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

WRITTEN SUBMISSIONS ON BEHALF OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I: Publication of Submissions

1. These submissions may be published on the Internet.

Part II: Intervention

2. The Attorney General for the State of New South Wales ("NSW Attorney") intervenes pursuant to s 78A of the Judiciary Act 1903 (Cth) in support of the Applicant, in relation to such issues as may need to be determined by the Court concerning Chapter III of the Constitution and the application of the principles in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51.

Dated: 28 November 12

Filed on behalf of the Attorney General for NSW by:
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Part III: Leave to intervene

3. Leave to intervene is not required.

Part IV: Provisions, statutes and regulations

4. The NSW Attorney does not take issue with the statement of issues, material facts and applicable provisions of the Constitution, statutes and regulations as they are set out in the submissions of the Respondents.

5. A copy of the Criminal Organisation Act 2009 (Qld) ("the Act") is attached to the Respondents' submissions.

Part IV: Argument

10 Summary of issues and argument

6. As in South Australia v Totani (2010) 242 CLR 1 and Wainohu v New South Wales (2011) 243 CLR 181, the Court has before it a Chapter III challenge to a State Parliament's response to organisations involved in serious criminal activity which pose an "unacceptable risk to the safety, welfare or order of the community" (the formulation under the analogous NSW and South Australian laws was the not dissimilar "risk to public safety and order"). The Act has many similarities to the Act considered in Wainohu, whose only established constitutional defect was the absence of a requirement that the eligible judge give reasons.

7. The constitutional flaws in Totani and Wainohu are not present here. The two
20 questions of substance raised in this matter are whether a process which vests the making of a declaration of such an organisation in a Supreme Court is invalid, first, because it is incompatible with the judicial function for that Court to be required to determine whether an organisation poses, on "information", an "unacceptable risk to the safety, welfare or order of the community"; and second, because of the way the Supreme Court is required by the Act to treat "criminal intelligence", in particular the compulsory exclusion of all persons save for the Applicant police Commissioner and a special advocate ("the Monitor") from participation in court in:

(a) the declaration by the court that particular information is criminal intelligence (a process excluding even the Monitor in the case of an informant); and

(b) the use of such material by the court in exercising its undoubted discretion to choose to make a declaration that the organisation is a "criminal organisation", which declaration is an essential precondition to the making of a control order.

8. As to the first point, the test in s 10(1)(c) is closely analogous to the task vested in the same court, found by this Court to be valid in Fardon v Attorney-General (Qld) (2004) 223 CLR 575, namely deciding whether a prisoner presents a "serious danger to the community" because of an "unacceptable risk that the prisoner will commit a serious sexual offence". The courts often undertake tasks which involve complex policy judgments, not necessarily on the basis of admissible evidence, and this has been so for decades, so for example, the difficult questions "whether intelligence is relevant to security" and "whether a communication of intelligence is for purposes relevant to security" were held by this Court to be susceptible of judicial determination in Church of Scientology Inc v Woodward (1982) 154 CLR 25.

9. As to the second point:

(a) The declaration, while an essential precondition to the making of control orders, (which orders, if made and breached, can lead to criminal sanctions) does not have any direct adverse legal consequence for members of the organisation, or the organisation itself, save possibly as to reputation.

(b) The declaration has nothing to do with a criminal trial, so that whatever Chapter III limits may exist in a criminal trial need not be ruled on in this matter. And, as noted, the court retains a discretion to refuse to make a declaration.

(c) The challenge to the classification exercise is misconceived. All of the matters which may comprise criminal intelligence under the Act are well recognised categories of information attracting public interest immunity privilege. Here, the fact that the classification process involves a closed hearing is ameliorated, except in relation to informers, by use of a 'special

advocate' figure (the Monitor). In other words the practice is more favourable than at common law insofar as the Monitor sees the criminal intelligence and can test it. The supposedly unconstitutional features of this process identified in the Respondents' submissions do not advance their argument.

(d) As to informers, at common law, as Gleeson CJ, Clarke and Sheller JJA said in R v Smith (1996) 86 A Crim R 308 at 311 "the practice, which has long since hardened into a rule of law, that the identity of police informers will be protected from disclosure [means that in such cases the]... balance has already been struck; it falls on the side of non-disclosure except where, at a criminal trial, disclosure could help show that the accused is not guilty". In other words, the common law, outside of a presently irrelevant exception in criminal trials, is already unyielding in relation to that which would tend to identify an informer.

(e) Finally, as to the utilisation of the material classified as criminal intelligence in a substantive application in circumstances where it will not have been disclosed to the Respondents or their legal representatives, that is a rare but not unknown existing practice permissible under the common law as, for example, the cases of Amer v Minister for Immigration, Local Government and Ethnic Affairs (No. 1) (unreported, Federal Court of Australia, 18 December 1989, Lockhart J) and Nicopoulos v Commissioner for Corrective Services (2004) 148 A Crim R 74 demonstrate. If the common law permits the practice, its statutory adoption (which is certainly not unique to the Act) will not infringe the Kable principle.

(f) The Act is accordingly valid.

A permissible judicial policy judgment

10. The Respondents submit that the criteria in s 10(1)(c) of the Act involves a policy assessment devoid of adequate legal standards or criteria capable of judicial application because is requires an assessment of "unacceptable risk" to the "community".

11. The Respondents' contentions in relation to the assessment of "unacceptable risk" (Respondents' Submissions "RS" [37]) are inconsistent with the conclusion in Fardon that such a standard is sufficiently precise to engage the exercise of State judicial power: at 593 [22] per Gleeson CJ, 596-597 [34] per McHugh J, 657 [225] per Callinan and Heydon JJ.

12. Likewise, the Respondents' contentions in relation to the assessment of risk to the "community at large" (RS [37]) are inconsistent with Thomas v Mowbray (2007) 233 CLR 307. In Thomas v Mowbray, this Court rejected similar contentions advanced by the appellant in relation to a provision which required the court to be satisfied on the balance of probabilities that an order was "reasonably necessary, and reasonably appropriate and adapted *for the purpose of protecting the public from a terrorist act*" [emphasis added]. Gleeson CJ observed at 329 [17] that relevantly similar powers have traditionally been exercised by the judiciary and to decide that such powers are exclusively within the province of the executive branch of government would be contrary to our legal history, noting also at 334 [28] that "predictions as to danger to the public, which are commonly made against a background of the work of police, prison officers, public health authorities, welfare authorities, and providers of health care, are regularly part of the business of courts" (Heydon J agreeing at 526 [651]; see also Callinan J at 507-508 [596]; see generally Gummow and Crennan JJ at 352-353 [96]-[103]). So it is here.

13. Further, as Gummow and Crennan JJ there recognised, the protection of the public as a purpose of decision-making is not alien to the adjudicative process: at 355 [109], [110]. Their Honours' analysis did not suggest that the reference to the defined term "terrorist act" was decisive in rendering the risk assessment suitable for judicial determination: cf. RS [37].

14. Nor can the reliance upon material falling short of admissible evidence tip the balance to invalidity here; ascertaining the limits of far less precise criteria involving matters of policy has been found to be justiciable by the Courts: see Church of Scientology v Woodward per Mason J at 59-62, Brennan J at 75.

Criminal intelligence application

15. The Respondents' complaint in questions (i)-(v) (Special Case Book at 117-118) is as to the proposed reliance on information declared to be *criminal intelligence* in an application to the Supreme Court of Queensland for a declaration that the Second Respondent is a "criminal organisation" under s 8 of the Act: (RS [28]-[32]). Consisently with ss 66, 70 and 82 of the Act, that information was not provided to the Respondents or their legal representatives.

16. Before considering the scheme of the Act, it is necessary first to recall the rationale for the Kable principle. That principle is distinct from the limitations on Commonwealth legislative power that flow from the constitutional separation of federal judicial power. A State law that confers jurisdiction on a State Court will infringe Chapter III of the Constitution only if its effect is to substantially impair the independence and the impartiality of the State Court *as an institution*; that is, in the performance generally of its judicial functions and the exercise generally of its judicial powers: Fardon at 592-593 [19]-[21] per Gleeson CJ, 600-601 [41]-[42] per McHugh J, 617 [101] per Gummow J, 655-656 [219] per Callinan and Heydon JJ; Forge v Australian Securities and Investments Commission (2006) 228 CLR 45 at 67 [40] per Gleeson CJ, 76 [63] per Gummow J, Hayne and Crennan JJ, 136 [238] per Callinan J and 138 [244] per Heydon J; see also Wainohu at 208 [44] per French CJ and Kiefel J.

17. The Act only imposes requirements in relation to proceedings for declarations under the Act. It does not impose a general requirement on the Supreme Court (see K-Generation Pty Ltd v Liquor Licensing Court (2009) 237 CLR 501 at 542 [143] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

18. To the extent that the Act imposes a requirement on the court to proceed ex parte in respect of criminal intelligence, this does not have any implications for the capacity of the Supreme Court to discharge its various functions independently and impartially and in particular in the exercise of any federal jurisdiction that may be invested in it. Different questions might arise if this scheme were to be generally extended to criminal trials.

19. Bearing these matters in mind, there is nothing constitutionally repugnant about the direction in the Act that a criminal intelligence application made under Pt 6 is to be considered by the court without notice, of the application to, and participation by, persons other than the applicant and the Monitor: s 66.

20. As to non-participation, that is consistent with the effect of the practice of courts in relation to claims for public interest immunity. Courts must consider and determine public interest immunity claims on the basis that neither the party seeking access (nor its legal representatives) have access to the documents. That is because to disclose the documents, even on a restricted basis, to those acting for such a party, would be to encroach upon the confidentiality in the documents. In Commonwealth v Northern Land Council (1993) 176 CLR 604 at 620, the plurality said:

> There was ... no call for Jenkinson J to order that the documents be produced for inspection. But we would add that, even if there had been, the procedure of ordering production of documents for inspection by the legal representatives of one of the parties, even upon a restricted basis, before the claim for immunity had been decided by the Court, was open to serious question. Whatever the safeguards, it represents an encroachment upon the confidentiality claimed for the documents ... If inspection of documents is necessary to determine the question of immunity (and in this case it was not) then it ought to be carried out by the court before ordering production for inspection by a party [in a footnote their Honours noted that that was the procedure adopted in Alister v The Queen (1984) 154 CLR at 469]. No doubt this may in some cases cast a heavy burden on the court, but it is unavoidable if confidentiality is to be maintained until a claim for immunity is determined. [emphasis added]

Where that approach is taken, an opponent can frequently say little.

21. As to exclusion, although the procedure in Pt 6 of the Act mandates a general exclusion of legal representatives from access to the information, and that is not a general requirement for the determination of public interest immunity claims, the effect of exclusion is reached when there is no real participation in the determination of a claim at common law, as occurs when mere mention of the basis for the claim – such as an informer claim when there could be only one informer – must be, and is, avoided to preserve the privilege. In such matters the physical presence in court of opponents may belie their inability effectively to participate in

a privilege argument, which tends to confirm the Act's alteration to the common law is more apparent than real.

22. The public interest immunity analogy is directly applicable. All of the categories of material comprising 'criminal intelligence' are well established categories of material attracting public interest immunity privilege: see Attorney-General (NSW) v Stuart (1994) 34 NSWLR 667 at 675 per Hunt CJ at CL (Studdert J agreeing); Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (2008) 234 CLR 532 at 550 [5] per Gleeson CJ.

23. But of course, it is essential not to overlook the safeguards and discretions in the Act. As to informers, the court may not make a declaration that information provided by an informant is criminal intelligence unless it is supported in a "material particular" by other information before the court: s 72(4). And there must be a further affidavit in such cases, as required by s 64, which will allow the court to form a clear view as to the reliability of the informer's material, which, under the court's general discretion, may be discounted both at this stage (see s 72) as well as when deciding to make a declaration: see s 10. When applying the Kable principle to these provisions, it needs to be recalled that, as noted at [9(d)] above, in civil proceedings an informer claim defeats any countervailing interest in favour of disclosure as, by operation of a rule of the common law, the balance is struck against disclosure: R v Smith (1996) 86 A Crim R 308.

24. In all other instances of criminal intelligence, there is the substantially ameliorating role of the Monitor, who sees all and participates fully. Thus the Monitor is provided with access to the criminal intelligence, other than documents disclosing identifying information about an informant (s 77(3)-(4)), is entitled to be present during the hearings considering whether information is properly classified as criminal intelligence (s 70(2)), and has authority to present questions to the applicant, to examine or cross-examine witnesses (other than an informant) and to test and make submissions to the court about whether the application should be granted: ss 86, 89. The adverse effect of the ex parte nature of the proceedings as against the Respondent is thus substantially reduced.

25. Nor is the court unable to test such claims for itself. In all cases an affidavit to be relied on by the Commissioner at the hearing must be filed with the application: s 63(4). Given that the legislative conferral of jurisdiction on an established court brings with it the usual incidents of that court's exercise of jurisdiction, in the absence of contrary language (Gypsy Jokers at 555 [19]) the court, as was done in Alister v R (1983) 154 CLR 404 at [468]-[470], could insist on the filing of a further affidavit containing sufficient particularity to satisfy it.

26. In this respect, the Monitor takes on the role of 'special advocate' in the sense used in the United Kingdom, that is, an external advocate who reviews the relevant confidential material and in many ways represents the interests of a party in respect of that material (without disclosing it to the party). This process is provided for in the rules of the Special Immigration Appeals Commission, a superior court of record that deals with appeals from persons sought to be deported by the Home Secretary (see Special Immigration Appeals Commission Act 1997 (UK) s 6, Special Immigration Appeals Commission (Procedure) Rules 2003 (UK) rr 34-38; see generally IR (Sri Lanka) v Secretary of State for the Home Department [2012] 1 WLR 232; M v Secretary of State for the Home Department [2004] 2 All ER 863 at 868 [13]. The process was subsequently adopted in UK legislative schemes relating to the proscription of terrorist organisations (see Terrorism Act 2000 (UK) s 5 and Sch 3, Proscribed Organisations Appeal Commission (Procedure) Rules 2001 (UK) r 10) and control orders: see Prevention of Terrorism Act 2005 (UK) (since repealed), s 11 and Schedule, Civil Procedure Rules (UK) Pt 76). Here, the Monitor acts in the public interest but as an effective contradictor to the applicant.

27. Finally, as earlier noted, an application under s 63 of the Act that particular information be declared criminal intelligence does not require the court to receive or act upon information put forward by the Commissioner. To the contrary, under Pt 6 of the Act:

(a) the Court has a "discretion" to make a declaration of criminal intelligence only where it is "satisfied" that the information in fact meets that description as defined in s 59(1): s 72(1). The executive is not empowered

to determine the existence of facts (for example, the expectation of prejudice to a criminal investigation) sufficient to warrant classification;

(b) the court must carry out a balancing exercise, and in particular, the court may have regard to whether the public interest in preserving the secrecy of all categories of the information comprising the criminal intelligence is "outweighed" by any unfairness to the respondent (s 72(2)); and

(c) the court is not limited as to the matters it may consider in the exercise of its discretion (s 72(3)).

28. Thus, the court retains the function of determining whether the material should properly be classifed as criminal intelligence: although not identical, the analogies in favour of the Act's validity hold good with the legislation considered in Gypsy Jokers at 551-552 [7] per Gleeson CJ, at 558 [33], 559 [36] per Gummow, Hayne, Heydon and Kiefel JJ, at 594 [174] per Crennan J; and K-Generation at 527 [76] per French CJ, 542 [143]-[144] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ.

29. It is therefore not accurate to describe a declaration under s 72 as 'unlimited and unassailable' given that, as set out below, it remains the function of the court to determine what *weight* should be given to criminal intelligence relied upon as part of any substantive application (see RS [28]; cf. K-Generation at 527 [77] per French CJ, 543 [148] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

30. Finally, the Act is distinguishable from the legislation considered in International Finance Trust Co Ltd v New South Wales Crime Commission (2009) 240 CLR 319. In International Finance, the legislation directed that the application for a freezing order proceed *ex parte* if so requested by the executive. The effect of such a freezing order was immediately to restrain the assets of the affected party and was effectively unchallengeable, at least at first instance. Here, the making of a declaration under s 72 is an administrative act which does not immediately affect the legal rights or obligations of the Respondents. Further, a later substantive application under s 8 of the Act is *inter partes* except to the extent that application deals with the criminal intelligence. In that respect, as set out below, dealing with such material to the exclusion of the Respondents is at least consistent with the

approach of courts in some cases when relying on documents that are the subject of public interest immunity.

Substantive application under s 8

31. In respect of an application under s 8 that an organisation be declared a criminal organisation, the Act does not require the court to receive or act upon information put forward by the Commissioner. To the contrary, the court:

(a) has a determinative role in the process of evaluating the application under s 8 and an ultimate discretion to refuse the application in any event; to make such a declaration, the court must be satisfied that:

(i) the respondent is an organisation (s 10(1)(a));

(ii) members of the organisation associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity (s 10(1)(b)); and

(iii) the organisation is an unacceptable risk to the safety, welfare or order of the community (s 10(1)(c)).

(b) continues to operate under the usual rules of court, to the extent that those rules are consistent with the Act, albeit that 'information' can be acted upon (s 101); and

(c) is not bound to accept the truth of evidence it receives and may give the evidence such weight as it considers appropriate.

32. Critically, the court retains the function of determining for itself, on the basis of evidence from both parties (including any criminal intelligence) whether there is in fact information suggesting a link exists between the alleged criminal organisation and serious criminal activity: s 10(2)(a)(ii). Section 10(2)(b) requires the court to have regard to anything else it considers relevant, and does not constrain either the information which the court might consider relevant or the weight to be placed on such material.

33. In particular, it remains the function of the court to determine what *weight* should be given to the criminal intelligence relied upon as part of the application: see

generally K-Generation at 527 [77] per French CJ, 543 [148] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ. This extends to determining what weight to give to evidence from informants: cf. RS [32]. The court also retains the capacity to afford procedural fairness by disclosing the gist of the facts which criminal intelligence is adduced to prove, at least if that can be done without disclosing the underlying criminal intelligence or sources from which it comes.

34. Part 6 does remove the discretion of the court to take steps itself to ensure the confidentiality of the criminal intelligence by fashioning a 'halfway house'. However, this Court has held, at common law, that it is wrong to provide privileged material to counsel for the opponent for the purposes of the hearing: see Commonwealth v Northern Land Council at 620. Further, this Court has upheld legislation removing a critical element from the discretion that a court in would otherwise enjoy at general law. For example, s 15X of the Crimes Act 1914 (Cth), considered in Nicholas v The Queen (1998) 193 CLR 172, removed a critical element from the discretion that a court in a criminal matter would otherwise enjoy at general law to exclude evidence that narcotics were illegally imported into Australia because that evidence was tainted by that illegality. This Court rejected the contention that s 15X was invalid on the basis that it directed a court as to the manner and outcome of the exercise of its jurisdiction.

35. In any event, there is nothing repugnant about the fact that the Act allows consideration of criminal intelligence in determining a substantive application under Pt 2 of the Act in the absence of the Respondents (and where that information will not have been disclosed to a Respondent or its legal advisers): cf. RS [29].

36. The availability and *accessibility* of all relevant evidence in judicial proceedings is not absolute: see Gypsy Jokers at 596 [185], 597 [189] per Crennan J (Gleeson CJ agreeing at 549-550 [1]). The legislation considered there, as here, permitted the court to take the confidential information in question into account for the purpose of determining the proceedings: see at 550-551 [5] per Gleeson CJ, 559 [36] per Gummow, Hayne, Heydon and Kiefel JJ.

37. The courts may in some instances rely on documents that are the subject of public interest immunity in the determination of litigation to the exclusion of one or more of the parties to the litigation.

38. For example, in Amer v Minister for Immigration, Local Government and Ethnic Affairs (No. 1) (unreported, Federal Court of Australia, Lockhart J, 18 December 1989) Lockhart J relied on security assessments tendered by ASIO in relation to the applicant in circumstances where neither the applicant nor his legal advisers had been given access to the security assessments. Lockhart J stated at 2-3:

> For the Court not to disclose evidence to a party who may be affected by it, and to decline to disclose it on a restricted basis to counsel or solicitors for that party is a serious step which is taken only when necessary. This is a case where it is said that there is a conflict between the interests of the proper determination of issues between parties on the one hand and the balancing of national security on the other. In my opinion, having carefully considered submissions of counsel, the competition between the interests of justice to the applicants on the one hand and the interests of national security on the other calls for the documents not to be disclosed to counsel for the applicant or any other person on behalf of the applicant. Accordingly, I decline to allow that inspection.
>
> ...
>
> There is no perfect solution to a problem such as has arisen here. For the Court not to have inspected the documents would have placed the applicants in an invidious position. At least they have the comfort of the fact that a judge has inspected them and reached the view which I have indicated.

39. See discussion of Amer (No. 1) and Amer v Minister for Immigration, Local Government and Ethnic Affairs (No. 2) (unreported, Federal Court of Australia, Lockhart J, 19 December 1989) by the Full Federal Court in Leghaei v Director-General of Security and Anor (2007) 97 ALD 516; (2007) 241 ALR 141 at 146 [48]-[50] per Tamberlin, Stone and Jacobson JJ.

40. In Nicopoulos v Commissioner for Corrective Services (2004) 148 A Crim R 74, the Commissioner filed five affidavits in support of his case that the plaintiff, a lawyer, should be excluded from visiting clients in jail; three of those affidavits were the subject of a claim of public interest immunity. Despite the plaintiff not having access to these affidavits or a summary of their contents, Smart AJ accepted Mr. Perram's submissions and held that they should be taken into account in the

determination of the proceedings. After referring to the comments of Lockhart J in Amer (No. 1), Smart AJ stated at 91 [83]:

> Lockhart J seems to have proceeded on the basis that material not disclosed to one of the parties may be admitted into evidence if that evidence is of importance in the proceedings and the public interest in preserving its secrecy or confidentiality outweighs the public interest in making it available to the party adversely affected. There is a tension between the Court having all relevant material especially if it was before the decision maker and unfairness to the party adversely affected by not being told of it so that party can respond to that evidence. In the circumstances envisaged the public interest in maintaining the secrecy or confidentiality of the material must be compelling. Of course, circumstances may vary greatly and this will affect the balancing exercise. For example, disclosure of the material may be necessary to enable the person affected to obtain a verdict of not guilty. It may destroy the credit of an essential Crown witness. Again, the nature and importance of the civil rights or privileges at issue will be an important consideration in the balancing exercise.

41. Smart AJ went on to say at 94 [99]:

> However, despite the plaintiff not having access to these affidavits or a summary of their contents, they should be taken into account. I order and direct that they not be disclosed to the plaintiff or any other person except with the leave of a judge of this Court. I have given specific consideration to whether the contents of the affidavits or a summary might be made available to counsel for the plaintiff. There are a number of reasons why I have not made the contents or a summary available to the plaintiff's counsel. It is not in the public interest that anyone other than a limited number of officers of the Department of Corrective Services and the legal representatives of the Commissioner should be made aware of the Commissioner's sources and operating systems to detect and prevent crimes and breaches of prison regulations and rules. Further, in the present case counsel would be embarrassed by such knowledge and not being able to tell his client or his instructing solicitor. Counsel would also experience some difficulty in framing his submissions in such a way as not to give some clue as to the nature of the intelligence information. The latter two reasons are subsidiary reasons.

42. In these examples, the parties affected were denied the opportunity to confront the relevant deponents of the affidavits and denied the opportunity to properly test all of the adverse evidence to be considered in the determination of the proceeding (cf. RS [30]-[35]). There is no constitutionally relevant difference between this

procedure and what happens under the Act. Further, in Hussain v Minister for Foreign Affairs and Another (2008) 169 FCR 241 at 274-275 [139] the Full Federal Court (Weinberg, Bennett and Edmonds JJ) cited Nicopoulos with apparent approval.

43. It therefore cannot be said that the Act "offends everything about the way common law courts do judicial business" (cf. RS [35]).

Time allowed for response

44. The NSW Attorney adopts the submissions of the Applicant and Attorney-General for Queensland at [80]-[84] in respect of question (vii) (Special Case Book at 118).

Conclusion: No impairment of institutional integrity of the Supreme Court

45. As McHugh J explained in Fardon at 600-601 [41]-[42]:

> The bare fact that particular state legislation invests a state court with powers that are or jurisdiction that is repugnant to the traditional judicial process will seldom, if ever, compromise the institutional integrity of that court to the extent that it affects that court's capacity to exercise federal jurisdiction impartially and according to federal law. *State legislation may alter the burden of proof and the rules of evidence and procedure in civil and criminal courts in ways that are repugnant to the traditional judicial process without compromising the institutional integrity of the courts that must administer that legislation.* State legislation may require state courts to exercise powers and take away substantive rights on grounds that judges think are foolish, unwise or even patently unjust. Nevertheless, it does not follow that, because State legislation requires State courts to make orders that could not be countenanced in a society with a Bill of Rights, the institutional integrity of those courts is compromised.
>
> The pejorative phrase — "repugnant to the judicial process" — is not the constitutional criterion. In this area of constitutional discourse, it is best avoided, for it invites error. That which judges regard as repugnant to the judicial process may be no more than a reflection of their personal dislike of legislation that they think unjustifiably affects long recognised rights, freedoms and judicial procedures. State legislation that requires State courts to act in ways inconsistent with the traditional judicial process will be invalid only when it leads to the conclusion that reasonable persons might think that the legislation compromises the capacity of State courts to administer invested federal jurisdiction impartially according to federal law. That conclusion is likely to be reached only when other provisions of the legislation or the surrounding circumstances as well as the departure from the traditional judicial process indicate that the state court might not be an

impartial tribunal that is independent of the legislative and the executive arms of government. [emphasis added]

46. Even if this Court were to hold that the Act, as State legislation, has altered the rules of procedure in civil courts in ways that are repugnant to the traditional judicial process, it has not done so in a way which compromises the institutional integrity of the court that must administer that legislation.

47. There is no basis for concluding that the requirements of the Act in respect of criminal intelligence have any implications for the capacity of the Supreme Court to discharge any other functions independently and impartially and, in particular, in the exercise of any federal jurisdiction that may be invested in it. In the absence of such a nexus, the Kable principle has no application. The Act, therefore, is valid.

Part VI: Time required for submissions

48. Counsel estimate that no more than 30 minutes will be needed for the presentation of the NSW Attorney's oral argument.

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