HIGH COURT OF AUSTRALIA
FILED
28 NOV 2012
THE REGISTRY DARWIN

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

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY (INTERVENING)

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Basis of intervention

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

Part III: Leave to intervene

3. Unnecessary.

Part IV: Applicable constitutional provisions, statutes and regulations

4. The relevant provisions of the *Criminal Organisation Act 2009* (Qld) (**the Act**) said to infringe Ch 3 of the *Constitution* are identified at pars 15 to 24 and 39 of the Submissions of the First and Second Respondents filed on 9 November 2012 (**the Respondents' Submissions**).

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Part V: Statement of argument

5. The principle for which *Kable* stands as authority is that, since the *Constitution* contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid.[1]

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6. It is "neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court".[2] The first step in determining whether the provisions infringe the *Kable* principle is one of statutory interpretation,[3] including proper consideration of the context in which the provision was enacted.[4]

7. If, in considering the validity of legislation it appears that there are different constructions available, "a construction is to be selected which would avoid rather than lead to a conclusion of constitutional invalidity".[5]

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8. Legislation will deny to a court the constitutional character of an independent and impartial tribunal only "when other provisions of the legislation or the surrounding circumstances *as well as* the departure from the traditional judicial process indicate that the court might not be an impartial tribunal that is independent of the legislative and the executive arms of government".[6]

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1 *Baker v The Queen* (2004) 223 CLR 513 at [5]-[6] per Gleeson CJ, [21] per McHugh, Gummow, Hayne and Heydon JJ; *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 at [15] per Gleeson CJ, [37] per McHugh J, [102] per Gummow J, [198] per Hayne J, [213] per Callinan and Heydon JJ; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [40] per Gleeson CJ, [63] per Gummow, Hayne and Crennan JJ; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [56] per French CJ.

2 See *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [63] and [64] per Gummow, Hayne and Crennan JJ. See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [104] per Gummow J; *Baker v The Queen* (2004) 223 CLR 513 at [81] per Kirby J; *Gypsy Jokers Inc v Commissioner of Police* (2008) 234 CLR 532 at [10] per Gummow, Hayne, Heydon and Kiefel JJ.

3 *Gypsy Jokers Inc v Commissioner of Police* (2008) 234 CLR 532 at [11]-[12] per Gummow, Hayne, Heydon and Kiefel JJ.

4 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501at [46], [51]-[52] per French CJ; and consider the approach in the plurality's reasons at [143]-[149] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ.

5 *Gypsy Jokers Inc v Commissioner of Police* (2008) 234 CLR 532 at [11] per Gummow, Hayne, Heydon and Kiefel JJ. See also *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501at [46] per French CJ.

6 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [42] per McHugh J. It is not enough that the law might be considered "unreasonable" or to give rise to an unreasonable result: see *Fardon* at [23] per Gleeson CJ; *Nicholas v The Queen* (1998) 193 CLR 173 at [37] per Brennan CJ; *Baker v The Queen* (2004) 223 CLR 513 at [6] per Gleeson CJ.

Individual or cumulative operation

9. The respondents contend that the provisions identified at questions (i) to (vii) of the Special Case "taken individually or in their cumulative operation, are incompatible with, and repugnant to, the institutional integrity of the Supreme Court as a repository of federal jurisdiction and as part of the integrated Australian court system established by the *Constitution*".[7]

10. It may be accepted as a general proposition that a number of provisions in their cumulative operation might infringe the *Kable* principle, in circumstances where the individual operation of each would not.[8] The evaluation process required is not unlike that involved in deciding whether a body can be said to be exercising judicial power.[9]

11. This is not to say that functionally separate aspects of the Act may be said to operate in combination so as to infringe the *Kable* principle. Thus, for example, the question whether the requirements in respect of criminal intelligence declarations infringe the *Kable* principle is not informed by the operation of the time limit imposed for responding to a substantive application; but that question may be informed by an examination of the provisions relating to the subsequent deployment of evidence the subject of such a declaration. In fact, but for its potential use in a substantive application, a declaration that information is criminal intelligence would be of no practical account in any *Kable* calculus.

12. The provisions identified at questions (i) to (v) of the Special Case may be considered both individually and in their combined operation in order to determine whether those provisions operate to impair substantially the court's institutional integrity. The individual operation only of the provisions identified at questions (vi) and (vii) of the Special Case is the matter for consideration in determining whether there is a material impairment.

Determination and use of criminal intelligence

13. "Criminal intelligence"[10] may be received by the court in the exercise of its powers, relevantly, in a substantive application made under Part 2 of

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7 Respondents' Submissions, par [27].

8 *Wainohu v New South Wales* (2011) 243 CLR 181 at [118] and [185] per Heydon J; *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319at [136] per Heydon J; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [100] per Gummow J (referred to with approval in *South Australia v Totani* (2010) 242 CLR 1 at [204] per Hayne J).

9 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501at [90] per French CJ.

10 Defined in s 59 of the Act to mean information relating to actual or suspected criminal activity, whether in the State or elsewhere, the disclosure of which could reasonably be expected to: (a) prejudice a criminal investigation; or (b) enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement; or (c) endanger a person's life or physical safety.

the Act. The court is obliged to adopt certain procedures to maintain the confidentiality of any material which has been declared as criminal intelligence.

14. It may be accepted that ss 66, 70 and 78 of the Act require the court to adopt procedures that involve substantial departures from the usual rules of natural justice; but when consideration is given to the role of the court in the statutory scheme as a whole, it is apparent that the court remains equipped to ameliorate any resulting unfairness or injustice. In particular, because the Act affects the open court principle it must be construed, where constructional choices are open, "to maximise the power of the court to implement the statutory command conservatively".[11]

15. The statutory scheme reserves to the court broad discretions as to the making of orders that may affect a person's rights, as well as leaving untouched the (essentially discretionary) exercise of assessing the weight of evidence supporting the making of such orders.

Discretion

16. Under the statutory scheme, critical discretions are reserved to the court in respect of:

    (b) the making of a criminal organisation declaration under s 10;[12] and

    (b) the making of a declaration that information is criminal intelligence under s 72.

17. In each case the court "may" make the declaration if satisfied of certain matters. It is clear having regard to the sections and to the statutory scheme as a whole that "may" does not mean "must" in this context.[13]

18. In addition to that decisional discretion, s 10(2)(b) of the Act provides that the matters to which the court is to have regard in considering whether to make a criminal organisation declaration include "anything else the court considers relevant".[14]

19. Similarly, s 72 of the Act, as well as referring several times to the court's "discretion" to declare information to be criminal intelligence, contains an express recognition in s 72(6) that the court may decide not to make a

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11 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [49] per French CJ.

12 See also control orders, s 18; public safety orders, s 33; and fortification removal orders, s 43.

13 There is no room for the operation of the principle expressed in *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 at 134-135 per Windeyer J; see also *Leach v R* (2007) 230 CLR 1 at [38] per Gummow, Hayne, Heydon and Crennan JJ.

14 See also s 18(3)(b) of the Act concerning control orders.

declaration notwithstanding that it is satisfied that information is criminal intelligence.

20. If any further indication was needed of the legislature's intention to reserve relatively unfettered discretions to the court under ss 10 and 72, it may be noticed that the permissive language of those sections stands in contrast to other provisions in the Act by which the court "must" do certain things in certain circumstances.[15]

21. The practical significance of the discretions is apparent when the relevant operation of Part 6 is considered.

Criminal intelligence declarations

22. In deciding whether to make a declaration under s 72 of the Act, a court will first assess whether, on the balance of probabilities (s 110), the information the subject of an application under s 63 is "criminal intelligence" as defined in s 59.[16] In making that assessment the court is not subject to direction; it will accord to the evidence adduced in support of the application such weight as it thinks appropriate. The assessment of weight may include consideration of the fact that the process by which the application is made is one in which there is no facility for those potentially affected by a criminal intelligence declaration to test the evidence in support of the application. If the source of the criminal intelligence is an informant, the court's assessment of weight may legitimately involve consideration of the effect of the restrictions imposed by s 64 of the Act.

23. The functions and involvement of the criminal organisation public interest monitor in testing the appropriateness and validity of an application, including the facility to put questions, cross-examine certain witnesses, and make submissions to the court about the appropriateness of granting the application, also serve to ameliorate any prejudice that might otherwise be suffered by a respondent to a substantive application through exclusion from the criminal intelligence process.[17]

24. If the court is satisfied that the grounds for making a declaration are made out, it will then consider whether the declaration should be made. In making that assessment the court may again have regard to the statutory limitations imposed upon the scrutiny of the evidence. Just as importantly, it may have regard to the fact that the criminal intelligence the subject of a declaration is likely to be deployed in an application for a substantive declaration or order, and that the respondent will have no opportunity to test the criminal intelligence in that context. It may also

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15 Section 78 of the Act provides an example of this selective use.

16 The court's role in making an assessment of the character of the information is therefore more immediate and direct than under the scheme considered in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532.

17 Act, ss 63(6), 66, 70(2), 71, 86, 88 and 89.

take into account the limitations imposed by the statutory scheme upon the circumstances in which a criminal intelligence declaration may be revoked.[18]

25. In addition to those generally subsisting discretions, in determining whether to declare information to be criminal intelligence the court is expressly invited to weigh the potential unfairness to a respondent against the public interest in the admission of evidence the disclosure of which might otherwise prejudice a criminal investigation, identify an informant, or endanger life or physical safety.[19] The commissioner is not empowered to dictate that process, and it is for the court to determine upon the evidence provided to it whether the disclosure of the information might have the prejudicial effect spoken of in s 60(a) of the Act.[20]

26. The *ex parte* process mandated by Part 6 is not relevantly similar to the scheme considered in *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.[21] The role of the court under Part 6 is substantially different in content and reach from the limited role of the court in that case.[22] Moreover, in the case of criminal intelligence, there is an obvious rationale (self-evident in the criteria in s 59) for a process from which the party to whom the intelligence relates is substantially excluded.

Substantive applications

27. Section 81 of the Act[23] requires in effect that declared criminal intelligence that would be admissible apart from the declaration must be admitted into evidence in a substantive application.[24] The section overcomes objections that might otherwise be taken (such as first hand hearsay, inability to test the protected evidence, etc), but does not make declared criminal intelligence admissible in all circumstances.

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18 Act, s 74.

19 Act, s 72(2).

20 See, for example, *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [7] per Gleeson CJ; at [33] per Gummow, Hayne, Heydon and Keifel JJ; at [174] per Crennan J.

21 Cf Respondents' Submissions at [28]. In this respect, the Attorney-General for the Northern Territory adopts pars 53 to 56 of the Submissions of Applicant and Attorney-General for Queensland filed on 23 November 2012 (**the Queensland Submissions**).

22 As Gummow and Bell JJ observed in *International Finance Trust Company* at [97]-[98], the distinguishing feature of the process under consideration in *International Finance Trust Company* was the mandatory *ex parte* sequestration of property upon suspicion of wrongdoing for an indeterminate period.

23 See also s 75(2) of the Act, by which the operation of the relevant provisions is triggered when material in support of a substantive application includes declared criminal intelligence.

24 In this respect the operation of the statutory scheme may be contrasted with the scheme in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 (cf at [77] per French CJ).

28. Nor, importantly, does the section involve any direction as to the weight to be attributed to evidence the subject of a criminal intelligence declaration. The court is entitled, in assessing weight, to take account of the considerations of fairness underpinning the evidentiary rules that, apart from s 81, would have rendered such evidence inadmissible. The court may thus take into account the fact that evidence the subject of a criminal intelligence declaration is largely immune from the traditional curial processes for testing its reliability. The chance that evidence of that nature will prove decisive may be reduced by the court's disinclination to place weight on material which, because of the operation of a criminal intelligence declaration, the respondent has not been able to test or see.[25]

29. In circumstances where the court is satisfied on the balance of probabilities that the criteria for a grant of substantive relief are established, the grant of relief remains discretionary. Accordingly, where declared criminal intelligence has proven material to the discharge of the evidentiary burden, a court concerned that the denial of procedural fairness mandated by s 78 may have operated so as to cause substantial injustice could properly refuse relief.[26]

30. In particular, once the condition for the exercise of the power to make a criminal organisation declaration is met (ie the court's satisfaction as to the matters in s 10(1)), the court has a discretion whether or not to make the declaration. That discretion falls to be exercised judicially.

31. Even if it were considered that the word "may" in s 10 operates as a conferral of a power coupled with a duty to exercise it upon satisfaction of the matters in s 10(1),[27] the breadth and open operation of the matters to be considered under s 10(2) is such that the Court retains its judicial decisional independence.[28]

32. When considering whether to make a declaration under s 10 of the Act the court is required to consider all the relevant circumstances, including whether the information properly sustains a link between the organisation and serious criminal activity, whether there are relevant criminal convictions, whether the information sustains a conclusion that current or former members of the organisation are involved in serious criminal

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25 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501at [148] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ.

26 It can also be noted here that the court, whether or not it is constituted by the same judge as made the criminal intelligence declaration, may approach the task in the knowledge that such a declaration is the product of the discretionary considerations already described.

27 See, for example, *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277, esp at 301-302 per Williams J, referring to *Julius v Lord Bishop of Oxford* (1880) LR 5 App Cas 214 at 223. But see fn 13 above.

28 To adopt the language of French CJ in *South Australia v Totani* (2010) 242 CLR 1 at [62], [69.5], [70], [78], [82].

activity, and any other matter the court considers relevant.[29] Although the Act alters and diminishes the court's traditional role in relation to material that might otherwise be subject to a claim for public interest immunity, it does not involve either the legislature or the commissioner "instructing" the court on a particular case, and does not prevent the court performing traditional judicial functions.[30]

Reasons

33. It may be added that the statutory scheme involves no departure from the requirement that a court provide reasons for its decisions. Thus, in contrast to the scheme considered in *Wainohu v New South Wales* (2011) 243 CLR 181,[31] the court's deliberative processes in the making or refusal of criminal intelligence declarations and substantive orders, including as to the exercise of the various discretions described above, will be exposed to scrutiny.

34. Although the content of any reasons given will be constrained by the subject matter, that effect "is indistinguishable from the modification of procedural fairness which can arise from the application of the principles of public interest immunity".[32] Reasons may still be formulated in general terms to convey an adequate account of the process.

Considerations of natural justice

35. It is well established that "the principles of natural justice do not comprise rigid rules, but the requirements of compliance with those principles will depend upon the particular circumstances",[33] and in particular upon what is fair in those circumstances "including the nature of the power exercised and the statutory provisions governing its exercise".[34]

36. The decision in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 demonstrates that legislative provisions which displace the usual incidents of procedural fairness, and which oblige a court to conduct proceedings subject to that displacement, do not necessarily

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29 Cf s 14(1) of the SOCCA held invalid in *South Australia v Totani* (2010) 242 CLR 1. See *Totani* at [23], [35] per French CJ; [110], [140]-[141] per Gummow J; [197], [211], [215], [219], [222], [226], [228], [232] per Hayne J; [434]-[435] per Crennan and Bell JJ; [450], [453]-[454], [464], [474]-[476], [478] per Kiefel J.

30 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501at [258] per Kirby J.

31 See particularly at [92] per Gummow, Hayne, Crennan and Bell JJ.

32 See *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [182]-[185] per Crennan J.

33 *Heatley v Tasmanian Racing & Gaming Commission* (1977) 137 CLR 487 at 514 per Aickin J; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at [48] per McHugh and Gummow JJ.

34 *Kioa v West* (1985) 159 CLR 550 at 563 per Gibbs CJ; 584 per Mason J.

impair that court's institutional integrity so as to deny to the court the constitutional character of an independent and impartial tribunal.[35] There is no relevant difference (which would point to invalidity) between these provisions and the provisions upheld in *K-Generation Pty Ltd.*

37. The concern underpinning the rules of procedural fairness is the avoidance of practical injustice.[36] When considered in light of the powers and discretions that continue to inhere in the court, the departures from the rules of procedural fairness effected by the statutory scheme are not such as to deprive the court of its power to avoid practical injustice, and not such as to impair its integrity in the relevant sense.

38. Otherwise, the Act preserves the ordinary incidents of the judicial process. The onus of proof is on the applicant. The rules of evidence apply. The court's discretion as to which order is to be made is to be exercised by reference to specified criteria. There is a right of appeal.[37] With the exception of criminal intelligence, hearings are conducted in public, and in accordance with the ordinary judicial process, and the outcome of each case is to be determined on its merits.[38]

The criterion of "unacceptable risk"

39. There is nothing unusual about legislation that requires courts to find "unacceptable risk" as a condition of the exercise of a power.[39] Like "special reasons" or "special circumstances", it is a formula which denotes that judicial discretion should not be confined by precise definition, or where the circumstances of potential relevance are so various as to defy precise definition.[40] It is the duty of a court to give

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35 See also *South Australia v Totani* (2010) 242 CLR 1 at [124]-[125] per Gummow J with whom French CJ (at [44]), Crennan and Bell JJ (at [416]) agreed.

36 See, for example, *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at [37] per Gleeson CJ.

37 Act, ss 124-126.

38 *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 at [19] per Gleeson CJ.

39 See, for example, s 17 of the *Crimes (Serious Sex Offenders) Act 2006* (NSW) (unacceptable risk of committing a serious sex offence, and in determining whether to make a detention order the Supreme Court is to have regard to the "safety of the community"); s 16 of the *Bail Act 1980* (Qld) (unacceptable risk that the defendant if released on bail would, *inter alia*, endanger the safety or welfare of any person); s 35 of the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) (unacceptable risk of committing a relevant offence); s 275 of the *Adoption Act 2009* (Qld) (unacceptable risk of harm to the applicant "or someone else" if information were disclosed); s 19C of the *Criminal Law (Sentencing) Act 1988* (SA) (the release of a defendant would involve an unacceptable risk to the safety of the community); and s 47 of the *Transport Security (Counter-Tourism) Act* (Qld) (unacceptable risk of significant adverse impacts associated with a terrorist act).

40 *Baker v The Queen* (2004) 223 CLR 513 at [13] per Gleeson CJ. See also *Baker* at [41]-[42] per McHugh, Gummow, Hayne and Heydon JJ.

meaning to the requirement of "unacceptable risk" in context unless that is impossible, and to do so in a way which avoids any invalidity.[41]

40. There is no material and qualitative difference between a determination whether an organisation through the agency and activities of its membership is an unacceptable risk to the "safety, welfare or order of the community", and a determination such as whether an individual presents a risk to the "safety of the community" or the "safety or welfare of any person".

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41. There is no material distinction between the application of the criterion in s 10(1)(c) of the Act and the provision under consideration in *Fardon*, in respect of which Gleeson CJ observed:[42]

> It was argued that the test, posed by s 13(2), of "an unacceptable risk that the prisoner will commit a serious sexual offence" is devoid of practical content. On the contrary, the standard of "unacceptable risk" was referred to by this Court in *M v M* in the context of the magnitude of a risk that will justify a court in denying a parent
> 20 access to a child. The Court warned against "striving for a greater degree of definition than the subject is capable of yielding". The phrase is used in the *Bail Act 1980* (Qld), which provides that courts may deny bail where there is an unacceptable risk that an offender will fail to appear (s 16). It is not devoid of content, and its use does not warrant a conclusion that the decision-making process is a meaningless charade.

42. The decision whether there is a risk that is unacceptable is one that is capable of being reached by the processes of judicial reasoning. The
30 application of the ordinary principles of statutory interpretation may involve an attempt to divine the policy underlying a legislative requirement, but that is a routine aspect of the courts' role.[43]

43. The determination of "unacceptable risk" falls to be made in the context of an application in which the commissioner must provide particulars of the grounds on which the declaration is sought and the information supporting those grounds, and must adduce evidence of sufficient cogency to persuade the court that the criteria grounding the making of a declaration are satisfied.[44]

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44. The tasks of determining whether the criteria stipulated in s 10(1) of the Act have been satisfied, and exercising the discretion vested by the

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41 *Baker v The Queen* (2004) 223 CLR 513 at [14] per Gleeson CJ citing s 31 of the *Interpretation Act 1987* (NSW), and *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at [28] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

42 *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 at [22] per Gleeson CJ.

43 *Thomas v Mowbray* (2007) 233 CLR 307 at [81], [88], [94]-[95], [109]-[110] per Gummow and Crennan JJ; at [595] per Callinan J.

44 Act, s 8.

provision, involve the court in the application of standards sufficiently precise to engage the exercise of judicial power.[45]

Power to extend time for the filing of a response

45. The Attorney-General for the Northern Territory adopts pars 80 to 84 of the Queensland Submissions in relation to the operation of ss 9 and 106 of the Act.

10 **Part VI: Presentation of oral argument**

46. The time taken for the presentation of the Northern Territory's oral argument will depend in part on the content of the preceding arguments, but in any event should not exceed 20 minutes.

Dated: 28 November 2012

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for M P Grant

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[45] See *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 at [34], [44] per McHugh J; *Thomas v Mowbray* (2007) 233 CLR 307 at [15]-[16], [28] per Gleeson CJ.