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 010 634 689)

First Respondent

FINKS MOTORCYCLE CLUB, GOLD COAST CHAPTER

Second Respondent

ANNOTATED WRITTEN SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

Filed on 28 November 2012 by:
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Part I. Suitability for Publication

1. The Attorney-General for South Australia ("South Australia") certifies that these submissions are in a form suitable for publication on the internet.

Part II. Intervention

2. South Australia intervenes as of right pursuant to s78A of the *Judiciary Act 1903* in support of the Applicant.

Part III. Grounds for leave for intervention

3. Not applicable.

Part IV. Applicable constitutional and legislative provisions

4. The applicable constitutional and legislative provisions are identified in the special case (Special Case Book p115-118).

Part V. Argument

South Australia's arguments in summary

5. The Respondents' essential complaint is a denial of procedural fairness in that it does not have access to declared criminal intelligence on a hearing of a substantive application under the *Criminal Organisation Act 2009* (Qld) ("**CO Act**"). Their complaints regarding open justice and ex parte hearings are aspects of the same contention.

6. In considering the alleged invalidity of the CO Act, South Australia submits this Court must consider whether the legislation requires or empowers the Supreme Court of Queensland to do something which is substantially inconsistent or incompatible with the continuing subsistence, in every aspect of its judicial role, of its defining characteristics as a court. To do so requires this Court to undertake an evaluative process having particular regard to what is essential to the exercise of judicial power.

7. Given that the content of procedural fairness can and has permissibly been subject to statutory modification, a minimum content of procedural fairness can not be viewed as an immutable defining characteristic of a court such that statutory modification causes incompatibility with the judicial process. The operation of the CO Act does not result in the Supreme Court of Queensland being required to act in a manner substantially inconsistent or incompatible with the continuing subsistence of its defining characteristics and the performance of its judicial role.

The Kable doctrine

8. Chapter III of the Constitution envisages and provides that the State Supreme Courts, and the courts of the States, will exercise judicial power to quell controversies, including controversies arising under and involving the interpretation of the Commonwealth Constitution and the construction and application of federal laws.[1] The Constitution envisages that such controversies may be resolved either in the exercise of such federal jurisdiction as the Commonwealth Parliament may vest in those courts, or in the exercise of such general or "non-federal" jurisdiction as they may from time to time possess.[2] This status of the Supreme Courts and the courts of the States, coupled with the constitutionally entrenched supervisory jurisdiction of the Supreme Courts[3] and the appellate jurisdiction of this Court, as provided for by s73(ii) of the Constitution, combine to form an integrated Australian judicial system.[4] As functionaries within this system the Supreme Courts and the courts of the States have a role and existence that transcends their status as State courts.[5]

9. The Supreme Courts and courts of the States are, self evidently, organs of the States created for the purposes of the States.[6] The consequence of this is that variation in the structure and

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1 In this regard the Supreme Courts are a "Supreme Court" and a "court of a State" within the meaning of covering clause 5 and ss 71, 73(ii) and 77(iii) of the *Constitution*. Such courts are also courts in which the judicial power of the Commonwealth has been vested under s77(iii) of the *Constitution* by s39(2) of the *Judiciary Act 1903* (Cth).

2 See L Zines, *Cowan and Zines' Federal Jurisdiction in Australia* (3rd ed, 2002) at pp 196-7.

3 *Kirk v Industrial Court of NSW* (2010) 239 CLR 531 at 566 [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Public Service Association of SA Inc v Industrial Relations Commission of SA* [2012] HCA 25 at [25] (French CJ), [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), [73] (Heydon J).

4 *Wainohu v New South Wales* (2011) 243 CLR 181 at 208 [44] (French CJ and Kiefel J), 228 [105] Gummow, Hayne, Crennan and Bell JJ); *Hogan v Hinch* (2011) 243 CLR 506 at 541 [45] (French CJ).

5 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103 (Gaudron J), 114 (McHugh J); *South Australia v Totani and Another* (2010) 242 CLR 1 at 37 [47], 41 [58], 42 [61] and 43 [62] (French CJ).

6 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 102 (Gaudron J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 655 [219] (Callinan & Heydon JJ).

functions of courts of the States is to be expected.[7] Further, to the extent that the doctrine of the separation of powers does not apply to the States,[8] a State may confer upon its courts a non-judicial function.[9] These features in combination are implicitly accepted by the Constitution. However, also implicit in the creation of the integrated Australian system is the assumption that irrespective of whether the court exercising federal judicial power is a State or a federal court, the standard of justice shall be the same.[10] There is then implicit in the Constitution, particularly in Ch III, an assumption as to the defining characteristics of the courts of the integrated Australian judicial system that the Supreme Courts and the courts of the States must meet, despite the State courts being organs of the State and despite the doctrine of the separation of powers not applying in the States. It is in this sense that the Supreme Courts and the courts of the States in which the judicial power of the Commonwealth is vested must remain fit repositories of the judicial power of the Commonwealth.[11]

10. The relevant defining characteristics of the Supreme Courts and the courts of the States have been identified as reflected in what is necessary to the maintenance of the institutional integrity of those courts. Hence in *Forge*, Gummow, Hayne and Crennan JJ stated:[12]

> [A]s is recognised in *Kable*, *Fardon v Attorney-General (Qld)*[13] and *North Australian Aboriginal Legal Aid Service Inc v Bradley*[14], 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.

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7 *South Australia v Totani and Another* (2010) 242 CLR 1 at 46 [67]-[68] (French CJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 599-600 [38] to [40] (McHugh J).

8 *South Australia v Totani and Another* (2010) 242 CLR 1 at [66] (French CJ).

9 *K-Generation Pty Ltd v Licensing Court of South Australia* (2009) 237 CLR 501 at 259-530 [88] (French CJ); *Wainohu v New South Wales* (2011) 243 CLR 181 at 192 [7] (French CJ and Kiefel J); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 106 (Gaudron J), 142-143 (Gummow J).

10 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103 (Gaudron J), 114-5 (McHugh J); *South Australia v Totani and Another* (2010) 242 CLR 1 at 45 [66], 46 [68] (French CJ).

11 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 116 (McHugh J); *South Australia v Totani and Another* (2010) 242 CLR 1 at 46 [68] (French CJ).

12 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne and Crennan JJ) (Footnotes in original). See also *Forge* (2006) 228 CLR 45 at 121 [192] (Kirby J); *Gypsy Jokers* (2008) 234 CLR 532 at [159]-[161] (Crennan J) (Gleeson CJ agreeing); cf *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 83 (Dawson J): "as long as they are in fact courts" and "provided they are courts within the meaning of s 77(iii)".

13 (2004) 223 CLR 575.

14 (2004) 218 CLR 146 at 164 [32].

11. The institutional integrity of the Supreme Courts and the courts of the States in which the judicial power of the Commonwealth is vested is to be understood by reference to a number of factors that map the scope and nature of judicial power, the latter being a concept not susceptible to precise definition.[15] As French CJ observed in *K-Generation Pty Ltd v Liquor Licensing Court*:

> The question whether functions, powers, or duties cast upon a court are incompatible with its institutional integrity as a court will be answered by an evaluative process which may require consideration of a number of factors.[16]

12. The question is whether the "court is required or empowered by the impugned legislation to do something which is substantially inconsistent or incompatible with the continuing subsistence, in every respect of its judicial role, of its defining characteristics as a court"[17] - the *Kable* doctrine.

13. The doctrine focuses upon protecting *capacity* and what is *essential* to the role of the judicial arm of government and the maintenance of the integrity of the integrated Australian judicial system.[18] In this regard the descriptor, "substantial", as used by the Chief Justice in the quotation in the preceding paragraph, is important.[19]

14. In addition, in the application of the doctrine it is necessary to focus on the practical operation of the impugned law[20] as the doctrine is functionalist not formalist in character.[21] In considering inconsistency or incompatibility with the defining characteristics of a court, the nature of judicial power should be borne in mind.[22] It should also be noted that the judicial process or the

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15 *The Queen v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394 (Windeyer J); *R v Davison* (1954) 90 CLR 353 at 366 (Dixon CJ and McTiernan J); *The Queen v Quinn; Ex parte Consolidated Food Corp* (1977) 138 CLR 1 at 15 (Aickin J); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189 (The Court).

16 (2009) 237 CLR 501 at 530 [90] (French CJ); *International Finance Trust Company v NSW Crime Commission* (2009) 240 CLR 319 at 352-353 [50] (French CJ).

17 *South Australia v Totani* (2010) 242 CLR 1 at 48 [70] (French CJ), 63 [131] (Gummow J); *Crump v New South Wales* (2012) 86 ALJR 623 at 682 [31] (French CJ); *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [61] (Gummow and Crennan JJ); *Wainohu v New South Wales* (2011) 243 CLR 181 at 208 [44] and 210 [46] (French CJ and Kiefel J).

18 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 600-1 [41]-[42] (McHugh J), cited with approval in *South Australia v Totani* (2010) 242 CLR1 at 97 [248] (Heydon J).

19 *South Australia v Totani* (2010) 242 CLR 1 at [264] (Heydon J).

20 *Wainohu v New South Wales* (2011) 243 CLR 181 at 229 [106] (Gummow, Hayne, Crennan and Bell JJ); *South Australia v Totani* (2010) 242 CLR 1 at 50 [74] (French CJ), 84 [213] (Hayne J); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 158 [14] (Gleeson CJ).

21 *Wainohu v New South Wales* (2011) 243 CLR 181 at 212 [52] (French CJ and Kiefel J) .

22 See *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374-5:

> "[The exercise of judicial power entails] ... as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation,

capacity to administer the common law form of adversarial trial is a means to an end, the end being the exercise of power manifest in an order quelling a controversy.[23] Thus matters of procedure and evidence are amenable to legislative change without the judicial process being compromised.[24]

15. In considering what is or is not an impermissible distortion of the defining characteristics of a court it must be borne in mind that courts may be organised or structured in a variety of ways for the purpose of exercising jurisdiction without offending Ch III[25] or the *Kable* doctrine.[26] The point is that once variation in the judicial process is acknowledged and accepted, there is no entrenched norm, with the result that the question of whether a significant departure from what is acceptable has occurred "inevitably attracts consideration of predominant characteristics together with comparison of historic functions and processes of courts of law".[27] It also highlights the fact that there arises a distinction between aspects of the judicial process or method that serve the ultimate end but are not essential to its attainment, and those that are essential to its attainment. Abrogation or modification of the former is less likely to be incompatible with the institutional integrity of a Supreme Court or a court of a State.

Procedural fairness and the Kable doctrine

16. It has been said that procedural fairness lies at the heart of the judicial function[28] and that, amongst other things, "it requires that a court ... provide each party to proceedings before it with

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> so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist. It is right, I think, to conclude from the cases on the subject that a power which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified."

23 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469 (Mason CJ, Dawson and McHugh JJ); *Nicholas v The Queen* (1998) 193 CLR 173 at 186 (Brennan CJ).

24 *Nicholas v The Queen* (1998) 193 CLR 173 at 188-189 [23] (Brennan CJ); 225 [123] (McHugh J); 272-273 [234] Hayne J.

25 *Harris v Caladine* (1991) 172 CLR 84 at 91 (Mason CJ and Deane J).

26 *North Australia Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146.

27 *South Australia v Totani* (2010) 242 CLR 1 at [69] (French CJ), [134] (Gummow J).

28 *International Finance Trust Company Ltd v NSW Crime Commission* (2009) 240 CLR 319 at [54] (French CJ); *Wainohu v New South Wales* (2011) 243 CLR 181 at [44] (French CJ and Kiefel J); *Re Refugee Tribunal; Ex parte AALA* (2000) 204 CLR 82 at [42] (Gaudron and Gummow JJ); *Leeth v The Commonwealth* (1992) 174

an opportunity to be heard, to advance its own case and to answer, by evidence and argument, the case put against it".[29]

17. Importantly, "[a]ccording to the circumstances, the content of the requirements of procedural fairness may vary".[30] Consistent with this, procedural fairness requires the avoidance of "practical injustice".[31]

18. What amounts to a reasonable opportunity to be heard will depend upon and be determined by the nature of the jurisdiction and the range of competing interests that may need to be accommodated.[32] In determining whether a reasonable opportunity to be heard has been afforded a person, "the whole of the circumstances in the field of enquiry are of importance" and
10 "[t]he nature of the jurisdiction exercised and the statutory provisions governing its exercise are amongst those circumstances".[33]

19. The constitutional validity of any statutory modification to the rules of procedural fairness to be applied by a court of a State will be determined, as indicated above at [12], by considering whether such requirement is "substantially inconsistent or incompatible with the continuing subsistence, in every respect of the court's judicial role, of its defining characteristics as a court". Here it must be borne in mind that:

CLR 455 at 470 (Mason CJ, Dawson and McHugh JJ). See also *RCB as Litigation Guardian of EKV, CEV, CIV and LRV v The Honourable Justice Forrest* [2012] HCA 47 at [42] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

29 *International Finance Trust Company Ltd v NSW Crime Commission* (2009) 240 CLR 319 at [54] (French CJ), [141] (Heydon J); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Harris v Caladine* (1991) 172 CLR 84 at 150 (Gaudron J); *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395 (Dixon CJ and Webb J).

30 *International Finance Trust Company Ltd v NSW Crime Commission* (2009) 240 CLR 319 at [54] (French CJ); *RCB as Litigation Guardian of EKV, CEV, CIV and LRV v The Honourable Justice Forrest* [2012] HCA 47 at [42] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469 (Mason CJ, Dawson and McHugh JJ); see also, *International Finance Trust Company Ltd v NSW Crime Commission* (2009) 240 CLR 319 at [55] (French CJ); *Re Minister for Immigration and Multicultural And Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [37]-[38] (Gleeson CJ).

31 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37] (Gleeson CJ); see also 34-5 [106] (McHugh and Gummow JJ), 38-9 [122] (Hayne J), 48 [149] (Callinan J); *RCB as Litigation Guardian of EKV, CEV, CIV and LRV v The Honourable Justice Forrest* [2012] HCA 47 at [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

32 *J v Lieschke* (1987) 162 CLR 447 at 457 (Brennan J).

33 *Coulter v The Queen* (1988) 164 CLR 350 at 356 (Mason CJ, Wilson and Brennan JJ). See also *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 504 (Kitto J).

a. Parliament can validly legislate to exclude or modify the rules of procedural fairness provided there is sufficient indication[34] that they are excluded by plain words of necessary intendment;[35]

b. procedural fairness, like the open justice principle, is not an end in itself. Rather the rationale underpinning procedural fairness promotes better decision-making and contributes to the legitimacy of such decision making.[36] Such rationale gives way where it would serve to defeat the purpose for which jurisdiction is engaged. In *Gypsy Jokers*, Gummow, Hayne, Heydon and Kiefel JJ said:

> Remarks of Deane J in *Australian Broadcasting Commission v Parish* are relevant here. His Honour said:
>
> > "The results of an undue discounting of legitimate claims to confidentiality are likely to be both the deterrence of the subject from having recourse to courts of justice for the vindication of legal rights or the enforcement of criminal law and the discouragement of willing co-operation on the part of witnesses whose evidence is necessary to enable the ascertainment of truth. The interests of the administration of justice plainly make it desirable that obligations of confidence be not lightly overruled and that legitimate expectations of confidentiality as to private and confidential transactions and affairs be not lightly disregarded."
> >
> > He added:
> >
> > "In some cases, where publicity would destroy the subject matter of the litigation, the avoidance of prejudice to the administration of justice may make it imperative that the ordinary prima facie rule of open justice in the courtroom gives way to the overriding need for confidentiality."[37] (footnotes omitted)

Related to this is the observation of the Australian Crime Commission as to violence being an enabler of organised crime:

> Violence, extortion and threats of violence are used [by organised crime groups] to intimidate people and pervert the course of justice by preventing witnesses from assisting police or giving evidence in court. Kidnapping and threats of violence are also tactics used to discourage people from assisting law enforcement or rival groups. Organised crime groups usually target other criminals because they are considered less likely to report violence to law enforcement. People who have fallen out with senior organised crime identities, or whose usefulness has ended, have

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34 *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396 (Dixon CJ and Webb J, Taylor J agreeing).

35 *Annetts v McCann* (1990) 170 CLR 596 at 598 (Mason CJ, Deane and McHugh JJ); *Gypsy Jokers Inc v Commissioner of Police (WA)* (2008) 234 CLR 532 at 595-6 [182] (Crennan J).

36 M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action*, (2009) 4th Ed at 7.15.

37 *Gypsy Jokers Inc v Commissioner of Police (WA)* (2008) 234 CLR 532 at 560-1 (Gummow, Hayne, Heydon and Kiefel JJ); see also *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 472 (McHugh J) - the need to preserve confidentiality in the context of criminal investigations "does not exclude procedural fairness, but reduces its content, perhaps in some circumstances to nothing"; *Kioa v West* (1985) 159 CLR 550 at 615 (Brennan J).

> also been kidnapped, threatened or even murdered. The extent of this type of offending is unclear, but it is likely to be significantly higher than reported.[38]

c. the same rationale also gives way to the public interest. Here the law with respect to public interest immunity is instructive. Public interest immunity is an example of courts modifying their processes to accommodate the public interest.[39] Those modifications include, if required, inspection by the court of documents subject of a claim where a party or parties and their legal representations are not permitted to view the documents.[40] In this regard in *Alister v The Queen* Gibbs CJ, Wilson, Brennan and Dawson JJ stated:

> 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.[41]

A logical extension of this has been the acceptance by courts of confidential affidavits sworn in support of an application for public interest immunity.

d. in *Gypsy Jokers* and *K-Generation* the non-disclosure of confidential information to a litigant and its use by the court against that litigant in the circumstances of those cases did not represent a modification of the rules of procedural fairness repugnant to the *Kable* doctrine.[42]

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38 Australian Crime Commission, *Organised Crime in Australia 2011*. at p 51 www.crimecommission.gov.au/publications/organised-crime-australia/organised-crime-australia-2011-report (Viewed 27 November 2012). See also *Crime Profile Series – Outlaw Motorcycle Gangs*, Australian Crime Commission, April 2011 (available at http://www.crimecommission.gov.au/sites/default/files/files/omcgs.pdf). See also the details of various offences outlined at Special Case Book p 80 [536], p83 [553], p83-84 [555], p84-85 [558], p87 [572], p91-92 [586], p 93 [594], p 94-95 [598], and p 95-96 [603] of the *Originating Application* (Exhibit WMP 1 of the Affidavit of William Murray Potts, pp9-104 of the Special Case Book).

39 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 98 [24] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

40 *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 620.

41 (1984) 154 CLR 404 at 469; also *Thomas v Mowbray* (2007) 233 CLR 307 at [124] (Gummow & Crennan JJ).

42 *K-Generation Pty Ltd v Licensing Court of South Australia* (2009) 237 CLR 501 at [97] (French CJ), [147] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 234 CLR 532 at 559 [35] - [36].

Kable and the open justice principle

20. The ordinary rule is that court proceedings are to be conducted "publicly and in open view".[43] In *Russell v Russell*, Gibbs J observed that "[t]he fact that courts of law are held openly and not in secret is an essential aspect of their character".[44] However, the common law rule is not immutable,[45] and its alteration in particular cases, either directly by a State legislature or by the conferral of a discretion on the court itself, is not incompatible with the status of the court concerned as a "court of a State" within the meaning of Ch III of the Constitution.[46]

21. A blanket rule that all proceedings of State courts be conducted in the absence of one of the parties, irrespective of any special circumstances or policy considerations to justify that course in particular cases or particular classes of case, might be inconsistent with the "defining characteristics" of State courts, because such a rule may turn State courts into "a different kind of tribunal".[47] But, providing the exclusion of a party can be regarded as a reasonable response to a legitimate policy concern, a State Parliament may provide that parts of classes of proceedings to which that policy concern applies are to be conducted in private, including in the absence of one of the parties.[48]

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43 *Scott v Scott* [1913] AC 417 at 441 per the Earl of Halsbury. See also *Hogan v Hinch* (2011) 243 CLR 506 at 530-532 [20]-[21] (French CJ), 553 [90] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

44 (1976) 134 CLR 495 at 520.

45 *Hogan v Hinch* (2011) 243 CLR 506 at 531-2 [21] (French CJ), 553-554 [89] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

46 *Hogan v Hinch* (2011) 243 CLR 506 at 539 [41] French CJ; 554 [91] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). As all the judgments in *Russell v Russell* (1976) 134 CLR 495 recognised, it is within the capacity of State legislatures to "determine the policy" and to prescribe the exercise of jurisdiction in a closed court in particular classes of cases. The question in *Russell* was whether it was within the legislative power of the Commonwealth Parliament under ss 51(xxii), 51(xxxix) and 77(iii) of the Constitution to require a State court exercising federal jurisdiction to hear proceedings under the Family Law Act 1975 (Cth) otherwise than in public. Mason and Jacobs JJ, in dissent, held that the Commonwealth Parliament could do so (at 536-7 per Mason J and at 555 per Jacobs J). The majority, comprising Barwick CJ, Gibbs and Stephen JJ, held that Commonwealth legislative power did not extend so far, but their reasons make it plain that they regarded it as within the capacity of a State legislature to prescribe that certain classes of proceedings should be conducted in a court closed to the public.

47 *Russell v Russell* (1976) 134 CLR 495 at 532 per Stephen J, quoting from the speech of Lord Shaw in *Scott v Scott* [1913] AC 417 at 481, and quoted in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 521 [49] (French CJ). See also at 505-6 (Barwick CJ) and at 532 (Stephen J). The latter passage was quoted with apparent approval by the Chief Justice in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 521 [49].

48 That a court may go so far as to require the reception of evidence and hearing of argument in private in the absence of the parties and their representatives does not deny the court its constitutional character of independence and impartiality: *K-Generation Pty Ltd v Licensing Court of South Australia* (2009) 237 CLR 501 at [97] (French CJ), [147] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); *Gypsy Jokers Motorcycle Club*

Q1 to 5 – criminal intelligence

22. The Respondents point to the following five features of the CO Act, which either separately or in combination, impermissibly compromise the institutional integrity of the Supreme Court:

    a. The *ex parte* process mandated by ss 66 and 70 for the purposes of an application for a criminal intelligence declaration, when considered in light of the unlimited and unassailable nature of such orders once made;

    b. The direction to the Supreme Court in s78 to exclude a respondent and a respondent's legal representative from any part of a substantive hearing in which declared criminal intelligence is to be considered;

10 c. Related to the previous feature, and by virtue of ss 82 and 109, the denial of any discretion in the Supreme Court to take steps to provide any declared criminal intelligence, or information disclosed in a hearing of a criminal intelligence application, to a respondent or his or her legal representative;

    d. The denial of any ability of the Supreme Court or a respondent to properly evaluate and test evidence sourced from informants, by virtue of s76 and sub-ss 63(5), 64(2), 65(4), 71(2) and 80(2);

    e. The ability of the Supreme Court, pursuant to s10(2), to have regard to declared criminal intelligence in determining an application for a criminal organisation declaration, given the impugned features of the criminal intelligence regime referred to above.

20 23. These features in effect modify the rules as to procedural fairness and the open court principle. They have the consequence that evidential information that may be used against a respondent is not disclosed to the respondent and consequently is not tested by the respondent.

Ex parte criminal intelligence application and determination

24. The criminal intelligence application and declaration is the first step in a series of applications, and must be looked at in context of the CO Act as a whole. It does not of itself affect rights. In the course of the process for a substantive order under the CO Act, the general nature of the material

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Inc v Commissioner of Police (WA) (2008) 234 CLR 532 at 559 [35] - [36]. See also *Russell v Russell* (1976) 134 CLR 495 at 520 (Gibbs J), an approach which was accepted and applied in *Hogan v Hinch* (2011) 243 CLR 506

will be known (by virtue of its definition), and its relevance to the substantive application.

25. Proceedings *ex parte* are not incompatible with the judicial function.[49] Information is criminal intelligence where it relates to "actual or suspected criminal activity ... 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".[50] The Commissioner must 'reasonably believe' the information to constitute criminal intelligence prior to the making of an application.[51] In those circumstances, to allow potential respondents to be a party to the criminal intelligence application would undermine the fundamental purpose of an application.

10 26. This Court held regimes for the declaration of criminal intelligence information to be compatible with constitutional requirements in *Gypsy Jokers,*[52] *K-Generation,*[53] and *Wainohu.*[54] The CO Act regime differs from those previously considered, but in ways that ensure fairness between the parties to a greater extent. Specific differences include:

a. The initial decision as to which information is to be protected from disclosure is solely in the Supreme Court's discretion,[55] acting impartially and via a judicial process, as opposed to a classification process being undertaken by a member of the executive branch, subject to review for want of reasonableness by the Supreme Court. The Supreme Court retains a broad discretion to make a declaration of criminal intelligence **if** it is satisfied that the information is criminal intelligence within the meaning of the CO Act.[56] The fact that declared criminal
20 intelligence is confidential and will not be disclosed to respondents on a substantive application is an aspect of "unfairness to the respondent"[57] that must be considered by the Supreme Court as part of the balancing process to be undertaken between that potential

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at 530-532 [20]-[21] (French CJ), 553-554 [89] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

49 *South Australia v Totani* (2010) 242 CLR 1 at 101 [258] (Heydon J), *Thomas v Mowbray* (2007) 233 CLR 355 [112] (Gummow and Crennan JJ); *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at 348 [39] (French CJ), 364 [89] (Gummow and Bell JJ), 385 [154] (Heydon J).

50 Section 59 of the CO Act

51 Subsection 63(2) of the CO Act.

52 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 234 CLR 532 at 559 [36] (Gummow, Hayne, Heydon and Kiefel JJ).

53 *K-Generation Pty Ltd v Licensing Court of South Australia* (2009) 237 CLR 501 at 532 [98] and [99] (French CJ); [143] to [149] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

54 *Wainohu v NSW* (2011) 243 CLR 181 at 229 [108] (Gummow, Hayne, Crennan and Bell JJ).

55 Section 72 of the CO Act.

56 Section 72(6) of the CO Act;

unfairness and the public interest as identified in the objects in ss60(a)(i) – (iii). This would inevitably require the Supreme Court to consider the cogency and reliability of the information at the time of considering a declaration. In addition, consider nation should be given to the respondent's inability to contradict errors, identify omissions, or refute false allegations;

b. Information as to the reliability of the information subject of the declaration application, and in particular any information obtained from an informant, is required to be submitted with, and considered as part of, the application;[58]

c. The presence and role of the COPIM[59] allows for the validity and appropriateness of the application, including the reliability of the information, to be tested, as opposed to the decision being made in the absence of any independent 'objector'; and

d. Contrary to the Respondents' contention that a declaration of criminal intelligence is "unlimited and unassailable", where circumstances change following the making of a criminal intelligence declaration suggesting that the declaration is no longer appropriate, the Supreme Court retains its inherent powers to stay proceedings on a substantive application until such time as the Commissioner applies to revoke the declaration[60].

Respondents to be excluded from part of substantive hearing where declared criminal intelligence considered

27. The Supreme Court has, pursuant to the CO Act, a broad discretion to determine what information is declared criminal intelligence.[61] The only material that will be withheld from a respondent will be information which is declared criminal intelligence, following the process incorporating the safeguards identified above.

28. A similar scheme, of open and closed material with the use of an impartial advocate to test closed material, was adopted in England in relation to control orders made under the *Prevention of*

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57 Subsection 72(2) of the CO Act.

58 Subsections 63(3)(d) and 63(7). Subsection 64(4) of the CO Act identifies material to be contained in the affidavit supporting the application including (among other matters) the full criminal history of the informant, any information about allegations of professional misconduct against the informant, and any inducements or rewards offered for the information.

59 Sections 66, 70, 86, 87, 89 of the CO Act.

60 Such application to be made pursuant to section 74 of the CO Act.

61 See paragraph [26(a)] above.

Terrorism Act 2005. The House of Lords,[62] applying a decision of the Grand Chamber of the European Court of Human Rights,[63] held that English courts may have regard to closed material, provided that a respondent has been given sufficient information about those allegations to enable him to give effective instructions to his special advocate.[64] Hence even in England, where individuals have an overarching right to a fair trial,[65] disclosure of the evidence upon which the court may act is not considered an essential element of the fair trial. The House of Lords considered that whether the closed material procedure was fair or not depended on the facts of each case and the nature of information provided to the respondent.[66] It was not possible to say that in every case, the use of closed material denied the respondent a fair trial. The Supreme
10 Court of Canada has similarly emphasised "a context-sensitive approach to procedural fairness," noting that the right to know the case to be met is not absolute.[67]

29. A similar approach should be taken by this Court to the CO Act. On a criminal organisation declaration application, or a control order application, the respondent will know the grounds on which the order is sought[68] and the information supporting the grounds, [69] but not any declared criminal intelligence. It is not possible to say that in every case, or even in a majority of cases, the respondent will not have sufficient information in order to understand the substance of the allegations against them. The CO Act does not necessarily deny a respondent the requisite standard of procedural fairness, and as such it does not require the Supreme Court to act in a manner repugnant, in a substantial regard, to the defining characteristics of a court.

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62 *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28; [2010] 2 AC 269.

63 *A v The United Kingdom* [2009] ECHR 301.

64 *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 at [59], [66] (Lord Phillips of Woth Matravers), [86] (Lord Hope of Craighead), [120] (Lord Brown of Eaton-Under-Heywood).

65 English courts are obliged to comply with Articles 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

66 *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 at [59] (Lord Phillips) (with whom Lord Hoffmann at [70]; Lord Hope at [75]; Lord Scott at [89]; Lord Rodger at [98]; Lord Walker at [99]; Baroness Hale at [100]; Lord Carswell at [109] and Lord Brown at [110] agreed) stated:

> "This establishes that the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials, the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be."

67 *Charkaoui v Minister of Citizenship and Immigration* [2007] 1 SCR 350 at [57] (Chief Justice, for the Court).

68 Subsections 8(2)(c), 8(5)(c), 16(2)(b) and s16(4)(c) of the CO Act.

69 Subsections 8(2)(d), 8(5)(c), 16(2)(c) and s16(4)(c) of the CO Act.

30. To the extent that the Respondents rely upon the s79 direction to the Supreme Court to conduct a closed hearing on the substantive application when declared criminal intelligence is considered, that alone is not incompatible with or repugnant to the judicial function.[70]

Denial of Supreme Court's discretion to take appropriate steps in preserving confidentiality of declared criminal intelligence

31. Unlike the regimes considered in *Gypsy Jokers* and *K-Generation*, once information is declared under the CO Act to be criminal intelligence, the Supreme Court is given no discretion as to the steps that are then required to be taken to preserve the confidentiality of the information.

32. The 'mandatory' nature of the legislative direction to the Supreme Court as to the treatment of declared criminal intelligence does not offend the *Kable* doctrine given the judicial process underpinning the declaration itself. Courts have been obliged to impose specific consequences mandated by legislation as a result of a prior judicial finding.[71]

33. As discussed above at [26(a)], a declaration that certain information is criminal intelligence will relate to information that the Supreme Court considers should not be disclosed to potential respondents because of the overriding public interest in one or more of the ss60(a)(i) – (iii) objects, and where the information is of sufficient cogency to outweigh the fact that the respondent has not had the opportunity to answer or test it. That the Supreme Court adheres to its own declaration is not substantially inconsistent or incompatible with its continuing judicial function as a court of a State.[72]

Denial of the right of respondents or the Supreme Court to test evidence of informants

34. The CO Act provides the Supreme Court with an effective opportunity to assess and test the reliability of evidence provided by informants by:

    a. requiring applications for criminal intelligence declarations to be accompanied by an assessment of the reliability and validity of the information, along with an explanation of the system employed in that assessment.[73] Where the information has been provided by an informant, additional information relevant to the reliability of that information must be

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70 See paragraphs [20] and [21] above.

71 See *Palling v Corfield* (1970) 123 CLR 52, 58 (Barwick CJ), 64 (Menzies J), 67 (Owen J) and 70 (Walsh J); *South Australia v Totani* (2010) 242 CLR 1 at 48-9 [71] (French CJ), [133] (Gummow J).

72 See also paragraph [26(d)] above.

provided by affidavit.[74] Contrary to the Respondents' submissions, the required information is extensive, relevant and can be used by the COPIM to argue that a declaration should not be made;

b. requiring criminal intelligence declaration applications to be heard and determined with the assistance of the COPIM, whose statutory role is to independently test and make submissions to the Supreme Court about the appropriateness and validity of the application, including by presenting questions to the Police Commissioner, and examining or cross-examining witnesses;[75]

c. requiring the Supreme Court to refuse a criminal intelligence application based on information provided by an informant where that information is not wholly or partly supported in a material particular by other information before the court.[76]

35. The Respondents' argument presupposes that these provisions will be ineffective in the absence of the ability of a respondent to know the identity of, and personally cross examine, an informant. There is no reason to assume so. At common law, there is no right to challenge an accuser in criminal proceedings.[77] The right is to a fair trial. Further, there is nothing in the CO Act which prevents a respondent on a control order application from calling evidence to disprove that he or she satisfies the criteria in section 16 of the CO Act, and/or is of good character.[78] For example, it is open to a respondent to call evidence to prove that he or she is not a member of a declared organisation. Contrary to the Respondents' contention, the Supreme Court acting under the CO Act is armed with the usual tools and techniques of judicial fact-finding.

Supreme Court may rely on information 'suggesting' a link between an organisation and serious criminal activity

36. Pursuant to s10 of the CO Act, the Supreme Court may make a declaration that a respondent is a criminal organisation where the court is satisfied, on the balance of probabilities,[79] of each of the matters set out in subsections 10(1)(a) to (c). In applying the standard of proof "reasonable

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73 Subsections 63(3)(d) and (7) of the CO Act.
74 Section 64 of the CO Act.
75 Sections 86 and 89 of the CO Act.
76 Subsection 72(4) of the CO Act.
77 *Gee v Magistrates Court* (2004) 89 SASR 534 at [60] (Gray J); [128] (Besanko J).
78 As was the case in *Gypsy Jokers Inc v Commissioner of Police* (2008) 234 CLR 532 at [173] (Crennan J).
79 Section 110 of the CO Act.

satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved."[80]

37. The requisite state of satisfaction must be reached on reasonable grounds.[81] The fact that subsection 10(2) requires the Supreme Court to have regard to various matters does not alter the test to be applied, or the level of satisfaction required, under subsection 10(1). The respondent's inability to contradict any declared criminal intelligence will be a factor that the Supreme Court considers in determining the weight to be given to that information.[82]

38. Section 10(2) of the CO Act is analogous to the impugned law in *Fardon v Attorney-General (Qld)*[83] which required the Supreme Court to consider a number of matters when deciding whether to make an order, and to observe a "paramount consideration" to protect the community.[84] However, the law was found not to impair the institutional integrity of the Supreme Court. There was "nothing to suggest that the Supreme Court is to act as a mere instrument of government policy. The outcome of each case is to be determined on its merits".[85] Consequently, s10 of the CO Act, which defines and limits the Supreme Court's discretion, does not impermissibly impair the court's independence, nor does it create the appearance of impermissible interference. There is committed to the Supreme Court a genuine adjudicative function.

39. To the extent that the Respondents contend that the Supreme Court is permitted to make a declaration on the basis of a "suggested" link is not a denial of procedural fairness.

Conclusion - Criminal Intelligence and Procedural Fairness

40. Given that the content of procedural fairness can and has permissibly been subject of statutory modification, the obligation to afford a minimum content of procedural fairness can not be viewed as an immutable defining characteristic of a court such that statutory modification causes

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

81 *George v Rockett* (1990) 170 CLR 104 at 112-3 (the Court); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 234 CLR 532 at 557-8 [28] and 559 [36] (Gummow, Hayne, Heydon and Kiefel JJ); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 540 [136] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ) and at 257 [576] (Kirby J).

82 *K-Generation Pty Ltd v Licensing Court of South Australia* (2009) 237 CLR 501 at 527 [73], [76] – [77] (French CJ), 543 [148] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

83 (2004) 223 CLR 575.

84 See *Dangerous Prisoners (Sexual Offenders) Act 2003*, sub-ss13(4) and (6).

85 At 592 [19] (Gleeson CJ); see also 596-7 [34] (McHugh J).

incompatibility with the judicial process. For the reasons expressed above, the impugned provisions of the CO Act with respect to *ex parte* hearings, withholding declared criminal intelligence from the respondent and closing the court room to the respondent and members of the public, are not individually incompatible with the judicial function. The question then becomes why should they in combination together cause the Supreme Court to act in a manner substantially inconsistent or incompatible with its defining characteristics as a court of a State. There is no reason to conclude as such.

Q6 - s10(1)(c) – criteria incapable of judicial application

41. Subsection 10(1)(c) requires the Supreme Court to be satisfied that a respondent organisation "is an unacceptable risk to the safety, welfare or order of the community" prior to making a criminal organisation declaration. This is not inconsistent with the judicial function, nor with the defining characteristics of State courts. This Court has held that a test of "an unacceptable risk that the prisoner will commit a serious sexual offence" is not devoid of content, and was sufficiently precise to engage the exercise of State judicial power.[86] Such a criterion is not "so indefinite as to be insusceptible of strictly judicial application".[87] As Gummow and Crennan JJ said in *Thomas v Mowbray*:[88]

> Statutory criteria for curial decision may be expressed in broad terms but still be susceptible of application in the exercise of the judicial power of the Commonwealth.

42. There are numerous authorities rejecting submissions that the conferral of powers and discretions for exercise by imprecisely expressed criteria deny the character of judicial power and involve the exercise of authority by recourse to non-legal norms.[89]

43. Courts are required to consider and assess risks to community safety, welfare or order in other contexts,[90] and whether such risks are 'unacceptable', for example with respect to the sentencing

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86 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 593 [22] (Gleeson CJ), 596-7 [34] (McHugh J), 657 [225] (Callinan and Heydon JJ).

87 See *R v Commonwealth Industrial Court; Ex parte Amalgamated Engineering Union, Australian Section* (1960) 103 CLR 268 at 383 (Kitto J) (Dixon CJ agreeing), referred to with approval in *Thomas v Mowbray* (2007) 233 CLR 307 at 345 [73] (Gummow and Crennan JJ).

88 (2007) 233 CLR 307 at 341 [58]. See also *Sue v Hill* (1999) 199 CLR 462 at 520-1 [145]-[149] (Gaudron J).

89 *Baker v The Queen* (2004) 223 CLR 513 at 532 [42] (McHugh, Gummow, Hayne and Heydon JJ).

90 *Thomas v Mowbray* (2007) 233 CLR 307 at 334 [28] (Gleeson CJ), 355 [109] (Gummow and Crennan JJ), 507 [595] (Callinan J).

of defendants suffering a mental impairment.[91] Courts are also required to consider risks of likely recidivism, for the purposes of assessing the potential danger to the community, prior to imposing a sentence of imprisonment on a defendant.[92] The assessment required under subsection 10(1)(c) of the CO Act is analogous, and therefore does not materially effect the Supreme Court's exercise of judicial power. Importantly, to the extent that subsection 10(1)(c) requires the Supreme Court to consider matters of policy, such matters are derived from the scope and purpose of the CO Act and are not the product of any direction of the Executive. Thus subsection 10(1)(c) does not "involve the enlistment" of the Supreme Court, or render the Supreme Court "an instrument of the Executive:"[93] the Supreme Court's assessment as to the level of risk is its own, based on the information before it. It should also be remembered that the Supreme Court, as a court of a State, is able to perform non-judicial functions.[94]

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Q7 – s9 – procedural fairness as to time limits

44. Section 9 requires a response to an application for a criminal organisation declaration to be filed at least 5 business days before the return date[95] for the application. Pursuant to subsection8(5)(b), the return date must be within 35 days of filing. Only the Police Commissioner, as applicant, is entitled to apply for an extension of the return date.[96]

45. The conferral of jurisdiction on the Supreme Court under Part 2 of the CO Act should be understood as bringing with it the usual incidents of the exercise of jurisdiction by the Supreme Court,[97] unless a "plain intendment to establish a distinct regime" is apparent.[98] No such plain

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91 For example, pursuant to s19C of the *Criminal Law (Sentencing) Act 1988* (SA).

92 See for example, s11(1)(a)(ii) of the *Criminal Law (Sentencing) Act 1988* (SA). See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 586 [2] (Gleeson CJ).

93 *South Australia v Totani* (2010) 242 CLR 1 at 52 [82] (French CJ), 67 [149] (Gummow J), 160 [436] (Crennan and Bell JJ), 173 [481] (Kiefel J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 621 [116] (Gummow J).

94 *K-Generation Pty Ltd v Licensing Court of South Australia* (2009) 237 CLR 501 at 259-530 [88] (French CJ); *Wainohu v New South Wales* (2011) 243 CLR 181 at 192 [7] (French CJ and Kiefel J); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 106 (Gaudron J), 142-143 (Gummow J).

95 The return date is the date fixed by the Registrar for the hearing of the application: see Schedule 2 of the CO Act.

96 Section 106 of the CO Act.

97 *Wainohu v NSW* (2011) 243 CLR 181 at 230 [111] (Gummow, Hayne, Crennan and Bell JJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 234 CLR 532 at 555 [19] (Gummow, Hayne, Heydon and Kiefel JJ).

98 *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at [79] - [80] (Gummow and Bell JJ), [128], [134] (Hayne, Crennan and Kiefel JJ), 385 [154] (Heydon J).

intendment is discernible here: the regime created by the CO Act under Part 2 is neither self-contained nor exhaustive.[99] Pursuant to section 101 of the CO Act the *Uniform Civil Procedure Rules 1999* (Qld) apply to applications made under Part 2 to the extent they are consistent with the CO Act. Those Rules include a power of the Supreme Court to adjourn the hearing of an application either by consent,[100] or by making orders or directions about the conduct of a proceeding that it considers appropriate.[101]

46. Subsections 8(5)(b), 9(3) and 9(4) should not be construed as being inconsistent with these Rules, particularly given that such a construction may prevent the Supreme Court from affording procedural fairness to a party.[102] Such Rules would therefore apply, and would allow the Supreme Court to make orders or directions as appropriate to ensure that a respondent to an application has an appropriate opportunity to consider and answer the material forming part of an application pursuant to s8 of the CO Act, prior to the making of a declaration (or not) under s10. This is what occurred in this matter.[103]

Q8 – Costs

47. No order for costs should be made in favour or against South Australia.

Part VI. Estimated hours

48. South Australia estimates it will require 20 minutes for presentation of its oral argument.

Dated: 28 November 2012

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99 *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at [162] (Heydon J).
100 Rules 30, 31(6) of the *Uniform Civil Procedure Rules 1999* (Qld).
101 Rules 366, 367 of the *Uniform Civil Procedure Rules 1999* (Qld).
102 *K-Generation Pty Ltd v Licensing Court of South Australia* (2009) 237 CLR 501 at [48], [65] (French CJ).
103 See Order of Boddice J 21 June 2012 (Special Case Book pp106-107).