

THE CONSTITUTIONALITY OF QUEENSLAND'S RECENT (LEGAL) WAR ON 'BIKIES'

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The Queensland government has responded to a perceived 'criminal problem' with motorcycle clubs by directly naming and declaring 26 motorcycle clubs. It supplements earlier legislation that provided for a court to make such an order, upon defined criteria. The effect of the declaration is that it becomes a criminal offence for participants in the declared organisation to associate. The legislation provides for minimum mandatory gaol terms for various offences, including the act of associating. This article argues that there are serious constitutional questions surrounding such legislation, including on the basis of Chapter III of the Constitution, and the extent to which a court's institutional integrity is compromised by legislation of this nature.

I INTRODUCTION

In October 2013, the Queensland Parliament passed a raft of legislative changes with the ostensible purpose of 'cracking down' on groups thought to present a challenge to public safety. For the purposes of this article, and for ease of reference, the legislation will be referred to as the 'anti-bikie laws'. Clearly the primary target of these laws is motorcycle clubs. Passage of these laws quickly followed a well-publicised violent altercation between members of rival motorcycle clubs on the Gold Coast, and the shooting of a member of a motorcycle club at a Gold Coast shopping mall. Legal groups such as the Queensland Law Society and the Queensland Bar Association have expressed serious concern with the legislation, including the lack of consultation before it was introduced, as well as the substantive content of the provisions. The Queensland government has responded by deriding some members of the judiciary and legal profession as living in ivory towers,¹ and by claiming that

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¹ Michael McKenna, 'Campbell Newman Says Judges Don't Understand Queenslanders Have Had Enough', *The Australian*, 25 October 2013.

some criminal lawyers are part of the ‘criminal machine’.² Subsequently, defamation proceedings have been issued against the Queensland Premier and Attorney-General. In summary, the introduction of these laws has taken place in a highly charged political environment with strongly held views on both sides, with the government claiming that such laws are necessary to stamp out criminal behaviour in the State, and civil libertarians and lawyers expressing grave concern with the substance of the provisions and the precedent being set.

This article considers arguments regarding the constitutionality of aspects of the new laws. A High Court challenge to the new laws was filed on 19 March 2014. Part II of the article summarises the essence of the new regime. It will be seen that there are many possible constitutional arguments in relation to the new laws. Some of these have been examined elsewhere,³ and will not be discussed again here. In Part III, a constitutional argument is mounted against aspects of the new laws, drawing on past High Court and state Supreme Court precedent in this area of constitutional law.

II THE LEGAL ‘WAR’ ON BIKIES

A *The Criminal Organisation Act 2009 (Qld)*

It is first necessary to explain briefly the *Criminal Organisation Act 2009* (Qld) (‘the Act’) which was passed by the previous State government⁴ and became operational in 2011. Broadly, section 8(1) of that legislation provided for the Police Commissioner to apply to the Supreme Court for an order that a particular organisation be declared to be a ‘criminal organisation’ under the Act. Section 10(1) provided that the court might make the order if it was satisfied that: (a) the respondent was an organisation; (b) members of the organisation associate for the purpose of engaging in (‘or conspiring to

² Kate Kyriacou, ‘Campbell Newman Says Lawyers for Bikies Are Part of Criminal Gang Machine’, *Courier Mail* (Brisbane), 6 February 2014.

³ Anthony Gray, ‘Constitutionally Protected Due Process and the Use of Criminal Intelligence Provisions’ (2014) 37(1) *University of New South Wales Law Journal* 125; Anthony Gray, ‘Freedom of Association in the Australian Constitution and the Crime of Consorting’ (2013) 32(2) *University of Tasmania Law Review* 149.

⁴ Known as the ‘Bligh Government’. Bligh became Premier in 2007 and remained in that position until her government was defeated in 2012.

engage in') serious criminal activity; and (c) the organisation presented an unacceptable risk to the community.⁵

The main purpose of obtaining a declaration that the organisation was a criminal organisation becomes clear upon reading Part 3 of the Act dealing with control orders. Section 18(1) of the Act empowers the court to make a control order against a person if satisfied that the person (a) is, or has been, a member of a declared criminal organisation, (b) engages in, or has engaged in, serious criminal activity, and (c) associates for the purpose of engaging in, or conspiring to engage in, serious criminal activity.⁶ The content of the control order is a matter for the court, but may include matters such as restrictions on the person associating with other members of the criminal organisation or with other nominated individuals or class of individuals, and restrictions on the possession of weapons, or on employment options. Contravention of a control order can attract a maximum penalty of three years' imprisonment for a first offence, or five years for a subsequent offence.⁷

The Act was clearly drafted in light of the High Court decision in *South Australia v Totani*,⁸ where six members of the High Court declared provisions of that State's anti-association laws invalid. This case will be considered in more detail below; however, two key differences between the South Australian legislation (which was held to be invalid) and the Queensland legislation (which was found by the High Court to be valid)⁹ were that: (a) in the case of the South Australian law, it was the Attorney-General, and not the court, who was empowered to declare the organisation to be criminal; and (b)

⁵ The court was required to take certain matters into account in considering its decision, including the past criminal records of members of the organisation, evidence of links between the organisation and serious criminal activity, evidence that the organisation's members have been or are involved in serious criminal activity, and evidence that members of an interstate or overseas chapter of the organisation associate for criminal purposes (s 10(2)(a)). The court could take into account any other matter it considered relevant (s 10(2)(b)).

⁶ In making such an order, the court can consider factors such as the criminal history of the person or those with whom the person associates, and anything else the court considers relevant (s 18(3)). The Act contains provisions that are constitutionally contentious, including the use of the concept of 'criminal intelligence' (see pt 6 of the Act). If the court is satisfied that evidence led by the government meets that definition, it will not be disclosed to the organisation, or to its members. It will be presented to the court in the absence of the legal representative/s of the organisation or its members. The present author has expressed grave reservations about these provisions elsewhere: Gray, 'Constitutionally Protected Due Process', above n 3. The High Court unanimously held the legislation to be constitutionally valid in *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 ('*Pompano*'). It is not necessary to re-enter this field for present purposes.

⁷ *Criminal Organisation Act 2009* (Qld) s 24.

⁸ (2010) 242 CLR 1 ('*Totani*').

⁹ *Pompano* (2013) 87 ALJR 458.

in the case of the South Australian law, the court had no discretion in making the control order sought. Rather, the court was required to make the order upon satisfaction that the person the subject of the order was a member of a declared organisation. In contrast, the 2009 Queensland Act provides that the court has discretion as to whether or not to make the control order, based on a number of factors. This helps to explain the different outcomes in the High Court decisions of *Totani* and of *Pompano*.

Despite the Queensland government passing the *Criminal Organisation Act 2009* (Qld), and being willing to defend its constitutionality in the High Court, it has never sought or obtained a declaration against an organisation, or a control order against any of the organisation's members, under its own legislation.

In response to some high-profile altercations involving members of motorcycle clubs, the Queensland government moved in October 2013 to 'get tougher' on motorcycle clubs, based on a suspicion that they were fronts for illegal activity including money laundering, extortion and drug trafficking. It passed a raft of new laws and amendments to existing ones. The most noteworthy are summarised below.

B *The Criminal Law (Criminal Organisations Disruption) Amendment Act 2013 (Qld)*

First, Parliament passed the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld). Its most important provision is its introduction of the *Criminal Code (Criminal Organisation) Regulation 2013* in Schedule 1. This regulation declares 26 named organisations to be 'criminal organisations' for the purposes of the *Criminal Code 1899* (Qld). There is no explanation in either the legislation or the explanatory memorandum of the basis upon which these 26 organisations were chosen. There is perhaps some guidance found in section 38 of the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld), which indicates that when recommending that an organisation be declared in future, the Minister should have regard to a range of factors.¹⁰

In other words, the Queensland Parliament effectively bypassed the existing mechanism in the *Criminal Organisation Act 2009* (Qld) (which, having

¹⁰ These include evidence of any link between the entity and serious criminal activity, any criminal convictions of participants in the association, or associates of participants, evidence that participants are involved or have been involved in criminal behaviour, evidence relating to criminal activity of overseas or interstate chapters of the organisation, and anything else the Minister believes is relevant.

never been used, did not permit the government to plausibly argue that a court had identified practical difficulties with the legislation or loopholes). It provided now for a direct declaration by Parliament, rather than a declaration by a court. More commentary on this change is provided below.

The executive declaration has critical consequences in its interaction with other provisions of the Act. These consequences include the following:

- (a) The creation of an offence of a participant in a 'criminal organisation' being knowingly present in a public place with at least two other participants, the offence attracting a minimum term of imprisonment of six months and a maximum of three years.¹¹ The purpose of the presence is immaterial to the commission of the offence;
- (b) The creation of an aggravating factor in relation to a handful of specified offences in the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld), that aggravating factor being that an offender was a member of a 'criminal organisation'. Specifically, minimum mandatory sentences apply if a member of a criminal organisation commits certain offences;¹²
- (c) The creation of a reverse onus for bail applications; bail is presumed refused to a member of a criminal organisation charged with an offence;¹³
- (d) The application of provisions of the *Crime and Misconduct Act 2001* (Qld) providing for the Chair of the Crime and Misconduct Commission to call a person in for a meeting or order them to produce documents. The defence of 'reasonable excuse' for failing to do so is a defence, but it is expressly stated that a person's fear of injury to themselves or to another, or fear of damage or loss of property, is not a reasonable excuse for failure to answer questions or produce documents. Failure to do what is required is punishable by a court as a contempt, with minimum mandatory penalties for second or subsequent offences;¹⁴

¹¹ *Criminal Code 1899* (Qld) s 60A(1), introduced at the time of the anti-association amendments in October 2013.

¹² *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) ss 43–47.

¹³ *Ibid* s 4. On the presumption of innocence, see Anthony Gray, 'Constitutionally Protecting the Presumption of Innocence' (2012) 31(1) *University of Tasmania Law Review* 131.

¹⁴ *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) ss 14–15, 21. Mandatory minimum penalties for contempt in this context are, for a second offence, two and a half years' gaol, and for a third or subsequent offence, five years' gaol: s 199(8B) of the

- (e) The permission given to police to search a member of a criminal organisation without the need for a warrant;¹⁵
- (f) The allowed segregation of a person whilst in prison;¹⁶
- (g) The fact that a person may be required to wear a monitoring device or that such a device may be installed in their home if they are on parole or subject to a community-based order;¹⁷ and
- (h) Significant restrictions on the ability of a member of a declared organisation to work in particular industries.¹⁸

The other significant change made was in relation to sentencing. It has already been noted above that membership of a declared organisation is seen as an aggravating circumstance in relation to a small number of defined offences, and a system of minimum mandatory sentencing is applied to those offences, pursuant to the *Criminal Law (Criminal Organisations Disruption) Act 2013* (Qld). However, another Act passed at the same time, the *Vicious Lawless Association Disestablishment Act 2013* (Qld) ('VLAD Act'), imposes a much more widespread, and serious, system of minimum mandatory sentencing with respect to participants in declared organisations.

C *The Vicious Lawless Association Disestablishment Act 2013 (Qld)*

Two important definitions help shape the scope of the *VLAD Act*. The first is that of 'participant'. This is someone who asserts, declares or advertises in any way membership of an association, one who seeks to be a member of an association, attends more than one meeting of an association, or takes part in the affairs of the association.¹⁹ The Act then defines a 'vicious lawless associate' as a person who (a) commits a declared offence; (b) is a 'participant' within the meaning of section 4, and (c) commits the offence pursuant to the objects of the association.²⁰ It is a defence for the person to

Crime and Misconduct Act 2001 (Qld) (inserted by s 30 of the *Criminal Law (Criminal Organisation Disruption) Amendment Act 2013* (Qld)). See also *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld) ss 28–40.

¹⁵ *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) s 54.

¹⁶ *Ibid* s 14.

¹⁷ *Ibid* s 16.

¹⁸ *Ibid* ss 57–67 (electrician), ss 128–133 (building and construction), ss 139–143 (racing industry) and s 179 (tow truck industry).

¹⁹ *VLAD Act* s 4.

²⁰ *Ibid* s 5(1).

show that the organisation does not have as one of its purposes the commission of declared offences.²¹ Schedule 1 of the Act contains a list of 'declared offences'. These range from the very serious (murder, rape, torture, serious assault, grievous bodily harm) to the relatively trivial (possession of illegal drugs).

The key provision is section 7. It provides that in sentencing a 'vicious lawless associate' for a declared offence, the court must impose a sentence of imprisonment of 15 years, as well as sentencing for the actual crime committed. The two sentences must be applied cumulatively, not concurrently.²² The 15-year mandatory period must be served entirely in a corrective services facility.²³ This minimum period increases to 25 years if the person was an office bearer of the association at the time the offence was committed, and is in addition to the sentence for the actual crime committed. Again, this 25-year period must be served entirely in a corrective services facility.²⁴ If there was any doubt, section 8 reiterates that the offender is not eligible for parole during the 15 or 25 years of imprisonment mandated by section 7.

For example, consider a person who is a participant in the affairs of a declared organisation because they wear the colours of such an organisation. They are found with a small quantity of marijuana in their possession. If there is evidence that this possession occurs pursuant to the objects of the association, and they cannot show that the organisation does not have a criminal purpose as at least one of its purposes, they must be sentenced to at least 15 years' imprisonment in a Queensland gaol, and 25 years' imprisonment if they happened to be the secretary of the declared organisation. The sentence cannot be mitigated by a court and must be served entirely within a correctional facility.

Arguments that might be used to invalidate the legislation as being contrary to the requirements of the *Constitution* will now be considered. Arguments regarding the constitutionality of the laws are distinct from arguments regarding: the utility of the above laws in tackling crime; whether the laws were introduced as populist law and order measures rather than being justified by the prevalence of crime that could not be captured using pre-existing laws; what the precise extent of law-breaking within the declared organisations actually is; and whether the laws were preceded by sufficient consultation

²¹ Ibid s 5(2).

²² Ibid s 7(2)(b).

²³ Ibid s 7(1)(b).

²⁴ Ibid s 7(1)(c).

with relevant stakeholders. All of those issues are separate from, and irrelevant to, questions of constitutionality

III FOUR CONSTITUTIONAL ARGUMENTS AGAINST THE 'ANTI-BIKIE' LAWS

It was in 1956 that the High Court began to develop its Chapter III jurisprudence, discerning from the structure of the *Constitution* an intention to divide judicial, legislative and executive power. This was probably an indirect reflection of Montesquieuan separation of powers theory developed in the 18th century which was to be so pivotal to the drafting of the United States *Constitution*, and which in turn influenced Australia's founding fathers. This separation of power would generally²⁵ make unconstitutional a law which conferred power that was non-judicial in nature on a Chapter III court. The corollary was that it would similarly be unconstitutional for a law to confer judicial power on a non-Chapter III court.²⁶ This fundamental principle requires clarification of two issues — the scope of a 'Chapter III' court; and the nature of judicial power (and, obviously, non-judicial power). The response to the first issue is relatively settled — we understand that a 'Chapter III' court embraces federal courts established pursuant to the Commonwealth *Constitution* and we understand the notion of state courts with federal jurisdiction and the nature of an integrated court hierarchy in Australia, such that the notion of a Chapter III court includes state courts and some tribunals.

It is also clear that the question of whether a body is a 'court' is a question of substance, not form. Clearly, Parliament cannot plausibly argue that a body is a court, for instance, simply because it is called a 'court', if it is not 'in substance' a court.²⁷ However, it is not entirely clear what minimum requirements must exist in order that a body can in substance be called a court. This is an issue that has been relatively sparsely developed by the High Court to date. However, the Court has confirmed that a necessary characteristic of a court (at least, a superior court) is that it have power to correct jurisdictional error committed by a lower court, such that a statute purporting to remove this power is offensive to the *Constitution*.²⁸ It is also a

²⁵ Exceptions would subsequently develop to this principle, including the *personae designata* exception: *Hilton v Wells* (1985) 157 CLR 57.

²⁶ *R v Kirby; Ex Parte Boilermakers Society of Australia* (1956) 94 CLR 254 ('*Boilermakers*').

²⁷ Suri Ratnapala and Jonathan Crowe, 'Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power' (2012) 36 *Melbourne University Law Review* 175, 178.

²⁸ *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 566 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Kirk*').

necessary characteristic of a court that it be able to provide reasons for its decisions.²⁹

The second issue that logically arises from the *Boilermakers* decision is what is meant by 'judicial power'. The High Court has been notoriously reluctant to precisely articulate what is meant by judicial power.³⁰ In an early case, Griffith CJ stated that it meant:

the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, limb or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision ... is called upon to take action.³¹

The High Court has confirmed that one feature of the exercise of judicial power is the kind of process that is generally followed in the tribunal. This means that if a court is required,³² or authorised,³³ to use processes that are different from those traditionally considered to be key features of a 'judicial process', the court may find that the departures are sufficient to deny the exercise of the power its judicial character, potentially creating Chapter III constitutional difficulties.³⁴ Consistently with this, a law which removes from a body a traditional characteristic of the exercise of judicial power may be such that it denies the process the character of a judicial process, again potentially creating constitutional difficulties.³⁵

²⁹ *Wainohu v New South Wales* (2011) 243 CLR 181 ('Wainohu').

³⁰ *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ) ('Forge').

³¹ *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357.

³² *Thomas v Mowbray* (2007) 233 CLR 307, 355 (Gummow and Crennan JJ); *Totani* (2010) 242 CLR 1, 157 (Crennan and Bell JJ); *International Finance Trust v New South Wales Crime Commission* (2009) 240 CLR 319, 353 (French CJ) ('International Finance Trust').

³³ *Chu Kheng Lim v Commonwealth* (1992) 176 CLR 1, 26–7 (Brennan, Deane, Dawson JJ); *Nicholas v The Queen* (1998) 193 CLR 173, 208–9 (Gaudron J); *Leeth v Commonwealth* (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ).

³⁴ *Thomas v Mowbray* (2007) 233 CLR 307, 329 (Gleeson CJ), 356 (Gummow and Crennan JJ); *Kirk* (2010) 239 CLR 531, 580–1 (French CJ Gummow, Hayne, Crennan, Kiefel and Bell JJ).

³⁵ *Wainohu* (2011) 243 CLR 181. There is a vast literature. A sample includes: Ratnapala and Crowe, above n 27; Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23(2) *Monash University Law Review* 248; Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205; Will Bateman, 'Procedural Due Process under the Australian Constitution' (2009) 31 *Sydney Law Review* 411; Christine Parker, 'Protection of Judicial Process as an Implied Constitutional Principle' (1994) 16 *Adelaide Law Review* 341; Wendy Lacey, 'Inherent Jurisdiction, Judicial Power and Implied Guarantees Under Chapter

Traditional characteristics of a body having judicial power have typically included an independent and impartial tribunal. Therefore a court cannot be given powers that would lead observers to suspect that the court was not independent and unbiased.³⁶ In other words, it cannot be given powers (or have powers removed) that would serve to undermine its ‘institutional integrity’.³⁷ The High Court has stated that typical characteristics of a judicial process include an open court with public hearing,³⁸ the requirement of natural justice,³⁹ an adversarial process,⁴⁰ the giving of reasons for decisions,⁴¹ and the requirement that the allegations the court is asked to hear are sufficiently specific.⁴² The above might be neatly summarised as the requirement that a court process accord those involved ‘procedural fairness’.⁴³

On the other hand, it must be acknowledged that the strictures of the *Boilermakers* principle still do not apply in the same way at state level as they do at federal level. The High Court was at pains to emphasise this once again in *Pompano*. Though most of the recent use of Chapter III principles has been in relation to state laws, and state laws were invalidated in cases such as *Totani*, *International Finance Trust* and *Wainohu*, it must be conceded that at state level there is nothing *necessarily* constitutionally obnoxious about the fact that powers essentially similar in nature are given to the judiciary and the legislature.

III of the *Constitution*’ (2003) 31 *Federal Law Review* 57; Rebecca Welsh, ‘A Path to Purposive Formalism: Interpreting Chapter III for Judicial Independence and Impartiality’ (2013) 39(1) *Monash University Law Review* 66; Brendan Gogarty and Benedict Bartl, ‘Tying *Kable* Down: The Uncertainty about the Independence and Impartiality of State Courts following *Kable v DPP (NSW)* and Why It Matters’ (2009) 32(1) *University of New South Wales Law Journal* 75.

³⁶ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 98 (Toohey J), 107 (Gaudron J), 117 (McHugh J), 134 (Gummow J) (*‘Kable’*); *Ebner v Official Trustee* (2000) 205 CLR 337, 344–5 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 362–3 (Gaudron J), 373 (Kirby J).

³⁷ *Forge* (2006) 228 CLR 45, 67 (Gleeson CJ), 76 (Gummow, Hayne and Crennan JJ), 122 (Kirby J); *Wainohu* (2010) 243 CLR 181, 206 (French CJ and Kiefel JJ), 229 (Gummow, Hayne, Crennan and Bell JJ); *Pompano* (2013) 87 ALJR 458, 477 (French CJ), 487 (Hayne, Crennan, Kiefel and Bell JJ), 498 (Gageler J).

³⁸ *Russell v Russell* (1976) 134 CLR 495.

³⁹ *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

⁴⁰ *Forge* (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ), with whom Callinan J (at 136) and Heydon J (at 150) agreed.

⁴¹ *Wainohu* (2010) 243 CLR 181, 208–9 (French CJ and Kiefel J), 226 (Gummow, Hayne, Crennan and Bell JJ).

⁴² *Kirk* (2010) 239 CLR 531, 559 (French CJ, Gummow, Hayne, Heydon, Kiefel and Bell JJ).

⁴³ *Wainohu* (2011) 232 CLR 181, 208–9 (French CJ and Kiefel JJ), 226 (Gummow, Hayne, Heydon, and Bell JJ); *Pompano* (2013) 87 ALJR 458, 477 (French CJ), 500 (Gageler J); *Dietrich v The Queen* (1992) 177 CLR 292.

It will now be considered whether the anti-bikie laws might be challenged on the basis that they infringe these Chapter III requirements.

A major feature of the Queensland government's anti-bikie laws is the direct legislative declaration of 26 named motorcycle clubs as 'criminal organisations' in the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld). The very serious consequences of this for members or participants in such organisations, and their families, have been noted above.

It is important to contrast these amending provisions with the pre-existing provisions of the *Criminal Organisation Act 2009* (Qld) which, although the provisions of this Act have not been used, provides in section 10 that a *court* can make a declaration that an organisation is a criminal organisation.

At the very least, this situation raises concerns regarding the separation of powers, since the power of declaration has been given on the one hand to a court, and at the same time it is exercised by the legislature. The question arises of the true nature of the power to declare an organisation to be criminal. If it is judicial in nature, then the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) appears to be an unacceptable example of the legislature purporting to exercise judicial power. If it is legislative in nature, then the relevant provisions of the *Criminal Organisation Act 2009* (Qld) would appear to be invalid, as conferring a non-judicial power on a judicial body.⁴⁴ (This latter point is subject to further argument below.) Further doubts are created when the decisions of the High Court in *Totani* and *Pompano* are recalled. In the former case, where a member of the executive made the relevant declaration, the law was declared invalid; in the latter case, where the court made the declaration, the law was declared valid. It will be necessary to consider the legislation invalidated in *Totani* and validated in *Pompano* in more detail to see what light it and the decisions can shed on the current issue.

⁴⁴ In making this argument, it must be conceded that some muddying of the waters can occur and that sometimes powers can be classified in more than one way: Stephen McDonald, 'Involuntary Detention and the Separation of Judicial Power' (2007) 35 *Federal Law Review* 25, 67. There is also the argument regarding whether the question of separation of powers should be answered in a formalistic way — with careful definitions of legislative, executive and judicial power that are mutually exclusive — or a functional way, acknowledging the great difficulty in neatly establishing a dividing line between the various types of power and applying a flexible test that takes into account the reason for the divide. See on this debate Thomas Merrill, 'The Constitutional Principle of Separation of Powers' (1991) *Supreme Court Review* 225; William Gwyn, 'The Indeterminacy of the Separation of Powers and the Federal Courts' (1989) 57 *George Washington Law Review* 474.

Four specific arguments against the constitutionality of the 2013 changes will now be considered. All arguments are sourced from the requirements of Chapter III of the *Constitution*, and the idea that a court may not be given powers, or be denied powers, that undermine its independence and/or institutional integrity. The first argument is that the changes are inconsistent with the reasoning of the High Court in *Totani* (based on Chapter III). The second is that the nature of the power to declare an organisation to be criminal is judicial rather than executive or legislative in nature, so an Act purporting to reflect the legislature exercising such a power is offensive to Chapter III because it interferes with the court's institutional integrity. The third is that the legislation, by obliging the court to act upon the declaration, so interferes with its obligation to provide fair process so as to be offensive to Chapter III because of its offensiveness to institutional integrity. The fourth is that the mandatory minimum sentencing aspect of the 2013 changes is offensive to the requirements of Chapter III, despite a 2013 High Court decision to the contrary.

A *South Australia v Totani*

Section 10(1) of the *Serious and Organised Crime (Control) Act 2008* (SA) empowered the State Attorney-General, upon application by the Police Commissioner, to declare an organisation criminal if satisfied that (a) members of the organisation associated for the purpose of planning, supporting or engaging in criminal activity; and (b) the organisation represented a risk to public safety.⁴⁵ Section 14(1) then stated that a court might, on application by the Police Commissioner, make a control order against a person if the court was satisfied that the person was a member of a declared organisation. The control order had to prohibit that person from associating with other members of the organisation, and could deal with other matters such as placing limits on association with other individuals, limits on weapon ownership etc. It was an offence, punishable by up to five years' imprisonment, to breach a control order.⁴⁶

⁴⁵ The *Serious and Organised Crime (Control) Act 2008* (SA) s 10(3) (now amended) set out matters to which the Attorney-General was to have regard in deciding whether or not to make the declaration, including information suggesting a link between the organisation and serious criminal activity, any criminal convictions of current or former members and those who associated or who had associated with members, and any other information suggesting that current or former members of the organisation or those who associated or who had associated with members of the organisation had been or were involved in serious criminal activity directly or indirectly.

⁴⁶ *Ibid* s 22I. It was also an offence for a person to associate on at least six occasions in 12 months with someone who was the subject of a control order, in circumstances where the person knew of or was reckless as to the existence of the order (ss 35(1)(b), (2)).

By a majority of 2:1 in the South Australian Supreme Court and by 6:1 in the High Court, aspects of the above legislation were held to be invalid, being contrary to the requirements of Chapter III of the *Constitution*.

Some aspects of the judgment of the majority in the Supreme Court decision should be noted. Whilst the High Court did not accept all of the reasoning employed by the majority, several members⁴⁷ noted without disapproval the aspect of the reasoning of Bleby J (for the majority) that identified four elements to be established in order to obtain a control order under that Act:

- (1) Members of the organisation of which the defendant to the application for a control order is alleged to be a member associate for the purpose of planning, facilitating, supporting or engaging in serious criminal activity;
- (2) The organisation represents a risk to public safety in the State;
- (3) The declaration is made; and
- (4) The defendant is a member of the organisation the subject of the declaration.⁴⁸

Bleby J, with whom Kelly J agreed, reasoned that the first three of these four steps were carried out by the executive, and these were the most significant of the steps. This meant that the process by which a person was deprived of the entitlement to associate with whom they wished, upon pain of imprisonment for up to five years, lacked necessary procedural safeguards. These included the entitlement to contest several matters that might be contentious, and to respond to the government's case. The government was attempting to unacceptably and significantly control the outcome of a judicial process, significantly compromising the court's institutional integrity.⁴⁹ Bleby J

⁴⁷ *Totani* (2010) 242 CLR 1, 60 (Gummow J), 76 (Hayne J), 153 (Crennan and Bell JJ).

⁴⁸ *Totani v South Australia* (2009) 105 SASR 244, 280.

⁴⁹ *Ibid* 280–1, 283. Members of the High Court expressed partial agreement with this reasoning in *Totani* (2010) 242 CLR 1, 35 (French CJ), 61 (Gummow J), 76 (Hayne J), 153 (Crennan and Bell JJ). However, members of the Court disagreed with the suggestion that the Attorney-General's decision to declare was effectively unreviewable (Gummow J at 62, Hayne J at 77, Crennan and Bell JJ at 153). They also disagreed that, in assessing Chapter III compatibility, it was a matter of weighing the relative size and complexity of tasks undertaken by the executive relative to the judiciary (French CJ at 36, Hayne J at 79–80), and disagreed with concerns raised regarding the use of 'criminal intelligence' (French CJ at 36, Gummow J at 61, Crennan and Bell JJ at 153).

suggested that the outcome might have been different if the court were the body with the power to make the declaration.⁵⁰

The High Court noted that the legislation required the court to make a decision that was largely pre-ordained by the executive declaration.⁵¹ The executive provided an essential circumstance for the making of the control order, a fact which distinguished this case from precedent such as *Thomas v Mowbray* and *Fardon v Attorney-General (Qld)*⁵² where the court's discretion was essentially unconstrained and was not based on an essential finding by a member of the executive.⁵³ As Crennan and Bell JJ put it:

The conditions upon which the Court must make a control order require the Court to give effect to the determination of the Executive in the declaration (which implements the legislative policy), without undertaking any independent curial determination, or adjudication of the claim or premise of an application for a control order by the Commissioner of Police, that a particular defendant poses risks in terms of the objects of the Act. This has the effect of rendering the Court an instrument of the Executive, which undermines its independence.⁵⁴

French CJ noted that the executive declaration was not accompanied by reasons, and could not be challenged in court. It was based on an executive determination of the guilt of a person who may not be before the court.⁵⁵ This was incompatible with the requirements of Chapter III, in particular the requirement of decisional independence. Several members of the Court expressed concern that the exercise of the power was independent of a determination that the person the subject of the order had ever engaged, or was likely to engage, in criminal conduct.⁵⁶ Hayne J noted:

[U]pon the motion of the Executive, the Court is required to create new norms of conduct, that apply to a particular member of a class of persons who is chosen by the Executive, on the footing that the Executive has decided that some among the class (who may or may not include the

⁵⁰ *Totani v South Australia* (2009) 105 SASR 244, 281 (with whom Kelly J agreed). A feature of the Queensland version of anti-association legislation, the *Criminal Organisation Act 2009* (Cth), was that the court had the power to declare the organisation to be a criminal organisation, based on criteria enshrined in the Act. All members of the High Court validated this legislation: *Pompano* (2013) 87 ALJR 458.

⁵¹ *Totani* (2010) 242 CLR 1, 21 (French CJ).

⁵² (2004) 223 CLR 575 ('*Fardon*').

⁵³ *Ibid* 66 (Gummow J), 89 (Hayne J), 158 (Crennan and Bell JJ).

⁵⁴ *Ibid* 160.

⁵⁵ *Ibid* 21 (French CJ).

⁵⁶ *Ibid* 28 (French CJ), 58 (Gummow J), 84–5 (Hayne J), 159 (Crennan and Bell JJ), 165 (Kiefel J).

defendant) associate for particular kinds of criminal purposes. It is not the business of the courts, acting at the behest of the executive, to create such norms of conduct without inquiring about what the subject of that norm has done, or may do in the future. To be required to do so is repugnant to the institutional integrity of the courts.⁵⁷

The legislation gave the neutral colour of judicial proceedings to something that was, in essence, an executive action.⁵⁸ Crennan and Bell JJ in *Totani* noted that sometimes a state court could be required to act on the basis of a factum determined by the executive, and that this may be consistent with Chapter III requirements. However, this was a question of fact and degree, and a significant confinement of the court's adjudicative powers could indicate an intention to conscript the court into the execution of an executive or legislative plan.⁵⁹ The latter was the case here, in that the court was essentially required to implement a legislative policy without any independent curial determination or adjudication of the premise of the application — that the control order would assist in meeting the objects of the Act.⁶⁰ Kiefel J expressed similar concerns:

The Court, although having determined nothing about the activities of members of the organisation and nothing about whether the defendant to the application has had any connection with criminal activities, is obliged by the Act to make [a control] order.⁶¹

Further, Hayne J noted that membership of an association, affiliation with that organisation, or association with one or more of its members did not in every case demonstrate support for all aims and objectives of the group, or any methods it engaged to achieve those aims and objectives.⁶² Hayne J said that 'a central and informing principle of criminal liability in Australia, as elsewhere, is that guilt is personal and individual'.⁶³

⁵⁷ Ibid 88–9. He noted that membership, affiliation or association with an organisation or some of its members did not in every case demonstrate support for the aims and purposes of the organisation, and emphasised that traditionally in the legal system, guilt was individual and personal: at 90.

⁵⁸ Ibid 52 (French CJ), 172 (Kiefel J). The United States Supreme Court had originally stated that the reputation of courts could not be borrowed by political branches to 'cloak their work in the neutral colours of judicial action': *United States v Mistretta* 488 US 361, 407 (1989).

⁵⁹ *Totani* (2010) 242 CLR 1, 154.

⁶⁰ Ibid 160.

⁶¹ Ibid 168.

⁶² Ibid 90.

⁶³ Ibid.

In summary, the essential points made by the majority of the High Court in *Totani* are that the court will have concerns where:

- (a) no reasons have been given for the executive declaration;
- (b) the exercise of the power by the court takes place independently of a finding that a person subject to it ever engaged or was likely to engage in criminal behaviour;
- (c) the executive provides an essential circumstance for the making of a control order; and
- (d) whilst there is no absolute prohibition on legislation declaring a fact and then requiring a court to act on that fact, its validity hinged on a question of degree, and such a law has the potential to undermine the institutional integrity of a court, particularly if a significant part of the overall facts to be determined was declared (deemed) by parliament.

Circumstance (d) is of greatest constitutional importance. The wording of (d) makes clear again that the constitutional difficulty with the legislation in *Totani* was not simply the fact that a member of the executive made the declaration. Rather, the constitutional difficulty in terms of Chapter III requirements was created by the interaction between that fact and the subsequent role played by the court, that role being, in effect, to rubber-stamp the action of a member of the executive.

The application of this summary to the offence contained in section 60A of the *Criminal Code 1899* (Qld) will now be considered.

1 *Section 60A of the Criminal Code 1899 (Qld) in the light of Totani*

The offence created by section 60A requires the following to be shown:

- (a) the relevant organisation has been declared to be a criminal organisation, such declaration having been made by the Attorney;⁶⁴

⁶⁴ The *Criminal Code 1899* (Qld) provides no criteria by which, or explanation of how, the 26 organisations declared were assessed. However, s 38 refers to criteria for how future assessments will be made, which provides some guidance. These criteria include: evidence of any link between the entity and serious criminal activity, any criminal convictions of participants in, or associates of participants in, the association; evidence that participants are involved or have been involved in criminal behaviour; evidence relating to criminal activity of

- (b) the person charged is a 'participant' in that organisation, participant being defined broadly to include a person asserting or advertising membership of such an association, one who seeks to be a member, who attends more than one meeting, or who takes part in the affairs of the organisation;
- (c) the person is knowingly present in a public place; and
- (d) the person is with two other participants in the organisation.

Obviously, there are real factual similarities between the control order regime considered in *Totani* — making it a crime to associate with other members of an organisation declared criminal by the Attorney — and the 'participation' offence now found in section 60A of the *Criminal Code 1899* (Qld) — making it, amongst other things, a crime to associate with other members of an organisation declared by the legislature to be criminal.

Applying the above summary of the Court's concerns in *Totani* to section 60A, it is clear that just as in *Totani* the executive did not provide an explanation for the declaration, under section 60A there is no need for such an explanation. A critical concern of all the majority judges in *Totani* was that the making of the control order by the court was independent of a finding that the person the subject of the order had ever engaged in, or was ever likely to engage in, criminal behaviour. A similar concern exists with section 60A. None of the above elements of a crime under section 60A require any evidence that the person charged had ever engaged in, or would in future engage in, criminal behaviour (apart from the alleged crime under section 60A). In relation to the third factor — that the executive provides an essential circumstance for the making of the order — the executive provides in section 60A a critical aspect of the offence, deeming the organisation to be a 'criminal organisation'. And whilst this is not necessarily fatal to constitutional validity,⁶⁵ its prime importance in the scheme of things, and the relative ease of proving the other elements, suggest that the court's institutional integrity is

overseas or interstate chapters of the organisation; and anything else the Minister believes is relevant. As noted earlier, the 2009 Act gave the court the potential to make such a declaration, but this power was never actually used, and it seems that the government's preferred mode of operation now is simply to directly declare organisations.

⁶⁵ 'If the satisfaction of a condition enlivening the court's statutory duty depends upon a decision made by a member of the Executive branch of government, it does not necessarily follow that the Parliament has thereby authorised the Executive to infringe impermissibly upon the judicial power': *International Finance Trust* (2009) 240 CLR 319, 352 citing *Palling v Corfield* (1970) 123 CLR 52, 58–9 (Barwick CJ), 62 (McTiernan J), 64–5 (Menzies J), 65 (Windeyer J) agreeing with other members of the Court at 67 (Owen J), 69–70 (Walsh J), 70 (Gibbs J).

being compromised because it has not been left with meaningful judicial work to do. Crennan and Bell JJ objected in *Totani* to a court being required to give effect to the determination of the executive without undertaking any independent curial determination or adjudication of the claim that a person posed a risk in terms of the Act's objects. As a result, the court was effectively an instrument of the executive; the independence of the court was undermined.⁶⁶

Similarly in section 60A, in the words of Crennan and Bell JJ in *Totani*, it can be argued that the court is left with little meaningful judicial work to do. Whilst it must be satisfied that an individual is (a) a participant (b) knowingly present in a public place (c) with two other participants, the court is required to act on the basis of the legislature's determination that there is sufficient criminal activity surrounding a particular organisation that it warrants being declared to be criminal (in terms of the objectives of the Act, as Crennan and Bell JJ emphasised in *Totani*). Furthermore, the court must act on the legislature's determination that anyone within the definition of 'participant' in relation to a declared organisation is sufficiently likely to be involved in the commission of, or the planned commission of, a crime, that it would be consistent with the objects of the legislation (again, Crennan and Bell JJ in *Totani*) to criminalise that very act of association. The issue of ascertaining the extent to which the court order in a particular case would further the objectives of the relevant legislation is also a feature of the judgment of Hayne J in *Totani*.⁶⁷

In seeking to apply the justices' comments about the importance of a judge being able to determine independently whether the court order would in a given case assist in meeting the objectives of the legislation, it is somewhat difficult to ascertain the precise reason for the introduction of sections 60A–60C into the *Criminal Code 1899* (Qld). These amendments were introduced in the compendium *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld). There is little in the Explanatory Memorandum accompanying that legislation that elaborates on the precise reasons for the criminalisation of association, beyond rhetoric about a 'zero tolerance crackdown on criminal gangs' and, perhaps, the title of the Act itself. No explanation appears as to why the 26 motorcycle clubs were chosen for 'declaration'. (This is obviously relevant to the operation of section 60A, because it criminalises the act of association amongst participants in a 'declared' organisation). This makes it difficult (or impossible) for a court to

⁶⁶ *Totani* (2010) 242 CLR 1, 160.

⁶⁷ 'The Court is required to make a control order without inquiring how, if at all, the order will contribute to the legislative object of disrupting the criminal activities of identified groups, or the criminal activities of any individual': *ibid* 89.

independently assess whether finding particular 'participants' in a declared organisation guilty of a crime under section 60A would in fact assist in achieving the 'zero tolerance crackdown on criminal gangs' apparently sought by the Queensland government, which raises constitutional difficulties, according to the express words of Hayne, Crennan and Bell JJ in *Totani*.

Hayne J, in explaining his decision to invalidate the legislation due to Chapter III incompatibility, concluded:

It is not the business of the courts, acting at the behest of the executive, to create ... norms of conduct without inquiring about what the subject of that norm has done, or may do in the future. To be required to do so is repugnant to the institutional integrity of the courts.⁶⁸

Similarly here, in the words of Hayne J in *Totani*, the court is being required to create a norm of conduct (to find a person associating with others guilty of a crime) without inquiring *at least in substance* about what they have done or will do.⁶⁹ Hayne J expressed (constitutional) concern in *Totani* with legislation that restricted an individual's freedom of association 'where neither the executive nor the judicial branch has made any determination about what he or she has done, intends to do, or is likely to do, in connection with serious criminal activity'.⁷⁰ Surely this concern is also aroused by section 60A of the *Criminal Code 1899* (Qld). Neither the executive nor judiciary has made any determination about what the individual liable to conviction under the section has done, will do, or is likely to do, in connection with crime. Any assessment by the legislature was of the declared organisation, rather than any particular 'participant' in the affairs of the organisation. Further, the Act defines 'participant' broadly to include, amongst other things, a person holding membership of a declared organisation. Yet Hayne J in *Totani* specifically found that:

Membership of an organisation, affiliation with that organisation or association with one or more of its members does not in every case demonstrate support for all of the aims and purposes of the group, or all of the methods that it uses to achieve its aims or purpose ... the conclusion is

⁶⁸ Ibid 89.

⁶⁹ In other words, the court is not asked to determine whether the individuals have associated for the purposes of planning future criminal activity, or will in future do so. The inquiry is limited to whether they are participants in a declared organisation, and have knowingly met at least two participants of such organisation publicly. It is not fatal to invalidity that the court is left with some work to do. For instance, in *Totani*, the court had to determine whether the individual was in fact a member of the organisation declared by the Attorney-General. This did not save the legislation from invalidity.

⁷⁰ *Totani* (2010) 242 CLR 1, 84–5.

not inevitable, and is all the harder to draw as the premise for it varies from active membership, through affiliation to mere association with members.⁷¹

The definition of ‘participant’, which enlivens the section 60A offence of associating, is even broader than ‘member’, including those asserting membership or association with the organisation, those seeking to become members, and those who attend more than one meeting of the association. It is even harder to show here that criminalising such activities is conducive to the purpose of the legislation, relevant to constitutionality, in the express opinion of Hayne, Crennan and Bell JJ in *Totani*, than it was in *Totani* itself. The section suffers from the same defect that Hayne J identified in *Totani*, that of legislation enlisting the court in creating new standards of behaviour for individuals (participants) not because of what they have done, may do or will do, but because ‘the Executive has chosen them’.⁷² Surely a very similar observation may also fairly be made about section 60A, though there the legislature did the choosing. The constitutional defect remains.

Section 60A(2), containing a defence to the offence, needs to be pointed out. It reflects a reverse onus, creating a defence if the accused can show that the organisation declared by the executive to be criminal does not in fact have, as at least one of its purposes, the commission of crime. However, this does nothing to resolve the concern of the judges in *Totani*, referred to in the previous paragraph, that the action of the court in convicting the accused for associating was independent of a finding that the person the subject of the charge had ever actually engaged in criminal behaviour or that this was the purpose of the association.

Nothing in the High Court decision in *Pompano* is inconsistent with the above argument. As indicated, that case dealt with provisions of the *Criminal Organisation Act 2009* (Qld), which provided that the court had power (and discretion) to make the order declaring the organisation to be criminal. In that sense, the legislation was like that considered, and validated, by the High Court in *Thomas v Mowbray*. It is submitted that the legislation considered here is quite different in nature.

For this reason, the precedent in *Totani* may assist in the argument that the 2013 changes are contrary to the requirements of Chapter III.

⁷¹ Ibid 90.

⁷² Ibid 93.

B The Nature of the Power Declaring an Organisation to be a 'Criminal Organisation'

Another contentious constitutional question concerns the nature of a power declaring an organisation to be a 'criminal organisation'. This arises because in the original *Criminal Organisation Act 2009* (Qld) this was a power exercised by the court. In contrast, the latest amendments allow the legislature to declare organisations to be 'criminal organisations'. The declarations have the same effect as the court order; they are a necessary antecedent to an eventual charge that members of the organisation are associating, contrary to either the Act or section 60A of the *Criminal Code 1899* (Qld), for example. The question thus arises of the nature of such a power. Clearly, separation of powers questions arise, because in one iteration the power was given to a court; in the other, the power was exercised by the legislature.

An argument exists to counter constitutional concern with the fact that essentially the same power has been given, on the one hand, to the judiciary, and on the other hand, at a later time, to the legislature. This is the so-called 'chameleon doctrine' which suggests that while there are powers that are clearly judicial in nature, and there are powers that are clearly non-judicial in nature, there is a 'grey area' of powers which may plausibly be exercised by a range of bodies. In such cases, the nature of the power is determined by the body to whom the power has been entrusted.⁷³ However, care must be taken with this doctrine, lest the *Boilermakers* admonition be subverted by an essentially positivistic approach whereby the nature of power is determined by what the legislator conferring the power says it is, rather than being determined by a substance approach which considers the true nature of the power.⁷⁴

1 Nature of Judicial Power

As indicated, judges have been notoriously reluctant to exhaustively define the nature of judicial power. The typical starting point is the statement of Griffith CJ in *Huddart Parker and Co Pty Ltd v Moorehead* that:

[T]he words 'judicial power' as used in sec 71 of the *Constitution* mean the power which every sovereign authority must of necessity have to decide

⁷³ *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277, 305 (Kitto J); *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 360 (Gaudron J); *Thomas v Mowbray* (2007) 233 CLR 307, 326 (Gleeson CJ).

⁷⁴ *Thomas v Mowbray* (2007) 233 CLR 307, 426–7 (Kirby J, dissenting), 466–7 (Hayne J, dissenting).

controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property.⁷⁵

Typically, an important feature of judicial power is the fact that it determines a controversy between parties by the application of existing (legal) standards to facts.⁷⁶ In contrast, if a power determines what legal rights and obligations should be created in future, this might indicate that non-judicial power is being exercised.⁷⁷ Another feature of the exercise of judicial power is its final and conclusive nature.⁷⁸

In *Thomas v Mowbray*, the question arose of whether legislation empowering a court to make a control order offended the requirements of Chapter III of the *Constitution*. The court was empowered to make the order if it was satisfied on the balance of probabilities either that the making of the order would substantially assist in preventing a terrorist act, or that the person had provided training to, or received training from, a listed terrorist organisation, provided the court was satisfied that the contents of the control order were reasonably necessary, and appropriate and adapted, to protect the public from a terrorist act. A control order could, amongst other restrictions, include provisions restricting the ability of a person subject to it from communicating or associating with nominated individuals. It was a gaolable offence to contravene a control order. Part of the constitutional challenge to the legislation was that the provision empowered a court to exercise power that was non-judicial in nature, contrary to the requirements of Chapter III. There is obviously some analogy between the making of a control order like this, and the criminal ‘participation’ provisions currently being considered, in that both criminalise an act of association.

A majority of the High Court in *Thomas v Mowbray* found that the making of a control order was an exercise of a power that was judicial in nature. The majority acknowledged that the concepts the court was required to apply — including concepts such as whether the control order was reasonably necessary to protect the public, and whether the control order would substantially assist in preventing a terrorist act — were broad. However, there were many other instances where the courts were required to apply broad

⁷⁵ (1909) 8 CLR 330, 357.

⁷⁶ *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188–90; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 375.

⁷⁷ *Precision Date Holdings Ltd v Wills* (1991) 173 CLR 167, 189.

⁷⁸ *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 355 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

standards; of itself, this breadth did not mean the power was non-judicial.⁷⁹ The court was also satisfied that the proceedings for the issue of a control order raised a 'justiciable controversy'⁸⁰ and involved the application of legal criteria to facts, hallmarks of a judicial process. If further justification was required, some justices commented that it was 'a good thing' that powers affecting the liberty of the individual be exercised by members of the judiciary, rather than a non-judicial body or individual.⁸¹

2 Nature of Power to 'Declare an Organisation'

As indicated above, all members of the High Court sitting in *Pompano* validated the *Criminal Organisation Act 2009* (Qld) in its original form. It will be recalled that the legislation provided that the court could declare an organisation to be a criminal organisation, based on given criteria.⁸² There were serious consequences of such a declaration. Presumably all members of the Court believed in that case that the making of the declaration was an exercise of judicial power, otherwise issues *could* have arisen with the separation of powers principle.⁸³

French CJ specifically rejected an argument that section 10(1)(c), by permitting the court to take into account the extent to which the organisation was an unacceptable risk to the safety, welfare or order of the community, did not involve the exercise of judicial power.⁸⁴ He acknowledged that the 'unacceptable risk' criterion was a broad one, but that this was not fatal to a finding that the power was judicial in nature.⁸⁵ Further, responding to an argument that the declaration was non-judicial, French CJ agreed that the declaration did not have any coercive operation. However, it would have

⁷⁹ *Thomas v Mowbray* (2007) 233 CLR 307, 331–2 (Gleeson CJ), 345 (Gummow and Crennan JJ), 507 (Callinan J), 526 (Heydon J); cf Kirby J (446), Hayne J (468) dissenting.

⁸⁰ *Ibid* 344 (Gummow and Crennan JJ), 507 (Callinan J), 526 (Heydon J).

⁸¹ *Ibid* 329 (Gleeson CJ), 507 (Callinan J), 526 (Heydon J).

⁸² These were: (a) the respondent was an organisation; (b) members of the organisation associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity; and (c) the organisation was an unacceptable risk to the safety, welfare or order of the community (ss 10(1)(a)–(c) respectively).

⁸³ This is a reference to the *Kable* principle. This argument will be elaborated upon below. Of the judges in *Totani*, only French CJ specifically considered whether the relevant power was judicial or not. There is some debate about the application of separation of powers principles at a state level, compared with application of the principles at the federal level. The High Court has often suggested that the separation requirement is stricter at the federal level, compared with the state level where some laws clearly infringing the principle might nevertheless be found constitutionally valid.

⁸⁴ *Thomas v Mowbray* (2007) 233 CLR 307 [21].

⁸⁵ *Ibid* [24].

significant legal consequences for the organisation and its members.⁸⁶ It provided a foundation for the making of a control order which would significantly affect the common law freedoms of individuals.⁸⁷ These facts fortified his Honour's conclusion that the nature of the power was judicial, rather than non-judicial.⁸⁸ French CJ's comments express sentiments similar to those expressed in earlier cases that it is sound that the exercise of powers with significant impacts on human rights be considered judicial in nature, and that such exercise should enliven the due process requirements typically associated with the judicial process.⁸⁹

The recent High Court decision of *Momcilovic v The Queen*⁹⁰ considered the nature of a power of declaration, and is of some use here. This is despite the very different nature of the declaration in that case (to the effect that a statutory provision could not be interpreted consistently with a human right) compared with the type of declaration presently under discussion (that an organisation is criminal, with attendant serious consequences in a number of Acts). A further complication is that the judges differed significantly in how they viewed the declaratory power in that case.⁹¹ Nevertheless, one of the reasons that French CJ gave for concluding that the power of declaration in *Momcilovic* was non-judicial in nature was that the declaration did not enable or support or facilitate the exercise by the court of its judicial function.⁹² Obviously, this can be contrasted with the provision currently under discussion. Heydon J considered the 'highly general, indeterminate, lofty, aspirational and abstract' language used to describe the power in determining that the power was non-judicial in nature;⁹³ and Bell J found that the criteria used for exercise of the power were typically those considered by a court in the traditional judicial process.⁹⁴

⁸⁶ Ibid [25].

⁸⁷ Ibid [30].

⁸⁸ Hayne, Crennan, Kiefel and Bell JJ did not expressly address this point.

⁸⁹ For example, *Thomas v Mowbray* (2007) 233 CLR 307, 329 (Gleeson CJ); *Fardon* (2004) 223 CLR 575, 586 (Gleeson CJ).

⁹⁰ (2011) 245 CLR 1 ('*Momcilovic*').

⁹¹ Ibid 67 (French CJ), 96 (Gummow J), 123 (Hayne J), 170 (Heydon J), where they concluded that the power of declaration in that context was non-judicial in nature; Crennan and Kiefel JJ found that it was ancillary to the exercise of judicial power (at 227) and Bell J seemed to suggest that it was judicial in nature (at 250).

⁹² Ibid 66.

⁹³ Ibid 170. This is again in contrast with the criteria for the exercise of the declaration here, at least as evidenced in the original *Criminal Organisation Act 2009* (Qld), given that no new criteria were provided by which the 26 named organisations were assessed.

⁹⁴ *Momcilovic* (2011) 245 CLR 1, 250. It is argued that the criteria in the original *Criminal Organisation Act 2009* (Qld) are of a nature that a court would typically consider.

The argument then is that, in substance, the power to declare an organisation criminal, because of its impact on the liberties of individuals affected, is either a judicial power or ancillary to the exercise of a judicial power, and should be reposed in the judicial arm of government, rather than the legislative arm. A purported exercise of such power by the legislature is offensive to Chapter III requirements.

However, even if the power to make a declaration is 'judicial' in the relevant sense, is there anything prohibiting such a power from being exercised by the legislature? Clearly, such an exercise would be impermissible at the federal level; however, it is clear that the separation of powers doctrine is of more limited application at state level.

One view of the federal/state difference, expressed by McHugh J in *Fardon*, is that:

[There is nothing] in the *Constitution* that would preclude the States from legislating so as to empower non-judicial tribunals to determine issues of criminal guilt or to sentence offenders for breaches of the law.⁹⁵

On the other hand, it is not clear that other members of the High Court have accepted this position.⁹⁶ For instance, in *Totani*, one of the arguments made to the Court was precisely that it was open to a state legislature to authorise a body other than a court to exercise judicial power. Gummow J specifically cited the page number from the judgment of McHugh J in *Fardon*, on which the quote above appears, in connection with that argument. He then responded that these were 'large propositions for an intervener to advance', and whilst accepting the possibility that state legislatures may confer at least some judicial power on a body that is not a court of a state, he specifically did not accept the proposition that a body other than court could, for instance, punish criminal guilt, a function typically conducted by a court.⁹⁷ To the extent that the argument that the separation of powers principle has more limited application at state level than at federal level is based on the finding in the

⁹⁵ (2004) 223 CLR 575, 600. McHugh J expressed similar sentiments in *Kable*: 'The Parliament of New South Wales has the constitutional power to pass legislation providing for the imprisonment of a particular individual': *Kable* (1996) 189 CLR 51, 121.

⁹⁶ In *Fardon* (2004) 223 CLR 575, 627 Kirby J (in dissent) expressed concern that a broad view of the difference between the operation of the separation of powers doctrine at federal or state level should not undermine the integrated nature of the Australian court structure.

⁹⁷ *Totani* (2010) 242 CLR 1, 67. Members of the High Court in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 referred to the 'exclusively judicial function of adjudging and punishing criminal guilt' (Brennan, Deane and Dawson JJ), though admittedly this was in the context of a federal law. The extent to which these judges would apply the same sentiment to the state level is not entirely clear. They did not expressly confine it to federal courts.

*BLF*⁹⁸ case of a lack of separation of powers in state constitutions, some have challenged the continuing correctness of that decision, in light of subsequent decisions.⁹⁹ It has, however, never been formally overruled.

Thus, it may fairly be said that there is some uncertainty as to the precise application of the separation of powers doctrine at state level, and in particular the extent to which a function that is judicial can be conferred or exercised by a non-judicial body.

Perhaps a stronger way to articulate this argument is to acknowledge that state laws which compromise the institutional integrity of state courts will be invalid due to the requirements of Chapter III. Specifically, powers may not be given to a court, or members of a court, by which its institutional integrity is or may be compromised.¹⁰⁰ A court cannot be required to perform a task that is inconsistent with its institutional integrity.¹⁰¹ Chapter III requires that there be a body fitting the description of a ‘state supreme court’. This requires, for instance, that the body have the power to correct jurisdictional error of inferior courts,¹⁰² and to provide reasons for its decisions.¹⁰³ The removal of such power triggered Chapter III constitutional invalidity. As Ratnapala and Crowe write:

The case of *Kirk* establishes that institutional integrity also prevents state legislatures from withdrawing certain types of jurisdiction from state courts.¹⁰⁴

⁹⁸ *Building Construction Employees and Builders’ Labourers’ Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 (‘*BLF*’).

⁹⁹ ‘It has been the longstanding judicial view, repeatedly affirmed by state supreme courts, the High Court and the Privy Council, that the doctrine of the separation of powers is not constitutionally entrenched at state level. This orthodox view, we argue, no longer represents the constitutional law of Australia following a series of judgments of the High Court commencing with *Kable*’: Ratnapala and Crowe, above n 27, 176. The present author has developed an argument that the *BLF* decision should be overturned: see Anthony Gray, ‘Executive Detention and the Australian Constitution’ (2014) *Australian Journal of Administrative Law* (forthcoming). Further, contrary to the decision in *BLF*, French CJ and Kiefel J specifically stated in *Wainohu* that a state legislature could not now, consistent with ch III, enact a law purporting to abolish the Supreme Court of a state: *Wainohu* (2011) 243 CLR 181, 210.

¹⁰⁰ *Forge* (2006) 228 CLR 45, 67 (Gleeson CJ), 76 (Gummow, Hayne and Crennan JJ) 122 (Kirby J); *Momcilovic* (2011) 245 CLR 1.

¹⁰¹ *New South Wales v Kable* (2013) 87 ALJR 737 [17] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

¹⁰² *Kirk* (2010) 239 CLR 531.

¹⁰³ *Wainohu* (2011) 243 CLR 181.

¹⁰⁴ Ratnapala and Crowe, above n 27, 189.

It may be conceded here that the removal of a power to declare an organisation to be criminal in nature is not as clear an example of a breach of Chapter III requirements as the legislation discussed in *Kirk* or *Wainohu*. It is hard to argue that the ability to exercise such a power is an 'essential characteristic' of a court.

On the other hand, the precise contours of the 'institutional integrity' test are not clear at this point. It may not be necessary, in order to meet this test, that an 'essential characteristic' of a court be implicated by the legislation. There have been recent suggestions that *any substantial change* to the kinds of power traditionally exercised by a court, and *any substantial change* to the kinds of power traditionally exercised by a legislature might trigger Chapter III concerns at a state level; prime examples of such changes include the conferral of non-judicial powers on the judiciary, or the exercise of judicial powers by non-judicial figures. For example, some members of the High Court in *Momcilovic* found that the conferral of what were considered non-judicial powers on a court offended its institutional integrity.¹⁰⁵ Gummow J (dissenting, but with whom Hayne J agreed on this point) noted that the powers given to the court represented a '*significant change* to the constitutional relationship between the arms of government',¹⁰⁶ finding that the powers given to the judiciary in that case were essentially legislative in nature. This led him to a finding of constitutional invalidity. Importantly, the context was a state law conferring power on a state court.¹⁰⁷

A similar position was taken by Heydon J in *Momcilovic*. He first characterised the nature of the power being exercised. Given the kinds of factors that those granting the power contemplated would be taken into account (in his words, 'indeterminate, lofty, aspirational, abstract' and involving questions of public interest), he concluded that an exercise of legislative power had been contemplated. This led him to a conclusion of constitutional invalidity:

[Section] 7(2) creates difficult tasks. It imposes them on judges. But they are not tasks for judges. They are tasks for a legislature. Section 7(2) reveals that the Victorian legislature has failed to carry out for itself the tasks it describes. Instead of doing that, it has delegated them to the judiciary.¹⁰⁸

¹⁰⁵ *Momcilovic* (2011) 245 CLR 1.

¹⁰⁶ *Ibid* 95–6 (emphasis added).

¹⁰⁷ *Ibid*.

¹⁰⁸ *Ibid* 172.

For Heydon J also, this led to a finding of constitutional invalidity, in that a state law purported to confer powers, which should have been exercised by the legislature, on a state court.

In other words, three members of the High Court recently determined that the conferral of what it classified as powers that were in substance non-judicial on a judicial body was offensive to the requirements of Chapter III because it interfered with the court's institutional integrity. The judicial body involved was a state court.

Surely what can be said about the conferral of 'unusual' powers on a court, can also be said about the conferral of 'unusual' powers on the legislature.¹⁰⁹ As a corollary of the principle espoused by Gummow and Hayne JJ in *Momcilovic*, it can also be argued that the removal of the power of the court to declare an organisation to be criminal, and the exercise of that power by the legislature, represents a 'significant change to the constitutional relationship between the arms of government'.¹¹⁰

This is most clearly demonstrated by the fact that a power of that nature was given to the judiciary in the *Criminal Organisation Act 2009* (Qld). It was then 're-allocated' to the legislature by amending legislation in 2013. In the present author's opinion, that does answer the description of a 'significant change to the constitutional relationship between the arms of government'.¹¹¹ The legislature is seeking to appropriate for itself a power to make an order which has very significant effects on individuals, a type of power that numerous judges have expressed to be 'best' reposed in the judiciary. To adapt the above quoted judgment of Heydon J in *Momcilovic*, the 2013 amendments allocate to the legislature the task of declaring an organisation criminal. But it is not a task for the legislature; it is a task for the courts.

If it is accepted that the power to declare an organisation to be criminal is really 'judicial' in nature, and should, given its impact on fundamental civil liberties, be reposed in the judiciary, then its removal from the judiciary, and placement with the legislature, compromises the institutional integrity of a court. This is not to say that the exercise of judicial power by a non-judicial body will never be permissible, particularly at state level. It is rather to say that it is a question of degree, and there will be a stage where the removal of what is essentially a judicial power to a non-judicial body will offend the institutional integrity of the court. That this is the current law in this area can

¹⁰⁹ The word 'unusual' is used here to mean powers that one would not typically expect the body to be exercising.

¹¹⁰ *Momcilovic* (2011) 245 CLR 1, 95–6 (Gummow J, with whom Hayne J agreed).

¹¹¹ *Ibid.*

be concluded from the judgment of Gummow J in *Totani* and the High Court decision in *Wainohu*. Support for these conclusions can be drawn from the judgments of Gummow, Hayne and Heydon JJ in *Momcilovic*.

C *The Court's Obligation to Act Fairly*

The joint reasons of Hayne, Crennan, Kiefel and Bell JJ in *Pompano* agreed with the proposition that a court was required to act fairly and impartially, in order that its institutional integrity not be compromised.¹¹² In addressing this requirement, these judges placed critical importance on the ability of judges in the prescribed process to take into account the circumstances in which evidence in support of the application for a declaration was obtained:

In deciding any application for declaration of an organisation as a criminal organisation, the Supreme Court would know that evidence of those assertions and allegations that constituted criminal intelligence had not been and could not be challenged directly. The Court would know that the respondent and its members could go no further than make general denials of any wrongdoing of the kind alleged. What weight to give to that evidence would be a matter for the Court to judge ... noticing that the Supreme Court must take account of the fact that a respondent cannot controvert criminal intelligence does not seek to deny the allegation of legislative invalidity by asserting that the Supreme Court can be 'relied on' to remedy any constitutional infirmity or deficiency in the legislative scheme. Rather it points to the fact that under the impugned provisions the Supreme Court retains its capacity to act fairly and impartially. Retention of the Court's capacity to act fairly and impartially is critical to its continued institutional integrity.¹¹³

The joint reasons contrasted the legislation invalidated in *Wainohu* with the Queensland *Criminal Organisation Act*, concluding that the Queensland legislation 'did not in any way alter the duty of the Supreme Court to assess the cogency and veracity of the evidence that is tendered in an application for a declaration of an organisation as a criminal organisation'.¹¹⁴

Further, the joint reasons expressed the belief that the legislation was consistent with the requirement of institutional integrity because the court was empowered to weigh up evidence, including the circumstances in which it was

¹¹² *Pompano* (2013) 295 ALR 638, [167] (joint reasons); [194] (Gageler J). This mirrors comments in earlier cases observing that fairness is a characteristic of a judicial process: eg *Wainohu* (2011) 243 CLR 181, 208 (French CJ and Kiefel J), 225 (Gummow, Hayne, Crennan and Bell JJ).

¹¹³ *Pompano* (2013) 295 ALR 638 [166]–[167].

¹¹⁴ *Ibid* [168].

obtained and the opportunity (or lack thereof) of those affected to hear and counter evidence being led against them, in assessing whether a declaration that the organisation was criminal should be made. This ensured that the judges could act fairly.¹¹⁵ In similar cases, one of the reasons why the High Court validated the legislation was the retention of court discretion, in particular the extent to which it was required to accept submissions or assertions by members of the executive.¹¹⁶

The new provisions stand in marked contrast to the earlier provisions in this respect. By directly declaring an organisation to be criminal, the legislation removes the power of the court to weigh up the evidence said to suggest that the organisation is worthy of such a declaration. This has serious consequences.¹¹⁷ The court will not see such evidence. It is required to act on the declaration by the legislature that the organisation meets the criteria for the making of such an order. Nothing specific is contained in the Act or Explanatory Memorandum indicating what led the 26 organisations to be declared criminal. Therefore, we are left with the criteria contained in the original legislation, or with the indicators contained in the 2013 legislation regarding why an organisation might be declared in future, as guides to how the power was/will be exercised. However, the court is not empowered to overturn the legislature's decision. A critical piece of the original legislation, the piece which justified the High Court's decision in *Pompano* that the legislation was compatible with the court's institutional integrity, has been

¹¹⁵ This was also a feature of the High Court's reasoning in cases such as *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 ('*Gypsy Jokers*') and *K-Generation v Liquor Licensing Court* (2009) 237 CLR 501.

¹¹⁶ *K-Generation v Liquor Licensing Court* (2009) 237 CLR 501, 543: '[T]he ... Court is not bound to accept in its terms the "criminal intelligence" upon which the Police Commissioner relies. The Court itself may question the evidence in closed session' (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). Another important consideration in the joint reasons was that, even if the court did accept the evidence produced by the Commissioner, it could independently determine the weight to be given to it (at 543). French CJ expressed similar sentiments: '[T]here is nothing in [the legislative provision] requiring the ... Court to accept or act upon information submitted to it by the Commissioner of Police' (at 527) ... '[T]he ... Court can look behind the Police Commissioner's classification of information as criminal intelligence to determine whether it meets the objective criteria upon which that classification must be based' (at 531). French CJ added that '[t]here is nothing to prevent an applicant faced with unseen "criminal intelligence" from tendering comprehensive evidence about his or her own good character and associations' (at 527); *Pompano* (2013) 87 ALJR 458.

¹¹⁷ Clearly the courts do not like having their discretion removed. For instance, in *Gypsy Jokers* (2008) 234 CLR 532, the majority found that the legislation was valid only because it inferred that the court retained a power to second guess the determination of a member of the executive that relevant evidence should remain confidential. Kirby J (dissenting) did not read the legislation this way, claiming that it was really intended to make the executive's decision on the confidentiality of certain evidence final and binding on the court. For this reason, he found that the legislation was contrary to the requirements of ch III.

removed, surely raising serious questions regarding the constitutionality of the new laws. The legislation suffers from the fatal constitutional defect identified in *Totani*, that of requiring a court to make orders without undertaking any independent curial determination or adjudication of the claim.¹¹⁸

1 *Analogy with Conclusiveness Certificates?*

Some analogy is apparent with the issues raised in *Conway v Rimmer*¹¹⁹ (a precedent adopted by the High Court)¹²⁰ where the House of Lords considered the validity of a ministerial declaration that documents would not be produced to a litigant in proceedings against the Crown, on the basis that production would be contrary to the public interest. A unanimous court found that it was for the court, and not for the executive, to decide whether the public interest justified disclosure or non-disclosure of the material. Members of the court expressed grave concern with a minister deciding whether or not disclosure would be permitted, something which could impair due administration of justice.¹²¹ Courts had exercised this power of weighing up competing considerations in favour of or against disclosure for many years.¹²² Lord Morris stated that a system whereby the court would be bound by a ministerial statement that disclosure was contrary to the public interest would be 'out of harmony with the spirit which in this country has guided the ordering of our affairs and in particular the administration of justice'.¹²³ Lord Pearce agreed that it was up to the court to decide what evidence it shall demand in the fulfilment of its public duty to administer justice.¹²⁴

Again, some analogy exists with the situation in *Attorney-General (Cth) v Tse Chu-Fai*,¹²⁵ involving interpretation of the *Extradition Act 1988* (Cth) and, in particular, the definition of an 'extradition country'. In the context of a

¹¹⁸ In finding the legislation in *Totani* invalid, Crennan and Bell JJ noted that '[t]he conditions upon which the Court must make a control order require the Court to give effect to the determination of the Executive in the declaration (which implements the legislative policy), without undertaking any independent curial determination, or adjudication, of the claim or premise of an application for a control order by the Commissioner of Police ... This has the effect of rendering the Court an instrument of the Executive, which undermines its independence': *Totani* (2010) 242 CLR1, 160; see also at 21 (French CJ), 66 (Gummow J66), 89 (Hayne J).

¹¹⁹ [1968] AC 910.

¹²⁰ *Sankey v Whitlam* (1978) 142 CLR 1, 38 (Gibbs ACJ), 96 (Mason J).

¹²¹ *Conway v Rimmer* [1968] AC 910, 951 (Lord Reid).

¹²² *Ibid.*

¹²³ *Ibid* 955 (Lord Morris), 977 (Lord Hodson).

¹²⁴ *Ibid* 980; see also at 994 (Lord Upjohn).

¹²⁵ (1998) 193 CLR 128.

discussion of the requirements of Chapter III of the *Constitution*, six members of the High Court found that:

The Executive, a representative of which is a party to a controversy arising under the 1988 Act, cannot, by a certificate furnished by another representative, 'compel the court to an interpretation of statutory words which it believes to be false'.¹²⁶

We see that both in the line of Australian cases dealing with institutional integrity, such as *Gypsy Jokers*, *K-Generation*, *Wainohu* and *Totani*, and the public interest immunity cases such as *Conway* and *Sankey*, the Court has insisted that one of its essential characteristics is its ability to weigh up evidence presented by both sides, in deciding upon an application of the law. It has frowned on attempts by the executive or legislature to make this determination independently of the court.

It can be seen how the 2013 amendments offend the sentiments expressed in these cases. Those amendments purport to interfere with the court's power to weigh up evidence to determine whether or not members of an organisation do in fact associate for criminal purposes, do in fact have criminal records, and are in fact members of associations which have links with other associations interstate or internationally that are involved in crime. A court would ordinarily receive evidence on all of these matters, and have the chance to weigh it in light of submissions by members of the relevant organisation. The 2013 changes short-circuit this by requiring the court to act on the declaration by the legislature as to the criminality of the organisation, and by making the court abandon its traditional role of weighing up evidence on contentious legal issues. In the language of Chapter III, this offends the institutional integrity of the court. It takes away from the court a power that it traditionally exercised, just as the government purported to do in *Conway*.

D Minimum Mandatory Sentencing

Another aspect of the scheme that is highly constitutionally contentious is the provision for minimum mandatory sentencing, exacerbated by the very long minimum mandatory terms of imprisonment for which the legislation provides.¹²⁷ The most glaring example appears in the *VLAD Act*, involving a

¹²⁶ Ibid 149 (Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ) (only six judges heard the case); the text in inverted commas is the Court in *Tse* quoting Scarman LJ in *In re James (An Insolvent)* [1977] Ch D 41, 71.

¹²⁷ Anthony Gray and Gerard Elmore, 'The Constitutionality of Minimum Mandatory Sentencing Regimes' (Pt 1) (2012) 22(1) *Journal of Judicial Administration* 37; Anthony Gray and Gerard Elmore, 'The Constitutionality of Minimum Mandatory Sentencing Regimes' (Pt 2) (2013) 23(2) *Journal of Judicial Administration* 58.

minimum mandatory term imprisonment of 15 years for the commission of nominated offences pursuant to the activities of a 'declared organisation', or 25 years' imprisonment if the person happens to be an office holder in the organisation. The person cannot be given parole during this minimum time. The minimum time is in addition to any other penalty to be applied for the offence. Nominated offences include serious offences, but also include relatively trivial offences such as drug possession.

Are there constitutional difficulties with requiring a court to impose a minimum 15-year term of imprisonment on someone convicted of drug possession, or 25 years if they are the secretary of a declared organisation?

One might have thought so. Two strands of the High Court's Chapter III jurisprudence are relevant here. First, the Court has resisted the attempted conscription of the judiciary into the implementation of an executive plan.¹²⁸ Second, the court has resisted (mandated) departures from the traditional judicial process.¹²⁹ Both indicate an unconstitutional attack on judicial independence and the institutional integrity of a Chapter III court.

Members of the High Court have declared that a law which 'purport[s] to direct the courts as to the manner and outcome of the exercise of their jurisdiction' was offensive to Chapter III.¹³⁰ One reason that a majority of High Court invalidated the legislation in *Kable* was that it had the effect that the

judiciary is apt to be seen as but an arm of the executive which implements the will of the legislature. Thereby a perception is created which trenches upon the appearance of institutional impartiality.¹³¹

Surely, a provision requiring the imposition of a minimum gaol term purports to direct the court in the exercise of its power to sentence an individual once guilt is established. In *Totani*, Crennan and Bell JJ invalidated the legislation partly because:

¹²⁸ *Kable* (1996) 189 CLR 51; *Totani* (2010) 242 CLR 1.

¹²⁹ *International Finance Trust* (2009) 240 CLR 319; *Wainohu* (2011) 243 CLR 181; Robert French, 'Essential and Defining Characteristics of Courts in an Age of Institutional Change' (2013) 23(1) *Journal of Judicial Administration* 3.

¹³⁰ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 36–7 (Brennan, Deane and Dawson JJ). See also *Gypsy Jokers* (2008) 234 CLR 532, 560: '[L]egislation which purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction would be apt impermissibly to impair the character of the courts as independent and impartial tribunals' (Gummow, Hayne, Heydon and Kiefel JJ).

¹³¹ *Kable* (1996) 189 CLR 51, 134 (Gummow J); to like effect at 98 (Toohey J), 107 (Gaudron J), 124 (McHugh J).

Legislation which draws a court into the implementation of government policy, by confining the court's adjudicative process so that the court is directed or required to implement legislative or executive determinations without following ordinary judicial processes, will deprive the court of the characteristics of an independent and impartial tribunal.¹³²

This is surely what legislation imposing minimum mandatory sentences does. Clearly, provisions for minimum mandatory sentences are government policy. Clearly, the laws direct the courts to implement a legislative or executive determination about the appropriate penalty.

The extract from *Crennan and Bell JJ* also focuses on the second strand of argument by which Chapter III issues are raised, the extent to which the legislation mandates departure from traditional judicial process.¹³³ Clearly, ordinary judicial process includes an assessment of a just penalty/sentence following conviction.¹³⁴ This involves the weighing up of various matters pertaining to an individual's sentence, including the circumstances of the offence, the age of the offender, the reasons for committing the offence, the impact on the victim, the offender's past conduct, any relevant personal or family history, and a consideration of past sentences for similar offences. There is an overriding need for proportionality between (a) the court's perception of the gravity of the offence and the circumstances in which the offender committed it, and (b) the sentence ordered by the court.¹³⁵

¹³² *Totani* (2010) 242 CLR 1, 157. In *Thomas v Mowbray* (2007) 233 CLR 307, 477-8, Hayne J had constitutional concern with legislation where 'federal courts are left with no practical choice except to act upon a view proffered by the executive', stating that such legislation would damage the institutional integrity and maintenance of public confidence in the judiciary.

¹³³ '[L]egislation which requires a court exercising federal jurisdiction to depart to a significant degree from the methods and standards which have characterised judicial activities in the past may be repugnant to Chapter III': *Thomas v Mowbray* (2007) 233 CLR 307, 355 (Gummow and Crennan JJ).

¹³⁴ 'The King in his own person cannot adjudge any case, either criminal or betwixt party and party; but it ought to be determined and adjudged in some court of justice, according to the law and custom of England': *Prohibitions Del Roy* (1607) 12 Co Rep 63; 77 ER 1342. In *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 Brennan, Deane and Dawson JJ (with whom Mason CJ agreed) refer to the 'exclusively judicial function of adjudging and punishing criminal guilt'; *Al-Kateb v Godwin* (2004) 219 CLR 562, 609-10 (Gummow J), 650 (Hayne J); *Reyes v The Queen* [2002] UKPC 11, [47] (Lord Bingham, for the court, stating that a 'non-judicial body cannot decide what is the appropriate measure of punishment to be visited on a defendant for a crime he has committed').

¹³⁵ *Veen v The Queen (No 2)* (1988) 164 CLR 465, 472: 'The principle of proportionality is now firmly established in the country. It was the unanimous view of the Court in *Veen (No 1)* that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender' (Mason CJ, Brennan, Dawson and Toohey JJ); *Wong v The Queen* (2001) 207

It is submitted that, applying the stated test of Crennan and Bell JJ, such laws deprive the court of the features of an independent and impartial tribunal, by taking away a significant part of its role in weighing up all of these circumstances at the time of sentence, and requiring it to start with a government-mandated minimum sentence, in particular a mandated minimum sentence that is far higher than what a court would typically order for at least some of the offences to which the mandatory minimum sentencing regime applies. This view has attracted academic support,¹³⁶ and is consistent with a Privy Council decision.¹³⁷

This submission will not be developed any further here because it must be acknowledged that in *Magaming v The Queen*¹³⁸ ('*Magaming*'), six members of the High Court validated a mandatory sentencing regime against a Chapter III challenge. The joint reasons concluded that the court's sentencing function could only take place in the context of the statutory power conferred upon the court, and it was open for the legislature to set the parameters as it saw fit, including the introduction of minimum mandatory sentences.¹³⁹ This was not, according to the majority, contrary to the requirements of Chapter III.

CLR 584, 611–12: 'the task of the sentence is to take account of all of the relevant factors and to arrive at a single result which takes due account of them all' (Gaudron, Gummow and Hayne JJ).

¹³⁶ Manderson and Sharp concluded that mandatory sentencing laws 'are so fundamentally different in character as to make a mockery of the courts' judicial role in the sentencing of offenders. It is not the severity of the laws, but their complete and structural abrogation of a meaningful judicial role in the infliction of a penalty that subverts the rule of law and is thereby an instance of the legislature requiring courts to act in a manner which is incompatible with the judicial process': Desmond Manderson and Naomi Sharp, 'Mandatory Sentences and the Constitution: Discretion, Responsibility and Judicial Process' (2000) 22 *Sydney Law Review* 585, 605; Peter Sallmann, 'Mandatory Sentencing: A Bird's Eye View' (2005) 14 *Journal of Judicial Administration* 177; Andrew Trotter and Harry Hobbs, 'The Great Leap Backward: Criminal Law Reform with the Hon Jarrod Bleijie' (2014) 36(1) *Sydney Law Review* 1, 12–22.

¹³⁷ In *Liyana v The Queen* (1965) UKPC 1, the Council invalidated a mandatory sentencing regime in relation to those involved in an attempted coup. The Council found that it was offensive to the separation of powers for which the relevant country's *Constitution* provided: '[T]he judges were deprived of their normal discretion as respects appropriate sentences. They were compelled to sentence each offender on conviction to not less than ten years' imprisonment ... even though his part in the conspiracy might have been trivial.' Gageler J (dissenting) reached the same conclusion in *Magaming* (2013) 87 ALJR 1060 [88]–[89] though he did so by another route, deciding that in the context where some offences attracted mandatory minimum penalties and others did not, the fact that the executive had a choice of which route to follow was the encroachment on judicial power, contrary to ch III requirements.

¹³⁸ (2013) 87 ALJR 1060 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ, Gageler J dissenting).

¹³⁹ *Ibid* [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), [103] (Keane J).

Of course, it would be extremely unlikely that the High Court would overturn this decision in the near future, given the fact that it was made in 2013 and was a decision by six justices. The remote possibility exists that the High Court might distinguish this decision when it considers the very high minimum mandatory sentences provided for in the *VLAD Act*. The minimum non-parole periods of 15 years or 25 years are substantially heavier than the minimum sentences provided for in the regime challenged in *Magaming*, which had a minimum non-parole period of three years. It is possible, though admittedly unlikely, that the Court would hold that a direction for a court to impose such a high minimum sentence so substantially interferes with the discretion that a sentencing court typically has that it infringes the independence and institutional integrity of the court, by requiring it to impose grossly unfair and unjust penalties, bearing no sensible relationship to the gravity of the offence.

Current members of the High Court have acknowledged that fairness is an abiding characteristic of a judicial process.¹⁴⁰ Surely, there comes a point at which a very high minimum mandatory baseline undermines the very fairness which a court is sworn to ensure, undermining its institutional integrity. While it can be argued that these comments were directed to fairness of process, it can also plausibly be argued that a defining feature of courts is fairness of outcome. After all, process is a means to an outcome. A clearly unfair outcome is of greater practical significance to the parties involved than an unfair process. Process must not be reified above outcomes.

IV CONCLUSION

During 2013 some remarkable laws were passed with the ostensible purpose of ‘dealing with’ outlaw motorcycle clubs. As has been seen at other times when governments respond quickly with tough laws to deal with some perceived ‘emergency’, human rights that have been long fought for, and thought to be won, can become casualties. The High Court needs to be wary of its acquiescence in such steps, lest the exceptional become the normal.

Four constitutional arguments against the 2013 changes have been made in this article. First, it has been argued that the provision criminalising participation in a declared organisation runs counter to the High Court decision in *Totani*. In particular it runs counter to the evident concern with the lack of reasons given for executive decisions, with the requirement that the

¹⁴⁰ *Totani* (2010) 242 CLR 1, 43 (French CJ); *International Finance Trust* (2009) 240 CLR 319, 338 (French CJ); *Wainohu* (2011) 243 CLR 181, 208 (French CJ and Kiefel J), 225 (Gummow, Hayne, Crennan and Bell JJ).

court to act on a government declaration of an organisation's criminality, and with the criminalisation of an individual in the absence of proof that the individual was involved in any wrongdoing. Second, it has been argued that the power to declare an organisation criminal, given the consequences of the power for individuals involved in the organisation, is essentially judicial in nature, as reflected in the original *Criminal Organisation Act 2009* (Qld) and confirmed by the High Court. As a result, the sudden exercise of the power by the legislature in 2013 reflects an impermissible breach of the separation of powers doctrine. Third, it has been argued that, by requiring the court to act on the legislature's declaration of 26 motorcycle clubs, the court is being required to act contrary to fair process, as that concept has been applied by the court itself. Fourth, it has been argued that there is room to constitutionally challenge the minimum mandatory regime despite the High Court decision in *Magaming*, given the very high level at which the minimum mandatory sentencing provisions have been set.