IN THE HIGH COURT OF AUSTRALIA
BRISBANE OFFICE OF THE REGISTRY

No. B59 of 2012

BETWEEN:

ASSISTANT COMMISSIONER MICHAEL JAMES CONDON
Applicant

and

POMPANO PTY LTD (ACN 101 634 689)
First Respondent

and

FINKS MOTORCYCLE CLUB, GOLD COAST CHAPTER
Second Respondent

WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

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PART I INTERNET PUBLICATION

1. These submissions are in a form suitable for publication on the Internet.

PART II BASIS OF INTERVENTION

2. The Attorney General for Western Australia intervenes under section 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 PROVISIONS, STATUTES AND REGULATIONS

4. The Attorney General for Western Australia accepts the First and Second Respondents' statement of the applicable legislative provisions.

PART V SUBMISSIONS

Attorney General's Contentions

5. The Attorney General for Western Australia adopts the submissions of the Applicant and the Attorney General for Queensland and further contends that:

   (a) Provisions in the *Criminal Organisation Act 2009* (Qld) (**Queensland Act**) for the making of a criminal intelligence declaration are not repugnant to the judicial process in a fundamental degree and do not otherwise deprive the Supreme Court of Queensland of its defining characteristics as a Supreme Court;[1] and

   (b) Section 10(1)(c) of the Queensland Act does not provide for a condition to the power to make a criminal organisation declaration which is insusceptible of strictly judicial application and, in the alternative, would not be invalid even if it did confer non-judicial power.[2]

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1 See [11]-[49] below.
2 See [50]-[71] below.

Limitations on State Legislative Power Derived from Chapter III of the Constitution

6. Commencing with *Kable*,[3] decisions of this Court have established the principle that a State legislature cannot confer upon a State court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role under Chapter III of the Constitution as a repository of federal jurisdiction.

7. In subsequent cases the source of this limitation on State legislative power has been more particularly identified. That source, rooted in the text of the Constitution, is the constitutional concepts of a "Supreme Court" from which an appeal lies to this Court under s. 73 of the Constitution and a "court of a State" in which the Commonwealth Parliament may vest federal jurisdiction under s. 77(iii) of the Constitution. As the plurality noted in *Forge v Australian Securities and Investment Commission*:

> "Because Ch III requires that there be a body fitting the description 'the Supreme Court of a State', it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description. ... the relevant principle is one which hinges upon maintenance of the defining characteristics of a 'court', or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to 'institutional integrity' alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies."[4]

8. However, as noted by Gummow J in *Fardon v Attorney-General (Qld)*:[5]

> "...the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes."

9. Put another way, a provision may not alter the character of a State court in a manner inconsistent with the exercise of federal jurisdiction by authorising the State court to engage in activity which is repugnant to the judicial process in a fundamental degree.[6]

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3 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 96 per Toohey J, 103 per Gaudron J, 116-119 per McHugh J and 127-128 per Gummow J.

4 *Forge v ASIC* (2006) 228 CLR 45, [63] per Gummow, Hayne and Crennan JJ; to similar effect see Gleeson CJ at [41] (Callinan J concurring at [238]). See also *Wainohu v NSW* (2011) 243 CLR 181, [44]-[45] per French CJ and Kiefel J, [105] per Gummow, Hayne, Crennan and Bell JJ; *South Australia v Totani* (2008) 242 CLR 1, [69] per French CJ, [201]-[207] per Hayne J, [426]-[427] per Crennan and Bell JJ.

5 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [104].

6 *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, [55]-[56] per French CJ, [98] per Gummow and Bell JJ, [136], [140] per Heydon J.

10. The proper question to be addressed is therefore whether the impugned provisions so alter the character of the Supreme Court that it would cease to meet the constitutional description of a "Supreme Court" or a "court of a State".[7]

Provisions Concerning Declared Criminal Intelligence

Procedural Fairness does not always require that a party to litigation have access to all the evidence

11. While the rules of procedural fairness are a usual aspect of the judicial process,[8] the content of the requirements of procedural fairness are not immutable. Ordinarily, the rules of procedural fairness require courts to disclose information upon which their decision is based, and to provide the parties with an opportunity to make submissions in relation to that information[9]. However, the content of the rules of procedural fairness is not fixed and varies depending on the particular circumstances. Relevant factors include the particular statutory framework (including its objects and purpose),[10] the nature of the judicial inquiry and the particular subject matter. It has also been recognised that the courts "mould their procedures" to accommodate public interest immunity.[11] The rules of procedural fairness may be subject to statutory modification even in a curial setting.[12]

12. In the Western Australian Court of Appeal decision in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police,*[13] Martin CJ conducted a review of decisions in other countries and concluded that:[14]

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7 Framing the constitutional question in that manner also accords with the approach recently taken by the High Court in *Kirk v Industrial Relations Court of NSW* (2010) 239 CLR 531, [96] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

8 *Wainohu v NSW* (2011) 243 CLR 181, [44] per French CJ and Kiefel J; *South Australia v Totani* (2008) 242 CLR 1, [62] per French CJ; *International Finance Trust Company Ltd v NSW Crime Commission* (2009) 240 CLR 319, [54]-[55] per French CJ, [88]-[89] per Gummow and Bell JJ.

9 See, for example, *Applicant VEAL of 2002 v Minister for Immigration* (2005) 225 CLR 88, [15]-[16].

10 *SZBEL v Minister for Immigration* (2006) 228 CLR 152, 160-61, [26].

11 *Gypsy Jokers Motorcycle Club Inc v The Commissioner of Police* (2008) 234 CLR 532, [182] per Crennan J; *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, [24] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.

12 *Commissioner of Police v Tanos* (1958) 98 CLR 383, 395-6 per Dixon CJ and Webb J (Taylor J concurring), cited in *Saeed v Minister for Immigration* (2010) 241 CLR 252, [14] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ; *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319, [74] (fn 66); and *Gypsy Jokers Motorcycle Club Inc v The Commissioner of Police* (2008) 234 CLR 532, [182] per Crennan J.

13 (2007) 33 WAR 245, [9]-[58].

14 (2007) 33 WAR 245, [56]-[57]. See also the decision of *Charkaoui v Minister for Citizenship and Immigration* [2007] 1 SCR 350, [32]-[46], where the Supreme Court of Canada recognised that the requirement that evidence not be disclosed (in circumstances where a judge had determined that disclosure would be injurious to national security or the safety of any person) did not compromise the

> "...courts in those jurisdictions have not concluded that the right of a party to have unrestricted access to all the information, upon which a court relies, is an essential or indisputable component of a fair trial."
>
> "...it has been acknowledged that the content of the requirements of procedural fairness or fundamental justice will depend upon the particular circumstances of the case and cannot be prescribed in the abstract. Further, in each jurisdiction, it has been expressly recognized that the ordinary requirements of procedural fairness, including the ability of a party to know the case that he or she has to meet, must sometimes yield to a countervailing public interest in the protection of the confidentiality of evidentiary material, even as against a party to the proceedings. In some jurisdictions with particular statutory charters of human rights, that conclusion has depended upon the provision of legislative safeguards against the abuse of such powers. However, even in those jurisdictions, the courts have generally, but not invariably, shown an inclination to leave the striking of the appropriate balance to the legislature rather than usurp that function themselves."

13. In *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*,[15] *K-Generation Pty Ltd v Liquor Licensing Court*[16] and *South Australia v Totani*[17] this Court has recognised that legislation imposing requirements on a court to take steps to maintain the confidentiality of criminal intelligence, which may include denying a party any access to that material, will not infringe the requirements of Chapter III of the Constitution.

14. Further, it is open to a State legislature to modify the rules of procedural fairness in relation to the exercise of functions by an administrative tribunal, including a tribunal of which judicial officers are members, by requiring that access to material be denied to a party to proceedings before the tribunal.[18] If the rules of procedural fairness can be modified so as to exclude access to material before an administrative tribunal, including a tribunal with a judicial membership, then there is no reason why a State Parliament should not have power to confer a function on a State court in the exercise of non-federal jurisdiction in a manner which protects criminal intelligence against disclosure.

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independence or impartiality of the judge. However, the legislation was held to be inconsistent with s. 7 of the *Canadian Charter of Rights* on other grounds.

15 (2008) 234 CLR 532, [12], [33], [36] per Gummow, Hayne, Heydon and Kiefel JJ; [192] per Crennan J (Gleeson CJ concurring at [1]).

16 (2009) 237 CLR 501, [10], [61]-[63] per French CJ, [149] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ.

17 *South Australia v Totani* (2008) 242 CLR 1, [121]-[125] per Gummow J (French CJ concurring at [44], Crennan and Bell JJ concurring at [416]), [280]-[283] per Heydon J.

18 *Bennett & Co v Director of Public Prosecutions (WA)* (2005) 31 WAR 212, 222[45]; *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33, 53-6 per Brennan J; *Annetts McCann* (1990) 170 CLR 596, 598. See ss. 3(1), 160 and 80 of the *State Administrative Tribunal Act 2004* (WA) regarding "exempt matter"; see also ss. 35, 36, 36A, 39 and 39A of the *Administrative Appeals Tribunal Act 1975* (Cth).

15. Therefore, the circumstance that the Queensland Act provides for the Supreme Court to receive criminal intelligence to which a party to the proceedings is denied access neither deprives the Court of one of its defining characteristics nor requires the Court to act in a manner which is repugnant to the judicial process in a fundamental degree. To produce invalidity something more is required.

16. The additional matters to which the Respondents refer concern:

    (a) Provision for the making and determination of a criminal intelligence declaration in the absence of the respondent; and

    (b) Restrictions on the receipt of evidence as to the identity of informers.

10 17. Before considering those particular matters, it is appropriate to have regard to the broader statutory context in which the impugned provisions appear.

Statutory Context

18. The regime established by the Queensland Act shares most of the attributes of ordinary judicial decision making.

19. The provisions of the Queensland Act relating to criminal intelligence declarations and criminal organisation declarations do not impair the decisional independence of the Supreme Court. The Queensland Act does not oblige the Supreme Court to act upon the direction, or at the behest, of the executive.[19] Nor does the Queensland Act require the Court to merely implement an executive determination without
20 undertaking any independent curial determination as to whether the information is criminal intelligence and whether a respondent is a criminal organisation.[20] Further, the Queensland Act does not enlist the Supreme Court to give effect to legislative and executive policy,[21] allowing no consideration by the Supreme Court of the need for the criminal intelligence declaration or the criminal organisation declaration.[22]

20. It is for the Supreme Court to make an independent assessment as to whether a criminal intelligence declaration should be made, and it may only be made if the

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19 See *Gypsy Jokers Motorcycle Club Inc v The Commissioner of Police* (2008) 234 CLR 532, [7] per Gleeson J, [33] and [36] per Gummow, Hayne, Heydon and Kiefel JJ; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, [10], [61]-[63], [98] per French CJ; cf. *South Australia v Totani* (2008) 242 CLR 1, [142] and [149] per Gummow J, [229] per Hayne J.

20 cf. *South Australia v Totani* (2008) 242 CLR 1, [420], [428] and [436] per Crennan and Bell JJ.

21 cf. *South Australia v Totani* (2008) 242 CLR 1, [481] per Kiefel J.

22 cf. *South Australia v Totani* (2008) 242 CLR 1, [474]-[478] per Kiefel J.

Supreme Court is satisfied the information is criminal intelligence.[23] This requires the Supreme Court to be satisfied that the information relates to actual or suspected criminal activity, 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.[24]

21. This is information of a kind which the courts have recognised is capable of attracting public interest immunity.[25] Further, unlike the legislation considered in *Gypsy Jokers*, *K-Generation*, and *Totani*, the Queensland Act provides for the Supreme Court to balance competing public interest considerations in determining whether a criminal intelligence declaration should be made. In the former cases, if the relevant court determined the relevant material to have the status of criminal intelligence then the confidentiality requirements were automatically engaged. Under the Queensland Act, once the Supreme Court determines that material is criminal intelligence it then retains discretion as to whether or not to make a criminal intelligence declaration. In exercising that discretion the Supreme Court may have regard to whether the matters favouring preserving confidentiality outweigh any unfairness to the respondent.[26] It is open to the Supreme Court, in the exercise of its discretion, to form the view that the objects do not outweigh the unfairness to a respondent and decline to make a criminal intelligence declaration. In any event, as members of this Court accepted *Nicholas v The Queen*, the alteration of common law rules concerning the balancing of conflicting public interest considerations does not, even in the exercise of federal jurisdiction, constitute an impermissible intrusion on the judicial power of the Commonwealth.[27]

22. Likewise, it is for the Supreme Court to make an independent assessment of whether a criminal organisation declaration should be made. The Queensland Act does not

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23 Section 72(1) of the Queensland Act.

24 Section 59(1) of the Queensland Act.

25 *Sankey v Whitlam* (1978) 142 CLR 1. See also the discussion in *Gypsy Jokers Motorcycle Club Inc v The Commissioner of Police* (2008) 234 CLR 532, [5] per Gleeson J, [23]-[24] per Gummow, Hayne, Heydon and Kiefel JJ, [180] per Crennan J.

26 Sections 60(a) and 72(2) of the Queensland Act.

27 *Nicholas v The Queen* (1998) 193 CLR 173, [55] per Brennan J, [159]-[160], [164] and [167] per Kirby J, [234] and [243]-[244] per Hayne J.

dictate whether any particular organisation should be a declared organisation. Such a declaration may only be made if the Supreme Court is satisfied that the criteria in s. 10(1) of the Queensland Act are satisfied. The fact that information is criminal intelligence does not mean that a criminal organisation declaration will be necessarily be made.[28] The weight to be attributed to criminal intelligence in a criminal organisation declaration application remains in the discretion of the Supreme Court.

23. Even when the conditions to the power to make a criminal intelligence declaration[29] or a criminal organisation declaration[30] are satisfied, the Supreme Court is not required to make a declaration. The Court retains discretion as to whether to do so.

24. Whilst s. 72(2) of the Queensland Act refers to some particular matters to which the Supreme Court may have regard when deciding whether or not make a criminal intelligence declaration, this does not limit the matters that the Supreme Court may consider, and the decision to declare information is criminal intelligence remains in the discretion of the Supreme Court.[31]

25. Likewise, whilst s. 10(2)(a) of the Queensland Act refers to some particular matters to which the Supreme Court must have regard when deciding whether or not make a criminal organisation declaration, the Supreme Court may also have regard to anything else the Court considers relevant and it is left for the Supreme Court to determine what matters are relevant.[32]

26. In terms of the rules of evidence, applications for both criminal intelligence declarations and criminal organisation declarations must be in writing, must comply with the requirements of ss. 63(3) and 8(2)-(6) of the Queensland Act respectively, and must be supported by an affidavit. An affidavit relied upon in an application under the Queensland Act may only contain a matter if direct oral evidence of the matter would be admissible,[33] except in relation to an affidavit relied on in an application for a criminal intelligence declaration. Such an affidavit may contain statements based on information and belief if the person making the affidavit states

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28 See also *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, [77] per French CJ, [148] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ.
29 Section 72(6) of the Queensland Act.
30 Section 10(1)(2) of the Queensland Act.
31 Sub-sections 72(1) and (3) of the Queensland Act.
32 Section 10(2)(b) of the Queensland Act.
33 Section 107(1) of the Queensland Act.

the sources of the information and the grounds for the belief.[34] This is no different from the position in relation to, for example, affidavits in interlocutory applications,[35] applications for summary judgment[36] and the evidentiary provisions regarding business records.[37] It is no more than a modification of the hearsay rule. Parliament may vary the rules of evidence without infringing Chapter III of the Constitution.[38]

27. Questions of fact are to be decided on the balance of probabilities.[39]

28. Police officers or officers of external agencies (other than informants) may be called at a hearing of a criminal intelligence declaration to give evidence and be cross-examined by the court or the COPIM.[40]

29. There is no prohibition on the giving of reasons.[41] Rather, the usual judicial obligation to give adequate reasons for the Court's decisions will apply.[42]

30. Further, the Queensland Act provides for the appointment of a Criminal Organisation Public Interest Monitor ("COPIM").[43] The functions of the COPIM are to:[44]

    (a) monitor each application to the Supreme Court for a criminal organisation order or the variation or revocation of a criminal organisation order; and

    (b) monitor each criminal intelligence application; and

    (c) test, and make submissions to the Supreme Court about, the appropriateness and validity of the monitored application.

31. The COPIM is to be given all material given by the applicant to the Supreme Court.[45]

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34 Section 61 of the Queensland Act; such an affidavit may also be admitted in evidence in the proceedings for the substantive application: s. 107(2) of the Queensland Act.

35 Order 6, rules 2(c) and 3A of the *Rules of the Supreme Court 1972* (WA); s. 75 of the *Evidence Act 1995* (Cth).

36 Order 14, rule 2(2) of the *Rules of the Supreme Court 1972* (WA); rule 13.1(1)(b) of the *Uniform Civil Procedural Rules 2005* (NSW).

37 Section 79C(3) of the *Evidence Act 1906* (WA); sub-ss. 69(2) and (4) of the *Evidence Act 1995* (Cth).

38 See *Nicholas v The Queen* (1998) 193 CLR 173.

39 Section 110 of the Queensland Act.

40 Section 71 of the Queensland Act.

41 cf. *Wainohu v NSW* (2011) 243 CLR 181, [82] per Gummow, Hayne, Crennan and Bell JJ.

42 *Mt Lawley Pty Ltd v Western Australian Planning Commission* (2004) 29 WAR 273, [26]-[28] and cases there cited; see also *Wainohu v NSW* (2011) 243 CLR 181, [54]-[55] per French CJ and Kiefel J.

43 Section 83(1) of the Queensland Act.

44 Section 86 of the Queensland Act.

45 Sections 16(5), 88(1), 63(6) of the Queensland Act.

32. At any hearing where the COPIM appears, the COPIM may present questions for the applicant, examine or cross-examine witnesses and make submissions.[46]

33. The fact that the COPIM is unable to make a submission to the Supreme Court while a respondent or their legal representative is present,[47] and the fact that the court may, in its discretion, exclude the COPIM from the hearing while a respondent or their legal representative are present,[48] does not limit the ability of the COPIM to carry out its functions. The function of the COPIM is to act as a contradictor in relation to those applications or parts of applications where there is no respondent, or the respondent is unable to be present. The COPIM is not needed when the respondent (or their legal representative) is able to review material, be present at the hearing and make submissions.

34. A public interest monitor of some description was also a significant feature in some of the international cases referred to by Martin CJ in the Western Australian Court of Appeal decision in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*.[49]

35. Finally, the Supreme Court is expressly permitted to have regard to whether the matters mentioned in s. 60(a)(i)-(iii) (the objects of Part 6 of the Queensland Act) outweigh any unfairness to respondent.[50]

Determination of Declarations in the Absence of the Respondent

36. The provisions requiring the exclusion of the respondent from the hearing and determination of an application for a criminal intelligence declaration are in some ways analogous to the common law rules for determining claims of public interest immunity. It is well established that a Court may inspect documents which may be the subject of a claim for public interest immunity without non-government parties to the proceedings in which immunity is claimed having access to the documents. Such an approach may preclude the effective participation of those other parties in the determination of whether the documents attract public interest immunity, even if the outcome of the determination may be of significance for the court's determination of the substantive matter.

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46 Section 89(2) of the Queensland Act.
47 Section 89(3) of the Queensland Act.
48 Section 89(4) of the Queensland Act.
49 (2007) 33 WAR 245, [24]-[25] and [37]-[39].
50 Section 72(2) of the Queensland Act.

37. For example, in *Alister v The Queen*,[51] the applicants for special leave to appeal to this Court had been convicted of conspiracy to murder and attempted murder. The Court found that the trial judge had erred in refusing to inspect documents subpoenaed from ASIO, in respect of which public interest immunity was claimed. After hearing argument, the Court granted special leave and stood the appeal over to enable the Director General of ASIO to produce the documents for the Court's inspection.[52] The majority of the Court found, after inspection, that the documents were not relevant to the issues at trial and could not have been used for the purposes of cross-examining Crown witnesses, that the claim of public interest immunity should have been upheld and that the appellants had not lost a chance of acquittal by the failure to produce the material.[53] In doing so, the majority noted:

> "The disposal of any point in litigation, without the fullest argument on behalf of the parties, is a course to which every court reacts adversely, however untenable the point in issue may first appear, and however unlikely it is that argument will assist it. The present case evokes the same reaction. But it is the inevitable result when privilege is rightly claimed on grounds of national security."

38. Where the courts have recognised an inherent power to inspect documents to which a party is denied access for the purposes of determining claims of public interest immunity, it is not inimical to Chapter III of the Constitution for a State Parliament to prescribe a discrete statutory process for determining claims of public interest immunity which excludes a respondent to an application for a declaration. The provisions have the added benefit of ensuring that the Supreme Court has before it information relevant to the exercise of its discretion under s. 10 of the Queensland Act.[54]

39. The decision of *International Finance Trust Co Ltd v NSW Crime Commissioner*[55] is to be distinguished from the present case:

    (a) In *International Finance* the Court was required to consider and determine an *ex parte* application for a restraining order which directly affected the property rights of the person to whom it related.[56]

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51 (1984) 154 CLR 404.
52 (1984) 154 CLR 404, 468 per Gibbs CJ, Wilson, Brennan and Dawson JJ.
53 (1984) 154 CLR 404, 469 per Gibbs CJ, Wilson, Brennan and Dawson JJ.
54 See the discussion in *Gypsy Jokers Motorcycle Club Inc v The Commissioner of Police* (2008) 234 CLR 532, [5] per Gleeson J, [23]-[24] per Gummow, Hayne, Heydon and Kiefel JJ, [180] per Crennan J; *South Australia v Totani* (2008) 242 CLR 1, [269] per Heydon J.
55 (2009) 240 CLR 319.
56 (2009) 240 CLR 319, [97] per Gummow and Bell JJ.

(b) A criminal intelligence declaration does not, of itself, have any effect on the liberty or property rights of any individual or organisation. Rather, it results in the identification of evidence that may not be disclosed to a respondent (or legal advisers) when the Supreme Court considers an application for a substantive order, including a criminal organisation declaration under s. 10 of the Queensland Act.

(c) It is only a criminal intelligence application which is required to be heard *ex parte*, and not a criminal organisation declaration. Whilst a respondent and their legal representative in a criminal organisation declaration hearing cannot be present when criminal intelligence is being considered, the respondent is able to make submissions on the question of whether the criminal organisation declaration should be granted.

(d) Unlike *International Finance*, the *ex parte* nature of a criminal intelligence application is not left to the discretion of the executive.[57]

Protecting the identity of informers and other witnesses

40. In civil proceedings the identities of police informants in a criminal case are subject to public interest immunity.[58] This immunity extends to criminal proceedings, except where the disclosure of the identity of the informants could help to show that the accused is innocent of the offence.[59]

41. In criminal proceedings there is mixed authority at common law as to whether a witness is able to give evidence in circumstances where identifying information is withheld from the accused and their legal representatives.

(a) In *Jarvie v Magistrates' Court of Victoria,*[60] the Full Court of the Supreme Court of Victoria held that the magistrate had the power to permit two undercover police witnesses to give evidence without disclosing their true

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57 (2009) 240 CLR 319, [45] per French CJ.

58 *Cain v Glass (No 2)* (1985) 3 NSWLR 230, 246-7 per McHugh JA (Kirby P concurring at 234); *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, 218 per Lord Diplock, 228 and 230 per Lord Halisham (Lord Kilbrandon concurring at 242), 232-33 per Lord Simon,

59 *Cain v Glass (No 2)* (1985) 3 NSWLR 230, 246-7 and 251 per McHugh JA (Kirby P concurring at 234); *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, 218 per Lord Diplock, 232-3 per Lord Simon.

60 [1995] 1 VR 84, 88-89, 99-100 per Brooking J (Southwell JJ concurring at 100), 100 per Teague J (although noting that exceptional circumstance should be shown).

names, and that the appropriate course was to balance the public interest factors in favour of anonymity with those in favour of the right to a fair trial.

(b) However, in *R v Davis*[61] the House of Lords held that protective measures imposed in a murder trial, including withholding a witness' address and identifying particulars from the accused and his legal advisers, and preventing the accused's legal counsel from asking any question which might enable the identification of the witness, rendered the trial unfair.[62] A similar conclusion was reached in *R v Stipendiary Magistrate at Southport; ex parte Gibson*.[63]

42. The basis of the decisions referred to at paragraph 41(b) above was the common law right of an accused to be confronted by his accusers[64] so that he might cross-examine and challenge their evidence.[65] The reasons in both cases were founded on the criminal process and do not seek to establish any general rule which operates outside the auspices of a criminal trial. As applications for criminal intelligence declarations and criminal organisation declarations are civil proceedings,[66] the issues which concerned the courts in those decisions do not arise.

43. In Australia, the courts have also permitted a party to rely on affidavit evidence containing material subject to public interest immunity which is not disclosed to the other party or their legal advisers.[67]

44. Considered against the above background, provision for the exclusion of evidence as to the identity of informers from curial proceedings, at least where the proceedings are not a trial for a criminal offence, does not deprive the Supreme Court of Queensland of any of its defining characteristics.

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61 [2008] 1 AC 1128, [35] per Lord Bingham of Cornhill, [46] per Lord Rodger of Earlsferry, [61]-[62] per Lord Carswell, [63] per Lord Brown of Eaton-Under-Heywood, [97]-[98] per Lord Mance.

62 The House of Lords also held that the trial did not meet the standards of article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*: [44] per Lord Rodger of Earlsferry, [96]-[97] per Lord Mance.

63 *R v Stipendiary Magistrate at Southport; ex part Gibson* [1993] 2 Qd R 687, 689-692 per Williams J, 701-702 per Ambrose J, 704-5 per Cooper J.

64 *R v Davis* [2008] 1 AC 1228, [5] and [34] per Lord Bingham of Cornhill, [44] per Lord Rodger of Earlsferry, [49] per Lord Carswell, [68] per Lord Mance; *R v Stipendiary Magistrate at Southport; ex part Gibson* [1993] 2 Qd R 687, 691 per Williams J, 701-702 per Ambrose J.

65 *R v Davis* [2008] 1 AC 1228, [5] and [34] per Lord Bingham of Cornhill, [44] per Lord Rodger of Earlsferry, [49] per Lord Carswell, [68] per Lord Mance.

66 Applications for both criminal intelligence declarations and criminal organisation declarations are civil proceedings. The standard of proof is on the balance of probabilities (s. 110) and the *Uniform Civil Procedural Rules 1999* (Qld) apply to the extent consistent (s.101).

67 *R v Khazaal* [2006] NSWSC 1061 (national security information); *Nicopoulos v Commissioner for Corrective Services* [2004] NSWSC 562 (intelligence information).

45. It is also relevant to note that any prejudice to a respondent (or future respondent) as a result of the provisions regarding informants is mitigated by a number of particular features of the Queensland Act. Firstly, if the intelligence was provided to the agency by an informant, the commissioner must file an affidavit setting out the matters referred to in s. 64(4) of the Queensland Act. These matters include information regarding the informant's criminal history,[68] information regarding allegations of professional misconduct, any inducements or rewards offered[69] and a statement that the officer holds an honest and reasonable belief that the relevant intelligence is reliable, including the reasons for that belief.[70] The provision of this information assists the Supreme Court in evaluating the informant's information for the purposes of the exercise of the discretion to make a criminal intelligence declaration.

46. Secondly, if the information was provided to the relevant agency by an informant, the Supreme Court may not declare that information is criminal intelligence unless some or all of the information is supported in a material particular by other information (including criminal intelligence) before the Supreme Court.[71]

47. Thirdly, the COPIM is to be provided with copies of the relevant material and may attend the criminal intelligence hearing (and the criminal organisation declaration hearing) for the purpose of testing the appropriateness and validity of application. In so doing, the COPIM may present questions for the applicant to answer, examine and cross-examine witnesses and make submissions.[72] Whilst the requirement to give material to the COPIM does not extend to the requirement to give any identifying information about an informant,[73] the COPIM is able to cross-examine a witness on matters relating to an informant or information obtained from an informant, with the only limitation being that no question may be asked that could lead to the disclosure of any identifying information.[74]

48. Fourthly, it is open to the Supreme Court, in the exercise of its discretion, to form the view that the object of allowing evidence to be admitted without enabling the

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68 Section 64(4)(d)(i) of the Queensland Act.
69 Section 64(4)(d)(ii)-(v) of the Queensland Act; but see also ss. 64(5)-(10) which details what is sufficient to comply with s. 64(4)(d)(i)-(iii).
70 Section 64(4)(e) of the Queensland Act.
71 Section 72(4)-(5) of the Queensland Act.
72 Sections 8(6), 62, 63(6), 66, 70(2)(c), 71, 86, 88 and 89 of the Queensland Act.
73 Section 88(2) of the Queensland Act.
74 Section 71(2) of the Queensland Act.

discovery of the existence or identity of confidential sources of information[75] does not outweigh the unfairness to a respondent caused by the use of the information from the informant in the circumstances permitted under the Queensland Act,[76] and therefore decline to make a criminal intelligence declaration.

49. Finally, the weight to be attributed to any criminal intelligence from an informant remains in the discretion of the Supreme Court.

Section 10(1)(c) of the Queensland Act

Construction of the Queensland Act: Identifying the risk to be assessed

50. Section 10(1)(c) of the Queensland Act requires, as one of three conditions for the existence of the Supreme Court's discretion to make a criminal organisation declaration, that the respondent organisation "is an unacceptable risk to the safety, welfare and order of the community."

51. That condition is imposed in the context of an Act which has as its principal object the disruption and restriction of activities of organisations involved in serious criminal activity.[77] The specific matters to which the Supreme Court is directed to have regard in considering whether or not to make a criminal organisation declaration are concerned with "serious criminal activity"[78] and convictions of the members or former members of the organisation.[79]

52. The principal operation of a criminal organisation declaration is as a precursor to the making of a control order or an interim control order. A control order can only be made if the Supreme Court is satisfied that the respondent to the application for a control order engages in, or has engaged in, serious criminal activity.[80] An interim control order can only be made where the Supreme Court is satisfied that there are reasonable grounds for believing that there is a sufficient basis to make the final order.[81] That will include a requirement that the Supreme Court, when considering the application for an interim control order, is satisfied that there are reasonable

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75 Section 60(a)(ii) of the Queensland Act.
76 Sectin 72(2) of the Queensland Act.
77 Long Title and s. 3(1) of the Queensland Act.
78 Sections 10(2)(a)(i), (iii) and (iv) of the Queensland Act.
79 Section 10(2)(a)(ii) of the Queensland Act.
80 Sections 18(1)(b) and (2)(a) of the Queensland Act.
81 Section 21(3) of the Queensland Act.

grounds for believing that the respondent has engaged in, or will engage in, serious criminal activity.

53. While the existence of a criminal organisation declaration is a mandatory relevant consideration when the Supreme Court deals with an application for a public safety order,[82] it is not a condition to, or a criterion for the exercise of, the power to make a public safety order.[83]

54. The existence of a criminal organisation declaration may satisfy one of the conditions for making a fortification removal order.[84] However, the power to make a fortification removal order is also conditioned on the Court being satisfied that the extent and nature of the fortification is excessive for any lawful use of that type of premises.[85] The concern of that part of the Queensland Act is with fortifications which facilitate the use of the relevant premises for unlawful purposes.

55. "Serious criminal activity" is defined by the Queensland Act to mean the commission of a "serious criminal offence" or an act or omission outside Queensland which, if done in Queensland, would have been or would be a serious criminal offence.[86]

56. In the above statutory context, the risk to the safety, welfare or order of the community referred to by s. 10(1)(c) of the Queensland Act must arise from unlawful conduct, particularly that which constitutes serious criminal activity, by the organisation, its members or associates. That is, the Supreme Court's assessment of an unacceptable risk is an assessment of the risk of harm as a result of the commission of offences (or engaging in conduct outside Queensland which would be an offence in Queensland).

"Unacceptable risk"

57. The concept of "unacceptable risk" is not unknown to the courts. Courts commonly are required to conduct an evaluation of the risk or probability of harm occurring if an order is, or is not, made in the exercise of a discretionary judgment. In such a case the court will inevitably be required to consider whether the magnitude of the risk justifies the making, or the refusal to make, an order of a particular kind. That is

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82 Section 28(2)(b)(i) of the Queensland Act, read with the definition of "criminal organisation" in Schedule 2 to the Queensland Act.
83 These are specified in s. 28(1) of the Queensland Act.
84 Section 43(1)(b)(ii) of the Queensland Act.
85 Section 43(1)(c) of the Queensland Act.
86 Sections 6 and 7 of the Queensland Act, read with Schedule 1 to that Act.

necessarily a judgment about whether a risk is "acceptable" or "unacceptable". Sometimes the court will express the question in those terms.

58. For example, in *M v M*,[87] this Court regarded the test to be applied when considering the significance of allegations of sexual abuse for the exercise of the Family Court's jurisdiction to make custody orders as "best expressed" by saying:

> "that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse." (emphasis added)

59. In *Dupas v The Queen*,[88] this Court held, in the course of deciding that a stay of a criminal trial was not warranted, that:

> "the pre-trial publicity was not such as to give rise to an unacceptable risk that it had deprived the appellant of a fair trial." (emphasis added)

Unacceptable Risk and Criminal Offences

60. Further, the courts are regularly required to assess the risk to society presented by a person being sentenced for a criminal offence. It is established that, while a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection from the risk of recidivism on the part of the offender, the protection of society is a material factor in fixing an appropriate sentence.[89] Sentencing legislation may also specifically provide for the protection of the community as a purpose of sentencing or a relevant sentencing consideration.[90]

61. Further, State statutes may make provision for the indefinite detention of an offender for a period beyond that which would result from the imposition of a sentence proportionate to the offender's criminality. Such an indefinite sentence may be imposed by reference to considerations such as the danger or risk which the offender will pose to society.[91] Those provisions may engage the courts in an assessment of the risk of the offender re-offending in a manner which presents a danger to society,

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87 (1988) 166 CLR 69, 78 per Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ.

88 (2010) 241 CLR 237, [39] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

89 *Veen v The Queen (No 2)* (1988) 164 CLR 465, 472-3 per Mason CJ, Brennan, Dawson and Toohey JJ.

90 See *Crimes (Sentencing Procedure) Act 1999* (NSW), ss. 8(c), 60(1) and s. 7 of Schedule 1; *Sentencing Act 1995* (WA), s. 6(4)(a).

91 *McGarry v The Queen* (2001) 207 CLR 121; *Lowndes v The Queen* (1999) 195 CLR 665; *Chester v The Queen* (1988) 165 CLR 611.

usually at some future time when the offender would otherwise be released from custody.[92]

62. Risk of harm arising from future offending is also a consideration to which courts may have regard in deciding whether to grant bail to a person charged with or convicted of a criminal offence. When exercising its jurisdiction, implied from s. 73 of the Constitution, to grant bail to preserve the utility of pending or proposed appeals, this Court may consider whether the defendant poses a risk to the community or a particular individual.[93] The same consideration may arise under State bail legislation.[94]

10 63. In *Fardon v Attorney General (Qld)*,[95] this Court held valid a provision which authorised a State court to make an order for the continuing detention of a prisoner convicted of sexual offences where there was "an unacceptable risk that the prisoner will commit a serious sexual offence" if released from custody.

64. In *Thomas v Mowbray* the majority of this Court found that a condition for the exercise of the power to issue an interim control order was not expressed so as to be insusceptible of strictly judicial application.[96] A condition for the exercise of that power was that the court was satisfied that the making of the order would substantially assist in preventing a terrorist act.[97] A "terrorist act" was defined to include certain acts which create "a serious risk to the health or safety of the
20 public".[98] Gleeson CJ regarded the question of whether "someone who had been trained by terrorists poses an unacceptable risk to the public" as capable of judicial evaluation.[99] Gummow and Crennan JJ recognised that "the protection of the public as a purpose of decision-making is not alien to the adjudicative process" in rejecting an objection by the plaintiff in that case to "the engagement of issuing courts in the assessment of risk to the public".[100] The fact that a court may be required to have

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92 See, for example, *Crimes (Serious Sex Offenders) Act 2006* (NSW), ss. 9(3) and 17(4)(a); *Dangerous Sexual Offenders Act 2004* (WA), s. 7(1). The operation of the latter provisions was considered in *DPP (WA) v GTR* (2008) 38 WAR 307, [14]-[27].

93 *United Mexican States v Cabal* (2001) 209 CLR 165, [62] per Gleeson CJ, McHugh and Gummow JJ.

94 Clause 1(a)(ii) and(iii) of Part C, Schedule 1 to the *Bail Act 1982* (WA).

95 (2004) 223 CLR 575, esp at [22] per Gleeson CJ, [97]-[98] per Gummow J (Hayne J concurring) [225] per Callinan and Heydon JJ.

96 (2007) 233 CLR 307, [19]-[28] per Gleeson CJ, [71]-[95] per Gummow and Crennan JJ, [595] per Callinan J, [651] per Heydon J, Kirby and Hayne JJ contra.

97 Section 104.4(1)(c)(i) of the *Criminal Code* (Cth), reproduced at (2007) 233 CLR 307, [572].

98 Section 101.1(1) and (2)(e) of the *Criminal Code* (Cth), reproduced at (2001) 233 CLR 307, [566].

99 (2007) 233 CLR 307, [28].

100 *Thomas v Mowbray* (2007) 233 CLR 307, [109]-[110], Callinan J concurring at [595]-[600].

regard to, or give effect to, a legislatively prescribed policy, or give content to a broad standard, did not spell invalidity.[101]

65. As was noted in *Thomas v Mowbray*, the power of justices of the peace to bind persons over to generally be of good behaviour could be exercised on the court's assessment of a risk of criminal conduct against the public at large.[102] Similarly, the issue of apprehended violence orders by courts commonly turns on the relevant court's assessment of the risk that a respondent will commit an offence or engage in behaviour likely to lead to a breach of the peace.[103]

Assessing whether risk arising from Criminal Conduct is "Unacceptable"

66. Whether the reference is to "an unacceptable risk", as in the Queensland Act, or simply to "a risk", as in the NSW,[104] South Australian,[105] Northern Territory[106] and the Western Australian[107] Acts, the essential task required of the court remains the same. That task is to consider whether the nature and extent of the risk to public safety represented by the organisation is such as to justify the exercise of the discretion to make a declaration. The nature of the task in assessing "unacceptable risk" in the context of dangerous sexual offenders legislation was described by Wheeler JA in the following terms in *DPP (WA) v Williams*:[108]

> "In my view, an 'unacceptable risk' in the context of s. 7(1) is a risk which is unacceptable having regard to a variety of considerations which may include the likelihood of the person offending, the type of sexual offence which the person is likely to commit (if that can be predicted) and the consequences of making a finding that an unacceptable risk exists. That is, the judge is required to consider whether, having regard to the likelihood of the person offending and the offence likely to be committed, the risk of that offending is so unacceptable that, notwithstanding that the person has already been punished for whatever offence they may have actually committed, it is necessary in the interests of the community to ensure that the person is subject to further control or detention."

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101 *Thomas v Mowbray* (1002) 233 CLR 307, [80]-[92] per Gummow and Crennan JJ.

102 (2007) 233 CLR 307, [16] per Gleeson CJ, [116]-[120] per Gummow and Crennan JJ; see also G Flick, *Civil Liberties in Australia* (1981), 113-118.

103 See, for example, ss. 11A and 34 of the *Restraining Orders Act 1997* (WA).

104 Section 9(1)(b) of the *Crimes (Criminal Organisations Control) Act 2009* (NSW), considered in *Wainohu v NSW* (2011) 243 CLR 181, and s. 9(1)(b) of the *Crimes (Criminal Organisations Control) Act 2012* (NSW).

105 Section 11(1)(b) of the *Serious and Organised Crime (Control) Act 2008* (SA), as amended by the *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012* (SA).

106 Section 18(2)(b) of the *Serious Crime Control Act 2009* (NT).

107 Section 13(1)(c) of the *Criminal Organisations Control Bill 2012* (WA) which has been passed by the Legislative Assembly and the Legislative Council but has yet to receive Royal Assent.

108 (2007) 35 WAR 297, [63], a passage adopted by Steytler P and Buss JA in *DPP (WA) v GTR* (2008) 38 WAR 307, [26].

67. As this passage indicates, the task of assessing "unacceptable risk" is capable of judicial performance.

Issue is not categorisation as judicial power but whether institutional integrity of a State Court is affected

68. In any event, even if (contrary to the above submissions) the inquiry required by s. 10(1)(c) of the Queensland Act were to be categorised as non-judicial in nature, it would remain within the legislative power of the Queensland Parliament to vest the power to make declarations in the Supreme Court.

69. In *Thomas v Mowbray* a question was whether the impugned Commonwealth legislation engaged the judicial power of the Commonwealth. The question as to whether the legislative criteria were sufficiently certain arose in that case because the Commonwealth Parliament could only invest judicial power in the relevant court. The question posed in a challenge to State legislation is different. As Gummow J noted in *Fardon*,[109] when finding valid State laws which the Commonwealth could not enact:

> "The repugnancy doctrine in Kable does not imply into the Constitutions of the States the separation of judicial power mandated for the Commonwealth by Ch III. That is fundamental for an understanding of Kable."

70. As State laws can validly invest a State court with non-judicial power, even if the Queensland Act were found to invest the Supreme Court of that State with non-judicial power it would not necessarily be invalid. Some abrogation of the defining characteristics of that Court as a Supreme Court would be required for the Respondents' argument to succeed. It is not enough to show that the power is non-judicial; it is necessary for the Respondents to show that the exercise of the power is "repugnant to the judicial process in a fundamental degree"[110] or otherwise compromises the one of the defining characteristics of that Court.[111]

71. It may also be noted that in NSW, South Australia, Western Australia and the Northern Territory the assessment is in fact under taken by an eligible judge or, in the case of Western Australia and the Northern Territory, a retired judge. Even if

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109 *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, [86] per Gummow J, Hayne J concurring); see also [36] per McHugh J.

110 *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, [98] per Gummow and Bell JJ, [136] per Hayne, Crennan and Kiefel JJ, [140] per Heydon J.

111 *Forge v ASIC* (2006) 228 CLR 45, [41] per Gleeson CJ, [63] per Gummow, Hayne and Crennan JJ, [238] per Callinan J; *Kirk v Industrial Relations Court of NSW* (2010) 239 CLR 531, [96] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

(contrary to the above submissions) the Queensland provision were found to be invalid, different considerations would arise in considering the validity of those other State statutes where the power is not invested in a court.

Validity of Sections 9 and 106 of the Queensland Act

72. The Attorney General for Western Australia adopts the submissions of the Applicant and the Attorney-General for Queensland, to the effect that provision for the respondent organisation to file a response at least 5 days before the return date of the application for a declaration does not impair the institutional integrity of the Supreme Court of Queensland.

10 **PART VI TIME REQUIRED FOR ORAL ARGUMENT**

73. The Attorney General for Western Australia estimates that he will require 15 minutes for the presentation of his oral argument.

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