IN THE HIGH COURT OF AUSTRALIA **No. B59 of 2012**
BRISBANE REGISTRY

BETWEEN: **ASSISTANT COMMISSIONER MICHAEL JAMES CONDON**

Applicant

AND: **POMPANO PTY LTD (ACN 010 634 689)**

First Respondent

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AND: **FINKS MOTORCYCLE CLUB, GOLD COAST CHAPTER**

Second Respondent

SUBMISSIONS ON BEHALF OF APPLICANT AND ATTORNEY-GENERAL FOR QUEENSLAND, INTERVENING

I. CERTIFICATION

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

20 ### II. CONCISE STATEMENT OF ISSUES

2. The issues are identified in the questions in the special case.

III. SECTION 78B NOTICES

3. The respondents have given notice to the Attorneys-General in compliance with s 78B of the *Judiciary Act 1903* (Cth). The applicant does not consider that any further notice is required.

IV. CITATIONS

4. There are no relevant judgments below.

Date of document: 23 November 2012
Filed on behalf of: the applicant and the Attorney-General for Queensland, Intervening

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V. STATEMENT OF RELEVANT FACTS

5. The applicant accepts the statement of facts provided by the respondents.

VI. ARGUMENT

(a) The statutory scheme for criminal intelligence

6. Part 6 of the *Criminal Organisation Act 2009* (Qld) provides a scheme for the admission and protection of evidence containing 'criminal intelligence'.[1] This term is defined as follows:[2]

> ***Criminal intelligence*** is 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 Commissioner of Police ('the commissioner') may apply to the Supreme Court ('the Court') for a declaration that particular information is criminal intelligence. The commissioner can only make the application if he or she reasonably believes that the information is criminal intelligence.[3] The application must identify the information and address a number of specific matters. These include the grounds on which the declaration is sought, an explanation of the intelligence assessment system of the 'relevant agency'[4] for the information, and the assessment of the information made under that system.[5]

7. The court then hears the application at a special closed hearing which may be attended only by the commissioner, the commissioner's representatives, court staff, police witnesses and the Criminal Organisation Public Interest Monitor ('COPIM'). The last of these, as part of his or her functions,[6] can present questions for the commissioner, cross-examine police witnesses and make submissions about the appropriateness of granting the application.[7]

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1 Act, s 60.
2 Act, s 59.
3 Act, s 63(2).
4 The term is defined in the Act, s 59A.
5 Act, s 63(3). A copy of all the material given to the Supreme Court must also be given to the Criminal Organisation Public Interest Monitor as soon as reasonably practicable: see s 88.
6 Act, s 86.
7 Act, ss 71, 89.

8. If the court is satisfied that the information is criminal intelligence, it has a discretion whether to make the declaration.[8] In exercising that discretion, it must[9] have regard to whether specific matters in s 60 of the Act, such as prejudice to a criminal investigation, outweigh any unfairness to a person who is or may be subject to other kinds of applications made under the Act ('substantive applications').[10] These would include applications for a declaration that an organisation is a criminal organisation.[11]

9. The Court must hear the part of the application in which the declared criminal intelligence is to be considered at a closed hearing which may be attended only by the commissioner, the commissioner's representatives or nominees, court staff, witnesses and the COPIM.[12]

10. Part 6 contains special provisions that regulate information that is provided by an 'informant'.[13] The commissioner, in his application for criminal intelligence and accompanying affidavits and material, need not include any 'identifying information' about the informant and such identifying information cannot otherwise be required to be given to the court.[14] The term 'identifying information' means the informant's name, date of birth, current location, where the informant resides, and the person's position in an organisation.[15]

11. The commissioner must, however, file an affidavit by an officer of the relevant agency containing certain matters. These include a statement about inquiries that that the relevant agency has made concerning the existence and details of any allegations of professional misconduct against the informant. They also include the following:[16]

    (i) the informant's criminal history, including pending charges;
    (ii) any information held by the relevant agency about allegations of professional misconduct against the informant;
    (iii) any inducements or rewards offered or provided to the informant in return for assistance; and
    (iv) whether the informant was serving a term of imprisonment or was otherwise held in custody when the informant provided the relevant information to the relevant agency.

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8 Act, s 72(1).
9 The Act uses the word 'may' but for the reasons developed in paragraph 38 below, it means 'shall' or 'must'.
10 Act, s 72(2). 'Substantive applications' are defined in s 75.
11 Act, Part 2.
12 Act, s 78.
13 Schedule 2, see 'informant'.
14 Act, s 63(5).
15 Act, s 59A.
16 Act, s 64(4).

12. The informant cannot be called to or required to give evidence.[17]

13. Section 76 imposes identical requirements for declared criminal intelligence that comes from an informant.

14. A criminal intelligence declaration takes effect when it is made and remains in force until revoked.[18] A court may revoke a criminal intelligence declaration at any time on application by the commissioner.[19]

15. Section 82 makes it an offence for a person to disclose certain kinds of information, including declared criminal intelligence, unless the disclosure comes within a number of categories.

(b) Declaration of criminal organisations

16. The commissioner may apply to the court for a declaration that a particular organisation is a criminal organisation. The application must, among other things, provide a description of the nature of the organisation and any of its distinguishing characteristics, the grounds on which a declaration is sought, and the information supporting the grounds.[20] It must be also accompanied by any affidavit on which the commissioner intends to rely at the hearing and it must be filed and state a return date within 35 days of filing.[21]

17. A respondent to the application may file a response stating the facts relied upon in response to the application and the nature of the response in relation to each order sought by the applicant. The respondent must file the response at least 5 business days before the return date. The response must be accompanied by any affidavit on which the respondent intends to rely at the hearing.[22]

18. The commissioner may apply for an extension of a return date and the court may grant the extension on such conditions as it considers appropriate.[23]

19. The court hears the application and may make a declaration that an organisation is a criminal organisation if it is satisfied on the balance of probabilities[24] of three matters: the respondent is an organisation; members of the organisation associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity; and the organisation is an unacceptable risk to the safety, welfare or order

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17 Act, s 64(2).
18 Act, s 73.
19 Act, s 74.
20 Act, s 8(2).
21 Act, s 8(5).
22 Act, s 9.
23 Act, s 106.
24 Act, s 110.

of the community.[25] In considering whether to make a declaration, the court must have regard to specific information before the court, including information suggesting a link exists between the organisation and serious criminal activity and any conviction for current or former members of the organisation. The court must also have regard to anything else it considers relevant.[26]

20. A declaration that an organisation is a criminal organisation lasts for 5 years unless it is revoked or renewed.[27] An order can be revoked on application by the commissioner, the criminal organisation or a member of the criminal organisation.[28] However, the court may only revoke the order if satisfied that there has been a substantial change in the nature or membership of the criminal organisation to the extent that members no longer associate for the purpose of engaging in serious criminal activity and the organisation no longer represents an unacceptable risk to the safety, welfare and order of the community.[29]

21. Part 3 of the Act deals with control orders. It depends for its operation on there being a declaration under Part 2. That is because a court cannot make a control order against a respondent unless that person is, or has been, a member of a criminal organisation or associates with a member of a criminal organisation.[30]

22. A declaration is not, however, a prerequisite for making a public safety order under Part 4 of the Act[31] or a fortification removal order under Part 5.[32]

23. Although it is not an offence to be a member of a criminal organisation, it is an offence for a member of a criminal organisation to recruit anyone to become a member of, or to associate with, a member of a criminal organisation.[33]

(c) Statement of Argument

(i) Disclosure and competing public interests

24. The tension that arises when information should be disclosed so that a judicial decision will be based on the most full and accurate information available but when such disclosure will prejudice another substantial public interest has never been resolved by uniformly requiring disclosure. On the contrary, the whole field of discourse concerning privilege against disclosure consists of balancing competing public interests. Competing public interests against disclosure can arise,

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25 Act, s 10(1).
26 Act, s 10(2).
27 Act, s 12.
28 Act, s 13.
29 Act, s 13(9).
30 Act, ss 18(1)(a), 18(2)(b).
31 Act, s 28.
32 Act, s 43.
33 Act, s 100.

for example, by reason of the existence of a lawyer-client relationship, parliamentary privilege, a general relationship of confidence, the status of the potential discloser as a government and many others.[34]

25. Similarly, the public interest in having justice administered in public may conflict with other public interests so that, in some cases, the former interest yields to the latter; there are many occasions upon which it is right that proceedings be heard in camera.

26. Likewise, the general rule that an accused person has a right to confront his or her accuser, and to cross-examine, may give way when a more weighty competing public interest requires that such confrontation not occur in the usual way.[35]

27. In the leading early case concerning legal professional privilege, Knight-Bruce VC summarised the principle at the heart of all such conflicts as follows:[36]

> The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them... Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much.

28. And in *United States v Nixon*, Burger J, speaking for a unanimous Court, said:[37]

> The privileges referred to by the Court are designed to protect weighty and legitimate competing interests. Thus, the Fifth Amendment to the Constitution provides that no man "shall be compelled in any criminal case to be a witness against himself." And, generally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence. These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.

29. The enforcement of a privilege against disclosure, and a consequential denial of information to the court, is but when possible outcome when policy considerations collide. The range of choices open to a legislature when considering the solution to the dilemma present by such competing considerations are various:

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34 See the analysis of many occasions of privilege in '*Privileged Communications*' (1985) 98 *Harvard Law Review* 1450.

35 As in the case of the cross examination of children in criminal proceedings and the cross-examination of protected witnesses: see, respectively, *Evidence Act 1977* (Qld), Part 2, Div 4A and Div 6.

36 *Pearse v Pearse* (1846) 63 ER 950 at 957.

37 418 US 683 at 709-710 (1974).

(a) it could refuse to permit the admission of such material at all;[38]
(b) it could require full disclosure and the admission of such material if it is at all relevant to the task of the Court in establishing the truth in a case;
(c) it could permit admission and use of such material by the Court with limited non-disclosure to one side of the record;[39]
(d) it could permit the admission and use of such material without any disclosure at all to one side of the record.

10 30. Whatever choice is made, there will be some prejudice suffered by somebody, including one party to the relevant proceeding. Thus, the enforcement of legal professional privilege or the privilege against self incrimination may entirely preclude truthful information being placed before a court and may even prevent the bringing of proceedings at all.[40] In such a case, the public benefit in maintaining the privilege is regarded as paramount over the right of another person to a judicial decision upon the best evidence and may prevent such a person obtaining any decisions at all.

31. The provisions of the Act in question, with some qualifications, adopt the fourth
20 option.

32. It is not a principle of law that a statute, whose application prejudices *any* of the rights of a litigant, will be invalid even if it does so to vindicate other, competing, interests. It is not even a principle of law that a law that permits the consideration, by a court, of evidence unseen by one party is invalid for that reason. *K-Generation v Liquor Licensing Court* is authority for that proposition.[41] Nevertheless, although some of the rights of a litigant have been restricted or negated, a law cannot require the resulting trial itself to be wholly unfair.

30 33. It would therefore not be sufficient, in order to invalidate the Act, merely to demonstrate that its operation would result in *some* injustice to a litigant.

34. In order to ensure that the use of evidence in this way only occurs when its use is not inconsistent with the conduct of a fair trial, the Act makes provision for a judgment to be made by the Supreme Court.

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38 As in the case of legal professional privilege (which itself is not unlimited).

39 As in the case of the use of information but the non-disclosure of the identity of an informant who provided it.

40 In *Tuckiar v R* (1934) 52 CLR 335, legal professional privilege operated to prevent evidence of a confession by the accused being placed before the court, it having been made in circumstances giving rise to legal professional privilege; and the breach of the privilege in the circumstances of that case meant that, upon the quashing of his conviction, the accused could never be retried: see at 347.

41 (2009) 237 CLR 501 at 532 [97], [98] (French CJ), 542-543 [147]-[149] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

35. The Act only permits the use of information in this manner if, in the first place:

(a) the information relates to actual or suspected criminal activity;[42] and,
(b) its disclosure could reasonably be expected to:
  (i) prejudice a criminal investigation;
  (ii) enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement; or,
  (iii) endanger a person's life or safety.

36. Satisfaction of these factual criteria is not enough; it merely gives rise to an occasion for the exercise of a judicial discretion whether or not to permit the use of material which has been found to possess one or more of these qualities.

37. That discretion, conferred by s 72 of the Act, would require a Court to refuse to permit the use of such material if the public benefit to be gained by non-disclosure would not outweigh the public benefit in a litigant having either the right to know the evidence or to exclude it. Section 72(2) provides that:

> In exercising its discretion to declare information to be criminal intelligence, the court may have regard to whether matters mentioned in section 60(a)(i) to (iii) outweigh any fairness to a respondent.

38. The word 'may' must mean 'shall' because it is inconceivable that a court, in considering whether to make an order, could ignore the central issue raised for judicial determination by the Act itself. Further, having regard to Chapter III of the Constitution, the matters mentioned in s 60(a)(i) to (iii) could never outweigh the public interest in ensuring that all trials fair trials. The sub-section must be read conformably with the Constitution so that it would require the dismissal of an application if the result of a declaration would be a trial that is manifestly unfair.

39. As in *K-Generation v Liquor Licensing Court,*[43] the court is not obliged by the Act to receive the evidence. It has a discretion whether to do so; the factors relevant to the discretion include whether such a decision would be unfair to the respondent. The Act makes provision for the active participation of a devil's advocate, the COPIM. The COPIM not only has access to all the material placed before the Court,[44] but has the right to obtain further information from the applicant by 'presenting' questions for the applicant to answer.[45] The COPIM is entitled to be present at the substantive application when an order is sought that an organisation be declared a criminal organisation;[46] that is, the substantive application.

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42 Act, s 59(1).
43 (2009) 237 CLR 501.
44 Act, s 88(1).
45 Act, s 89(2)(a)(i).
46 Act, s 78(2)(e).

40. There is no prohibition against a respondent furnishing information to the COPIM so that that person can more usefully exercise rights to cross-examine and to make submissions to fulfill the statutory function of 'testing the appropriateness and validity of the application'.[47]

41. *Ex hypothesi*, absent these provisions of the Act, in order to avoid a 'non-trivial'[48] risk of prejudice to criminal investigations or to the bodily security of an informant, it would be the applicant who would suffer the prejudice in every case in which he is in possession of cogent evidence but is unable to use it; and the Court would be denied the best information. The choice for the legislature was between continuing a *status quo* in which such material could not be used or to authorise the Supreme Court to decide whether, in the circumstances of a particular case, any prejudice to a respondent—there may be none—is outweighed by the stated considerations.

42. Moreover, the Act does not prohibit the respondent knowing the facts which the criminal intelligence is tendered to prove in the substantive application. That is to say, 'criminal intelligence' is, by definition, information relating to actual or suspected criminal activity.[49] Such information, if relevant to the issues which the Court must decide in considering whether to declare an organisation under s 10, will tend to prove a fact or facts. The Act does not prohibit disclosure of the fact or facts sought to be proved by the evidence constituted by criminal intelligence. Thus, it would be open to the Court, and it would ordinarily required by the duty to afford a fair trial, to order that the applicant give to the respondent particulars concerning the actual acts alleged to have been done by persons and which are alleged to constitute 'serious criminal activity'.[50] It is only the disclosure of information which relates to 'actual or suspected criminal activity' and the disclosure of which could be reasonably expected to have the effects enumerated in s 59(1) which is prohibited.

43. If even the provision of such particulars might disclose, say, the existence of an informant,[51] thus precluding the giving of them, then when considering the exercise of discretion in the first place whether to declare the information 'criminal intelligence', the Court might well conclude that a declaration would work such unfairness to the respondent that no declaration should be made.

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47 Act, s 89(2).

48 *K-Generation* (2009) 237 CLR 501 at [62] (French CJ).

49 Act, s 59(1).

50 As defined in ss 6 and 7.

51 Act, s 59(1)(b): because, for example, proof of the doing of a criminal act by a person will necessarily imply that an informant exists.

(ii) The Kable principle and departures from judicial process

44. The principle established in *Kable v Director of Public Prosecutions (NSW)*[52] ('the *Kable* principle') invalidates State legislation that would deprive courts of their 'institutional integrity'. That term refers to those essential qualities that distinguish courts from other bodies.[53] The formulation of the *Kable* principle in terms of defining characteristics does not, however, imply that the States cannot authorise or require courts to depart in significant respects from the usual aspects of the judicial process. That is so for several reasons.

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45. First, the *Kable* principle is concerned with ensuring that State courts remain suitable repositories for federal jurisdiction.[54] That is its rationale. Departures from the judicial process are only significant if they undermine the suitability of State courts to exercise federal jurisdiction. As McHugh J explained in *Fardon v Attorney-General (Qld)*:[55]

> 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.

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46. Secondly, there is no separation of powers at the State level.[56] That absence was a deliberate choice of the founders of the Constitution. Yet to base invalidity on departures from the ordinary judicial process would in practice subject State courts to the same kinds of restrictions that have been imposed on the conferral of functions on federal courts which are subject to a strict separation of judicial power. It would also inhibit the capacity of the States, as laboratories of democracy in which experiments may be conducted,[57] to experiment with their court systems.

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47. Thirdly, the authorities accept that significant departures from ordinary judicial processes are permissible, even with regard to procedural fairness and the open

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52 (1996) 189 CLR 51.

53 *Forge v Australian Securities and Investments Commission*, (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ). See also *Wainohu v New South Wales* ('*Wainohu*') (2011) 243 CLR 181 at [44] (French and Kiefel JJ).

54 *Baker v The Queen* (2004) 223 CLR 513 at 534[51] (McHugh, Gummow, Hayne and Heydon JJ).

55 (2004) 223 CLR 575 at 601 [42] (emphasis added).

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

57 *New State Ice Co v Liebmann* 285 US 262 at 311 (1932) (Brandeis J). See also *South Australia v Totani* (2010) 242 CLR 1 at [246] (Heydon J).

court principle.[58] In *Russell v Russell*, for example, a majority of the High Court[59] held invalid a provision of the *Family Law Act 1975* (Cth) that purported to require State Supreme Courts to sit in camera in all cases when exercising federal jurisdiction in matrimonial causes. The majority held that the power to invest State courts with federal jurisdiction under s 77(iii) of the Constitution did not extend to laws regulating the constitution or organisation of those courts. But the Court accepted that State Supreme Courts could be required to sit in camera in particular types of cases. As Gibbs J said:[60]

> To require a court invariably to sit in closed court is to alter the nature of the court. Of course there are established exceptions to the general rule that judicial proceedings shall be conducted in public; *and the category of such exceptions is not closed to Parliament. The need to maintain secrecy or confidentiality, or the interests of privacy or delicacy, may in some cases be thought to render it desirable for a matter, or part of it, to be held in closed court.*

48. In *Gypsy Jokers v Commissioner of Police* ('*Gypsy Jokers*'),[61] the Court upheld the validity of s 76(2) of the *Corruption and Crime Commission Act 2003* (WA). This relevantly provided:

> The Commissioner of Police may identify any information provided to the court for the purposes of the review as confidential if its disclosure might prejudice the operations of the Commissioner of Police, and information so identified is for the court's use only and is not to be disclosed to any other person, whether or not a party to the proceedings, or publicly disclosed in any way.

49. The majority comprising Gleeson CJ and Gummow, Hayne, Heydon, Crennan and Kiefel JJ considered it important that the Supreme Court of Western Australia would determine for itself whether the information might prejudice the operations of the Commissioner of Police. Their Honours accepted that the Court could be required to act on the basis of such information, which would not be disclosed to a party.[62]

50. In *K-Generation v Liquor Licensing Court* ('*K-Generation*'), moreover, the Court upheld the validity of s 28A(5) of the *Liquor Licensing Act 1997* (SA). This required the Liquor Licensing Court and the Supreme Court to 'take steps' to

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58 These have been described as defining characteristics of courts: *Wainohu* (2011) 243 CLR 181 at 208 [44] (French CJ and Kiefel J).

59 Barwick CJ, Gibbs and Stephen JJ; Mason and Jacobs JJ dissenting.

60 (1976) 134 CLR 495 at 520 (emphasis added). See also (1976) 134 CLR 495 at 506-507 (Barwick CJ), 533 (Stephen J) (noting that parliamentary sanction is required for the exclusion of the public from proceedings except in a limited number of exceptions).

61 (2008) 234 CLR 532.

62 (2008) 234 CLR 532 at [36] (Gummow, Hayne, Heydon and Keifel JJ) [182]-[183] (citations omitted).

maintain the confidentiality of information classified by the Commissioner of Police as 'criminal intelligence'. These steps included steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives. As with the legislation considered in *Gypsy Jokers*, s 28A(5) authorised the Liquor Licensing Court and the Supreme Court to decide matters in reliance of confidential information that had not been disclosed to the other side.

51. It follows there is considerable scope for States to enact legislation requiring courts to depart from ordinary judicial processes. It will only be where such departures substantially undermine the suitability of the courts to act as repositories for federal jurisdiction that the State legislation will be invalid. That will occur if legislation impairs the independence and impartiality of the courts by directing them as to the manner and outcome of the exercise of their jurisdiction.[63]

52. For the reasons that follow, none of the impugned provisions of the Act substantially undermines the institutional integrity of the court.

(iii) Validity of sections 66 and 70

53. The respondents submit that because a declaration of criminal intelligence is unlimited as to time, unassailable and is made in a mandatory ex parte process, ss 66 and 70 of the Act breach the *Kable* principle.[64] They rely primarily on *International Finance Trust Co Ltd v New South Wales Crime Commission* ('*International Finance Trust*').[65]

54. These submissions should be rejected. First, the respondents' reliance on *International Finance Trust* is misplaced. That case concerned legislation which required the Supreme Court of New South Wales to make a restraining order over a person's property if that court was satisfied that there were reasonable grounds for an officer's suspicion.[66] The Supreme Court could not alter the restraining order except by granting an application for exclusion of property. But it could only do that if it was satisfied, on the balance of probabilities, that the property was not 'fraudulently acquired property' and was not 'illegally acquired'.[67] That was an onerous burden for an applicant to discharge. The combination of these features

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63 *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 37 (Brennan, Deane and Dawson JJ); *Nicholas v The Queen* (1998) 193 CLR 173 at [15] (Brennan CJ), [146] (Gummow J); *Gypsy Jokers* (2008) 234 CLR 532 at [39] (Gummow, Hayne, Heydon and Kiefel JJ); *South Australia v Totani* (2010) 242 CLR 1 at [132]-[134] (Gummow J).

64 Respondents' submissions, para 28.

65 (2009) 240 CLR 319.

66 *Criminal Assets Recovery Act 1990* (NSW), s 10.

67 *Criminal Assets Recovery Act 1990* (NSW), s 25.

undermined the court's institutional integrity. As Gummow and Bell JJ explained:[68]

> The Supreme Court is conscripted for a process which requires in substance the mandatory ex parte sequestration of property upon suspicion of wrong doing, for an indeterminate period, with no effective curial enforcement of the duty of full disclosure on ex parte applications. In addition the possibility of release from that sequestration is conditioned upon proof of a negative proposition of considerable legal and factual complexity.

55. The regime in Part 6 operates very differently. The closed, *ex parte* hearings mandated by ss 66 and 70 cannot result in orders immediately affecting anyone's liberty or property. They can only result in a declaration if the court, rather than the commissioner, is satisfied that the information meets the definition of criminal intelligence.[69] Even if the court is so satisfied, it can refuse to make a declaration on discretionary grounds. That will involve a balancing exercise like that conducted by a court in determining claims of public interest immunity.[70] In deciding the application, moreover, the court will have the benefit of submissions from the COPIM, who will have had access to the relevant information and can make submissions about the appropriateness of making a declaration.[71]

56. Furthermore, any declaration that the court makes does not affect the weight that it may place on the criminal intelligence in a substantive application. As the High Court pointed out in *K-Generation*, the fact that the criminal intelligence has not been tested or seen may well incline the court to discount it.[72] Given the features of the regime in Part 6 of the Act, which are similar to those in *Gypsy Jokers* and *K-Generation*, the court is not directed as to the manner and outcome of the exercise of its jurisdiction.[73] Its independence and impartiality are not compromised. Any comparison with the situation in *International Finance Trust* is therefore flawed.

57. Secondly, the respondents' submissions ignore the fact that ss 66 and 70 have the object and effect of preventing disclosure that would harm the public interest. The definition of 'criminal intelligence' speaks of information the disclosure of which can reasonably be expected to prejudice criminal investigations, enable the

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68 (2009) 240 CLR 319 at [97].

69 *Gypsy Jokers* (2008) 234 CLR 532 at [7] (Gleeson CJ), [33], [36] (Gummow, Hayne, Heydon and Kiefel JJ), [174] (Crennan J); *K-Generation* (2009) 237 CLR 501 at [148] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

70 *Gypsy Jokers* (2008) 234 CLR 532 at 559 [36] (Gummow, Hayne, Heydon and Kiefel JJ), [183] (Crennan J).

71 A respondent would have been able to have the same access to that information under the principles of public interest immunity.

72 (2009) 237 CLR 501 at [148] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). See also at [76] (French CJ).

73 See *Gypsy Jokers* (2008) 234 CLR 532 at [36] (Gummow, Hayne, Heydon and Kiefel JJ).

discovery of the existence of the identity of a confidential source of information relevant to law enforcement or endanger a person's life or physical safety.[74] That is information that would traditionally have been the subject of claims for public interest immunity.

58. The courts have recognised that the usual requirements of procedural fairness—disclosure of information to the other side, and an opportunity to comment—do not apply to resolving claims for public interest immunity.[75] Thus, courts can inspect for themselves the materials over which the immunity is claimed, without disclosing those materials to the other side.[76] They can also consider confidential affidavits in support of those claims.[77] This illustrates how the content of procedural fairness is reduced where disclosure of information would harm the public interest.

59. The reduction of the content of procedural fairness is not confined to claims for public interest immunity. On occasions, the courts have permitted a party to rely on confidential affidavits as part of its positive case. In *Nicopoulos v Commissioner for Corrective Services*,[78] for example, the New South Wales Supreme Court admitted confidential affidavits into evidence and denied the plaintiff and his advisers access to them. Acting Justice Smart found that it was not possible for the plaintiff to be given a meaningful summary without prejudicing future investigations and law enforcement.[79]

60. Given the definition of criminal intelligence, it is evident that there is a need to prevent the disclosure of that information to respondents while a court determines whether it is criminal intelligence under s 72 of the Act and whether to make a declaration. Parliaments are not confined to the methods available at common law for protecting against such disclosure. Once that is accepted, it is difficult to see why ss 66 and 70 would deprive the court of its institutional integrity.

(iv) Validity of section 78

61. The respondents claim that s 78 is invalid because proceedings under s 8 are a 'predicate step in a predominantly criminal process' and the effect of s 78 would be to prejudice a respondent's ability to refute a substantial portion of evidence put against it.[80]

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74 Act, s 59.

75 *Alister v The Queen* (1984) 154 CLR 404 at 469 (Gibbs CJ, Wilson, Brennan and Dawson JJ); *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [24] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

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

77 *Meissner* (1994) 76 A Crim R 81 at 85 (Carruthers J).

78 (2004) 148 A Crim R 74.

79 (2004) 148 A Crim R 74 at 89 [70].

80 Respondents' submissions, para 29.

62. These submissions should be rejected. First, while the judicial process ordinarily requires parties to be given an opportunity to present evidence and to challenge the evidence led against them, that requirement is not absolute. *Gypsy Jokers* and *K-Generation* make it plain that courts can rely upon information that has not been disclosed to the other party because it might prejudice criminal investigations or otherwise harm the public interest. It is therefore mistaken to claim that parties must invariably be given an opportunity to challenge the evidence led against them.

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63. Secondly, s 78 operates only on the part of the hearing in which the court is to consider declared criminal intelligence. Accordingly, the court will have already found that the disclosure of the information can reasonably be expected to prejudice criminal investigations, enable the discovery of the existence of the identity of a confidential source of information relevant to law enforcement, or endanger a person's life or physical safety.[81] It will have already found that any unfairness to the respondent is outweighed by the importance of avoiding disclosure. In these circumstances, it can hardly undermine a court's institutional integrity for the legislature to require a closed hearing at which the respondent and
20 its legal representatives do not appear.

64. Thirdly, while the COPIM cannot make a submission while the respondent and its legal representatives are present in court, s 78 does not prevent the respondent or its legal representatives from making representations to the COPIM about any matters that they choose. Nor does any other section. Subject to the prohibitions on disclosure in s 82, the COPIM can discuss any aspect of the application with the respondents outside of the closed hearing.[82]

65. Finally, the claim that proceedings under s 8 are a predicate step in a
30 'predominantly criminal process'[83] is unfounded. The proceedings under s 8 are civil. As with applications for public safety removal orders under Part 4 of the Act or fortification removal orders under Part 5, they are subject to proof on the balance of probabilities. They are also subject to the *Uniform Civil Procedure Rules 1999* (Qld) to the extent that those rules are consistent with the Act. The fact that it may be necessary to satisfy the court that members of the organisation have engaged in criminal activity or associate for that purpose does not alter the character of the proceedings. Courts in civil proceedings have been able to

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81 There is an obvious need to prevent the disclosure of that information to the respondent or its legal representatives: see *K-Generation* (2009) 237 CLR 501 at [74] (French CJ): 'As a practical matter it may be highly unlikely that relevant confidentiality could be assured if information were to be disclosed to an applicant adversely affected by it.'

82 It is submitted that the argument that s 89(4) deprives the COPIM's role of any substantive protection is mistaken. That power is discretionary and it is to be expected that a court would only exercise it if there was sufficient reason.

83 Respondents' submissions, para 29.

determine whether conduct amounting to a criminal offence has been committed for a long time. Thus, they have considered whether individuals have committed murder,[84] fraud[85] and other common law or statutory offences such as assault. The respondents' reliance on cases involving witnesses in criminal trials, such as *R v Davis*,[86] is therefore mistaken.

(v) Validity of sections 82 and 109

66. The respondents claim that ss 82 and 109 are invalid to the extent that they operate to deny to the court any discretion to take steps to provide any declared criminal intelligence to a respondent or the respondent's legal representatives.[87]

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67. These sections are not the subject of any direct challenge in the questions in the special case. The Court should therefore not entertain a challenge to them.[88]

(vi) Validity of section 76

68. The respondents' complaint is that s 76, read with other provisions including s 64, denies the Supreme Court and a respondent the proper basis to test an informant's evidence.[89]

69. These submissions ignore several factors. First, nothing in s 76 requires a court to accept an informant's evidence that is the subject of a declaration of criminal
20 intelligence. If the court is not satisfied of the informant's credibility because the informant has not given evidence in person or because it is lacking details about the informant's criminal record, it can give that evidence little or no weight.[90] The absence of any direction as to how the court is to decide the issue suggests there is no undermining of the institutional integrity of the court.

70. Secondly, and relatedly, the court has practical means of seeking to obtain some of the information that it may require to test the evidence. It may, for example,

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84 *Helton v Allen* (1940) 63 CLR 691. A person had been tried and acquitted of the murder of a person who died of strychnine poisoning. Civil proceedings were brought against the accused by one of the next of kin of the deceased, directed to establishing the unlawful killing and therefore that the accused could not take under the will.

85 *Rejfek v McElroy* (1965) 112 CLR 517.

86 [2008] 1 AC 1128.

87 Respondents' submissions, para 31.

88 In any event, it is difficult to understand why s 109 would result in significant procedural unfairness. As mentioned in paragraphs 58 to 59 above, courts have long modified their procedures to account for claims of public interest immunity. A respondent could have no expectation of access to a transcript in which a court considered information that the commissioner wished to have covered by a declaration of criminal intelligence. Access would be likely to defeat the confidentiality of the material.

89 Respondents' submissions, para 32.

90 The converse is also true. If the court is satisfied of the reliability of the informant's information because, for example, it is consistent with documentary evidence or the evidence of other witnesses, then it can choose to accept it.

indicate to the commissioner that it needs full details of information about the offences in the informant's criminal record or the allegations of professional misconduct if it is to be satisfied about the informant's credibility. Nothing in s 76 (or in s 64) would prevent the court from receiving that information if the commissioner sought to provide it; for the information would not be provided 'under a requirement'.

71. Thirdly, s 76 is a procedural law. It is akin to laws providing for witnesses to be compellable or non-compellable, preventing persons from disclosing evidence to a court[91] or imposing limitations on cross-examination.[92] The scope for parliaments to make such laws is wide. In *Nicholas v The Queen*, for example, the Court rejected a challenge to s 15X of the *Crimes Act 1914* (Cth). This required a court, in the context of a controlled operation, to disregard the fact that a law enforcement officer had committed an offence in importing narcotic goods, or had aided, abetted or been knowingly concerned in their importation. But s 15X did not deem any element of the offence to exist and did not go to a person's ultimate guilt or innocence.[93] That was the key to its validity.

72. Section 76 denies to the court the power to compel an informant to give evidence and to require certain information about the informant. But it does not affect the ultimate issues that the court must determine in any substantive application. Nor does it regulate the weight that the court may give to the informant's evidence. These matters suggest that it does not substantially undermine the institutional integrity of the court.

(vii) Validity of subsection 10(2)

73. The respondents submit that s 10(2) is invalid because it permits the Supreme Court to have regard to declared criminal intelligence in an application under s 8.[94]

74. That submission, however, is inconsistent with *Gypsy Jokers* and *K-Generation*. As mentioned above, those cases stand for the proposition that a court can consider information that is not disclosed to one party and can make a decision on the basis of that information. The situation under the Act with respect to criminal intelligence is relevantly the same.

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91 See, for example, *Elbe Shipping SA v Giant Marine Shipping SA* (2007) 159 FCR 518.

92 *Justices Act 1886* (Qld), ss 110B, 110C; *Evidence Act 1977* (Qld), ss 15A, 21A, 21AG, 21AH, 21N; *Criminal Law (Sexual Offences) Act 1978* (Qld), s 4; *Domestic and Family Violence Protection Act 2012* (Qld), s 151; *Domestic and Family Violence Act* (NT), s 109.

93 *Nicholas v The Queen* (1998) 193 CLR 173 at [24] (Brennan CJ), [156] (Gummow J), [252] (Hayne J).

94 Respondents' submissions, para 36.

75. In any event, the respondents' submissions treat s 10(2)(a) as if it were divorced from the rest of s 10. Subsection 10(1) requires a court to be satisfied of three matters:

(i) the respondent is an organisation;
(ii) members of the organisation associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity; and
(iii) the organisation is an unacceptable risk to the safety, welfare or order of the community.

10 'Serious criminal activity' is relevantly defined as a 'serious criminal offence'.[95] Because of the gravity of finding that members associate for the purpose of engaging in or conspiring to engage in the serious criminal offences, the court would require clear evidence before it could be satisfied of the second of the matters above.[96] The suggestion that a court might make a declaration simply because of 'an inkling...of a connection, whether material or immaterial' between serious criminal activity and the members of the organisation is therefore without foundation.[97]

(viii) Validity of subsection 10(1)(c)

20 76. The respondents submit that s 10(1)(c) is invalid because it calls for a policy assessment that is devoid of adequate legal standards or criteria capable of judicial application.[98]

77. These submissions, however, ignore numerous authorities demonstrating that even highly imprecise criteria are capable of being applied in accordance with the judicial method.[99]

78. In any event, courts are well accustomed to determining whether certain activities or persons pose an 'unacceptable risk' to persons or the community. In *Thomas v* 30 *Mowbray*, Gleeson CJ stated:[100]

> [P]redictions 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. In *Veen v The Queen [No 2]* this Court spoke of the role of protecting the public

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95 Act, s 6.
96 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362 (Dixon J); *Rejfek v McElroy* (1965) 112 CLR 517 at 521.
97 Respondents' submissions, para 36. Because no provision of the Act purports to restrict the court's obligation to provide reasons, it would be possible to ascertain whether the declaration was based on a mere inkling or something more. A decision of the court could be appealed.
98 Respondents' submissions, para 37.
99 See *Baker v The Queen* (2004) 223 CLR 513 at [42].
100 (2007) 233 CLR 307 at [28] (citations omitted).

> involved in sentencing. The topic was considered in a different context in *Fardon*, where it was pointed out that the standard of an unacceptable risk of harm, used in the Queensland legislation there in question, had been used by this Court in *M v M*, a case about parental access to children. Reference was earlier made to apprehended violence orders, and to the restraints on liberty which they may involve. I am unable to accept that there is a qualitative difference between deciding whether an angry person poses an unacceptable risk to his or her family, or to the community or some section of the community, or whether a sexually dysfunctional man poses an unacceptable risk to women, and deciding whether someone who has been trained by terrorists poses an unacceptable risk to the public. The possibility that the person will do what he or she has been trained to do, or will be used as a "resource" by others who have been so trained, is capable of judicial evaluation. I do not accept that these issues are insusceptible of strictly judicial decision-making.

79. These statements apply equally to s 10(1)(c) of the Act. That provision requires the court to be satisfied that the organisation poses an 'unacceptable risk' to the safety, welfare or order of the community. The standard of 'unacceptable risk' requires the court to assess the danger that the organisation poses to the community in light of its findings about members, their actions and the purposes for which they associate. That is not an activity that is inherently non-judicial or that would impermissibly align the judiciary with the executive and legislature.[101]

(vix) Validity of sections 9 and 106

80. The respondents claim that ss 9 and 106 mandate an impermissible departure from procedural fairness because they require a respondent to file its response within an inadequate time and only the commissioner can apply for an extension of time.[102]

81. These submissions should be rejected for three related reasons.

82. First, it is a well-established principle of interpretation that Parliament is taken not to deprive persons of fundamental rights and freedoms unless it expresses its intention in clear and unequivocal language.[103] Procedural fairness is such a right or freedom. An interpretation that would result in a breach of procedural fairness therefore should not be adopted if another construction is reasonably open.[104] The Act does not provide any consequence for a failure of a respondent to file a response with affidavits within the timeframes specified in s 9. Nor does it purport specifically to exclude the respondent from applying for or obtaining an extension. Accordingly, it should not be interpreted as precluding the court from considering

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101 Even if it were inherently non-judicial, it is difficult to see how it would necessarily breach the *Kable* principle. State courts, which are not subject to a strict separation of powers, are not required to exercise only judicial power.

102 Respondents' submissions, para 38.

103 This is the principle of legality: see *Momcilovic v The Queen* (2011) 245 CLR 1 at [43] (French CJ).

104 *K-Generation* (2009) 237 CLR 501 at [48] (French CJ).

a late response from a respondent or as precluding the court from extending the time for a respondent to file any affidavit material if the circumstances warrant it.

83. Secondly, and relatedly, the interpretation in paragraph 82 is supported by the principle that a legislature takes a court as it finds it.[105] The Supreme Court has inherent powers to ensure that cases before it are conducted in consistently with procedural fairness.[106] Those powers would extend to ensuring that a respondent to an application for the declaration of a criminal organisation has sufficient time to file its material. No provision of the Act purports to restrict the Supreme Court's implied power in that respect. Section 106 is directed simply to the position of the commissioner, not the respondent. The Act therefore manifests no clear intention that the respondent is incapable of obtaining an extension from the court or that any lateness in filing a response cannot be excused. None should be implied.

84. Thirdly, it is well established that courts should interpret a provision in a manner that results in validity rather than invalidity if such a construction is reasonably open.[107] If the respondents' interpretation of ss 9 and 106 mandated a breach of procedural fairness and thereby rendered those provisions invalid, the Court should adopt an alternative interpretation. For the reasons in paragraphs 82 and 83 above, it can do so.

85. It follows that the respondents' challenge to provisions of the Act should be dismissed.

86. Questions (i) to (vii) of the special case should therefore be answered 'no'.

87. Question (vii) should be answered 'the respondents'.

Dated: 23 November 2012

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105 *Electric Light and Power Supply* (1956) 94 CLR 554 at 560; *Mansfield v Department of Public Prosecutions* (WA) (2006) 226 CLR 486 at 491-492 [7]-[9]; *International Finance Trust* (2009) 240 CLR 319 at 377-378 [134] (Hayne, Crennan and Kiefel JJ).

106 *Cameron v Cole* (1944) 68 CLR 571 at 589 (Rich J); *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239 at 252 (Deane, Dawson, Toohey and Gaudron JJ).

107 *Gypsy Jokers* (2008) 234 CLR 532 at [11] (Gummow, Hayen, Heydon and Kiefel JJ). See also *Acts Interpretation Act 1954* (Qld), s 9.