooting and killing each other can't obey the laws that say you can't shoot or kill each other, I don't think they're going to obey a law that says you can't have a beer with each other or can't go on a motorcycle ride with each other'.