IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No B59 of 2012

BETWEEN:

ASSISTANT COMMISSIONER MICHAEL JAMES CONDON
Applicant

and

POMPANO PTY LTD (ACN 010 634 689)
First Respondent

FINKS MOTORCYCLE CLUB, GOLD COAST CHAPTER
Second Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

PART I: CERTIFICATION

1. These submissions are suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. The Attorney-General for Victoria intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the applicant.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

4. It is not necessary to add to the statement of applicable statutory provisions referred to in the respondents' submissions.

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Filed on behalf of: Attorney-General for the State of Victoria

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PART V: ARGUMENT

5. In summary, the Attorney-General for Victoria submits:

(a) The test whether a State law impairs the institutional integrity of a State court, so as to make it unfit to exercise federal jurisdiction, is to be applied having regard to the wide range of long established practices across courts in Australia. There are divergences between federal and State courts, and between different State courts. Many defining characteristics of courts have always been subject to exceptions and qualifications.

(b) Because the test looks to the integrity of the court as an institution, it is necessary to consider the challenged law as a whole, not just the respects in which it provides for departure from usual judicial processes. It is also relevant to have regard to:

(i) the interest that is sought to be served by any departure from the usual judicial process;

(ii) the extent of that departure, and whether it is likely to prejudice a party;

(iii) the extent to which any prejudice is removed or mitigated by other aspects of the statutory scheme (including the court exercising its usual powers and discretions); and

(iv) the extent (if any) to which the departure from the usual judicial process impinges on the independence of the court from the executive and the legislature.

(c) The fact that functions under the *Criminal Organisation Act 2009* (Qld) (**the Act**) are conferred on the Supreme Court brings with it the usual incidents of the exercise of jurisdiction by that Court. Thus the Court retains its usual powers and discretions in admitting and weighing evidence, and its general powers to control its procedures in the interests of justice, unless those powers are expressly or impliedly excluded. These two considerations go a long way towards ensuring that the Court is not made the instrument of the executive.

A. The test of institutional integrity

6. A State law will be invalid if it substantially impairs the institutional integrity of a State court that must be capable of exercising federal jurisdiction.[1] "Institutional integrity" refers to the defining or essential characteristics of courts, which set them apart from other decision-making bodies.[2] This doctrine does not, however, introduce a constitutional separation of powers at the State level.[3] Accordingly, the test of institutional integrity should be applied with restraint.[4]

7. One reason for restraint is that constitutional requirements of institutional integrity must accommodate the differences between State courts and federal courts, as well as between different types of State courts.

(a) The fact that State courts, unlike federal courts, may exercise administrative functions gives the State Parliaments a degree of institutional and procedural flexibility not open to the Commonwealth.[5] That is, a State law can validly combine judicial and non-judicial powers in a way that a Commonwealth law cannot. State legislatures therefore have greater flexibility in assessing what functions are appropriate for courts to perform.

(b) There is no single ideal model of judicial independence.[6] The guarantee of tenure in s 72 of the Constitution for federal judges is not applicable to the judges of State courts.[7] Until relatively recently State magistrates were State

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1 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 (***Fardon***) at 591 [15] (Gleeson CJ), 598 [35] (McHugh J), 617 [101] (Gummow J, with Hayne J agreeing on this point); *Momcilovic v The Queen* (2011) 245 CLR 1 at 66 [93] (French CJ), 93 [175] (Gummow J), 224-225 [593] (Crennan and Kiefel JJ).

2 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 (***Forge***) at 76 [63] (Gummow, Hayne and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1 (***Totani***) at 46 [68] (French CJ), 157 [428] (Crennan and Bell JJ), 162 [443] (Kiefel J); see also 103 [263] (Heydon J, dissenting in the result).

3 *Wainohu v New South Wales* (2011) 243 CLR 181 (***Wainohu***) at 212 [52] (French CJ and Kiefel J); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 (***K-Generation***) at 529 [88] (French CJ), 544 [153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

4 *Wainohu* (2011) 243 CLR 181 at 212 [52] (French CJ and Kiefel J).

5 *K-Generation* (2009) 237 CLR 501 at 529 [88] (French CJ).

6 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 (***Bradley***) at 152 [3] (Gleeson CJ).

7 *Forge* (2006) 228 CLR 45 at 66 [38] (Gleeson CJ), 77 [65] (Gummow, Hayne and Crennan JJ), 141 [255] (Heydon J). There is no constitutional difficulty with the pension entitlements of Federal and

public servants, and subject to the regulation and discipline inherent in that position.[8] There is a long history of the Chief Justices of State Supreme Courts acting as Lieutenant-Governors.[9]

(c) In short, the *Kable* doctrine [10] requires minimum requirements of independence and impartiality,[11] not uniform requirements. This is not to permit of different grades or qualities of justice,[12] but rather to recognise that the ends of justice may be met in more than one way, bearing in mind different structural and historical considerations which form part of the constitutional background.[13]

10 8. A second reason for restraint is that many general characteristics of courts do not apply in an absolute or unqualified manner.

(a) For example, usually sitting in public may be considered an essential characteristic of courts, but it is subject to exceptions. [14] Moreover, Parliament may prescribe additional circumstances in which courts are to be closed.[15]

Family Court judges being different from those of federal magistrates: see *Baker v The Commonwealth* [2012] FCAFC 121.

8 *Bradley* (2004) 218 CLR 146 at 165 [37] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); see also 153 [4] (Gleeson CJ).

9 See for example C Steytler and I Field, "The 'Institutional Integrity' Principle: Where Are We Now, and Where Are We Headed?" (2011) 35 *University of Western Australia Law Review* 227 at 254-255. Allowance must be made for such historical practices in assessing incompatibility: *Wainohu* (2011) 243 CLR 181 at 212 [52] (French CJ and Kiefel J).

10 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

11 *Forge* (2006) 228 CLR 45 at 67-68 [41] (Gleeson CJ).

12 Cf *Wainohu* (2011) 243 CLR 181 at 228-229 [105] (Gummow, Hayne, Crennan and Bell JJ).

13 *Forge* (2006) 228 CLR 45 at 68 [42] (Gleeson CJ): "Minimum standards of judicial independence are not developed in a vacuum"; see also 81 [80] (Gummow, Hayne and Crennan JJ): overseas analogies obscured the particular historical and governmental setting in which the issues in that case fell to be decided.

14 *Russell v Russell* (1976) 134 CLR 495 at 505 (Barwick CJ), 520 (Gibbs J), 532-533 (Stephen J); *K-Generation* (2009) 237 CLR 501 at 520-521 [49] (French CJ); *Hogan v Hinch* (2011) 243 CLR 506 at 530 [20], 541 [46] (French CJ).

15 *Russell v Russell* (1976) 134 CLR 495 at 506-507 (Barwick CJ), 555 (Jacobs J); see also at 520 (Gibbs J: the category of exceptions to open justice is not closed to the Parliament), 533 (Stephen J). See also *Hogan v Hinch* (2011) 243 CLR 506 at 553-554 [90]-[91] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); but see 534-535 [27] (n 179) (French CJ: It is an open question whether a provision mandating a closed court in certain types of proceedings is valid).

(b) Similarly, while courts must provide procedural fairness to parties, the content of procedural fairness will depend on the statutory context and the circumstances of an individual case.[16] For example, a State court may continue a criminal trial on indictment in the absence of the accused, if the accused has absconded.[17]

(c) Moreover, doctrines such as public interest immunity recognise that there are public interests that may on occasion weigh against the individual interests of litigants. There is scope for Parliament to alter how the balance between these competing interests is struck.[18]

10 (d) The ability of parties to challenge the evidence led against them[19] is not absolute. Even the right of a defendant in a criminal trial to confront his or her accusers has historically been subject to exceptions and statutory qualifications.[20]

B. Law should be considered as a whole, not just departures from usual judicial process

9. For these reasons, it would be in error to decide whether a State court has been deprived of the institutional integrity necessary to enable it to exercise federal jurisdiction simply by considering the ways in which a State law provides in certain specific instances for departure from the usual manner of conducting court
20 proceedings.

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16 See e.g. *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 503-504 (Kitto J); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 234 CLR 532 (***Gypsy Jokers***) at 595-596 [182], 597 [191] (Crennan J, with Gleeson CJ agreeing).

17 *R v Gee* [2012] SASCFC 86 at [78]-[83] (Gray and Sulan JJ); contra [290]-[296] (Peek J, dissenting). There is a long history of Magistrates' Courts being permitted to hear and determine summary offences in the absence of the accused: [82] (Gray and Sulan JJ), [139] (Peek J).

18 See generally, on altering the balance between competing public interests, *Nicholas v The Queen* (1998) 193 CLR 173 at 197 [37] (Brennan CJ), 203 [55] (Toohey J), 239 [164], [167] (Gummow J), 275-276 [241]-[242] (Hayne J); see also 211 [82] (Gaudron J).

19 See *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

20 See for example *R v Davis* [2008] 1 AC 1128 at 1137-1138 [5]-[6] (Lord Bingham), 1160-1161 [68] (Lord Mance). In Australia, it is accepted that there is a power for a court to order that witnesses give evidence behind a screen; however, that power should be exercised minimally because it impinges on the important right of an accused to confront accusers: see *BUSB v The Queen* (2011) 80 NSWLR 170 at 176 [28]-[29], [33] (Spigelman CJ, with Allsop P and Hodgson JA, McClellan CJ at CL and Johnson J agreeing).

(a) The fact that a measure is novel does not spell invalidity.[21] The historical practices of courts are relevant to whether a measure undermines the institutional integrity of a court,[22] but they are not determinative.[23]

(b) If a State law requires a court to perform a function in a manner that is inconsistent with the methods and standards that have characterised judicial proceedings, that may mean that the function is no longer judicial.[24] But State courts can validly perform non-judicial functions. It would be rare that a departure from usual judicial methods and standards, by itself, would impair the institutional integrity of a State court.[25] It is necessary to go further and consider the relationship that the law creates between the executive and the courts.[26]

10. In *International Finance*[27] and *Wainohu*,[28] the significant departure from usual judicial process had the effect of undermining the independence of the Supreme Court from the executive government. In *International Finance*, the State law required the Supreme Court to make an order without notice on the application of a State government official, when there was no adequate provision for the person affected by the order to have it set aside.[29] In *Wainohu*, the State law permitted the Supreme Court not to give reasons for an order made on application by the Commissioner of Police, where the statutory scheme provided a connection between this non-judicial function and the later exercise of jurisdiction by a Supreme Court

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21 *Momcilovic v The Queen* (2011) 245 CLR 1 at 63 [84] (French CJ), 207 [534] (Crennan and Kiefel JJ).

22 *International Finance Trust Company Ltd v NSW Crime Commission* (2009) 240 CLR 319 (***International Finance***) at 352-353 [50] (French CJ).

23 By analogy, a function conferred by Commonwealth law on a court is not invalid, simply because it has no readily apparent analogue in the common law or in pre-1900 legislation: *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 553 [11]-[12] (Gummow J).

24 Cf *Thomas v Mowbray* (2007) 233 CLR 307 at 355 [111] (Gummow and Crennan JJ). That case concerned a function conferred by a Commonwealth law on a court (see 339-340 [54]), so validity turned on whether the function was judicial.

25 *Fardon* (2004) 223 CLR 575 at 600-601 [41]-[42] (McHugh J).

26 *Totani* (2010) 242 CLR 1 at 35-36 [43] (French CJ), 80-81 [199]-[200] (Hayne J).

27 (2009) 240 CLR 319.

28 (2011) 243 CLR 181.

29 (2009) 240 CLR 319 at 366-367 [97]-[98] (Gummow and Bell JJ), 386 [159]-[160] (Heydon J); see also 355 [57] (French CJ: the law sanctioned an intrusion by the Executive into the judicial function).

judge.[30] Thus invalidity did not flow simply from the law departing in a significant respect from the usual judicial process.

11. It is therefore necessary to consider the scheme of the State law as a whole. Although validity is not determined through a simple balancing exercise or proportionality test,[31] it is relevant to have regard to:

(a) the interest that is sought to be served by a departure from the usual judicial process;

(b) the extent of that departure, and whether it is likely to prejudice a party;[32]

(c) the extent to which any prejudice is ameliorated by other aspects of the statutory scheme (including the capacity of the court to exercise its usual powers and discretions);[33] and

(d) the extent (if any) to which this departure from the usual judicial process impinges on the independence of the court from the executive or legislature.[34]

12. The conferral of judicial functions on the Supreme Court brings with it the usual incidents of the exercise of jurisdiction by the Supreme Court (such as the giving of reasons).[35] Thus the Supreme Court retains its usual powers and discretions in

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30 See *Momcilovic v The Queen* (2011) 245 CLR 1 at 227 [599] (Crennan and Bell JJ); *Wainohu* (2011) 243 CLR 181 at 219 [68] (French CJ and Kiefel J).

31 *International Finance* (2009) 240 CLR 319 at 351 [48] (French CJ); *Kurnell Passenger & Transport Service Pty Ltd v Randwick City Council* (2009) 230 FLR 336 at 363-364 [115] (Basten JA, with Giles JA agreeing).

32 Constitutional issues are less likely to arise when departures from the usual judicial process are not inherently prejudicial to one side: *Kurnell Passenger & Transport Service Pty Ltd v Randwick City Council* (2009) 230 FLR 336 at 362-363 [111]-[113] (Basten JA, with Giles JA agreeing).

33 See, in relation to these factors, *International Finance* (2009) 240 CLR 319 at 354 [54] (French CJ); see also *Forge* (2006) 228 CLR 45 at 146 [268] (Heydon J: it is necessary to consider the similarities in the safeguards applying to permanent and acting judges).

34 See the analysis of *International Finance* and *Wainohu* in para 10 above.

35 See *Gypsy Jokers* (2008) 234 CLR 532 at 555 [19] (Gummow, Hayne, Heydon and Kiefel JJ); *Wainohu* (2011) 243 CLR 181 at 230 [111] (Gummow, Hayne, Crennan and Bell JJ, with French CJ and Kiefel J agreeing on this point (at 220 [72])).

When functions are conferred on a court, it can be expected that the court will provide reasons even without an express obligation to do so: see *Hogan v Hinch* (2011) 243 CLR 506 at 540 [42] (French CJ).

admitting and weighing evidence and its general powers to control its procedures in the interests of justice, except where the law in question provides otherwise. The starting point is therefore that the Supreme Court can perform its functions independently, impartially and judicially.[36] The question is then whether the State law detracts from that position so as to affect the integrity of the Court as an institution under Ch III of the Constitution.

13. The respondents' arguments can be considered in the light of these general principles. It is convenient to group those arguments under the constitutional requirement that is said to be infringed – procedural fairness (special case questions (i)-(v) and (vii)), open justice (questions (ii) and (iii)), and the nature of the judgment required (question (vi)).

C. Procedural fairness: special case, questions (i)-(v), (vii)

14. The procedural fairness objections arise with the procedures in Pt 6 of the Act for applying for a criminal intelligence declaration (Div 2), and for protecting declared criminal intelligence at a substantive hearing (Div 3).

Question (i): Ex parte application (s 66)

15. An application for a criminal intelligence declaration must be considered without notice of it being given to anyone other than the criminal organisation public interest monitor (**COPIM**) (s 66).

16. Ex parte procedures involve a departure from the general requirement of procedural fairness that no order should be made that is adverse to a person's rights or interests without that person first having an opportunity to be heard.[37] At the same time, however, ex parte applications are "no novelty"[38] and statutory provisions requiring them do not inherently impinge on a court's institutional integrity.

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36 On the benefits of conferring these sorts of functions on courts, see *Fardon* (2004) 223 CLR 575 at 592 [20] (Gleeson CJ); *Thomas v Mowbray* (2007) 233 CLR 307 at 329 [17] (Gleeson CJ); *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241 at 280 [168] (the Court).

37 *International Finance* (2009) 240 CLR 319 at 348 [39] (French CJ), 363-364 [88]-[89] (Gummow and Bell JJ); see also 379 [141] (Heydon J).

38 *Thomas v Mowbray* (2007) 233 CLR 307 at 355 [112] (Gummow and Crennan JJ). Their Honours described the provision in question as contemplating, without specifying in terms, an ex parte procedure: at 338 [48].

17. In *International Finance*, this Court held that the ex parte procedure in s 10 of the *Criminal Assets Recovery Act 1990* (NSW) was invalid; however, no single view commanded the support of the four justices constituting the majority.

(a) Gummow and Bell JJ and Heydon J relied on the fact that the legislation did not make adequate provision for having an ex parte order set aside.[39] Gummow and Bell JJ also relied on the absence of any mechanism to enforce the usual duty of full disclosure on a person making an ex parte application.[40]

(b) French CJ relied on the fact that the legislation gave the executive government the ability to compel the Court to determine an application ex parte.[41]

International Finance does not decide that a law requiring a court to hear a matter ex parte is, for that reason, invalid.

18. Here, applications for a declaration or a control order are made on notice to a respondent: ss 8(5)(c) and 9, ss 16(4)(c) and 17. It is only the criminal intelligence application that is made ex parte. A criminal intelligence declaration does not in itself affect legal rights and obligations. Moreover, the Act provides that this intelligence should not be disclosed to a respondent at any point (see further below); accordingly, the very nature of the order sought precludes giving notice to the respondent.[42] The Supreme Court is not bound to accept the material relied on, nor bound to make the criminal intelligence declaration. In addition, the Act requires that the COPIM be given notice of the application, and provides for the COPIM to examine witnesses and make submissions in testing whether it is appropriate to grant the application (see ss 66, 70(2)(c), 86(c) and 89(2)). Thus the material being put forward by the commissioner will be tested by an independent person, as well as independently weighed and assessed by the Court.

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39 *International Finance* (2009) 240 CLR 319 at 366-367 [94]-[97] (Gummow and Bell JJ), 386 [159]-[160] (Heydon J).

40 *International Finance* (2009) 240 CLR 319 at 365-366 [93], [97].

41 *International Finance* (2009) 240 CLR 319 at 354-355 [55]-[57].

42 See, by analogy, *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 321 (the Court): the very nature of the activities to be authorised by a warrant issued under the *Listening Devices Act 1984* (NSW) precluded giving notice to the individual whose privacy will be affected.

Questions (ii), (iii) and (v): "Criminal intelligence" is not disclosed to a respondent

19. Part 6 of the Act prevents criminal intelligence from being disclosed to a respondent.

(a) The registrar must secure specified documents containing criminal intelligence (both in an application for a criminal intelligence declaration and in a substantive application), and these documents cannot be disclosed to a respondent or a respondent's lawyers (see ss 65(3) and 77(3)).

(b) The hearing of a criminal intelligence application, and any part of a substantive application in which declared criminal intelligence is to be considered, is closed to everyone except the persons listed in ss 70(2) and 78(2) respectively. These persons do not include a respondent or a respondent's lawyers.

(c) It is an offence to disclose criminal intelligence or information in an informant affidavit, subject to the exceptions in s 82(2) and the defences in s 82(3).

(d) A person may not obtain a transcript of a hearing that is closed under s 70 or s 78 (s 109(3)).

20. To the extent that these provisions operate to prevent a respondent receiving, and therefore testing, criminal intelligence that may be relied on to make an order affecting that respondent, they depart from the usual position that parties to judicial proceedings are given an opportunity to challenge the evidence led against them. However, the interests that are sought to be served by these provisions are: to avoid prejudicing criminal investigations; to avoid the existence or identity of confidential sources of information relevant to law enforcement being discovered; to avoid endangering anyone's life or physical safety (ss 59(1), 60(a)). These are substantial interests of a kind that have long been protected by the law, including in the context of public interest immunity.[43]

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[43] *Gypsy Jokers* (2008) 234 CLR 532 at 556 [23] (Gummow, Hayne, Heydon and Kiefel JJ), 595 [179]-[181] (Crennan J, with Gleeson CJ agreeing).

21. The Act contains safeguards to address the potential for prejudice to a respondent:

(a) The Court cannot make a criminal intelligence declaration unless it is satisfied that the information is "criminal intelligence" as defined[44] (s 72(1)). Even if satisfied, the Court retains a discretion whether to make the declaration, and can be expected to have regard to whether the interests sought to be protected (set out in s 60(a)) outweigh any unfairness to a respondent (s 72(2)).[45] This is similar to the balancing exercise undertaken in applying the principles of public interest immunity.[46]

(b) The Court has a complete discretion what weight to give to declared criminal intelligence, and whether the evidence (including such intelligence) is of sufficient weight to justify making the order sought.[47] The civil standard of proof applies (s 110) and, given the effect of a control order on a person's rights or interests, the Court might well decide that it would not be satisfied by inexact proofs, indefinite testimony or indirect inferences.[48]

(c) In addition, any declared criminal intelligence will be disclosed to the COPIM, who will make submissions on whether the orders should be made.[49] The respondent can still make submissions on why a substantive order should not be made, and put forward its own evidence addressing the relevant statutory criteria.[50]

(d) The Court would give reasons for its decision, thus opening its decision to public scrutiny.[51] The s 82 offence (disclosing criminal intelligence or

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44 "Criminal intelligence" is defined in s 59(1) to mean information relating to actual or suspected criminal activity, whether in Queensland or elsewhere, the disclosure of which could reasonably be expected to (a) prejudice a criminal investigation; or (b) enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement; or (c) endanger a person's life or physical safety.

45 See Applicant's and Attorney-General for Queensland's submissions, para 38.

46 *Gypsy Jokers* (2008) 234 CLR 532 at 559 [36] (Gummow, Hayne, Heydon and Kiefel JJ).

47 *K-Generation* (2009) 237 CLR 501 at 526-527 [75]-[76], 532 [98] (French CJ), 543 [148] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

48 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 (Dixon J).

49 *Gypsy Jokers* (2008) 234 CLR 532 at 597 [190]-[192] (Crennan J, with Gleeson CJ agreeing).

50 *K-Generation* (2009) 237 CLR 501 at 527 [78], 531 [95] (French CJ), 542 [146] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

51 Cf *Wainohu* (2011) 243 CLR 181 at 215 [58] (French CJ and Kiefel J).

information in an informant affidavit) would not apply to the Court[52] – however, it could be expected that the Court would not disclose declared criminal intelligence in its reasons for decision.[53]

Taken together, these safeguards mean that the Court is able to exercise its powers in relation to criminal intelligence material in such a way as to avoid unfairness. If the Court considers necessary, this can extend to refusing to accept criminal intelligence material altogether. Given this, and the openness of the Court's decision to public scrutiny, the provisions in the Act relating to criminal intelligence do not pose a threat to the Court's institutional integrity.

10 Question (iv): Protection of informants (s 76)

22. The Act contains additional restrictions on the disclosure of information relating to informants (defined in Sch 2 to include non-police officers and officers who obtained information under an assumed identity). An informant cannot be called or otherwise required to give evidence in a substantive application (s 76(2)). The Court will be provided with information about an informant, including a full criminal history (see s 76(3), read with s 64(4)(d)).

23. To the extent these provisions prevent a respondent from testing the material put against it, the Attorney-General relies on the submissions answering questions (ii), (iii) and (v) (paragraphs 20 and 21 above). However, a separate argument put
20 against validity is that these provisions deprive the Court of sufficient information to enable it to use judicial techniques to test the reliability of information provided by an informant.[54]

(a) One aspect of this argument is that the Court cannot see the informant in person. However, hearsay evidence can be received even in criminal trials, and courts may make assessments (for example) whether a representation was made in certain circumstances that make it highly probable that it is

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52 A court is not a "person" for the purposes of anti-disclosure provisions: see e.g. *Kizon v Palmer* (1997) 72 FCR 409 at 430-431 (Lindgren J, with Jenkinson and Kiefel JJ agreeing) and the authorities there cited.

53 *Gypsy Jokers* (2008) 234 CLR 532 at 560-561 [40]-[44] (Gummow, Hayne, Heydon and Kiefel JJ), 596-597 [183]-[191] (Crennan J, with Gleeson CJ agreeing); *Wainohu* (2011) 243 CLR 181 at 225 [92] (Gummow, Hayne, Crennan and Bell JJ).

54 Respondents' submissions, para 32.

reliable (*Evidence Act 2008* (Vic), s 65(2)(c)). Here, proceedings under the Act are civil in nature.[55]

(b) A second aspect of this argument is that details of criminal history and professional misconduct are provided in relatively general terms (see s 64(5)-(7) of the Act). But the Court is provided with sufficient material to assess properly an informant's credibility. The commissioner must state whether an offence or professional misconduct involved dishonesty (s 64(5) and (6)), and must also set out in full any inducements or rewards offered to the informant in return for assistance (s 64(4)(d)(iii)).

10 (c) In both respects, the Court retains a discretion what weight, if any, to give to the evidence. If the Court is not satisfied as to the reliability of the evidence it may attribute little or no weight to it.[56]

Question (vii): Time to respond to an application (ss 8(5), 9 and 106)

24. The time for a respondent to file a response is a matter of procedure, which the Supreme Court could extend under its usual powers. Accordingly, the specific power in s 106 of the Act (which refers only to extending time on application by the commissioner) would not exclude the Court's powers under the *Uniform Civil Procedure Rules 1999* (Qld) to make orders necessary to do justice in a proceeding (see r 367).

20 **D. Open justice: special case, questions (ii) and (iii) (ss 70, 78)**

25. Sections 70 and 78 of the Act, by requiring certain applications or parts of a substantive hearing to be heard in closed court, also raise an issue about the principle of open justice.

26. As already noted, the open court principle has always been subject to exceptions. There is no constitutional difficulty with a law permitting a court to be closed "in appropriate cases".[57] While mandating a permanently closed court would alter the

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55 Applicant's and Attorney-General for Queensland's submissions, para 65.

56 *K-Generation* (2009) 237 CLR 501 at 526-527 [75]-[76], 532 [98] (French CJ), 543 [148] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

57 *Hogan v Hinch* (2011) 243 CLR 506 at 553-554 [90]-[91] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ), citing *Russell v Russell* (1976) 134 CLR 495 at 520 (Gibbs J).

court as an institution, the same cannot be said of a more limited requirement. Accordingly, in limited circumstances, Parliament may require a court to be closed.[58]

27. In this case, the reason for closing the court is to maintain the confidentiality of information. In the case of a criminal intelligence application (s 70), closing the court is to secure the subject-matter of the proceeding. In the case of a substantive application (s 78), closing the court is to protect the confidentiality of information, where the Court has already found that disclosure of that information would undermine the objects set out in s 60(a) of the Act.[59] That decision is made in accordance with the principles of judicial independence, and reasons for it may be given in the usual way as the Court sees fit.[60] In this way, it is within the Court's control to ensure that the nature and content of the proceeding, its outcome and the reasons for that outcome, are disclosed to the public.

E. Nature of judgment required: special case, question (vi) (s 10(1)(c))

28. The respondents' final argument is that the s 10(1)(c) criterion of "unacceptable risk to the safety, welfare or order of the community" is insufficiently precise to be applied in the exercise of judicial power.

29. Section 10(1)(c) is no different in substance from the criteria upheld in *Fardon*[61] and *Thomas v Mowbray*[62] which also required the court to assess the risk of an event occurring. Content can be given to "safety, welfare or order of the community" by

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58 *Russell v Russell* (1976) 134 CLR 495 at 506-507 (Barwick CJ), 555 (Jacobs J); see also at 520 (Gibbs J: the category of exceptions to open justice is not closed to the Parliament), 533 (Stephen J). See also *Hogan v Hinch* (2011) 243 CLR 506 at 553-554 [90]-[91] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); but see 534-535 [27] (n 179) (French CJ: It is an "open question" whether a provision mandating a closed court in certain types of proceedings is valid).

59 *Gypsy Jokers* (2008) 234 CLR 532 at 559 [36] (Gummow, Hayne, Heydon and Kiefel JJ).

60 *Gypsy Jokers* (2008) 234 CLR 532 at 596 [185] (Crennan J, with Gleeson CJ agreeing).

61 (2004) 223 CLR 575 at 593 [22] (Gleeson CJ), 597 [34] (McHugh J), 657 [225] (Callinan and Heydon JJ). The Queensland law required the court to determine whether there was an unacceptable risk of a person committing a serious sexual offence if he or she was released.

62 (2007) 233 CLR 307 at 334 [28] (Gleeson CJ), 355 [109] (Gummow and Crennan JJ), 507 [595] (Callinan J). The Commonwealth law required the court to be satisfied that (relevantly): making the order would substantially assist in preventing a terrorist act; and the obligations imposed by the order were reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act: see 342 [64].

considering the objects of the Act as a whole.[63] In constitutional terms, s 10(1)(c) prescribes a judicially manageable standard in the same way as a power can be made exercisable in the "public interest"[64] or where there are "special reasons"[65] or "sufficient grounds".[66]

30. In any event, a State court can validly exercise non-judicial powers. It does not impair the institutional integrity of the Supreme Court to apply a valid law in accordance with its terms.[67] There is no question of the power in s 10(1)(c) being subject to political influence.[68] The whole point of entrusting the power to the Supreme Court is to ensure the contrary.[69]

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

31. Approximately 30 minutes will be needed for the presentation of oral submissions.

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63 See *Wainohu* (2011) 243 CLR 181 at 230 [111] (Gummow, Hayne, Crennan and Bell JJ), considering the criterion "sufficient grounds".

64 *Hogan v Hinch* (2011) 243 CLR 506 at 551 [80] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

65 *Baker v The Queen* (2004) 223 CLR 513.

66 *Wainohu* (2011) 243 CLR 181 at 230 [111] (Gummow, Hayne, Crennan and Bell JJ, with French CJ and Kiefel agreeing on this point (at 220 [72]).

67 *Fardon* (2004) 223 CLR 575 at 592-593 [21] (Gleeson CJ); see also *Nicholas v The Queen* (1998) 193 CLR 173 at 197 [37] (Brennan CJ), 275-276 [242] (Hayne J).

68 See Applicant's and Attorney-General for Queensland's submissions, para 79 (n 101).

69 *Thomas v Mowbray* (2007) 233 CLR 307 at 329 [17], 335 [30] (Gleeson CJ). See also *Fardon* (2004) 223 CLR 575 at 592 [20] (Gleeson CJ); *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241 at 280 [168] (the Court).