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

And

FINKS MOTORCYCLE CLUB, GOLD COAST CHAPTER

Second Respondent

REPLY OF THE FIRST AND SECOND RESPONDENTS

PART I: Internet publication

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

PART II: Reply

Criminal intelligence

2 The submissions of all those opposed to the respondents[1] proceed on the hypothesis that the impugned criminal intelligence provisions set out incidents of the exercise of judicial power that are consistent with the traditional judicial process. They identify each as an exceptional exercise of power well known to that process. It is asserted that in certain circumstances such as public interest immunity applications, courts have exercised the power to keep relevant information out of evidence. The point is also taken that courts can exercise the exceptional power of closing proceedings to the public,[2] and also that courts in exceptional circumstances keep information confidential from a party, and that, on exceptional occasions, courts sanction a process whereby information is kept from a legal representative who is unable to appear because of the permanent *ex parte* nature of the proceedings.

3 What the submissions do not grapple with is that the relevant provisions of the Act heap exceptionalism upon exceptionalism so that the end result is that the procedures

[1] Specific inconsistencies within and amongst the interveners' submissions and particular examples of the issues will be addressed in oral argument.

[2] See the reference to *Hogan v ACC* (2010) 240 CLR 651 by the Commonwealth Attorney at [57] which does not address the issue of the collocation of circumstances dealt with in this reply *viz* the exercise being tainted by the denial of procedural fairness in addition to confidentiality. It is the balancing exercise identified by the applicant at [55] in its submissions with which the respondents are concerned and which generates the relevant unfairness.

Filed on behalf of the first and second respondents
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to be employed by the court depart so fundamentally from traditional judicial procedure as to offend the *Kable* doctrine.

4 The criminal intelligence applications are *in camera*, and permanently *ex parte*, and the information is kept from a party and its legal representatives, and the other party and the Court are permitted to rely on that information *and* the Court is forbidden from regulating its own procedures so as to ameliorate any of those conditions in the interests of justice.

5 Further, it has been held by the Supreme Court of the United Kingdom in *Al Rawi v Security Service* [2012] 1 AC 531 that the very process presently in question finds no acceptable analogy in either procedures for the assessment of public interest immunity or for the protection of confidential information and trade secrets, and that the "safeguard" of a special advocate does not improve the situation. Neither the applicant nor any of the interveners refer to this authority despite fundamentally relying on the analogies and purported "safeguards" it dispels for their contention that there is no unacceptable departure from the judicial process.

6 In *Al-Rawi,* the Supreme Court held that there is no inherent power for a court in a civil trial, as there is none in a criminal trial,[3] to allow a procedure whereby a party and the court are able to rely on material that cannot be disclosed to the other party or its legal representatives even if disclosure was against the public interest and a special advocate was appointed to test the material.

7 In dismissing the analogy with public interest immunity Lord Dyson JSC said at [10]-[13] that features of a common law trial which are fundamental to the criminal and civil system of justice are the open justice and natural justice principles. Relying on the judgment of this Court in *Lee v The Queen* (1998) 195 CLR 594 at [32] where it was said that "confrontation and opportunity for cross-examination is of central significance to the common law adversarial system of trial", his Lordship went on to say at [14]:

> I do not believe that any of this is controversial, but it needs to be emphasised because, unlike the law relating to PII, a closed material procedure involves a departure from both the open justice and the natural justice principles.

At [41] his Lordship said:

> In many ways, a closed procedure is the very antithesis of the PII procedure. They are fundamentally different from each other. The PII procedure respects the common law principles to which I have referred. If documents are disclosed as a result of the process, they are available to both parties and to the court. If they are not disclosed, they are available neither to the other parties nor to the court. Both parties are entitled to full participation in all aspects of the litigation. There is no unfairness or inequality of arms. The effect of a closed material procedure is that closed documents are only available to the party which possesses them, the other side's special advocate and the court. I have already referred to the limits of the special advocate system.

8 Lord Hope of Craighead DPSC referred to the principles identified by Lord Dyson and at [72] said that "[t]he court has for centuries held the line as the guardian of these fundamental principles".

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[3] There being no relevant difference between the principles expressed in *R v Davis* for criminal trials which were said to be equally applicable to civil trials: cf applicant at [65]

9 The reference of Lord Dyson JSC to the "limits of the special advocate system" was expressed at [36] as involving a recognition that whilst it may "mitigate" some weaknesses its fundamental flaw was that the advocate was unable to take instructions from his or her client to enable the proper performance of his or her functions and, most importantly, it is not always possible for the trial judge to know, even with the assistance of the special advocate, when the special advocate is being hampered in the performance of their functions. Of course, the special advocate cannot test the material with any individual precision based on instructions as to its specific weaknesses, but merely with respect to the category of the type of information and
10 any apparent internal inconsistencies. At [37], his Lordship quoted a section of a report by the UK Parliamentary Joint Committee on Human Rights in respect of Counter-Terrorism Policy that dealt with special advocates as follows:

> After listening to the evidence of the special advocates, we found it hard not to reach for well worn descriptions of it as "Kafkaesque" or like the Star Chamber. The special advocates agreed when it was put to them that, in light of the concerns they had raised, "the public should be left in absolutely no doubt that what is happening...has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system". Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the
> 20 basic principles of adversarial justice in which lawyers are steeped, but it is very much against the basic notions of fair place as the lay public would understand them.

10 The Commonwealth Attorney-General refers to the lower court ruling in Canada in *Harkat* of the constitutionality of that special advocate system when dealing with the security clearance of aliens[4], but it needs to be borne in mind that under that legislative regime not only is a comprehensive summary of the secret information provided to the applicant but the judge always maintains control of the extent of communication that the special advocate is able to have with the applicant in order to take instructions.

11 On the issue of similarity of the task undertaken by a court in relation to confidential
30 information and trade secrets relied on as an analogy against the respondents, Lord Dyson JSC had this to say at [64]:

> [W]here the whole object of the proceedings is to protect a commercial interest, full disclosure may not be possible if it would render the proceedings futile. This problem occurs in intellectual property proceedings. It is commonplace to deal with the issue of disclosure by establishing "confidentiality rings" of persons who may see certain confidential material which is withheld from one or more of the parties to the litigation at least in its initial stages. Such claims by their very nature raise special problems which *require* exceptional solutions. I am not aware of a case in which a court has approved a trial of such a case proceeding in circumstances where one party
> 40 was denied access to evidence which was being relied on at the trial by the other party. [emphasis in original]

12 The conclusion drawn from the case was that there was no possibility of the court ordering such a procedure in the absence of statutory authority. That was perhaps a diplomatic way of saying unless "compelled" to by statute. The point remains that for Australian purposes, with an integrated federal judiciary, the impugned provisions of

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[4] cf the earlier decision of the Supreme Court of Canada in *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350 which held unconstitutional an earlier form of security clearance for aliens which did not have a special advocate procedure.

the Act do, as the UK Supreme Court recognised, represent a fundamental departure from the traditional judicial process and therefore breach the limit on permissible State legislative action. In circumstances where the court is prevented from being able to allow disclosure of the material to ensure fairness, even to legal representatives for the respondents, who it must be said have an overriding duty to the Court, are part of the judicial process, and are intrinsically subject to the control of the Court, this case departs markedly from *K-Generation* and the provisions suffer from all the defects and more identified in *Al-Rawi*. Contrary to the submissions of the applicant at [34]-[38] it shows why the anterior test of classifying the intelligence as secret does not deal with the fundamental unfairness of the trial in the ability to rely on it in the absence of the respondents being able to deal with it.

13 None of this cuts away from the established doctrine, as it relies on the ability of the Court to control its own processes, and does impair federation in the sense identified by the applicant which is keen to ensure that States maintain the capacity to be "a laboratory of democracy in which experiments may be conducted". Putting to one side the fact that Justice Brandeis was referring to the political and social experiments which he had long championed, such "experimentation" does not extend to depriving a court of a State from having the capacity to control its own process in a fundamental way. *Al-Rawi* held that there was no inherent power to order this process exactly because it was a type of trial repugnant to every traditional understanding of the common law. In Australia, as the Commonwealth Attorney-General properly recognises at [35], a State statute cannot authorise that state of affairs.

14 Care also needs to be taken with the submission of the applicant at [56] that evidence may be discounted by a Court because it has not been tested. The centrality of this information, the inability of the respondents to specifically instruct to test it and why it may not be given weight are important considerations. The importance of the evidence may be in its dramatic impact – this does not lead to the conclusion that the more explosive and serious the intelligence that it follows that the weight is proportionately reduced and that the more apparently benign the evidence the easier it is to accept or give greater weight to. Without an adversarial process with some of the usual judicial protections and the involvement of the respondents in the testing of the evidence, the secrecy means that there is no way in truly knowing why particular material was given weight or not.

15 To that may be added the submissions of the Commonwealth Attorney at [42]-[45] concerning the possibility of rights to appeal in the *UCPR* as somehow improving the character of the process. The "unassailability" referred to was the practical question of being able to test the judge's determination in relation to particular parts of intelligence. Setting on one side the usual appellate issues with the exercise of discretion and the ability to identify error and the reticence to interfere with factual findings based on inference and the "record", the procedure does not address the problem of an appeal by someone who was not involved in the primary process, who has no real understanding of what went on at first instance, where the true rationale for the decision making is not apparent, and where the COPIM, who may know some of these matters, is unable to assist, and where the client is unable to give real instructions about the errors committed even in a confined appellate process.

"Unacceptable risk"

16 The appropriateness of the task being undertaken is not concerned with the notion simpliciter of whether courts can assess "unacceptable risk", of course they can and do, but in the generality of the inquiry here at both ends of the spectrum. The examples given by the interveners, such as bail, *M v M*, *Mowbray* and *Fardon*, point to the very circumscribed inquiry of whether by dint of past conduct of a certain character, that conduct is at an unacceptable risk of being perpetuated by the individual in the future in a specific way, within a specific period, or to a specific individual. This may include the risk of a sexual offender committing the same offence against a particular person, or the risk of an alleged offender absconding before trial based on their particular characteristics and the conduct they are accused of: cf Gummow J in *Fardon* at 619 [106]-[108].

17 This is not a regime that is sui generis in nature or one where the factum upon which the Act turns is the particular status of an individual. This concerns a large number of individuals, over 100, who cannot even be said to be part of an unincorporated association, referred to only by nature of being a "motorcycle club" where the court is then asked to concern itself not with whether over 100 individuals acting in concert as a whole or some undefined smaller collection are at risk of committing some particular offence, but whether in some undefined way, the "club" presents an unacceptable risk to the safety, welfare or order of the community. What factual connection is required between particular conduct and by whom against which standard? The answer is none that is consistent with the judicial process, but one that requires identification with the Legislature and Executive as desiring to stop certain people associating because the policy of those organs has decreed it as such.

Time limits – question (vii)

18 The applicant at [80]-[84] gives a generous construction to secs 9 and 106 and their relationship with the *UCPR*. Practically, there is no difference to the respondents between invalidity and a construction of the sections that permits the respondents to make an application for an extension of time and allows the Court to consider in its discretion how much time shall be given to the respondents. The respondents are content with either outcome if this Court holds that the applicant's construction of the provisions is tenable. Justice Boddice clearly made the order staying the proceedings to accommodate these proceedings and without any reference to the impugned provisions, assuming he had the power to do so or considering that the consent orders fell within the definition of an "application by the Commissioner".

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