

Review of the *Criminal Organisation Act 2009*

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Queensland
Government

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Abbreviations

ACC	Australian Crime Commission
BAQ	Bar Association of Queensland
CCC	Crime and Corruption Commission
CI	criminal intelligence
CMC	Crime and Misconduct Commission
CO	criminal organisation
COA	<i>Criminal Organisation Act 2009 (Qld)</i>
CODA	the <i>Criminal Law (Criminal Organisations Disruption) Amendment Act 2013 (Qld)</i>
COPIM	Criminal Organisation Public Interest Monitor
ECtHR	European Court of Human Rights
FRO	Financial Reporting Order
OMCG	outlaw motorcycle gang
NCA	National Crime Agency
QCC	Queensland Crime Commission
QCCL	Queensland Council of Civil Liberties
PJCACC	Parliamentary Joint Committee on the Australian Crime Commission
QLS	Queensland Law Society
QPS	Queensland Police Service
RICO	<i>Racketeer Influenced and Corrupt Organizations Act of 1970, 18 USC §§ 1961-8</i>
SCPO	Serious Crime Prevention Order
the 2013 suite	the <i>Vicious Lawless Association Disestablishment Act 2013 (Qld)</i> , the <i>Tattoo Parlours Act 2013 (Qld)</i> , the <i>Criminal Law (Criminal Organisations Disruption) Amendment Act 2013 (Qld)</i> , and the <i>Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013 (Qld)</i>
UCPR	<i>Uniform Civil Procedure Rules 1999 (Qld)</i>
UMCQ	United Motorcycle Council of Queensland
VLAD	<i>Vicious Lawless Association Disestablishment Act 2013 (Qld)</i>

1 Introduction

We will not be left behind – Queensland will match any State in regard to the toughness of our laws to deal with the threat of outlaw motorcycle gangs.

Premier Anna Bligh, 30 March 2009 ¹

Today we will introduce to this parliament the toughest laws against these thugs this state has ever seen. Indeed, they are among the toughest in the world. They are not designed to just contain or manage the gangs; they are designed to destroy them... We wish to shut down these gangs and drive them out of our state.

Premier Campbell Newman, 15 October 2013 ²

The proposal is an attack on the right of freedom of association. At this point the target is a group, bikies, who have been publicly maligned. Whether this is deserved or not, and whether it fairly reflects on the attitudes of the majority or all members of the class, is not the point. The point is that any group of citizens, however innocent the purpose of their association, can find themselves subject to like laws if they fall into disfavour. Rather than an interest in motorcycles, the shared interest might be in politics. Are we to deploy the law against the bizarre or extreme or even against those with whom we disagree?

Bar Association of Queensland & Queensland Law Society, 2009 ³

Aside from ... examples of group violence, most OMCG chapters do not engage in organised crime as a collective unit. Rather, their threat arises from small numbers of members conspiring with other criminals for a common purpose. These criminally involved members are able to leverage off the OMCG to aid their criminal activities, ranging from social nuisance in residential communities through to their involvement in some of the most significant criminal syndicates in Australia.

Australian Crime Commission, 2013 ⁴

¹ Premier Anna Bligh and Neil Roberts, Minister for Police, Corrective Services and Emergency Services, 'Cabinet Approves Tough New Bikie Laws' (Media Statement, 30 March 2009) <<http://statements.qld.gov.au/Statement/Id/63175>>.

² Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3114.

³ Queensland Law Society and Bar Association of Queensland, Submission to Department of Justice and Attorney-General on Criminal Organisation Bill 2009, 22 September 2009, 2.

⁴ Australian Crime Commission, *Crime Profile: Outlaw Motorcycle Gangs* (July 2013) 2.

Two of the passages on the previous page are from former Queensland premiers concerning, respectively, the introduction in 2009 of the *Criminal Organisation Act 2009* (COA) and the introduction in 2013 of the suite of legislation which included the widely-publicised *Vicious Lawless Association Disestablishment Act 2013* (VLAD).⁵ The third passage appears in a joint submission from the peak Queensland legal professional bodies (the Law Society and the Bar Association) before the introduction of COA in 2009, and the fourth in an information sheet from Australia's principal crime authority, the Australian Crime Commission.

They reflect the concerns, and divisions, within our community about 'outlaw' motorcycle gangs (OMCGs), and about legislation introduced in recent years with the intention of inhibiting their activities, criminal or otherwise. This report addresses those matters and, also, the broader issue encapsulated in COA's name: legislation which can be used successfully against organised crime, in all its many forms.

1.1 Why review COA?

A review of COA, an Act introduced by the Bligh Government in 2009,⁶ is required under the legislation itself which says that it will be reviewed after five years to see if it is operating effectively, and meeting its statutory objects.⁷ The review was commissioned under Terms of Reference, which ask for some particular additional matters to be addressed.⁸

Coincidentally, a Taskforce on Organised Crime Legislation is reviewing the legislation which was introduced by the Newman Government in 2013, and included VLAD (the 2013 suite). The Taskforce, which I chair, is comprised of senior representatives of the Queensland Police Service (QPS), the Police unions, the Bar and the Law Society, the Departments of the Premier and Cabinet and Justice and Attorney-General, and the Public Interest Monitor. It has been meeting and working since June 2015 and will report to the government on 31 March 2016.

There is, as some submissions pointed out, an obvious thematic and chronological connection between COA and the 2013 suite: both were primarily directed at OMCGs and one, in a sense, overtook the other. As the Law and Justice Institute (Qld) submitted, they 'feed into and support' each other. Certainly, the two exercises embrace a broad-ranging, concurrent examination of this kind of legislation.

COA was intended to provide legal procedures which would see organisations whose purpose is primarily or largely criminal 'declared' to be so, and their members, activities and premises placed under various controls and constraints – without, however, any of the traditional elements of a criminal prosecution: arrest, trial, and conviction. Rather, COA anticipated the collection by

⁵ The other Acts being the *Tattoo Parlours Act 2013* (Qld), the *Criminal Law (Criminal Organisations Disruption) Act 2013* (Qld), and the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld) — together, 'the 2013 suite'.

⁶ The operative provisions of COA came into effect on 15 April 2010.

⁷ *Criminal Organisation Act 2009* (Qld) s 130. The 'objects' of the Act appear in s 3.

⁸ The Terms of Reference are **Attachment 1**.

the QPS of secret information and material (criminal intelligence, or CI) which would be used to persuade a judge of the Supreme Court to ‘declare’ the respondent to be a ‘criminal organisation’ and, later, to make orders limiting the ability of members to meet and organise criminal activity (control orders and other measures).

Only one COA application has ever been brought, and it did not run to completion. It was against an OMCG, the Finks Motorcycle Club. It was interrupted by proceedings about COA in the High Court. Later, it was discontinued after the Finks disbanded and ‘patched over’ to another OMCG (the Mongols) and, coincidentally, the 2013 suite of laws was introduced.

As it happens this review is timely for another reason, over and above the contemporaneous work of the Taskforce. Earlier this year the state government set up a Commission of Inquiry into organised crime under Michael Byrne QC, and it has reported recently (the Byrne Report).⁹

This matrix of legislation, inquiries and reports allows a topical examination of COA in the broad context of organised crime which, the Byrne Report shows, is growing and manifesting new elements and areas for concern; and, also, the particular problem of OMCGs upon which COA and the 2013 suite were focused.

I have concluded in this report that COA was a thoughtful attempt to combat organised crime without (as the High Court confirmed, in some respects at least) impermissibly intruding upon profound and deep-rooted constitutional principles about the relationship, in our system of government, between the executive and judicial arms. However, it is apparent that COA’s methodology, its attempts to maintain safeguards against such an intrusion, and the remedies it provides, mean that in practice it has not proved useful and holds no promise of becoming so. At the same time, I have gone further and suggested that the 2013 suite also suffers from serious deficiencies and that the legislature should consider a new approach to organised crime altogether – and, outlined a framework for that.

This review report is set out in chapters intended to traverse, in logical sequence, all the issues required to be considered under COA itself, and the Terms of Reference. A summary follows.

1.2 Organised Crime

COA, as its name signifies, was intended to operate in the world of organised crime and it is appropriate to first consider what that is. **Chapter 2** addresses both the big picture of organised crime, and the part OMCGs have in it. The chapter analyses the available statistical evidence which, while it has some limitations, suggests that involvement in organised crime by OMCG members is proportionally small, although sometimes of a serious kind.

Organised crime can be, at its most basic, any criminal activity involving some cohesive effort by two or more persons. But its form, as current research shows, is highly variable – from the activity of two people who liaise briefly and informally to commit crimes like car theft, a convenience or petrol station robbery, or a drug sale, through to things like large-scale drug

⁹ *Report of the Queensland Organised Crime Commission of Inquiry* (30 October 2015).

importation activity, or a sophisticated fraud involving a large number of people, a degree of planning, and implementation of the criminal enterprise in a way which requires structure, and rules of operation.

Recently, the Byrne Report highlighted other troubling and apparently growing forms of organised crime like paedophile rings involving online child sexual offending and the exchange of child exploitation material. There are criminal organisations with, sometimes, a large number of members who never meet, who probably would not recognise each other, who communicate through computers and, so far as having a recognisable 'organisational' structure is concerned, have no readily discernible hierarchy, no office-bearers, no record-keeping system and no written rules or objects. In short, these bear none of the features which traditionally attach to organisations in our society (corporations, firms, charities, sporting clubs and the like) which enable them to be identified and categorised.

COA had the announced object of disrupting and restricting criminal organisations, their activities, members, and associates.¹⁰ On its face COA was intended, then, to provide statutory implements which law enforcers could use to identify and deter people operating within this wide range of 'organisations' from engaging in crime.

The parliamentary debate at the time the legislation was introduced makes it clear, however, that the principal purpose of COA was to combat the perceived criminal activity of members of motorcycle gangs and that, to date, is the only purpose to which it has been put.

1.2.1 Outlaw Motorcycle Gangs

OMCGs have been visible in Australia for some decades. They have a particular image in the public eye: groups of motorcycles (commonly, with the distinctive noise of Harley-Davidsons) and (again, commonly) men in leather jackets with insignia identifying their gang. They have developed a reputation for intermittent acts of violence towards each other, sometimes occurring in circumstances which ignore the safety of uninvolved, innocent bystanders and, even, cause them harm;¹¹ for apparent disdain for law enforcement personnel; for involvement in crime — drug-dealing and trafficking, extortion and the like; for associating at closed (and sometimes fortified) clubhouses; and, for connections with some types of commercial activity — tattoo parlours, providing 'security' at nightclubs and similar venues, and so on.

This public image is tempered by a perception within the community that not all Harley-riding, leather-jacket-wearing motorcyclists are OMCG members; and, by publicity around some charitable activity by bikies.

OMCG members, particularly in numbers, attract different responses from outsiders. Some see them as a noisy, offensive and violent manifestation of the criminal element in society, whose group or individual presence anywhere is disturbing, sometimes frightening, and a constant affront to the mores of decent law-abiding citizens. Others appear to accept that, for whatever reason, certain men need this kind of association and the bonds it provides and, so long as their

¹⁰ *Criminal Organisation Act 2009* (Qld) s 3.

¹¹ The 'Milperra Massacre' (1984); the 'Ballroom Blitz' at Royal Pines on the Gold Coast (2006); and riots at Sydney Airport (2009); and Broadbeach (2013).

public behaviour is reasonable and they are not simply groups of criminals, will tolerate their existence and presence.

The aspects of OMCG member conduct which most rankle, it appears, are intermittent acts of what some commentators have called 'barbarian' violence in public places,¹² and the perception that most members support themselves from criminal activity or aspire to do so. These public incidents have an obvious connection with a subsequent legislative response: a violent incident at Sydney Airport in 2009 preceded the advent of COA; the Broadbeach/Southport incident in September 2013 was followed very quickly by the 2013 suite of laws.

The history of OMCGs certainly features irregular but recurring incidents of public violence. They often appear to occur suddenly and unexpectedly, and to spring from inter-gang rivalry. The 2013 suite had the avowed aim of extinguishing any possibility of their re-occurrence, by simply driving all bikies out of Queensland. That legislation has attracted comment and concern, however, about some of its elements including doubts about the constitutionality of some of its provisions, a grossly disproportionate sentencing regime, and concerns that it seriously impinges upon hard-won rights of free association in our society.

It is also doubtful that legislation like the 2013 suite can sustain its effect, in the long term. The metamorphosis of the Finks into the Mongols during the COA proceedings against them, discussed later in this report, is a vivid example of a group evading the intended effects of legislation specifically targeted at them. There is reason to suspect that the 2013 suite would in due course have been tested by other, like stratagems by determined groups of motorcycle riders.

This report recommends the retention, with some changes, of potentially useful (but to date unused) provisions within COA which, in conjunction with sufficient resources for the police force enabling effective detection work and the gathering of timely information about OMCG activity, can go far towards anticipating and preventing these public outbreaks of inter-gang violence. Those provisions create what are called 'control orders' and 'public safety orders'. As explained in **Chapters 8 and 9**, the latter have been effectively used in South Australia to that end.

Overall, this report concludes, more can be done about actual criminal activity by OMCG members but with less complication than COA and the 2013 suite involve. If it is true that OMCGs are organisations with a natural bent towards criminal activity and if the majority of members are ready, willing and able to commit crimes for their own or the gang's benefit, then laws which address that conduct can, this report says, be framed in a way which is relatively straightforward. We already have a comprehensive *Criminal Code*, and ancillary legislation dealing with particular problems like drugs, sufficient to address any criminal act an OMCG member might commit; and, if more is sought to be done in a legislative sense about organised crime, these long-settled laws provide a logical starting point, and a sound foundation.

¹² 'Barbarian culture' is the colourful phrase used by three legal academic writers in a recent book to describe offensive behaviour matching the traditional notion of an 'outsider' subculture which acts in a manner unacceptable to society, and represents 'radical freedom': Mark Lauchs, Andy Bain and Peter Bell, *Outlaw Motorcycle Gangs: A Theoretical Perspective* (Palgrave Macmillan, 2015) 3, 27.

1.2.2 OMCGs — the available statistical evidence

The exercise of considering whether anti-organised crime laws like COA are meeting or could meet their objectives (or, indeed, are necessary) reasonably requires an attempt to gauge the scale of organised crime in Queensland, including OMCG crime. An analysis of available evidence about levels of OMCG crime appears at **Chapter 2.3**. It indicates that OMCG members account for a very small proportion of overall crime in Queensland — on any view, considerably less than 1%.

1.3 The aims and objects of COA

COA was described by the Attorney-General who introduced it as constituting not a new norm, but ‘a further extraordinary tool in the law enforcement armoury’.¹³ The Act was informed by a view that, again in the words of that Attorney-General, ‘[t]he structure and methods of organised crime pose a challenge to the traditional processes of the criminal justice system’. This system is based on the prosecution and punishment of individuals who engage in proven criminal activity. ‘The long-term disruption of ongoing criminal enterprises’, said the Attorney, ‘may require more than isolated prosecutions of individual members’.¹⁴

It is tolerably clear that COA was seen as something which would supplement, and strengthen, the existing criminal law; and, again, that it was primarily directed at OMCGs. **Chapter 3** discusses the background to the Act, and its objects and targets.

(In passing, s 3(2) of COA states parliament’s intention that the Act should not be used to diminish the freedoms to advocate, protest or dissent, or take industrial action. Nothing in the work undertaken for this review suggests anything of that kind ever occurred, or might have.)

1.4 How COA works

COA envisages a three-stage process for proceedings against an alleged criminal organisation, explained in **Chapter 4**. Typically, in the first stage the Commissioner of Police will seek to have confidential material, which the respondents are never allowed to see, declared to be ‘criminal intelligence’; secondly, in the ordinary course, a substantive application will then be brought for an order that an organisation be declared a ‘criminal organisation’; and, then, stage three involves the making of control orders, public safety orders or fortification removal orders.

¹³ Queensland, *Parliamentary Debates*, Legislative Assembly, 29 October 2009, 3030 (Cameron Dick, Attorney-General). This view is echoed in the Premier’s statement on the introduction of the legislation: Anna Bligh and Cameron Dick, ‘Legislation introduced to disrupt serious criminal activity’ (Media Statement, 67135, 29 October 2009) <<http://statements.qld.gov.au/Statement/Id/67135>>.

¹⁴ Queensland, *Parliamentary Debates*, Legislative Assembly, 29 October 2009, 3030; see also 26 November 2009, 3709.

Each of these stages is considered in detail with particular reference to the only COA application brought so far, against the Finks Motorcycle Club, and the High Court case the Finks brought to challenge COA (*Pompano*).¹⁵ That application was eventually abandoned by the QPS in circumstances where, after a great deal of resources, time and money had been devoted to it, all or most of the Finks members ‘patched over’ to the Mongols, an event which gave rise to serious doubt whether the proceedings on foot (which had reached the second stage) retained any utility. By that time serious doubts had already arisen, too, whether the orders which might ultimately be granted in a COA proceeding justified the cost.

Chapter 4 considers the use of ‘criminal intelligence’ (CI) in depth and concludes that it presents significant barriers to the efficacy and workability of the Act. It examines the very unusual role of the court in an exercise which is alien to all traditional notions of legal ‘evidence’, and which also subverts long-established procedures within our adversarial system of justice. It considers the particular forensic problems associated with the use of CI in our courts, and the prospect that, even if material is classified by the court as CI, it may not be sufficient to overcome the unfairness to the respondent which is inherent in the procedure, and persuade a judge to make final orders.

Chapter 4 also discusses the role of the Criminal Organisation Public Interest Monitor (COPIM), a position under COA intended to obviate, to some extent, the inherent unfairness in its processes arising from the exclusion of the respondents from the first stage altogether and, later, from a full comprehension of the case against them in stages two and three.

The analysis also considers the ‘shape-shifting’ problem (the patching over of Finks members to the Mongols) and possible legislative remedies.

Ultimately, it is concluded that despite COA’s best intentions it is beset by internal difficulties arising from its attempts to approach criminal activity through associations (rather than individuals), through the novel medium of CI (rather than evidence in its traditional admissible form) and through procedures which are alien to the norms of our adversarial system of justice — and, for outcomes which are not viable when weighed against the cost of the proceedings themselves. For these reasons, it is concluded that COA is unlikely to be made more useful and effective by piecemeal or even large-scale renovation by amendment.

1.5 The Finks application

Chapter 5 further considers the application QPS brought against the Finks in light of the opportunity I had, as reviewer, to examine the still confidential supporting material filed in stage one, the CI application; and, to read the transcripts of the hearings in that proceeding.

That exercise confirmed information otherwise provided by the QPS — that the COA procedure was cumbersome, slow, very resource-intensive and expensive (even without the interruption caused by the High court challenge) and, ultimately, frustrating for at least two reasons: first, it was arguably rendered futile because Finks members simply left that club, and joined another;

¹⁵ *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38.

and, second, the ultimate goal of COA proceedings (control orders, etc) did not seem a satisfactory or sufficient outcome (and grew less so) in light of that effort and expense.

1.6 The *Pompano* case: the Finks challenge COA in the High Court

The nature and ramifications of the case the Finks brought in the High Court to challenge COA are discussed in **Chapter 6**. The High Court decision shows that, while COA incorporates checks and balances which evade the constitutional difficulties which had stymied earlier South Australian and New South Wales legislation, it leaves a number of important constitutional questions unaddressed.

The respondents argued that a combination of factors in COA meant its operation breached what is now commonly called the *Kable* principle.¹⁶ According to that principle, legislation will be unconstitutional if it is ‘incompatible with’ or ‘repugnant to’ the institutional integrity of a state court invested with federal jurisdiction.¹⁷

The principal factor relied upon by the Finks was that they had been wrongly excluded from the hearing in which criminal intelligence was declared, and would also be wrongly excluded from so much of the substantive application relating to declared criminal intelligence. They argued that they could not in those circumstances know the case against them which, in any event, was based on CI and consisted of ‘secret ex-parte evidence’.¹⁸ Without a proper basis or opportunity for the respondents to evaluate or test or rebut that evidence, it was said, the Supreme Court was required to ‘depart to a significant degree from the methods and standards which have characterised judicial activities in the past’.¹⁹

Central to the High Court’s rejection of this argument was the finding that, despite the highly unusual aspects of a COA application (including, of course, the absolute exclusion of the respondents from some of them), the Queensland Supreme Court still retained its decisional independence as well as a sufficient discretion to prevent unfairness – either by exercising a discretion in the substantive application to attribute less, or no, weight to CI, or by ordering a stay of the proceedings.

¹⁶ *Assistant Commissioner Condon v Pompano Pty Ltd* [2012] HCATrans 332 (4 December 2012), line 23 (Mr BW Walker SC).

¹⁷ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 98-99 (Toohey J), 103 (Gaudron J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 617 [101] (Gummow J); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 89 [123] (Hayne, Crennan, Kiefel and Bell JJ); *Pollentine v Bleijie* (2014) 88 ALJR 796, 804 [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Kuczborski v Queensland* (2014) 89 ALJR 59, 82 [102] (Hayne J), 104 [265] (Bell J).

¹⁸ *Assistant Commissioner Condon v Pompano Pty Ltd* [2012] HCATrans 332 (4 December 2012), line 20 (Mr BW Walker SC).

¹⁹ *Assistant Commissioner Condon v Pompano Pty Ltd* [2012] HCATrans 332 (4 December 2012), lines 2533-2534 (Mr BW Walker SC).

Importantly, however, the High Court did not resolve *all* the questions of constitutional validity which could arise under COA. Not all its provisions were considered, and the possible infringement of other constitutional principles was not addressed. These include potentially important matters like the *Kirk* principle, which concerns the right of parties to seek to have acts of the executive government reviewed and, if necessary, set aside by the courts, and important implied constitutional freedoms touching matters like political communication, and association.

1.7 Other relevant Queensland legislation

COA falls to be considered within the context of Queensland criminal law touching OMCGs and organised crime generally. **Chapter 7** discusses that other legislation including laws dealing with drugs, the confiscation of ill-gotten gains and, most importantly, the 2013 suite of laws. That suite enabled QPS to have the Finks declared to be a criminal organisation with none of the difficulty, complexity and cost which arose under the COA procedure: to declare organisations in the future, the Minister simply recommends it and, if that recommendation is accepted, it is achieved by executive fiat.

The 2013 suite was introduced and quickly passed by parliament in October 2013 after incidents involving bikies on the Gold Coast just a few weeks earlier. It was made up of the *Vicious Lawless Association Disestablishment Act 2013* (Qld) (VLAD), the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Act 2013* (Qld) (CODA), the *Tattoo Parlours Act 2013* (Qld), and the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld). CODA was supplemented by the *Criminal Code (Criminal Organisations) Regulation 2013*, under which 26 alleged OMCGs were declared to be criminal organisations and their headquarters declared 'prescribed places'.

The legislation introduced three new offences into the *Criminal Code*.²⁰ Under s 60A it is an offence for a participant of a criminal organisation to be knowingly in public in the company of at least two other participants. Section 60B prohibits a participant of a criminal organisation from entering or attempting to enter a prescribed place, or from attending or attempting to attend a prescribed event. Lastly, s 60C provides for an offence of recruitment, including an attempt to recruit. The penalty for each of these offences is a minimum of six months in jail, up to a maximum of three years (plus some other mandatory impositions).

In *Kuczborski v Queensland* (2014) 89 ALJR 59 the applicant sought a declaration in the High Court that the 2013 suite of laws was unconstitutional. However, because he had not been charged with any offence, the High Court found that Mr Kuczborski lacked standing to challenge the bulk of the new laws.²¹

²⁰ Inserted by *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) s 42.

²¹ *Kuczborski v Queensland* (2014) 89 ALJR 59, 65 [2], 69 [19], 71 [29]-[30], 72 [34] (French CJ), 81-82 [99]-[100] (Hayne J), 89 [151], 91 [168], 92 [177]-[178], 93 [181], 94 [188], 103 [259] (Crennan, Kiefel, Gageler and Keane JJ), 106 [280], 108 [285] (Bell J).

That does not mean that the High Court found the laws valid, only that they ‘must await consideration on another day’.²² Indeed, it was plain from the judgments that aspects of the 2013 suite concerned members of the court, who anticipated they would be challenged. For example, French CJ considered that the new offences in the *Criminal Code* ‘directly affect ... freedom of movement and association’.²³ Four other judges flagged the inevitability of a challenge to the constitutionality of a process by which an association of persons can be categorised as criminal simply by an executive act. Under certain circumstances it is, they said:

...inconceivable that an issue would not be raised by the defence as to the invalidity of [an executive] declaration based on the limitation on executive and legislative power implied by the freedom of communication and association on matters of political and governmental interest.²⁴

There are other concerns: doubt, for example, about the constitutional validity of the role played by the Commissioner of Police in sentencing under VLAD;²⁵ and, how presently evolving principles in decisions like *Lee v The Queen* and *X7 v Australian Crime Commission* might intersect with the ability of the Crime and Corruption Commission (CCC) to use self-incriminating evidence to confiscate property as well as to withhold evidence from a defendant facing a criminal trial.²⁶

Any perceived deficits in COA cannot be said to have been conclusively remedied or repaired by the 2013 suite and, Chapter 7 shows, it offers no comfort in that regard.

1.8 Legislation in other jurisdictions

Chapter 8 examines legislative efforts to combat organised crime (including OMCGs) in the Australian states and territories, New Zealand, Canada, the USA and the UK. It explains how COA incorporates a number of features adapted from other jurisdictions, including control orders, public safety orders and fortification removal orders.

The exercise reveals that none of these stratagems have proved useful in the fight against organised crime elsewhere in Australia, with one possible exception: a variant of public safety orders used in South Australia.

Comparison with other jurisdictions does suggest that COA’s control order model is not without potential utility, albeit with some significant recasting. The UK’s version of control orders, called ‘serious crime prevention orders’ (SCPOs) has found frequent, though targeted, use there. The test for granting a SCPO turns on proof of *serious* crime, rather than *organised* crime, so the difficulty of showing the existence of a criminal organisation does not arise. SCPOs are

²² *Kuczborski v Queensland* (2014) 89 ALJR 59, 69 [16] (French CJ).

²³ *Kuczborski v Queensland* (2014) 89 ALJR 59, 72 [36] (French CJ).

²⁴ *Kuczborski v Queensland* (2014) 89 ALJR 59, 97-98 [216] (Crennan, Kiefel, Gageler and Keane JJ).

²⁵ Much will depend on whether the discretion of the Commissioner is ‘unconfined’: *Pollentine v Bleijie* (2014) 88 ALJR 796, 805 [45] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

²⁶ *Lee v The Queen* (2014) 253 CLR 455; *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196.

overwhelmingly used as a post-conviction sentencing option. This means that the evidentiary burden is largely discharged in the course of a criminal trial. Lastly, the complex issues surrounding CI are absent in applications for SCPOs, for the simple reason that the court is bound by the rules of evidence.

SCPOs warrant earnest consideration, and Chapter 8 provides that.

1.9 Should COA, or some parts of it, be retained?

Chapter 9 considers which, if any, elements of COA should be retained; and, whether that should occur by persisting with COA itself or whether preserved parts should be installed into other existing or new legislation. It explores, and offers, a range of policy options.

1.10 Effective anti-organised crime legislation

Chapter 10 contains recommendations about the legislative future of COA and suggests a framework for a new approach to organised crime legislation. It concludes that, because the Taskforce is still considering the 2013 suite, any final decisions about the form of new legislation should await the Taskforce report due 31 March 2016.

1.11 The work behind this review

I was assisted by a small team of lawyers comprising a secretariat. We sought submissions from a range of potentially interested and informed parties including practising and academic lawyers, the legal professional associations, the Queensland Police Service and the Crime and Corruption Commission, the United Motorcycle Council of Queensland, and the Criminal Organisation Public Interest Monitors appointed under Part 7 of COA. We interviewed and held round table discussions with Queensland Police Service officers, the Crime and Corruption Commission, the COPIM most directly involved in the Finks application, and lawyers familiar with the legislation. A number of submissions were received from institutions and individuals, and a list is appended.²⁷

It was necessary to read some thousands of pages of confidential material filed in the Supreme Court proceedings. Secretariat officers also undertook extensive research into legislation and case law around laws of this kind, its history here and in other countries, as well as current thinking about effective anti-gang/criminal organisation stratagems.

Under the Terms of Reference I was permitted to have regard to the work of the Taskforce on Organised Crime Legislation and the information and materials its secretariat, comprised of legal officers from the Department of Justice and Attorney-General, has collected and produced since it began work in June 2015. That work has been wide-ranging and comprehensive in terms of its

²⁷ The list is **Attachment 2**.

focus upon the 2013 suite and the consideration, by a Taskforce comprised of members with disparate interests and views, of anti-OMCG and organised crime legislation.

1.12 Acknowledgements

Senior Legal Officer Dr Nicholas Carr BA (Hons I) LLB (Hons I) (UQ), MPhil PhD (Cantab) and Legal Officer Mr Kent Blore LLB (Hons) BA (UQ) comprised the working group/secretariat which undertook research and drafting work for this review, under the guidance and supervision of Director Ms Carolyn McAnally LLB (Hons II) B Bus (Distinction). Their work has been exemplary and I was privileged to have their assistance. As Taskforce chair I have, again, been assisted by a secretariat comprised of experienced lawyers²⁸ who have provided the Taskforce with a wealth of research, information and materials on many matters which were relevant for this review and, inevitably, their work merged with that required to produce this report. I am grateful for their help and support.

Assistance from the Queensland Police Service was timely and generous, and I am indebted to Ms Carolyn Harrison BA Dip Crim LLB (Hons) from QPS in particular for providing, and easing the path of reading, the large volume of CI material in the Finks case. QPS and the CCC were also helpful in providing senior officers and staff for consultation. The opportunity to discuss the matter with the actual prosecutor of the Finks application, Assistant Commissioner Condon, and with other senior police officers and legal staff was invaluable.

The role of COPIM has been filled by two appointees since the advent of COA, Mr Robert Needham and Mr Michael Halliday (a delegate, Ms Karen Carmody of counsel, stepped in briefly during Mr Needham's absence on one occasion) and they were also helpful and generous in answering direct questions about the case, and discussing it.

²⁸ Ms Sarah Kay B Bus LLB Grad Dip (Laws) Grad Cert (Laws), Mr Carson Lloyd LLB, and Ms Brenna Booth-Mowat LLB (Hons) B Gov&IntRel, with executive assistance from Ms Bridget Thomas and Ms Kirsty Sheridan.

2 Organised Crime

2.1 What is organised crime?

Organised crime is a creature of many shapes and hues. Over time it changes form, and evolves or mutates. These variations and changes mean that a settled definition continues to elude both researchers and law enforcers. Coming to an understanding of it requires acceptance of its complexity – and, then, resort to a variety of disciplines whose adherents have wrestled with that complexity.

As a constantly-evolving and multifarious concept organised crime can be viewed from a wide variety of distinct perspectives – criminological, sociological, cultural, economic, legal, and so on. Any theory or model, or attempt to define organised crime, will accordingly be a composite of these different insights. That said, there is an obvious danger: that the more the attempt takes these disparate elements into account, the greater the risk that it will approach over-complexity and, even, incoherence.

A workable model seems to be reducible to a synthesis of three dominant paradigms which will coalesce and overlap, in varying degrees, across different organisations and periods. These paradigms are hierarchy, culture and economics.¹

The hierarchical view emphasises structure. On this approach, organised crime is distinguished from other criminal activity by the existence of an enduring entity, structured along bureaucratic or quasi-military lines – with ranks of seniority, chains of command, rules and sometimes higher order elaborations like membership rituals, insignia and uniforms. The hierarchical model emerged from the early attempts of the US government and law-enforcement bodies to come to terms with organised crime. These attempts centred on the Italian-American mafia.²

Unsurprisingly, the theory bore the hallmarks of the theorists; indeed, it might almost be seen as a mirror of them.

Tracing steps that had become familiar to both the natural and social sciences, the next major attempt to theorise organised crime moved from structure, to function. Social scientists, this time, developed a model of a criminal organisation which emphasised a lack of structure beyond the individuals involved. Formal organisation was far less significant than informal ties that were

¹ The following discussion draws on Jay S Albanese, *Organized Crime in Our Times* (Elsevier, 6th ed, 2011) 105-18. Models can be stated at different levels of generality to produce different classifications. Dickie and Wilson, for example, posit a bipartite division between a mafia (hierarchical) model and a social systems theory that embraces both kinship (cultural) factors and economic opportunism: Phil Dickie and Paul Wilson, 'Defining Organised Crime: An Operational Perspective' (1993) 4 *Current Issues in Criminal Justice* 215, 215-6. The three elements of hierarchy, culture and economics, however, tend to be the irreducible factors in whatever arrangements are posited.

² The classic study being Donald Cressey, *Theft of the Nation: The Structure and Operations of Organized Crime in America* (Harper, 1969).

best summarised as those of broadly-defined friendship, trust or 'culture', which sometimes boiled down to ethnicity.³

This shaking-up of conceptual thinking about organised crime went a step further with the advent of the so-called 'enterprise' model. Unsurprisingly for an idea that emerged from economists, criminal activity was depicted as a form of business – the result of entrepreneurial, profit-seeking actors responding to market signals. Accordingly, organised crime came to be seen as a flexible, agile and responsive activity, with enterprises constantly emerging, adapting and/or dissolving based on the nature and extent of the criminal opportunities that are available. Whatever ties and structures develop have an unsurprising, overarching profit motive.⁴

These models are not inherently contradictory; they overlap, to a varying extent, across different criminal groups, with different features predominating on a case-by-case basis. Nevertheless, as with so much other discourse, it is the economic factor that has emerged as the dominant criterion of organised criminal activity. As one respected commentator puts it:

Differences among the models become less significant once one recognizes, as the organized crime literature clearly indicates, that (1) some organized crime is hierarchical in nature, and much is not; (2) some is locally based and ethnically bound in nature, and much is not; and (3) that *all organized crime activity is entrepreneurial in nature*.⁵

Our understanding of organised crime has shifted over time from a static to a dynamic basis, and a broad consensus now exists in which 'continuing criminal associations' figure as markers of less and declining importance compared to 'networks of convenience' based on economic opportunity, and facilitated by ever-advancing technological means.⁶

In common with other types of economic activity, the physical world is becoming less important as the virtual one assumes more significance. The sorts of crimes committed are no exception to this trend. While illicit drugs continue to be a primary market, much organised criminal activity has shifted from stereotypical offences like illegal gambling, wharf and cargo theft, prostitution and the like, to online frauds and financial crimes.

This complexity is reflected in the recent Byrne Report. Commissioner Byrne QC's inquiry ran the gamut from traditional organised crimes like drug trafficking and official corruption to sophisticated financial frauds and money laundering schemes to online child exploitation networks that utilise the darknet.

The Byrne Report also noted the manifold definitions of organised crime which exist internationally, and within Australia. In Queensland alone, apart from COA's identification of organised crime through the mechanism of declaring a 'criminal organisation' (see s 10(1)), at

³ See generally AK Cohen, 'The Concept of Criminal Organisation' (1977) 17(2) *British Journal of Criminology* 97.

⁴ See, eg, James O Finkenauer, 'Problems of Definition: What Is Organized Crime?' (2005) 8(3) *Trends in Organized Crime* 63, 66-7, 81.

⁵ Albanese, *Organized Crime in Our Times*, above n 1, 117 (emphasis added).

⁶ *Ibid* 118.

least two other definitions of organised crime appear in legislation — and they reflect facets of the models discussed above.

The *Police Powers and Responsibilities Act 2000* (Sch 6) leans heavily on *both* the hierarchical model ('ongoing criminal enterprise') and a broadly cultural one ('substantial planning and organisation') for its definition. The *Crime and Corruption Act 2001* (Sch 2) features hierarchical ('systematic and ongoing activity') and cultural ('substantial planning and organisation') models as alternatives, but requires in either case a concurrent enterprise element ('a purpose to obtain profit, gain, power or influence').

For his purposes, Commissioner Byrne eschewed the traditional requirement of hierarchical structure and suggested, among other things, either culture ('substantial planning or continuing activity') or enterprise ('financial gain') as alternative ways of defining organised crime.⁷

Almost 30 years ago the Fitzgerald Inquiry registered some of these features and trends. It was alive to the fluid, indefinable nature of organised crime, its Hydra-headed operation, and the difficulties of proving it.⁸ Commissioner Fitzgerald QC noted the possibility of introducing special powers and punishments in response to these challenges, and of a new emphasis on criminal intelligence as a tool to combat it.⁹ However, it is instructive to note what he said about the nature of organised crime:

Organised crime is self-perpetuating. The organisation persists in criminal activities for a long period, in fact for years or decades. It is intended to endure indefinitely. The nature of and emphasis given to particular criminal activities changes over time, but the organisation is the same.¹⁰

This prediction was written almost a quarter-century ago and it is no criticism of Fitzgerald that the model he proposed — the hierarchical model — has in fact become increasingly untenable as a means of conceptualising organised crime.

Some 16 years ago, Project Krystal adverted to a 'traditional image of organised crime' involving 'a hierarchically controlled, tightly structured, secretive, and extremely disciplined group of criminals dedicated to their "crime boss" and his organisation'.¹¹ The reality of organised crime, it noted, was quite different: 'The more probable scenario that is [sic: is that] of a loosely associated and fluid criminal "milieu" of persons from a variety of backgrounds.... There is compelling evidence that the organised criminal environment in Queensland is comprised of a diversity of loosely associated participants'.¹²

⁷ Byrne Report, 18.

⁸ GE Fitzgerald QC, *Report of a Commission of Inquiry Pursuant to Orders in Council* (3 July 1989) 161-9, esp at 161-2.

⁹ *Ibid* 173, 309, 317.

¹⁰ *Ibid* 162.

¹¹ Queensland Crime Commission and Queensland Police Service, *Project Krystal: A Strategic Assessment of Organised Crime in Queensland*, Public Information Paper (June 1999) 8.

¹² *Ibid* 9.

Even in a traditional organised crime activity like heroin trafficking, Queensland police concluded that the enterprises involved were decentralised, small, fluid, extremely flexible, rapidly responsive to market forces, and lacking in hierarchy.¹³ Australian images of organised crime, according to Project Krystal, were unduly shaped by foreign models that had, usually through entertainment media, become familiar: Italian Mafia, Japanese Yakuza, Chinese Triads, and OMCGs. Law enforcement intelligence, it concluded, 'has tended to disprove rather than confirm the theory that Australian organised criminal activity conforms with the overseas models'.¹⁴

The Queensland Crime Commission (QCC) reported in 1999 that organised crime in this state was characterised by:

A large number of opportunistic individuals, and groups of individuals, operating at varying levels of complexity within a diverse marketplace.... The emerging picture of modern organised crime networks operating in this State suggests that most are actually very flexible, loosely structured, relatively short term, essentially entrepreneurial associations. Many of these syndicates are created and dissolved according to the needs of the particular criminal activity.... Rather than mimicking the sinister corporate-like hierarchies of Mafia-style syndicates of past eras, organised criminal activity in Queensland tends to more closely resemble a 'patron-client relationship, a business relationship, a partnership, or a network'.... Crime groups rapidly adapt and respond to changing market conditions and social, economic, and technological circumstances in much the same way as their legitimate counterparts do.¹⁵

Accordingly, Project Krystal eschewed models of organised crime as 'an enduring rigidly structured hierarchy or "ethnic conspiracy"', and assessed organised crime as 'a *dynamic commercial activity*'.¹⁶

Australian research has continued to note the decline of 'traditional models'.¹⁷ In 2008, then Deputy Commissioner of the QPS, Ian Stewart, noted that criminal organisations based on 'long term commitment' had yielded to 'more fluid and flexible approaches that may see a temporary union to execute crime within a thematic context'.¹⁸ Other evidence to a federal parliamentary committee emphasised the '*dynamic and shifting membership and structures of organised crime groups*, as opposed to the traditional or stereotypical notion that they are exclusive hierarchies'.¹⁹

If ever Australian organised crime was once distinctive in its structure, contemporary trends indicate it is now closer to a common, global model. A recent British report on serious and

¹³ Ibid.

¹⁴ Ibid ix.

¹⁵ QCC, *Organised Crime in Queensland*, Crime Bulletin 1 (June 1999) 5 (reference omitted).

¹⁶ Ibid 3 (emphasis added).

¹⁷ Parliamentary Joint Committee on the Australian Crime Commission (PJACC), Parliament of Australia, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups* (August 2009) 9.

¹⁸ Evidence to Joint Committee on the Australian Crime Commission, Parliament of Australia, Brisbane, 7 November 2008, 18. Mr Stewart is now the Commissioner of the QPS.

¹⁹ Parliamentary Joint Committee on the Australian Crime Commission (PJACC), Parliament of Australia, *Inquiry into the future impact of serious and organised crime on Australian society* (September 2007) 6 (emphasis added).

organised crime emphasised the preponderance of ‘loose networks working with others based on trust and reputation’. Even hierarchical groups often gain their structure from family relationships, which provide a degree of informality that makes them much less visible to traditionalist eyes.²⁰ A Europol report this year noted ‘disintegrating’ group structures and the preponderance of ‘loose, undefined and flexible networks made up of individual criminal entrepreneurs’.²¹ Organised criminals are increasingly acting like freelance ‘service providers’ working on a project basis, often in the digital world, in the *ad hoc* pursuit of criminal opportunities.²²

These findings are of a piece with the conclusion of two Queensland researchers this year: ‘Today’s organised crime occurs through loose and undefined networks made up of criminal entrepreneurs and freelancers with little concern for group branding or loyalty. Their business model is increasingly digital, concealed by legitimate activity and global in reach’.²³

Today the ‘traditional’ model of organised crime is, according to the Australian Crime Commission (ACC), a mere stereotype — ‘Mafia-type brotherhoods controlling large-scale crime rackets such as drug trafficking and money laundering’ or ‘highly visible outlaw motorcycle gangs’.²⁴ While the ACC indicated that such images and organisations continue to have some relevance, it was concerned at the development of a less visible, more camouflaged aspect of organised criminality which is increasingly co-existent with authentic business in the same structure.²⁵

The ACC’s 2015 report on organised crime has predicted the expansion of ‘flexible networked structures’ in the coming years.²⁶ The traditional model continues to wane in favour of a type of organised crime which questions the very notion of ‘organisation’.

Some of the investigators consulted in the course of this review identified the most successful organised crime as that which is least ‘organised’. Hierarchies, rigid structures and large memberships lend themselves to easier targeting by law enforcement bodies. What are harder to detect and target are: looser associations which utilise freelancing individuals as much as members of any ongoing group; temporary partnerships for an *ad hoc* enterprise; decentralised (if any) decision-making; and rapid adaptation to changes in crime markets. These are the features of the most successful organised crime groups today.²⁷

These looser networks, and informal ties, tend to conceal whatever structure might actually exist in a given criminal organisation. Ephemeral, project-based enterprises allow for the emergence

²⁰ National Crime Agency (UK), *National Strategic Assessment of Serious and Organised Crime 2015* (23 June 2015) 8.

²¹ Europol, *Exploring Tomorrow’s Organised Crime* (2015) 10.

²² *Ibid* 8, 12.

²³ Terry Goldsworthy and Caitlin Byrne, ‘Why Australia needs to change its view of organised crime’, *The Conversation* (online), 11 June 2015 <<http://theconversation.com/why-australia-needs-to-change-its-view-of-organised-crime-42822>>.

²⁴ Australian Crime Commission, *Organised Crime in Australia 2015* (May 2015) 6.

²⁵ *Ibid*.

²⁶ *Ibid* 83.

²⁷ Australian Crime Commission, *Crime Profile: Organised Crime Groups* (July 2013) 1-3.

and disappearance of organisations in timeframes that escape or frustrate the possibility of detection by law enforcement, let alone the operation of substantial civil litigation (like, it must be said, COA). Parallels between criminal structures and corporate or kinship ones can make it impossible to extricate the criminal 'organisation' from the business or family one. Crimes that take place in the virtual world are much harder to detect and police. Communications technology has made it possible for criminal organisations to operate as smaller groups of individuals committing new offences, in new ways. It has also facilitated the development of an increased and more diffuse international element in domestic organised crime.²⁸

The three capabilities that the ACC considers are being most exploited by contemporary organised crime in Australia are integration with legitimate markets, online technology and transnationality.²⁹ Stereotypical organised crime activities such as violence and extortion, rather than being the norm, are now parts of a complex web of 'enablers' for organised crime which takes in money-laundering, cybercrime, identity crime, the exploitation of business structures, and corruption.³⁰ These enablers are feeding the operation of a panoply of offences which go beyond the *locus classicus* of organised crime, drug trafficking, to include intellectual property crime, child exploitation, visa and migration fraud, various types of financial fraud, and more.

2.2 OMCGs and organised crime

Research broadly contemporaneous with the development of COA (and its interstate predecessors) had highlighted 'an Australia-wide growth in the membership and illegitimate activities of outlaw motorcycle gangs'.³¹ At the same time, these groups represented an apparently aberrant tendency within organised crime more generally. 'While most criminal syndicates or networks rarely aim for public identification, OMCGs maintain websites, identify themselves through patches and tattoos, abide by written constitutions and bylaws, trademark club names or logos and engage in publicity campaigns'.³²

The OMCG model of organised criminality is a highly traditional, even old-fashioned one of 'militaristic hierarchy', 'chapters' and formal officeholders.³³ This model figures as an exception to the trend of organised crime away from communally based, hierarchical and readily

²⁸ ACC, *Organised Crime in Australia 2015*, above n 24, 83-4.

²⁹ *Ibid* 7-8.

³⁰ *Ibid* 11-34. The same enablers were considered by Commissioner Byrne QC pursuant to his term of reference 3(d): Byrne Report, 213, 556.

³¹ PJCACC, *The future impact of serious and organised crime on Australian society*, above n 19, 8.

³² Australian Crime Commission, *Crime Profile: Outlaw Motorcycle Gangs* (July 2013) 1.

³³ *Ibid* 2. This discipline and quasi-military mode of organising have led a parliamentary committee to compare the institutional structure of OMCGs to those of the police: PJCACC, *The future impact of serious and organised crime on Australian society*, above n 19, 8. It is worth noting that the Act was broadly modelled on federal legislation (which in turn drew upon British laws) dealing with another quasi-military and usually structured enterprise, terrorism: Andrew Lynch, 'Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law' (2008) 8 *Oxford University Commonwealth Law Journal* 159; Rebecca Ananian-Welsh and George Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' (2014) 38 *Melbourne University Law Review* 362.

identifiable (by ethnicity or ethos) groups towards looser and more entrepreneurial networks, often for short term or *ad hoc* purposes.³⁴

Faced with the evidence of a predominantly economic model in organised crime, some law enforcement bodies have not prioritised OMCGs. This was the approach of the ACC, which noted in 2009 that the OMCG model – structured, enduring, readily identifiable as a group – was atypical of organised crime. The key syndicates that it targeted were not so overt.³⁵

Similarly, Queensland police in 2008 expressed wariness about the danger of focusing too intently on visible groups, like OMCGs, which conform to traditional models.³⁶ They also stressed the need for an ‘inclusive focus’ that took account of the flexibility and fluidity which characterise modern organised crime.³⁷ Anti-gang laws, they emphasised, were only one part of the response to organised crime, and restrictions on consorting, for example, were difficult to police.³⁸ Legislative targeting of organisations could reduce public association, violence and intimidation, but also carried the risk of reducing the identifiability of these groups and driving them ‘underground’.³⁹ Asked about the criminality of OMCGs as groups, a representative of the QPS said:

There are people within the groups who work independently. They work as a group within the group and they align themselves with other areas. So there are all ambits of that sort of criminality, but it does not necessarily mean the entire club is involved. They sometimes use being part of that criminal entity as a means of extortion or threat or to be able to stand over potential witnesses or victims.⁴⁰

This raises a second issue in any targeting of OMCGs. Much evidence suggests that organised crime in OMCGs tends to arise from ‘small numbers of members conspiring with other criminals’ rather than from a chapter engaging in crime as a ‘collective unit’.⁴¹ It also arises through collaboration with other criminal gangs or networks.⁴² As Project Krystal emphasised, it is difficult to construct a clear picture of the interaction between individual members and the group as a whole, or of the relative contributions of each to the criminal enterprises associated with OMCGs.⁴³

On the one hand, it is apparent that particular OMCGs do know about the criminal activities of their members and sometimes profit from those activities. Moreover, certain groups actively take measures to counter law enforcement through fortification, security, surveillance, even the

³⁴ PJCACC, *The future impact of serious and organised crime on Australian society*, above n 19, 6.

³⁵ PJCACC, *Legislative arrangements to outlaw serious and organised crime groups*, above n 17, 27.

³⁶ Stewart, Evidence to PJCACC, above n 18, 18.

³⁷ Ibid 19.

³⁸ Ibid 20-1.

³⁹ Ibid 21.

⁴⁰ Ibid 23.

⁴¹ ACC, *Outlaw Motorcycle Gangs*, above n 32, 2.

⁴² Ibid 3.

⁴³ *Project Krystal*, above n 11, 24.

profiling of police. The group image and structure does, to some extent, support the criminal activities of its members.⁴⁴ Codes of silence and loyalty help to conceal the crimes and protect the criminal members of OMCGs.⁴⁵ Ultimately, however, Project Krystal found that:

With few exceptions, a review of significant national and state assessments of the alleged criminal activities of OMCGs indicates that what has, in fact, been brought to light are the criminal activities of individual members of OMCGs rather than the activities of the group as a whole. In other words, the assessments suggest that OMCG memberships include individual criminals and not that OMCGs commit offences as a criminal group.⁴⁶

Thus, law enforcement opinion tends to support the view that there is a distinction to be drawn between motorcycle gangs as groups, and the individuals within them who engage in criminal activity; and, having drawn that distinction, that it is the individuals rather than the groups who constitute the criminal threat.⁴⁷

This is reinforced by scholarly research which theorises the criminal element of OMCGs as a 'dark network' that does not correlate with the 'bright network' of the official club, but operates beneath it and/or on its fringes. The club itself may be nothing more than an *ad hoc* network of some useful contacts and helpers among many others with whom the 'dark network' maintains contact.⁴⁸ Either way, to focus on the official group is to miss the reality of the more fluid and hidden criminal enterprise that actually exists.

In other words, in grappling with the group-member interplay in OMCG criminality, a third problem emerges in that there is an aspect to OMCGs that is not so structured or traditional after all. Even they are adapting to a more fluid and entrepreneurial mode of operation.⁴⁹ There is some evidence that OMCGs are moving beyond their relatively rigid 'traditional' model, and diversifying their organisation and their activities in ways which bear hallmarks of the newer organised crime — infiltrating legitimate industries and utilising professional services to mask their activities, for example.⁵⁰ The exploitation of sophisticated corporate vehicles by some OMCGs has also been noted.⁵¹

⁴⁴ Ibid; James Quinn and D Shane Koch, 'The Nature of Criminality within One-Percent Motorcycle Clubs' (2003) 24(3) *Deviant Behaviour* 281, 286; Mark Lauchs, Andy Bain and Peter Bell, *Outlaw Motorcycle Gangs: A Theoretical Perspective* (Palgrave, 2015) 31.

⁴⁵ As acknowledged by the United Motorcycle Council of Queensland (UMCQ) itself: '[I]t is a completely foreign concept for members to interfere with, "rat" on or even question other members who may be involved in criminal activity.... [M]embers do turn a blind eye to other members who may be involved in criminal activities'. See UMCQ, Submission No 11.10 to *Queensland Taskforce on Organised Crime Legislation*, November 2015, 9.

⁴⁶ *Project Krystal*, above n 11, 23.

⁴⁷ PJCACC, *Legislative arrangements to outlaw serious and organised crime groups*, above n 17, 27-8.

⁴⁸ Julie Ayling, 'Pre-emptive Strike: How Australia is Tackling Outlaw Motorcycle Gangs' (2011) 36 *American Journal of Criminal Justice* 250, 261.

⁴⁹ ACC, *Organised Crime Groups*, above n 27, 1.

⁵⁰ See, eg, PJCACC, *Legislative arrangements to outlaw serious and organised crime groups*, above n 17, 24-5.

⁵¹ Ibid 22.

Finally, it is apparent that despite their remarkable level of structure and identifiability, the level of involvement in organised crime by OMCGs and their members is difficult to gauge.⁵² Academic researchers in 2008 attributed a ‘miniscule’ or ‘incredibly small’ proportion of crime to OMCGs, and in Queensland in 2013 the figure of 0.4% was ventured (rising to 0.9% when ‘associates’ as well as ‘members’ were counted).⁵³ This view was reinforced by the Byrne Report on 30 October this year. Commissioner Byrne QC estimated that OMCG members account for 0.52% of criminal activity in Queensland, with OMCG associates accounting for a further 1.18%.⁵⁴

There are, then, sound reasons why law enforcement authorities in Queensland have at times been lukewarm in their views about the overall significance of OMCGs and the need to focus on them. Then Deputy Commissioner Stewart said in 2008 that police were ‘mindful of the dangers’ of focusing too intently on OMCGs or any other ‘traditional’ organised crime group at the expense of the less visible, less familiar but more emergent models.⁵⁵ Stated most highly, OMCGs have been seen as an ‘easy target’.⁵⁶ This was a view to which a 2009 report from a Commonwealth Joint Parliamentary Committee came, at least in part. Noting that the visibility of OMCGs made them a ‘prominent target in both the political and public arenas’, it concluded that ‘serious and organised crime often involves a level of sophistication or capacity above that of many OMCGs’.⁵⁷

In 2015 the QPS acknowledged to the Organised Crime Commission of Inquiry that, while OMCGs are an important focus, ‘they are but one of the many types of activities that make the organised crime environment in Queensland’.⁵⁸ As Commissioner Byrne QC reported, OMCGs continue to be a feature of the drug trade, and this involvement fuels other criminal activity such as extortion and offences of violence. This can only mean that OMCGs must continue to be a focus of law enforcement authorities.

The important point to be taken from the research canvassed above, however, is that in terms of their *modus operandi* and, apparently, of the quantity of their offending (as to which see further 2.3 below), OMCGs represent a niche group. Compared to the major trends surveyed by the

⁵² Ibid 32; ACC, *Outlaw Motorcycle Gangs*, above n 32, 1.

⁵³ See, respectively, Arthur Veno and Julie van den Eynde, Submission No 10 to the Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, 23 June 2008, 2 and 9; and Terry Goldsworthy, ‘A phony war: bikies aren’t the only problem on Queensland’s Glitter Strip’, *The Conversation* (online), 17 October 2013 <<http://theconversation.com/a-phony-war-bikies-arent-the-only-problem-on-queenslands-glitter-strip-19231>>. Professor Veno’s research, it should be noted, was informed by his enlistment as an advisor to OMCGs for the purposes of a campaign to ‘neutralise’ political animus toward them, including through media advocacy. See Julie van den Eynde and Arthur Veno, ‘Participatory Action Research with High-risk Groups: Best Practice for Researchers’ Safety and data Integrity’ (2013) 25(1) *Current Issues in Criminal Justice* 491; Arthur Veno and Julie van den Eynde, ‘Moral Panic Neutralization Project: A Media-Based Intervention’ (2007) 17 *Journal of Community and Applied Social Psychology* 490. However, Veno’s and van den Eynde’s assessment of the volume of criminal offending was drawn from non-aligned research and correlates with subsequent data.

⁵⁴ Byrne Report, 25.

⁵⁵ Stewart, Evidence to PJACC, above n 18, 26.

⁵⁶ PJACC, *Legislative arrangements to outlaw serious and organised crime groups*, above n 17, 32.

⁵⁷ Ibid.

⁵⁸ Byrne Report, 24.

Byrne Report in illicit drugs, fraud, money laundering and child exploitation, the nature and methods of OMCGs are largely and uniquely ‘traditional’ – structured, formal, enduring, overt. Even when COA was promulgated, OMCGs were figuring rather incongruously in an organised crime landscape in which the notion of an ‘organisation’ itself was yielding to a more diffuse idea of opportunistic, adaptable, loose and temporary entrepreneurial networks.⁵⁹

2.3 OMCGs and organised criminal activity in Queensland – a statistical view

The QPS reports a gradual decline in total criminal activity in Queensland between 2005/06 and 2014/15 (an overall reduction of 12%).⁶⁰ There is no available data to show the total number of proven offences committed by persons throughout Queensland in that period, or to isolate exactly how many of those offences were committed by OMCG members.

Some information regarding the involvement of OMCG members in criminal activity in Queensland can be drawn from QPS statistics and the Byrne Report. However, much of the data is limited to the period after the 2013 suite of laws commenced. Conclusions about OMCG offending are therefore largely drawn on the basis of that discrete data period and with an acknowledgement that not all crime, and perhaps OMCG-related crime in particular, is reported.

Assistant Professor Terry Goldsworthy reports that between April 2008 and April 2014, OMCG members were convicted of 4,323 criminal offences.⁶¹ The most common offence was possessing dangerous drugs (523 offences, or 12.09%), followed by public nuisance (285 offences, or 6.59%), breach of bail condition (258 offences, or 5.96%) and assaulting or obstructing a police officer (218 offences, or 5.04%). Assistant Professor Goldsworthy obtained that data from a Right to Information application made by him, and the data that he relied upon is not otherwise publicly available for comment.

The Byrne Report, relying on evidence obtained from the QPS, concluded that over a 21 month period (17 October 2013 to 30 June 2015) OMCG members accounted for 0.52% of persons charged with offences across Queensland.⁶² It was noted that the period immediately following the introduction of the VLAD laws in 2013 was one of intense law enforcement focus on OMCG members and their associates. Across that 21 month period:

- charges were laid against people in Queensland on 133,883 occasions (noting that a person might have had multiple charges laid against him/her during any one of those occasions);
- of those occasions, 696 related to OMCG members (noting that a total of 478 individuals were charged with 1,093 offences; meaning that for some, they were charged on more than one occasion);

⁵⁹ PJACC, *The future impact of serious and organised crime on Australian society*, above n 19, 7.

⁶⁰ Queensland Police Service, *Annual Statistical Review 2014/15* (2015) Commissioner’s Foreword.

⁶¹ Terry Goldsworthy, Submission No 5.17 to the *Queensland Taskforce on Organised Crime Legislation*, 9 September 2015, 14.

⁶² Byrne Report, 25.

- of those 1,093 offences, 52% (that is, 572 offences) were simple offences requiring summary disposition in the Magistrates Court; 27% (that is, 298 offences) of the total number of offences were drug-related; 19% (that is, 208 offences) were traffic or driving-related; and 11% (that is, 122 offences) were offences of violence against the person (including extortion).⁶³

QPS statistics indicate that between 17 October 2013 and 31 July 2015, 100 persons were charged with an offence where it was alleged that the person was a 'vicious lawless associate' as a circumstance of aggravation. Of those 100 people, 31 were identified as either members or associates of an OMCG.⁶⁴ That figure includes people who disassociated from their OMCG membership throughout that period. The other 69 people were not known to be members or associates of an OMCG.

Queensland courts keep statistics on the number of defendants and charges lodged with the courts (specifically for the charges which are listed under Sch 1 of the VLAD Act). Those statistics indicate that, for the period 17 October 2013 to 31 October 2015:

- a total of 126,245 defendants were charged with 178,065 offences; and
- of those defendants, 474 were charged with 827 offences attracting either the VLAD Act or the 'participant in a criminal organisation' circumstance of aggravation.⁶⁵

VLAD- and criminal organisation-related offenders therefore made up 0.37% of the total number of defendants and 0.46% of the total number of charges for that period. It is not possible to isolate what proportion of those offenders are identified OMCG members as the data does not provide any identifying particulars regarding the offenders or the circumstances of the alleged offences.

These statistics give rise to at least two responses. The first and most immediate is that they confirm and elaborate upon the empirical research which indicates that OMCGs account for what is, by any measure, a very small proportion of overall crime in Queensland. At least tentatively, they also suggest that there may not be a firm basis for believing that organised criminality *in toto* accounts for much more.⁶⁶

The second effect of the data is to raise a broader point about the legislative and policy approach to organised crime. If there is more to the picture than the simple 0.5% figure suggests, it is incumbent upon policymakers and law enforcement officials to make that case. If the case is made, then it will be important to reconsider the legislative approach to organised crime from both ends. That is, the effective targeting of organised criminal activity will not only be a matter

⁶³ Ibid.

⁶⁴ Queensland Police Service, Submission No 5.16 to *Queensland Taskforce on Organised Crime Legislation*, 2015, 22.

⁶⁵ Courts Performance and Reporting Unit (Qld), Response to Data Request, *Queensland Taskforce on Organised Crime Legislation*, 20 November 2015.

⁶⁶ The VLAD Act elements of 'participant' and 'association' are framed very broadly and appear apt to capture the widest possible range of persons: see *Vicious Lawless Association Disestablishment Act 2013* (Qld) ss 3, 4. There may be other elements of the VLAD Act that allow for a defendant more readily to escape the operation of that Act.

of the drafting of particular provisions but of a more wide-ranging and rigorous examination which starts with an accurate conceptualisation of organised crime. Only then can it proceed to consider not just new legislative provisions but the innovative (or even orthodox) use of existing ones in order to fashion an integrated and hopefully more effective approach.

3 Aims and Objects of COA

3.1 The background to the introduction of COA and its primary focus upon OMCGs

While COA contains no specific reference to OMCGs (there are, as will be seen, indirect references) it is clear that they loomed large in its understanding of organised crime. The Minister's second reading speech singled out OMCGs and noted that Queensland's legislation was part of a trend begun in other states, where the laws were said to have been enacted '[i]n response to outlaw motorcycle gang violence'.¹

The rest of the second reading debate was thick with references to OMCGs, and included remarks on Taskforce Hydra (a police operation targeting OMCGs).² The Premier's media statement at the time of introducing the legislation singled out 'bikie organisations' as a target.³

Stakeholder responses to government consultation on the Bill adverted to its targeting of OMCGs and its 'apparent genesis' in the Sydney Airport brawl between OMCG members in March 2009.⁴ Interested parties consulted by non-government members included the United Motorcycle Council of Queensland (UMCQ) and other motorcycle groups.⁵ Given that those groups are not recognised stakeholders in the legal profession or law reform more generally, it can be inferred that their participation was sought because they were perceived to be a distinct target of the legislation.

When COA was amended in 2011, a government member referred to 'laws surrounding our bikies and trying to shut down bikie gangs'.⁶ The Minister's second reading speech for the amending Bill made numerous references to outlaw motorcycle gangs, and emphasised the

¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 29 October 2009, 3030 (Cameron Dick, Attorney-General).

² For examples, see: Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2009, 3594 (Jason O'Brien), 3594-6 and 3600-2 (Lawrence Springborg), 3603-4 (Shane Knuth); and 26 November 2009, 3670 (Kerry Shine), 3673-4 (Liz Cunningham), 3680-1 (Aidan McLindon).

³ Anna Bligh and Cameron Dick, 'Legislation introduced to disrupt serious criminal activity' (Media Statement, 67135, 29 October 2009) <<http://statements.qld.gov.au/Statement/Id/67135>>.

⁴ Queensland Council for Civil Liberties (QCCL), Submission to Department of Justice and Attorney-General (Qld), *Consultation Draft of Criminal Organisation Bill*, 22 October 2009, 1-2.

⁵ Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2009, 3594, (Lawrence Springborg) and 3603 (Shane Knuth); and 26 November 2009, 3673 (Liz Cunningham).

⁶ Queensland, *Parliamentary Debates*, Legislative Assembly, 29 November 2011, 3855 (Judy Spence).

Sydney Airport brawl.⁷ A number of scholarly accounts identify the origins of COA and similar legislation interstate (some in considerable detail) in a concern about the operations of OMCGs.⁸

Insofar as any of this finds expression in COA itself, it is only in passing and in an oblique manner. Section 10(2)(a)(iv), for example, refers to any overseas or interstate ‘chapter or branch’ of an alleged criminal organisation (emphasis added). The use of ‘chapter’ is likely to contemplate OMCGs – in popular discourse, at least, they are the best-known if not the only criminal organisation to use that term to refer to their sub-units. Similarly, s 28(2)(e) seems to have mass OMCG ‘rides’ in mind when it refers to ‘effective traffic management’ as a consideration when making a public safety order.

The weight of evidence indicates that OMCGs were the primary model of organised crime which informed the development of the Act, and that they were envisaged as its primary targets. This is not to say, of course, that other forms of organised crime were ignored, or that they are irrelevant to COA. But in reviewing the operation of the Act – its ‘effects’, as it were – it is important to keep in mind that OMCGs were apparently the most significant of its ‘causes’ in the sense that they provided the chief model of organised criminal activity which COA set out to disrupt and restrict.

3.2 The anticipated uses of COA

As has already been established, OMCGs represent a somewhat aberrant tendency among forms of organised criminality in Australia, and law enforcement authorities were aware of this at the time COA was being developed. The operation of the Act therefore falls to be assessed in a context in which the model of criminality upon which it is premised is both a minority trend, and a receding one, in the overall pattern of organised crime. Moreover, COA’s focus on the concept of an ‘organisation’ operates on an ambiguous criterion in light of the uncertainty surrounding the group’s role, as distinct from that of particular individuals within it.

To be clear, no one disputes that members of OMCGs continue to represent an important form of organised criminality in Australia, particularly with respect to drug production and trafficking. As such, it is vital to disrupt and restrict their activities. What is much more contested and even

⁷ Queensland, *Parliamentary Debates*, Legislative Assembly, 25 October 2011, 3366-7 (Paul Lucas, Attorney-General).

⁸ Andreas Schloenhardt, ‘Mafias and Motorbikes: New Organised Crime Offences in Australia’ (2008) 19 *Current Issues in Criminal Justice* 259, 259-60; Andreas Schloenhardt, ‘Banning the Bikies: Queensland’s Criminal Organisation Act 2009’ (2011) 31 *Queensland Lawyer* 100, 100; George Morgan, Selda Dagistanli and Greg Martin, ‘Global Fears, Local Anxiety: Policing, Counterterrorism and Moral Panic Over “Bikie Gang Wars” in New South Wales’ (2010) 43 *Australian and New Zealand Journal of Criminology* 580, 583-8; Gabrielle Appleby and John Williams, ‘The anti-terror creep: Law and order, the States and the High Court of Australia’ in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 150, 150-2; Rebecca Ananian-Welsh and George Williams, ‘The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia’ (2014) 38 *Melbourne University Law Review* 362, 375-82. See also Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups* (August 2009) 22-4; Julie Ayling, ‘Pre-emptive Strike: How Australia is Tackling Outlaw Motorcycle Gangs’ (2011) 36 *American Journal of Criminal Justice* 250, 251.

doubtful is the extent to which this model, and legislation which focuses upon it, is relevant and useful to policing organised crime more generally.

What is also contested is whether the approach of COA and other Australian legislation — an approach in which the identification of an ‘organisation’ serves as the primary gateway to obtaining substantive orders — is the one best adapted to disrupting even the traditional type of organised crime represented by OMCGs.

In light of these considerations, it is important to recall the then Attorney-General’s own description of COA as constituting not a new norm but ‘an alternative method in combating organised criminal activity’. He envisaged the Act as ‘a further extraordinary tool in the law enforcement armoury’.⁹ It can be inferred that the primary and ordinary means of combating organised criminal activity, which the Act was supplementing with these ‘alternative’ and ‘extraordinary’ measures, was the existing criminal law.

Accordingly, in assessing the operation of COA it must be kept in mind that the legislature may not have intended to provide a panacea but, rather, a tightly focused and specialist mechanism tailored to a limited range of entities.

3.3 The aims and objects of COA

The stated objects of the Act are to ‘disrupt and restrict’ the activities of organisations involved in serious criminal activity and the members/associates of such organisations. COA expressly disavows any intention to affect individual freedoms to advocate, protest, dissent or take industrial action (s 3).

In adopting these aims COA was not breaking any new ground. Rather, the innovation lay in the means by which it sought to attain these ever-present aims of law enforcement. Those means will be described and analysed later when discussing the operation of the Act. What is important to note here is the fact that COA was informed by a view that, in the words of the then Attorney-General, ‘[t]he structure and methods of organised crime pose a challenge to the traditional processes of the criminal justice system’. This system is based on the prosecution and punishment of individuals who engage in proven criminal activity. ‘The long-term disruption of ongoing criminal enterprises’, said the Attorney, ‘may require more than isolated prosecutions of individual members’.¹⁰

In assessing its effectiveness, therefore, the Act (with its focus on the group, and its outcomes in the form of control orders and so on) is to be considered alongside the traditional process of criminal justice which targets individual offenders and results in imprisonment and other sentencing measures.

⁹ Queensland, *Parliamentary Debates*, Legislative Assembly, 29 October 2009, 3031, 3030 (Cameron Dick, Attorney-General). This view is echoed in the Premier’s statement on the introduction of the legislation: Bligh and Dick, ‘Legislation introduced to disrupt serious criminal activity’, above n 3.

¹⁰ Queensland, *Parliamentary Debates*, Legislative Assembly, 29 October 2009, 3030 (Cameron Dick, Attorney-General); see also 26 November 2009, 3709 (Cameron Dick, Attorney-General).

In addition, it may be that COA's orientation toward OMCGs reduces the scope of its stated objects insofar as it may render the Act inapt for targeting non-'hierarchical' forms of criminal organisation; or, even if it *is* apt, COA may not be used in practice for those organisations.

With particular regard to OMCGs, then, it appears that COA envisaged the development, in conjunction with interstate legislation, of an ever-thickening web of disruptive orders targeting groups and their members. Control orders would prevent the associating of individuals whose association was integral to the undertaking of criminal activity. These anti-association provisions would combine with other measures — restrictions on the display of 'colours', proscription of the use of clubhouses, bans from working in particular industries and so on — to dismantle the operation of the entire group. The Attorney indicated that control orders were 'designed to break the links that hold outlaw motorcycle gangs or other criminal organisations together'.¹¹ Given the way that declarations and orders can facilitate the obtaining of further declarations and orders, each additional proceeding would serve as a contribution to a virtuous cycle or 'snowball effect'. Of course, these outcomes could only arise and have practical effect on the basis of frequent use of COA. The practicability of such use was therefore an assumption fundamental to the Act achieving its aims.

Part 6 introduces a distinct object with respect to CI.¹² The object stated there is to:

- (a) Allow evidence that is or contains criminal intelligence to be admitted in applications under this Act without the evidence—
 - (i) prejudicing criminal investigations; or
 - (ii) enabling the discovery of the existence or identity of confidential sources of information relevant law enforcement; or
 - (iii) endangering anyone's life or physical safety.

Part 6 also aims to prohibit the unlawful disclosure of particular criminal intelligence. This is reflected in the offence of unlawful disclosure contained in s 82.

The CI provisions manifest a legislative decision to promote, or at least allow to be used as 'evidence', material which falls short of the usual evidentiary standard (namely 'intelligence'). Identifying the consequences of this significant step is an important part of assessing the operation of COA. Courts are not often faced with the option of receiving the sort of lower-quality information that is 'intelligence', and it is of interest to gauge how the possible introduction of such material has impacted upon the litigation process under the Act.

Allowing CI was a step consciously taken in light of fears that the primary targets of the Act, OMCGs, presented a unique threat to informants and undercover operatives who provide

¹¹ Bligh and Dick, 'Legislation introduced to disrupt serious criminal activity', above n 3.

¹² The purpose of this review, stated in s 130(2), refers in terms only to the Act's objects 'under section 3'. However, the other stated purpose — to determine whether the Act is 'operating effectively' — requires implicitly that I have regard to objects stated elsewhere because the criterion of 'effectiveness' must operate upon some concrete notion of what 'effect' it is seeking to have.

evidence against them.¹³ The Minister's second reading speech adverted to prosecutions being 'hindered by intimidation and violence towards witnesses and investigators'.¹⁴

COA, at least informally, was also envisaged to operate as a deterrent. In light of similar laws which had been passed elsewhere (South Australia, New South Wales, and the Northern Territory), the then Attorney-General was anxious to 'send a clear message that Queensland will not be seen to be or to have become a safe haven for criminal organisations'.¹⁵ '[B]ikie gangs', he said, 'are beginning to flourish' on the Gold Coast.¹⁶

In addition to the Terms of Reference, therefore, a proper assessment of whether the Act is meeting its objects under s 3 will need to take account of all of these considerations. The use and aims of CI interact with the Act's scheme and aims as a whole, and this interaction must be gauged. The possibility of differential utility for the Act as between 'traditional' and non-traditional forms of organised crime must be considered. The Act's potential for frequent use and deterrent effects must be explored. The comparison that informs all such analysis must be the established methods of policing and prosecution. It is in light of these factors that an overall picture of the efficacy of the Act will emerge.

¹³ Ayling, 'Pre-emptive Strike', above n 8, 257.

¹⁴ Queensland, *Parliamentary Debates*, Legislative Assembly, 29 October 2009, 3030 (Cameron Dick, Attorney-General); see also 26 November 2009, 3711-2 (Cameron Dick, Attorney-General).

¹⁵ Queensland, *Parliamentary Debates*, Legislative Assembly, 29 October 2009, 3030 (Cameron Dick, Attorney-General). See also 26 November 2009, 3709 (Cameron Dick, Attorney-General).

¹⁶ Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 2009, 3710 (Cameron Dick, Attorney-General).

4 The operation of COA

In *Pompano* one of the High Court judges, Gageler J, summarised the processes contained in COA. It provides, he said: ‘... for a three-stage process. Stage one is the declaration of criminal intelligence. Stage two is the declaration of a criminal organisation. Stage three is the making of a control order, or a public safety order or a fortification removal order’.¹ This analysis of the Act will discuss each of these three elements, in that order.

4.1 Criminal Intelligence

The criminal intelligence (CI) provisions occupy Part 6 of the Act, and they are not a necessary feature of any of the substantive (non-CI) applications which can be made. Nevertheless, in light of the Act’s focus on serious organised crime it is to be anticipated that few if any substantive applications would not seek to make use of CI. The Act requires that if the Commissioner relies on alleged CI for a substantive application, the CI application must be heard first (s 67). Despite their strictly optional status, therefore, the CI provisions will in practice constitute the first step in most if not all applications. They were described by the Minister in his second reading speech as a ‘central feature of the scheme’ provided by the Act.²

A CI application takes place without notice to anyone other than the Criminal Organisation Public Interest Monitor (COPIIM) and is heard in a special closed court in which only the Commissioner, his/her legal representatives, the COPIIM, witnesses and court staff are present (ss 66 and 70).

‘Criminal intelligence’ is information relating to actual or suspected criminal activity,³ which information, if disclosed, could reasonably be expected: (a) to prejudice a criminal investigation; (b) to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement; or (c) to endanger a person’s life or physical safety (s 59).

The primary object of the CI provisions is to allow such information to be admitted in substantive proceedings, without such admittance having the aforementioned effects of prejudice, discovery or danger (s 60). This object is to be attained by permitting the use of criminal intelligence without notice to, and in the absence of, any party against whom it is to be used (ss 66, 70; and Part 6, Div 3). The requirement for confidentiality in the use of CI is reinforced by the creation of the offence of unlawful disclosure of CI or information contained in a CI application (alleged CI)

¹ *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 111 [199].

² Queensland, *Parliamentary Debates*, Legislative Assembly, 29 October 2009, 3031 (Cameron Dick, Attorney-General).

³ ‘Criminal activity’ here ‘should be read as requiring the identification of specific criminal offences’: *Pompano* (2013) 252 CLR 38, 85 [108] (Hayne, Crennan, Kiefel and Bell JJ).

(s 82). In ordinary language, criminal intelligence is ‘secret evidence’ and is often referred to as such in the scholarly literature.⁴

Generally speaking, affidavit evidence for any proceeding under the Act may only contain material that would be admissible in oral form (s 107(1)). The CI provisions create an exception to this rule in s 61, which permits the use of hearsay evidence – statements based not on direct knowledge but on information and belief – in affidavits used in a CI application, provided that the deponent states the sources of the information and the grounds for the belief. Such evidence, allowed in a CI application, is then also allowed in a substantive application (s 107(2)). In both respects, however, as emphasised in *Pompano*, the Act leaves for the court the matter of the weight to be given to the secret evidence.⁵

Arguably, the greater significance of the CI provisions lies not in their allowing material which would otherwise be inadmissible as evidence, but in allowing the use of evidence that the Commissioner would otherwise choose not to adduce because to adduce it would prejudice an investigation, or reveal a source of information, or endanger a person.⁶

The procedure for applying for a CI declaration is as follows. The Commissioner, if s/he reasonably believes the information meets the definition of criminal intelligence, may apply to the court for a declaration (s 63(1)-(2)).

The application must be accompanied by affidavit evidence which (s 63(3)):

- (a) identifies the information;
- (b) states the ‘relevant agency’ for the information (this is, broadly speaking, the agency from which the information was obtained, being either the QPS or an ‘external’ body like the Australian Federal Police, the CCC or interstate police: s 59A);
- (c) states the grounds on which the declaration is sought; and
- (d) explains the relevant agency’s system for assessing the reliability and validity of crime-related information, and the assessment that was made under that system for the information (s 63(3)(d) and (7)).

There are additional provisions which apply in the event that an ‘informant’ provides information. An informant is anyone other than a law enforcement officer who provides information which the Commissioner reasonably believes to be CI. A law enforcement officer is also an informant if s/he obtained information under an assumed identity (Sch 2). Accordingly, the informant provisions will very commonly be enlivened. Under s 64(2), an informant cannot be called or otherwise required to give evidence, but information provided by an informant must be accompanied by an affidavit from the officer of the relevant agency, and the affidavit must (s 64(4)):

⁴ See, eg, Rebecca Ananian-Welsh, ‘Secrecy, procedural fairness and state courts’ in Greg Martin, Rebecca Scott Bray and Miiko Kumar (eds), *Secrecy, Law and Society* (Routledge, 2015) 120, 121-1; Kent Roach, ‘Secret Evidence and Its Alternatives’ in Aniceto Masferrer (ed), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer, 2012) 179. French CJ also referred to criminal intelligence as ‘secret evidence’ in *Pompano* (2013) 252 CLR 38, 47 [4].

⁵ *Pompano* (2013) 252 CLR 38, 75 [76] (French CJ), 102 [166] (Hayne, Crennan, Kiefel and Bell JJ).

⁶ *Ibid* 97 [148] (Hayne, Crennan, Kiefel and Bell JJ).

- (a) state the agency and the officer's position at the agency;
- (b) state that the officer reasonably believes, and has made all reasonable efforts to ensure, that the officer has full knowledge of the agency's information about the informant and the intelligence provided by the informant to that agency;
- (c) state that the officer reasonably believes that the relevant agency has made all reasonable enquiries about the existence and details of any allegations of 'professional misconduct' (which term is undefined) against the informant;
- (d) contain information about the informant's full criminal history, allegations of professional misconduct against him/her, inducements or rewards offered in return for the informant's assistance, whether the informant was an adult or child at the time of providing the intelligence, and whether the informant was being held in custody when s/he provided the information (other 'identifying information' about an informant may be omitted from any affidavit: ss 59A and 63(5)); and
- (e) state that the officer holds an honest and reasonable belief that the intelligence is reliable, and the reasons for that belief.

As noted by the Chief Justice in *Pompano*, the leading of this evidence in order to satisfy the statutory criteria is a significant task. 'They are important and substantive criteria which are not to be satisfied by pro forma affidavits containing conclusionary statements'.⁷

At the hearing of a CI application only the Commissioner, his/her representatives, the COPIM, witnesses and court staff may be present (s 70). Section 71(1) allows, with the leave of the court, law enforcement officers (other than those who are informants) to be called to give evidence and to be cross-examined by both the COPIM and the court itself.

As French CJ emphasised in *Pompano*, when engaged in an *ex parte* inquisitorial process such as a CI application, the Supreme Court possesses the 'inherent power to control that process in order to avoid its abuse and to avoid injustice. That power will extend to the calling of a witness or witnesses necessary to ensure that so far as practicable the Supreme Court is not acting upon information which is incomplete in some important respect'.⁸ In any event, as the Chief Justice pointed out, the Queensland *Uniform Civil Procedure Rules 1999* (UCPR) in r 391 provide such a power for the court and COA expressly retains the application of those rules to the extent that they are consistent with the Act (s 101). As with all applications at which s/he is present, the COPIM may test the appropriateness and validity of the application by questioning the Commissioner, examining or cross-examining witnesses, and making submissions (s 89).

The Act requires a number of measures to be taken to protect the secrecy of the hearing and of the information that features in it. It is an offence to disclose CI or information that has been disclosed in a CI application (s 82). Before hearing a CI application, the court must provide a warning about the confidential nature of the information involved in the hearing, and must warn of the disclosure offence (s 68). This warning must appear in bold print at the start of any transcript of the hearing, and each page of transcript must be watermarked with the warning about the disclosure offence (s 69). Under s 65 the Registrar must seal and securely store the

⁷ Ibid 74 [75] (French CJ).

⁸ Ibid 62 [44] (French CJ).

documents (including any orders) involved in the application, and access to such documents is restricted.

The court may declare CI if it is satisfied that the information meets the definition (provided above) contained in s 59 (s 72(1)). This, however, is a discretionary judgment and in exercising its discretion the court may have regard to whether the allowing of such evidence on a secretive basis is outweighed by any unfairness to a respondent (s 72(2)). That is, as the joint reasons in *Pompano* explained, in reaching this decision the court is engaged in the task – a somewhat familiar one, not least in the evidentiary context – of balancing the public interest in apprehending those involved in criminal activity against the interests of accused persons (and, no doubt, of society more generally) in what is ordinarily an essential element of a fair trial: namely, knowledge of the evidence against them and, through that, the best opportunity to test and rebut that evidence in their defence.

For the purposes of the CI provisions the relevant public interest might more properly be characterised not only as the apprehension of those involved in criminal activity, but doing so by avoiding the adverse consequences indicated in ss 59(1) and 60(a): prejudicing criminal investigations; revealing the existence or identity of confidential sources of law enforcement information; and endangering life or physical safety.⁹

It was accepted in *Pompano* that the discretion in s 72(1) could *never* be exercised to make a CI declaration if, in the court's judgment, the admission of that CI in a substantive application would deprive the respondent of the opportunity fairly to meet that application.¹⁰

If the court acts on the basis of information provided by an informant, it cannot declare the information to be CI unless at least some of the information is supported in a material particular by other information before the court (s 72(4)). This supporting information may be other declared CI, or may be information that is itself the subject of a CI application (s 72(5)). It seems, then, that it is sufficient for one informant's information to be corroborated by that of another informant. Nevertheless, as the Chief Justice reiterated in *Pompano*, while the informant provisions 'place a respondent at a forensic disadvantage[,...] the Supreme Court has the discretion to accept or reject or to give little weight to information provided by an informant'.¹¹

While UCPR r 667(2)(a) would allow a CI declaration, as an 'order ... made in the absence of a party', to be set aside at any time, this is inconsistent with the prevailing provisions of COA, which allow for revocation only upon an application by the Commissioner (s 74(1)).¹² Given the *ex parte* character of CI applications, the Supreme Court at all times retains the inherent power to prevent abuse of its own processes by revoking a declaration if the applicant has failed to discharge its obligation of full disclosure.¹³ This is, apparently, the only power to revoke a CI declaration lying

⁹ Ibid 85 [109] and 97 [147] (Hayne, Crennan, Kiefel and Bell JJ).

¹⁰ Ibid 112-3 [203]-[204] (Gageler J).

¹¹ Ibid 81 [92] (French CJ).

¹² See *ibid* 113-4 [206] (Gageler J).

¹³ Ibid 61 [43] (French CJ).

outside COA itself. Nevertheless, that obligation of full disclosure is not without significance in the Commissioner's task when applying for a CI declaration.

4.2 Issues arising from the use of criminal intelligence

4.2.1 Conceptual

In the course of the consultations undertaken for this review, concern emerged from a number of stakeholders about the tension (at best) or contradiction (at worst) between 'intelligence' and 'evidence'. These issues arise from COA's insertion (in Part 6) of the former into a forensic process that has hitherto only operated on the basis of the latter.

Intelligence, and the information and material of which it is comprised, is not (usually) evidence as that word is traditionally used in the judicial sphere. It can at the highest be said to *lead* to evidence or to facilitate the collection of it. Intelligence is, by definition, 'patchy'— fragmentary or highly circumstantial— information bearing on possibly remote risks. Suspicion is its animating criterion. It is predictive in nature, for its primary aim is the prevention of hypothesised harm.

Evidence, on the other hand, is explanatory. It seeks to identify truth (guilt) for the purposes of apprehension, adjudication and retribution. It is wholly reactive— by definition, it only exists after a crime has been committed.

The evidentiary process culminates in the presentation of information in a public forum (court) where it is subjected to challenge, testing and contradiction before it is decided upon by a judge or lay jury. Those who collect evidence are under a duty to collect and disclose 'all' of it, regardless whether it is inculpatory or exculpatory of an individual suspect.

Intelligence gatherers are under no such obligation, and their methods of collection are subject to minimal if any external oversight. Intelligence is oriented from the start toward a coterie of experts. As a matter of weighting and proportion it rests much more on *opinion*, as opposed to *fact*, when compared to evidence. It is collected and presented in secrecy, and never subjected to external challenge. Publicity, which may reveal the sources and methods of its collection, is antithetical to intelligence.

Intelligence is a concept unknown to the law. It is drawn from the non-legal (one might almost say extra-legal) discourses of defence, security and espionage. It figures as an incongruous and alien presence in the justice system into which it has been imported.

Ultimately, evidence and intelligence might be seen as diametrically opposed in that the former operates in a culture in which the *desideratum* is to avoid a 'false positive' (wrongful conviction), as manifested in Blackstone's famous maxim that 'the law holds, that it is better that ten guilty persons escape, than that one innocent suffer'.¹⁴ In contrast, the predictive or preventive focus

¹⁴ William Blackstone, *Commentaries on the Laws of England* (11th ed, 1791) vol 4, 358.

of intelligence makes it more tolerant of false positives. The false negative, rather – the risk that goes unanticipated, the ‘dots’ that go unconnected – is more to be avoided.¹⁵

The distinction between intelligence and evidence has attracted substantial scholarly attention in the wake of laws directed at terrorism (and now organised crime) which provide for intelligence to be admitted and used as evidence in court proceedings. Given the fundamental and wide-ranging incommensurability canvassed in the literature and elsewhere, there are grounds for scepticism about the possibility of any genuine ‘judicialisation’ of intelligence whereby it becomes more amenable to established forensic standards, publicity and challenge.¹⁶

As Hayne J has observed:

[T]he problem presented by the use of intelligence material is more deep-rooted than any question of preserving secrecy. Even if taking steps to secure the continuing secrecy of intelligence material is, or can be made, consistent with the generally open and adversarial nature of litigation in the courts, it is the nature of the material to be considered that presents issues of a kind not suited to judicial determination. In particular, by its very nature, intelligence material will often require evaluative judgments to be made about the weight to be given to diffuse, fragmentary and even conflicting pieces of intelligence. Those are judgments of a kind very different from those ordinarily made by courts....

Rarely, if ever, would it be information about which expert evidence, independent of the relevant government agency, could be adduced. In cases where it could not be tested in that way (and such cases would be the norm rather than the exception) the court, and any party against whose interests the information was to be provided, would be left with little practical choice except to act upon the view that was proffered by the relevant agency.¹⁷

Intelligence has been, it will be understood, inserted into a process which is embedded in procedural and evidentiary rules that developed over centuries in an evidence-only context. The only procedural change accompanying this radical departure has been the introduction of unprecedented measures designed to keep intelligence entirely secret from the persons against whom it is directed, and partially secret from others, like the COPIM who is meant to test it and the judge who is required to assess it.

The evidentiary and procedural consequences of introducing intelligence into a forensic environment will be considered later. What needs to be noted at an early point in this analysis is the fact that the insertion of intelligence into an evidence-based discourse creates a problem of

¹⁵ This discussion has drawn on Kent Roach, ‘The eroding distinction between intelligence and evidence in terrorism investigations’ in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 48, 48-54; and Tamara Tulich, ‘Adversarial Intelligence? Control Orders, TPIMs and Secret Evidence in Australia and the United Kingdom’ (2012) 12(2) *Oxford University Commonwealth Law Journal* 341, 341-3.

¹⁶ Roach, ‘The eroding distinction’, above n 15, 56, 62; Clive Walker, ‘Intelligence and Anti-Terrorism Legislation in the United Kingdom’ (2005) 44 *Crime, Law and Social Change* 387, 409-10. Tulich, ‘Adversarial Intelligence’, above n 15, 369 is more hesitant.

¹⁷ *Thomas v Mowbray* (2007) 233 CLR 307, 477 [510]-[511] (Hayne J). His Honour was in dissent as to the result.

‘comparing apples and oranges’. Stakeholders referred to it as a clash of cultures or a ‘conflict of histories and traditions’.

Ultimately our courts operate, as they have for centuries, on the basis of evidence. This means that, at the least, the conversion of ‘intelligence’ into something approaching usable ‘evidence’ will require considerable labour on the part of the intelligence gatherers and agencies. This was the experience of the QPS in the Finks application. Given its undigested and fragmentary character, intelligence needs a lot of explaining in order to make it coherent and commensurable to an evidentiary mind. In addition to increasing the burdens on intelligence officers, this will also mean that there is always an impulse to expand the volume of CI in order to provide the sort of context necessary to make it comprehensible.

At the very least, the use of intelligence will almost always have the effect of making proceedings lengthier and more complex than they otherwise would be if they involved and relied upon evidence in its traditional sense. At the worst, the clash of cultures can result in proceedings getting bogged down in an evidentiary and procedural quagmire.

4.2.2 Evidentiary

The cultural leap taken in legislation like COA with its use of secret evidence has flow-on effects upon the evidentiary tasks set by the Act. It is at the stage of actually *using* criminal intelligence, rather than merely declaring it, that a number of challenges become manifest. Given the anticipated centrality of criminal intelligence in any substantive application, these challenges are significant in affecting and assessing the efficacy of COA as a whole.

Criminal intelligence may be adduced in any substantive application under the Act. The consideration of criminal intelligence in the course of any substantive hearing takes place at a ‘special closed hearing’ from which the respondent and its legal representatives are excluded (ss 75, 78). The High Court in *Pompano* repeatedly emphasised that, while they did not bear on the validity of the statute, matters of *ex parte* hearings and the respondents’ inability to test the evidence being led against them would have to be considered by the court in exercising its judgment – a judgment that COA leaves unimpaired – as to the admissibility and weight of such evidence.¹⁸

As a result of the interplay between the Act and ordinary rules of procedure and evidence, the use of affidavit material from a criminal intelligence application (including affidavits containing hearsay: s 107(2)) is permitted in a substantive application. But, according to French CJ, this would require the leave of the court because of r 395 of the UCPR, which specifies that leave is required in order for a party to rely on evidence given in other proceedings, or at an earlier stage of the same proceedings.¹⁹ When considering the grant of leave, and in any event when considering the evidence itself, the Chief Justice emphasised that the court ‘may have regard to the probative value of the hearsay material contained in such an affidavit and the unfairness, if

¹⁸ *Pompano* (2013) 252 CLR 38, 59 [37], 76 [80], 80 [88] (French CJ), 102 [166] (Hayne, Crennan, Kiefel and Bell JJ).

¹⁹ *Ibid* 58-9 [36]-[37] (French CJ).

any, worked by admitting it. *Even if* such an affidavit were admitted the Supreme Court would still have to determine what, *if any*, weight was to be given to it'.²⁰

The exclusion or effective disregard of such evidence are more than technical possibilities. In some cases the lack of any significant probative value will be plain on the face of the material itself due to the requirement (in s 63(3)(d)) to disclose an agency's internal assessment of the material. A six-level system of alphanumeric grading is widely used to classify criminal intelligence. Sources are rated from A ('completely reliable') to E ('unreliable') and F ('reliability cannot be judged'), while the information they provide is rated from 1 ('report confirmed') to 5 ('improbable report') and 6 ('accuracy cannot be judged'). Whatever system is used, any self-assessment will from an evidentiary perspective be of impaired significance to begin with. Public documents from South Australia, where the above system is used, indicate that criminal intelligence was proffered in support of an application there when it rated as C-3 or higher.²¹ The 'C' indicates a 'fairly reliable' source (one step above 'not usually reliable') while the '3' indicates information that is 'possibly true' (one step above a 'doubtful report'). Clearly, in any litigation carrying COA-type consequences, untested information that is self-assessed by the party tendering it as 'possibly true' and coming from a 'fairly reliable' source can assume virtually no significance as evidence.

In both the Chief Justice's and the joint reasons in *Pompano*, the validity of the Act rested in significant part on the fact that the court in COA proceedings retains at all times the power, indeed the duty, to consider the cogency and veracity of CI evidence, and to determine what (if any) weight to give it.²² The consideration and determination will fall to be undertaken on the basis of established principles of evidence.

In that respect it is to be noted that the case law bristles with scepticism about the value and use of hearsay evidence, and with downright alarm at untested and anonymous testimony.²³ The anonymous accusers and secret testimony of the Star Chamber were the horrors against which common law adversarial procedure defined itself.²⁴ Indeed, secret evidence is unknown to the common law because, in the words of Lopes LJ: 'no evidence given by one party affecting another party in the same litigation can be made admissible against the other party, unless there is a

²⁰ *Ibid* 59 [37] (French CJ) (emphasis added).

²¹ Alan Moss, *A review of the execution of the powers under the Serious and Organised Crime (Control) Act 2008 exercised during the period 1 July, 2009 to 30 June, 2010* (30 September 2010) 16-7.

²² *Pompano* (2013) 252 CLR 38, 59 [37], 76 [80], 80 [88], and see also 81 [92] (French CJ), 102 [166], 103 [168] (Hayne, Crennan, Kiefel and Bell JJ).

²³ The rallying point being the trial of John Lilburn for seditious libel: *Lilburn's Case* (1637) 3 St Tr 1315. See further: *Duke of Dorset v Girdler* (1720) Prec Ch 531; 24 ER 238; *Teper v The Queen* [1952] AC 480, 486 (Lord Normand); *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, 231 (Lord Simon); *R v Stipendiary Magistrate at Southport; ex parte Gibson* [1993] 2 Qd R 687, 691 (Williams J); *Al Rawi v Security Service* [2012] 1 AC 531, 592-3 [93] (Lord Kerr); *R v Davis* [2008] 1 AC 1128, 1137-8 (Lord Bingham).

²⁴ David Lusty, 'Anonymous Accusers: An Historical and Comparative Analysis of Secret Witnesses in Criminal Trials' (2002) 24 *Sydney Law Review* 361, 370-2. The Star Chamber was initially popular 'because it convicted offenders who were too powerful to be brought to justice at common law': *ibid* 371. See also JH Baker, *An Introduction to English Legal History* (Butterworth LexisNexis, 4th ed, 2002) 199.

right to cross-examine'.²⁵ One reason for this is the concern for procedural fairness (discussed at 4.2.3 below). But it rests equally on an overlapping but distinct concern for evidentiary rigour.

In a recent case involving issues, in a British context, which were not dissimilar to those raised by this aspect of the Act, Lord Kerr said the following when dealing with a submission that certain evidence could be disclosed fully to a judge but kept secret from a defendant:

This proposition is deceptively attractive — for what, the appellants imply, could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. *To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead.* It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial. However astute and assiduous the judge, the proposed procedure hands over to one party considerable control over the production of relevant material and the manner in which it is to be presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable.²⁶

His Lordship's point is, with respect, well made. It was reinforced in the course of consultation with the first COPIM under the Act, Mr Robert Needham, who was concerned that secrecy removes the possibilities not just of testing or rebuttal, but even of context. In operating upon the basis of links drawn between individuals and an organisation, the Act hinges on context. A criminal organisation declaration, for example, may only be made when members of an organisation 'associate *for the purpose of* serious criminal activity, and when the *organisation* is an unacceptable risk to the community (s 10(1)). In deciding these questions, the court must have regard to 'information *suggesting a link exists* between the organisation and serious criminal activity' (s 10(2)(a)(i)). Context is the difference between a crime committed by an individual who happens to be a member of an organisation, and a crime committed by an individual as part of an organisation. Yet such context is often the very thing that is missing from fragmentary intelligence. It could — and would, in at least some cases — readily be supplied by the absent respondent.

A number of further evidentiary perils can be identified as arising from the use of CI in an application under the Act. They include the following:

- the respondent does not know, and therefore has no opportunity to test and challenge, any information contained in CI;
- informants, who will likely provide much if not most of the information in CI, remain anonymous to and unavailable for cross-examination by the COPIM, and therefore even the latter has no opportunity to test their evidence;
- informants will sometimes be persons of impugned integrity — convicted criminals, members of allegedly criminal organisations, or persons liable (but for their informing) to the same charges and other legal consequences as those against whom they inform;

²⁵ *Allen v Allen* [1894] P 248, 254. See further the other cases collected in LexisNexis Butterworths, *Cross on Evidence* (at December 2015) [17475].

²⁶ *Al Rawi v Security Service* [2012] 1 AC 531, 592-3 [93] (emphasis added).

- the hearsay nature of some of the evidence that may be adduced, which compromises both the probative value of the evidence itself, and its ability to be challenged or tested; and
- even when matters relevant to the testing of the evidence are required to be disclosed in an informant affidavit, those matters can be disclosed in a non-specific way that compromises the COPIM's ability to make submissions based on such disclosures.²⁷

In the rush to consider (and critique) questions of *validity*, scholarly commentary at least has largely overlooked the effect of such well-embedded principles and considerations as these in the *operation* of the Act. Yet it is precisely to these factors that the High Court's explication of the Act points. The use of CI as evidence has, however, been a focus of the writings of Professor Gray:

Practically, it would be difficult for the court to know what weight to place on the material. To what extent should the evidence be discounted because the defendant's ability to counteract it was hamstrung? How can a person defend themselves against an allegation, when they have little or no detail about the allegation? Can the disadvantage the person suffers as a result be quantified? Or even described in words?²⁸

Nevertheless as the High Court has indicated in *Pompano* should such issues as those canvassed by Professor Gray (and above, by Hayne J) arise under COA they will fall to be dealt with as matters of weight and admissibility of the evidence and, perhaps, the viability of the proceedings themselves. In the words of the joint judgment:

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.²⁹

In support of this proposition the joint reasons cited a passage from the *K-Generation* case, in which it was said that the decision to apply for a CI declaration may itself 'greatly reduce the chance of the "criminal intelligence" being decisive, because, in at least some cases, the

²⁷ For example: informants' criminal and disciplinary history can be stated as occurring within a seven-year bracket, rather than in a particular year; the nature of any allegation of professional misconduct seemingly need not be particularised (for example, as to whether it involved dishonesty or not); and disclosures of criminal history need only be stated in broad terms (whether the offence involved property, violence, dishonesty and so on). In a tangential way, the Act itself adverts to the possibility that this may diminish the probative value of CI by providing, as a statutory example, that the court may, when considering a CI declaration, take into consideration the fact that an informant's criminal history 'may be incomplete'. This arises, however, in s 72(3), ie within pt 6 of the Act, which deals only with CI applications rather than the substantive ones in which CI is used.

²⁸ Anthony Gray, 'A comparison and critique of closed court hearings' (2014) 18 *International Journal of Evidence and Proof* 230, 253.

²⁹ *Pompano* (2013) 252 CLR 38, 102 [166] (Hayne, Crennan, Kiefel and Bell JJ).

Licensing Court may feel disinclined to place weight on material which the Police Commissioner's application has prevented the applicant for a licence being able to test, or even see'.³⁰

Here, again, evidentiary concerns overlap with procedural ones. COA places judges in uncharted waters insofar as it requires them to assess the weight of evidence which otherwise is considered so dangerous, unfair and unreliable that it is ordinarily subject to a blanket exclusion – untested testimony. Perhaps the only guidance on the weight to be given to this evidence is that provided by unusual cases in which evidence has been given but the opportunity to cross-examine on it has been lost because the witness is deceased, absent or somehow unfit to continue. Even then, some authorities have held that the evidence is to be disregarded, though the better view is probably that it is admissible subject to diminished weight.³¹

In *Re Simpson*, an affidavit by a witness absent overseas was admitted 'but its weight [was] clearly affected considerably by the absence of any cross-examination upon it'.³² In *Re O'Neill* it was said that the position would be that the affidavit of a witness who had died or otherwise become unavailable to be cross-examined would 'either be rejected, or, if it is received, only slight weight may be given to its contents'.³³ 'Of course,' said Refshauge J in a recent case, 'the weight attributable to such an affidavit on which the deponent has not been cross-examined is thereby much diminished'.³⁴

In such instances, however, it has been an important feature of the relevant evidence that it was given openly in the proceedings in circumstances where the witness was expecting or liable to be cross-examined on it.³⁵ When, as in the case of CI informants, the evidence is given out of court by a witness who knows that s/he is going to remain anonymous and cannot be questioned, the evidence is going to be discounted even more. And it stands to reason that it will be discounted still more when, as will sometimes be the case under the Act, it is being provided by an informant of known criminal and drug-using tendencies.

Further, while the orders under the Act are civil and preventative in character (rather than criminal and punitive) they carry serious consequences for the liberty (and, potentially, livelihood) of the person subjected to them. Accordingly, they enliven the *Briginshaw* principle, under which the civil standard of proof (the balance of probabilities) is engaged in a more searching and rigorous fashion by reason of circumstances surrounding the proceedings.³⁶ In addition to the serious consequences of acting on the evidence, those circumstances would include the fact that the allegations are grave in character (touching as they do on serious criminal activity), and that

³⁰ *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 543 [148] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

³¹ *Cross on Evidence*, above n 25, [17480]; *Curley v Duff* (1985) 2 NSWLR 716.

³² *Re Simpson* (Unreported, Federal Court of Australia, Burchett J, 9 January 1990).

³³ [1972] VR 327, 333. 'Slight weight' was also given to the evidence in similar circumstances in *Chan v Mazurkiewicz* [2015] WASC 432, [20].

³⁴ *Legal Practitioner v Council of the Law Society of the ACT (No 2)* [2014] ACTSC 9, [538].

³⁵ *Cross on Evidence*, above n 25, [17480].

³⁶ *Briginshaw v Briginshaw* (1938) 60 CLR 336.

they are easily made and difficult (indeed, because they are secret, perhaps *impossible*) to rebut.³⁷

In sum, while COA makes secret and untested evidence admissible it does not, as the High Court emphasised in *Pompano*, compel the court to admit it. Its ultimate use, and the weight to be attributed to it, remain matters of curial discretion. Established case law suggests that the application of the civil standard of proof in COA-type proceedings will be careful and rigorous, and that evidence in the nature of criminal intelligence will generally be granted little weight if it is admitted at all. Thus, the Act's practical operation may well be greatly narrowed, if not at times circumvented or overborne, by the ordinary principles which govern a court's reception and use of evidence.

It would be self-defeating to seek to overcome these consequences by legislating a way through, or around, them. As the High Court emphasised in *Pompano*, these were the sort of consequences that saved the validity of the Act, albeit with what appear to be considerable difficulties in practice. The alternative to these practical difficulties is not, however, a smoothly-operating Act but, rather, an invalid one. The ability to weigh evidence for itself is a hallmark of judicial power and to require a court to act upon some other entity's idea of evidentiary worth would be to direct the court as to the manner and outcome of the exercise of its jurisdiction, and to compromise its independence and impartiality.³⁸

Submissions on the Bill which became the Act identified other potential problems with the use of CI as evidence. The Bar Association (BAQ) and Law Society (QLS) raised the possibility that, by allowing the admission of 'intelligence' which fails to meet the established tests for 'evidence', the Act's lowering of the evidentiary threshold 'will reward lazy policing and will promote the de-skilling of police investigators'.³⁹ The collection of mere intelligence — '[a]ssertions and insinuations' — will, the profession argued, 'be performed as an end in itself'.⁴⁰ It was also said that the use of intelligence 'is open to the worst abuse at the hands of unscrupulous informants and corrupt police'.⁴¹

³⁷ In addition to *Briginshaw* itself, see further: *Barten v Williams* (1978) 20 ACTR 10; *Khawaja v Secretary of State for the Home Department* [1984] AC 74; *Trade Practices Commission v Nicholas Enterprises Pty Ltd [No 2]* (1979) 26 ALR 609; *Wright v Wright* (1948) 77 CLR 191, esp 210-11 (Dixon J); JRS Forbes, *Evidence Law in Queensland* (Lawbook Co, 9th ed, 2012) 72-3 [A.114].

³⁸ *Harris v Caladine* (1991) 172 CLR 84, 147, 150 (Gaudron J); *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496-7 (Gaudron J); *Nicholas v The Queen* (1992) 193 CLR 173, 187-8 [19]-[20] (Brennan CJ), 208-9 [74] (Gaudron J), 277 [249] (Hayne J); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 36-7 (Brennan, Deane and Dawson JJ); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359 [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 560 [39] (Gummow, Hayne, Heydon and Kiefel JJ).

³⁹ QLS and BAQ, Submission to Department of Justice and Attorney-General on Criminal Organisation Bill 2009, 22 September 2009, 8.

⁴⁰ *Ibid.* See also Julie Ayling, 'Pre-emptive Strike: How Australia is Tackling Outlaw Motorcycle Gangs' (2011) 36 *American Journal of Criminal Justice* 250, 259.

⁴¹ QLS and BAQ, Submission to Parliamentary Crime and Misconduct Committee on Criminal Organisation Amendment Bill 2011, 7 November 2011, 8.

Reduction over time of policing skills and techniques would lessen law enforcement's ability to detect crime, to collect admissible evidence of it and, ultimately, to convict those who commit it. The latter is a much more potent means of disrupting and restricting criminal enterprises than anything under the Act. The Bar Association's submission to this review developed these concerns to make the further point that stopping the information-gathering process short at the 'intelligence' stage (without using that intelligence to obtain evidence) would be not only a sub-optimal use of such information, but positively counter-productive to the task of compiling evidence sufficient to arrest, charge and convict individuals.

In a similar vein, the inaugural COPIM, Mr Needham, noted the paradox that the more intelligence is collected, and the better it is, the closer the authorities are to being able to launch a successful prosecution for substantive offences rather than operate within COA.

Given the present limits on the range of uses for CI and the very limited experience of its use under COA, it cannot be said that these fears have yet come to pass. What can be said, though, is that as information of considerably lower grade than admissible evidence, CI always presents the risk of hindering rather than promoting the rigorous establishment of the factual truths upon which the Act operates.⁴²

4.2.3 Procedural

Along with curial functions concerning the assessment of evidence, COA's retention of a sufficient degree of procedural fairness (including by virtue of the court's inherent powers to mitigate the unfairness that does arise under the CI provisions) is the second major basis for the Act's validity. In *Pompano*, the judgments of French CJ and Gageler J, in particular, emphasised that those powers provided the sort of safeguards which retained the court's institutional integrity notwithstanding COA's novel departures from procedures ordinarily associated with a fair hearing and, by extension, with constitutional permissibility.⁴³

In allowing the use of secret evidence COA clearly violates what is usually a central tenet of procedural fairness, namely that parties to litigation be given an opportunity to know and be able to answer all the allegations, evidence and submissions made against them.⁴⁴ Nevertheless, the court is still required to act fairly in COA proceedings.⁴⁵ The relevance of this obligation when dealing with criminal intelligence was explained by French CJ: 'The power of the Supreme Court to control its own proceedings in order to avoid unfairness also suggests that it would have a discretion to refuse to act upon criminal intelligence where to do so would give rise to a degree of

⁴² BAQ and QLS, Submission to Department of Justice and Attorney-General on proposed motorcycle gang laws, 25 May 2009, 14. One of the purposes of the COPIM, according to the then Attorney-General, is to test criminal intelligence and thereby to 'assist the Court in making a decision as an independent and impartial tribunal': see Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 2009, 3711 (Cameron Dick, Attorney-General).

⁴³ See, eg, *Pompano* (2013) 252 CLR 38, 62-3 [44]-[45], 75 [77], 76 [80], 79-80 [87]-[88] (French CJ), 105 [178], 111 [198], 115 [212] (Gageler J). See also at 101 [162] (Hayne, Crennan, Kiefel and Bell JJ).

⁴⁴ *Ibid* 56 [30] (French CJ), 100 [158] (Hayne, Crennan, Kiefel and Bell JJ), 105 [177], 108 [188] (Gageler J).

⁴⁵ *Ibid* 67 [71] (French CJ), 103 [168]-[169] (Hayne, Crennan, Kiefel and Bell JJ), 110 [194] (Gageler J).

unfairness in the circumstances of the particular case'.⁴⁶ A number of authorities advert to the existence of a discretion under the general law to refuse evidence, on the ground of procedural fairness, when it has not been exposed to cross-examination.⁴⁷ Where that lack of exposure is not due to death or incapacity but to the conduct of the party seeking to admit it, the court may be particularly sensitive to the unfairness that would arise by admitting it.⁴⁸ As already mentioned, the fact that the admission of CI in substantive proceedings would require a grant of leave under r 395 of the UCPR also provides, according to French CJ, a legislative basis for the same discretion.⁴⁹

It is in light of these considerations that it becomes clear why scholarly commentary has, with colourful turns of phrase, described the decision in *Pompano* (especially the judgment of Gageler J) as 'throwing down the gauntlet to other judges in future litigation of this kind' or 'arming' respondents to challenge COA proceedings.⁵⁰ Ultimately, a stay of proceedings is available in any case where the operation of COA's CI provisions has rendered the hearing procedurally unfair to the respondent.

As Gageler J emphasised, the secret evidence provisions 'might well result' in a respondent 'being left without any real practical opportunity to respond to declared criminal intelligence that is relied upon as evidence to establish one or more grounds for the making of [a] declaration or order'.⁵¹ The position of the COPIM and of the court itself in testing criminal intelligence is not much greater. It was accepted in *Pompano* that the public interest in ensuring that all trials are fair trials could never be outweighed by any factors weighing in favour of a declaration of CI.⁵² Similarly, it must be the case that CI could never be *used* in a substantive application where such use would render the hearing procedurally unfair.

⁴⁶ Ibid 80 [88], see also 59 [37], 81 [92] (French CJ); cf the recent joint judgment (of which the Chief Justice partook) in which the High Court refrained from expressing a view on 'the scope, if any' of a discretion to exclude otherwise admissible evidence on the basis of procedural fairness in criminal trials at least: *Police v Dunstall* (2015) 89 ALJR 677, 689 [47]. The position of Nettle J (see 694 [67], and esp 692 [59] and the cases there cited) appears to have the support of other Australian superior courts, the House of Lords (*R v Sang* [1980] AC 402), and *Cross on Evidence*, above n 25, [11125], as well, of course, of French CJ in *Pompano*. In any event, the ambiguity is a matter not of doctrine but of remedy only — it remains a truth universally acknowledged that a stay of proceedings is always available to prevent an unfair trial: *Police v Dunstall* (2015) 89 ALJR 677, 689-690 [48], 695 [81].

⁴⁷ See *Re O'Neill* [1972] VR 327, 333 and the cases there cited; *In re Becker* [1934] SASR 137, 140 (Murray CJ); *In re Bottomley; ex parte Brougham* (1915) 84 LKB 1020.

⁴⁸ See *Ghosn v Principle Focus Pty Ltd* [2008] VSC 454, [20]-[21], [24]. While there are legitimate reasons for the confidentiality of CI, it remains the case that the party seeking to adduce the secret evidence is also the only party who can apply to keep it secret, and in *K-Generation* this apparent unfairness was said at least to go to the weight of the evidence: (2009) 237 CLR 501, 543 [148] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

⁴⁹ *Pompano* (2013) 252 CLR 38, 59 [37].

⁵⁰ Greg Martin, 'Outlaw Motorcycle Gangs and Secret Evidence: Reflections on the Use of Criminal Intelligence in the Control of Serious Organised Crime in Australia' (2014) 36 *Sydney Law Review* 501, 530; Steven Churches, 'How closed can a court be and still remain a common law court?' (2013) 20 *Australian Journal of Administrative Law* 117, 120.

⁵¹ *Pompano* (2013) 252 CLR 38, 112 [202] (Gageler J).

⁵² Ibid 112 [203] (Gageler J).

Hence the High Court's emphasis that, even under COA, the proceedings must always be fair. Indeed, procedural fairness, in the words of Gageler J, is an immutable characteristic of Chapter III courts under the *Constitution*.⁵³ What varies is the content of procedural fairness, which in any particular case is tailored to the whole of the circumstances.⁵⁴ In framing that content, relevant considerations include the nature of the jurisdiction and the parties themselves, the competing interests that need to be balanced, and the subject matter of the proceedings.⁵⁵

No one can doubt that there are powerful reasons for maintaining the confidentiality of criminal intelligence – according to law enforcement authorities, the safety and lives of informants can depend upon it. But it is important to be clear that what is at stake in COA proceedings is not the confidentiality of CI but its use. It will remain confidential in any event. The question is whether it should be used in order to impact seriously upon the liberty and livelihood of a respondent to a substantive application.

The guiding question for procedural fairness is always whether a party is afforded a reasonable opportunity to be heard, to advance its own case, and to answer, by evidence and argument, the case put against it.⁵⁶ It is the last of those considerations that is contentious in COA proceedings by virtue of the use of criminal intelligence which is unknown to the respondent, who is thereby deprived of the opportunity to answer that evidence, to test it, contradict it, rebut it, discredit it, place it in context, or make meaningful submissions about its interpretation, importance and anything else connected with it.

The High Court has declared that the ability of parties to challenge the evidence led against them is fundamental to the judicial process (and by extension procedural fairness).⁵⁷

Nevertheless, against the Act's blanket prohibition of such a challenge to CI, the court in *Pompano* pointed to various countervailing factors which saved, as it were, the *possibility* of procedural fairness in any particular case:

- the capacity for witnesses to be called, questioned or cross-examined by the judge and the COPIM in the absence of the respondent;⁵⁸
- the obligation of full disclosure on the applicant in the *ex parte* hearings required when considering CI;⁵⁹

⁵³ *Ibid* 110 [194] (Gageler J).

⁵⁴ *Ibid* 72 [68] (French CJ), 99-100 [156]-[157] (Hayne, Crennan, Kiefel and Bell JJ), 109 [192] (Gageler J); *International Finance Trust Company Ltd v NSW Crime Commission* (2009) 240 CLR 319, 354 [54] (French CJ).

⁵⁵ *RCB v The Honourable Justice Forrest* (2012) 247 CLR 304, 321 [42] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *J v Lieschke* (1987) 162 CLR 447, 457 (Brennan J); *Coulter v The Queen* (1988) 164 CLR 350, 356 (Mason CJ, Wilson and Brennan JJ).

⁵⁶ *Pompano* (2013) 252 CLR 38, 56 [30] (French CJ) and 108 [188] (Gageler J); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

⁵⁷ See, eg, *Bass v Permanent Trustee Co* (1999) 198 CLR 334, 359 [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). The same has been said in respect of procedural fairness in a non-judicial context: *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J).

⁵⁸ *Pompano* (2013) 252 CLR 38, 62-3 [44]-[45], 79 [87] (French CJ).

⁵⁹ *Ibid* 61 [43], 75 [77] (French CJ). See also at 92 [131] (Hayne, Crennan, Kiefel and Bell JJ).

- the fact that the Commissioner is required, in a substantive application, to provide detailed information and particulars such that the respondent will know *what* case is being made against it, even if the CI provisions deprive him/her of the knowledge of *how* the Commissioner seeks to prove that case;⁶⁰ and
- the ability of the court to consider fairness when exercising its discretion to declare CI, or to receive or refuse it as evidence.⁶¹

Whether these measures are enough to render COA proceedings fair to a respondent will be dependent on the circumstances of the case at hand. When they are not, the court will be obliged to exercise its inherent power to stay proceedings on the basis that the use of CI renders them incurably unfair.

Much turns on the fact that, while CI remains unknown to and untested by a respondent, the allegations that it seeks to substantiate will be known. Any application will have to disclose to the respondent the case being made against it, and will have to provide particulars of the grounds upon which the Commissioner relies and the information supporting those grounds — particular criminal activity that is alleged, individuals involved in it and so on.⁶²

While this goes some way to informing the respondent of the case made against it, the ability to meet that case remains seriously hampered when the evidence substantiating it is secret. As the joint judgment in *Pompano* indicated, all that a respondent can do is ‘make general denials of any wrongdoing of the kind alleged’.⁶³ With informant information in particular, neither the respondent, the court nor the COPIM have any basis to evaluate or test the evidence (other than whatever basis may be provided by the Commissioner’s own material).

It is only possible to hypothesise but, somewhere, a point must be reached at which the use of CI in the Commissioner’s case makes it impossible for the respondent fairly to meet the allegations being made. The imperfectly joined contests of fact opened up by broad allegations and denials will often come down to matters of reliability and credit, and these are things with which the respondent cannot meaningfully engage when deprived of knowledge of the evidence being led in secret and the persons who are giving it.⁶⁴ Indeed, precisely in proportion as the court proposes to act on CI will the respondent’s inability to attack its reliability and credit loom as significant, and unfair. The same point of unfairness could also, conceivably, be reached by reason of the sheer volume of CI in any particular case, or the proportion it bears to the overall body of evidence, or the nature of its interaction with the allegations which are made.

⁶⁰ Ibid 79 [87] (French CJ), 83-4 [103]-[105], 100 [158], 101 [163] (Hayne, Crennan, Kiefel and Bell JJ).

⁶¹ Ibid 79-80 [87]-[88] (French CJ), 101 [162] (Hayne, Crennan, Kiefel and Bell JJ).

⁶² Ibid 101-2 [163]-[164] (Hayne, Crennan, Kiefel and Bell JJ).

⁶³ Ibid 102 [166] (Hayne, Crennan, Kiefel and Bell JJ).

⁶⁴ Tom Bingham, *The Rule of Law* (Penguin, 2011) 99-100 discusses *R v Davis* [2008] AC 1128, a trial in which witnesses were anonymised and screened from the defendant: ‘The effect of this procedure, in a case which depended crucially on the accuracy and honesty of the evidence identifying the defendant, was to deny him any opportunity of effectively challenging it. He simply did not know who was accusing him. Without knowing that, he could scarcely begin to defend himself. The obvious questions (“How long have you known the defendant? How well did you know him? Where did you meet him?”) could not be asked’.

It seems clear that the level of unfairness will increase commensurably with the significance assumed by CI in any particular substantive application. And whenever the importance of CI in a proceeding renders too much of the case against a respondent unanswerable, the proceeding will become unfair. The validity of COA proceedings will, therefore, turn in large part on the CI adduced in them. In light of the nature and specificity of the allegations made against a respondent, the question for the court will be: having regard to the quantity of CI, the weight attached to it, the bearing it has upon critical questions of fact, and the overall importance it assumes in the proceedings, has it been possible for the respondent reasonably to answer the case made against him/her/it?

When the question is put that way, only one possible answer is apparent: CI possesses an inherently self-defeating quality in the sense that, the more important it is in any particular case, the more likely that case is to be stayed or invalidated because of procedural unfairness. This might mean that prudence would dictate that CI assume as little significance as possible in COA proceedings. But CI conduces to its own multiplication – because it is inherently impaired in terms of its weight, a logical response is to increase its quantity in order to make up for its reduced quality. Indeed, the Act's requirement for informant material to be corroborated by other material will necessitate, in many cases, the proffering of further CI (including further informant material) in support. The undigested and circumstantial form that intelligence often assumes will also mean that criminal intelligence of necessity comes in substantial volume in order to explain otherwise fragmentary information or to compile the 'big picture'. With that expanding volume, however, a greater part of the applicant's case takes the form of secret and unanswerable evidence, which means that the point of overall procedural unfairness draws ever nearer.

It can fairly be said, then, that the utility and efficacy of the CI provisions are likely to be in inverse proportion to the actual use and effect of CI. In light of the risk it poses to procedural fairness, it can confidently be predicted that it will only be in the rarest of cases, if any at all, that CI made a difference to the outcome of proceedings.

It would be both a bold and an angst-ridden judge who allowed untested, unanswerable and secret evidence to be the determinative factor in granting an application under COA. It must be that in many, if not most cases in which CI might make the difference between success and failure, the CI will have assumed such significance in the proceedings that a serious risk of unfairness arises.

If this be so, a real question hangs over the utility of the CI provisions, for it means that CI is only usable to the extent that it is of no use – it can only be admitted when it makes no difference to the outcome of proceedings. If, for reasons of procedural fairness, CI can only be admitted to the extent that it has no effect on the outcome, it appears to have little practical purpose.

4.2.4 Practical

The cultural, evidentiary and procedural challenges presented by CI have the effect of creating vast practical difficulties for operating within COA. Stakeholders consulted for this review were united and emphatic in expressing the view that the Act operates in a cumbersome and difficult way. The QPS was frank and helpful in discussing the immense amount of careful work

necessary to prepare the only application brought under COA, against the Finks.⁶⁵ A considerable part of this is attributable to the requirements for dealing with CI in proceedings.

Intelligence, as already noted, is fragmentary, unsifted material. Unlike evidence, it exists (or at least *presents*) as an undifferentiated mass rather than as discrete items or pieces. Yet, in order to be made susceptible to the CI declaration process in Part 6 of the Act, this material does have to be sifted on some sort of item-by-item basis. Each individual unit of intelligence must then be subjected to the exercise of the declaratory discretion in s 72. This is not only because of the established principles on the judicial exercise of discretions.⁶⁶ Given the magnitude of the procedural unfairness potentially opened up by a CI declaration, it is imperative – as the QPS acknowledged in the *Pompano* litigation – that information *not* be declared CI as far as is possible.

Thus, for example, any information already in the public domain must be extricated from the body of CI in order not to have it ‘cloaked’ by the CI declaration. This is a very real possibility in light of the fact that CI bears on criminal activity, and some of that criminal activity will have been the subject of charges and trials. Mr Needham observed that a substantial portion of alleged CI in the *Pompano* proceedings was information, or was based on information, that had been put in evidence in past proceedings. All such material would have to be subjected to close comparison with publicly available court records before it could be declared or used as CI. The Commissioner must trawl through it carefully in order to comply with his duty of full disclosure. This will make for the tedious research of past files, scrutiny of transcripts and so on.

Moreover COA itself mandates that ‘information’ be treated in a differentiated way when undertaking the process of deciding a CI application under s 72. Each unit – however identified or denoted – of information must be individually weighed in order to determine whether the factors in s 60(a)(i)-(iii) overcome any unfairness to a respondent. The information must be connected to ‘actual or suspected criminal activity’ (s 59(1)), which requires that it be linked to specific, identified offences.⁶⁷

The Act also envisages information being broken down by ‘informant’. Thus, s 72(3) provides the example that, in the case of each informant, the court is entitled to take into consideration the fact that the informant’s criminal history is disclosed to an incomplete extent under s 64. Section 74(4) requires the court to be able to identify, for all information provided by an informant, some corroboration ‘in a material particular’ before it is able to declare CI.

The information provided by informants, then, must also be broken down into its component ‘material particulars’ in order to meet the requirements of s 72. The terms of that section seem also to require another complex analytical process to be undertaken. When considering ‘any unfairness’ to a ‘respondent’ under s 72(2), the court is required to consider under the latter category ‘any existing or possible substantive application’ in which the information may be considered (s 72(7)). Given the *ex parte* nature of these hearings, the Commissioner will be required to provide the fullest disclosure of the individuals and groups against whom substantive applications are considered possible with respect to each piece of information. The application

⁶⁵ See, further, Chapter 5.

⁶⁶ *House v The King* (1936) 55 CLR 499, 503 (Starke J), 505 (Dixon, Evatt and McTiernan JJ).

⁶⁷ *Pompano* (2013) 252 CLR 38, 85 [108] (Hayne, Crennan, Kiefel and Bell JJ).

will have to address separately the grounds for making the CI declaration in respect of each identified potential respondent. The court must then consider the respective unfairness caused to each potential respondent in order properly to discharge the task envisaged in s 72(2).

As the QPS confirmed, even before a CI application gets to court a significant amount of logistical effort must go into simply producing the requisite application and affidavits for a CI proceeding. COA requires that a CI application 'identify' the alleged CI, and separately to state the 'grounds' on which the declaration is sought. The agency's 'intelligence assessment system' must be explained, as must the assessment that was made under it. The compilation of an informant affidavit requires the daunting research exercise of attaining 'full knowledge' of the entirety of an agency's information about an informant, and of the intelligence held by the agency that was provided by the informant. The agency must make all reasonable enquiries about the existence and the details of allegations of 'professional misconduct' about an informant, and must disclose both that misconduct and the informant's full criminal history. The deponent must be able to aver that s/he holds an honest and reasonable belief in the reliability of the information, and must explain why that belief is held.⁶⁸

The researching and compilation of this material is, in all cases, going to be a time-consuming and painstaking task.

An estimate was provided that the preparation of one such affidavit consumed over 50 hours of an officer's time. The requirement that the affidavit material be deponent (and agency) specific means that this work will have to be duplicated, even when the same informant has provided information to more than one agency.

Beyond that, due to the sensitivity of intelligence a large amount of careful consideration must go into choosing the informant material that will be proffered in any proceeding. 'Handlers' are naturally protective and anxious about their informants and, even though the material is secret, there are still legitimate fears that the fact that CI is provided will alert the respondent to an informant's identity and may give away a valuable source of information. The possible consequences of this for an informant's safety make officers apprehensive about the provision of CI in the first place, and of the content and amount of CI that is provided. Stakeholder consultation revealed that considerable quantities of information were withheld from the *Pompano* CI application, for this reason.

There is some reason, then, to doubt that the fullest possible use and sharing of information occurs under COA. The provision of information, even secretly, always carries an appreciable risk that a source may be revealed, and it seems likely that intelligence could be withheld for a range of other reasons. Agencies in other jurisdictions may be constrained in the purposes for which they can disclose sensitive information. If they are conducting their own operations targeting a group, they must weigh the risk of exposure against the reward offered by use of the information under COA. In any such analysis the relatively unspectacular outcomes available under the latter, even at its best possible use, will at least sometimes tell against it.

Even within Queensland, information sharing may be hampered by at least one inherent tension evident on the face of the Act. The Crime and Corruption Commission (CCC) is an external agency under COA, and in that capacity may share criminal intelligence with the QPS. On the

⁶⁸ These requirements are all found in ss 63(3) and 64(4) of COA.

other hand, in addition to combating major crime, the CCC's other primary purpose is to investigate and combat corruption.⁶⁹ The former must operate on a basis of trust in the police, the latter on a basis of mistrust.

In the exercise of its anti-corruption functions the CCC will be privy to complaints and information about allegedly corrupt police officers. The CCC's interactions with police will in many respects be tempered by a natural and entirely appropriate caution in light of its statutory duties. It is not, therefore, difficult to conceive that in at least some cases the CCC will be disinclined to share particular intelligence for fear that valuable and vulnerable sources may be revealed. Charges against police for the illegal release of confidential information, including betrayal of informants, are a regular feature of the CCC's work.⁷⁰

In short, there are a range of reasons why a substantial amount of important intelligence may and will be left out of COA applications in spite of the protections granted to CI. This raises a question about the overall utility of providing for CI at all.

On the other hand, as already mentioned, the nature of CI also conduces to the expansion of the volume of material. Prudence, the requirements of evidence, and the Act itself all urge that material be corroborated and reinforced. Quantity might be called in aid of material that is inherently compromised in its quality. It is no criticism of the QPS to observe that this appears to have been the approach adopted in the *Pompano* litigation, which adduced a voluminous pile of evidence: over 140 affidavits, over 6000 pages of criminal intelligence, and an originating application that ran to over 100 pages.

Whether quite such quantities of material will be necessary in every case is an open question, but the conclusion seems inescapable that the CI provisions of the Act create the need for an enormous expense of effort on the part of an applicant. This at the same time that, as already mentioned, the dangers of evidentiary and procedural unfairness are increased in proportion with the significance of CI in any proceeding.

In sum, it is apparent that Part 6 entails a laborious undertaking by the Commissioner in preparing an application, and a detailed consideration by the judge hearing it. The time and expense entailed can be expected to be substantial if it does not verge on the prohibitive. The volume of intelligence material can be expected to be large, and there is an in-built incentive to multiply its volume in order to provide some compensation for the operation of established legal principles which call its quality into doubt. It will have to be broken down by informant, by

⁶⁹ *Crime and Corruption Act 2001* (Qld) ss 4-5.

⁷⁰ See, eg, Kristian Silva, 'Queensland Police officer charged after allegedly revealing drug informant', *Brisbane Times* (online), 27 October 2015 <<http://www.brisbanetimes.com.au/queensland/queensland-police-officer-charged-after-allegedly-revealing-drug-informant-20151027-gkk1ik.html>>; Crime and Corruption Commission (CCC), 'Police officer charged for releasing confidential information' (Media Release, 20 August 2015) <<http://www.ccc.qld.gov.au/news-and-media/ccc-media-releases/police-officer-charged-for-releasing-confidential-information-2013-20.08.2015>>; CCC, 'Former police officer to appear in court on misconduct charges' (Media Release, 20 August 2015) <<http://www.ccc.qld.gov.au/news-and-media/ccc-media-releases/former-police-officer-to-appear-in-court-on-misconduct-charges-2013-20.08.2015>>.

respondent, by ‘material particular’ and in other respects before the judicial discretion to declare it can be exercised.

It is to be kept in mind, too, that the declaration of CI operates on a ‘free-standing’ basis. Accordingly, as the High Court made clear in *Pompano*, its consideration at the CI stage is not the end of the matter. All CI information will fall to be re-considered, on a case-by-case and item-by-item basis, in substantive applications in order for a judge to determine whether or not to admit it, and how much weight to accord it.

The value of such labour on the part of the Commissioner is questionable in light of the very real possibilities of the exclusion and discounting of CI in subsequent, substantive COA proceedings.

4.2.5 Judicial

All these problems converge upon the judge hearing a COA application. The use of CI has unique ramifications for the judicial task. Material that has hitherto, in our justice system, been subject to blanket inadmissibility must now be considered as evidence, and admitted and weighed on a discretionary basis.

This task is invidious, and somewhat artificial — according to the ordinary rules of evidence (which continue to apply unless inconsistent with a provision of COA), the material is considered so dangerous, lacking in credibility and unfair that it cannot and ought not be admitted. Yet the judge is required to consider it afresh in light of a new discretion to admit and weigh it. The legislature commands the judge at least to consider using material that every consideration of law, culture, tradition and habit urges, if it does not outright require, that s/he disregard.

Our adversarial system of justice is premised on the notion that the best guarantee of evidentiary rigour is procedural fairness, by allowing the opposing party to know and test the evidence being led against him/her. This leaves the judge to play the role of impartial arbiter between competing parties. Indeed, impartiality in adversarial proceedings finds its definition in this passive role of the adjudicator being placed ‘above the fray’. One of the ingenuities of the common law is the way it has thus constructed procedural fairness as the major pillar of evidentiary rigour. The maintenance of fairness thus forms a mutually-reinforcing compact with the pursuit of truth. Justice is best done by being seen to be done.

The Chief Justice in *Pompano* identified, as a significant safeguard of COA proceedings, the ability of a judge to interrogate the CI presented *ex parte* — for example, by calling and examining witnesses of his/her own motion.⁷¹ This also finds expression in ss 71(1) and 80(1)(b) of the Act itself, which advert to the court itself conducting cross-examination of witnesses. Such a measure might be seen as some compensation for the absence, in the hearing room, of a respondent who might otherwise be expected to test the evidence by exercising those same powers.

But this raises a fundamental paradox of CI, as it bears on the judicial role. Insofar as the judge exercises these powers in the interest of subjecting the Commissioner’s evidence to appropriate testing and scrutiny, the judge risks violating another established principle of procedural fairness:

⁷¹ *Pompano* (2013) 252 CLR 38, 62-3 [44]-[45], 79 [87].

in proportion as the arbiter takes a proactive part in the truth-seeking aspect of proceedings, s/he compromises at least the appearance of neutrality. Of course, in the interests of ensuring a fair trial, a judge may be required to make appropriate interventions, including asking questions of witnesses, but the 'boundary for judicial intervention' is marked by 'the need to preserve the appearance of neutrality'.⁷² If a judge breaches that boundary and thereby affords (or appears to afford) an advantage to the respondent, the applicant who is present will have a cause for complaint to add to the absent respondent's.

The more a judge takes it upon him- or herself to test the Commissioner's evidence, the more s/he is exposed to potential criticism for entering the fray and therefore of being incapable of bringing an impartial mind to bear on the matters to be decided.

Rather than standing at the apex of the mutually-reinforcing duumvirate of procedural fairness and factual rigour, the judge is now situated in between them as contending impulses. The interests of truth are set against those of procedural fairness. The passive judge will preside over a procedure manifestly unfair to the absent respondent, and will have cause to doubt the verity of material presented *ex parte*. The judge who actively seeks to improve the truth-seeking side of the proceedings, by performing tasks that would have been performed by the absent party, may compound the unfairness by risking the appearance of bias against the present party.

The relationship between procedural fairness and a substantive justice founded on truth is a defining feature of the justice system as we know it. It conditions the training and mentality of lawyers and judges alike. In some sense it forms part of the mental furniture and the lived experience of all members of the community. If it is to be recast, even just on the *ad hoc* basis of COA proceedings, it requires judges to take on the radically different role of active truth-seeker rather than impartial arbiter.

The judge, thrust into complicity with one form of procedural unfairness (an *ex parte* hearing), risks actually compounding that problem if s/he tries to ameliorate it by acting inquisitorially. The CI provisions place the judge, as arbiter, in the impossible position of regulating unfairness while, as tester of evidence, s/he also violates fairness. The judge is to determine the weight and admissibility of CI, yet is also required actively to doubt it, to probe it for weakness, even to seek out contradictions of it. The judge's arbitral role may be compromised, in appearance if not also in reality, by the role s/he has played in testing the material.

These matters will all, even subconsciously, bear upon the judge in a COA proceeding, who is placed in a nigh impossible position by the contradictory hybrid that the Act creates. On the one hand, in the interests of procedural fairness, the judge will be conditioned by decades of experience, by binding authority, by tradition and habit, to refrain from 'interfering' in proceedings by taking an active part. On the other, in the interests of truth and substantive justice the judge will be subjected to novel *legal* imperatives to interfere in proceedings in order to test and, potentially, contradict one party's evidence in order to compensate for the absence of the usual tester and contradictor – namely, the other party.

⁷² *Panagopoulos v Southern Healthcare Network* (Unreported, Supreme Court of Victoria, Smith J, 15 September 1997), cited with approval in *Murphy v Stevens* [2003] SASC 238 (1 August 2003) [207] (Mulligan J, Williams and Besanko JJ agreeing). See also *Burwood Municipal Council v Harvey* (1995) 86 LGERA 389, 397 (Kirby P); *Jones v National Coal Board* [1957] 2 QB 55, 64 (Denning LJ).

'I sometimes feel a little bit like a fig leaf', said a Canadian judge of his role in analogous proceedings.⁷³ Indeed, speaking on behalf of the Canadian Federal Court, Justice Hugessen was scathing of the requirement to proceed *ex parte*:

[W]e talked about it, we hate it. We do not like this process of having to sit alone hearing only one party and looking at the materials produced by only one party and having to try to figure out for ourselves what is wrong with the case that is being presented before us and having to try for ourselves to see how the witnesses that appear before us ought to be cross-examined.⁷⁴

Even if the judge overcomes the adversarial disinclination to participate in the proceedings, it is far from certain that s/he will make a meaningful contribution to them. Productive witness examination and cross-examination require exhaustive preparation based on a thorough knowledge of a case from all angles. Judges in COA proceedings are privy only to the material which the Commissioner chooses to present. The judge's knowledge of who could be called as witnesses, and the matters on which s/he may question them, will be entirely within the gift of the applicant. In practice, and intending no disrespect, the judge may be a dubious foundation upon which to rest any hopes for evidentiary rigour, or fairness.

Our judges usually have no training or background in the inquisitorial method which they may be required to employ in order to discharge their duties in the course of the Act's *ex parte* proceedings. Regardless of all the other objections to the Act's secret procedure, then, there is reason to doubt the competence that judges can bring to it.

Combined with the unavoidable appearance of partiality involved when acting *ex parte* (hence Hugessen J's wariness of the fig leaf), this raises the possibility that the standing of the courts could erode over time.⁷⁵ As Dr Churches observes, provisions for CI rely heavily upon the courts' 'bankroll of goodwill' with the community.⁷⁶ That reputation has been accumulated over decades, perhaps centuries, on the perception that the courts are a reliable safeguard of fairness and that they bring to their tasks the utmost expertise. Though hard won, it is a reputation that could easily be lost if the courts come to be seen as complicit with unfairness or as acting with less than thorough competence.

The Canadian Supreme Court, in finding that a CI-type procedure violated the *Charter of Rights and Freedoms*, summarised the effect of the evidentiary and procedural compromises entailed by secret evidence as follows. It is an eloquent reflection on the judicial task under an Act like COA:

⁷³ Justice James K Hugessen, 'Watching the Watchers: Democratic Oversight' in D. Daubney (ed), *Terrorism, Law and Democracy: How is Canada Changing Following September 11?* (Les éditions Thémis, 2002) 381, 386.

⁷⁴ *Ibid* 384.

⁷⁵ '[T]he means used to achieve justice must have the support derived from public acceptance of both the process and its results.... People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing': *Richmond Newspapers Inc v Virginia*, 448 US 555, 571-2 (Burger CJ) (1979). See also *Home Secretary v AF [No 3]* [2010] 2 AC 269, 355 [63] (Lord Phillips).

⁷⁶ Steven Churches, 'How closed can a court be and still remain a common law court?' (2013) 20(3) *Australian Journal of Administrative Law* 117, 120.

The fairness of the ... procedure rests entirely on the shoulders of the designated judge. Those shoulders cannot by themselves bear the heavy burden of assuring, in fact and appearance, that the decision ... is impartial, is based on a full view of the facts and law, and reflects the named person's knowledge of the case to meet. The judge, working under the constraints imposed by the [Act], simply cannot fill the vacuum left by the removal of the traditional guarantees of a fair hearing. The judge sees only what the ministers put before him or her. The judge, knowing nothing else about the case, is not in a position to identify errors, find omissions or assess the credibility and truthfulness of the information in the way the [respondent] would be.... Despite the judge's best efforts to question the government's witnesses and scrutinize the documentary evidence, he or she is placed in the situation of asking questions and ultimately deciding the issues on the basis of incomplete and potentially unreliable information.

The judge is not helpless; he or she can note contradictions between documents, insist that there be at least some evidence on the critical points, and make limited inferences on the value and credibility of the information from its source. Nevertheless, the judge's activity on behalf of the [respondent] is confined to what is presented by the ministers. The judge is therefore not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring.⁷⁷

4.2.6 Conclusion: the use of criminal intelligence

Part 6 of the Act aims at facilitating the use of criminal intelligence in COA proceedings. For various reasons, despite the protection afforded to it, it is to be expected that a substantial quantity of such material will be neither shared nor used. But by far the larger challenge for the Act is when criminal intelligence *is* used because, in the manifold complexity and difficulty that CI brings to a COA procedure, it presents apparently insuperable barriers to the efficacy and workability of the Act.

In this way, the aims and operation of Part 6 loom as contradictory of the aims and operation of the Act as a whole.

Criminal intelligence adds a round of labour-intensive litigation to the COA process. Even absent (or after) that round, its use requires painstaking forensic tasks in the face of evidentiary and procedural difficulties that are inherent in such use. There is reason to expect that criminal intelligence will be safe and workable in inverse proportion to the significance it assumes in any proceeding – paradoxically, the less important the criminal intelligence is, the more readily it can be used. It is a clear and unavoidable conclusion that criminal intelligence adds greatly to the length and complexity of COA proceedings. It makes the Act prohibitively expensive, slow and cumbersome to use. It therefore both inhibits the use of the Act and, when used, retards the Act's ability to disrupt and restrict the criminal organisations that it targets.

As an innovation to traditional court processes, it has proved to be self-defeating. The experience under COA provides compelling evidence that criminal intelligence contributes substantially to rendering ineffective any judicial process into which it is inserted.

⁷⁷ *Charkaoui v Canada* [2007] 1 SCR 350, 388-9 [63]-[64] (McLachlin CJ, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ).

4.3 Criminal Organisations

The declaration of a criminal organisation (CO) is an important step in seeking or obtaining any other substantive orders under the Act. It is a precondition for a control order (s 18(1)(a) and s 18(2)(b)), provides one basis for making fortification removal orders (s 43(1)(b)(ii)), and informs the making of public safety orders (s 28(2)(b)(i)).

The Commissioner applies for a CO declaration by filing an application and affidavit(s) which state, *inter alia* (s 8(2)-(3)):

- (a) details sufficiently identifying the organisation;
- (b) a description of the nature and characteristics of the organisation;
- (c) the grounds on which the declaration is sought; and
- (d) information supporting the grounds.⁷⁸

These documents must be served on the respondent organisation and provided to the COPIM (s 8(5)(c) and (6)). The organisation may provide a response and affidavit(s) (s 9).

The court may make a CO declaration if satisfied of three things (s 10(1)):

- (a) that the respondent is an organisation;
- (b) that its members associate for the purpose of conspiring or engaging in 'serious criminal activity'; and
- (c) that the organisation is an unacceptable risk to community safety, welfare or order.

'Serious criminal activity' is a central concept in the Act. It means a 'serious criminal offence' or behaviour outside of Queensland that, if done here, would constitute such an offence (s 6).

'Serious criminal offence', in turn, is defined in s 7(1) to mean:

- (a) an indictable offence punishable by seven or more years imprisonment;
- (b) an offence against the Act itself; or
- (c) a *Criminal Code* offence listed in Sch 1 of the Act.

In considering whether or not to make a declaration, the court must have regard to whatever it considers relevant, which must include (s 10(2)(a)):

- (i) information suggesting a link between the organisation and serious criminal activity;
- (ii) any convictions of the organisation's former or current members;
- (iii) information (regardless of convictions) suggesting that current/former members are/have been involved in serious criminal activity, directly or indirectly; and
- (iv) information suggesting that members of interstate or overseas branches of the organisation associate for the purpose of conspiring or engaging in serious criminal activity.

⁷⁸ Together, (c) and (d) require the provision of 'detailed particulars' of both the grounds and the information supporting those grounds: *Pompano* (2013) 252 CLR 38, 100 [158] (Hayne, Crennan, Kiefel and Bell JJ). See also at 79 [87] (French CJ).

The joint judgment in *Pompano* placed considerable emphasis on what the judges saw as the cumulative effect of these provisions: 'In combination, these provisions require the Commissioner to tell the respondent the whole of the case which the Commissioner seeks to make in support of the application for a declaration. That is, the Commissioner must identify, in detail, the information upon which the Commissioner will seek to rely to satisfy the Supreme Court of the three criteria for making a declaration'.⁷⁹ In seeking to make out the requisite link between the organisation's members and serious criminal activity,

... the Commissioner will have had to provide particulars of the activity upon which the Commissioner relies, of those who are alleged to have engaged in that activity and of whether those persons are alleged to be or to have been members of the organisation.

For all practical purposes, demonstration of association for the purposes described would be possible only if persons alleged to have then been members of the organisation were alleged to have engaged in relevant acts or omissions constituting serious criminal activity before the application for declaration of the organisation was made. Thus the Commissioner must allege and prove not only the occurrence of past serious criminal activity by persons who then were members of the organisation but also that members of the organisation associate for one or more of the identified purposes relating to that activity.⁸⁰

These requirements for comprehensive detail in satisfying the elements of COA must be appreciated in light of the significant evidentiary challenges presented by the use of criminal intelligence. The High Court repeatedly emphasised the need for specificity and particulars in meeting the criteria for a declaration in ss 8 and 10. Not only must the Commissioner compile masses of information, the information must be in sufficient detail.

Quite properly, the Commissioner's task under the Act is not a light one because it is the detail with which it is presented that saves the possibility of procedural fairness (as explained at 4.2.3).⁸¹ But it does make for a laborious operation, which is compounded by the logistical demands that attend any litigation: for example, hearsay will not suffice for the non-CI affidavits prepared for a substantive proceeding. As the QPS pointed out, that means that if a traffic officer in Mt Isa conducted a street check of a person alleged to be a member of the respondent organisation, the same officer must prepare the affidavit attesting to it.

When the introduction of COA was being considered, the legal profession raised a concern that the CO provisions might make the Act self-defeating of its objects. By targeting identifiable criminal groups, the Act puts in place an incentive not that they cease being criminal groups, but that they cease being *identifiable* as such. 'Club insignia will no longer be worn, Club membership will not be recorded, gathering places for clandestine meetings will move from place to place, assets of any group will be held by proxies', and groups will be harder to penetrate in order to gain intelligence. In other words, the very groups and individuals which COA targets will

⁷⁹ *Pompano* (2013) 252 CLR 38, 83-4 [103]. See also at 84 [104]-[105], 100 [158] (Hayne, Crennan, Kiefel and Bell JJ).

⁸⁰ *Ibid* 101-2 [163]-[164] (Hayne, Crennan, Kiefel and Bell JJ).

⁸¹ *Ibid* 79-80 [87]-[88] (French CJ), 101 [162] (Hayne, Crennan, Kiefel and Bell JJ).

be driven 'underground' and will thereby become harder to disrupt, let alone to apprehend and convict.⁸²

The Bar reiterated these concerns in its submission to this review. They are not concerns limited to the legal profession, for they have been expressed by senior law enforcement officers here and interstate.⁸³ They have been echoed by researchers.⁸⁴ They were concerns laid before the Queensland Parliament when considering the Act.⁸⁵ In due course, they were borne out.

4.3.1 The shape shifting problem: Finks morph into Mongols

While the application to have it declared a criminal organisation was on foot, the Finks Motorcycle Club largely disbanded and 'patched over' to the Mongols. Media reports at the time suggested that this was a tactical response to the COA litigation.⁸⁶ These reports appear to be well-founded from a legal perspective. The patching over raises a seemingly fatal problem of 'shape shifting' in the functioning of the Act at the CO declaration stage. Accordingly, it warrants discrete consideration in some detail.

It will be recalled that under s 10(1) of the Act, the court may make a CO declaration if it is satisfied, *inter alia*, that 'the respondent is an organisation'. Given the very broad definition of 'organisation' in Sch 2, the critical component of that test is 'respondent'.

The respondent is an organisation 'sufficiently identif[ied]' by details in the application (s 8(2)(a)). It is to be expected as a matter of ordinary experience that the primary means of identifying something will be by the use of its name. This also seems to be envisaged by s 8(4), which indicates that a name is sufficient to identify an organisation (though the Act wisely leaves open

⁸² BAQ and QLS, Submission on proposed motorcycle gang laws, above n 42, 8; QLS and BAQ, Submission on Criminal Organisation Amendment Bill 2011, above n 41, 17.

⁸³ Victoria Police, Submission No 4 to Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, 2008, 2; Evidence to the Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into legislative arrangements to outlaw serious and organised crime groups*, Brisbane, 7 November 2008, 21 (Ian Stewart, Deputy Commissioner, Queensland Police Service); Evidence to the Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into legislative arrangements to outlaw serious and organised crime groups*, Perth, 4 July 2008, 6-7 (Leonard Roberts-Smith QC, Commissioner, WA Crime and Corruption Commission).

⁸⁴ Ayling, 'Pre-emptive Strike', above n 40, 261; Nicola McGarrity, 'From Terrorism to Bikies: Control orders in Australia' (2012) 37(3) *Alternative Law Journal* 166, 169; Andreas Schloenhardt, 'Banning the Bikies: Queensland's Criminal Organisation Act 2009' (2011) 31 *Queensland Lawyer* 100, 113.

⁸⁵ Nicolee Dixon, 'Regulating Bokie Gangs' (Research Brief No 2009/18, Parliamentary Library, Parliament of Queensland, 2009) 57.

⁸⁶ See, eg, Nick Ralston and Rory Callinan, 'US Mongols "patch over" Australian Finks gang', *Sydney Morning Herald* (online), 14 October 2013 <<http://www.smh.com.au/national/us-mongols-patch-over-australian-finks-gang-20131013-2vgnd.html>>; Josh Robertson, 'Mehrang Mashaghati, aka "Magic", key to Mongols' patchover to Finks, police say', *Sunday Mail* (online), 13 July 2014 <<http://www.couriermail.com.au/news/queensland/mehrang-mashaghati-aka-magic-key-to-mongols-patchover-to-finks-police-say/story-fnihsrf2-1226986906574>>; Anthony Dowsley, 'What does the Mongol takeover of the Finks mean for Melbourne?', *Herald Sun* (online), 19 October 2013 <<http://www.heraldsun.com.au/news/law-order/what-does-the-mongol-takeover-of-the-finks-mean-for-melbourne/story-fni0fee2-1226743123717>>.

the possibility of identifying a respondent by other means). Whatever means are used, the court must be satisfied that the entity so identified subsists (s 10(1)(a) uses the present tense 'is') at the time when the declaration is to be made.

It follows that if a respondent identified by name (or some other designation) ceases to exist by the time the hearing of the application is concluded, there is no entity to which a declaration can apply – the court cannot be satisfied that the respondent is an organisation, as is required under s 10(1)(a).

It is the dissolution of a respondent which presents a particular problem. COA provides for organisations changing their identities in s 12 ('the shape shifting provisions'). Under s 12(2), a change in the name or membership of a criminal organisation does not affect a CO declaration. Under s 12(3), the criminal organisation is taken to include any organisation into which the members substantially reform themselves (whether or not they dissolve the organisation named in the declaration). The problem, however, is that both of these provisions operate upon a 'criminal organisation'. This phrase is relevantly defined in Sch 2 as an organisation *subject to* a CO declaration.

The shape shifting provisions therefore appear only to have effect after a CO declaration has been made. Once made, s 12(2) enables the declaration to 'follow' the organisation through changes of name and membership, and s 12(3) enables the declaration to follow the members of the declared organisation into any organisation into which they substantially re-form.

Even if the respondent organisation still exists at the time for making a declaration, members' abandonment of it raises problems for the operation of the Act. In such a case, while the possibility of a declaration remains open, the satisfaction of other parts of the test in s 10(1) becomes problematic. If the members who leave form a substantial part of the criminal element of the respondent organisation, then the court may not be satisfied that the remaining members of the organisation associate for purposes of serious criminal activity, or that the organisation is an unacceptable risk to the community (s 10(1)(b) and (c)). This was the form that shape shifting took in the *Pompano* litigation and it has been repeated interstate with the same tactical effect.⁸⁷

Can s 12 follow the members who leave the organisation *before* it was declared? Seemingly not, at least so far as the CO declaration is concerned. Section 12(3) enables the following of 'members' of the 'criminal organisation'. At the date of the declaration – which is the date when the entity becomes a 'criminal organisation' – the relevant persons are not 'members' but former members.

This is of little consequence substantively, however, because the orders to which the CO declaration serves as a gateway are not predicated only upon current membership of a CO. Under s 18(1)(a), for example, control orders may be made for a person who 'is, *or has been*, a member of a criminal organisation' (emphasis added). Former membership of a CO is also relevant to public safety orders (s 28(2)(b)(i)).⁸⁸

⁸⁷ Evidence to the Crime and Public Integrity Committee, Parliament of South Australia, Adelaide, 3 July 2015, 21-2 (Grant Stevens, Deputy Commissioner, SA Police).

⁸⁸ Insofar as anti-fortification orders hinge upon the declared status of an organisation, it is only current and prospective membership that can be considered: s 43(1)(b)(ii) of COA. An 'associate' (undefined) of a

There appears to be no warrant for reading the reference to a person who ‘has been’ a member of a CO (eg in s 18 for control orders) as denoting only those persons who have left the organisation since it was declared. The Act elsewhere takes into account the consideration of former membership even before an organisation has become a ‘criminal organisation’. Former members are expressly relevant to the very making of a CO declaration (s 10(2)(a)(ii) and (iii)), which by definition means that what is being considered is their ex-membership of an organisation that was not a CO at the time.

The critical and conclusive strategies for avoiding the operation of COA, therefore, are the dissolution of the respondent before a declaration is made or the migration of a sufficient portion of its criminal element to some other entity. In these cases, a CO declaration simply cannot be made in respect of that respondent; nor (obviously) can the Commissioner obtain any of the orders that are dependent upon membership or former membership of a declared organisation.

As COA presently stands (see s 101), the only possible recourse in the event of a shape shifting respondent is to the UCPR, which apply under the Act to the extent that they are consistent with it. There are provisions for joinder and substitution of parties in rr 68 and 69. Rule 69, however, serves to facilitate the adjudication of all matters in dispute or connected with ‘the proceeding’, and there is authority defining this term as ‘the action as it stands before further parties are added’.⁸⁹ In the case of a simple re-badging of the target organisation, however, it is probably the case that r 69 would be wide enough to enable a new entity to be held to be ‘connected with’ the existing proceeding against the old entity. But that is not the end of the matter.

Rule 68 allows the court to order separate trials, impose a stay or make other orders if the addition of a new cause of action or respondent ‘may delay the trial of the proceeding, prejudice another party or is otherwise inconvenient’. The addition of a new entity to the application also enlivens r 377 (amendment of originating process), because the application itself would need to be amended to include grounds and information relevant to the old entity’s transformation into the new entity. Regardless of whether r 68’s reference to ‘another party’ includes the party being added, matters of prejudice and fairness to the new respondent will have to be considered.⁹⁰ The discretion being exercised under both rr 377 and 69 would also be informed by the other matters mentioned in r 68 – any delay or inconvenience that would be occasioned by the amendment. Any amendment being made at so late a stage will have its merits examined carefully and will need to demonstrate clear validity.⁹¹

These factors mean that whether the UCPR would enable the timely addition or substitution of a new respondent will largely turn on the nature of the allegation informing the proposed amendment. A case of straightforward re-badging capable of being established by clear and

declared organisation can also provide the necessary link to a CO for the purpose of an anti-fortification order, but, without more, it seems unlikely that a former member would be an ‘associate’ of the CO.

⁸⁹ *MAM Mortgages Ltd (in liq) v Cameron Bros* [2002] QCA 330 (3 September 2002) [27] (McPherson JA), citing *Interchase Corporation Limited (In Liq) v FAI General Insurance Company Limited* [2000] 2 Qd R 301, 314.

⁹⁰ *Bishop v Bridgelands Securities* (1990) 25 FCR 311, 314; *Thomas v State of Queensland* [2001] QCA 336, [19]; *Advanced Air Conditioning Pty Ltd v Aquilina* [2004] QDC 180.

⁹¹ *Aqwell Pty Ltd v BJC Drilling Services Pty Ltd* [2007] QSC 140, [6]; see also *Kestrel Coal Pty Ltd v Longwall Roof Supports Ltd* [2003] QSC 187, [16].

relatively simple evidence would more readily attract a grant of leave than the more complex case of migration of some members to a pre-existing entity (like Finks patching over to Mongols). Indeed, in the latter case, the targeting of the new entity would amount in substance to an entirely new application against it. Such a shift would require the comprehensive compilation of new evidence as well as the re-casting of existing evidence in order to demonstrate the matters required by s 10. It can confidently be predicted that such a significant change to the application would not be capable of being addressed by means of mere amendment – the new and additional proof to which the amendment would put the applicant mean that the existing proceedings would be very significantly delayed and inconvenienced. Considerable prejudice would also be caused to the proposed new respondent.

Even in the case of the most superficial re-badging, it seems unlikely that the evidence required to *prove* that a new entity is *identical* to the old one would be available to police so promptly that it could conveniently be addressed with an amendment to proceedings then on foot (possibly to an advanced stage). In any event, the new entity would have to receive notice of the application to add it to the proceedings and an opportunity to prepare its answer to that application. That is all the opportunity that an agile respondent would need to initiate another change of identity.

The inescapable problem presented by shape shifting is that of the time entailed by evidence-based litigation. There will always be a delay between an organisation changing its identity and the collection of intelligence and evidence to that effect. The application for a criminal organisation declaration will always provide notice to the target organisation of the need to change its identity. Even if police are alert to such a change, the requisite application to amend will again provide the organisation with notice. Accordingly, the organisation can again move to dissolve its new identity in order to frustrate the making of a declaration in respect of *it*. This will necessitate yet another round of evidence gathering in order to equate the former target organisations with whatever new one emerges in their stead.

Thus, provided an identified group shape-shifts upon being made a respondent, or upon application being made to make it one, no declaration can be made respecting it. The inevitable time that intervenes between the application and the declaration will provide an opportunity to change identity.

A sufficiently agile respondent can, therefore, continually evade the operation of COA. An entity will always receive notice of an application to add it as a respondent to existing CO proceedings. And it will always be given an opportunity to formulate and prepare its response to that application. Evidence will always have to be gathered to prove that the new entity is the same as or substantially similar to the earlier one. Accordingly, it will always have an opportunity to dissolve itself or migrate members so as to render the CO proceedings moot. Indeed, even without the shape shifting problem, law enforcement officials consulted for this review expressed concern at the difficulty of keeping intelligence and evidence current in light of the delay and duration of court proceedings.

4.3.2 Possible responses to shape shifting

4.3.2.1 The Act as it stands

COA itself, though oriented towards organisations, could be utilised differently to circumvent the shape shifting respondent. The definition of ‘organisation’ (Sch 2) is so broad that any combination of three persons suffices to meet it. An organisation need not be an incorporated entity, need not have any official structure or recognition, and need not have a name. In terms of identifying an organisation for the purpose of seeking a declaration, all the Commissioner need do is to provide ‘details sufficiently identifying the organisation’ and its ‘distinguishing characteristics’ (s 8(2)(a) and (b)).

Accordingly if the Commissioner is to target the criminal element of, say, an OMCG, the respondent organisation need not be the OMCG itself but a sufficiently delineated association of persons within it. This would be analogous to the ‘association-in-fact’ approach under the American RICO statute.⁹² As discussed earlier, research suggests that this is, in fact, a more accurate picture of the criminal aspect of OMCGs, which exists less as a whole-of-group enterprise than as the co-ordinated activity of some individuals within the gang.

There tends to be a core group, a small number of individuals within the gang, who are responsible for the bulk of criminal activity, and virtually all of the serious offending, ascribed to it.⁹³ Provided that such a group can be identified, the shape-shifting problem falls away in the sense that without any formal name or structure, there is nothing to ‘dissolve’ or migrate from. The organisation is identified as an informal network of individuals, and any formal (re-)badging becomes irrelevant to the existence and nature of this group.

This may present a problem of evidence insofar as it may be harder to satisfy a judge that a diffuse, unnameable entity *is*, in fact, an ‘organisation’. On the other hand, if the research discussed at 2.2 is correct, the evidence and intelligence will, in reality, revolve largely around not an OMCG as a whole but the relatively small number of organised criminals within it. So other evidentiary problems – chiefly those associated with establishing a level of whole-of-group risk and criminal activity – may fall away.

This approach sacrifices breadth to precision. The narrowing of focus might be perceived as insufficiently disruptive inasmuch as it does not permit of declarations naming a whole OMCG as ‘criminal’. It would require a significant adjustment of litigation strategy. Ultimately it would also entail a conceptual leap away from the concern with OMCGs *simpliciter* and the jettisoning of an approach to organised crime centred on the official ‘organisation’.

In short, it would require that the Act be used in a manner substantially at odds with the approach that informed its creation.

⁹² Discussed in further detail in Chapter 8.10.

⁹³ See Chapter 2.2.

4.3.2.2 Changing the Act

COA itself envisages, in other circumstances, the problems of both time and notice that together operate to create the shape shifting problem. The control order regime (s 21) allows for interim orders to be made if the Commissioner can persuade the court that reasonable grounds exist for believing there to be a sufficient basis to make the final order (s 21(3)). Interim control orders operate with notice to the respondent (ss 16(2)(f) and 21(1)), but they overcome the necessary delays in litigating the question to the end of a contested hearing. The criminal intelligence regime (Part 6), on the other hand, operates in secret and without notice to its targets.

The combination of these two mechanisms may provide another solution to the shape shifting problem.

A procedure for the obtaining of interim CO declarations might be conceived, as follows: like the CI provisions, an *ex parte* hearing without notice could be held, in which the Commissioner would be required to convince the court that there are reasonable grounds for believing there to be a sufficient basis to obtain a final order. If the court were so satisfied and it made an interim CO declaration, this interim declaration would be served on a respondent with the application for the final declaration. The matter would then be litigated under the Act as it stands.

An interim declaration regime would have the effect of taking a respondent by 'surprise' in that the entity is only apprised of the need to change or dissolve its identity once it has already been declared. Steps to dissolve or to migrate members would, under the interim declaration, be of little practical effect insofar as the Act's provisions for 'following' the organisation and its former members would apply (ss 12(2), 12(3), 10(2)(a)(ii) and 10(2)(a)(iii)).

This, however, does not do away with the shape shifting problem. A respondent will still have received notice of the application, and a judge will still have to be satisfied of the elements in s 10(1) in order to make a final declaration. The target entity could still, between the interim and the final order, dissolve itself or migrate sufficient members to create serious doubt about, if not the impossibility of satisfying s 10(1) on a final basis. In that case no final declaration could be made, and the members or former members would no longer be associated with a criminal organisation, as they were under the interim declaration.

It is apparent that the true problem, when faced with an agile respondent, is the inevitable delay between receiving notice and the making of a final order. Any declaration which operates on the basis of *present* conditions will be bedevilled by the opportunity given to respondents by the time that the litigation takes.

Even an interim declaration regime would, then, need to be reinforced by some provision of an operative date for the judgment that the court is required to make. The 'relation-back day' in insolvency provides a broad analogy here, and for the same reason — to allow for the unwinding of certain actions that have been taken after a critical date.⁹⁴ With the CO provisions, that crucial date is the date from which a respondent received notice of an application to declare it.

In this respect it may be that s 10 could be amended to insert into the *chapeau* words to the effect that a declaration may be made 'if the court is satisfied that, *at the date of the interim*

⁹⁴ *Corporations Act 2001* (Cth) pt 5.6, div 1A; and ss 588FE, 588FF.

order [or some other operative date like the date of the originating application]', the elements of sub-s (1) are satisfied. Section 10(1)(a)-(c) would then be recast into an additional past tense. This would make the final hearing operate as a confirmation of the interim order.

A similar effect could be obtained, even without an interim declaration regime, by providing for an operative date or for a retrospective 'window' of time (the past two years, the past five years, or some other appropriate period) that serves as the *factum* on which the judge's assessment of the organisation is to operate. The key point is that if the basis for making the declaration is a state of affairs on some past date, and if that date is the date upon which the respondent received notice of the application, then no steps to change or dissolve the identity of the organisation can be of any effect.

4.3.3 Patching over and OMCGs

The concern expressed by law enforcement officials at the Finks' apparent tactical adroitness is a reflection of their firm belief in a distinct OMCG ethos, and the strength of group identity that it inculcates. Officers consulted in the course of this review had been convinced (not without reason) of a strong, often lifetime commitment of members to their particular OMCG. The giving up of OMCG 'colours' is, or is perceived to be, a difficult existential step for a member to take. Group identity is integral to the exclusivity, empowerment, camaraderie and perhaps intimidation that attract men to OMCGs in the first place. Without colours, an OMCG member is to all appearances just another motorcyclist.

Scholarly research confirms the popular stereotype about the strength of group identity which permeates OMCGs. Loyalty is a concept central to understanding the cohesion and endurance of these groups – researchers have indicated that the club supplants all other forms of group identity for its members. By constituting members as 'brothers', bonding through shared activity (including criminal activity), and otherwise providing an all-encompassing social centre to their lives, the OMCG becomes a surrogate family, workplace, recreational club and much else besides.⁹⁵ Accordingly, 'tribal' or even 'sect-like' loyalty has been seen as a hallmark of OMCGs.⁹⁶ Group bonds are forged through 'intense and exclusive membership' which promotes 'moral, emotional and material interdependence'. One researcher refers to a 'spiralling of commitment' through which impulses stemming from both the individual and the group 'serve to entwine the club and member's identity' and to foster 'extreme commitment to a group identity'.⁹⁷ This is both reflected and reinforced by a well-known 'once a member, always a

⁹⁵ Mark Lauchs, Andy Bain and Peter Bell, *Outlaw Motorcycle Gangs: A Theoretical Perspective* (Palgrave, 2015) 48; Thomas Barker, *Biker Gangs and Organized Crime* (Matthew Bender, 2007) 66. The United Motorcycle Council of Queensland (UMCQ) reflects this view of its member clubs: UMCQ, Submission No 11.10 to the *Queensland Taskforce on Organised Crime Legislation*, November 2015, 9-13.

⁹⁶ James F Quinn and Craig J Forsyth, 'The Tools, Tactics, and Mentality of Outlaw Biker Wars' (2011) 36 *American Journal of Criminal Justice* 216, 220, 227. See also Kira J Harris, 'Commitment and the 1% Motorcycle Club: Threats to the Brotherhood' (Paper presented at the Third Australian Counter-Terrorism Conference, Perth, 3-5 December 2012) 24.

⁹⁷ Harris, 'Commitment and the 1%', above n 96, 24-5.

member' ethos which commonly features in members' tattoos: 'Bandidos Forever, Forever Bandidos' and so on.⁹⁸

Clearly this understanding informed those parties who expressed surprise at the apparently strategic patching over of Finks to the Mongols which contributed to the frustration of the *Pompano* proceedings. But the patching over phenomenon is not an unfamiliar one in the world of OMCGs, and there is much evidence to suggest that these groups operate in 'a shifting complex of alliances and tensions' which conduces to a more flexible operation than simple notions of group identity or loyalty would suggest.⁹⁹

Law enforcement officials familiar with the Finks contextualised the patching over in the group's recent history. In the late 1990s, a significant number of senior Finks were charged and two were imprisoned in connection with the death of Darryl Lewis.¹⁰⁰ The president of the club cooperated with law enforcement and informed on his fellow members. The ascent of a new leadership, along with territorial tensions on the Gold Coast, fueled a recruitment drive. Around this time, a number of core Finks were imprisoned for various offences. Accordingly, at the time of the COA application against it, the Gold Coast chapter featured a proportion of members who had a shorter history and looser bonds with the group as a whole. Some of this information was publicly known at the time. Some of it may have required intelligence work. Certainly it is the sort of risk-based, predictive analysis which is the natural domain of intelligence, and it points to conditions being apt for patching over.

Brotherhood and cohesion in OMCGs have always co-existed with other elements, including an entrepreneurial one, to form an overall group identity.¹⁰¹ Patching over thus operates as a strategic response to changes or opportunities in the OMCG or criminal environments — expanding territory, entering new drug markets, or assimilating another (usually weaker) group, for example.¹⁰² In particularly threatening, opportune or fluid contexts, it has even been described as a 'rather common' occurrence.¹⁰³ This highlights the hybrid or ambiguous model of criminality toward which some OMCGs are tending as they adapt their deeply 'traditional' model to more recent trends.

There is no necessary inconsistency between these two phenomena. A strong sense of group loyalty and cohesion can co-exist with a group resolution to patch over in the interests of survival, expansion or some other pragmatic reason. The practice of OMCGs forming strategic alliances

⁹⁸ Barker, *Biker Gangs*, above n 95, 70-1.

⁹⁹ Quinn and Forsyth, 'Tools, Tactics and Mentality', above n 96, 218.

¹⁰⁰ *R v Laycock* [1999] QCA 307; Jamie Walker and Sarah Elks, 'Bikies Inc: how police sting revealed clubs' bid to amass a legal war chest', *The Australian* (online), 9 November 2013 <<http://www.theaustralian.com.au/news/nation/bikies-inc-how-police-sting-revealed-clubs-bid-to-amass-a-legal-war-chest/story-e6frg6nf-1226756212708>>.

¹⁰¹ Harris, 'Commitment and the 1%', above n 96, 25.

¹⁰² Barker, *Biker Gangs*, above n 95, 62, 72 (see also at 5-7, 81-3, 138, 148-52 for further references to patching over); Harris, 'Commitment and the 1%', above n 96, 25.

¹⁰³ James Quinn and D Shane Koch, 'The Nature of Criminality within One-Percent Motorcycle Clubs' (2003) 24(3) *Deviant Behaviour* 281, 290.

with other criminal groups — whether of their own or of a radically different kind — is well known. Longstanding enmities have been buried or set aside when it is opportune so to do.

Indeed, Ayling has noted the ‘flexibility and resilience in the face of attack’ demonstrated by Australian OMCGs when they banded together to form United Motorcycle Councils as state legislatures started rolling out legislation (like COA) aimed at disrupting and restricting them.¹⁰⁴ In Queensland, in particular, OMCGs have taken concerted action through the United Motorcycle Council to protest against the 2013 suite of legislation in the years since COA was introduced. Indeed, it was COA, not VLAD, which provided the impetus for the early activity, if not for the formation, of this group.¹⁰⁵

4.3.5 Conclusion: the criminal organisation stage

The patching over of the Finks to the Mongols confirmed the doubts of those who saw COA’s focus on the ‘organisation’ as an incentive for criminal groups to change their appearance without any disruption of the underlying reality.

Shape shifting is, in effect, a variation on the ‘going underground’ theme — the variation lying in the fact that instead of *reducing* their visibility the Finks simply *changed* it. Unfortunately this change was not such as to disrupt or restrict any criminal activity in which the Finks-cum-Mongols may have been engaged. It was simply an effective tactic for frustrating the operation of the Act, and insofar as any use of COA targets an official ‘organisation’ it will be exposed to a risk of the same failure. In this respect, COA was unequal to the task of keeping up with an agile respondent.

This bears upon other hopes which were expressed for COA. Rather than deterring any OMCGs, the Finks’ tactical patching over may only have emboldened any groups which were engaging in criminal activity. Even within the narrow compass of a highly visible and traditional target, COA ultimately lacked utility. This does not bode well for its use against the less visible and more innovative groups that characterise modern organised crime. Indeed, the experience with the Finks confirms the tentative signs that OMCGs may not be as hidebound as their stereotype, and are capable of the sort of flexible and opportunistic manoeuvring not usually associated with traditional or hierarchical criminal groups.

The discrete problem of shape shifting is not insoluble, but the nature of the solutions is such as to pose serious questions about the utility of targeting criminal organisations by focusing on the ‘organisation’. In one respect — taking COA as it stands but framing the target ‘organisation’ in a very different way — the solution operates by equiparating the group with its constituent individuals as far as is possible.

¹⁰⁴ Ayling, ‘Pre-emptive Strike’, above n 40, 262.

¹⁰⁵ A UMCQ submission describes the Council as coming together for the purpose of advocating against COA: UMCQ, Submission No 11.10 to *Queensland Taskforce on Organised Crime Legislation*, November 2015, 7. The UMCQ’s website, on the other hand, dates the Council from April 2009 (before COA) and expressly disavows the notion that anti-association legislation was a catalyst for the formation of the UMCQ. There it is said that discussions leading to the formation of the Council began in October 2008 for the purpose of instituting a forum for ‘peacefully resolv[ing] disputes away from the public eye’: UMCQ, *About the UMCQ* <<http://www.umcinc.com.au/index.php?page=about-the-umcq>>.

This suggests that the path to efficacy lies through, rather than around, the traditional criminal process which has always operated upon the irreducible *datum* of the individual. Even if an organisation-centric approach were insisted upon, and COA augmented with a backdating provision to ensure that CO declarations could be made, the solution comes freighted with another problem, for the Commissioner might be drawn into a further round of litigation to determine whether any new entity is a 'substantially reformed' version of the declared one (s 12(3)). The original declaration on its own would still be of real use in that it would allow the Act's provisions for following 'former' members to take effect. But in that case the legislation once again gains its purchase by targeting persons rather than groups. Whichever way it is turned, the Act's innovative focus on the organisation does much to send one back to the good sense that informs the criminal law's traditional focus on the individual.

4.4 Control, Public Safety and Anti-Fortification orders

A criminal organisation declaration is the necessary precondition for a control order, but only one of a number of relevant (not determinative) considerations in the making of public safety and anti-fortification orders.

4.4.1 Control orders

The requirements for an application for a control order are broadly comparable to those for a CO declaration (s 16). A respondent may file a response (s 17). There are two bases on which the court may make a control order. The first is upon satisfaction of the criteria in s 18(1), namely that a respondent:

- (a) is or has been a member of a CO; and
- (b) engages or has engaged in serious criminal activity; and
- (c) associates with any person for the purpose of engaging or conspiring to engage in serious criminal activity.

The second basis is contained in s 18(2). It requires the court to be satisfied that the respondent:

- (a) engages or has engaged in serious criminal activity; and
- (b) associates with any member of a CO for the purpose of engaging or conspiring to engage in serious criminal activity.

In considering these elements the court must have regard to the criminal history of the respondent and of those whose association with him or her is relied on for the application (s 18(3)(a)(i) and (ii)). It must (s 18(3)(a)(iii)) also have regard to 'any activity or behaviour of the respondent at any time which tends to prove a matter of which the court must be satisfied' under s 18(1) or 18(2). It appears likely that these provisions are redundant. Given that the element of engaging in serious criminal activity is common to both s 18(1) and s 18(2), criminal history will always fall to be considered in any event. And s 18(3)(a)(iii) seems to amount to directing the court to consider what would otherwise simply be called 'evidence'.

The court may impose whatever conditions it considers appropriate in a control order (s 19(1)). Numerous examples of the kinds of prohibitions which may be included in an order are provided in s 19(2):

- (a) associating with a member of a CO;
- (b) associating with another controlled person;
- (c) possessing weapons, explosives or any stated thing;
- (d) carrying on a 'prescribed activity' (defined in Sch 2 to mean casino, security, pawn broking, weapons dealing, tow truck, motor dealing, liquor supply, racing, prostitution and some other services);
- (e) recruiting for a CO;
- (f) associating with stated persons;
- (g) being in stated places; and
- (h) undertaking stated employment.

Under s 19(5), if the control order is made under s 18(1) (ie if the respondent is or has been a member of a CO) then the order must include conditions prohibiting association with members of a CO, association with other controlled persons, possessing a weapon, carrying on a prescribed activity and recruiting for a CO. This is subject to the possibility of relaxation to allow association with people who are in a 'personal relationship' (defined in Sch 2) with the respondent (s 19(5)(b) and (7)). If an order prohibits the possession of any thing, the respondent must deliver the thing to police, or otherwise dispose of it within 24 hours (s 19(6)).

A control order takes effect when made if the respondent is present at the court. Otherwise it takes effect when served on the respondent, with provision made for service by public notice if that is 'not practicable' (s 20(1) and (2)). An order lasts until revoked (s 20(3)). Section 20(4) provides that *if* an order is made in reliance on a person's membership of a CO or association with members of a CO, then the order ceases to have effect in the event that the CO declaration expires or is revoked. This will apply to all control orders as, by virtue of s 18(1)(a) and (2)(b), it is not possible to obtain an order without one of those links to a CO being made out.

Under s 21 the court may make an interim control order pending the final determination. An interim order can only be made on or after the return date and service upon the respondent (s 21(1) and (2)), but can be made in the respondent's absence (s 21(4)). The basis for making an interim order is that the court is 'satisfied there are reasonable grounds for believing there is sufficient basis to make the final order' (s 21(3)).

An interim control order 'is taken to include, and to impose on the respondent, the following conditions' (s 21(5)):

- (a) that the respondent must not associate with a member of a CO, other than someone with whom s/he has a personal relationship;
- (b) that the respondent must not associate with another controlled person, other than someone with whom s/he has a personal relationship;
- (c) that licences or rights under the *Weapons Act 1990* (Qld) are suspended;
- (d) that the respondent must not recruit anyone to join or associate with a CO; and
- (e) that the respondent must dispose of or deliver to police anything that s/he is prohibited from possessing (s 21(6)).

Provision is made for varying and revoking control orders on the application of both the controlled person and the Commissioner. Particular grounds must be made out by the controlled person in order to obtain variation or revocation (ss 22(9) and 23(9)). Perhaps strangely, in the event that the Commissioner applies for variation or revocation, there is no indication of what s/he must satisfy the court in order to obtain an order.

Within seven days of the order coming into force, police may enter and search premises occupied by the controlled person (s 25(1) and (2)). They may seize anything that the person is prohibited from possessing under the order (s 25(2)(b)). If the seizure takes place within the first 24 hours of the order being in effect, the seized thing must be kept and returned to the person when the control order ceases (s 26).

It is an offence knowingly (which includes constructive knowledge) to contravene a control order (s 24(1) and (4)). The penalty for a first offence is three years imprisonment. Later offences attract a penalty of five years (s 24(1)).

4.4.2 Assessing control orders

Any assessment of the control order regime will be imperfect in light of the absence of any substantial experience of its operation – not just in Queensland, but anywhere in Australia. Only one valid control order has been issued in respect of organised crime, that being in South Australia.¹⁰⁶ That experience, as discussed elsewhere in this report, was profoundly discouraging of any belief in the utility of control orders as presently framed.¹⁰⁷

Control orders have also been issued in the very different Commonwealth context of terrorism legislation. During the operation of those laws only two control orders have been issued. One of them was confirmed beyond the interim stage. In 2012 the Independent National Security Legislation Monitor concluded that ‘control orders in their present form are not effective, not appropriate and not necessary’.¹⁰⁸ He recommended their repeal, and that consideration be given to making new provision for control orders on a post-conviction basis for dangerous and unrehabilitated offenders.¹⁰⁹

In respect of the utility of control orders targeting organised crime in Queensland, any assessment must come to terms with the view expressed by the now Commissioner of Police (then Deputy Commissioner) in 2008. Giving evidence to a Commonwealth parliamentary inquiry

¹⁰⁶ Under s 14(2) of the *Serious and Organised Crime Control Act 2008* (SA). See Alan Moss, *A review of the execution of the powers under the Serious and Organised Crime (Control) Act 2008 exercised during the period 1 July, 2010 to 30 June, 2011* (30 September 2011) 7-8 [9]-[10]. As discussed below at 8.3.3, there were eight control orders issued under another provision of the South Australian legislation, but these were rendered invalid as a result of a constitutional challenge in *South Australia v Totani* (2010) 242 CLR 1.

¹⁰⁷ See Chapter 8.3.3 and 8.3.7.

¹⁰⁸ Bret Walker SC, *Independent National Security Legislation Monitor: Declassified Annual Report* (20 December 2012) 4. For the detailed discussion of the control order regime, see Chapter 2 of that report.

¹⁰⁹ *Ibid* 44.

into organised crime legislation, Mr Stewart was asked to consider the possibility of legislation targeting consorting for criminal activity and outlawing association with particular groups:

Traditional consorting laws were repealed in Queensland in 2005, and when in place those laws were increasingly difficult to police. The Queensland Police Service considered there were greater priorities for investigative staff than enforcing consorting laws which had been enacted in the 1920s. Contemporary communications technology, including mobile phone, SMS and online forums make criminal consorting less reliant on physical contact and therefore much more difficult to police.¹¹⁰

He saw the utility of consorting provisions as ‘a means to inhibit and deter attempts to recruit new members’.¹¹¹ While control orders may impose any conditions that the court considers appropriate, many of the suggested possibilities in s 19(2) target consorting-type activity.¹¹² Mr Stewart’s concerns about the viability and resource-intensiveness of monitoring control orders are echoed by academics.¹¹³

Concerns about policing control orders become particularly acute in a context in which doubt has been expressed about the likelihood of their observance. There is logical force to this view. Given the evidence that certain OMCG members do not comply with laws concerning violence, illicit drugs, weapons or transport (despite the penalties for such offences), it is a real question whether they can be expected to comply with control orders even though there are penalties for breaching them.¹¹⁴

In 2008 the CMC (now, the CCC) noted that ‘historically, the policing of anti-consorting style laws has been associated with significant police corruption’.¹¹⁵ The notorious Licensing Branch, which policed consorting laws in the 1970s and 1980s, was cited. These concerns were shared by the Bar Association (BAQ) and Law Society (QLS).¹¹⁶ They were repeated in 2011 when the BAQ and QLS, identifying the Act’s control order regime as a form of anti-consorting law, described it as ‘an open invitation to the corruption of police’.¹¹⁷ In other words, the primary means of disrupting serious criminal activity (control orders) could, it was feared, itself *lead* to serious criminal activity (corruption). The Bar Association maintained this concern in its submission to this review.

¹¹⁰ Evidence to the Joint Committee on the Australian Crime Commission, Parliament of Australia, Brisbane, 7 November 2008, 20-1 (Ian Stewart, Deputy Commissioner, QPS).

¹¹¹ *Ibid.*

¹¹² For example, s 19(2)(g) suggests for control orders a term proscribing being in the vicinity of a stated place. Section 19(2)(a), (b) and (f) suggest proscribing association with particular persons. Under sch 2, association includes communication (including by electronic means).

¹¹³ See, eg, Ayling, ‘Pre-emptive Strike’, above n 40, 262.

¹¹⁴ See, eg, Nicola McGarrity, ‘From Terrorism to Bikies: Control orders in Australia’ (2012) 37 *Alternative Law Journal* 166, 169.

¹¹⁵ Crime and Misconduct Commission, Submission No 6 to Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, May 2008, 8.

¹¹⁶ QLS and BAQ, Submission on Criminal Organisation Bill 2009, above n 39, 1, 6-8.

¹¹⁷ QLS and BAQ, Submission on Criminal Organisation Amendment Bill 2011, above n 41, 9.

The QPS indicated that criminal intelligence again emerges to present difficulties at this stage of the Act's operation. The conditions imposed by control orders always carry the possibility of revealing the underlying intelligence basis which informs those conditions. Prohibitions on associating with particular individuals or being in particular places, for example, indicate that police know that the respondent associates with those persons or frequents those places for the purpose of criminal activity. If the number of people privy to that information about a respondent is relatively small, the nature of the control order will alert the respondent to the existence of an informant and may carry a serious risk of the latter being exposed or subjected to reprisal. Either the use of the intelligence or the conditions of the order must be tempered in order to alleviate that risk, and the utility of one or the other is reduced commensurately.

While the Finks application was on foot the QPS anticipated some utility in the control orders which might be obtained. It had developed detailed action plans including the sorts of additional prohibitions which it hoped to include in these orders, such as proscriptions on the wearing of OMCG 'colours' and presence at clubhouses. Insofar as criminal activity may feed off those activities and other behaviour targeted by control orders (such as physical association with other particular persons, possession of weapons or work in particular industries like security), it is clear that they would possess some utility in disrupting and restricting criminal activity as well as enhancing community safety. They would be particularly apt where criminal activity depends on intimidation and violence, as it is alleged to do with some OMCG members.

QPS readily acknowledges that control orders are resource-intensive and costly to police and enforce. But in the Finks application it was prepared, in light of the benefit in terms of disruptive effect, to make that investment even to the extent of undertaking round-the-clock monitoring of particular individuals' compliance. What proved unsustainable under COA, however, was the investment necessary to reach the stage of control orders – three rounds of complex litigation extending over years. As a matter of practical common sense and statutory obligation, the QPS is mindful of both a logistical and a financial cost-benefit analysis of the operations it undertakes.¹¹⁸ As the Finks proceeding dragged on and the costs mounted, control orders came to loom as a prize not worth the fight.

Police continue to see a role for control orders if they can be obtained more efficiently. In consultation for this review, officers expressed the view that orders requiring drug testing or the wearing of monitoring devices could, in appropriate circumstances, play a role in their preventative strategies targeting organised crime.

This insight brings to mind the control order-type regimes and conditions which operate in the context of parole and certain types of sexual offending. It may be that the disruptive and preventative utility of control orders coalesces with the resourcing concerns which arise under COA to suggest a similar post-conviction mechanism for the imposition of appropriate conditions.

Restrictions imposed on this basis would, so far as is possible, answer the concerns of those who see control orders as redolent of outdated (or potentially dangerous) consorting-type laws. It would also situate control orders as an adjunct to the established criminal process, which is arguably their more appropriate and effective use. They will never be as disruptive or restrictive as the penalties obtainable upon a criminal conviction, yet it seems no exaggeration to observe

¹¹⁸ As to the financial aspect, see the *Financial Accountability Act 2009* (Qld) s 61.

that the three-stage procedure for obtaining them under COA is more exhaustive and demanding than a criminal trial, despite COA's lower standard of proof.

The more proportionate and efficient structuring of these disruptive measures would appear to be to have control orders enlivened simply by the traditional, albeit demanding, process of obtaining a criminal conviction.

4.4.2 Public Safety Orders

The Commissioner may apply for a public safety order, and the respondent may file a response (ss 31-32). Only the Commissioner may apply to vary or revoke an order (s 36). The court may make the order if satisfied that the 'prescribed grounds' exist (s 33). Those grounds are outlined in s 28(1):

- (a) the presence of the respondent at premises or an event, or within an area, poses a serious risk to public safety or security; and
- (b) making the order is appropriate in the circumstances.

In considering these criteria the court must have regard to (s 28(2)):

- (a) the respondent's criminal history and any previous behaviour of the respondent that posed a serious risk to public safety or security;
- (b) whether the respondent: (i) is or has been a member of a CO; (ii) is or has been subject to a control order; or (iii) associates or has associated with a member of a CO or a person who has been subject to a control order;
- (c) if advocacy, protest, dissent or industrial action is the likely reason for the respondent being present at the relevant premises or area – the public interest in maintaining freedom to participate in those activities;
- (d) whether the degree of risk involved justifies imposing the conditions in the order, having particular regard to any legitimate reasons that the respondent may have for being present at the event or area;
- (e) the extent to which making the order will reduce the risk to public safety or security or effective traffic management; and
- (f) anything else relevant.

Importantly, public safety orders can be issued not only to individuals but to a 'group of persons' (s 28(1)). When the respondent is a group, the court is directed, when considering the criteria in s 28(1) and (2), to consider 'the extent to which members of the group, as opposed to every member of the group', satisfy the criteria (s 28(3)).

The conditions of an order may be whatever the court considers necessary having regard to the 'prescribed grounds' (s 29(1)). The Act in s 29(2) adverts to the following prohibitions as possible forms of order:

- (a) entering or remaining in stated premises;
- (b) attending or remaining at a stated event;
- (c) entering or remaining in a stated area; and
- (d) doing a stated thing in a stated area.

The order takes effect when made if the respondent is present, or upon service, which may be by public notice if the respondent is a group or personal service is not practicable (s 34(1) and (2)). The order remains in force until revoked or until the date stated in the order, which cannot be more than six months after the making of the order (s 34(3)).

Provision is also made for applications without notice if the Commissioner considers it necessary due to urgent circumstances (s 35(1) and (2)). The court may, before deciding the application, direct the Commissioner to provide notice (s 35(5)). An order made without notice only remains in force for 24 hours, and cannot be extended without an application in the normal manner (s 35(6) and (8)).

Knowing contravention of a public safety order is an offence punishable by one year imprisonment (s 38(1)). Police officers are granted powers to enter, search and detain for the purposes of serving and enforcing orders (s 37).

No public safety orders have been obtained under the Act, nor were any planned. Police expressed some scepticism of their utility in light of the demonstrated complexity and delay associated with operating under other parts of the Act. They are considered in Chapter 8 below in the context of their use in other jurisdictions with comparable laws.

4.4.3 Fortification Removal orders

The Commissioner may apply (s 41) for a fortification removal order, and the respondent may file a response (s 42). To make an order, the court must be satisfied of the following (s 43(1)):

- (a) the premises have a 'fortification';
- (b) the premises are being, are likely to be, or have been used in connection with a serious criminal offence, or to conceal evidence or keep the proceeds of such an offence; or are owned or habitually used by a criminal organisation or a member or associate thereof; and
- (c) the extent or nature of the fortification is excessive for any lawful use of that type of premises.

A 'fortification' is defined in s 39 as (in short) any structure or device designed to stop or hinder uninvited entry to premises.

If the court makes an order it must fix an inspection period during which police may (with reasonably necessary force) enter and re-enter the premises to monitor compliance with the order and search for other fortifications (s 44). Provision is made for ancillary orders regarding enforcement, to allow for account to be taken of any residential use of the premises, the neighbourhood of the premises and so on (s 45).

Police are granted powers to enforce an order by removing or modifying the fortification, which powers are subject to procedural requirements (ss 50-52). Those procedures also apply to inspections under s 44 (see s 44(3)). Fortifications that have been removed are forfeited to the State (s 54), and the State may recover any reasonable costs incurred in removing the order (s 55).

Section 56 makes it an offence to hinder enforcement action. Provision is made for State compensation to persons who are not responsible for the fortification but whose property is damaged by the removal of the fortification (s 57). Any compensation so payable may then be claimed from the respondent or other responsible person by the State (s 58).

Academic consultation with interstate police has indicated that, in the eyes of the latter, fortification orders lack utility as a means of disrupting OMCGs.¹¹⁹ This is confirmed by the analysis of other states' laws, discussed later.¹²⁰

4.5 The operation of COA's substantive provisions

Information provided by the QPS sheds light on the practical operation of a COA proceeding. At least seven specialist staff were devoted to the compilation of the Finks application, which, as already indicated, involved over 140 affidavits and 6600 pages of evidence. There were at least ten Supreme Court appearances before the proceedings were discontinued – either full hearing days or case management reviews.

That effort took the Finks application past the first (CI) stage but not as far as the second (a criminal organisation declaration), which was set down for a four week hearing which never eventuated.

The proceedings were on foot for two years, one month and ten days. Deducting the eight months taken up by the preparation and disposition of the High Court challenge, it means that eighteen months was insufficient to reach somewhere short of a CO hearing, which itself would have been of no substantive effect. The cost to the QPS in human resources alone is estimated to have been over \$1.9 million, a sum which does not include legal costs, operational costs or the costs of other staff who had to make *ad hoc* contributions to the Finks application by, for example, preparing their own affidavits.¹²¹

Even with persistent use of COA through to control orders, each stage of the process, with the inevitable delays that attend Supreme Court litigation, would expose once-current intelligence and evidence to the risk of growing stale.

Each CO declaration and control order targeting a particular group or individual would provide an opportunity for undeclared groups and uncontrolled persons to fill any resulting void, thus setting off another multi-year process of investigation and litigation. Shape shifting will always present the risk of further complexity and sometimes of outright escape. The Finks application process must, for the QPS, have been frustrating and ultimately dispiriting.

¹¹⁹ Andreas Schloenhardt, 'Battling the Bikies: South Australia's Serious and Organised Crime (Control) Bill 2007' (2008) 30 *Bulletin (Law Society of South Australia)* 8, fn 2.

¹²⁰ See Chapter 8.1 and 8.14.

¹²¹ Here it may be appropriate to recall that it took one investigative officer an estimated 50 hours to prepare one affidavit for the CI hearing (see Chapter 4.2.4).

Doubtless some of the time and resources expended can be attributed to the fact that this was unfamiliar litigation taking place under a new Act, but whatever efficiencies would be achieved through practice will not outweigh the fundamental disincentives to operating under COA.

The Act's multi-stage operation creates a complex and resource-intensive process out of all proportion to the benefits which can be obtained under it. It is incapable of timely and agile operation. In a world of finite police and court resources, it is impossible of use at the sort of volume and frequency which would be necessary to have an appreciable impact on criminal groups. It is unequal to the task of combating OMCGs and portends even less utility against non-traditional forms of organised crime. It cannot have had any deterrent effect on criminal groups operating in Queensland. It has not disrupted or restricted them. If organised crime presents challenges to traditional criminal processes, they are not challenges that COA is capable of meeting.

4.6 Corresponding orders and other features

Part 8 provides for the registration of corresponding orders, which are orders cognate with CO declarations and control orders that are made under interstate legislation. The definitions (see Sch 2) of 'corresponding order', 'corresponding control order' and 'corresponding declaration' envisage the relevant interstate laws being identified by regulation, but no such regulation has been made.

The registration of orders is primarily the responsibility of the Supreme Court Registrar. Information obtained from the registry indicates that no action has been taken under the Act's corresponding order regime.

Other obligations are imposed on the registry by the CI provisions, which in ss 65 and 77 require the Registrar to secure and heavily restrict access to CI. In order to comply with these obligations, Queensland Courts Services developed a suite of procedures in anticipation of receiving applications for (1) the listing of COA matters; (2) the declaration of CI; (3) the registration of corresponding orders; and (4) the searching and copying of COA files. These measures were necessary to ensure that only identified, senior registry staff would manage all dealings with material filed under the Act.

The measures were developed in consultation with the QPS. The protocols which were developed to guide registry staff and ensure compliance with the Act run to 25 pages of detailed instructions.

Consultation with the registry made it apparent that COA presents a challenge of resource intensive case management for it and its staff. The need to quarantine CI-related material from the substantive court file requires designated officers to consider carefully all file material in order not to release or leave insecure CI material inadvertently. In the only application to date, the volume of material meant that this was a laborious undertaking. Special measures also have to be taken in the event of appeals that require the physical movement of court files.

The burden that CI places upon the registry is a serious one, and there is a concern that it could not be sustained in the face of an increase in the use of criminal intelligence. If a CI regime is to

be continued, the capacity of the registry to store and secure confidential material will have to be enhanced. It appears that, at current resourcing levels, any significant use of CI will risk compromising the very confidentiality that the Act seeks to protect.

4.7 Accountability mechanisms

4.7.1 The COPIM

The Act creates a Criminal Organisation Public Interest Monitor (COPIM). The then Attorney-General described the COPIM's position as being 'akin to the role of an *amicus curiae* or friend of the court'.¹²²

The Attorney said that the COPIM was 'essential' in the functioning of the criminal intelligence regime introduced by the Act. This is for at least two reasons. First, the COPIM figures as one of the Act's 'significant safeguards' in balancing the desirable confidentiality of CI against the undesirability of 'any abrogation of democratic principles and procedural fairness'. Second, the COPIM plays an important part in promoting the rigour and veracity of criminal intelligence by 'assist[ing] the court in testing the appropriateness and validity of applications'.¹²³ In other words, it was envisaged that the COPIM would answer to both the evidentiary and the procedural pitfalls associated with criminal intelligence.

These aims are to be realised by the COPIM exercising the following statutory functions (s 86):

- (a) monitoring each application for the making, variation or revocation of a criminal organisation order;
- (b) monitoring each criminal intelligence application; and
- (c) testing and making submissions to the court about the appropriateness and validity of each monitored application.

Provision is made for another monitor to deputise for the COPIM if the latter is unavailable to perform his/her functions (s 87). Resort has been had to these provisions at least once since the Act was introduced. Under s 92 the COPIM is obliged to issue an annual report on the performance of his/her functions.

While s 86 refers only to the COPIM testing and making submissions about a 'monitored application' — meaning an application for either the declaration of criminal intelligence or of a criminal organisation — the following should be noted. The COPIM must be given all material provided by the Commissioner to the court for 'an application at which the COPIM appears' (s 88(1)). The COPIM is entitled to receive the application and supporting material not only for 'monitored applications' mentioned in s 86 but also for applications that s/he is not expressly

¹²² Queensland, *Parliamentary Debates*, Legislative Assembly, 29 October 2009, 3031 (Cameron Dick, Attorney-General).

¹²³ *Ibid.*

monitoring: for control orders (s 16(5)), for public safety orders (s 31(6)), and for fortification removal orders (s 41(6)).

Not only is the COPIM entitled to appear at *any* hearing – ie hearings for ‘monitored applications’ as well as any other applications (see s 108(5)) – any hearing *cannot proceed* in the absence of the COPIM unless the court decides otherwise (s 108(3)). This right of audience is not limited to the special closed hearings and applications in which criminal intelligence is being utilised (which is material to which the COPIM would be uniquely privy compared to the respondent). And at *any* hearing at which the COPIM appears, s/he is entitled to test the appropriateness and validity of the application by questioning the Commissioner, examining or cross-examining witnesses, and making submissions to the court (s 89).

It appears, then, that the COPIM’s monitoring and testing of applications is not limited to those applications mentioned in s 86. Given that no substantive applications under the Act have progressed to a full hearing, no occasion has arisen for testing this interpretation or exercising any power under it. But it stands to reason that if CI can be utilised when seeking any substantive orders (s 75), the COPIM ought to have a right to participate in those proceedings notwithstanding that they are not mentioned among the COPIM’s functions in s 86. The COPIM may not, however, make submissions when the respondent or its legal representatives are present before the court (s 89(3)). Indeed, the court has the discretion to exclude the COPIM from a hearing while the respondent or its representatives are present (s 89(4)).

In the exercise of the COPIM’s powers, two further matters are worthy of note. First, the COPIM’s role will assume most significance in those hearings at which criminal intelligence is being considered or deployed. In particular, it is at the taking of the step to declare information to be criminal intelligence that the COPIM’s testing of evidence and making of submissions will be of most consequence. In taking this step the court must consider whether the allowance of the evidence so as not to prejudice criminal investigations, enable the discovery of sources of information or endanger anyone’s safety is outweighed by any ‘unfairness to a respondent’ (s 72(2)).

Given, however, that the application for a declaration of criminal intelligence operates as an independent first step prior to any substantive application, the relevant ‘respondent’ who may suffer unfairness is potentially impossible to identify. Accordingly, the ability of the COPIM to identify, and make submissions about, any relevant unfairness is significantly constrained. This was noted by the High Court in *Pompano*.¹²⁴ As Gageler J pointed out, it means that the judgment as to unfairness operates in something of a vacuum, such that ‘the assessment of unfairness has to be made as a prediction’.¹²⁵ The High Court emphasised that the criterion of (un)fairness is always a practical one brought to bear in particular real circumstances; yet, in the

¹²⁴ (2013) 252 CLR 38, 75 [76] (French CJ), 86 [112], 101 [162] (Hayne, Crennan, Kiefel and Bell JJ), 113 [205] (Gageler J).

¹²⁵ *Ibid* 113 [205].

absence of an identified respondent, it is a criterion that falls to be applied, as French CJ pointed out, hypothetically (at least to some extent).¹²⁶

It must be borne in mind that this takes place in an *ex parte* hearing, in which the ordinary rules of procedure impose upon the Commissioner a duty of full disclosure.¹²⁷ That is to say that the Commissioner must, with the utmost good faith, do his best to supply the place of the absent party or parties, and must bring to the notice of the court all facts material to the determination of the question.¹²⁸ The operation of this principle in the context of the task set by s 72(2) would seem to require that the Commissioner disclose to the court all of those persons who are contemplated as respondents for applications for substantive orders in which the CI might be used. To this extent, the hypothetical nature of the exercise is to be minimised, and the COPIM given the maximum possible opportunity to make meaningful, (because concrete) submissions about unfairness to each identified individual.

The second and somewhat related question which arises concerns the extent of the COPIM's interaction with a respondent or potential respondent in the discharge of his/her functions. As all members of the High Court in *Pompano* observed, the COPIM does not 'stand in the shoes' of any identified or potential respondent.¹²⁹ The Minister, it will be recalled, described the COPIM's function as similar to an *amicus curiae*.

This leaves uncertain the duty or opportunity for the COPIM, in the course of discharging his/her functions, to seek or obtain information from a (potential) respondent. Express provision is made for such communications with a respondent in Victoria, where the court-appointed 'Special Counsel' is expressly charged with representing the interests of the identified respondent in any application.¹³⁰ According to the joint judgment in *Pompano*, the Queensland Act 'provides no foundation for treating the COPIM's task as extending so far' as 'seek[ing] or obtain[ing] any instructions about the matters the subject of the criminal intelligence application'.¹³¹ The Chief Justice, however, noted (apparently not without suggestion) that '[t]here is no express prohibition upon communication between the respondent's legal representative and the COPIM to better inform the COPIM for the purpose of the discharge of his or her functions'.¹³²

So far as applications for the declaration of CI are concerned, the express exclusion of notice of the application to anyone other than the COPIM (s 66) clearly indicates that the COPIM cannot

¹²⁶ Ibid 75 [76] (French CJ), 99 [156] (Hayne, Crennan, Kiefel and Bell JJ), 108 [188] (Gageler J) (quoting Gleeson CJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 14 [37]).

¹²⁷ Adverted to in *Pompano* (2013) 252 CLR 38, 61 [43] (French CJ), for example.

¹²⁸ See *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679, 681-2. French CJ adverts to this authority in *Pompano* (2013) 252 CLR 38, 61 [43], fn 77.

¹²⁹ See *Pompano* (2013) 252 CLR 38, 65-66 [54], 75 [77] (French CJ), 86 [112] (Hayne, Crennan, Kiefel and Bell JJ), 114 [208] (Gageler J).

¹³⁰ See *Criminal Organisations Control Act 2012* (Vic) ss 71, 79.

¹³¹ See *Pompano* (2013) 252 CLR 38, 86 [112], where Hayne, Crennan, Kiefel and Bell JJ note that nor was any submission made to this effect.

¹³² Ibid 65 [52].

communicate with any other person in the discharge of his/her functions at that stage.¹³³ With regard to substantive applications, however, the Act's express retention of the usual rules and processes of litigation unless they are inconsistent with the Act (s 101) provides support for the view that, in the absence of any express or necessarily implied proscription on the COPIM liaising with a respondent or its representatives, the COPIM is at liberty to obtain whatever assistance s/he can from information provided by a respondent or its representatives in a substantive application. Of course, the prohibition on the COPIM (or anyone else) disclosing any criminal intelligence continues at all times.

Information from a respondent might provide valuable assistance in the COPIM's testing of evidence (including declared CI) and the COPIM's making of submissions when a substantive application resorts to a special closed hearing to consider declared CI. Indeed, it might be wondered how the COPIM could possibly otherwise obtain the sort of information that may assist in testing and making submissions about substantive applications. That role might be rendered quite illusory if the COPIM is limited to the material that police themselves disclose to him/her.

The general law imposes no limit on *amici curiae* with respect to their interaction with other parties. This analogy drawn by the Minister, as well as his reference to the COPIM serving to provide some balancing of the procedural unfairness created by the CI provisions, militate in favour of the COPIM being able to confer with identified respondents for the better discharge of the COPIM's functions. Given that the joint reasons were limited to communication between the COPIM and a (potential) respondent in a criminal intelligence application, this seems to be both an open interpretation of the COPIM's functions, and the preferable one.

4.7.2 Effectiveness of the COPIM

In *Pompano* the Chief Justice described the COPIM provisions as adopting a 'fairly minimalist' approach to the protection of a respondent's interests.¹³⁴ Given that a respondent's interests coincide with the evidentiary and procedural safeguarding outlined above, that observation applies to the overall impact which a COPIM is able to have in testing and making submissions about the evidence proffered in applications made under the Act.

I have had the considerable advantage of consultation with both of the COPIMs who have been appointed since the Act commenced. In substance they agree with each other and with the Chief Justice in their observations on the effect that a COPIM is able to have on proceedings.

As the current COPIM (Mr Michael Halliday, 2013-present) highlighted, the COPIM, like the judge him- or herself, is denied any material that may disclose identifying information about an informant (s 88(2)). Given that informants may not appear or be questioned in CI hearings, this makes it impossible for the COPIM to engage in any meaningful testing of, or any meaningful submission about informant evidence. Without knowing who an informant is, and with the

¹³³ On one reading, the observations in the joint reasons and the reasons of French CJ are consistent insofar as the former are limited to a 'criminal intelligence application'. However, in support of its view, the joint judgment cited the broader provisions dealing with the COPIM's functions in ss 86, 89 and 90. It is the clear requirement for an *ex parte* hearing in s 66, however, that surely provides the conclusive foundation for this view with regard to criminal intelligence applications.

¹³⁴ *Pompano* (2013) 252 CLR 38, 70 [65].

diluted disclosures that are contained in an informant affidavit, it is impossible even to make abstract submissions as to the credit of an informant. Mr Halliday observed that these restrictions may prevent the COPIM from properly and thoroughly monitoring and testing the appropriateness and validity of the relevant application.

An example may illustrate the problem to which Mr Halliday refers. Amendments introduced in 2011 to dilute the information disclosed in an informant affidavit enable, for example, both the dating and the description of an informant's criminal record to be in very vague terms. A hypothetical comparison of two informants might be drawn. One was convicted of defrauding an employer (s 408C of the *Criminal Code*) seven years ago, when aged 18. The other was convicted of perjury last year, the particulars of the offence being that the informant gave false evidence in a trial or investigation concerning the X Motorcycle Club. Under the amendments (reflected in the Act as it currently stands), both such informants could have their criminal records disclosed as follows: 'For the period 2009-2015, one offence involving dishonesty'.¹³⁵ Yet, in an application regarding the X Motorcycle Club, the second informant's evidence warrants much more careful consideration, and much less weight, than the first informant's. Fuller disclosure of the criminal record would clearly result in the COPIM's testing of and submissions about the evidence resulting in a greater, and entirely proper caution about the informant's testimony.

The first COPIM (2010-2013), Mr Robert Needham, had the advantage of appearing at the only CI hearings which have occurred — the application for a CI declaration in the Finks application. His experience was that it is 'impossible' for the COPIM to contest any factual matters — the limited disclosures which are made, and the fact that all material presented to the court is controlled by the Commissioner, provide no basis for the testing or contradiction of CI. He expressed concern at the level of unfairness that remained inherent in the process and, in light of this, at the possibility that the accountability that the COPIM brings to the process might be more apparent than real. Mr Halliday's hypothetical doubt was borne out by Mr Needham's experience — no piece of information was excluded from the CI declaration in the Finks application as a result of any challenge, objection or submission from the COPIM (although, as discussed later, his efforts did result in some parts of the CI material that was initially notified being withdrawn, or not proceeded with).

These observations draw attention to the dilemma confronting the COPIM. Insofar as s/he is intended to test evidence, s/he is prevented from engaging with the credit of informants, let alone the substance of their information. Even with non-informant evidence, it appears impossible for a COPIM meaningfully to test the allegations made. Barring personal acquaintance with the persons or activities concerned (a position that may safely be assumed), the COPIM will have no basis upon which to test or controvert any assertions made in an application.¹³⁶

¹³⁵ See the example provided in COA following s 64(7).

¹³⁶ Patent contradiction on the face of the material, or unusually self-discrediting evidence or behaviour by a witness, would be other (and rare) circumstances in which the applicant's own material might be discounted, but these would be inherent defects that are plain to the judge and would not require a COPIM to bring them out: for an example (obvious and self-defeating exaggeration by a witness), see *Videski v Australian Iron and Steel Pty Ltd* (Unreported, New South Wales Court of Appeal, Kirby P, Meagher and Cripps JJA, 17 June 1993; sometimes cited but not readily available as [1993] NSWCA 282).

The only source of information which might be used so to test or controvert the Commissioner's case is the respondent. Such information will, of course, never be available to the COPIM. Respondents are prevented from knowing that a CI application even exists. And, when they know that CI does exist — by the time of a substantive application — the COPIM is prohibited from disclosing any of it to them, even when such disclosure is essential for the most basic fulfilment of the COPIM's statutory tasks.

What contribution, in these circumstances, can the COPIM meaningfully make to balance the procedural unfairness operating against a respondent? The proscription of any (or any significant) communication between the COPIM and the respondent renders the COPIM's presence at CI-related hearings, on its face, a rather empty gesture. The unfairness lies in the absence of respondents from the hearing and the inability of respondents to know and test the evidence being led against them. Given the constraints under which the COPIM operates, that unfairness is not mollified by his/her presence at the hearing. As a matter of practice, the basis on which the COPIM might test or make submissions about the Commissioner's application is limited to material that the Commissioner himself provides.

The practical influence of the COPIM therefore operates, at its highest, in an informal and non-specific way. Mr Needham liaised with police and their counsel in advance of hearings, and some material was withdrawn or recast as a result. Beyond that, very much in the *amicus* manner, he assisted the court in coming to grips with the sheer volume and complexity of the CI. In Mr Needham's view, it would be impossible for a single judge to survey, scrutinise and understand such material without the assistance of someone else. In this respect, he saw the COPIM as much more of an aid or comfort to the judge than to a respondent.

Doubtless the diligent and conscientious work of the applicant's counsel, who is under a duty to render such assistance to the court in an *ex parte* hearing, also serves this purpose. But the COPIM might be seen as rendering a distinct service to the administration of justice by providing a 'fresh set of eyes' and the only point of view that is not the applicant's in a CI-related hearing.

In this light the Chief Justice's reference to the minimalism of the COPIM model takes on an additional significance. The practical functioning outlined above coalesces with the formal minimalism of the role to leave a wide scope for variation in the COPIM's activity and contribution. This variation will be supplied by the personal qualities of whoever occupies the position. Mr Needham confirmed an observation made by the Queensland Council of Civil Liberties (QCCL) prior to the Act's introduction, namely that 'the role of COPIM and its effectiveness at any given time will depend on the character and make up of the individual who is the COPIM'.¹³⁷

On the *amicus* model which informed the COPIM provisions, this seems an inescapable consequence; but it might be doubted whether it is satisfactory for such important statutory purposes as those which COA entrusts to the COPIM to be subject to the idiosyncrasies and discretions of an individual personality. In any event, the scope for individuality granted to

¹³⁷ Queensland Council for Civil Liberties (QCCL), Submission to Department of Justice and Attorney-General (Qld), Consultation Draft of Criminal Organisation Bill, 22 October 2009, 17.

whoever fills the COPIM role underscores the importance of the recruitment provisions considered below.¹³⁸

Finally, it is to be noted that s 87(2) requires the consent of the court *and of the Commissioner* for a person to act as a substitute COPIM. Given that it is the substitute COPIM's role to test the Commissioner's own application, to grant the latter a power of veto over the former compromises the integrity of the substitute's position. Indeed, it risks exacerbating the very procedural unfairness which the COPIM is meant to ameliorate by fostering a possible apprehension of bias. The Commissioner, quite rightly, has no role in the appointment of a COPIM and there is no reason why this should be any different in the event that someone has to deputise for the COPIM. It should be recorded that when this power fell to be exercised at one point during the Finks application, the Assistant Commissioner acted as a generous and model litigant.

4.7.3 Alternatives to the COPIM model

A substantial body of commentary on the Act and similar provisions elsewhere has drawn on comparisons with other approaches to secret evidence. These comparisons frequently lead those who make them to criticise COA for taking an unnecessarily narrow (one might, following the Chief Justice, use the term 'minimalist') approach to providing for measures that counteract the serious unfairness worked by criminal intelligence.

The COPIM model is very much seen as a second best approach for two main reasons. First, the COPIM does not in any sense 'represent' the respondent in CI-related hearings. Given that s/he serves instead in the nature of an *amicus curiae*, the contribution to compensating for the absence of the respondent is negligible. If the unfairness lies in the lack of *adversarial* challenge by someone representing the interests of the respondent, then to provide for the possibility of challenge by a figure who expressly does *not* represent the interests of the respondent is hardly to the point.

Second, even taking the role of the COPIM as we find it, there is an inadequate basis for testing the Commissioner's evidence in light of the comprehensive restrictions that operate on criminal intelligence – the allowance of hearsay, the anonymity of informants and the inability to cross-examine them, the diluted disclosures made about their criminal and other history; and, of course, chiefly the absolute prohibition on the respondent knowing anything of the criminal intelligence in any event. Here the emphasis lies on the inability to mount a meaningful *adversarial challenge* to secret evidence. The person who is present (the COPIM) gets to know whatever material is adduced, but lacks the knowledge of any basis on which it might be tested or contextualised. The person with that knowledge (the respondent) is not able to be present, and the COPIM is not permitted to disclose the CI to the respondent in order to obtain instructions on how to challenge it.

These two problems have, in some jurisdictions, led to variations on the COA procedure. Those variations, well-canvassed in the academic literature, were urged upon the review by a significant body of stakeholders.¹³⁹ The first of them is to enhance the adversarial element of proceedings

¹³⁸ See 4.7.6.

¹³⁹ Professor Anthony Gray, Dr Greg Martin, the Queensland Council for Civil Liberties, the Law and Justice Institute (Qld) and the United Motorcycle Council (Qld) all expressed support for one or both of 'gisting' and special counsel.

by providing for a 'special counsel' instead of a COPIM. Unlike the latter, a special counsel does not act as an *amicus* but is charged with representing the absent party and advocating on its behalf. The second response is to provide for a greater possibility of challenge to secret evidence by requiring some measure of disclosure to the respondent. This procedure has become known as 'gisting'.

The UK House of Lords, under the influence of the European Court of Human Rights (ECtHR), explained gisting in *Home Secretary v AF [No 3]*.¹⁴⁰ The case involved legislation permitting the imposition of control orders on terrorism suspects on the basis of secret evidence. A special advocate could be appointed to represent the controlled person in closed hearings and could communicate with him/her. Once the special advocate had been served with the secret evidence, though, s/he was no longer permitted to communicate with the controlee except by leave of the court.

It was held that the requirement for a fair trial found in Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (in conjunction with the *Human Rights Act 1998* (UK)) required that in all cases the controlled person be informed of the 'gist' of the case against him/her.

[T]he controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.¹⁴¹

In other words, there must be disclosure of the 'essence' of the case against the respondent.¹⁴² Gisting has been described as 'a lesson for Australia' and has often been pointed to by those who are critical of the secrecy of COA-type provisions for criminal intelligence.¹⁴³ Stakeholders consulted for this review saw it as a means to mitigate the unfairness worked by secret evidence and as a salute to rights and principles that are well established in our law.

Consideration of gisting as an addition to COA must proceed on the basis of a clear understanding of what the Act requires at present by way of disclosure. The legislation considered in *AF* laid down none of the sorts of requirements that exist for a COA application. It empowered the Home Secretary to impose a control order if s/he had 'reasonable grounds' for 'suspecting' that the respondent was or had been involved in 'terrorism-related activity', and if

¹⁴⁰ [2010] 2 AC 269. The ECtHR, in turn, was influenced by a Canadian procedure for special immigration cases: see *Chahal v United Kingdom* (1996) 23 EHRR 413, 469 [131], 472 [144].

¹⁴¹ *Home Secretary v AF [No 3]* [2010] 2 AC 269, 354 [59] (Lord Phillips).

¹⁴² *Ibid* 356 [65] (Lord Phillips).

¹⁴³ Megan Caristo, 'Secretary of State for the Home Department v AF: a lesson for Australia' (2010) 32 *Sydney Law Review* 693; Greg Martin, 'Outlaw Motorcycle Gangs and Secret Evidence', above n 50, 509-18; Council of Australian Governments (COAG), *Review of Counter-Terrorism Legislation* (2013) 59-60; Steven Churches and Sue Milne, 'Kable, K-Generation, Kirk and Totani: Validation of criminal intelligence at the expense of natural justice in Ch III courts' (2010) 18 *Australian Journal of Administrative Law* 29, 41.

s/he considered the order necessary to protect the public.¹⁴⁴ The Home Secretary could only make the order if s/he had obtained permission of the court.¹⁴⁵ Provided the Home Secretary's grounds were not 'obviously flawed', the court could grant such permission.¹⁴⁶ The applicable rules of court required the Home Secretary to file 'a statement of reasons to support the application'.¹⁴⁷

One of the applications considered in *AF* consisted of the following statement by the Home Secretary:

- (a) I have reasonable grounds for suspecting that you are or you have been involved in terrorism-related activity; and
- (b) I consider it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to impose certain obligations upon you in order to prevent or restrict your further involvement in terrorism-related activity.¹⁴⁸

The reasons offered in support of the application appear to have consisted of the following statement:

I believe that you are involved in providing support for the Jihadist insurgency in Iraq, and in radicalising individuals in the UK. I also believe you have received terrorist training and have taken part in terrorist activities.¹⁴⁹

In another case, the 'open statement' simply described how the respondent had been prevented from boarding flights to the Middle East. In the words of the Court of Appeal:

The explanations that he had given for his proposed travel had not been convincing. His passport had been confiscated. This, of itself, fell far short of demonstrating an intention to join the terrorists fighting in Iraq. The open statement asserted that MB was an Islamic extremist and that the Security Service considered that he was involved in terrorism-related activities as defined in section 1(8) of the *PTA*. No details were given of this assertion....

It is plain that the justification for the obligations imposed on MB lay in the closed material.¹⁵⁰

The full statement of reasons provided to the respondent (MB) appeared to amount to 10 paragraphs that narrated information that MB already knew — his dealings with police at the airport, and a visit by police to his mother. The only justificatory, as opposed to descriptive, statements were the following crucial assertions: 'The Security Service is confident that prior to the authorities preventing his travel, MB intended to go to Iraq to fight against coalition forces.... The Security Service considers that it is necessary [to impose the order]'.¹⁵¹ In another matter,

¹⁴⁴ *Prevention of Terrorism Act 2005* (UK) c 2, s 2(1). The Act was repealed in December 2011 and replaced by the *Terrorism Prevention and Investigation Measures Act 2011* (UK) c 23.

¹⁴⁵ *Ibid* s 3(1)(a).

¹⁴⁶ *Ibid* s 3(2)(a) and (b).

¹⁴⁷ *Civil Procedure Rules 1998* (UK) r 76.8.

¹⁴⁸ *Secretary of State for the Home Department v AE* [2008] EWHC 132 (Admin) (1 February 2008) [8]-[9].

¹⁴⁹ *Ibid*.

¹⁵⁰ *Secretary of State for the Home Department v MB* [2007] QB 415, 431 [24], 432 [27].

¹⁵¹ *Re MB* [2006] EWHC 1000 (Admin) (12 April 2006) [20].

the disclosed case against a respondent amounted to ‘the bare assessment of the Security Service that [he] posed an imminent risk of absconding’.¹⁵²

It appears, therefore, that gisting was developed in a context in which a respondent could be told almost nothing meaningful about the basis for the application against him/her.

The perfunctory nature of this disclosure is to be compared (perhaps flatteringly) to the requirements laid down for a COA application.¹⁵³ In seeking to satisfy the criteria for a COA order, the Commissioner’s application must, *inter alia*, state both the grounds on which the declaration is sought and the information supporting those grounds (ss 8(2)(c), (d), and 16(2)(c), (d)). For both criminal organisation declarations and control orders, the grounds and the information must be oriented toward establishing engagement of persons in serious criminal activity and association of persons for the purpose of engaging in such activity.

As the High Court explained in *Pompano*, these are not routine tests or cursory requirements. The joint judgment, which considered them thoroughly, explained that they require the Commissioner to lay out the whole of the case against the respondent, and to identify in detail the information that is being relied upon to satisfy the statutory criteria.¹⁵⁴ Because those criteria include an allegation of serious criminal activity, the Commissioner will have to provide detailed particulars of that activity (including the identification of specific offences) and of the individuals who were alleged to have engaged in it, or associated, for that purpose.¹⁵⁵ The application served on the Finks consisted of about 100 pages outlining the case against them. As the joint judgment in *Pompano* emphasised, the respondent to COA proceedings will know in detail *what* allegations are being made against it. The criminal intelligence provisions will deny the respondent knowledge of *how* that case is being made insofar as it is founded on secret evidence.

This distinction between ‘what’ and ‘how’ appears to play a substantial role in gisting. Under that test the respondent must be told enough about the allegations against him/her to enable effective instructions to be given in relation to those allegations. Under COA, the respondent ought to receive more than a gist of the case against it; the Act requires that the detailed case be presented in full. The critical point at which a ‘gisting’ trial becomes unfair is when the case disclosed against the respondent is one of mere *general* assertions *and* where the case is based to a decisive degree on secret evidence. *Pompano*’s repeated injunctions for detail appear to obviate the first possibility. And, if the discussion above (at 4.2.3) is correct, *Pompano*’s emphasis that COA leaves intact the court’s ability to regulate the overall fairness of proceedings means that a case based decisively on secret evidence will in many, perhaps even all, cases tip over into unfairness.

It is not clear, therefore, what scope there would be for ‘introducing’ gisting into COA proceedings. The High Court seems to have indicated that in practice it is already there. It is difficult, perhaps impossible, to conceive of a case in which the requirements of COA and

¹⁵² *BM v Secretary of State for the Home Department* [2010] 1 All ER 847, 854 [14]; see also 852 [10].

¹⁵³ ‘The case for the Control Order in open is very short’: *Secretary of State for the Home Department v AF* [2007] EWHC 651 (Admin) (30 March 2007) [11]; cf *Pompano* (2013) 252 CLR 38, 48 [10] (French CJ): ‘Information supporting the grounds of the application was set out at length’.

¹⁵⁴ *Pompano* (2013) 252 CLR 38, 83-4 [103] (Hayne, Crennan, Kiefel and Bell JJ).

¹⁵⁵ *Ibid* 85 [108], 100 [158], 101-2 [163]-[164] (Hayne, Crennan, Kiefel and Bell JJ).

Pompano would be satisfied but those of *AF* would not, though the unexplored limits of the former's requirement for procedural fairness makes it impossible to be certain. The Act's requirements (including the proscription on disclosing any CI), and the High Court's explication of them, do lay down clear lines that gisting avoids, and in this respect the latter *may* allow in some circumstances for an element of secret evidence to be disclosed.¹⁵⁶ It is perhaps this sort of scenario that French CJ had in mind when he adverted to the possibility of a legislative relaxation of COA's prohibition on disclosing CI and granting instead a discretion to the Supreme Court to allow limited disclosure, at least to the respondent's legal representatives, in an appropriate case.¹⁵⁷

But the European decision on which British gisting rests, at least, countenances a scenario that would represent the very extreme of what could hypothetically arise under COA:

[E]ven where *all or most of the underlying evidence remained undisclosed*, if the allegations contained in the open material were sufficiently specific, it should [be] possible for the applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations.¹⁵⁸

Provided the 'what' appears in sufficient detail, gisting seems to permit of the 'how' consisting entirely of secret evidence.¹⁵⁹ According to the ECtHR and the UK gisting model, this would *amount* to procedural fairness. Under COA, this may amount to meeting the statutory requirements as to the form of an application, with the hearing of it still subject to an additional and overriding discretion to consider and use fairness as a basis for refusing to act on some secret evidence or staying proceedings completely.

AF's vaguer notion of the gist or essence of the case against a respondent may mean that in some (possibly many) cases the latter is provided with less information than the detailed particulars required by a COA application — one scholar has argued that gisting is 'all too easily hollowed out'.¹⁶⁰ The threshold of 'essence' or 'gist' might fall considerably short of *Pompano*'s 'detailed particulars' and 'the whole of the case which the Commissioner seeks to make'.¹⁶¹ Indeed, a committee of the UK parliament has described the post-*AF* gisting regime there as 'passive and minimalist', with 'headline allegations' only being disclosed.¹⁶² Overall, there does not appear to be a secure basis for concluding that gisting would provide a respondent with

¹⁵⁶ It might be noted, too, that in the statutory context of *AF* the relevant public interest that informs the extent of disclosure was national security. The scope for any similar discretion that may exist under the general law is drastically limited in the case of a criminal trial: *AF* [2010] 2 AC 269, 356 [65] (Lord Phillips); *R v Davis* [2008] AC 1128.

¹⁵⁷ *Pompano* (2013) 252 CLR 38, 78 [85].

¹⁵⁸ *A v United Kingdom* (2009) 49 EHRR 29, 720-1 [220] (emphasis added).

¹⁵⁹ See also *Home Secretary v MB* [2008] 1 AC 440, 492 [75] (Baroness Hale).

¹⁶⁰ Ryan Goss, 'Balancing away Article 6 in *Home Office v Tariq*: Fair trial rights in closed material proceedings' in Greg Martin, Rebecca Scott Bray and Miiko Kumar (eds), *Secrecy, Law and Society* (Routledge, 2015) 58, 59; see also Tulich, 'Adversarial Intelligence', above n 15, 362-3.

¹⁶¹ *Pompano* (2013) 252 CLR 38, 84 [103], 100 [158] (Hayne, Crennan, Kiefel and Bell JJ).

¹⁶² Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, House of Lords Paper No 64, House of Commons Paper No 395, Session 2009-10 (2010) 17-8.

greater knowledge of the case against it than is required by the Act as it stands. Gisting emerged in statutory contexts that mandated a radically lower (practically *no*) minimum of disclosure of the allegations against a respondent, and needs to be understood as a response to those contexts.

The case for importing it into the very different procedure laid down by COA is not made out. While one or the other regime may provide for a greater level of disclosed information in particular cases, the two models appear to be broadly comparable in their operation and in the outcomes they are likely to produce. If anything, COA might be seen as likely to result in a higher level of disclosure of the applicant's case more often than gisting.

The 'special counsel' or 'special advocate' procedures which often dovetail with gisting provide for a legal representative to be appointed to act for the respondent in secret evidence-related hearings.¹⁶³ Versions of this have existed in the UK and Canada, and even under the Victorian equivalent of COA. When the procedure is adopted in national security-related proceedings, eligibility to serve as a special advocate is gained by obtaining government security clearance. Under the *Criminal Organisations Control Act 2012* in Victoria, the special counsel is simply a barrister who, in the opinion of the court, has the appropriate skills and ability to represent the respondent.¹⁶⁴

While special counsel or advocates are privy to the secret evidence that is used in a proceeding, they are not, regardless of the existence or otherwise of a gisting requirement,¹⁶⁵ permitted to disclose to the respondent whatever material has been deemed secret. Sometimes they are not permitted to communicate with the respondent at all once they have seen the secret material.¹⁶⁶ In this respect, respondents remain in ignorance as to the evidence being used against them and have no way of arming their legal representatives with the knowledge that may allow for meaningful testing of that evidence. Those representatives, likewise, are in no better position than the COPIM is under the Act in respect of their ability to inform themselves for the purpose of testing the secret evidence.¹⁶⁷

¹⁶³ Support for the introduction of special counsel to COA-type proceedings is found in Greg Martin, above n 50, 509-18; COAG, *Review of Counter-Terrorism Legislation*, above n 143, 59-60; Gabrielle Appleby and John Williams, 'The anti-terror creep: Law and order, the States and the High Court of Australia in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 150, 157-8.

¹⁶⁴ *Criminal Organisations Control Act 2012* (Vic) ss 71(2), 79(2).

¹⁶⁵ There is no allowance for gisting under the Victorian scheme, for example.

¹⁶⁶ The UK model allowed a special advocate, after seeing secret evidence, to communicate with his/her 'client', the respondent, only with leave of the court: *Civil Procedure Rules* (UK) r 76.25(2) and (4).

¹⁶⁷ The problems hindering effective performance of special advocates' functions are comprehensively canvassed in: Martin Chamberlain, 'Special Advocates and Procedural Fairness in Closed Proceedings' (2009) 28 *Civil Justice Quarterly* 314; Martin Chamberlain, 'Update on Procedural Fairness in Closed Proceedings' (2009) 28 *Civil Justice Quarterly* 448; Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, House of Lords Paper No 64, House of Commons Paper No 395, Session 2009-10 (2010) 18-24; Adam Tomkins, 'National Security and the Due Process of Law' (2011) 64(1) *Current Legal Problems* 215; and Aileen Kavanough, 'Special Advocates, Control Orders and the Right to a Fair Trial' (2010) 73(5) *Modern Law Review* 824.

In this light, there is reason to doubt whether special counsel strengthen the adversarial element of proceedings involving secret evidence. An uninformed adversary looms as a rather artificial and hollow one. Moreover, if the unfairness lies in the non-disclosure of material to the respondent and his/her legal representatives, it is not clear why it is any fairer to disclose the material to persons who are not the legal representatives of the respondent, but who are commissioned as such by the very government or court that is seen as acting unfairly in the first place. The Canadian procedure endorsed by the ECtHR as a model sounds a lot like the COPIM: the respondent and its legal representatives are removed from the court, and ‘their place is taken by a security-cleared [ie government-vetted] counsel *instructed by the court*, who cross-examines the witnesses and generally *assists the court* to test the strength of the state’s case’.¹⁶⁸ So described, the special advocate takes on much of the guise of an *amicus* (or *vice versa*) – an aid to the court rather than the ‘client’.

Mr Needham, with first-hand experience of the knowledge constraints involved, considered the special counsel model to be fraught with tension. He also questioned whether it amounted to anything more than a merely apparent change that did nothing to alter the underlying reality. An element of (even perceived) window dressing would have undesirable consequences for the reputation of, and public trust in, the courts. It would also visit upon counsel an even greater conflict than that which attends the judicial role when secret evidence is utilised.

Legal representatives are charged with doing their utmost to advance the interests of their client. They are subject to fiduciary duties that include full disclosure to and communication with the client. As special counsel, however, their paramount duty to the court, as well as the secrecy mandated by legislation, would require them to maintain the confidentiality of all secret evidence. They are therefore placed in a position of invidious professional and ethical conflict. Evidently the American (and one Canadian) version of gisting raises this to an excruciating pitch, for the ‘gist’ is not overseen or laid down by the court. Rather, the special counsel is left to self-regulate.¹⁶⁹ The special counsel must adjudge where the line is to be drawn between the utmost disclosure of the ‘essence’ of the case against the respondent and a breach of the secrecy requirement (which may carry disciplinary, criminal or contempt penalties).

The pedigree of these debates has perhaps gone underappreciated. During the Troubles in Northern Ireland, Lord Diplock was charged with considering special legal measures to meet the unique and daunting challenges of terrorism and sectarian violence. One reform that was considered was a procedure for witness anonymity whereby an accused might be excluded temporarily from the courtroom. His or her legal representatives would still be present to hear the evidence, and they could take instructions from the accused for the purpose of cross-examination. But there would be a prohibition on the representatives disclosing the witness’s identity to the accused, either directly (if they knew it) or indirectly by reason of transmitting

¹⁶⁸ *Chahal v United Kingdom* (1996) 23 EHRR 413, 472 [144] (emphasis added).

¹⁶⁹ Kent Roach, ‘Secret Evidence and Its Alternatives’ in Aniceto Masferrer (ed), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer, 2012) 179, 186-8. The US does not deploy a *special* counsel system *per se*. Rather, the first-choice legal representatives themselves are security-cleared and trusted not to reveal confidential information to the client: Angus McCullough QC et al, Justice and Security Green Paper: Response to Consultation from Special Advocates (16 December 2011) 12; David Cole and Stephen I Vladeck, ‘Navigating the Shoals of Secrecy: A Comparative Analysis of the Use of Secret Evidence and “Cleared Counsel” in the United States, the United Kingdom, and Canada’ in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart, 2014) 161, 165.

identifying details elicited in the course of the evidence. If the witness was kept anonymous from the accused's lawyers, Lord Diplock made the obvious point that they would be gravely handicapped in testing the witness's credibility. If the witness was known to the lawyers but prohibited from disclosure to the accused, another problem arose: 'To disclose this to counsel but to prohibit him from communicating it to the accused would expose him to a conflict between his duty to his client and his duty to the State inconsistent with the role of the defendant's lawyer in a judicial process'.¹⁷⁰

That is the inescapable conflict that secret evidence creates for a special counsel. If s/he cannot disclose any of it to the respondent, s/he is armed with just as little basis as the COPIM for challenging or testing the secret evidence. If s/he can gist it to the respondent, the seemingly impossible conflict that was the judge's shifts to the special counsel.

While the point is moot in light of the conclusions reached elsewhere in this report, the asserted superiority of gisting and/or special counsel to the procedures under the Act has not been demonstrated. Those models appear to come with similar or equivalent grave defects to those attending the COPIM role.

4.7.4 Appointment of COPIM

The appointment of the COPIM is subject to a number of special procedures mandated by the Act. The Minister must advertise nationally for the position, must consult with the Parliamentary Committee about both the process for appointment and about the specific individual who the Minister proposes to appoint, and must obtain and consider a report about the proposed appointee's background (s 85).

A person can only be appointed COPIM if s/he has served or is qualified to serve as a Federal, High or state Supreme Court judge (s 84(1)). A person cannot be appointed as COPIM if s/he occupies a position that places him/her in association with various prosecutorial and law enforcement authorities (s 84(3)). Among possible appointees who are equally qualified, the Minister must give priority to a retired judge (s 84(2)).

4.7.5 Annual COPIM Reports

The COPIM is required to furnish the Minister with an annual report about the performance of the COPIM's functions in each financial year (s 92(1)). The Minister must table these reports in the Legislative Assembly (s 92(4)). In the five years that COA has been operative, it appears that four such reports have been furnished and tabled.

For financial year 2010-11 the COPIM report consisted of a one-page letter indicating that no applications had been made by the Commissioner under the Act, and therefore the COPIM was not called upon to exercise any of his functions. The report also discloses a meeting between the COPIM and the Law, Justice and Safety Committee of the state parliament.

For financial year 2011-12 the COPIM also provided a one-page report. In that year, the Commissioner made a criminal intelligence application and an application for a criminal

¹⁷⁰ United Kingdom, *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland*, Cmnd 5185 (1972) 11.

organisation order. With respect to the former, the COPIM reported that: 'I was supplied with the affidavit material as required by the Act and appeared at the hearing of the application to carry out my required functions with respect to the application'. The criminal organisation application was ultimately adjourned pending the High Court application that became the *Pompano* case.¹⁷¹

The Parliamentary Crime and Misconduct Committee sought the advice of the COPIM in about November 2011.¹⁷² This concerned amendments to COA being considered in the Criminal Organisation Amendment Bill 2011. The amendments 'dilute[d] the requirement to provide details of an informant's full criminal history ... without providing full particulars'.¹⁷³ It was reported that the COPIM supported such dilution so as to protect an informant's identity, and that he 'considered that the amendments in the Bill would not impinge on his ability to carry out his functions under the Act'.¹⁷⁴

For financial year 2013-14 the COPIM supplied a two-page letter. After outlining his functions and noting the High Court's decision in *Pompano* handed down that year, the COPIM indicated that he was supplied with relevant affidavit material and that he appeared at the Supreme Court twice for the purposes of the Commissioner's application to have the Finks Motorcycle Club, Gold Coast Chapter, and Pompano Pty Ltd declared as criminal organisations. Neither of those appearances was for a substantive hearing, as the matter was first adjourned and then discontinued.

For 2014-15, the COPIM supplied a two-page letter. No applications were made during the year.

No COPIM report was tabled for financial year 2012-13. Evidently this is due to the role being unfilled from late June 2013 to October 2013, which is the period when a COPIM report would usually be prepared.

The Act does not lay down requirements or guidelines for the COPIM report, but it expressly adverts to the possibility of the COPIM making recommendations (s 92(3)). It also forbids the COPIM from revealing any criminal intelligence in the report (s 92(2)). These two features suggest that the Act envisages that the COPIM report will engage substantively with the COPIM's performance of his functions. That view also receives support from s 88 of the Act, which entitles the COPIM to obtain a transcript of proceedings and requires the COPIM to return to the Commissioner the material which was supplied to the COPIM only after the COPIM has completed the annual report. Accordingly, the COPIM is expected to have significant volumes of substantive material to hand when compiling the report.

There would be more to discuss if more than one application had been made and concluded over the past five years. In addition, it is likely that a COPIM would feel (and *be*) seriously inhibited in what s/he can say in a report in light of the proscriptions concerning criminal intelligence.

¹⁷¹ At least one directions hearing for this application took place while the COPIM was overseas on leave, and the COPIM's functions were performed by another monitor (for which provision is made under s 87 of COA).

¹⁷² Parliamentary Crime and Misconduct Committee, Queensland, *Report No. 85: Criminal Organisation Amendment Bill 2011*, November 2011, 3.

¹⁷³ *Ibid* 6.

¹⁷⁴ *Ibid* 7.

Discussion in entirely abstract terms may not be very helpful or informative, and may even appear obfuscatory. Furthermore, a COPIM might understandably and properly feel constrained in what s/he can put in a report when the proceedings being reported on remain on foot. Serious analysis, reflection, and perhaps criticism or suggestions for amendment might better and less prejudicially be kept for after the proceedings have been concluded. At the least, only after seeing the operation of all stages of a COA proceeding could a COPIM, particularly in the early years of the Act's operation, reach a firm view about the significance of what transpired at the first (CI) stage.

The absence of a report for 2012-13 is in one sense contrary to s 92 of the Act, but that section operates on 'the COPIM'. If there was no COPIM at the time the report was required to be prepared, there is an arguable case that the section may not have any operation.

4.7.6 Annual Reviews

Section 129 of COA requires an annual review to be undertaken for the purpose of determining whether the powers conferred by the Act have been exercised appropriately. These reviews must be conducted by a retired Supreme Court judge (s 128). The Minister is charged with the responsibilities of ensuring that these annual reviews are carried out (s 127) and tabling the consequent report (s 132(4)). The Act requires that the reviewer be given access to criminal intelligence for the purpose of the review (s 131). Clearly this is in order to facilitate the reviewer being able meaningfully to gauge whether the powers granted by the Act – including the powers to apply for CI declarations, and to use declared CI in other applications – are being appropriately exercised (s 129(1)).

Searchable public records indicate that no report has been tabled in the Legislative Assembly or considered by the relevant parliamentary committee. Evidently no such review has been undertaken for any of the five years in which COA has been operative. This was confirmed by departmental officers..

The failure of Attorneys-General over the past five years to obtain any of the mandatory annual reviews amounts to repeated breaches of the Act.¹⁷⁵ Even if that mandate carried an implication that reports were only required when powers under the Act *had* been exercised, Attorneys were required to obtain reports in the years ending April 2012, 2013 and 2014.

Alan Moss, a retired judge who has conducted annual reviews of the South Australian equivalent of COA, has said this about his task:

The review process is quite a powerful tool. It needs to be because it stands in substitution for the judicial process which would normally determine proceedings of this kind. Not that the review is in any sense a judicial process. It is an administrative process conducted by a single person and its

¹⁷⁵ Section 129 states that annual reviews 'must' be carried out, and s 127 states that the Minister 'must' ensure that such reviews are carried out. For a recent exploration of the imperative connotation of the word 'must', see *Frost v Miller* [2015] QSC 206 (9 July 2015) [57]-[60] (Carmody CJ, as his Honour then was).

purpose is to provide a fair and impartial assessment of the exercise of powers under the Act during each 12 month period of its operation.¹⁷⁶

The problem runs deeper than the absence of fair and impartial assessments of the use of the Act. The absence of those assessments creates at least the appearance that fairness, impartiality and accountability are not taken seriously. Moreover, failures to undertake annual reviews have deprived the police, the legislature and the people of Queensland of the opportunity to improve the Act at an earlier stage.

To take the obvious example, if reviews had been carried out with the diligence that Mr Moss brought to his task in South Australia, it is likely that the shape shifting problem would have been noticed much earlier, and the Act could have been amended timeously.¹⁷⁷ Ultimately, this review might have been looking back at a more substantial and edifying history of COA's use.

4.7.7 Legal Affairs and Community Safety Committee (formerly the Law, Justice and Safety Committee and the Legal Affairs, Police, Corrective Services and Emergency Services Committee)

Section 91(1) of the Act confers the following functions on the Committee:

- (a) to monitor and review the performance of the COPIM's functions under the Act;
- (b) to report to the Legislative Assembly, commenting as it considers appropriate, on any matter about the COPIM that the committee considers should be brought to the Assembly's attention; and
- (c) to examine each annual report tabled in the Legislative Assembly under this Act.

Section 91(1)(c) takes in both the COPIM's annual reports and the annual reviews by a retired judge required by s 129, as the Act requires both to be tabled in the Legislative Assembly (ss 92(4) and 132(4)).

There has been little scope for meaningful activity by the Committee during the operation of the Act. The Committee has met with COPIMs twice (in 2011 and 2015). The 2011 meeting, in particular, though it took place before the sole application had been brought, canvassed substantive issues connected with the COPIM role. The Committee has not issued any reports on its oversight of the COPIM, for the understandable reason that there has been so little activity to oversee. There is no record of any notice or concern by the Committee at the failure of Ministers

¹⁷⁶ Alan Moss, *A review of the execution of the powers under the Serious and Organised Crime (Control) Act 2008 exercised during the period 1 July, 2008 to 30 June, 2009* (24 September 2009) 10 [15]. The provision for annual reviews then contained in s 37 of the *Serious and Organised Crime (Control) Act 2008 (SA)* was materially the same as in s 129 of COA. These observations remain valid in the Queensland context notwithstanding that CO declarations were made by the executive under the equivalent South Australian legislation at the time.

¹⁷⁷ See, eg, Alan Moss, *A review of the execution of the powers under the Serious and Organised Crime (Control) Act 2008 exercised during the period 1 July, 2009 to 30 June, 2010* (30 September 2010) esp at 5. Though no powers were exercised under the Act in that year, Mr Moss undertook a wide-ranging consideration of the activity of law enforcement authorities and possible amendments to the legislation. The report ran to 25 pages with a further 18 in annexures.

to obtain annual reviews. Strictly speaking, of course, the Committee's role is only enlivened upon a report being tabled.

There is cause for concern about the Minister's level of consultation with the Committee under s 85(b). That section requires the Minister to consult with the Committee as to the process for selecting a COPIM and the appointment of a particular person to the role. The recruitment of a COPIM takes on particular significance in light of the extent to which the performance of that role hinges on the individual filling the office (outlined above).¹⁷⁸

Feedback from the Committee indicates that Ministers engaged in little if any meaningful consultation in either respect. For the recruitment of both COPIMs, it appears that the Minister informed the Committee of the process that the Minister had decided upon. On both occasions the Committee expressed an expectation that consultation would ensue. It appears that on neither occasion did any consultation ensue. Rather, the Minister seems to have issued a notice of his intention to appoint an individual at short (and in one instance very short) notice. In 2010, the Committee was given 24 hours to advise the Minister as to his proposed appointee. In 2013, it was given six days.

On the information available, there has been a failure to engage in the real consultation envisaged by s 85(b) in respect of both the process for recruitment and the individual appointee. If nothing else, this conduces to the unfortunate appearance that the Act's obligations concerning the COPIM – and therefore, to some extent, the position itself – are not taken seriously. Not only should they be taken seriously, they should appear to be so.

4.7.8 Conclusion: Accountability under the Act

The COPIM's role has been assessed above. With regard to the other features of COA, the following observations must be made. Annual reviews and Committee oversight comprise central features of the Act's accountability mechanisms. The Attorney-General was congratulated for their inclusion.¹⁷⁹ They attracted the notice of scholars and commentators when the Act was introduced.¹⁸⁰ They received emphasis as 'significant safeguards' in the interest of 'democratic principles' in the Minister's second reading speech.¹⁸¹

Insofar as there has been a substantial failure to comply with the Act's obligations, those safeguards have failed and those principles have been compromised.

¹⁷⁸ See 4.7.2.

¹⁷⁹ Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 2009, 3672 (Kerry Shine).

¹⁸⁰ See, eg, Andreas Schloenhardt, 'Banning the Bikies', above n 84, 105.

¹⁸¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 29 October 2009, 3031 (Cameron Dick, Attorney-General).

5 The Finks Application

Although some aspects of the QPS application against the Finks and the work involved in preparing and presenting it were discussed earlier,¹ my role as statutory reviewer of the Act permitted special access to the criminal intelligence (CI) material used in that proceeding.

In theory, that privilege of being the only person outside QPS, the COPIM and the court to see the CI might suggest an opportunity for a deeper understanding of the ins and outs of a COA case.

In practice, while the exercise of reviewing the large volume of CI material filed in the Finks case was interesting and informative, it did not change my perceptions or conclusions about the efficacy of the Act as a whole.

5.1 The progress of the Finks case

It is, nevertheless, appropriate to mention a few matters – and, some perceptions about the manner in which the hearings were conducted – which can be gleaned from the material, supplemented by helpful discussions with senior QPS officers and legal staff who were involved in the matter as well as a series of written answers QPS helpfully and comprehensively provided to specific questions it was asked about the case.

The usual application under COA, it will be recalled, involves a three-stage process. First, secret proceedings in which a judge is asked to consider information and materials, and to decide whether or not it should be categorised and declared to be CI. Second, a substantive application to have the respondent declared to be a criminal organisation. Third, further applications for measures such as control orders against individual members of the declared criminal organisation.

QPS began proceedings against the Finks with an application to declare CI material filed on 3 February 2012. Those proceedings finished on 27 March 2012. QPS then filed a substantive application on 1 June 2012. That second proceeding was delayed by the Finks' referral of questions about COA to the High Court, which were reserved until that Court handed down its judgment in *Pompano*² on 14 March 2013.³

The substantive application was then mentioned on several occasions before a Queensland Supreme Court judge and, ultimately, QPS was given leave to discontinue it on 13 March 2014. The documents filed in support of that order permitting discontinuance were sealed up, by order of the presiding judge. I have not sought their re-opening.

¹ In Chapter 4.

² (2013) 252 CLR 38.

³ The High Court proceedings are discussed in detail in Chapter 6.

5.2 The criminal intelligence declaration proceedings

COA, again, permitted my having recourse to all of the CI material presented in court.⁴ The reviewer's role is, in that respect, special but the constraints necessary to safeguard the CI material still apply; unsurprisingly, COA requires that care be taken about disclosure of any of that material, and that its confidentiality be maintained.⁵ This report cannot contain any material of that kind.⁶

No disadvantage arises from that limitation, either for the purposes of undertaking this review or those of the government, or any other reader. The purposes of this review are to determine whether COA is operating effectively and meeting its objects⁷ and to address the matters contained in the Terms of Reference. It is unnecessary, for any of those purposes, to refer to the material in any detail and no occasion arises for concern that the confidentiality which attaches to it might inhibit the effectiveness of this review. It is sufficient for all relevant purposes to refer to the material in only very general terms.

All of the CI material had, after the discontinuance of the proceedings, been returned to QPS by the court. QPS staff provided it in a helpful and efficient (and, of course, secure) way, easing the work of reading it.

The material was voluminous, running to over 6,500 pages. It was apparent that the investigative work which produced it covered a significant period of time, a number of individuals alleged to be members or associates of the respondent organisation, and wide-ranging allegations of various forms of criminal activity. QPS advises that it began the work not long after COA received its assent in December 2009, that it involved a significant number of QPS officers and staff, and that it took a long time to prepare in a form suitable for a formal application to the court.

Reading the material readily confirmed that its collection and presentation to the court in a form necessary to attract a declaration that it qualified as CI under COA would have been a large, complex, and time-consuming task. The material had to be sufficient to satisfy a judge that it qualified as CI under s 72 and, to that end, that it met the tests for qualification set out in s 59 and the requirements of ss 63 and 64. The novelty of the proceeding would also have attracted a continuing need for legal advice and supervision in the course of that preparatory work.

The proceedings took some days before a single judge of the Supreme Court. It is apparent from the hearing transcripts that both counsel and the judge (and the COPIM, who was present at all hearings) strove to make the proceedings as efficient as possible by, for example, reading all the material in advance of the hearings and regularly showing, with respect, a creditable familiarity with it.

⁴ *Criminal Organisation Act 2009* (Qld) s 131(1).

⁵ *Ibid* s 131(2).

⁶ *Ibid* s 132(2).

⁷ *Ibid* s 130(2).

It was also apparent that all actors approached the exercise in a careful and considered way which reflected its seriousness and, also, its novelty. While the fact this was the first application of its kind could have added to the overall hearing time, the volume of material filed in support of it meant the hearing would always have been a lengthy one and any extra care or caution engendered by the fact it was the first of its kind did not greatly add, it appears to me, to its duration. It is probable that any proceeding under COA of this kind would be lengthy.

Nor was it apparent that the size of the material reflected any excess of caution – overkill, as it were – on the part of the QPS as applicant. The exercise of persuading a court to permit the use of evidence which can never be seen by the respondents and which they have no opportunity to respond to, or rebut, necessitates the highest degree of caution by that court in the exercise of its discretion. Any prudent applicant will recognise its obligation, in those circumstances, to ensure its supporting material is sufficient for purpose.⁸

As discussed earlier in Chapter 4, COA is also highly prescriptive about what this supporting material *must* contain. It must address the matters raised in s 59 to show that disclosure of the information might, for example, endanger a person's life or safety, and contain detailed identifying information about informants and agencies along with such matters as intelligence and information assessment systems (s 63). If an informant's evidence is to be relied upon, the applicant must give comprehensive disclosure of things like their criminal history so the court can form an independent view about the likely credibility of their allegations (s 64). These things meant that supporting affidavits were lengthy, and accompanied by many exhibits.

Section 10, the primary provision allowing an order in a substantive application, uses both the present and past tenses. Material filed in support of an application about CI material will necessarily place an organisation and its members in an historical context in terms of alleged criminal activity but must, also, establish that it is *presently* an 'unacceptable risk to the safety, welfare and order of the community' (s 10(1)(c)).

The application itself was also, necessarily, a lengthy document. Section 63(3)(c) requires that it contain 'the grounds upon which the declaration is sought'. The discretion being exercised by the court may include consideration of the question whether the risk that disclosure of the material could, for example, endanger someone's life or safety outweighs any 'unfairness to a respondent' (s 72(2)). Arguably, those questions of unfairness as an element of the application for a declaration that material is 'criminal intelligence' must also include a preliminary consideration, as it were, of the potential use of any declared material in the subsequent substantive application (because, under s 8(2)(c), the substantive application must also state the grounds upon which it is sought).

Read in concert those provisions mean that the application document itself had to contain many of the elements of a traditional pleading so that, although the respondent was not present, both the presiding judge and the COPIM were properly apprised of the ways in which the applicant would seek to persuade the court (in both the application for a declaration that material was

⁸ See, eg, the remarks of the plurality in *Pompano* where it is said the Commissioner must identify '... in detail, the information upon which the Commissioner will seek to rely...': *Pompano* (2013) 252 CLR 38, 84 [103] (Hayne, Crennan, Kiefel and Bell JJ).

'criminal intelligence', and any following substantive application) that the risks associated with disclosure outweighed the obvious, ever-present risk of unfairness to the respondent.

It can be said, without harming the shield of confidentiality which must attend the CI material, that the application and affidavits filed by QPS in the case were comprehensive, and impressive in the sense that they manifested high levels of attention to detail and to the many statutory requirements set up by COA.

Orders were made by the presiding judge in the CI application. In light of the later abandonment of the substantive application it is unnecessary to discuss them in detail save to note two things: that orders were made in respect of some material and that, as the hearing progressed over some days, the applicant refined the material it sought to have declared, and withdrew some of it; and, that some of those decisions were prompted by queries and concerns raised by the COPIM.

5.3 The substantive application

The point made earlier about the necessary detail required of proceedings under COA is illustrated by the length of the substantive application which, in its final form, was 109 pages long.⁹ It listed and named 50 alleged current members of the Finks, 17 alleged former members, and 10 alleged 'nominee' members. It descended, in considerable detail, into the alleged structure and organisation of the Finks OMCG as well as its nature and 'distinguishing characteristics'.

Fifty-eight pages of the document contained detailed allegations of acts and conduct on the part of named persons alleged to be members which were intended to establish both membership, and conduct warranting a declaration. Particulars of that alleged conduct, involving events said to go back so far as 1991, took up the following 33 pages, ending with the plea that '[i]nformation supporting the grounds of this application is also contained in information which has been declared criminal intelligence'. In support of the application, 144 affidavits were filed.

The time allowed for a response by the respondents is five days before the nominated 'return date'¹⁰ which is, itself, within 35 days of the filing of the application. This is always likely to be insufficient and the applicant sensibly allowed the respondent more time, and an order to that effect was made by consent at the first hearing of the matter.

⁹ The reference is to the amended originating application filed 8 May 2013.

¹⁰ *Criminal Organisation Act 2009* (Qld) s 9(3).

5.4 Why was the Finks application discontinued by the Queensland Police Service?

QPS personnel were helpful and direct in discussions about the application process in the case against the Finks and volunteered that, by March 2014, there were two compelling reasons to discontinue it.

The first was that the COA process had already been a time-consuming and expensive exercise for QPS (exacerbated by the delay associated with the reference to the High Court) when, late in 2013, new information suggested the Finks had disbanded and its members had joined the Mongols, such that there was doubt about the continuing efficacy of the existing application (QPS estimates its total resource costs, from beginning to discontinuance, exceeded \$1.9 million).

The second was that the 2013 suite of legislation had effectively extinguished any need to continue under COA: the Finks had been declared to be a ‘criminal organisation’ by legislative fiat,¹¹ with all the consequences that had under the 2013 laws. The COA procedure had become, therefore, otiose.

QPS apparently concluded, after the Finks disbanded and patched over to the Mongols, that this development would, in any event, make it difficult to obtain a declaration in the existing application that the Finks OMCG was a criminal organisation under COA; and, that there was little potential utility in obtaining control orders against persons who were no longer, it appeared, members of the Finks.

I respectfully agree with that conclusion. By late 2013 media reports and police enquiries revealed that this patching over had occurred, and the Gold Coast chapter of the Finks Motorcycle Club was probably an empty shell with all or most of its members having gone across to join the Mongols. Most of the alleged members who had featured in the proceedings for declarations about CI, and were named in the substantive application, were now Mongols and no longer Finks. Those facts created a measurable risk that the substantive application would fail (for want of a respondent).

That circumstance could not, it also appeared, be repaired by recourse to s 10(2)(a)(iii) of COA which refers to the involvement of ‘former members’ in criminal activity, because the court still had to be satisfied of all the matters set out in the present tense in s 10(1) – namely, that the respondent is an organisation, that its members associate to engage in serious criminal activity, and that it is an unacceptable risk to the safety, welfare and order of the community.

Absent any members in an OMCG called the Finks or, at least, some against whom these things could be proven, the continuance of the substantive application seemed likely to be a futile exercise.

¹¹ *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) s 70, sch 1; *Criminal Code (Criminal Organisations) Regulation 2013* (Qld) reg 2.

5.5 Queensland Police Service observations about the COA process, CI and substantive applications

QPS officers and staff were also forthright in offering their assessment of the Finks proceedings. A meeting was held with the Acting Commissioner, the named applicant (Assistant Commissioner Condon), and a number of senior officers and staff (including legal staff) who had been involved in the preparation and presentation of the case. Later, QPS provided a submission in response to direct questions it was asked about matters relating to the Finks proceeding.

QPS was concerned by the cost and delay associated with the process required by COA. The estimate of \$1.9 million mentioned earlier is, its officers said, conservative. The volume of material and the obvious amount of detailed work behind it means there is no reason to doubt, and every reason to accept, that estimate.

QPS's unsurprising concern with the complexity, cost and duration of the proceedings was expressed in frank terms. That concern was compounded by the apparent ease with which, to their perception, Finks members evaded the COA process by patching over to the Mongols. Like everyone else associated with the legislation and the proceedings, this event surprised them. That event and its implications for COA were discussed in detail at Chapter 4.3.1 to 4.3.3 and need not be repeated.

5.6 The role of the COPIM

The Criminal Organisation Public Interest Monitor has a role involving certain obvious tensions, also discussed in detail at Chapter 4.7. As Dr Greg Martin noted in a submission for the purposes of this review, the COPIM does not represent a respondent, or their interests; can be excluded from the hearing; has no apparent ability to adduce evidence; and, may struggle to find ways to mount effective challenges to the applicant's claims to secrecy.

As pointed out by Peter Callaghan SC in a submission on behalf of the Law and Justice Institute, an additional problem attaching to the COPIM's role is that, because the relevant proceedings are held in closed court it is impossible to know whether or not the duties of the office are being discharged effectively, or whether it is having any impact on the processing of applications.

Indeed, it is only the judge hearing an application, others permitted to be in the hearing room, and a reviewer in my role with lawful access to the records of those proceedings who are in a position to form views about the efficacy of the COPIM's efforts in a matter; and, of them, only I could comment publicly on a COPIM's work — and, then, only in a way which is careful to avoid disclosure of criminal intelligence.¹²

The court was, in my respectful view, fortunate to have a COPIM of Mr Robert Needham's background and experience. The hearing transcripts show he was forthright, diligent and helpful in his submissions to the court. He had plainly spent a large amount of time perusing, comparing

¹² *Criminal Organisation Act 2009* (Qld) s 132(2).

and analysing the very large amount of material which accompanied the Finks application before the hearings began; and, that he had considered the legislation and was able to meaningfully assist the presiding judge in debate around the meaning and effect of relevant (and, this being the first ever hearing, novel) COA provisions. He was, apparently, fearless in testing and querying each of the many parts of the application – ie, it is apparent that the attending COPIM took that part of his role very seriously, and discharged it carefully and effectively.

That said, it is also apparent that the exercise was one which primarily involved testing evidence in a vacuum – that is to say, the best the COPIM could ever do in the absence of meaningful instructions from those persons who were the subject of adverse allegations in the material was to carefully examine that material and see whether it met the statutory requirements, whether it was ‘corroborated’ in the special sense contained in s 72(4),¹³ how it measured up against traditional notions of admissible evidence and where, for example, it might be lacking.

Obvious examples which can, I think, be canvassed without intruding into the material itself are instances where an absence of corroboration, where contradictory material, or where the terms or circumstances in which an allegation was raised made it doubtful that the material could ever have sufficient weight to establish a respondent’s criminality.

In reality, that was the highest and best use the COPIM could make of the material he was given. Intending no disrespect to Mr Needham, the role can be described as something akin, as it were, to an official spoiler – querying, quibbling and quantifying the material according to its satisfaction of the requirements contained in COA, and making value judgments about whether it fell within the definition of ‘criminal intelligence’ contained in s 59 – ie, whether it is or was information relating to actual or suspected criminal activity and whether its disclosure might be prejudicial or dangerous.

The responsible and efficient discharge of the statutory role by the COPIM in the Finks application does not answer the concerns about the inherent drawbacks of the role discussed at Chapter 4.7.2 where, as noted, Mr Needham frankly admits its intrinsic frustrations and disadvantages.

5.7 Court management of applications

The Supreme Court Registry has provided a summary of the steps it took to ensure material filed in the criminal intelligence application was kept confidential and properly safeguarded. The process was necessarily arduous. Details are set out at Chapter 4.6. I saw nothing which would give rise to any concern that those procedures are not adequate and appropriate. The demands placed upon court staff involve an additional resource cost to be factored in to any conclusions about the efficacy of COA.

The conduct of the case in court was, again, efficient and effective within the constraints created by the welter of CI material. Nothing suggests that the safeguards of confidentiality around that

¹³ Section 72(4) provides that, in the case of information provided to an agency by an informant, it cannot be declared CI unless some or all of it is ‘supported in a material particular’ by other information before the court.

material were ever put in jeopardy. It would be presumptuous to remark upon the conduct of the hearings themselves and, in any event, unnecessary because (as already remarked) it was clear the presiding judge devoted exemplary effort to familiarising himself with the legislation, and the CI material and the issues it raised so that it is inconceivable the proceedings could have proceeded more quickly.

5.8 Summary

Absent the interruption to the proceedings caused by the High Court case, QPS would have been ready to go to a hearing of the substantive application in the second half of 2012. After the High Court proceeding, the substantive application was listed in November 2013 for a hearing for four weeks. Again, without that interruption it is not unreasonable to assume that, all things being equal, the substantive hearing might have been completed by late 2012 at best, and mid-2013 at worst — that is to say, in all, the best part of a year or, at worst, up to 18 months.

For proceedings intended to meet a perceived threat from an OMCG and its members the delay would still have been unsatisfactory. That is academic now, of course. The concatenation of problems and events which beset the Finks proceeding — delay, high cost, the interruption of High Court proceedings, the ‘patching-over’, and the advent of the 2013 suite — provide a ready explanation for its demise.

Having, however, seen the CI material it is not inappropriate to consider what might have happened had these supervening events not occurred.

The material was, I thought, as effective and well-presented as it could be. It can be said, going as close as I reasonably can to the perimeter of the wall of confidentiality which surrounds that material, that QPS overall presented a case which, in terms of COA’s objects and processes, was impressively broad and detailed and appeared to be a tolerably strong one — at least, in terms of persuading a judge that some material should be declared to be CI.

That said, overcoming the first hurdle is still far short of obtaining final COA orders and the ultimate outcome of the later, substantive application cannot reasonably or reliably be predicted or surmised.

For the reasons discussed at considerable length at Chapter 4.2 serious doubt arises that an applicant who is principally, or largely, relying upon declared CI will succeed in obtaining the final orders and relief COA provides. There remains a significant risk for an applicant that it will fail to persuade the court that the CI material should be afforded sufficient weight to overcome the profound level of unfairness to the respondent(s) which attends the proceeding. It is a fairly bold leap to anticipate that a court would ever allow untested, unanswerable and secret material to persuade it to make, for example, control orders infringing on individual liberties.

Those big-picture questions aside, the Finks proceeding raises equally serious concerns about the utility of COA. It suggests that the time and cost likely to be involved in proceedings against identifiable groups like OMCGs is disproportionate to the highest achievable legal consequence — ie, declarations and control orders, and the like.

It also raises the question whether the resources required might be put to better use simply prosecuting alleged OMCG members for their alleged crimes (with, as discussed later, additional charges, and significant additional penalties, associated with a circumstance of aggravation based upon membership of a criminal organisation and offending connected with that membership).

As discussed in Chapter 8, an unusual feature of much of the anti-organised crime legislation passed in Australian states is the absence of its actual (or successful) use, or use on other than rare occasions. COA has, at least, been tested; but the opportunity to see the inner workings, as it were, of an application under the Act offered by the chance to read the CI material does not alter my view that it is riven with legal and practical problems which raise serious doubts about its overall utility. That is not to say – as will, again, be discussed later in Chapter 9 – that some of its elements ought not be preserved.

6 High Court challenge to COA

In 2013, COA survived a High Court challenge in the case of *Assistant Commissioner Condon v Pompano Pty Ltd* ('*Pompano*').¹ The challenge was based upon the *Kable* principle, which prevents a state legislature from giving a state court a function which is incompatible with, or repugnant to, the court's role in the federal judicial structure.

In *Pompano* the High Court found that the provisions of COA dealing with criminal intelligence (CI) did not offend that constitutional safeguard. Crucial to the decision was the finding that, despite highly unusual aspects of those proceedings (including, of course, the absolute exclusion of the respondents from them) the Queensland Supreme Court still retained its decisional independence and a sufficient discretion to prevent unfairness – either by exercising a discretion to attribute less, or no, weight to CI, or by ordering a stay of the proceedings.

The High Court did not, however, resolve all the questions of constitutional validity which could arise under COA. Not all its provisions were considered, and the possible infringement of other constitutional principles was not addressed. These include potentially important matters like the *Kirk* principle (discussed later), and the implied constitutional freedom of political communication (together with its cognate, the freedom of association).

6.1 The Finks proceedings

On 1 June 2012, the Assistant Commissioner of the Queensland Police Service filed an application in the Supreme Court under s 8 of COA seeking a declaration that the Gold Coast Chapter of the Finks Motorcycle Club and Pompano Pty Ltd were, together, a 'criminal organisation'. The question of the constitutional validity of the Act was then removed into the High Court² and referred to the Full Court for hearing.³

At the hearing on 4 and 5 December 2012 the respondents argued that a combination of factors 'add[ed] up' to a breach of the *Kable* principle.⁴ Again, according to that principle legislation will be unconstitutional if it is 'incompatible with' or 'repugnant to' the institutional integrity of a state court invested with federal jurisdiction.⁵

¹ (2013) 252 CLR 38.

² *Pompano Pty Ltd v Assistant Commissioner Condon* [2012] HCATrans 242 (5 October 2012), lines 96-98 (French CJ and Crennan J).

³ *Pompano Pty Ltd v Assistant Commissioner Condon* [2012] HCATrans 268 (26 October 2012) (Kiefel J).

⁴ *Assistant Commissioner Condon v Pompano Pty Ltd* [2012] HCATrans 332 (4 December 2012), line 23 (Mr BW Walker SC).

⁵ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 98-99 (Toohey J), 103 (Gaudron J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 617 [101] (Gummow J); *Pompano* (2013) 252 CLR 38, 89 [123] (Hayne, Crennan, Kiefel and Bell JJ); *Pollentine v Bleijie* (2014) 88 ALJR 796, 804 [42] (French CJ, Hayne,

The principal factor relied upon by the respondents was that they had been excluded from the hearing in which CI was declared, and would be excluded from so much of the substantive application relating to declared CI. They argued that they could not, in those circumstances, know the case against them.

Insofar as the case against them was based on CI, it consisted of ‘secret ex-parte evidence’.⁶ Without a proper basis to evaluate or test the evidence, it was said that the Supreme Court was required to ‘depart to a significant degree from the methods and standards which have characterised judicial activities in the past’.⁷

In response the applicant argued that the *Kable* principle still leaves considerable scope to state legislatures to strike a balance between the public interest in having justice actually administered in public, and conflicting public interests such as ‘the right of the public to see that law enforcement agencies can investigate crimes without being prejudiced’.⁸ In striking that balance, the applicant argued, COA does not infringe the *Kable* principle because of a number of its other features which are designed to ensure fairness, and do so: for example, the court may consider unfairness when exercising its discretion to declare criminal intelligence,⁹ and it retains a discretion regarding the weight to accord it.¹⁰ The respondents’ legal representatives can also make representations to the Criminal Organisation Public Interest Monitor (COPIM)¹¹ who acts as a ‘proxy’ advocate in the proceedings.¹²

6.2 The High Court’s decision

On 14 March 2013, the High Court unanimously upheld the provisions of COA relied upon in the application for a declaration, finding that they were not repugnant to or incompatible with the institutional integrity of the Supreme Court of Queensland and did not offend *Kable*.

The High Court came to this conclusion by means, however, of three separate lines of reasoning. In broad terms the plurality, in order to find that the provisions were constitutionally valid, focused upon safeguards built into COA; Gageler J relied upon the court’s inherent jurisdiction to

Crennan, Kiefel, Bell and Keane JJ); *Kuczborski v Queensland* (2014) 89 ALJR 59, 82 [102] (Hayne J), 104 [265] (Bell J).

⁶ *Assistant Commissioner Condon v Pompano Pty Ltd* [2012] HCATrans 332 (4 December 2012), line 20 (Mr BW Walker SC).

⁷ *Ibid* lines 2533-2534 (Mr BW Walker SC).

⁸ *Ibid* lines 2646-2666, 3365-3382 (Mr W Sofronoff QC S-G).

⁹ *Ibid* lines 2903-2911 (Mr W Sofronoff QC S-G).

¹⁰ *Ibid* lines 3455-3463, 3599-3607 (Mr W Sofronoff QC S-G).

¹¹ *Ibid* lines 3492-3497, 3513-3537 (Mr W Sofronoff QC S-G).

¹² *Ibid* lines 3546-3561 (Mr W Sofronoff QC S-G).

avoid an abuse of process; and French CJ adopted both approaches.¹³ Ultimately the court, as a whole, was satisfied that ‘...the Queensland Supreme Court retained [its decisional independence as well as a] sufficient discretion to effectively preserve the fairness of proceedings before it – whether through exercising its discretion to attribute less, or even no, weight to the evidence, or to order a stay of proceedings’.¹⁴

The plurality (Hayne, Crennan, Kiefel and Bell JJ) first construed COA. They found that the Commissioner’s application must include ‘detailed particulars of what is alleged against the respondent organisation and how the Commissioner puts the case for making a declaration’.¹⁵ These requirements cannot be hidden in CI withheld from the respondent.

On this reading of the Act, ‘the criminal intelligence provisions deny a respondent knowledge of *how* the Commissioner seeks to prove an allegation; they do not deny the respondent knowledge of *what* is the allegation made against it’.¹⁶ It is true that an adversarial system ‘assumes, as a general rule, that opposing parties will know *what* case an opposite party seeks to make and *how* the party seeks to make it’, however that general rule ‘is not absolute’.¹⁷ Where ‘legislation provides for novel procedures which depart from th[at] general rule ... the question is whether, taken as a whole, the court’s procedures for resolving the dispute accord both parties procedural fairness and avoid “practical injustice”’.¹⁸

Procedural fairness is preserved under COA, the plurality said, because ‘fairness to a respondent is a matter to which the Supreme Court may have regard in deciding whether to declare information to be criminal intelligence’,¹⁹ and if that evidence is later relied upon in an application for a criminal organisation declaration, the court must decide the ‘cogency and veracity’²⁰ of that evidence as well as what weight to give it, taking into account that any ‘assertions and allegations that constituted criminal intelligence ... could not be challenged

¹³ Gabrielle Appleby, ‘Protecting procedural fairness and criminal intelligence: Is there a balance to be struck?’ in Greg Martin, Rebecca Scott Bray and Miiko Kumar (eds), *Secrecy, Law and Society* (Taylor and Francis, 2015) 75, 90-91.

¹⁴ Rebecca Ananian-Welsh, ‘Secrecy, procedural fairness and state courts’ in Greg Martin, Rebecca Scott Bray and Miiko Kumar (eds), *Secrecy, Law and Society* (Taylor and Francis, 2015) 120, 128. Strictly speaking, the attribution of weight is concerned with veracity not fairness, and procedural unfairness cannot be cured by attributing less weight to particular evidence: *Pompano* (2013) 252 CLR 38, 114 [209] (Gageler J). Rather, unfairness is cured by excluding particular evidence altogether, or ‘refus[ing] to act upon’ it: at 80 [88] (French CJ). Though note that, in a criminal context, five judges of the High Court recently cast doubt on the existence of a general discretion to exclude evidence on the basis of unfairness: *Police v Dunstall* (2015) 89 ALJR 677, 687 [34], 689 [47] (French CJ, Kiefel, Bell, Gageler and Keane JJ).

¹⁵ *Pompano* (2013) 252 CLR 38, 84 [105].

¹⁶ *Ibid* 101 [163].

¹⁷ *Ibid* 100 [157].

¹⁸ *Ibid*.

¹⁹ *Ibid* 101 [162].

²⁰ *Ibid* 103 [168].

directly'.²¹ These features point to the fact that under COA 'the Supreme Court retains its capacity to act fairly and impartially' which is 'critical to its continued institutional integrity'.²²

The Chief Justice reasoned that a court's institutional integrity will be impaired where it no longer exhibits a defining characteristic, and that such characteristics include adherence to procedural fairness and the open court principle as a general rule.²³ However, defining characteristics 'describe limits' and are not absolute.²⁴ While COA has a 'significant' impact on procedural fairness safeguards, according to French CJ, it is nonetheless valid because of the following features, in combination:

- The Supreme Court is given a recognisably judicial function under the Act and cannot be directed as to the outcome.²⁵ In particular it has a discretion to refuse to make a declaration,²⁶ and must base its decision on its own assessment of the evidence including the weight to be given to the evidence.²⁷
- The application for a declaration must set out all the grounds on which the declaration is sought and the information supporting those grounds.²⁸
- The Supreme Court retains significant inherent powers as well as powers under the *Uniform Civil Procedure Rules 1999 (Qld)* (UCPR), such as the power to order that the applicant provide particulars and the power to call a witness in a special closed hearing.²⁹
- When considering whether to make a criminal organisation declaration based upon CI, the Supreme Court may have regard to degrees of unfairness to the respondent.³⁰ In fact, French CJ suggests that the Supreme Court may refuse an application for a criminal organisation declaration in order to avoid an unfairness which was unforeseen at the time that the information was declared to be CI.³¹
- The COPIM provides a 'limited measure of redress for the imbalance between the parties in respect of the use of criminal intelligence' and may cross-examine witnesses in special closed hearings.³²
- Other than an exception to the hearsay rule in ss 61 and 107(2) of COA, the rules of evidence apply to the proceedings. In any event, even the exception to the hearsay rule

²¹ Ibid 102 [166].

²² Ibid 102 [167].

²³ Ibid 71 [67].

²⁴ Ibid 72 [68].

²⁵ Ibid 75 [78].

²⁶ Ibid 79 [87(2)].

²⁷ Ibid 59 [37], 79 [87(3)], 80 [88].

²⁸ Ibid 79 [87(4)].

²⁹ Ibid 79 [87(5), (8)].

³⁰ Ibid 79 [87(6)].

³¹ Ibid 80 [88].

³² Ibid 79 [87(7), (8)].

does not overcome the requirement that the evidence be relevant. Under r 395 of the UCPR, leave of the Supreme Court would also be required.³³

- The process of withholding CI is analogous to the determination of public immunity claims in the exercise of the Supreme Court's inherent power.³⁴

For Gageler J, the impugned provisions were not rendered compatible with the *Kable* principle by the presence of the COPIM,³⁵ nor by the ability of the Supreme Court to determine the weight of CI,³⁶ nor by the width of the discretion allowed to the Supreme Court in making a declaration under the Act.³⁷ The provisions were saved from incompatibility 'only by the capacity of the Supreme Court of Queensland to stay a substantive application in the exercise of inherent jurisdiction in a case where practical unfairness becomes manifest'.³⁸

The High Court also disposed of two subsidiary arguments. The first was that, in deciding whether an organisation presented an 'unacceptable risk' under s 10(1)(c) of COA, the court was required to undertake a non-judicial task. All of the judges agreed that although 'risk' is an imprecise criterion, its assessment is nonetheless a judicial task.³⁹ In any event, the conferral of a non-judicial function on a state Supreme Court would not necessarily impinge upon the *Kable* principle.⁴⁰

The second argument was that the limited period of time allowed under COA for a respondent to file its response to an application gave rise to procedural unfairness; but all the judges were satisfied that, because the Supreme Court retained a power to extend the deadline or act upon a late response, no question of unfairness arose.⁴¹

6.3 Summary of why COA does not infringe the *Kable* principle

With the exception of Gageler J, it is clear that the High Court's finding of validity rested on a number of safeguards 'taken as a whole'.⁴²

Any amendments to COA or similar legislation must take into account this constellation of safeguards. If the balance were to be disturbed, it is unclear how many safeguards might be

³³ Ibid 58-59 [36]-[37], 79 [87(9)].

³⁴ Ibid 63 [46], 75 [78].

³⁵ Ibid 114 [208].

³⁶ Ibid 114 [209].

³⁷ Ibid 115 [210].

³⁸ Ibid 105 [178].

³⁹ Ibid 54 [23]-[24] (French CJ), 96 [143] (Hayne, Crennan, Kiefel and Bell JJ), 104-105 [175] (Gageler J).

⁴⁰ Ibid 53 [22] (French CJ).

⁴¹ Ibid 81 [93]-[94] (French CJ), 103-104 [171]-[172] (Hayne, Crennan, Kiefel and Bell JJ), 104 [175] (Gageler J).

⁴² Ibid 78 [87] (French CJ), 100 [157] (Hayne, Crennan, Kiefel and Bell JJ).

removed or to what extent each safeguard may be diminished before the legislation would cease to comply with the *Kable* principle.

The safest option would be to ensure that legislation like COA retains the comprehensive list of features relied upon by French CJ to uphold the legislation.⁴³ At the other end of the spectrum, the riskiest option would be to rely upon Gageler J's judgment to make all manner of changes, provided only that they do not displace the Supreme Court's inherent power to stay an action for abuse of process.⁴⁴

A summary of the safeguards relied upon by each judge in the High Court to uphold the CI provisions of COA is set out in the following table:

	French CJ	Hayne, Crennan, Kiefel and Bell JJ	Gageler J
The Supreme Court performs a recognisably judicial function in declaring CI or a criminal organisation.	53 [22], 75 [78], 79 [87(1)].	-	-
The Supreme Court retains a discretion in declaring CI or a criminal organisation.	79 [87(2)], 81 [92].	101 [162].	Cf 105 [178], 115 [210].
The Supreme Court cannot be directed as to the outcome and retains its decisional independence.	75 [78], 79 [88].	-	-
The Supreme Court must assess the cogency and veracity of evidence before it.	79 [87(3)].	103 [168].	-
It is a matter for the Supreme Court what weight to give to CI.	75 [76], 80 [88], 81 [92].	102 [166].	Cf 105 [178], 114 [209].
Notwithstanding the CI provisions, a respondent to an application for a criminal organisation declaration will know the case against it because the application must set out the grounds and supporting information.	79 [87(4)].	101 [163].	-
The Supreme Court retains the power to order the applicant to provide particulars under r 161 of the UCPR.	79 [87(5)].	-	-
The Supreme Court may have regard to degrees of unfairness in declaring CI or a criminal organisation.	75 [76], 79-80 [87(6)], [88], 81 [92].	101 [162].	-
The COPIM provides a limited measure of redress for the imbalance between the parties in respect of the use of CI.	75 [77], 79 [87(7)].	-	-

⁴³ Ibid 78-79 [87] (French CJ).

⁴⁴ Ibid 105 [178], 111 [198], 115 [212] (Gageler J).

The rules of evidence apply (subject to ss 61 and 107(2) of COA).	79 [87(9)].	-	-
The Supreme Court retains an inherent power to revoke an <i>ex parte</i> order in favour of a party who failed to discharge its obligations of full disclosure.	61 [43], 63 [45], 75 [78].	Cf 86-87 [111], [113].	-
The Supreme Court retains an inherent power to refuse to act upon CI to avoid unfairness.	80 [88].	-	-
The Supreme Court retains an inherent power to call a witness to ensure the court is not acting on incomplete information.	62 [44], 63 [45], 75 [78], 79 [87(8)].	-	-
The Supreme Court retains inherent power to stay an action for abuse of process if practical unfairness becomes apparent.	-	-	105 [178], 111 [198], 115 [212].
The Supreme Court's role in declaring CI is similar to the Supreme Court's inherent jurisdiction regarding claims for public interest immunity.	63 [46], 74 [73]-[74], 75 [78].	-	-

6.4 What the High Court did not decide

6.4.1 Unresolved *Kable* questions

In consultation as part of this review, the Crown Solicitor noted that the High Court's decision in *Pompano* did not confirm the constitutional validity of the entirety of COA. The High Court only considered and upheld ss 9, 10, 66, 70, 76 and 78 of COA.

Two members of the court noted that the requirement of a closed hearing in substantive proceedings in s 108 had not been challenged.⁴⁵ Obviously, there are less compelling reasons to close a court in a substantive application in which CI is not being considered. A requirement that a court operate *in camera* without justification may impair the court's institutional integrity. As French CJ said, '[n]o plausible explanation was offered, and none appears from the COA, for these remarkable constraints'.⁴⁶ On the other hand, given that ss 70 and 78 were upheld and they impose 'more restrictive hearing regimes'⁴⁷ than s 108, it may be that s 108 also complies with the *Kable* principle. The question, however, remains unresolved.

Chief Justice French also noted that s 109 (which restricts access to transcript material) was not in issue in the proceedings.⁴⁸ It is possible to interpret s 109(3) as giving the Commissioner of Police a discretion to refuse access to the transcript to a respondent organisation, its members

⁴⁵ Ibid 77 [83] (French CJ), 115 [214] (Gageler J).

⁴⁶ Ibid 77 [83] (French CJ).

⁴⁷ Ibid.

⁴⁸ Ibid.

and their legal representatives. Such an interpretation may give rise to an argument that the executive is able to dictate an inequality of arms. To this it might be said, that even if this interpretation were preferred, the court would retain an inherent power to stay the proceedings as an abuse of process – which, according to Gageler J, would be enough to avoid invalidity. Alternatively, s 109(5) may be construed as requiring the Commissioner to grant any application for access to a transcript. Arguably, on either construction, s 109 would not infringe the *Kable* principle. However, it is by no means certain that the High Court would come to this conclusion.

6.4.2 Control orders and the freedom of political communication and association

The objects clause of COA makes clear that the Act is not intended to ‘diminish the freedom of persons in the State to participate in advocacy, protest, dissent or industrial action’.⁴⁹ Nonetheless, control orders and public safety orders under Parts 3 and 4 of COA have the potential to restrict a person’s capacity to communicate and associate for political purposes. The High Court has found that political communication and association is protected by an implication in the *Constitution*.⁵⁰ The freedom however, is not absolute. According to the most recent case on point, a law may burden the freedom if:⁵¹

- the law’s purpose and the means adopted to achieve that purpose are legitimate,
- the law is rationally connected to its purpose,
- there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose, and
- the law strikes an adequate balance between the importance of its purpose and the extent of the restriction it imposes on the freedom.

Control orders may be made on one of two bases under s 18. One basis involves proof of serious criminal activity and association for that purpose.⁵² The other requires, in addition, proof of membership of a declared criminal organisation.⁵³ If the control order is made on the first basis, the Supreme Court may impose the conditions it thinks appropriate.⁵⁴

⁴⁹ *Criminal Organisation Act 2009* (Qld) s 3(2).

⁵⁰ The implied freedom of political communication was first found in: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 46-50 (Brennan J), 72-74 (Deane and Toohey JJ), 94-95 (Gaudron JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137-139 (Mason CJ), 149-150 (Brennan J), 168-169 (Deane and Toohey JJ), 210-217 (Gaudron J), 229-233 (McHugh J). A freedom of association was confirmed to be a corollary of the freedom of communication in: *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 234 [148] (Gummow and Hayne JJ); *Wainohu v New South Wales* (2011) 243 CLR 181, 230 [112] (Gummow, Hayne, Crennan and Bell JJ); *Tajjour v New South Wales* (2014) 88 ALJR 860, 886 [95] (Hayne J), 891 [134] (Crennan, Kiefel and Bell JJ), 891 [136] (Gageler J), [242]-[244] (Keane J). Cf 867 [4], 878 [46] (French CJ).

⁵¹ *McCloy v New South Wales* (2015) 89 ALJR 857, 862-863 [2] (French CJ, Kiefel, Bell and Keane JJ).

⁵² *Criminal Organisation Act 2009* (Qld) s 18(2).

⁵³ *Ibid* s 18(1).

⁵⁴ *Ibid* s 19(1).

However, in line with High Court authority, we must assume that the Supreme Court will take into account the implied freedom when determining the conditions that are appropriate. As the majority said in *Wainohu v New South Wales*, ‘the power of the Supreme Court to make a control order should be construed conformably with the implied freedom so as to render reviewable for error any particular order which exceeded the limit of the implied freedom’.⁵⁵ That is, if a judge makes a control order which breaches the implied freedom, it will be because the judge got the order wrong and not because the Act allowed the order. Accordingly, the Act will be valid, but the control order may be appealed to the Court of Appeal.

The same is true of a public safety order under Part 4 of COA. In fact, the requirement of the court to take into account the implied freedom is made explicit by s 28(2)(c). According to that provision, when deciding whether to make a public safety order the court must have regard to the ‘public interest in maintaining freedom to participate’ in ‘advocacy, protest, dissent or industrial action’.

The difficulty is that if a control order is made on the second basis (membership of a declared criminal organisation), the court’s discretion in imposing conditions is removed. In that case, the court is required by s 19(5)(a) to impose conditions prohibiting association with other members of a criminal organisation as well as anyone else subject to a control order. The inability to tailor a control order so as to avoid breaching the implied freedom may mean that this fetter is unconstitutional.

It is certainly possible to think of alternatives but these may not be ‘reasonably practicable means of achieving the same purpose’. For example, under s 19(5)(b), the court may decline to impose the anti-association conditions if they would have an adverse impact on a personal relationship. It may be reasonably practicable to include a similar discretion based on the implied freedom. Such a ‘carve out’, as it were, might use comparable language to that in s 28(2)(c) in respect of public safety orders.

Another alternative might be to allow a controlled person to apply for variation of the order, something which was possible under the legislation considered in *Wainohu*.⁵⁶ This would involve allowing the court to dispense with the mandatory conditions when considering a variation application,⁵⁷ and possibly allowing a controlled person to bring an application for variation sooner than one year after the order is initially made.⁵⁸

Against these hypothetical arguments there stands, however, the decision of a clear majority of the High Court in *Tajjour v New South Wales*.⁵⁹ In that case Hayne, Crennan, Kiefel and Bell JJ all found that a carve out for political communication may not ‘equally advanc[e] the legislative

⁵⁵ *Wainohu v New South Wales* (2011) 243 CLR 181, 231 [113] (Gummow, Hayne, Crennan and Bell JJ). See also at 220 [72] (French CJ and Kiefel J). For an analogous example in another statutory setting, see *AA v BB* (2013) 296 ALR 353, 379 [133] (Bell J).

⁵⁶ *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 19(7).

⁵⁷ Cf *Criminal Organisation Act 2009* (Qld) s 22(1).

⁵⁸ Cf *ibid* s 22(2)(b).

⁵⁹ (2014) 88 ALJR 860.

purpose⁶⁰ of the anti-consorting laws. Similarly with respect to COA it might be said that the objective of the control order conditions is the prevention of criminogenic association ‘regardless of the purpose or reason for the association’.⁶¹ A political communication defence may ‘shift the focus’ from the fact of association to what is said and done in the course of that association.⁶² This would have further consequences for investigation by the police and potential exploitation by controlled persons.⁶³ Thus, there is a strong argument that there is no compelling alternative to s 19(5)(a) as it is currently drafted.

Even without a compelling alternative, the mandatory conditions in any control order will still be invalid if they do not strike the right balance between their purpose of disrupting serious organised crime, and their restriction on the implied freedom.

The difficulty in predicting the answer to that question is that a majority of the High Court has only very recently embraced a robust form of proportionality analysis, which the judges admit ‘requir[es] a value judgment’.⁶⁴ It is unclear to what extent previous decisions of the court based on a different test⁶⁵ may guide the outcome in future cases, based on this new test.

6.4.3 The ousting of judicial review and the *Kirk* principle

When COA was enacted it contained s 155, which exempted decisions made under the Act from judicial review. That section has since been removed⁶⁶ but COA remains outside the reach of the *Judicial Review Act 1991* (Qld).⁶⁷

One year after COA was passed, the High Court delivered judgment in *Kirk v Industrial Relations Commission*.⁶⁸ The High Court held that the ‘supervisory role of the [state] Supreme Courts exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts’;⁶⁹ that is, a State Supreme Court’s supervisory jurisdiction is constitutionally entrenched, notwithstanding privative clauses such as that enacted by s 155. Otherwise, the High Court warned, there would be ‘islands of power immune from supervision and restraint’.⁷⁰

⁶⁰ Ibid 888 [113] (Crennan, Kiefel and Bell JJ).

⁶¹ Ibid 885 [90] (Hayne J).

⁶² Ibid 885 [89] (Hayne J).

⁶³ Ibid 889 [121] (Crennan, Kiefel and Bell JJ).

⁶⁴ *McCloy v New South Wales* (2015) 89 ALJR 857, 863 [2] (French CJ, Kiefel, Bell and Keane JJ).

⁶⁵ Previously the test was enunciated in *Lange* and slightly modified in *Coleman: Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Coleman v Power* (2004) 220 CLR 1, 50-51 [92]-[96] (McHugh J), 77-78 [196] (Gummow and Hayne J).

⁶⁶ By virtue of *Reprints Act 1992* (Qld) s 40.

⁶⁷ *Judicial Review Act 1991* (Qld) s 18(2)(b), sch 1, pt 2.

⁶⁸ (2010) 239 CLR 531.

⁶⁹ Ibid 581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁷⁰ Ibid 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

Not all privative clauses will, however, be rendered inoperative by the principle in *Kirk*; only those that ‘would take from a state Supreme Court power to grant relief on account of jurisdictional error’.⁷¹ In *Kirk*, the High Court refused to mark out the ‘metes and bounds’ of jurisdictional error⁷² — although, in the earlier case of *Aala*, Hayne J said that there is ‘a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do’.⁷³

As COA currently stands, most decisions under the Act are made by the Supreme Court and appellable to the Court of Appeal.⁷⁴ Being decisions of the Supreme Court, they are not subject to judicial review. But it is possible to argue that COA envisages other decisions, as well: for example, under s 94, the registrar of the Supreme Court must register a ‘corresponding order’ upon satisfaction of certain criteria. Even though the provision uses mandatory language, it is clear that a decision can be made under an enactment even if no discretion is involved.⁷⁵ The registrar’s determination whether the criteria are met ‘will generally be a decision of an administrative character, made under an enactment, within the meaning of the Judicial Review Act’.⁷⁶ If the registrar misapprehends the criteria informing their decision or takes into account irrelevant matters, they may fall into jurisdictional error.⁷⁷

If such a scenario were to arise neither s 94 nor any other provision of COA would be rendered unconstitutional. Rather, the ouster clause in the *Judicial Review Act 1991* (Qld) would be invalid to the extent that it shields, from review for jurisdictional error, any administrative decision made under COA. It should be borne in mind that if an application for review of jurisdictional error were brought, s 108 of COA would apply.⁷⁸ Accordingly, the right to appear would be limited to one individual member of the organisation, the COPIM must be present (unless the court otherwise decides) and the hearing must be heard in closed court.⁷⁹

⁷¹ Ibid 581 [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁷² Ibid 573 [71] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁷³ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 141 [163] (Hayne J), quoted in *Kirk v Industrial Relations Commission* (2010) 239 CLR 531, 571 [66] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁷⁴ *Supreme Court of Queensland Act 1991* (Qld) s 62, subject to *Criminal Organisation Act 2009* (Qld) pt 9, div 5.

⁷⁵ *Judicial Review Act 1991* (Qld) s 4(a).

⁷⁶ *Peeverill v Meir* (1990) 95 ALR 401, 421 (Burchett J). See also *Australian Postal Corporation v Forgie* (2003) 130 FCR 279, 288 [40] (Black CJ, Merkel and Stone JJ).

⁷⁷ *Craig v South Australia* (1995) 184 CLR 163, 179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ), quoted with approval in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 572 [67] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁷⁸ Section 108 applies to an ‘application, appeal or review’: *Criminal Organisation Act 2009* (Qld) 108(1). ‘Review’ appears to refer to ‘judicial review’ rather than a statutory review under pt 9, div 6 of the Act.

⁷⁹ *Criminal Organisation Act 2009* (Qld) s 108(2)(a), (3), (4).

7 Other Queensland legislation aimed at criminal organisations

7.1 COA's future is interwoven with the full package of legislation aimed at criminal organisations

It would be facile to discuss COA without adverting to other criminal legislation operating in Queensland and, in particular, the suite of legislation introduced in 2013 – which, it will be remembered, converted the complex process under COA to have a group declared to be a 'criminal organisation' into one involving a ministerial recommendation.

What, if anything, should be done about existing anti-organised crime legislation (and, hence, what is to become of COA and its elements) cannot be resolved without considering the role they may have to play in combating organised crime in conjunction with other laws in Queensland. It is appropriate, then, to consider COA within the pantheon of existing criminal legislation including the 2013 suite.

7.2 *Criminal Code (Qld) and Drugs Misuse Act 1986 (Qld)*

Given that criminal organisations engage, by definition, in crime their activities are necessarily covered by the ordinary criminal law. For example, drug offences under the *Drugs Misuse Act 1986 (Qld)* capture the activities of the '76 per cent of identified Queensland organised crime networks ... involved in the illicit drug market'.¹ Networks of child sex offenders are engaged in various offences against the *Criminal Code (Qld)* such as procuring and grooming children, and making and distributing child exploitation material.² Criminal organisations involved in financial crimes such as 'boiler room' enterprises are likewise covered by the *Criminal Code*, with such offences as fraud, identity theft, forgery and secret commissions.³

The business model of criminal organisations such as OMCGs, with a reputation for violence, is also targeted by the ordinary criminal law. The use of threatening behaviour to extort money is covered by specific offences like making threats, threatening violence and unlawful stalking.⁴

¹ Michael Byrne QC, *Report of the Queensland Organised Crime Commission of Inquiry* (October 2015) 3 ('Byrne Report').

² *Criminal Code (Qld)* ss 217, 218A-218B, 228A-228C.

³ *Ibid* ss 398, 408C-408E, chs 42A, 48.

⁴ *Ibid* ss 75, 359, 359E(1).

Actual use of violence is of course prohibited⁵ as are public displays of violence between rival gangs through the offences of affray, riot and going armed so as to cause fear.⁶

These offences are not only targeted at individuals working alone but also at people working together, including as members of criminal organisations. If two or more people 'form a common intention to prosecute an unlawful purpose' all of them may be responsible for any resulting offence.⁷ Similarly any person who aids, counsels or procures another to commit an offence is, likewise, guilty of the offence.⁸ Even if no offence is actually committed, an unsuccessful conspiracy to commit a crime or other offence is punishable by up to seven years in prison.⁹

The list is comprehensive. As the Byrne Report pointed out, a new specific offence of participating in a criminal organisation would likely add little to 'the wide range of offences currently available in the Criminal Code'.¹⁰

7.3 Criminal confiscation legislation

Removing the financial incentive of crime through confiscation legislation is key to 'tackl[ing] the causes and punishing the perpetrators of serious crime'.¹¹

Originally, under the *Crimes (Confiscation of Profits) Act 1989* (Qld) proceeds of crime could only be confiscated following conviction for an offence, and only if the property was related in some way to that offence.¹² Both of those anchors have come unstuck. Although a confiscation-based scheme was continued under Chapter 3 of the *Criminal Proceeds Confiscation Act 2002* (Qld),¹³ it has been largely eclipsed by a new civil confiscation scheme under Chapter 2.

Now, applications for forfeiture may be made to the Supreme Court 'before or without the need for a final criminal conviction'.¹⁴ If a Crime and Corruption Commission (CCC) officer or police officer reasonably suspects that a person has committed an offence punishable by at least five years imprisonment and has derived proceeds from the offence, the CCC may apply for a

⁵ See, eg, *ibid* ss 300-303 (murder and manslaughter), 314A (unlawful striking causing death), 320 (grievous bodily harm), 323 (wounding), 335 (assault), 339 (assault occasioning bodily harm), 340 (serious assault).

⁶ *Ibid* ss 61, 69, 72.

⁷ *Ibid* s 8.

⁸ *Ibid* s 7.

⁹ *Ibid* ss 541-543.

¹⁰ Byrne Report, above n 1, 550.

¹¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 22 October 2002, 3857 (RJ Welford, Attorney-General and Minister for Justice).

¹² *Crimes (Confiscation of Profits) Act 1989* (Qld) ss 3(1) (definition of 'tainted property'), 6(1), 8(1) (as enacted).

¹³ *Criminal Proceeds Confiscation Act 2002* (Qld) ch 3.

¹⁴ Queensland, *Parliamentary Debates*, above n 11. See also *Criminal Proceeds Confiscation Act 2002* (Qld) s 13(1).

restraining order against any of the alleged offender's property.¹⁵ However, the officer need not suspect that any profit was made from the alleged offence if it involved certain features 'typically associated with organised crime',¹⁶ such as extortion, money laundering, child pornography and dangerous drugs.¹⁷

The Supreme Court is required to make a restraining order if satisfied there are reasonable grounds for the suspicion, but may refuse to do so in the public interest.¹⁸ Once restrained, the CCC can apply for a forfeiture order.¹⁹ This then puts the onus on the alleged offender to show that 'it is more probable than not that the property to which the application relates is not illegally acquired property'.²⁰ Any property not excluded in this way must then be forfeited to the state if the Supreme Court is satisfied on the balance of probabilities that the offender committed the suspected offence at some point in the last six years.²¹ In appropriate cases the court may decline to make an order if it would be contrary to the public interest.²²

It is also possible to confiscate property suspected of being derived from serious crime even though the suspected offender does not own the property, or the offender cannot be identified.²³

In 2013 the reach of the criminal confiscation legislation was 'significantly broaden[ed]'.²⁴ In accordance with the Newman Government's election promise to introduce 'tough new laws to target the ill-gotten gains of criminals',²⁵ a new Part 5A of Chapter 2 was inserted²⁶ under which it is now possible for the CCC to apply for an unexplained wealth order.²⁷

The Supreme Court must grant the order if satisfied there is a reasonable suspicion that a person has engaged in serious crime and has unlawfully acquired wealth at any point in the past (not only within the last six years, as with forfeiture orders).²⁸ Notably, the test of 'reasonable

¹⁵ *Criminal Proceeds Confiscation Act 2002* (Qld) ss 12(1)(a)(i), 28(1), (3)(a), 29(1)(b).

¹⁶ Queensland, *Parliamentary Debates*, above n 11, 3858 (RJ Welford, Attorney-General and Minister for Justice).

¹⁷ *Criminal Proceeds Confiscation Act 2002* (Qld) s 29(1)(a), sch 2, pt 1.

¹⁸ *Ibid* s 31(1), (2). For a recent discussion of the 'public interest' test, see: *Hogan v Hinch* (2011) 243 CLR 506, 536 [31], 540 [41] (French CJ), 551 [80] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

¹⁹ *Criminal Proceeds Confiscation Act 2002* (Qld) s 56(1).

²⁰ *Ibid* s 68(2)(b). For a similar order at the restraining stage, see ss 47(1), 48(1)(a). For an exclusion order after a forfeiture order has been made, see: ss 66, 67.

²¹ *Ibid* s 58(1)(a), (9).

²² *Ibid* s 58(4).

²³ *Ibid* ss 28(3)(b), (c), 29(1)(c), (d).

²⁴ Legal Affairs and Community Safety Committee, Parliament of Queensland, *Criminal Proceeds (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012* (Report No 26, 2013) 12.

²⁵ Queensland, *Parliamentary Debates*, Legislative Assembly, 1 May 2013, 1344 (JP Bleijie, Attorney-General and Minister for Justice).

²⁶ *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013* (Qld) s 40.

²⁷ *Criminal Proceeds Confiscation Act 2002* (Qld) s 89F(1).

²⁸ *Ibid* s 89G(1).

suspicion' is considerably lower than the civil standard, let alone the criminal standard. The person subject to the order must then pay to the state any of their current or previous wealth which they cannot prove was lawfully acquired.²⁹ Again, however, the Supreme Court may refuse to make an unexplained wealth order or reduce the assessed value of the unexplained wealth if it is in the public interest to do so.³⁰

The 2013 amendments also introduced a new 'serious drug offender confiscation order scheme' in Chapter 2A of the Act.³¹ By virtue of this new scheme, '[w]hile [drug offenders] may be willing to risk imprisonment, they must now contemplate the risk of being stripped of all of their assets'.³² Under this scheme if a person is convicted of a 'serious drug offence' the sentencing court must issue a serious drug offence certificate.³³ Serious drug offences include trafficking, supplying and producing dangerous drugs.³⁴

The CCC can then apply to the Supreme Court for an order forfeiting, to the state, all of the drug offender's property and any gifts they may have given within the last six years.³⁵ The drug offender may only keep the equivalent of what a bankrupt is entitled to keep on filing for bankruptcy.³⁶ Once again, the court retains an overriding discretion to refuse to make a confiscation order if it would be against the public interest.³⁷ Recently, Dalton J exercised this discretion in an application to confiscate the home of a pensioner, on the basis that it would render him 'financially and socially vulnerable' and thus, potentially, a burden on the state.³⁸

7.4 The 2013 suite of laws

On 27 September 2013 events occurred on the Gold Coast at Broadbeach and, later, at the Southport Police Station which are now usually called the 'Broadbeach riot' or similar.³⁹

²⁹ Ibid ss 89L(2), (3), 89M(1).

³⁰ Ibid ss 89G(2), 89H(3).

³¹ *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013* (Qld) s 42.

³² Queensland, *Parliamentary Debates*, above n 25, 1345 (JP Bleijie, Attorney-General and Minister for Justice).

³³ *Penalties and Sentences Act 1992* (Qld) s 161G(1), introduced by *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013* (Qld) s 63.

³⁴ *Penalties and Sentences Act 1992* (Qld) sch 1B.

³⁵ *Criminal Proceeds Confiscation Act 2002* (Qld) ss 93ZY(1), 93ZZ(2).

³⁶ Ibid ss 93E, 93ZY(1)(a).

³⁷ Ibid s 93ZZB(2).

³⁸ *Queensland v Deadman* [2015] QSC 241 (21 August 2015) [22], [24].

³⁹ *Queensland Police Service v Clarke-Davis* [2014] QMC 15 (20 January 2014) [3] (Chief Magistrate Carmody QC). See also *Clarke-Davis v Commissioner of Police* [2014] QDC 61 (12 March 2014) (Farr SC DCJ).

Less than three weeks later the Queensland Parliament enacted a ‘comprehensive package’ of laws⁴⁰ described by the Attorney-General as ‘potentially the toughest reforms in Australia’s history dealing with criminal motorcycle gangs’.⁴¹ The purpose of the laws was variously described by the Attorney-General as: to ‘break the culture of criminal motorcycle gangs’; to ‘break their morale’; to ‘put as many of these criminal motorcycle gang members in jail as possible’; and, to ‘rid them from the state of Queensland’.⁴²

The first of these laws, well known by the acronym ‘VLAD’ (*Vicious Lawless Association Disestablishment Act 2013* (Qld)), introduced mandatory sentences of 15 years for ‘vicious lawless associates’ who commit declared offences, to be served cumulatively upon the sentence for the actual offence, and without the possibility of parole.⁴³ If the person is an office-bearer of a ‘vicious lawless association’,⁴⁴ the additional mandatory sentence is extended to 25 years in prison.⁴⁵

A long list of ‘declared’ offences are included in the Schedule to the Act. While many are serious and typically associated with organised crime, some are not. The list also includes what can be relatively low-level criminal behaviour: for example, the offence of affray carries a maximum penalty of imprisonment for one year.⁴⁶ Hence, an office-bearer who commits affray may not receive a custodial sentence at all for the underlying offence, yet will nonetheless be required to serve a mandatory sentence of 25 years in prison.⁴⁷

The only way a defendant can avoid these crushing penalties is to cooperate with police,⁴⁸ and then only if the Commissioner of Police accepts the offer of cooperation, being satisfied that it will ‘be of significant use’.⁴⁹ Despite the momentous consequences, for an accused, of the Commissioner’s decision s/he is not required to give reasons for the decision to accept or refuse an offer of cooperation.⁵⁰

⁴⁰ Explanatory Notes, *Vicious Lawless Association Disestablishment Bill 2013* (Qld) 1; Explanatory Notes, *Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013* (Qld) 1.

⁴¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 16 October 2013, 3289 (JP Bleijie, Attorney-General and Minister for Justice).

⁴² *Ibid*; Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3161 (JP Bleijie, Attorney-General and Minister for Justice).

⁴³ *Vicious Lawless Association Disestablishment Act 2013* (Qld) ss 7(1)(a), (b), (2)(b), 8(1).

⁴⁴ A term not defined in the Act despite forming part of its title: *Kuczborski v Queensland* (2014) 89 ALJR 59, 68 [14] (French CJ).

⁴⁵ *Vicious Lawless Association Disestablishment Act 2013* (Qld) s 7(1)(b), (c).

⁴⁶ *Criminal Code* (Qld) s 72(1).

⁴⁷ *Vicious Lawless Association Disestablishment Act 2013* (Qld) s 7(3)(a). See also *Kuczborski v Queensland* (2014) 89 ALJR 59, 68 [12] (French CJ).

⁴⁸ *Vicious Lawless Association Disestablishment Act 2013* (Qld) s 9(1); *Penalties and Sentences Act 1992* (Qld) s 13A.

⁴⁹ *Vicious Lawless Association Disestablishment Act 2013* (Qld) s 9(2)(b), (3).

⁵⁰ *Vicious Lawless Association Disestablishment Act 2013* (Qld) s 9(4); *Judicial Review Act 1991* (Qld) pt 4.

The next plank of the 2013 suite was the *Tattoo Parlours Act 2013* (Qld) which was designed to 'prevent[] infiltration of the Queensland tattoo industry by criminal organisations, including criminal motorcycle gangs and their associates'.⁵¹ The Act requires tattooists and tattooing businesses to be licensed, on pain of a fine of up to nearly \$60,000 for a first breach, rising to nearly \$120,000 or imprisonment for 18 months for third and subsequent breaches.⁵² All applications for a licence are referred to the Commissioner of Police for investigation into whether the applicant is a 'fit and proper person' or whether the granting of the licence would otherwise be 'contrary to the public interest'.⁵³ The Commissioner is entitled to take into account secret criminal intelligence and their decision is an effective veto on the application being granted.⁵⁴ That is, under the new scheme, a tattooist can be deprived of their livelihood without ever being told why, and without ever being given the opportunity to challenge the information relied upon.⁵⁵

This new power of the Commissioner was rolled out to a number of other industries the following month, to embrace the issue of electrical licences, liquor licences, contractors' licences, certificates required in the racing industry, second-hand dealers' licences, licences required to be a security guard, and tow truck licences.⁵⁶

The *Tattoo Parlours Act* also inserted ss 173EC and 173ED into the *Liquor Act 1992* (Qld).⁵⁷ The effect of these provisions is that members of declared criminal organisations are prohibited from wearing gang insignia on licensed premises. Breach carries a maximum penalty of between nearly \$45,000 for a first offence and nearly \$90,000 or 18 months imprisonment for third and subsequent offences.

The last plank of the 2013 suite was the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld). It ushered in a number of severe measures, most notably:

- additional police powers to stop and search people suspected of being members of criminal organisations, irrespective whether they are suspected of committing an offence;⁵⁸

⁵¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3155 (JP Bleijie, Attorney-General and Minister for Justice).

⁵² *Tattoo Parlours Act 2013* (Qld) ss 6, 7; *Penalties and Sentences Act 1992* (Qld) ss 5(1)(e)(i), 5A(1); *Penalties and Sentences Regulation 2015* (Qld) reg 3.

⁵³ *Tattoo Parlours Act 2013* (Qld) s 15(b).

⁵⁴ *Ibid* ss 17(2), 20(3), sch 1 (definition of 'adverse security determination').

⁵⁵ *Ibid* s 22.

⁵⁶ *Electrical Safety Act 2002* (Qld) s 65B; *Liquor Act 1992* (Qld) s 47B, *Queensland Building Services Authority Act 1991* (Qld) ss 49AA, 56AA; *Racing Act 2002* (Qld) ss 212A, 224, 225, 230A; *Second-hand Dealers and Pawnbrokers Act 2003* (Qld) ss 8(3), 20A; *Security Providers Act 1993* (Qld) ss 12(1A), 23A; *Tow Truck Act 1973* (Qld) ss 21AA, 21B(1)(c), 36AA; inserted by *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld) ss 62, 92, 133-4, 141, 143-4, 146, 160(2), 165, 172, 179, 194, 196(2), 206.

⁵⁷ Introduced by *Tattoo Parlours Act 2013* (Qld) s 75 (as enacted).

⁵⁸ *Police Powers and Responsibilities Act 2000* (Qld) s 29(1A) (cf ss 29(1), 30), inserted by *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) s 54.

- the power of the CCC to withhold exculpatory evidence from members of criminal organisations who are defending a criminal charge;⁵⁹
- the power of the CCC to compulsorily acquire evidence from members of criminal organisations which can then be used against them in confiscation proceedings;⁶⁰
- a reversal of the presumption of bail for members of criminal organisations, including where the offence charged is only a simple offence or, even, a regulatory offence;⁶¹ and,
- the introduction of executive declarations of criminal organisations, whereby the Attorney-General can declare that an organisation is a criminal organisation on the basis of any matter they consider relevant.⁶²

In addition, the Act introduced three new offences into the *Criminal Code*.⁶³ Under s 60A of the *Criminal Code* it is an offence for a participant of a criminal organisation to be knowingly in public in the company of at least two other participants. Section 60B prohibits a participant of a criminal organisation from entering or attempting to enter a prescribed place, or from attending or attempting to attend a prescribed event. Lastly, s 60C provides for an offence of recruitment, including an attempt to recruit.

The penalty for each of these offences is a minimum of six months in jail, up to a maximum of three years. In addition, the defendant's driving licence must be disqualified for a period of at least three months 'whether or not the offence was committed in connection with, or arose out of, the driving of a motor vehicle'.⁶⁴ Any vehicle used before, during, and after one of these offences is to be confiscated and forfeited to the state upon conviction.⁶⁵

⁵⁹ *Crime and Corruption Act 2001* (Qld) ss 55A, 55F, 201(1A), inserted by *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) ss 11, 31.

⁶⁰ *Crime and Corruption Act 2001* (Qld) ss 55A, 55F, 197(3)(c), inserted by *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) ss 11, 27, as amended by *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld) s 38.

⁶¹ *Bail Act 1980* (Qld) s 16(3A), (3C), inserted by *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) s 4, as amended by *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld) s 7.

⁶² *Criminal Code* (Qld) ss 1 ((c) of definition of 'criminal organisation'), 708A, inserted by *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) ss 41, 49. The open-ended criteria for a declaration means that it is '[f]or all practical purposes ... unreviewable': *Kuczorski v Queensland* (2014) 89 ALJR 59, 79 [84] (Hayne J).

⁶³ Inserted by *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) s 42.

⁶⁴ *Penalties and Sentences Act 1992* (Qld) s 187(2), (4), inserted by *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) s 52.

⁶⁵ *Police Powers and Responsibilities Act 2000* (Qld) ss 123B(1)(a), 123G(1), 123H(2)(a), inserted by *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) s 60.

7.5 The High Court challenge to the 2013 suite of laws: *Kuczborski v Queensland*

Mr Kuczborski was a member of the Brisbane Chapter of the Hells Angels Motorcycle Club, which had been listed and declared as a 'criminal organisation' as part of the 2013 suite of laws.⁶⁶ He sought a declaration in the High Court that the suite of laws was unconstitutional. However, because he had not been charged with any offence, the High Court found that Mr Kuczborski lacked standing to challenge the vast bulk of the new laws.⁶⁷ That does not mean that the High Court found the laws valid; merely that they 'must await consideration on another day'.⁶⁸

The High Court only considered ss 60A-60C, inserted into the *Criminal Code* and ss 173EB-173ED, inserted into the *Liquor Act*. An element of each of these offences is that the offender was a participant in a 'criminal organisation' or wore the insignia of a 'declared organisation'.⁶⁹

For the offences under the *Criminal Code*, the prosecution is able to establish that there is a criminal organisation in one of three ways. One is to show that the organisation had been declared a criminal organisation by the Supreme Court using the process under COA.⁷⁰ Another is to prove to the jury's satisfaction that the organisation is a criminal organisation independently of the mechanism under the COA but using essentially the same test.⁷¹ Lastly, the prosecution can rely upon a declaration by the executive that an organisation is a criminal organisation.⁷² The alleged offences under the *Liquor Act* only picked up the last method of showing that the organisation is a criminal organisation.⁷³

Mr Kuczborski argued that, considered as a whole, the suite of laws impermissibly enlist the courts to implement the policy of the executive and legislature to destroy certain associations and, hence, infringe the *Kable* principle. The High Court unanimously disagreed. The executive does not exercise judicial power when it declares that an organisation is a criminal organisation. Such a declaration does not involve an adjudication of criminal guilt or of rights and liabilities.⁷⁴

⁶⁶ *Criminal Code (Criminal Organisations) Regulation 2013* (Qld) reg 2.

⁶⁷ *Kuczborski v Queensland* (2014) 89 ALJR 59, 65 [2], 69 [19], 71 [29]-[30], 72 [34] (French CJ), 81-82 [99]-[100] (Hayne J), 89 [151], 91 [168], 92 [177]-[178], 93 [181], 94 [188], 103 [259] (Crennan, Kiefel, Gageler and Keane JJ), 106 [280], 108 [285] (Bell J).

⁶⁸ *Ibid* 69 [16] (French CJ).

⁶⁹ *Criminal Code* (Qld) ss 60A(1), 60B(1), 60C(1); *Liquor Act 1992* (Qld) s 173EC read with s 173EA (definition of 'prohibited item').

⁷⁰ *Criminal Code* (Qld) s 1 (paragraph (b) of the definition of 'criminal organisation'). But not for s 60C: see s 60C(3) (definition of 'criminal organisation'). See also *Criminal Organisation Act 2009* (Qld) s 136(2).

⁷¹ *Criminal Code* (Qld) s 1 (paragraph (a) of the definition of 'criminal organisation'). See also *Kuczborski v Queensland* (2014) 89 ALJR 59, 78 [75]-[76] (Hayne J), 97 [213] (Crennan, Kiefel, Gageler and Keane JJ), 110 [297] (Bell J).

⁷² *Criminal Code* (Qld) s 1 (paragraph (c) of the definition of 'criminal organisation'). See also *Evidence Act 1977* (Qld) s 43(b).

⁷³ *Liquor Act 1992* (Qld) s 173EA (definition of 'declared criminal organisation').

⁷⁴ *Kuczborski v Queensland* (2014) 89 ALJR 59, 100 [234] (Crennan, Kiefel, Gageler and Keane JJ).

The declaration merely forms one ingredient of the offence.⁷⁵ It is 'commonplace' for the executive to prescribe an element of an offence by regulation.⁷⁶

In deciding whether criminal guilt has been established, the court must still determine the other elements of the offence including whether the accused is a member of the organisation and, if raised as a defence, whether the organisation in fact has criminal activity as one of its purposes.⁷⁷ That is, the impugned provisions 'do not require a court to perform any function other than a characteristically judicial function'.⁷⁸ In this way the case of *Totani* can be distinguished⁷⁹ because '[a]t the trial of an accused for such an offence, the court's powers and functions are exactly the same as on the trial of an accused for any criminal offence'.⁸⁰

The joint judgment further noted that the laws do not seek to cloak the work of the legislature in the court's reputation for impartiality. As four judges of the High Court said:

... it is abundantly clear that the responsibility for any perceived harshness or undue encroachment on the liberty of the subject by these laws lies entirely with the political branches of government.⁸¹

Although Hayne J disagreed with Mr Kuczborski's arguments that the courts are required to do the bidding of the executive,⁸² his Honour nonetheless went on to find that ss 60A-60C of the *Criminal Code* do infringe the *Kable* principle. This was because the provisions require a court to assimilate an executive or legislative declaration that an organisation is a criminal organisation with a judicial determination of the same status. Yet, according to his Honour, the two are 'radically different kinds of judgment'.⁸³ One is an 'untested and effectively untestable judgment made by the political branches of government'⁸⁴ and the other is:

a conclusion reached in proceedings which, subject to limited exceptions, are held in public with either the accused person being able to test the material relied on by the prosecution to prove this element of its case or the organisation in question being afforded the opportunity to meet and test the allegations levelled against it and its members.⁸⁵

⁷⁵ Ibid 89 [155], 100 [235] (Crennan, Kiefel, Gageler and Keane JJ).

⁷⁶ Ibid 86-87 [131] (Hayne J).

⁷⁷ Ibid 74 [41] (French CJ), 111 [303] (Bell J).

⁷⁸ Ibid 99 [225] (Crennan, Kiefel, Gageler and Keane JJ).

⁷⁹ Ibid 73 [40] (French CJ), 89-90 [156], 98-99 [222]-[224] (Crennan, Kiefel, Gageler and Keane JJ), 109-110 [295]-[296] (Bell J).

⁸⁰ Ibid 110 [296] (Bell J).

⁸¹ Ibid 99 [229] (Crennan, Kiefel, Gageler and Keane JJ).

⁸² Ibid 84 [110]-[111] (Hayne J).

⁸³ Ibid 85 [116] (Hayne J).

⁸⁴ Ibid.

⁸⁵ Ibid 85 [115] (Hayne J) (footnote omitted).

Justice Hayne held that requiring a court to conflate the two determinations was repugnant to, and incompatible with, the court's institutional integrity. Justice Hayne was, however, the only member of the bench to find that the *Kable* principle had been breached.

7.6 Remaining doubts about the constitutional validity of the 2013 suite

It must not be overlooked that the decision in *Kuczborski* was 'confined to a challenge based upon principles derived from *Kable*'.⁸⁶ The High Court did not consider other constitutional arguments, in particular whether the laws derogate from the implied constitutional freedoms of political communication, and association.⁸⁷

Indeed, French CJ considered that the new offences in the *Criminal Code* 'directly affect ... freedom of movement and association'.⁸⁸ Four other judges flagged the inevitability of a challenge to the constitutionality of an executive declaration under certain conditions. In an appropriate case, their Honours said it is:

... inconceivable that an issue would not be raised by the defence as to the invalidity of [an executive] declaration based on the limitation on executive and legislative power implied by the freedom of communication and association on matters of political and governmental interest.⁸⁹

Moreover because Mr Kuczborski lacked standing to challenge many elements of the 2013 suite, most of them remain unexamined. A fair doubt lingers with respect to the constitutional validity of the role played by the Commissioner of Police in sentencing under the *Vicious Lawless Association Disestablishment Act*.⁹⁰ Likewise, it remains to be seen how the evolving principles in *Lee v The Queen* and *X7 v Australian Crime Commission* intersect with the ability of the CCC to use self-incriminating evidence to confiscate property as well as to withhold evidence from a defendant facing a criminal trial.⁹¹

These concerns fall within the remit of the Taskforce on Organised Crime. Many aspects of the 2013 suite are exposed to doubt as to their ability to survive a properly mounted constitutional challenge, or are the subject of swingeing criticism: for example, the gross disproportionality of some of the sentencing regimes.

⁸⁶ Ibid 73 [37] (French CJ) (footnote omitted). See also at 111 [305] (Bell J).

⁸⁷ Ibid 88 [144] (Crennan, Kiefel, Gageler and Keane JJ).

⁸⁸ Ibid 72 [36] (French CJ).

⁸⁹ Ibid 97-98 [216] (Crennan, Kiefel, Gageler and Keane JJ).

⁹⁰ Much will depend on whether the discretion of the Commissioner is 'unconfined': *Pollentine v Bleijie* (2014) 88 ALJR 796, 805 [45] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

⁹¹ *Lee v The Queen* (2014) 253 CLR 455; *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196.

Those concerns also mean, for present purposes, that any perceived deficits in COA cannot be said to have been conclusively remedied or repaired by the 2013 suite and it offers no comfort in that regard.

8 Legislative attempts to combat organised crime in other jurisdictions

8.1 Lessons learned from other jurisdictions

All of COA's elements were inspired by legislative experiments in other jurisdictions. One way of evaluating the effectiveness of COA is to compare its operation to those prototypes as well as similar legislation in other jurisdictions, with a view to adopting variations that work.

That comparative analysis reveals that control orders have been successfully used only once in Australia in the context of organised crime. By contrast, they have been used regularly in the UK. Public safety orders have only been used with any success in one Australian jurisdiction and fortification removal orders have been used rarely.

The legislative pedigree of COA can be traced first to fortification removal orders enacted in Western Australia in 2002 as part of a reaction to a car bombing. The secret use of criminal intelligence (CI) can be traced to firearms licensing legislation in New South Wales, copied by South Australia in the wake of a shooting at Monash University in Victoria in 2002. After the High Court upheld the constitutional validity of these laws,¹ the use of CI was rolled out across South Australian legislation and is now a common feature in organised crime legislation in other states and territories.

Following a shooting incident in a nightclub in Adelaide in 2007, South Australia took the unprecedented step of appropriating control orders from federal anti-terror laws and introducing them for the first time into organised crime laws. The original South Australian model provided for the executive to declare criminal organisations and for the court to make a control order against the organisation's members. In 2010, the High Court found this legislative scheme unconstitutional in the case of *South Australia v Totani*² because it required the courts to do the executive's bidding.

In 2009, only 10 days after a violent brawl between OMCG members at Sydney Airport, New South Wales enacted its own version of control order legislation. Under its legislation, declarations were to be made by a judge acting in their personal, rather than in their judicial, capacity. These laws were in turn struck down in 2011 in the case of *Wainohu v New South Wales*³ on the basis that the judges were relieved of the requirement to give reasons for their decision.

¹ *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.

² 2010) 242 CLR 1.

³ (2011) 243 CLR 181.

Queensland enacted COA in 2009, providing instead that the declaration would be made by the Supreme Court. After the High Court upheld this legislation in 2013 in *Assistant Commissioner Condon v Pompano Pty Ltd*,⁴ South Australia, New South Wales, the Northern Territory and Victoria all replicated the Queensland model. Only Western Australia retains the model of judges making declarations as an administrative rather than judicial function. See 9.15 for a timeline of control order legislation in Australia and 9.16 for a comparison of the key tests under the legislation.

Despite the flurry of activity in state and territory parliaments over the last decade there is limited evidence that these laws have been put into use and effect by law enforcement authorities. In Western Australia, where fortification removal orders have been longest available, only three attempts have been made to obtain such an order. In South Australia, four attempts have been made. Victoria has filed at least two applications in the short time since its legislation came into force in 2013. There is no evidence of fortification removal orders having been sought or made in other Australian jurisdictions, including Queensland. Public safety orders are available in South Australia, the Northern Territory and Queensland. Only South Australia appears to make extensive use of the orders, having issued 155 against individual OMCG members in respect of 12 to 15 public events since 2010.

The South Australian Attorney-General declared the Finks Motorcycle Club as a criminal organisation in 2009. However, the eight control orders which were made on the basis of that declaration were reversed by the High Court's decision in *Totani*. Under the South Australian legislation it is possible to make a control order without a prior declaration in limited circumstances. One such control order was granted in respect of a member of the Rebels Motorcycle Club in 2010 or 2011. In 2010, an application was made to a judge in New South Wales to have the Hells Angels Motorcycle Club declared as a criminal organisation but the application was overtaken by the High Court proceedings in *Wainohu*, which invalidated the legislation. Although Queensland successfully defended the constitutionality of COA, in 2014 the QPS withdrew its application to the Supreme Court to have the Finks Motorcycle Club declared. No declaration or control order has been sought in Western Australia, the Northern Territory or Victoria.

Thus, in seven years of control order legislation across six jurisdictions in Australia, there has only ever been one valid control order made, imposing only limited restrictions, in relation to one individual.

In vivid contrast the UK version of control orders — Serious Crime Prevention Orders (SCPOs) — have been issued on at least 318 occasions since 2007.⁵ The success of these orders may be put down to a combination of factors. First, the power to make a SCPO is enlivened by proof of *serious crime*, rather than *organised crime*. Rather than focusing on the existence of a criminal organisation, the SCPO model hinges upon the activities of individuals typically bound up in organised crime. Second, although SCPOs may be granted without a criminal conviction, they are overwhelmingly used as a post-conviction sentencing option, so that the test is generally satisfied in the course of a criminal trial. Lastly, CI is only admissible if it is evidence. This removes all the difficulties and challenges encountered in the Finks application of declaring information and

⁴ (2013) 252 CLR 38.

⁵ Discussed in more detail at 8.13 of this chapter.

material which falls short of being admissible evidence to be CI, and then determining what weight to give it.

Because of the limited success of the models employed by COA, it is valuable to compare them to other legislative schemes in order to evaluate the effectiveness of the models themselves.

Jurisdictions elsewhere have adopted a number of other legislative strategies to combat organised crime, including:

- strengthening police investigation powers through the use of controlled operations, assumed identities, surveillance devices and the protection of witness identities;
- reducing the financial incentive of organised crime by making it easier to confiscate the proceeds of crime, and in some cases all of the property of an offender, whether or not it is derived from crime;
- deterring organised crime by increasing the penalties of offences typically associated with organised crime;
- prohibiting criminogenic associations by modernising or reintroducing consorting offences; and
- making it an offence to participate in a criminal organisation.

The ability of police to investigate organised crime and strategies of deterrence are, undoubtedly, important tools for dealing with criminal organisations. More contentious are the consorting and participation offences. New South Wales, the Northern Territory, South Australia and Victoria have now re-enacted or modernised a consorting offence. While the aim in each case was to target organised crime, the limited evidence available suggests that vulnerable groups have borne the brunt of the new offence, including youth, Indigenous Australians and the homeless.

Offences of participating in the activities of a criminal organisation have been introduced in New South Wales, South Australia, Western Australia and the ACT as well as at the federal level. In New South Wales the participation offence is charged relatively frequently, but almost always in conjunction with an underlying offence. In South Australia this has given rise to concerns of double punishment. International experience of similar participation offences in Canada and New Zealand suggest that they have not resulted in a noticeable decline in organised crime.

The noteworthy exception is the *Racketeer Influenced and Corrupt Organizations Act of 1970* (RICO) in the United States, which has been credited with bringing down large criminal organisations such as mafia networks.⁶ RICO criminalises participation (among other things) in an enterprise engaged in a pattern of racketeering activity. Like COA, the focus on the organisation involves considerable amounts of police, prosecution and court resources. In this connection the success of RICO may be attributable to the fact that it falls under federal jurisdiction and benefits from greater federal resources. RICO's operation is also assisted by several unique aspects of American law such as a 'liberal construction clause', a looser requirement of relevance for the admission of evidence and a greater readiness to allow trials against multiple co-accused. Even in this legal environment RICO remains an exceptional tool.

⁶ 18 USC §§ 1961-8. Discussed in more detail at 8.10 of this chapter.

This comparison shows that there is utility in the control order model. If COA's control orders are amended in line with SCPOs in the UK, they can offer what consorting offences and participation offences cannot: appropriately targeted restrictions on the factors leading to organised crime.

8.2 New South Wales

Of Australian jurisdictions, New South Wales has the longest history of legislation aimed at disrupting criminal organisations. The 1920s and 1930s saw the growth of organised criminal gangs in East Sydney. After a series of shootings, New South Wales passed the *Pistol Licensing Act 1927* (NSW), which prompted gang members to 'abandon revolvers for razors'.⁷ The infamous razor gangs proved difficult to police, owing to the fact that razors might be carried for innocent purposes and that 'the victims largely refused to identify their attackers and kept a code of silence'.⁸ In 1929, the government responded by making it a circumstance of aggravation to carry a razor blade at the time of arrest⁹ as well as reintroducing the lash as a punishment for malicious wounding and grievous bodily harm.¹⁰ By that time, however, the razor gangs had become a media-fuelled moral panic.¹¹ Later that same year, the government bowed to pressure from the media and enacted an offence of 'habitually consort[ing] with reputed criminals or known prostitutes'.¹² In 1979, the offence was changed from consorting with reputed criminals to consorting with 'persons who have been convicted of indictable offences'.¹³ However, in recent decades the offence largely 'fell into disuse'.¹⁴

⁷ 'Razor-slashing: A Terrible Weapon', *Sydney Morning Herald* (Sydney), 7 January 1928, 26, quoted in Alex Steel, 'Consorting in New South Wales: Substantive Offence or Police Power?' (2003) 26(3) *UNSW Law Journal* 567, 582.

⁸ Steel, above n 7, 582.

⁹ *Crimes Act 1900* (NSW) s 353B, introduced by *Crimes (Amendment) Act 1929* (NSW) s 16(2).

¹⁰ *Crimes Act 1900* (NSW) sch 6, introduced by *Crimes (Amendment) Act 1929* (NSW) s 16(1)(a).

¹¹ Steel, above n 7, 586-587.

¹² *Vagrancy Act 1902* (NSW) s 4(1)(j), introduced by the *Vagrancy (Amendment) Act 1929* (NSW) and based upon *Police Offences Amendment Act 1901* (NZ) s 4; itself preceded by *Vagrancy Act 1835* (NSW) s 2.

¹³ *Crimes Act 1900* (NSW) s 546A, introduced by *Crimes (Summary Offences) Amendment Act 1979* (NSW) sch 5(3).

¹⁴ Ombudsman, New South Wales, *Review of the use of the consorting provisions by the NSW Police Force*, Issues Paper (2013) 5.

8.2.1 *Crimes Legislation Amendment (Gangs) Act 2006 (NSW) – offence of participating in criminal groups and fortification removal orders*

More recently, in 2006, New South Wales became the first Australian jurisdiction to introduce specific legislation to ‘criminalise gang participation and gang-related activity’ following ‘tit-for-tat shootings’ in south-western Sydney.¹⁵

The *Crimes Legislation Amendment (Gangs) Act 2006 (NSW)* introduced several new offences relating to ‘[p]articipation in criminal groups’ into the *Crimes Act 1900 (NSW)*. Section 93IK (now s 93T¹⁶) of the *Crimes Act 1900 (NSW)* made it an offence for a person to participate in a criminal group knowing it is a criminal group and knowing, or being reckless as to whether, their participation contributes to criminal activity. Borrowing from New Zealand legislation,¹⁷ a ‘criminal group’ was defined in s 93IJ (now s 93S) as a group of three or more people who share a common objective of either profiting from serious offences or seeking to engage in serious violence.¹⁸ Participation carried, and continues to carry, a maximum penalty of five years imprisonment.¹⁹ If the participation in the criminal group involves assault or property damage, the maximum penalty increases to 10 years,²⁰ and 14 years if it involves assaulting a police officer.²¹ A separate offence of recruiting was also introduced, carrying a maximum penalty of seven years imprisonment unless the recruit was a child, in which case the penalty increases to 10 years.²² Between its introduction in 2006 and mid-2009, 132 prosecutions included a charge under s 93T, most of these in combination with drug or robbery charges.²³ It is clear from recent case law that people continue to be prosecuted for participating in criminal groups, generally in addition to charges for substantive offences.²⁴

¹⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 August 2006, 1142, 1145 (Tony Stewart).

¹⁶ *Renumbered by Crimes Amendment Act 2007 (NSW) sch 2[13]*.

¹⁷ *Crimes Act 1961 (NZ) s 98A*.

¹⁸ Andreas Schloenhardt, ‘Mafias and Motorbikes: New Organised Crime Offences in Australia’ (2008) 19(3) *Current Issues in Criminal Justice* 259, 262.

¹⁹ *Crimes Act 1900 (NSW) s 93IK(1) (now s 93T(1))*.

²⁰ *Ibid s 93IK(2), (3) (now s 93T(2), (3))*.

²¹ *Ibid s 93IK(4) (now s 93T(4))*.

²² *Ibid s 351A, introduced by Crimes Legislation Amendment (Gangs) Act 2006 (NSW) sch 1[17]*.

²³ ACT Government, *Government Report to the ACT Legislative Assembly: Serious Organised Crime Groups and Activities* (2009) 18.

²⁴ See, for example, *R v Tannous* (2012) 227 A Crim R 251, 253 [4], 258 [32] (Basten JA); *Abbas v The Queen* [2013] NSWCCA 115 (22 May 2013) [144] (Garling J); *R v Tuki [No 4]* [2013] NSWSC 1864 (13 December 2013) [93], [136] (Johnson J); *Hamzy v The Queen* [2014] NSWCCA 223 (17 October 2014) [30]-[31] (Hoeben CJ at CL); *Czako v The Queen* [2015] NSWCCA 202 (3 August 2015) [7], [33]-[55] (McCallum J); *Akbari v The Queen* [2015] NSWCCA 240 (7 September 2015) [16] (RA Hulme JA).

New South Wales also introduced fortification removal orders in 2006.²⁵ Now, under Part 16A of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), the Police Commissioner can apply to the Local Court for a fortification removal order.²⁶ The Local Court is to make the order if satisfied, among other things, that the premises are used to commit serious indictable offences, to conceal evidence of such offences or to store the proceeds of them.²⁷ If the owner does not remove the fortification the police are authorised to enter the premises and enforce the order.²⁸

8.2.2 *Crimes (Criminal Organisations Control) Act 2009* (NSW) – criminal organisation declarations and control orders

On 22 March 2009 a violent brawl broke out between members of the Hells Angels and the Comancheros at Sydney Airport resulting in the death of Anthony Zervas, the brother of one of the Hells Angels members.²⁹ Although the perpetrators were eventually dealt with under the ordinary criminal law for affray and homicide offences,³⁰ there was immediate political pressure ‘to proceed quickly’ and ‘get tough on outlaw motorcycle gangs’.³¹ Ten days after the incident at Sydney Airport Premier Nathan Rees introduced the *Crimes (Criminal Organisations Control) Bill 2009* (NSW), stating that the ‘bikie gangs [had] crossed the line’ by spilling their violence ‘into public places’ and ‘threatening the lives and safety of innocent bystanders’.³² The Bill was passed by both houses of parliament the same day.³³

Under the *Crimes (Criminal Organisations Control) Act 2009* (NSW), the Attorney-General could appoint Supreme Court judges to be ‘eligible judges’.³⁴ The Commissioner of Police could then apply to an eligible judge for a declaration that an organisation is a declared organisation.³⁵ If the Commissioner relied upon CI, the eligible judge was required to take steps to maintain its confidentiality, provided the information was properly classified as CI.³⁶ Once an organisation was declared,³⁷ the Commissioner could apply for interim control orders and control orders

²⁵ Introduced by *Crimes Legislation Amendment (Gangs) Act 2006* (NSW) sch 2[5].

²⁶ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 210B(1).

²⁷ *Ibid* s 210B(2)(b).

²⁸ *Ibid* s 210D(1), (2).

²⁹ Bronwen Merner et al, ‘Criminal Organisations Control Bill 2012’ (Research brief No 10, Parliamentary Library, Parliament of Victoria, 2012) 10.

³⁰ *R v Menzies* [2012] NSWSC 158 (2 March 2012) (RA Hulme J); *R v Hawi* [2012] NSWSC 332 (10 April 2012) (RA Hulme J).

³¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 April 2009, 14442 (Premier Nathan Rees).

³² *Ibid* 14440 (Premier Nathan Rees).

³³ *Ibid* 14465; New South Wales, *Parliamentary Debates*, Legislative Council, 2 April 2009, 14387.

³⁴ *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 5(3).

³⁵ *Ibid* s 6(1).

³⁶ *Ibid* ss 8(5), 28(3), taken from the provisions of the *Liquor Licensing Act 1997* (SA) upheld in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.

³⁷ *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 25.

against members of the organisation.³⁸ Unlike the South Australian legislation at the time, the court retained a discretion as to whether to make a control order.³⁹ These control orders would have the effect of criminalising association between controlled members⁴⁰ and preventing them from working in certain fields such as the gambling industry and tow truck driving.⁴¹

Crucially, in making a declaration, eligible judges were relieved of the obligation to provide reasons.⁴² It was for this reason that in the case of *Wainohu v New South Wales*⁴³ a majority of the High Court found the legislative scheme repugnant to the institutional integrity of the New South Wales Supreme Court.⁴⁴ Because the other parts of the Act hinged upon the validity of the declaration provisions, the entire Act was struck down.⁴⁵

8.2.3 Criminal Assets Recovery Amendment (Unexplained Wealth) Act 2010 (NSW) – unexplained wealth

A decade after Western Australia first introduced unexplained wealth laws, New South Wales followed suit in 2010. In its fight against ‘criminals, particularly those involved in organised and serious crime’, New South Wales sought to take ‘from them that which they desire most – their money’.⁴⁶ The move from a purely conviction-based confiscation scheme was required, according to the Police Minister, because of the way ‘the criminal marketplace adapts and changes’.⁴⁷

Under the new provisions inserted into the *Criminal Assets Recovery Act 1900* (NSW), the New South Wales Crime Commission may apply to the Supreme Court for an unexplained wealth order.⁴⁸ Unlike unexplained wealth laws in Western Australia and South Australia, the nexus to criminal activity is not completely removed. The Supreme Court may only make the order if it has a reasonable suspicion (albeit a lower threshold than satisfaction on the balance of probabilities) that the respondent has engaged in serious crime related activity or acquired serious crime

³⁸ *Crimes (Criminal Organisations Control) Act 2009* (NSW) ss 14(1), 19(2)(a).

³⁹ Lorana Bartels, ‘The status of laws on outlaw motorcycle gangs in Australia’ (Research in Practice Report No 2, Australian Institute of Criminology, 2010, 2nd ed) 4-5. For a detailed comparison of the South Australian and New South Wales legislation at the time, see ACT Government, above n 23, 51-59.

⁴⁰ *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 26.

⁴¹ *Ibid* s 27.

⁴² *Ibid* s 13(2).

⁴³ (2011) 243 CLR 181.

⁴⁴ *Ibid* 219-220 [68]-[70] (French CJ and Kiefel J), 228 [104] (Gummow, Hayne, Crennan and Bell JJ).

⁴⁵ *Ibid* 220 [71] (French CJ and Kiefel J), 231 [115]-[116] (Gummow, Hayne, Crennan and Bell JJ).

⁴⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 June 2010, 24499 (Michael Daley, Minister for Police).

⁴⁷ *Ibid* 24496 (Michael Daley, Minister for Police).

⁴⁸ *Criminal Assets Recovery Act 1900* (NSW) s 28A(1), introduced by *Criminal Assets Recovery Amendment (Unexplained Wealth) Act 2010* (NSW) sch 1[14].

derived property.⁴⁹ The criminal activity can have occurred at any time in the past.⁵⁰ However, the Supreme Court retains a discretion not to make an order where it is in the public interest to do so,⁵¹ such as where it would cause 'undue hardship on dependent children under the age of 18 years or dependants with a severe disability'.⁵² Then in the process of assessing the unexplained wealth, the respondent bears the onus of proving on the balance of probabilities that their wealth was legally acquired.⁵³

8.2.4 *Crimes Amendment (Consorting and Organised Crime) Act 2012 (NSW) and Crimes (Criminal Organisations Control) Act 2012 (NSW) – amendments to consorting offence, participation offence and control order regime in light of Wainohu*

In early 2012 New South Wales reworked all three of its legislative approaches to organised crime. First, it 'modernise[d] the offence of consorting'.⁵⁴ The new consorting offence in s 93X of the *Crimes Act 1900* (NSW) prohibits consorting with at least two convicted offenders on at least two occasions after having been given an official warning from a police officer.⁵⁵ The requirement of repeated interaction with more than one person 'recognises the fact that the goal of the offence is not to criminalise individual relationships but to deter people from associating with a criminal milieu'.⁵⁶

Consorting now includes electronic communication⁵⁷ to capture 'networks established via Facebook, Twitter and SMS'.⁵⁸ A number of defences were also introduced to exempt consorting in certain circumstances such as with family members or in the course of employment and education.⁵⁹ An amendment proposed by the Greens to exclude consorting for the purpose of protest, advocacy, dissent or industrial action was not ultimately included.⁶⁰ The penalty for consorting was also increased from six months imprisonment to three years imprisonment.

⁴⁹ *Criminal Assets Recovery Act 1900* (NSW) s 28A(2).

⁵⁰ Cf *ibid* ss 22(2), 27(2).

⁵¹ *Ibid* s 28A(4).

⁵² New South Wales, *Parliamentary Debates*, above n 46, 24499 (Michael Daley, Minister for Police).

⁵³ *Criminal Assets Recovery Act 1900* (NSW) s 28B(2), (3).

⁵⁴ New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 February 2012, 8130 (Greg Smith, Attorney-General).

⁵⁵ Introduced by *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW) sch 1[9].

⁵⁶ New South Wales, *Parliamentary Debates*, above n 54, 8131 (Greg Smith, Attorney-General).

⁵⁷ *Crimes Act 1900* (NSW) s 93W (definition of 'consort').

⁵⁸ New South Wales, *Parliamentary Debates*, above n 54, 8132 (Greg Smith, Attorney-General). But note that New South Wales police did not rely upon electronic consorting in any of the charges laid in the first 12 months of operation: Ombudsman, New South Wales, above n 14, 8-9.

⁵⁹ *Crimes Act 1900* (NSW) s 93Y.

⁶⁰ New South Wales, *Parliamentary Debates*, Legislative Council, 7 March 2012, 9103-9107.

Despite the manifest parliamentary intention that the consorting provision would be used to combat criminal gangs, the available evidence suggests that police have used their discretion in issuing warnings to disproportionately target marginalised groups. In a study of the consorting provisions in the first 12 months of operation, the New South Wales Ombudsman found that 'Aboriginal people accounted for 38% of all people who were issued an official warning' despite only accounting for 2.5% of the total population.⁶¹ In the same period, 83 children had been issued a warning.⁶² Anecdotal evidence also indicated homeless people were more likely to be subject to the new powers because 'consorting is focused on observations of public behaviour, [such that] the potential impact of the provisions is greater on people who spend more time in public places'.⁶³

The new consorting offence was the subject of an unsuccessful High Court challenge in 2014 in the case of *Tajjour v New South Wales*.⁶⁴ A majority of the High Court found that, although s 93X imposes a burden on freedom of political communication and association,⁶⁵ it is reasonably appropriate and adapted to serve the legitimate end of preventing the formation, maintenance or expansion of criminal networks.⁶⁶ The new offence was, therefore, upheld.

The second reform introduced in early 2012 related to the offence of participating in a criminal group found in s 93T (formerly s 93IK) of the *Crimes Act 1900* (NSW). The mental element of participation was extended from subjective knowledge to include objective knowledge so as to capture 'those on the periphery' of criminal gangs. That is:

... rather than requiring a person to have known that the group was a criminal group and to know or be reckless as to whether the participation contributed to criminal activity, a person will commit an offence where he or she ought reasonably to have known those things.⁶⁷

Two new circumstances of aggravation were also introduced. If the participation in the criminal group involves 'directing' the activities of the group, the penalty increases from a maximum five years imprisonment to 10 years⁶⁸ in order to reflect the 'greater degree of responsibility'.⁶⁹ If the activities being directed are 'organised and on-going', the penalty further increases to a maximum of 15 years imprisonment.⁷⁰

⁶¹ Ombudsman, New South Wales, above n 14, 9, 30. Enquiries with the Ombudsman's office confirm that a final report is still outstanding with no anticipated due date.

⁶² *Ibid* 33.

⁶³ *Ibid* 37.

⁶⁴ (2014) 88 ALJR 860.

⁶⁵ *Ibid* 877 [40] (French CJ), 882 [71] (Hayne J), 888 [108] (Crennan, Kiefel and Bell JJ), 895 [159] (Gageler J).

⁶⁶ *Ibid* 883-885 [76]-[93] (Hayne J), 888-890 [112]-[125], 891 [133] (Crennan, Kiefel and Bell JJ).

⁶⁷ New South Wales, *Parliamentary Debates*, above n 54.

⁶⁸ *Crimes Act 1900* (NSW) s 93T(1A), introduced by the *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW) sch 1[4].

⁶⁹ New South Wales, *Parliamentary Debates*, above n 54.

⁷⁰ *Crimes Act 1900* (NSW) s 93T(4A), introduced by the *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW) sch 1[5].

Lastly, in 2012 New South Wales dealt with the High Court's decision in *Wainohu*. The *Crimes (Criminal Organisations Control) Act 2009* (NSW) was repealed⁷¹ and re-enacted 'in a form which repair[ed] the identified constitutional shortcomings'.⁷² The new *Crimes (Criminal Organisations Control) Act 2012* (NSW) was substantially the same as its predecessor, except that eligible judges were required to give reasons for making a declaration, revoking a decision or refusing an application.⁷³ As a consequence of this change, an eligible judge was also directed to take steps to maintain the confidentiality of any criminal intelligence when giving reasons for their decision.⁷⁴

8.2.5 *Crimes (Criminal Organisations Control) Amendment Act 2013* (NSW) – amendments to control order regime in light of *Pompano*

In 2013 Queensland's successful defence of COA in the High Court in *Pompano* prompted New South Wales to 'adopt those aspects of the Queensland model which were considered and upheld by the High Court'.⁷⁵ Declarations are now made by the Supreme Court of New South Wales rather than an eligible judge in their personal capacity.⁷⁶ The test for whether to make a declaration was also modified to incorporate the 'unacceptable risk' test 'used in Queensland and approved by the High Court'.⁷⁷

The tests in Queensland and New South Wales are now identical except that, whereas in Queensland the purpose of association must be 'engaging, or conspiring to engage in serious criminal activity',⁷⁸ in New South Wales the purpose may also be 'organising, planning, facilitating, [or] supporting' serious criminal activity.⁷⁹ This test is said to represent a 'hybrid' of the original New South Wales test and the test under COA.⁸⁰ In terms of the use of CI, New South Wales moved away from the South Australian model of requiring a judge to maintain the confidentiality of intelligence, towards the Queensland approach of a 'three-stage model'⁸¹ where the first stage is to apply to the Supreme Court for a CI declaration.⁸² The COPIM's function

⁷¹ *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 39A (as enacted).

⁷² New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 February 2012, 8279 (Greg Smith, Attorney-General).

⁷³ *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 13(2) (as enacted).

⁷⁴ *Ibid* s 28(1) (as enacted). See also New South Wales, *Parliamentary Debates*, above n 72, 8280 (Greg Smith, Attorney-General).

⁷⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 March 2013, 19116 (Greg Smith, Attorney-General).

⁷⁶ *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 7(1) (current version). Cf s 9(1) (as enacted).

⁷⁷ New South Wales, *Parliamentary Debates*, above n 75.

⁷⁸ *Criminal Organisation Act 2009* (NSW) s 10(1)(b).

⁷⁹ *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 7(1)(b) (current version).

⁸⁰ New South Wales, *Parliamentary Debates*, above n 75.

⁸¹ *Ibid*.

⁸² *Crimes (Criminal Organisations Control) Act 2012* (NSW) ss 28G(1), 28M(1) (current version).

under COA was also replicated in the New South Wales legislation with the creation of a ‘criminal intelligence monitor’.⁸³

Despite the overhaul of the NSW criminal organisation legislation in 2012 and the significant amendments in 2013, as in Queensland only one abortive attempt has ever been made to have a criminal organisation declared. On 6 July 2010 the Acting Commissioner of Police for New South Wales applied to an eligible judge for a declaration in respect of the Hells Angels Motorcycle Club. The application was overtaken by High Court proceedings in *Wainohu v New South Wales*. Since the Act was found invalid, and despite the introduction of revised legislation, New South Wales police have not brought any further applications.

8.2.6 Proposed changes – serious crime prevention orders and public safety orders

At the 2015 state election, the incumbent Baird Government made an election commitment to introduce UK-style Serious Crime Prevention Orders (SCPOs) as well as public safety orders. It is envisaged that SCPOs will restrict association with certain people or access to certain places and:

... will be issued by the Supreme Court where the Court is satisfied on the balance of probabilities that a person or business is involved in a serious crime related activity, or by the District Court if a person has already been convicted of a serious offence.⁸⁴

In contrast public safety orders will be issued by senior police officers with the aim of ‘prevent[ing] people from attending places or events where they are expected to engage in violence or present a serious threat to public safety or security’.⁸⁵ These reforms have not yet been introduced.

8.3 South Australia

In early 2001 during the annual run of the South Australian Gypsy Joker Motorcycle Club, an affray broke out between members of the club and a newly formed policing unit called the Tactical Response Group. The conflict was allegedly sparked by reports that police officers were knocking over motorcycles. In the result, the Tactical Response Group was forced to retreat. According to two academics, ‘[t]he humiliation of [the South Australian Police] provided the political will to create a moral panic led by Premier Rann and his police’.⁸⁶ The ensuing ‘war on

⁸³ Ibid ss 28C-28F (current version).

⁸⁴ New South Wales Government, *Election Commitments 2015-19: Building Our Future*, 13 <www.budget.nsw.gov.au/__data/.../Election_Commitments_2015-19.pdf>.

⁸⁵ Ibid.

⁸⁶ Arthur Veno and Julie van den Eynde, Submission to Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, 23 June 2008, 2. But note that the authors’ method of ‘participatory action research’ means that their views may not be completely impartial: Julie van den Eynde and Arthur Veno, ‘Participatory Action Research with High-risk Groups: Best Practice for Researchers’ Safety and Data Integrity’ (2013) 25(1)

bikies' proved to be 'a highly successful policy platform' for the Rann Government, leading South Australia to become perhaps the 'most innovative' source of legislative experiments to deal with organised crime.⁸⁷

8.3.1 Statutes Amendment (Anti-Fortification) Act 2003 (SA) – fortification removal orders

South Australia's experiments began in 2003 with the adoption of Western Australia's fortification removal orders. The 2003 amendments to the *Summary Offences Act 1953* (SA) provide for the Commissioner of Police to apply to the Magistrates Court for a fortification removal order.⁸⁸ The Attorney-General at the time said that the amendments 'carrie[d] out the Labor Party's commitment to try to prevent the construction of outlaw motorcycle gang headquarters in South Australia and also to allow police to demolish the existing fortifications'.⁸⁹

At the beginning of 2015 *The Advertiser* newspaper revealed that the power had only been exercised four times since the laws came into effect in 2004.⁹⁰

8.3.2 Use and protection of criminal intelligence

Earlier in 2002, following a shooting at Monash University in Victoria, the Australasian Police Ministers' Council had resolved to adopt 'laws allowing the Commissioner of Police to refuse and revoke handgun licenses [sic] and applications on the basis of criminal intelligence or any other relevant information'.⁹¹ The laws were to be modelled on amendments made by New South Wales earlier that year⁹² as part of a suite of laws 'designed to inhibit the illegal supply of

Current Issues in Criminal Justice 491. The reference to the concept of 'moral panic' derives from Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (Routledge, 3rd ed, 2002).

⁸⁷ Gabrielle Appleby and John Williams, 'A New Coat of Paint: Law and Order and the Refurbishment of *Kable*' (2012) 40 *Federal Law Review* 1, 3.

⁸⁸ *Summary Offences Act 1953* (SA) s 74BB, introduced by *Statutes Amendment (Anti-Fortification) Act 2003* (SA) s 8.

⁸⁹ South Australia, *Parliamentary Debates*, House of Assembly, 26 June 2003, 3557 (MJ Atkinson, Attorney-General).

⁹⁰ Andrew Dowdell, 'Descendants Motorcycle Club likely to consent to changes demanded by SAPOL to Adelaide clubrooms', *The Advertiser* (Online), 30 April 2015, <<http://www.adelaidenow.com.au/news/south-australia/descendants-motorcycle-club-likely-to-consent-to-changes-demanded-by-sapol-to-adelaide-clubrooms/story-fni6uo1m-1227328908810>>. For two other examples see: *Osenkowski v Magistrates Court of South Australia* (2006) 96 SASR 456, 458 [1] (Doyle CJ); Nigel Hunt, 'Police lodge court order to tear down fortification protecting Mongols bikie gang's Thebarton clubrooms', *The Advertiser* (Online), 30 October 2013 <<http://www.adelaidenow.com.au/news/south-australia/police-lodge-court-order-to-tear-down-fortification-protecting-mongols-bikie-gangs-thebarton-clubrooms/story-fni6uo1m-1226749966620>>.

⁹¹ Ministerial Council on the Administration of Justice, Australasian Police Ministers' Council, *Special Meeting on Firearms (Handguns): Consolidated Resolutions* (November 2002, Sydney) 4 [13].

⁹² *Firearms Act 1996* (NSW) ss 11(5A), 29(3A), introduced by *Firearms Amendment (Public Safety) Act 2002* (NSW) sch 1 [6], [9]. For the claim that these laws served as the national model, see: New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 2002, 6418 (Michael Costa, Minister for Police).

firearms'.⁹³ South Australia delivered on its promise the following year by enacting the *Firearms (COAG Agreement) Amendment Act 2003* (SA).

Although the perpetrator at Monash University had suffered from paranoid delusional disorder and was not alleged to have any links to gangs, the use of CI to refuse or revoke firearms licences was justified on the basis of preventing organised crime. In his second reading speech, the Deputy Premier said that: '[c]riminal intelligence should be recognised in the critical area of firearms as a basis on which the Registrar [Commissioner of Police] can prevent organised crime, particularly motor cycle gangs, from obtaining and using these lethal weapons'.⁹⁴

The amendments allowed the Commissioner of Police to refuse or cancel a firearms licence on the basis of CI. If the Commissioner relied upon CI, s/he was also relieved of the obligation to provide reasons.⁹⁵ On appeal, the Magistrate was required to '... take steps to maintain the confidentiality of the information classified as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the appellant and the appellant's representative'.⁹⁶

These amendments served as a prototype for further CI provisions introduced in 2005.⁹⁷ South Australia acted upon police concerns about 'the infiltration of organised crime into the security and hospitality industries' by extending the use of CI to licensing decisions under the *Security and Investigation Agents Act 1995* (SA), the *Liquor Licensing Act 1997* (SA) and the *Gaming Machines Act 1992* (SA). According to the Attorney-General the amendments were 'crafted in light of police information indicating a significant level of involvement by, in particular, outlaw motorcycle gangs in these industries'.⁹⁸

The use of CI in licensing decisions under the *Liquor Licensing Act* was the subject of a High Court challenge in 2009 in the case of *K-Generation Pty Ltd v Liquor Licensing Court*.⁹⁹ Section 28A of that Act required the Liquor and Gambling Commissioner, the Licensing Court of South Australia and the Supreme Court of South Australia to take steps to maintain the confidentiality of information classified by the Commissioner of Police as CI.¹⁰⁰ In the result, the

⁹³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 June 2002, 3891 (Reba Meagher).

⁹⁴ South Australia, *Parliamentary Debates*, House of Assembly, 23 September 2003, 241 (KO Foley, Deputy Premier).

⁹⁵ *Firearms Act 1977* (SA) ss 12(7a), 20(3a) introduced by *Firearms (COAG Agreement) Amendment Act 2003* (SA) ss 8(1), 13.

⁹⁶ *Firearms Act 1977* (SA) s 21E(2), introduced by *Firearms (COAG Agreement) Amendment Act 2003* (SA) s 15. For current version regarding appeal to the District Court, see *Firearms Act 1977* (SA) s 26C(5)(a) (current version).

⁹⁷ *Statutes Amendment (Liquor, Gambling and Security Industries) Act 2005* (SA). See also South Australia, *Parliamentary Debates*, House of Assembly, 9 December 2004, 1295 (MJ Atkinson, Attorney-General): 'These confidentiality of criminal intelligence provisions are modelled on provisions enacted in the Firearms Act by the *Firearms (COAG Agreement) Amendment Act 2003*'.

⁹⁸ South Australia, *Parliamentary Debates*, above n 96, 1294 (MJ Atkinson, Attorney-General).

⁹⁹ (2009) 237 CLR 501.

¹⁰⁰ Introduced by *Statutes Amendment (Liquor, Gambling and Security Industries) Act 2005* (SA) s 27.

High Court unanimously upheld the provision.¹⁰¹ Their Honours found that the courts were not impermissibly directed by the executive because ‘the courts could determine for themselves both whether the information met the definition of criminal intelligence in the *Liquor Licensing Act* and what steps to take to maintain the confidentiality of the information’.¹⁰² Thereafter, the obligation to ‘take steps to maintain the confidentiality of ... criminal intelligence’ was ‘rolled out’¹⁰³ across South Australian legislation.¹⁰⁴

8.3.3 *Serious and Organised Crime (Control) Act 2008 (SA)* – criminal organisation declarations, control orders and public safety orders

On 2 June 2007 four people were injured in a shooting in an Adelaide nightclub during an argument between members of two motorcycle gangs.¹⁰⁵ A month later Premier Rann ‘announced legislative reforms aimed at tackling the menace of outlaw motorcycle gangs and other criminal associations’.¹⁰⁶ The resulting *Serious and Organised Crime (Control) Act 2008 (SA)* was said to ‘grant[] unprecedented powers to the police and the Attorney-General to combat serious and organised crime’.¹⁰⁷ It is true that the legislation was unprecedented in the organised crime sphere, however it ‘dr[ew] directly upon the Commonwealth’s national security laws’¹⁰⁸ enacted in 2005.¹⁰⁹

The adoption of the anti-terror model was accompanied by rhetoric equating OMCG members with terrorists. Premier Rann told the media, ‘We’re allowing similar legislation to that that

¹⁰¹ *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 531-532 [94]-[99] (French CJ), 542-543 [143]-[149] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), 576-580 [257] (Kirby J).

¹⁰² *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 99 [154] (Hayne, Crennan, Kiefel and Bell JJ).

¹⁰³ Gabrielle Appleby, ‘Protecting procedural fairness and criminal intelligence: Is there a balance to be struck?’ in Greg Martin, Rebecca Scott Bray and Miiko Kumar (eds), *Secrecy, Law and Society* (Taylor and Francis, 2015) 75, 77.

¹⁰⁴ See for example, *Casino Act 1997 (SA)* ss 45A(3), 66A, 69; *Summary Offences Act 1953 (SA)* ss 21F(11), (13), 21H(5), 21J(3), (5), 66J, 74BGA; *Hydroponics Industry Control Act 2009 (SA)* s 7; *Serious and Organised Crime (Control) Act 2008 (SA)* ss 5A, 9(7); *Serious and Organised Crime (Unexplained Wealth) Act 2009 (SA)* s 6; *Child Sex Offenders Registration Act 2006 (SA)* s 5A.

¹⁰⁵ Mark Russell, ‘Nightclub bikie shooting sparks fears of gang war’, *The Age* (online), 3 June 2007 <<http://www.theage.com.au/articles/2007/06/02/1180205580355.html>>.

¹⁰⁶ South Australia, *Parliamentary Debates*, House of Assembly, 21 November 2007, 1805 (MJ Atkinson, Attorney-General).

¹⁰⁷ *Ibid* 1806 (MJ Atkinson, Attorney-General).

¹⁰⁸ Rebecca Ananian-Welsh and George Williams, ‘The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia’ (2014) 38 *Melbourne University Law Review* 362, 376.

¹⁰⁹ *Criminal Code (Cth)* div 104, introduced by *Anti-Terrorism Act (No 2) 2005 (Cth)* sch 4, pt 1, upheld in *Thomas v Mowbray* (2007) 233 CLR 307, 327-328 [15] (Gleeson CJ), 347-348 [78]-[79] (Gummow and Crennan JJ), 506-507 [591]-[596] (Callinan J).

applies to terrorists, because these people are terrorists within our community'.¹¹⁰ Once enacted, the Premier proclaimed the Act to be 'the world's toughest anti-bikie laws'.¹¹¹

The Act allowed the Attorney-General to declare an organisation for the purposes of the Act if satisfied that:¹¹²

- (a) members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and
- (b) the organisation represents a risk to public safety and order in this State.

In making a decision the Attorney-General was directed to a number of discretionary considerations,¹¹³ including 'any other matter the Attorney-General considers relevant'.¹¹⁴ The Attorney-General was not required to provide any reasons for a decision to declare an organisation, nor disclose any information relied upon if the information was classified as CI by the Police Commissioner.¹¹⁵ The Attorney-General's decision was also immune from judicial review and could not be 'challenged or questioned in any proceedings'.¹¹⁶

Once an organisation had been declared, the Police Commissioner could apply to the Magistrates Court for a control order against its members. Among other things, such control orders could prohibit association with other members,¹¹⁷ on penalty of up to five years imprisonment.¹¹⁸ Subject to limited exceptions, any other person would also be prohibited from associating with a controlled person more than six times in a 12 month period.¹¹⁹ If the Commissioner relied upon CI, the Magistrates Court was required to take steps to maintain its confidentiality.¹²⁰

As will be seen the Achilles' heel of the scheme was that, where an organisation had been declared, the Magistrates Court was deprived of any discretion as to whether to make the control order. Upon application by the Commissioner the court was required by s 14(1) to make the order 'if satisfied that the defendant is a member of a declared organisation'. By contrast, under s 14(2), the Magistrates Court had a discretion to make a control order if satisfied the defendant

¹¹⁰ ABC Radio National, 'South Australia's plans to obliterate outlaw bikie gangs', *Law Report*, 6 May 2008 (Mike Rann) <<http://www.abc.net.au/radionational/programs/lawreport/south-australias-plans-to-obliterate-outlaw-bikie/3254212>>.

¹¹¹ M Rann, 'SA set for world's toughest anti-bikie laws' (Media Release, 8 May 2008), cited in Bartels, above n 39, 2.

¹¹² *Serious and Organised Crime (Control) Act 2008* (SA) s 10(1).

¹¹³ *Ibid* s 10(3).

¹¹⁴ *Ibid* s 10(3)(f).

¹¹⁵ *Ibid* s 13.

¹¹⁶ *Ibid* s 41(2). Cf *South Australia v Totani* (2010) 242 CLR 1, 27 [26] (French CJ), 62 [128] (Gummow J), 78 [193] (Hayne J), 105 [268] (Heydon J), 153 [415] (Crennan and Bell J).

¹¹⁷ *Serious and Organised Crime (Control) Act 2008* (SA) s 14(5)(a)(i), (b)(i).

¹¹⁸ *Ibid* s 22(1).

¹¹⁹ *Ibid* s 35(1)(b).

¹²⁰ *Ibid* s 21(2).

engages in serious criminal activity and also regularly associates with others who engage in such activity or who are members of a declared organisation.

The South Australian Attorney-General declared the Finks Motorcycle Club to be a declared organisation on 14 May 2009 and tabled the reasons for his decision in parliament.¹²¹ The Commissioner of Police then applied to the Magistrates Court for control orders against 12 alleged Finks members. Of these, eight were granted and four were adjourned.¹²² Donald Hudson was subject to a control order, and Sandro Totani was the subject of an application for one. Both commenced proceedings in the Supreme Court, seeking a declaration that s 14(1) of the Act was invalid. All of the control orders which had been granted were stayed pending the outcome.

A majority of the Full Court of the SA Supreme Court held the provision invalid,¹²³ as did a majority of the High Court on appeal.¹²⁴ Their Honours found that s 14(1) authorised the executive to enlist the Magistrates Court to implement decisions of the executive in a manner incompatible with the court's institutional integrity.

Prior to the High Court's decision in *Totani* the Commissioner made a further application to the Attorney-General on 9 December 2009 to have the Rebels Motorcycle Club declared.¹²⁵ The Attorney-General preferred, however, to await the High Court's decision after which he decided not to proceed to consider declaring the Rebels 'because to do so would be inconsistent with the legislation which he [would soon be] proposing'.¹²⁶ The police did, however, successfully seek a control order under s 14(2) against one member of the Rebels Motorcycle Club, Jamie Brown, on the basis that he had engaged in serious criminal activity and regularly associated with others who engaged in similar activity. The Magistrate made an order prohibiting Mr Brown from associating with a number of people, but declined to make an order which would prevent him from attending licensed premises on the basis that such a condition would be too broad, and without any clear nexus to crime prevention.¹²⁷

¹²¹ MJ Atkinson, *Serious and Organised Crime (Control) Act 2008: Application for declaration regarding the Finks MC: Reasons of the Honourable MJ Atkinson MP, Attorney-General*, tabled in the South Australian House of Assembly 14 May 2008.

¹²² Alan Moss, *A review of the execution of the powers under the Serious and Organised Crime (Control) Act 2008 exercised during the period 1 July, 2008 to 30 June, 2009*, tabled in the South Australian House of Assembly 13 October 2009, 28 [68].

¹²³ *Totani v South Australia* (2009) 105 SASR 244, 280-281 [155]-[157] (Bleby J), 305 [277] (Kelly J).

¹²⁴ *South Australia v Totani* (2010) 242 CLR 1, 52 [82] (French CJ), 67 [149] (Gummow J), 92-93 [236] (Hayne J), 160 [436] (Crennan and Bell JJ), 173 [481] (Kiefel J).

¹²⁵ See Annexure AM-3 to Alan Moss, *A review of the execution of the powers under the Serious and Organised Crime (Control) Act 2008 exercised during the period 1 July, 2009 to 30 June, 2010*, tabled in the South Australian House of Assembly 25 November 2010.

¹²⁶ Alan Moss, *A review of the execution of the powers under the Serious and Organised Crime (Control) Act 2008 exercised during the period 1 July, 2010 to 30 June, 2011*, tabled in the South Australian House of Assembly 24 November 2011, 7 [9].

¹²⁷ *Ibid* 7-8 [10].

South Australian Police have recently said that ‘despite the success of this application ... Section 14(2)(b) is unworkable’.¹²⁸ The application involved 18 months’ police work, 21 police witnesses, nine civilian witnesses, a large volume of sworn affidavits and evidence, and 12 appearances before the Magistrate. According to police, ‘[t]he resulting single control order did not justify the considerable expenditure of time and effort’.¹²⁹

Another measure introduced by the *Serious and Organised Crime (Control) Act 2008* (SA) which was not invalidated by *Totani* is the use of public safety orders. Under s 23, a senior police officer may make a public safety order if satisfied that the presence of certain people at a certain place would pose a serious risk to public safety, and that the order would be appropriate in the circumstances.¹³⁰ The order can prohibit specified people from entering certain premises, an event, or an area¹³¹ generally for up to 72 hours unless extended by the Magistrates Court.¹³² The power was used for the first time on 3 December 2010 to prohibit members of the Hells Angels Motorcycle Club and the New Boys from attending a concert function called Stereosonic 2010.¹³³ By early 2013, a total of 155 public safety orders had been issued against individual OMCG members in respect of 12 to 15 public events.¹³⁴ According to South Australian Police: ‘The orders have been very effective in preventing violent activity at public events. There has only been one arrest for breach of a Public Safety Order and the accused received a six month suspended sentence of imprisonment’.¹³⁵

8.3.4 *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA) – confiscation of unexplained wealth

Shortly before the High Court challenge South Australia also passed the *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA). Unlike the previous confiscation regime¹³⁶ the unexplained wealth laws do not require proof that a serious offence has been committed. Rather, the Crown Solicitor may apply to the District Court for an order confiscating a person’s wealth merely because it cannot be explained;¹³⁷ that is, any wealth in excess of lawfully

¹²⁸ South Australian Police, Clarification of Evidence to Crime and Public Integrity Policy Committee, *Inquiry into Serious and Organised Crime Legislation*, 10.

¹²⁹ *Ibid* 11.

¹³⁰ *Serious and Organised Crime (Control) Act 2008* (SA) s 23(1).

¹³¹ *Ibid* s 23(3).

¹³² *Ibid* s 3 (definition of ‘Court’), 25(1).

¹³³ Moss, above n 126, 11-15 [13].

¹³⁴ Evidence to Crime and Public Integrity Policy Committee, *Inquiry into Serious and Organised Crime*, Parliament of South Australia, Adelaide, 3 July 2015, 21 (Deputy Commissioner Stevens).

¹³⁵ South Australian Police, above n 128, 12.

¹³⁶ *Criminal Assets Confiscation Act 2005* (SA).

¹³⁷ *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA) s 9(2).

obtained wealth.¹³⁸ In making an application the Crown Solicitor is entitled to rely on CI and the District Court is required to take steps to maintain its confidentiality.¹³⁹

According to evidence before the Crime and Public Integrity Policy Committee in late 2015 no unexplained wealth orders have yet been made.¹⁴⁰

8.3.5 Statutes Amendment (Serious and Organised Crime) Act 2012 (SA) and Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012 (SA) – participation in criminal organisation offence, circumstance of aggravation, consorting offence, anti-association orders and amendments to control order regime in light of *Totani* and *Wainohu*

As foreshadowed by the Attorney-General, after the High Court's decisions in *Totani* and *Wainohu*, South Australia enacted a raft of amendments in early 2012, seemingly in tandem with major reforms in New South Wales. The 'centrepiece' of the amendments was the introduction of a new offence of participation in a criminal organisation,¹⁴¹ evidently based upon similar provisions introduced in New South Wales in 2006.¹⁴²

Now, under s 83E of the *Criminal Law Consolidation Act 1935 (SA)*,¹⁴³ it is an offence to participate in a criminal organisation, knowing or being reckless as to both (a) whether it is a criminal organisation, and (b) whether the participation contributes to the occurrence of any criminal activity. Knowledge is presumed if the person was wearing the organisation's insignia at the time.¹⁴⁴ A 'criminal organisation' may be either an organisation declared under the *Serious and Organised Crime (Control) Act 2008* or a group of two or more people who engage in, or facilitate engagement in, a serious offence of violence or a serious offence they intend to profit from.¹⁴⁵ Participation carries a maximum penalty of 15 years imprisonment, increasing to 20 years if the participation involves assault or property damage, and to 25 years if it involves an

¹³⁸ As explained in the second reading speech: South Australia, *Parliamentary Debates*, South Australia, House of Assembly, 16 July 2009, 3614 (MJ Atkinson, Attorney-General).

¹³⁹ *Serious and Organised Crime (Unexplained Wealth) Act 2009 (SA)* s 6(2).

¹⁴⁰ Evidence to Crime and Public Integrity Policy Committee, Inquiry into Serious and Organised Crime, Parliament of South Australia, Adelaide, 25 September 2015, 69 (Alan Moss).

¹⁴¹ South Australia, *Parliamentary Debates*, House of Assembly, 15 February 2012, 80 (JR Rau, Deputy Premier, Attorney-General).

¹⁴² *Ibid* 79 (JR Rau, Deputy Premier, Attorney-General).

¹⁴³ Introduced by *Statutes Amendment (Serious and Organised Crime) Act 2012 (SA)* s 30.

¹⁴⁴ *Criminal Law Consolidation Act 1935 (SA)* s 83E(7).

¹⁴⁵ *Ibid* s 83D(1) (definitions of 'criminal organisation', 'criminal group' and 'declared organisation').

assault on a public officer.¹⁴⁶ Any term of imprisonment for participation is to be cumulative upon a sentence for the underlying serious offence.¹⁴⁷

A total of 84 people have been charged with participating in a criminal organisation, only 10 of whom were OMCG members.¹⁴⁸ Many of these charges have, however, been withdrawn by the Office of the Director of Public Prosecutions, something which is reflected in very few references to the offence in the case law.¹⁴⁹ In a recent submission to the Crime and Public Integrity Policy Committee the South Australian Director of Public Prosecutions explained why:

In my view, it is not always (if ever) appropriate that both a section 83E(1) offence and the substantive offence (for example, trafficking in a relevant drug or money laundering) be charged when the conduct alleged in each offence is the same. This is so as commonly the conduct that would demonstrate the act/s of participation for section 83E(1) is/are the very same act/s that are alleged to establish the substantive offence. To charge both the substantive offence and the section 83E(1) offence inevitably raises legal arguments about abuse of process and *autrefois convict*.¹⁵⁰

Separate to the offence of participation, another amendment made it a general circumstance of aggravation to commit an offence for the benefit of, at the direction of, or in association with, a criminal organisation. Likewise, identifying as a member of a criminal organisation in the course of committing an offence is also a circumstance of aggravation.¹⁵¹

Next, South Australia re-enacted a consorting offence, which had previously been repealed in 2008.¹⁵² The decision to do so was based on an understanding that the High Court, in *Totani*, had criticised the control order scheme whereas one member of the bench had discussed traditional consorting offences, apparently without criticism.¹⁵³

Under the new offence in s 13 of the *Summary Offences Act 1953* (SA), it became an offence punishable by imprisonment for two years to habitually consort with a person either found guilty of a serious and organised crime offence or reasonably suspected of having committed such an

¹⁴⁶ Ibid s 83E(1)-(4).

¹⁴⁷ Ibid s 83E(5).

¹⁴⁸ South Australian Police, above n 128, 12.

¹⁴⁹ The only reference in available cases to a charge under s 83E is: *R v Cekic [No 2]* [2014] SADC 143 (21 August 2014) [4] (Stretton DCJ).

¹⁵⁰ Adam Kimber SC, Submission to Crime and Public Integrity Policy Committee, *Inquiry into Serious and Organised Crime Legislation*, 1 April 2015, 2. See also: Evidence to Crime and Public Integrity Policy Committee, *Inquiry into Serious and Organised Crime*, Parliament of South Australia, Adelaide, 11 September 2015, 49 (Mr Kimber).

¹⁵¹ *Criminal Law Consolidation Act 1935* (SA) s 5AA(1)(ga), introduced by *Statutes Amendment (Serious and Organised Crime) Act 2012* (SA) s 29.

¹⁵² *Serious and Organised Crime (Control) Act 2008* (SA) sch 1 cl 6, repealing *Summary Offences Act 1953* (SA) s 13.

¹⁵³ This reading of *Totani* was set out in a proposal paper and repeated in the second reading speech: Government of South Australia, Attorney-General's Department, *Combatting Serious and Organised Crime* (August 2011) 6; South Australia, *Parliamentary Debates*, above n 141. The passage referred to is: *South Australia v Totani* (2010) 242 CLR 1, 31 [33] (French CJ).

offence.¹⁵⁴ Similarly, under s 66K, a person who continues to consort after having been issued a consorting prohibition notice is guilty of an offence punishable by imprisonment for two years.¹⁵⁵ A consorting prohibition notice may be issued by a senior police officer if satisfied that the recipient has habitually consorted with someone found guilty of certain offences or who is reasonably suspected of having committed such offences during the previous three years.¹⁵⁶ The prescribed offences include indictable offences of violence and organised crime offences.¹⁵⁷ Until earlier this year, a senior police officer could also issue a notice to a person subject to a control order to prohibit their association with any other person regardless of the criminality of the other person.¹⁵⁸ Consorting includes consorting by electronic means,¹⁵⁹ although the offence does not extend to prohibit associations between close family members or certain other innocent associations such as for genuine political purposes.¹⁶⁰ The consorting prohibition notice is 'indefinite in duration'¹⁶¹ unless the recipient of the notice applies to the Magistrates Court for cancellation or variation of the notice.¹⁶² If the Commissioner of Police relies upon any CI at such a review, the Magistrates Court must take steps to maintain its confidentiality.¹⁶³

Only two consorting prohibition notices have been issued, one each to the president and sergeant-at-arms of the Finks/Mongols Motorcycle Club.¹⁶⁴

South Australia also introduced an 'overlap[ping]' and 'complementary' measure¹⁶⁵ designed to restrict liaisons *by* criminals rather than *with* criminals. A police officer can now apply to the Magistrates Court under s 78(1) of the *Summary Procedure Act 1921* (SA) for an order prohibiting a person from associating with another specified person or from visiting a certain place.¹⁶⁶ Having 'full judicial discretion',¹⁶⁷ the court may make the order if satisfied the person has been convicted of certain offences within the previous two years and that the order is reasonably necessary to ensure the person does not commit further offences of a similar

¹⁵⁴ Introduced by *Statutes Amendment (Serious and Organised Crime) Act 2012* (SA) s 46.

¹⁵⁵ Introduced by *ibid* s 48.

¹⁵⁶ *Summary Offences Act 1953* (SA) s 66A(1).

¹⁵⁷ *Ibid* s 66(1) (definition of 'prescribed offence').

¹⁵⁸ *Ibid* s 66A(1)(a)(i) (as enacted), amended by *Statutes Amendment (Serious and Organised Crime) Act 2015* (SA) s 11(1).

¹⁵⁹ *Summary Offences Act 1953* (SA) s 66(2)(a).

¹⁶⁰ *Ibid* s 66A(2)(a), (b)(i).

¹⁶¹ South Australia, *Parliamentary Debates*, above n 141, 81 (JR Rau, Deputy Premier, Attorney-General). Cf notices issued to controlled persons: *Summary Offences Act 1953* (SA) s 66A(3) (as enacted), repealed by *Statutes Amendment (Serious and Organised Crime) Act 2015* (SA) s 11(2).

¹⁶² *Summary Offences Act 1953* (SA) ss 66D, 66E.

¹⁶³ *Ibid* s 66J.

¹⁶⁴ South Australian Police, above n 128, 13.

¹⁶⁵ South Australia, *Parliamentary Debates*, above n 141, 82 (JR Rau, Deputy Premier, Attorney-General).

¹⁶⁶ Introduced by *Statutes Amendment (Serious and Organised Crime) Act 2012* (SA) s 49.

¹⁶⁷ South Australia, *Parliamentary Debates*, above n 141, 82 (JR Rau, Deputy Premier, Attorney-General).

nature.¹⁶⁸ The order lasts for up to two years¹⁶⁹ and contravention carries a maximum penalty of six months imprisonment on the first occasion and then two years for subsequent breaches.¹⁷⁰ The non-association and place restriction orders can also be made as a 'sentencing option'¹⁷¹ without the need for a separate court application being made.¹⁷²

Such orders have been made in sentencing Comancheros members for an aggravated assault in 2012 and more recently against Hells Angels members for an affray.¹⁷³

Lastly, South Australia 'repair[ed]' the constitutional defects of the *Serious and Organised Crime (Control) Act 2008* in the wake of the High Court's decisions in *Totani* and *Wainohu*.¹⁷⁴ The key amendments were to:

- take the power to declare an organisation away from the Attorney-General and give it instead to 'eligible judges' of the Supreme Court,¹⁷⁵ as was then the case under equivalent legislation in New South Wales, Western Australia and the Northern Territory;¹⁷⁶
- require an eligible judge to give reasons for their decision to declare an organisation, unlike the legislation struck down in *Wainohu*;¹⁷⁷
- give the power to make a control order to the Supreme Court rather than the Magistrates Court;¹⁷⁸ and,
- provide that the Supreme Court *may* (rather than *must*) make a control order if satisfied of the test, unlike the provision found unconstitutional in *Totani*.¹⁷⁹

¹⁶⁸ *Summary Procedure Act 1921* (SA) s 78(2).

¹⁶⁹ *Ibid* s 78(3)(a).

¹⁷⁰ *Ibid* s 83(1).

¹⁷¹ South Australia, *Parliamentary Debates*, above n 141, 82 (JR Rau, Deputy Premier, Attorney-General).

¹⁷² *Criminal Law (Sentencing) Act 1988* (SA) s 19AA, introduced by *Statutes Amendment (Serious and Organised Crime) Act 2012* (SA) s 26.

¹⁷³ South Australian Police, above n 128, 16.

¹⁷⁴ South Australia, *Parliamentary Debates*, above n 141, 77 (JR Rau, Deputy Premier, Attorney-General); Government of South Australia, Attorney-General's Department, *Combatting Serious and Organised Crime* (August 2011) 8.

¹⁷⁵ *Serious and Organised Crime (Control) Act 2008* (SA) s 11(1), introduced by *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012* (SA) s 6.

¹⁷⁶ South Australia, *Parliamentary Debates*, above n 141, 98 (JR Rau, Deputy Premier, Attorney-General).

¹⁷⁷ *Serious and Organised Crime (Control) Act 2008* (SA) s 16, introduced by *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012* (SA) s 6.

¹⁷⁸ *Serious and Organised Crime (Control) Act 2008* (SA) s 3 (definition of 'Court'), introduced by *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012* (SA) ss 4(3).

¹⁷⁹ *Serious and Organised Crime (Control) Act 2008* (SA) s 22, introduced by *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012* (SA) s 6.

8.3.6 Statutes Amendment (Criminal Intelligence) Act 2012 (SA) – standardised use and protection of criminal intelligence

In 2012, South Australia also standardised its CI provisions across its statute books.¹⁸⁰ Now, whenever CI may be relied upon, a court:¹⁸¹

- (a) must, on the application of the Commissioner of Police, take steps to maintain the confidentiality of information classified by the Commissioner of Police as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives; and
- (b) may take evidence consisting of or relating to information that is so classified by the Commissioner of Police by way of affidavit of a police officer of or above the rank of superintendent.

8.3.7 Serious and Organised Crime (Control) (Declared Organisations) Amendment Act 2013 (SA) – amendments to control order regime in light of *Pompano*

In 2013, following the High Court decision in *Pompano*, South Australia transitioned its *Serious and Organised Crime (Control) Act 2008* from an ‘eligible judge’ model to the Queensland model of having a criminal organisation declaration made by the Supreme Court.¹⁸²

According to the Attorney-General the reason for preferring the Supreme Court is that constitutionality in *Pompano* depended upon the Supreme Court’s ability to rely upon its inherent jurisdiction to prevent unfairness. In contrast, an eligible judge acting in their personal capacity ‘has no such inherent jurisdiction or inherent characteristics to fall back upon’ to prevent unfairness and therefore avoid the invalidity of the legislative scheme.¹⁸³

Despite the amendments, according to a recent submission of the annual reviewer of the Act, ‘the impetus to use the Declaration and Control provisions of the Act was largely lost’ following *Totani*. Overall, ‘[t]he provisions of the ... Act in relation to Declared Organisations and Control Orders have not proven to be a success’.¹⁸⁴ Likewise, the South Australian Police have submitted that ‘due to the legislative complexity and police resources required’ to obtain

¹⁸⁰ *Statutes Amendment (Criminal Intelligence) Act 2012 (SA)*.

¹⁸¹ See, for example, *Casino Act 1997 (SA)* s 66A; *Firearms Act 1977 (SA)* s 26C(5); *Liquor Licensing Act 1997 (SA)* s 28A(5a); *Summary Offences Act 1953 (SA)* s 74BGA.

¹⁸² *Serious and Organised Crime (Control) (Declared Organisations) Amendment Act 2013 (SA)* esp s 9, amending s 11 of the *Serious and Organised Crime (Control) Act 2008 (SA)*.

¹⁸³ South Australia, *Parliamentary Debates*, House of Assembly, 4 July 2013, 6421 (JR Rau, Deputy Premier Attorney-General).

¹⁸⁴ Alan Moss, Submission to Crime and Public Integrity Policy Committee, *Inquiry into Serious and Organised Crime Legislation*, 16 February 2015, 1-2.

declarations and control orders, police have been more 'effective using traditional policing legislation to prevent, disrupt and investigate serious organised crime'.¹⁸⁵

8.3.8 Statutes Amendment (Serious and Organised Crime) Act 2015 (SA) – new anti-association offences in light of *Kuczborski* and amendments to consorting offence

South Australia made further changes in mid-2015 in light of the High Court decisions in *Tajjour* (upholding consorting offences in New South Wales) and *Kuczborski* (upholding certain anti-association provisions in Queensland). These amendments had no impact, however, upon the *Serious and Organised Crime (Control) Act 2008*.

First, South Australia inserted new offences into the *Criminal Law Consolidation Act 1935*,¹⁸⁶ 'mirroring those enacted in Queensland, both those in their Criminal Code and those in their Liquor Act'.¹⁸⁷ As in Queensland, it is now an offence for a participant in a criminal organisation to be knowingly present in a public place with two other participants,¹⁸⁸ to enter a prescribed place or attend a prescribed event;¹⁸⁹ or to recruit new members.¹⁹⁰ Each of these new offences carries a maximum penalty of three years imprisonment. It is also now an offence for a person to enter or remain in licensed premises while wearing the insignia or colours of a declared criminal organisation.¹⁹¹ The penalties escalate from \$25,000 for a first offence to \$100,000 or 18 months imprisonment for third and subsequent offences.

South Australia also followed Queensland's lead in declaring a list of criminal organisations and prescribed places by way of legislation to take effect as regulations.¹⁹² According to the Attorney-General, the reason for this was that 'while the making of a regulation is open to judicial review, the decision of Parliament is not'.¹⁹³

Second, South Australia amended its consorting offence to accord with New South Wales's consorting offence, given that it had been 'subjected to a thorough and searching examination by

¹⁸⁵ South Australian Police, above n 128, 18.

¹⁸⁶ *Statutes Amendment (Serious and Organised Crime) Act 2015 (SA)* ss 8-9.

¹⁸⁷ South Australia, *Parliamentary Debates*, House of Assembly, 3 June 2015, 1476 (JR Rau, Deputy Premier, Attorney-General).

¹⁸⁸ *Criminal Law Consolidation Act 1935 (SA)* s 83GC, mirroring *Criminal Code (Qld)* s 60A.

¹⁸⁹ *Criminal Law Consolidation Act 1935 (SA)* s 83GD, mirroring *Criminal Code (Qld)* s 60B.

¹⁹⁰ *Criminal Law Consolidation Act 1935 (SA)* s 83GE, mirroring *Criminal Code (Qld)* s 60C.

¹⁹¹ *Liquor Licensing Act 1997 (SA)* ss 117B(1) (definition of 'prohibited item'), 117E, mirroring *Liquor Act 1992 (Qld)* ss 173EA, 173EC.

¹⁹² *Criminal Law Consolidation (Criminal Organisations) Regulations 2015 (SA)*, *Liquor Licensing (Declared Criminal Organisations) Regulations 2015 (SA)*, introduced by *Statutes Amendment (Serious and Organised Crime) Act 2015 (SA)* schs 1-2.

¹⁹³ South Australia, *Parliamentary Debates*, above n 187, 1481 (JR Rau, Deputy Premier, Attorney-General). Regarding the intention to exclude judicial review, see also: Evidence to Crime and Public Integrity Policy Committee, Inquiry into Serious and Organised Crime, Parliament of South Australia, Adelaide, 3 July 2015, 24 (Deputy Commissioner Stevens).

the High Court and found to be constitutional'.¹⁹⁴ Now, in South Australia, consorting can extend to consorting with any convicted offender rather than only those convicted of a serious and organised crime offence.¹⁹⁵ Habitual consorting has, however, been narrowed to require proof of consorting with at least two such convicted offenders on at least two occasions.¹⁹⁶ There are also a number of innocent forms of consorting which are to be disregarded, such as consorting with family members.¹⁹⁷ As in New South Wales, the notable omission is a defence when consorting is for genuine political purposes.

Early media reports indicate that the new laws have resulted in most declared OMCGs abandoning their clubrooms, with their members now gathering in secret.¹⁹⁸ By the beginning of November 2015 South Australian police had issued 12 consorting prohibition notices to members of declared organisations. The Attorney-General is reported to have said that a legal challenge will be 'inevitable' once a gang member faces charges.¹⁹⁹

8.3.9 Criminal Assets Confiscation (Prescribed Drug Offenders) Amendment Bill 2015 (SA) – confiscation of explained wealth from drug offenders

The Rann and Weatherill Governments have attempted on five occasions to pass legislation allowing the 'total confiscation of property of a declared [drug offender]',²⁰⁰ either following conviction for a commercial drug offence, or following three convictions for less serious drug

¹⁹⁴ South Australia, *Parliamentary Debates*, above n 187, 1478 (JR Rau, Deputy Premier, Attorney-General).

¹⁹⁵ *Summary Offences Act 1953 (SA)* s 13(1), as inserted by *Statutes Amendment (Serious and Organised Crime) Act 2015 (SA)* s 10. Cf *Summary Offences Act 1953 (SA)* s 13(3), as inserted by *Statutes Amendment (Serious and Organised Crime) Act 2012 (SA)* s 46.

¹⁹⁶ *Summary Offences Act 1953 (SA)* s 13(2), as inserted by *Statutes Amendment (Serious and Organised Crime) Act 2015 (SA)* s 10.

¹⁹⁷ *Summary Offences Act 1953 (SA)* s 13(3), as inserted by *Statutes Amendment (Serious and Organised Crime) Act 2015 (SA)* s 10, modelled on *Crimes Act 1900 (NSW)* s 93X.

¹⁹⁸ Sheradyn Holderhead, 'South Australian bikies abandon their clubrooms as tough new anti-association laws take effect', *The Advertiser* (Online), 6 August 2015 <<http://www.adelaidenow.com.au/news/south-australia/south-australian-bikies-abandon-their-clubrooms-as-tough-new-anti-association-laws-take-effect/story-fni6uo1m-1227472748147?sv=2f5c4bf5914439fff786328a3622912b>>.

¹⁹⁹ Nigel Hunt, 'Tougher laws: Clubrooms abandoned, bikies now meeting covertly to thwart police', *Sunday Mail (SA)* (Online), 1 November 2015 <<http://www.theaustralian.com.au/news/tougher-laws-clubrooms-abandoned-bikies-now-meeting-covertly-to-thwart-police/story-e6frg6n6-1227589579438>>.

²⁰⁰ South Australia, *Parliamentary Debates*, House of Assembly, 11 February 2015, 45, quoting Labor's 2010 serious crime election policy. For the other four attempts, see: South Australia, *Parliamentary Debates*, House of Assembly, 18 May 2011, 3744-3750 (A Koutsantonis, Minister for Correctional Services); South Australia, *Parliamentary Debates*, House of Assembly, 14 February 2012, 56-62 (JA Rau, Deputy Premier, Attorney-General); South Australia, *Parliamentary Debates*, House of Assembly, 16 October 2012, 3101-3104 (JA Rau, Deputy Premier, Attorney-General); South Australia, *Parliamentary Debates*, House of Assembly, 7 May 2014, 81-85 (JA Rau, Deputy Premier, Attorney-General).

offences in a 10 year period.²⁰¹ As in Western Australia, the Northern Territory, Queensland and now Victoria the property is to be forfeited regardless whether the offender can show that it was acquired lawfully without any connection to criminal activity. The primary justification for this proposed law is that '[o]utlaw motorcycle gangs and their members are notoriously involved in drug trafficking'.²⁰² The most recent attempt passed the lower house on 26 February 2015.²⁰³ The upper house passed the Bill with substantial amendments on 10 September 2015.²⁰⁴ These amendments require that 50 % of confiscated assets be 'applied as additional government funding for drug rehabilitation programs'²⁰⁵ and allow an appeal court to discharge or vary a confiscation order 'regardless of whether th[e] Act authorised or required the order to be made'.²⁰⁶

It remains to be seen whether the lower house will agree or whether these amendments will effectively kill the Bill, as on previous occasions.²⁰⁷

8.4 Western Australia

8.4.1 *Criminal Property Confiscation Act 2000 (WA)* – unexplained wealth

Western Australia was the first Australian jurisdiction to introduce unexplained wealth laws.²⁰⁸ Facing a 'new era of organised crime', the government sought to overcome the difficulty in existing confiscation legislation of having to 'prove a relationship between unexplained wealth

²⁰¹ Proposed s 6A(1) of the *Criminal Assets Confiscation Act 2005 (SA)*, proposed by Criminal Assets Confiscation (Prescribed Drug Offenders) Amendment Bill 2015 (SA) cl 6 (as at the first reading speech in the House of Assembly on 11 February 2015).

²⁰² South Australia, *Parliamentary Debates*, House of Assembly, 11 February 2015, 45 (JR Rau, Deputy Premier, Attorney-General).

²⁰³ South Australia, *Parliamentary Debates*, House of Assembly, 26 February 2015, 448.

²⁰⁴ South Australia, *Parliamentary Debates*, Legislative Council, 10 September 2015, 1471.

²⁰⁵ Proposed s 209(1a) of the *Criminal Assets Confiscation Act 2005 (SA)*, proposed by Criminal Assets Confiscation (Prescribed Drug Offenders) Amendment Bill 2015 (SA) cl 21(2) (as at the third reading in the Legislative Council on 10 September 2015).

²⁰⁶ Proposed s 226(3a) of the *Criminal Assets Confiscation Act 2005 (SA)*, proposed by Criminal Assets Confiscation (Prescribed Drug Offenders) Amendment Bill 2015 (SA) cl 24 (as at the third reading in the Legislative Council on 10 September 2015).

²⁰⁷ The amended Bill has been returned to the lower house, but without a vote or further debate: South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2549-2550.

²⁰⁸ Parliamentary Joint Committee on the Australian Crime Commission (PJACC), Parliament of Australia, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups* (August 2009) 46 [3.55].

and criminal conduct'. It did this by making it irrelevant 'whether or not the person has committed any offence'.²⁰⁹

Now, under the *Criminal Property Confiscation Act 2000 (WA)*, the Director of Public Prosecutions may apply to a court²¹⁰ for an unexplained wealth declaration.²¹¹ The court must make the declaration if it finds that a person's 'wealth is greater than the value of the person's lawfully acquired wealth'.²¹² As a result, the unexplained wealth is payable to the state.²¹³ Lawfully obtained wealth may also be confiscated if it belongs to a person who has been declared a 'drug trafficker' on conviction for their third serious drug offence in 10 years.²¹⁴

8.4.2 *Criminal Investigation (Exceptional Powers) and Fortification Removal Act 2002 (WA)* – fortification removal orders and criminal investigation powers

On 1 September 2001 a retired police officer, Don Hancock, and his friend Lou Lewis were killed in a car bombing. Due to Don Hancock's active pursuit of OMCGs while Police Commander his 'death was widely seen as an act of revenge by bikies and the death of Lou Lewis as "collateral damage"'.²¹⁵ In the wake of the bombing a cabinet taskforce was established 'to develop a comprehensive strategy to tackle organised crime'.

Two months later Premier Gallop introduced into parliament what he described as 'the toughest laws in Australia for combating the sinister and complex activities of criminal gangs'.²¹⁶ The resulting *Criminal Investigation (Exceptional Powers) and Fortification Removal Act 2002 (WA)* sought to enhance the powers of the police to investigate criminal activity²¹⁷ as well as to remove fortifications.²¹⁸ These powers were subject to oversight by a retired judge, appointed as a special commissioner.²¹⁹

When the Corruption and Crime Commission was established a year later it was given a supervisory role in relation to police investigations into organised crime. Accordingly, the 2002 Act was repealed but substantially reproduced in the *Corruption and Crime Commission Act*

²⁰⁹ Western Australia, *Parliamentary Debates*, Legislative Assembly, 29 June 2000, 8611 (Dan Barron-Sullivan).

²¹⁰ Generally the Supreme Court for real property and the District Court for other property up to the value of the jurisdictional limit: *Criminal Property Confiscation Act 2000 (WA)* s 101.

²¹¹ *Criminal Property Confiscation Act 2000 (WA)* s 11(1).

²¹² *Ibid* s 12(1).

²¹³ *Ibid* s 14.

²¹⁴ *Misuse of Drugs Act 1981 (WA)* s 32A(1); *Criminal Property Confiscation Act 2000 (WA)* s 8(1).

²¹⁵ David Royds, 'The Murder of Don Hancock' (2013) 67(4) *Australian Police Journal* 158, 158.

²¹⁶ Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 November 2001, 5038 (Dr Geoff Gallop, Premier).

²¹⁷ *Criminal Investigation (Exceptional Powers) and Fortification Removal Act 2002 (WA)* pts 4, 5.

²¹⁸ *Ibid* pt 7.

²¹⁹ *Ibid* ss 7, 9-11.

2003 (WA).²²⁰ Police were also given new investigatory powers such as the power to assume identities, and to conduct integrity tests and controlled operations.²²¹ Now, under the renamed *Corruption, Crime and Misconduct Act 2003* (WA), the Commissioner of Police may apply *ex parte* to the Corruption and Crime Commission for the issue of a fortification warning notice.²²² The Commission must issue the notice if satisfied on the balance of probabilities that there are reasonable grounds for suspecting that the premises are heavily fortified and that they are habitually used by people involved in organised crime.²²³ The notice is to be given to the owner or occupier of the premises, following which they have 14 days to make a submission to the Commissioner of Police.²²⁴ The Commissioner must then consider the submissions, and if s/he in turn reasonably believes that the premises are heavily fortified and habitually used by people involved in organised crime, a fortification removal notice may be issued.²²⁵ The fortifications must then be removed within seven days failing which the police may enter the premises to remove them.²²⁶

Judicial review in the Supreme Court is limited to the question whether the Commissioner of Police held the relevant reasonable belief.²²⁷ At the review, the Commissioner may also rely upon CI to be withheld from the applicant for review 'if its disclosure might prejudice the operations of the Commissioner of Police'.²²⁸

The High Court upheld these provisions in *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police*.²²⁹ A majority of the judges found that, properly construed, the Act requires the Supreme Court to decide for itself whether the disclosure of the information would prejudice the operations of the Commissioner.²³⁰

A review of the Corruption and Crime Commission's annual reports from 2003 to 2015 reveals that only three fortification removal notices have ever been issued.²³¹ In 2009 media reports revealed that the other powers of investigation under the *Corruption and Crime Commission Act*

²²⁰ Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 May 2003, 7862 (Jim McGinty, Attorney-General).

²²¹ *Corruption, Crime and Misconduct Act 2003* (WA) ss 60, 64.

²²² *Ibid* s 68(1).

²²³ *Ibid* s 68(2).

²²⁴ *Ibid* ss 69(2)(b), 70(1).

²²⁵ *Ibid* s 72(2).

²²⁶ *Ibid* ss 73(2)(a), 75(1), (3).

²²⁷ *Ibid* s 76(1).

²²⁸ *Ibid* s 76(2).

²²⁹ (2008) 234 CLR 532.

²³⁰ *Ibid* 551-552 [7] (Gleeson CJ), 558 [33], 559 [36], 561 [44] (Gummow, Hayne, Heydon and Kiefel JJ), 593-594 [170]-[174] (Crennan J). Cf 584 [125] (Kirby J). See also the subsequent ruling by Blaxwell J, accepting some claims of confidentiality and rejecting others: *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police [No 2]* [2008] WASC 166 (13 August 2008) [56], sch.

²³¹ Corruption and Crime Commission of Western Australia, *Annual Report 2003-2004* (2004) 22; Corruption and Crime Commission, *Annual Report: 2010-2011* (2011) 91 [227]; Corruption and Crime Commission, *Annual Report: 2013-2014* (2014) 73 [116].

had been underutilised in the previous five years.²³² The Attorney-General who had introduced the Act in 2003 also questioned its effectiveness: he said that ‘toughening the law is fine at a political, rhetorical level ... [but] our experience in Western Australia has shown that they haven’t been used and therefore have not been effective’.²³³

8.4.3 *Criminal Organisations Control Act 2012 (WA)* – criminal organisation declarations, control orders, and new offences of participating and instructing

Following a state election in 2008 the new Barnett Government committed to a ‘multi-million dollar fighting fund to combat outlaw bikie gangs and other organised crime’.²³⁴ The government ‘closely monitor[ed]’ the new declaration and control order regime in South Australia, but preferred to await the result of the High Court challenge in *Totani* ‘before committing resources and money to something without knowing the potential pitfalls’.²³⁵

With the benefit of the High Court decisions in *Totani* and *Wainohu* the Western Australian Attorney-General introduced the Criminal Organisations Control Bill in 2011. In his second reading speech he drew particular attention to the rate of offending among OMCG members but emphasised that ‘while outlaw motorcycle gangs have the highest profile in the community’, the legislation would be directed at all criminal organisations.²³⁶ He acknowledged that the model adopted from South Australia and New South Wales would be resource intensive and likely a ‘decade-long process’,²³⁷ involving litigation at ‘every step of th[e] legislation’.²³⁸ It was therefore the government’s intention that the Act would be used in a ‘sufficiently targeted’ way, so as ‘to make the legislation a worthwhile tool’.²³⁹ When the *Criminal Organisations Control Act 2012 (WA)* was passed, the Western Australian government heralded it as the ‘nation’s toughest organised crime laws’.²⁴⁰

²³² P Murray, ‘Bikie gangs prosper as tough laws gather dust’, *West Australian*, 31 March 2009, cited in Bartels, above n 39, 6.

²³³ M Edwards, ‘Hit bikies’ hip pockets in gang crackdown: McGinty’, *ABC News*, 1 April 2009, cited in Bartels, above n 39, 6.

²³⁴ Rob Johnson and Christian Porter, ‘Criminal’s money will target organised crime’ (Media Statement, 30 November 2008) <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2008/11/Criminals'-money-will-target-organised-crime.aspx>>.

²³⁵ Rob Johnson, ‘Media response – bikie laws’ (Media Statement, 19 February 2009) <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2009/02/Media-response---bikie-laws.aspx>>.

²³⁶ Western Australia, *Parliamentary Debates*, Legislative Assembly, 23 November 2011, 9679 (Mr C Porter, Attorney-General).

²³⁷ Christian Porter, ‘Organised crime busting laws’ (Media Statement, 13 November 2011) <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2011/11/Organised-crime-busting-laws.aspx>>.

²³⁸ Western Australia, *Parliamentary Debates*, above n 236.

²³⁹ *Ibid.*

²⁴⁰ Michael Mischin, ‘Laws targeting criminal gangs pass Parliament’ (Media Statement, 14 November 2012) <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2012/11/Laws-targeting-criminal-gangs-pass-Parliament.aspx>>.

The Act allows for a judge or retired judge to be appointed as a 'designated authority', akin to the 'eligible judge' under the original New South Wales scheme.²⁴¹ Out of an abundance of caution, the Act stipulates that the designated authority is not subject to control by the executive.²⁴² Unlike interstate legislation, Western Australia has not moved away from the 'eligible judge' model despite the High Court's vindication of the different, Queensland model in *Pompano*.

The Commissioner of Police or the Commissioner of the Corruption and Crime Commission can apply to a designated authority for a declaration that an organisation is a criminal organisation.²⁴³ The designated authority has a discretion to make the declaration if satisfied that the respondent is an organisation, that its members associate for the purpose of 'organising, planning, facilitating, supporting or engaging in serious criminal activity', and that it represents a risk to public safety and order.²⁴⁴ Whether or not the designated authority decides to make a declaration, it must give reasons for its decision.²⁴⁵ Once made, the declaration remains in force for five years unless revoked or extended.²⁴⁶

The Commissioner of Police can then apply to the Supreme Court for interim control orders and control orders against the members of a declared organisation.²⁴⁷ The Supreme Court may make either order if satisfied that the person is a member of a declared organisation, was previously a member and has a continuing involvement with the organisation, or associates with members of the organisation and has engaged in serious criminal activity.²⁴⁸ The court must also be satisfied that the order is appropriate in the circumstances.²⁴⁹ The control order then continues for up to five years.²⁵⁰

A person subject to a control order may not associate with other controlled persons, be involved with the funds of the declared organisation, be involved in any public event or recruit people into the declared organisation.²⁵¹ If so minded, the Supreme Court may also include other conditions in a control order including conditions preventing a person from going to certain places, possessing certain things, using certain types of technology or working in certain industries such as gambling and security.²⁵² Breach of a condition is an offence with a penalty ranging from two to five years imprisonment.²⁵³

²⁴¹ *Criminal Organisations Control Act 2012 (WA) s 26(1)*.

²⁴² *Ibid* s 28.

²⁴³ *Ibid* s 7(1).

²⁴⁴ *Ibid* s 13(1).

²⁴⁵ *Ibid* s 14(1).

²⁴⁶ *Ibid* ss 16(2), 18, 21(1).

²⁴⁷ *Ibid* ss 35(1), 52(1).

²⁴⁸ *Ibid* ss 38(1)(b), 52(2).

²⁴⁹ *Ibid* s 52(1)(b).

²⁵⁰ *Ibid* ss 60(1)(g), 62(2).

²⁵¹ *Ibid* ss 58(1)(a), 77(2), 78(1), but see s 59(2)(a).

²⁵² *Ibid* ss 58(1)(b), (2), 79(1), 80.

²⁵³ *Ibid* ss 99, 102(1), 103(2), 106(1).

Even without a control order it is an offence for an owner, occupier or lessee to permit their premises to be habitually used by members of a declared organisation, or to be 'knowingly concerned' in the management of premises used by members of such an organisation. Both offences carry a maximum penalty of two years in prison.²⁵⁴

As in South Australia, if CI is relied upon in an application for a declaration or control order, the designated authority or the Supreme Court must 'take all reasonable steps to maintain the confidentiality of information [it] considers to be properly classified ... as criminal intelligence'.²⁵⁵

The key provisions of the Act only came into force in November 2013.²⁵⁶ According to the Ombudsman's report for the first monitoring period ending November 2014, no powers under the Act have yet been exercised.²⁵⁷

A number of amendments to other pieces of legislation were also introduced by the *Criminal Organisations Control Act 2012*. Foremost among these were two new offences inserted into the *Criminal Code (WA)*.²⁵⁸ It is now an offence under s 221E of the *Criminal Code* to participate in the activities of a criminal organisation 'for the purpose of enhancing [its] ability ... to facilitate or commit an indictable offence'. The offence carries a penalty of up to five years in prison. Under s 221F it is an offence punishable by 20 years imprisonment to instruct someone else to commit an offence for the benefit of a criminal organisation. A criminal organisation is either one declared under the *Criminal Organisations Control Act 2012* or one that meets the same criteria.²⁵⁹ The *Sentencing Act 1995 (WA)* was also amended to include mandatory minimum sentences of between two and 15 years imprisonment where declared criminal organisations are involved.²⁶⁰ Further, for the purposes of confiscation proceedings under the *Criminal Property Confiscation Act 2000*, if the respondent is a member of a declared organisation, 'all the property that the person owns or effectively controls' is now presumed to be crime-derived property'.²⁶¹

There is no evidence that any of these new provisions have been used to date.

²⁵⁴ Ibid s 107(2), (3).

²⁵⁵ Ibid ss 110 (2), 111(2).

²⁵⁶ Western Australia, *Government Gazette*, No 196, 1 November 2013, 4891.

²⁵⁷ Ombudsman Western Australia, *Report by the Parliamentary Commissioner for administrative investigations under section 158 of the Criminal Organisations Control Act 2012 for the monitoring period ended 1 November 2014* (21 January 2015) 2 [3], tabled in the Legislative Assembly, Parliament of Western Australia on 24 February 2015.

²⁵⁸ Introduced by *Criminal Organisations Control Act 2012 (WA)* s 173.

²⁵⁹ *Criminal Code (WA)* s 221D(1).

²⁶⁰ *Sentencing Act 1995 (WA)* s 9D, introduced by *Criminal Organisations Control Act 2012 (WA)* s 181.

²⁶¹ *Criminal Property Confiscation Act 2000 (WA)* s 148(4C), introduced by *Criminal Organisations Control Act 2012 (WA)* s 176.

8.5 Northern Territory

8.5.1 *Criminal Property Forfeiture Act 2002 (NT)* – unexplained wealth

To ‘assist in fighting serious crime’²⁶² the Northern Territory passed unexplained wealth laws based upon the Western Australian model in 2002.²⁶³ The *Criminal Property Forfeiture Act (NT)* allows the Director of Public Prosecutions to apply to the Supreme Court for an unexplained wealth declaration.²⁶⁴ The court must make the declaration if satisfied on the balance of probabilities that the respondent’s total wealth is greater than their lawfully acquired wealth.²⁶⁵ The respondent’s property is presumed ‘not to have been lawfully acquired unless the respondent establishes the contrary’.²⁶⁶ The assessed value of the unexplained wealth is then forfeited to the territory.²⁶⁷

Like Western Australia, the Northern Territory also went further than the unexplained wealth model. Section 94(1) requires lawfully acquired wealth to be forfeited to the territory where the owner or effective controller of the property has been declared a drug trafficker²⁶⁸ and the property is subject to a restraining order.²⁶⁹ The High Court recently upheld s 94(1) in 2014, finding that it does ‘not require the Northern Territory Supreme Court to give effect to any decision by the Executive’ and hence does not infringe the *Kable* principle.²⁷⁰

8.5.2 *Justice Legislation (Group Criminal Activities) Act 2006 (NT)* – introduction of consorting offence, non-association and place restriction orders and circumstance of aggravation

In response to ‘emerging gang-related activity’, the Northern Territory inserted three new offences into the *Summary Offences Act (NT)* in 2006, targeted according to the criminality of the group. For ‘groups of suburban youth involved in low-level crimes’,²⁷¹ the legislation introduced an

²⁶² Northern Territory, *Parliamentary Debates*, Legislative Assembly, 16 May 2002 (Dr Toyne, Attorney-General) (second reading speech for the Criminal Property Forfeiture Bill).

²⁶³ PJCACC, above n 208, 50 [3.78].

²⁶⁴ *Criminal Property Forfeiture Act (NT)* s 67(1).

²⁶⁵ *Ibid* s 71(1).

²⁶⁶ *Ibid* s 71(2).

²⁶⁷ *Ibid* s 72(1).

²⁶⁸ Under *Misuse of Drugs Act (NT)* s 36A.

²⁶⁹ Under *Criminal Property Forfeiture Act (NT)* s 44(1).

²⁷⁰ *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 430 [56] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

²⁷¹ Northern Territory, *Parliamentary Debates*, Legislative Assembly, 24 August 2006 (Dr Toyne, Attorney-General) (second reading speech for the Justice Legislation Amendment (Group Criminal Activities) Bill).

offence of loitering.²⁷² Under s 47B, a police officer may issue a notice requiring a person to stay away from an area for up to 72 hours.²⁷³ Failure to comply with the notice carries a maximum penalty of six months imprisonment.²⁷⁴ For 'low- and mid-level, intimidating and aggressive gang activity',²⁷⁵ the legislation introduced a new offence of violent disorder.²⁷⁶ Hence under s 47AA it is an offence to commit a violent act in the company of at least one other person if it causes a member of the public to fear for their safety. The maximum penalty for violent disorder is 12 months imprisonment.

Lastly, in order 'to stop organised, high-level criminal group behaviour',²⁷⁷ the Northern Territory enacted a consorting offence.²⁷⁸ Under s 55A the Commissioner of Police may give a notice to a person preventing them from associating with another person provided both the recipient and subject of the notice have previously been found guilty of certain offences carrying a maximum penalty of at least 10 years imprisonment. The Commissioner must also have a reasonable belief that the notice will likely prevent an offence involving multiple offenders and a substantial degree of planning.²⁷⁹ The punishment for contravening the notice is imprisonment for up to two years.²⁸⁰

The 2006 amendments also introduced non-association and place restriction orders as sentencing options.²⁸¹ A non-association order prohibits a person from being in company or communicating with specified people, and a place restriction order prohibits a person from visiting a certain place for up to 12 months.²⁸² Either may be imposed in sentencing a person for a significant offence (carrying a maximum penalty of at least one year in prison) if the court is satisfied that such an order may prevent the commission of another significant offence.²⁸³ Contravention of the order is itself an offence, punishable by up to six months imprisonment.²⁸⁴

²⁷² *Justice Legislation (Group Criminal Activities) Act 2006* (NT) s 22.

²⁷³ *Summary Offences Act* (NT) s 47B(1).

²⁷⁴ *Ibid* s 47B(4).

²⁷⁵ Northern Territory, *Parliamentary Debates*, above n 271.

²⁷⁶ *Justice Legislation (Group Criminal Activities) Act 2006* (NT) s 20.

²⁷⁷ Northern Territory, *Parliamentary Debates*, above n 271.

²⁷⁸ *Justice Legislation (Group Criminal Activities) Act 2006* (NT) s 23.

²⁷⁹ *Summary Offences Act* (NT) s 55A(4), (10).

²⁸⁰ *Ibid* s 55A(1).

²⁸¹ *Justice Legislation (Group Criminal Activities) Act 2006* (NT) s 7.

²⁸² *Sentencing Act* (NT) s 97A(2)(a), (b), (3)(b).

²⁸³ *Ibid* s 97A(2).

²⁸⁴ *Ibid* s 97D(1).

As a general sentencing consideration a new ‘non-exhaustive list of aggravating circumstances relating to gang activity’²⁸⁵ was also introduced.²⁸⁶ These include, for example, that ‘the offence involved substantial planning and organisation’.²⁸⁷

8.5.3 *Serious Crime Control Act 2009 (NT) – criminal organisation declarations, control orders, public safety orders and fortification removal orders*

Despite being home to only ‘a small number of motorcycle gang members’ the Northern Territory became concerned in 2009 that the ‘tough stance taken in South Australia and New South Wales’ may make the Northern Territory an attractive destination for interstate OMCG members.²⁸⁸

Accordingly the territory enacted the *Serious Crime Control Act 2009 (NT)* which provides for the making of declarations about organisations, control orders, public safety orders and fortification removal orders. As under the New South Wales legislation at the time, the criminal organisation declaration was to be made by an ‘eligible judge’ who was not required to give reasons.²⁸⁹

8.5.4 *Serious Crime Control Amendment Act 2011 (NT) – amendments to control order regime in light of Wainohu*

The Northern Territory was the first jurisdiction to amend its criminal organisation regime in the wake of the High Court’s decision in *Wainohu*, handed down in mid-2011. The amendments provided for declarations to be made by the Supreme Court instead of ‘eligible’ judges.²⁹⁰ The provision exempting judges from the requirement to give reasons was also repealed, leaving in place the ‘usual practice’ of the Supreme Court to ‘give reasons when deciding matters under the [A]ct’.²⁹¹

The Supreme Court may now declare an organisation if satisfied on the balance of probabilities²⁹² that its members ‘associate for the purpose of organising, planning, facilitating,

²⁸⁵ Northern Territory, *Parliamentary Debates*, Legislative Assembly, 24 August 2006 (Ms Lawrie, Attorney-General) (second reading speech for the Serious Crime Control Bill).

²⁸⁶ *Sentencing Act (NT)* ss 5(2)(f), 6A, the latter introduced by *Justice Legislation (Group Criminal Activities) Act 2006 (NT)* s 6.

²⁸⁷ *Sentencing Act (NT)* s 6A(h).

²⁸⁸ Northern Territory, *Parliamentary Debates*, Legislative Assembly, 11 June 2009 (Dr Toyne, Attorney-General) (second reading speech for the Justice Legislation Amendment (Group Criminal Activities) Bill).

²⁸⁹ *Serious Crime Control Act 2009 (NT)* ss 14, 20.

²⁹⁰ *Serious Crime Control Act (NT)* s 15, introduced by *Serious Crime Control Amendment Act 2011 (NT)* s 5.

²⁹¹ Northern Territory, *Parliamentary Debates*, Legislative Assembly, 19 October 2011 (Ms Lawrie, Attorney-General) (second reading speech for the Serious Crime Control Amendment Bill).

²⁹² *Serious Crime Control Act (NT)* s 83.

supporting or engaging in' the commission of offences punishable by imprisonment for five years or more, and that the organisation is a risk to public safety and order.²⁹³

The Commissioner of Police may then apply to the Supreme Court for control orders in respect of a declared organisation's members, former members or associates.²⁹⁴ As in South Australia, it is also possible to obtain a control order without first declaring an organisation. That is, a control order may be made against a person who has committed an offence punishable by at least five years in prison and who regularly associates with others guilty of similar offences.²⁹⁵ Once made, a person subject to a control order is prohibited from recruiting and associating with other controlled persons.²⁹⁶ A control order also potentially prevents a person from working in a number of industries such as gambling, security and tow truck driving.²⁹⁷

Where there is a serious risk to public safety or security, the Act also allows a senior police officer to make a public safety order. The effect of such an order is to prohibit the people specified in the order from being at a specified place, generally for up to 72 hours.²⁹⁸

The Act allows the Commissioner of Police to apply to the Court of Summary Jurisdiction for a fortification removal order where premises are fortified and it is reasonable to believe the premises are being used or are likely to be used in connection with the commission of an offence punishable by at least five years in jail. Additionally, the Commissioner may apply for such an order if the fortified premises are owned or habitually used by a declared organisation or its members.²⁹⁹

As in other jurisdictions if the Commissioner of Police relies upon CI in any proceeding for a declaration or order under the Act the court 'must take steps to maintain the confidentiality of [the] classified information' provided 'the court considers the classified information is [in fact] criminal intelligence'.³⁰⁰

The *Serious Crime Control Act* came into force on 1 December 2011 at the same time as the amendments.³⁰¹ Since then, it is understood that Northern Territory Police devoted considerable effort to developing an application against the Darwin Chapter of an OMCG. The operation was reviewed after six months and discontinued, possibly in light of the significant additional resources that would have been required to progress the application. Thus, no declarations or orders have been made under the Act.

²⁹³ Ibid ss 6 (definitions of 'serious criminal activity' and 'serious criminal offence'), 12.

²⁹⁴ Ibid ss 23(1)(a)-(c), 24(1).

²⁹⁵ Ibid s 23(1)(d).

²⁹⁶ Ibid ss 36(1), 37(2).

²⁹⁷ Ibid ss 6 (definition of 'prescribed activity'), 27(3), 38(2), 41

²⁹⁸ Ibid ss 42(1), 43(2).

²⁹⁹ Ibid ss 58(1), 59(1).

³⁰⁰ Ibid s 73(2).

³⁰¹ Northern Territory, *Government Gazette*, No S69, 1 December 2011.

8.5.5 Proposed changes – consorting offence

A review of the *Summary Offences Act* revealed that there had been no prosecutions for the offence of consorting as at 30 June 2013.³⁰² This was confirmed at a recent public hearing of the Ice Select Committee on 19 June 2015. The Northern Territory Police said that the existing consorting legislation ‘has not been successfully utilised and its application has been limited’. They revealed that, in the interests of efficiency, the Department of Attorney-General and Justice is considering repealing the existing offence and replacing it with one modelled on s 93X of the *Crimes Act 1900* (NSW).³⁰³

8.6 Victoria

8.6.1 *Criminal Organisations Control Act 2012* (Vic) – criminal organisation declarations and control orders

Victoria had ‘for many years publicly stood against the policing need for control order legislation’,³⁰⁴ preferring instead to rely upon its existing police powers to combat organised crime.³⁰⁵ In the 2010 state election, however, the Liberal-National Coalition made an election commitment to ‘introduce tough legislation to outlaw criminal bikie gangs’.³⁰⁶ The Coalition delivered on that promise in 2012 with the enactment of the *Criminal Organisations Control Act 2012* (Vic). Introducing the Bill, the Attorney-General said that ‘traditional criminal laws are limited in their effectiveness to respond to these organisations, as such laws can only be used to prosecute illegal activity on a case-by-case basis after the event’.³⁰⁷ The ‘significant and far reaching’ powers introduced to fight organised crime were, however, to be ‘subject to carefully framed safeguards’.³⁰⁸

³⁰² Northern Territory Government, Department of the Attorney-General and Justice, *Final Report: Review of the Summary Offences Act* (August 2013) 65.

³⁰³ Northern Territory Police, *Northern Territory Police Response to the Questions on Notice: Ice Select Committee* (19 June 2015) Northern Territory Government <http://www.nt.gov.au/lant/parliamentary-business/committees/ice/Answers_to_Questions_Taken_on_Notice_NT_Police_Service_Public_Hearing_19_June_2015.pdf#search=%22consorting%22>.

³⁰⁴ Appleby, above n 103, 75, 79. See also R Hulls, ‘Victoria’s tough laws best for dealing with bikie gangs’ (Media Release, 15 April 2009), cited in Bartels, above n 39, 7.

³⁰⁵ See, in particular, the additional investigative powers introduced in 2004: the *Crimes (Controlled Operations) Act 2004* (Vic); *Surveillance Devices (Amendment) Act 2004* (Vic); *Crimes (Assumed Identities) Act 2004* (Vic); *Evidence (Witness Identity Protection) Act 2004* (Vic); *Major Crimes (Investigative Powers) Act 2004* (Vic).

³⁰⁶ Victorian Liberal Nationals Coalition, ‘Vic Coalition to Outlaw Criminal Bike Gangs’ (Media Release, 18 March 2010), quoted in Merner et al, above n 29, 13.

³⁰⁷ Victoria, *Parliamentary Debates*, Legislative Assembly, 15 November 2012, 5070 (Robert Clark, Attorney-General).

³⁰⁸ *Ibid* 5071 (Robert Clark, Attorney-General).

Like COA, the *Criminal Organisations Control Act 2012* provides for a multi-stage process of applying for a declaration in respect of a criminal organisation and, if successful, then applying for a control order in respect of that organisation – although, at the time of its enactment, the Victorian legislation was different in four respects.

First, in addition to criminal organisations, the Supreme Court could (and still can) declare an individual who has ingrained themselves in an innocent organisation for criminal purposes.³⁰⁹ The second difference was, until recently, that a declaration required proof beyond reasonable doubt. For an organisation, the Supreme Court had to be satisfied beyond reasonable doubt that the organisation is or was engaged in serious criminal activity or that at least two of its members used the organisation for a criminal purpose.³¹⁰ Before declaring an individual, the Supreme Court had to be satisfied beyond a reasonable doubt that the individual was a member of an organisation and used it for a criminal purpose.³¹¹ In addition, the Supreme Court had to be satisfied on the balance of probabilities that the activities of the organisation or individual posed a serious threat to public safety and order.³¹² The third difference to COA was that, in addition to individuals, a control order could (and still can) be made against an organisation.³¹³ Lastly, the Victorian and Queensland CI provisions differ considerably.

Although the Victorian legislation post-dated COA its CI provisions are not borrowed from the Queensland Act but, rather, derive from provisions introduced into a number of other Victorian statutes in 2009.³¹⁴ If the Chief Commissioner applies to have CI kept confidential, the court may appoint a special counsel. Whereas the COPIM under COA is independent, a ‘special counsel’ is appointed in Victoria to represent the interests of the affected party.³¹⁵ At any time prior to having access to the CI, the special counsel is entitled to communicate with the respondent, or the respondent’s representative, for the purpose of obtaining information necessary to represent the interests of the respondent.³¹⁶ Thereafter, the special counsel may seek further information³¹⁷ but not so as to compromise the confidentiality of the information.³¹⁸ If CI is protected and relied upon in a substantive application, the court ‘may appoint the same person or a different person as special counsel’ to act in the respondent’s interests.³¹⁹

In addition, the court retains a discretion about whether to close the court when considering criminal intelligence³²⁰ whereas COA mandates closing. The Victorian CI provisions were

³⁰⁹ *Criminal Organisations Control Act 2012* (Vic) s 19(1)(b), (3) (as enacted).

³¹⁰ *Ibid* ss 19(2)(a), 21(1) (as enacted).

³¹¹ *Ibid* ss 19(3)(a), (b), 21(1) (as enacted).

³¹² *Ibid* ss 19(2)(b), (3)(c), 21(2) (as enacted).

³¹³ *Ibid* s 43(1) (as enacted).

³¹⁴ Introduced by the *Major Crime Legislation (Amendment) Act 2009* (Vic).

³¹⁵ *Criminal Organisations Control Act 2012* (Vic) s 71(1).

³¹⁶ *Ibid* s 71(3).

³¹⁷ *Ibid* s 71(4)(b).

³¹⁸ *Ibid* s 71(5)(a).

³¹⁹ *Ibid* s 79(3).

³²⁰ *Ibid* ss 73(1), 81(1).

designed having regard to the right to a fair hearing in s 24 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).³²¹ As one commentator points out, the Victorian legislation 'reflect[s] the European standard for compatibility with Art 6 of the European Convention on Human Rights' in requiring that the special advocate have an opportunity to 'communicate robustly with the respondent and the respondent's legal representatives'.³²² That said, the Victorian provisions do not go so far as allowing the special advocate to disclose the 'essence of the case' against the respondent, as required in Europe.³²³

8.6.2 *Fortification Removal Act 2013* (Vic)

Soon afterwards, the government delivered on the second part of its commitment to 'introduce laws to allow criminal bikie and similar gangs to be outlawed and fortifications of their premises to be demolished'.³²⁴

Under the *Fortification Removal Act 2013* (Vic), the Chief Commissioner of Police may apply to the Magistrates Court for a fortification removal order.³²⁵ The Magistrates Court may make the order if satisfied that the fortified premises are used in connection with certain offences, to conceal evidence of such offences or to keep the proceeds of such an offence.³²⁶ The owner or occupier then has three months in which to remove the fortification, unless the time is extended by the Chief Commissioner or the Magistrates Court.³²⁷ The police may inspect the premises while the order is in effect,³²⁸ and if the fortifications are not removed within time, the police can issue an enforcement notice and enter the premises to enforce the order.³²⁹ To ensure the fortifications are not rebuilt, the Chief Commissioner can then apply to the Magistrates Court for permission to inspect the premises for up to three years afterwards.³³⁰

As part of the policing strategy of Echo Taskforce, the first application for a fortification removal order was filed in October 2013 in respect of the Thomastown clubhouse of the Nomads, a

³²¹ Victoria, *Parliamentary Debates*, above n 307, 5069 (Robert Clark, Attorney-General).

³²² Appleby, above n 103, 80.

³²³ *A v United Kingdom* (2009) 49 EHRR 29, 720 [218], 720-721 [220]; *Home Secretary v AF [No 3]* [2010] 2 AC 269, 356 [65] (Lord Phillips of Worth Matravers, Lords Scott of Foscote, Rodger of Earlsferry, Walker of Gestingthorpe and Brown of Eaton-Under-Heywood, and Baroness Hale of Richmond agreeing).

³²⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 18 April 2013, 1316 (Mr Clark, Attorney-General).

³²⁵ *Fortification Removal Act 2013* (Vic) s 6.

³²⁶ *Ibid* s 11(2).

³²⁷ *Ibid* ss 16(1), 18(1), 22(1).

³²⁸ *Ibid* s 25.

³²⁹ *Ibid* ss 36, 37.

³³⁰ *Ibid* s 26.

chapter of the Hells Angels.³³¹ A second clubhouse belonging to the Bros motorcycle club was targeted in May 2014.³³²

8.6.3 *Criminal Organisations Control and Other Acts Amendment Act 2014 (Vic)* – amendment of control order regime and confiscation of serious drug offenders’ property

In late 2013 Victoria Police revealed that they had not made any applications under the Act, apparently due to the complexity of the process, the high burden of proof and the time involved.³³³

Victoria then introduced significant amendments in 2014 based on ‘feedback from Victoria Police’³³⁴ among other things. These amendments broadened the offences captured by ‘serious criminal activity’ from offences punishable by 10 years imprisonment to offences punishable by only five years imprisonment, and without any requirement that the offence involve substantial planning or organisation.³³⁵ The burden of proof to declare an individual was lowered from the criminal standard to the civil standard,³³⁶ and declarations about organisations were tiered into ‘prohibitive declarations’ and ‘restrictive declarations’ depending on whether the test could be satisfied to the criminal or civil standard.³³⁷ Restrictive declarations are now accompanied by control orders with lower thresholds. Rather than having to show that a control order would likely ‘contribute to the purpose of preventing or disrupting serious criminal activity’,³³⁸ it is sufficient to show that the order is ‘necessary or desirable ... in order to end, prevent or reduce a serious threat to public safety and order’.³³⁹

³³¹ Sarah Farnsworth, ‘Police evidence to be reworked in anti-fortification test case’, *ABC News* (online), 10 December 2013 <<http://www.abc.net.au/news/2013-12-10/police-evidence-to-be-reworked-in-anti-fortification-test-case/5147172>>.

³³² Anthony Dowsley, ‘Bros outlaw motorcycle gang ordered to tear down Yarraville clubhouse fortifications’, *Herald Sun* (online), 29 May 2014 <<http://www.heraldsun.com.au/news/law-order/bros-outlaw-motorcycle-gang-ordered-to-tear-down-yarraville-clubhouse-fortifications/story-fni0fee2-1226935938425>>.

³³³ Jane Lee, ‘Police neglect anti-bikie law due to high complexity’, *The Canberra Times* (online), 12 October 2013 <<http://www.canberratimes.com.au/victoria/police-neglect-antibikie-law-due-to-high-complexity-20131011-2ve1m.html>>.

³³⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2014, 2385 (Robert Clark, Attorney-General).

³³⁵ *Criminal Organisations Control and Other Acts Amendment Act 2014* (Vic) s 60(a) amended the definition of ‘applicable offence’ in ss 3 and 4 of the *Criminal Organisations Control Act 2012* (Vic). ‘Applicable offence’ is an element of ‘serious criminal activity’ in s 3, which in turn is an element of a declaration under s 19.

³³⁶ *Criminal Organisations Control Act 2012* (Vic) s 19(3) (current version).

³³⁷ *Ibid* s 19(2), (2A) (current version).

³³⁸ *Ibid* s 43(1)(b), (2)(b) (as enacted).

³³⁹ *Ibid* s 43(1)(b), (2)(b)(ii) (2A)(b) (current version).

Another amendment was directed to the problem of ‘organisations ... seek[ing] to frustrate control orders by purporting to hand in their club colours or by “patching over” to organisations with no criminal history in Australia’.³⁴⁰ To this end, s 45(4) now clarifies that a person who was a member of a declared organised ‘on the day of the initial application’ may still be subject to a control order, even though they have quit the organisation.

Despite these changes, Victoria Police has yet to bring any application under the Act.

At the same time as the changes to the control order regime Victoria introduced amendments to its *Confiscation Act 1997* (Vic) to ‘better enable law enforcement to target profits generated by very serious drug offences’.³⁴¹ This was seen as ‘one of the most effective methods of targeting and disrupting serious and organised crime’.³⁴² Now, when a person is convicted of a serious drug offence, the court is required to declare that they are a serious drug offender.³⁴³ A serious drug offence includes trafficking or cultivating a large commercial quantity of drugs.³⁴⁴ The effect of the declaration is ‘the mandatory forfeiture to the state of almost all of the offender’s property’,³⁴⁵ exempting only a ‘modestly priced vehicle’, necessary clothing, ordinary household items and tools of trade.³⁴⁶ A person with an interest in the property other than the serious drug offender may apply to have their property interests excluded; otherwise, the property is automatically forfeited after 60 days of being restrained, regardless of whether the property is derived from criminal activity.³⁴⁷

Curiously, the power to confiscate lawfully acquired property preceded unexplained wealth laws introduced two months later.

8.6.4 Justice Legislation Amendment (Confiscation and Other Matters) Act 2014 (Vic) – unexplained wealth

Victoria introduced unexplained wealth laws similar to New South Wales towards the end of 2014.³⁴⁸ According to the Attorney-General, such laws ‘are a powerful tool to target and disrupt serious and organised crime’.³⁴⁹

³⁴⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2014, 2385 (Robert Clark, Attorney-General).

³⁴¹ Ibid 2384 (Robert Clark, Attorney-General).

³⁴² Ibid.

³⁴³ *Sentencing Act 1991* (Vic) s 89DI.

³⁴⁴ *Confiscation Act 1997* (Vic) s 3(1) (definition of ‘serious drug offence’); *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ss 71, 72, 79(1), 80(1), (3)(a), (b).

³⁴⁵ Victoria, *Parliamentary Debates*, above n 340, 2384 (Robert Clark, Attorney-General).

³⁴⁶ *Confiscation Act 1997* (Vic) s 24(2).

³⁴⁷ Ibid s 36GA.

³⁴⁸ Introduced by *Justice Legislation Amendment (Confiscation and Other Matters) Act 2014* (Vic) s 16.

³⁴⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 20 August 2014, 2831 (Robert Clark, Attorney-General).

Under the new provisions inserted into the *Confiscation Act 1997* (Vic) the Director of Public Prosecutions may apply *ex parte* to the Supreme Court or the County Court for an unexplained wealth restraining order.³⁵⁰ This ensures that ‘the assets are not disposed of before the court can consider whether they were lawfully acquired’.³⁵¹ The court must make a restraining order if it has a reasonable suspicion that the person with an interest in the property has engaged in serious criminal activity or that the property was illegally acquired.³⁵² Where the basis of the order is reasonable suspicion of serious criminal activity, the property must also be worth at least \$50,000.³⁵³ The reason for this requirement is that ‘the laws are targeted at those making significant profits from crime’.³⁵⁴ If a restraining order is made, any person with an interest in the property may apply to have their interest excluded from the operation of the restraining order.³⁵⁵ The court may grant an exclusion order if satisfied that the property was lawfully acquired, however the starting presumption is that the property was illegally acquired.³⁵⁶ Unless an exclusion order is made or the Director of Public Prosecutions applies to set aside the restraining order,³⁵⁷ after six months the unexplained wealth is automatically forfeited to the state.³⁵⁸

8.6.5 *Criminal Organisations Control Amendment (Unlawful Associations) Act 2015* (Vic) – consorting offence

The *Criminal Organisations Control Act* was further amended in October 2015, although the amendments have not yet come into force.³⁵⁹ According to the second reading speech, the impetus for the change is that ‘gangs – including bkie gangs – have become significantly more sophisticated’ and that ‘[a]ssociations between gang members ... occur not only in meetings at clubhouses but through social media and online’.³⁶⁰

In order to meet the challenge of this dynamism Victoria has joined New South Wales and South Australia by shifting from a focus on control orders to anti-consorting measures.³⁶¹ Once commenced, the Bill will introduce a new Part 5A into the Act which will prohibit individuals from

³⁵⁰ *Confiscation Act 1997* (Vic) s 40F(1), (2).

³⁵¹ Victoria, *Parliamentary Debates*, above n 349, 2832 (Robert Clark, Attorney-General).

³⁵² *Confiscation Act 1997* (Vic) s 40I(1), (3).

³⁵³ *Ibid* s 40I(1)(a)(iv).

³⁵⁴ Victoria, *Parliamentary Debates*, above n 349, 2832 (Robert Clark, Attorney-General).

³⁵⁵ *Confiscation Act 1997* (Vic) s 40R(1).

³⁵⁶ *Ibid* s 40S(1), (2).

³⁵⁷ *Ibid* s 40X.

³⁵⁸ *Ibid* s 40ZA(1).

³⁵⁹ *Criminal Organisations Control Amendment (Unlawful Associations) Act 2015* (Vic).

³⁶⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 2 September 2015, 3013 (Martin Pakula, Attorney-General).

³⁶¹ *Ibid* 3014 (Martin Pakula, Attorney-General).

associating with others convicted of serious criminal offences.³⁶² The pivotal provision of the new part will be s 124A(1), which provides that an individual who has been served with an unlawful association notice must not associate with people specified in the notice on three or more occasions in a three month period, or on six or more occasions in a 12 month period. A notice may only be issued by a senior police officer, and only on the basis of a reasonable belief that the person has previously associated with someone who has been convicted of certain offences (generally, an indictable offence punishable by five years imprisonment³⁶³) as well as that the prevention of their association would inhibit criminal activity.³⁶⁴ Unlike in New South Wales, a juvenile may not be issued with a notice.³⁶⁵

Failure to comply with the notice will be an offence punishable by three years imprisonment or 360 penalty units. There will be a number of carve outs, such as for associating with family members or for genuine political purposes.³⁶⁶ A person who has been served with an unlawful association notice will also be able to seek internal review by Victoria Police,³⁶⁷ as well as apply for a special authority to associate,³⁶⁸ such as to attend the funeral of a mutual acquaintance.³⁶⁹

8.7 Tasmania

Organised crime has had a lower profile in Tasmania. According to 2004 data from the Australian Crime Commission, Tasmania was the only Australian jurisdiction without any high-threat organised crime groups.³⁷⁰ In 2009, the Tasmanian Attorney-General noted 'we are fortunate in Tasmania not to have the same problems with organised crime'.³⁷¹ The genesis of most organised crime legislation in Tasmania has been through interstate agreements to ensure consistency across borders.

³⁶² *Criminal Organisations Control Amendment (Unlawful Associations) Act 2015* (Vic) s 5. Cf *Summary Offences Act 1966* (Vic) s 49F, repealed by *Criminal Organisations Control Amendment (Unlawful Associations) Act 2015* (Vic) s 9.

³⁶³ *Criminal Organisations Control Act 2012* (Vic) s 3 (definition of 'applicable offence').

³⁶⁴ New s 124D(1).

³⁶⁵ New s 124D(1).

³⁶⁶ New s 124A(3), (4)(f).

³⁶⁷ New s 124M(1).

³⁶⁸ New s 124B.

³⁶⁹ Explanatory memorandum, *Criminal Organisations Control Amendment (Unlawful Associations) Bill 2015* (NSW) 4.

³⁷⁰ PJCACC, above n 208, 48 [3.68].

³⁷¹ L Giddings, 'Government moves on organised crime' (Media Release, 16 April 2009), cited in Bartels, above n 39, 7.

8.7.1 Investigative powers

The first of these came in 2006, following agreement between the states and territories on reforms for dealing with multi-jurisdictional crime in the wake of the September 11 terrorist attacks. Tasmania passed four cognate Bills dealing with controlled operations, surveillance devices, assumed identities and witness anonymity.³⁷² According to the Minister for Justice at the time, '[w]hile the joint working party report [which formed the basis of interstate consensus] was a response to the terrorism attacks in the USA, the bills provide[d] powers to tackle not only terrorism but also other serious crimes and offences'.³⁷³ In particular, the new investigative powers were seen as necessary to confront 'highly organised criminal networks such as drug cartels, motor vehicle rebirthing gangs and motorcycle gangs operat[ing] with relative ease across State and Territory borders'.³⁷⁴

8.7.2 *Police Offences Amendment Act 2007 (Tas)* – fortification removal orders

In the following year, Tasmania introduced fortification removal orders.³⁷⁵ Now, under Part 2, Division 3 of the *Police Offences Act 1935* (Tas) the Commissioner of Police may apply *ex parte* to a Magistrate for a fortification warning notice.³⁷⁶ The Magistrate may issue the notice if satisfied 'on the balance of probabilities that there are reasonable grounds for suspecting' that the premises are heavily fortified.³⁷⁷ The owner then has 14 days after being served to make submissions.³⁷⁸ If the Commissioner has a reasonable belief that the premises are still heavily fortified, they may issue a fortification removal notice.³⁷⁹ The owner then has seven days to remove the fortification or face forcible removal of the fortification by police.³⁸⁰

As in Western Australia, judicial review is limited to whether the Commissioner could have reasonably held a belief that the premises were heavily fortified.³⁸¹ If the Commissioner relies upon CI at the review, the 'information so identified is for the magistrate's use only and must not be disclosed to any other person, whether or not a party to the proceedings, or publicly disclosed in any way'.³⁸²

³⁷² *Police Powers (Assumed Identities) Act 2006* (Tas); *Police Powers (Controlled Operations) Act 2006* (Tas); *Police Powers (Surveillance Devices) Act 2006* (Tas); *Witness (Identity Protection) Bill 2006* (Tas).

³⁷³ Tasmania, *Parliamentary Debates*, House of Assembly, 1 November 2006, Part 2, 32 (Mr Kons, Minister for Justice).

³⁷⁴ *Ibid* 29 (Mr Kons, Minister for Justice).

³⁷⁵ Introduced by *Police Offences Amendment Act 2007* (Tas) s 7.

³⁷⁶ *Police Offences Act 1935* (Tas) s 20B(1).

³⁷⁷ *Ibid* s 20B(2).

³⁷⁸ *Ibid* ss 20C(2)(b), 20D(1).

³⁷⁹ *Ibid* s 20F(1), (2).

³⁸⁰ *Ibid* ss 20G(1)(a), 20I(1), (3).

³⁸¹ *Ibid* s 20J(1).

³⁸² *Ibid* s 20J(2).

8.7.3 *Crime (Confiscation of Profits) Amendment (Unexplained Wealth) Act 2013 (Tas) – unexplained wealth*

Tasmania enacted unexplained wealth laws in 2013 following agreement to introduce legislation of this kind by the Standing Committee of Attorneys-General at a meeting in 2009. The laws are 'intended to deter organised crime by targeting the profit' of those 'who may be difficult to prosecute and convict of specific crimes'.³⁸³ In completely removing the link to an offence, Tasmania's legislation follows unexplained wealth laws in Western Australia and the Northern Territory.³⁸⁴

Now under Part 9 of the *Crime (Confiscation of Profits) Act 1993 (Tas)*,³⁸⁵ the Director of Public Prosecutions may apply to the Supreme Court for an unexplained wealth declaration against a person.³⁸⁶ The Supreme Court is required to make the declaration if it finds that 'it is more likely than not that the value of the person's total wealth is greater than the value of his or her lawfully acquired wealth',³⁸⁷ with the respondent bearing the onus of showing that the wealth was legitimately acquired.³⁸⁸ If a declaration is made, the respondent's unexplained wealth is payable to the state.³⁸⁹

8.7.4 Recent developments – resources rather than legislation

The Hodgman Government came to power in 2014 with an election commitment to establish a Serious and Organised Crime Squad funded by \$7.2 million over four years.³⁹⁰ Since then, a Serious Organised Crime Division has been created, comprising the Serious Organised Crime Unit, Fraud and e-Crime Investigation Services and the Computer Forensics Unit.³⁹¹ However, there do not appear to be any plans to introduce control orders or other legislation to deal further with organised crime.

³⁸³ Tasmania, *Parliamentary Debates*, House of Assembly, 21 August 2013, 28-29 (Mr Wightman, Minister for Justice).

³⁸⁴ *Ibid* 84 (Mr Wightman, Minister for Justice).

³⁸⁵ Introduced by *Crime (Confiscation of Profits) Amendment (Unexplained Wealth) Act 2013 (Tas)* s 12.

³⁸⁶ *Crime (Confiscation of Profits) Act 1993 (Tas)* s 141(1).

³⁸⁷ *Ibid* s 142(2).

³⁸⁸ *Ibid* s 85.

³⁸⁹ *Ibid* s 144(1).

³⁹⁰ Tasmanian Liberals, *Serious and Organised Crime Squad* <<https://www.tas.liberal.org.au/policy#SAOCS>>.

³⁹¹ Tasmanian Government, Department of Police and Emergency Management, *Annual Report 2014-15* (2015) 16.

8.8 Australian Capital Territory

8.8.1 *Crimes (Sentencing) Act 2005 (ACT)* – post-conviction non-association orders and place restriction orders

In 2005 the ACT introduced ‘two new, important preventative tools for courts’ as sentencing options: non-association orders and place restriction orders.³⁹² A non-association order prohibits an offender from associating with a specified person for a specified time. A place restriction order prohibits an offender from being, or attempting to be, in a specified place.³⁹³ Either order can be made if the offence for which the person is being sentenced involves personal violence, and the court is satisfied that such an order is necessary to prevent them from committing further offences or from harassing someone³⁹⁴ but the conditions imposed must ‘not be disproportionate to the purpose for which the order is made’.³⁹⁵ As an example of a disproportionate condition, the explanatory statement gives an order preventing a stalker from visiting the suburb where their victim works, rather than simply the particular workplace.³⁹⁶

8.8.2 Investigative powers

Like other jurisdictions the ACT enacted a suite of investigative powers between 2008 and 2011 based on model legislation prepared by the Standing Committee of Attorneys-General.³⁹⁷ The laws provide for ‘modern tools’ to help ‘dismantle organised crime’,³⁹⁸ namely controlled operations, assumed identities, surveillance devices and the protection of witness identities.

8.8.3 *Crimes (Serious Organised Crime) Amendment Act 2010 (ACT)* – offences of affray, participating in criminal groups and recruiting to engage in criminal activity

Only nine days after the bikie affray at Sydney Airport on 22 May 2009 the ACT Attorney-General responded ‘to sensationalist headlines and media coverage’ by calling for evidence gathering and reflection rather than ‘a knee-jerk reaction to put in place similar laws to those in one or two

³⁹² Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 7 April 2005, 1507 (Mr Stanhope, Chief Minister, Attorney-General).

³⁹³ *Crimes (Sentencing) Act 2005 (ACT)* s 21.

³⁹⁴ *Ibid* s 23(1).

³⁹⁵ *Ibid* s 23(2).

³⁹⁶ Explanatory Statement, *Crimes (sentencing) Bill 2005 (ACT)* 12.

³⁹⁷ *Crimes (Controlled Operations) Act 2008 (ACT)*; *Crimes (Assumed Identities) Act 2009 (ACT)*; *Crimes (Surveillance Devices) Act 2010 (ACT)*; *Crimes (Protection of Witness Identity) Act 2011 (ACT)*.

³⁹⁸ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 3 July 2008, 2664 (Mr Corbell, Attorney-General); Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 20 August 2009, 3422 (Mr Corbell, Attorney-General); Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 25 February 2010, 705 (Mr Corbell, Attorney-General). See also Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 25 August 2011, 3851 (Mr Corbell, Attorney-General).

other jurisdictions just because they suddenly seem like a good idea at the time'.³⁹⁹ The following day, the ACT Legislative Assembly passed a motion resolving that the government provide advice to the Assembly about the effectiveness of organised crime legislation in the ACT as well as in other jurisdictions, particularly the control order regimes in South Australia and New South Wales.⁴⁰⁰

Nearly two months later the Attorney-General tabled a comprehensive review of serious organised crime legislation in the ACT.⁴⁰¹ The report found that it was still too early to tell whether the legislation in South Australia and New South Wales had any impact on reducing organised crime, but based on evidence from overseas jurisdictions, doubted it would.⁴⁰² It noted that similar legislation in the ACT would engage a number of rights under the *Human Rights Act 2004* (ACT), including freedom of association, and the rights to a fair trial and to examine prosecution witnesses.⁴⁰³ The report instead suggested a number of other 'legislative enhancements'.⁴⁰⁴

These enhancements were delivered in 2010 in a series of amendments to the *Crimes Act 1900* (ACT) and the *Criminal Code 2002* (ACT).⁴⁰⁵ The amending legislation introduced offences of affray,⁴⁰⁶ participation in a criminal group⁴⁰⁷ and recruiting people to participate in criminal activity.⁴⁰⁸ It also expanded the offences relating to the protection of people involved in court proceedings to cover those involved in criminal investigations.⁴⁰⁹ Other amendments extended criminal responsibility for substantive offences by reintroducing concepts of joint criminal enterprise⁴¹⁰ and being 'knowingly concerned' in the commission of an offence.⁴¹¹

³⁹⁹ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 31 March 2009, 1547, 1579 (Mr Corbell, Attorney-General).

⁴⁰⁰ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 1 April 2009, 1717.

⁴⁰¹ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 24 June 2009, 2860 (Mr Corbell, Attorney-General).

⁴⁰² ACT Government, above n 23, 17, 38, 46.

⁴⁰³ *Human Rights Act 2004* (ACT) ss 15(2), 21, 22(2)(g); ACT Government, above n 23, 25.

⁴⁰⁴ ACT Government, above n 23, 25.

⁴⁰⁵ Introduced by *Crimes (Serious Organised Crime) Amendment Act 2010* (ACT) ss 4, 6, 7, 9, 10.

⁴⁰⁶ *Crimes Act 1900* (ACT) s 35A.

⁴⁰⁷ *Criminal Code 2002* (ACT) ss 652-654.

⁴⁰⁸ *Ibid* s 655.

⁴⁰⁹ *Ibid* s 709A

⁴¹⁰ *Ibid* s 45A(1).

⁴¹¹ *Ibid* s 45(1).

Although unexplained wealth laws were considered in the 2009 report they were not included in the package of amendments in 2010.⁴¹² There are recent signs that the ACT may introduce such laws in the near future.⁴¹³

Recently, the ACT has confirmed that it 'will not introduce [the] types of bills and laws that we have seen in other jurisdictions that proscribe people on the basis of their membership of an organisation'. Rather, the ACT's approach is to 'tackle [organised crime] based on the offending behaviour, based on the offence, [and] based on the criminality'.⁴¹⁴

8.9 Commonwealth of Australia

Due to the federal division of powers in Australia, the states and territories have primary responsibility for law enforcement. The Commonwealth's law enforcement responsibilities are more limited and generally 'reflect its constitutional powers ... includ[ing] immigration, social security, taxation, border control, banking regulation and national security'.⁴¹⁵ Both levels of government recognise, however, that their law enforcement responsibilities often overlap, such that a national, coordinated response to organised crime is required. To this end in April 2009 the Standing Committee of Attorneys-General agreed to implement a number of legislative reforms. The Commonwealth delivered on its commitment in two pieces of legislation in 2010 which together effected the following key changes.

First, a number of changes were made to the Commonwealth's confiscation legislation, most notably through the introduction of unexplained wealth laws. By removing the need to prove a link to a specific offence, the new confiscation measure was said to 'represent a quantum leap in terms of law enforcement strategy'.⁴¹⁶ Now, under Part 2-6 of the *Proceeds of Crime Act 2002* (Cth), a person's property may be forfeited to the Commonwealth if they cannot satisfy a court that their wealth was not derived from a Commonwealth offence, a foreign indictable offence, or a state offence that has a federal aspect.⁴¹⁷ In line with the recommendation of the Senate

⁴¹² ACT Government, above n 23, 39-40.

⁴¹³ ACT Government, *Australian Capital Territory Budget 2014-2015: Budget Statements* (2014) 1 <http://apps.treasury.act.gov.au/__data/assets/pdf_file/0015/601071/Justice-and-Community-Safety-Directorate-Budget-Statement.pdf>: one of the goals of the Justice and Community Safety Directorate in 2014-2015 was 'progressing reforms to introduce an unexplained wealth law'.

⁴¹⁴ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 19 February 2015, 601 (Mr Corbell, Attorney-General).

⁴¹⁵ Attorney-General's Department, Submission No 16 to Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, August 2008, 4 [19].

⁴¹⁶ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 24 June 2009, 6965 (Mr McClelland, Attorney-General).

⁴¹⁷ *Proceeds of Crime Act 2002* (Cth) s 179E(1)(b), inserted by *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) sch 1, pt 1 [13].

Legal and Constitutional Affairs Committee,⁴¹⁸ the court has a discretion to refuse to make an unexplained wealth order if it would be contrary to the public interest.⁴¹⁹ The court also has a general discretion to refuse outside of a public interest criterion but, following a recent amendment this year, that broad discretion may only be exercised if the unexplained wealth is less than \$100,000.⁴²⁰

Second, police investigation powers were enhanced by implementing the model laws for controlled operations, assumed identities and witness identity protection.⁴²¹ These laws were developed in the wake of the September 11 terrorist attack at the 2002 Leaders' Summit on Terrorism and Multi-Jurisdictional Crime. They were later endorsed by the Standing Committee of Attorneys-General in 2004 and thereafter implemented in most states and territories.⁴²²

Third, an amendment to the *Criminal Code Act 1995* (Cth) extended criminal responsibility for Commonwealth offences using the concept of 'joint commission'.⁴²³ It adds to other means of extending criminal responsibility such as aiding, abetting, counselling, procuring, committing by proxy, inciting and conspiring.⁴²⁴ As Attorney-General McClelland explained the new concept of joint commission, '[i]f a group of two or more offenders agree to commit an offence together, the effect of joint commission is that responsibility for criminal activity engaged in under the agreement by one member of the group is extended to all other members of the group'.⁴²⁵ The new provision is intended to be used against 'organised groups who divide criminal activity between them'.⁴²⁶

Fourth, amendments to the *Telecommunications (Interception and Access) Act 1979* (Cth) facilitated greater access to telephone interception for the purpose of investigating criminal

⁴¹⁸ Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009* (September 2009) 58 [6.8], 59 [6.11].

⁴¹⁹ *Proceeds of Crime Act 2002* (Cth) s 179E(6) (now s 179E(6)(b)), originally inserted by *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) sch 1, pt 1 [13].

⁴²⁰ *Proceeds of Crime Act 2002* (Cth) s 179E(6)(a), inserted by *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Act 2015* (Cth) sch 1 [20]. See also Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 5 March 2014, 1642 (Mr Keenan, Minister for Justice).

⁴²¹ *Crimes Act 1914* (Cth) pts IAB (controlled operations), IAC (assumed identities), IACA (witness identity protection for operatives), introduced by *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) sch 3, pt 1 [10].

⁴²² Commonwealth of Australia, *Parliamentary Debates*, above n 416, 6966 (Mr McClelland, Attorney-General).

⁴²³ *Criminal Code Act 1995* (Cth) s 11.2A, introduced by *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) sch 4, pt 1 [4].

⁴²⁴ *Criminal Code Act 1995* (Cth) ss 11.2, 11.3-11.5.

⁴²⁵ Commonwealth of Australia, *Parliamentary Debates*, above n 416, 6968 (Mr McClelland, Attorney-General).

⁴²⁶ *Ibid.*

organisations.⁴²⁷ The information gathered in this way may also be used in applications for declarations and control orders under state criminal organisation legislation.⁴²⁸

Last, the Commonwealth inserted a new Part 9.9 into the *Criminal Code Act 1995* (Cth) which contains four new offences involving criminal organisations and associations.⁴²⁹ These new offences carry maximum penalties of between three and 15 years in prison. Under s 390.3 it is an offence to associate with another person on at least two occasions in a way that facilitates their engagement in serious organised crime.⁴³⁰ The crime committed by the other person must involve at least two people, and be an offence punishable by at least three years in prison.⁴³¹ Under s 390.4 it is an offence to provide material support or resources to a criminal organisation so as to aid the commission of certain offences punishable by at least one year in prison.⁴³² It is also an offence under s 390.5 to commit certain offences punishable by at least 12 months imprisonment for the benefit of, or at the direction of, a criminal organisation.⁴³³ Conversely, it is an offence under s 390.6 to direct the activities of a criminal organisation, if those activities either constitute offences punishable by at least 12 months imprisonment or aid the commission of such offences.⁴³⁴

For each of the last three offences, a criminal organisation is one whose aims or activities include committing crimes punishable by at least three years imprisonment for the benefit of the organisation.⁴³⁵ Because the Commonwealth's power to enact criminal laws is limited, the underlying offences must also have a connection to the Commonwealth. They must be foreign, Commonwealth or territory offences, or state offences with a federal aspect.⁴³⁶

It is unclear whether the new criminal organisation offences have been useful in combating organised crime. There is certainly no evidence in the case law of anyone being charged with an

⁴²⁷ The meaning of 'serious offence' was extended to include activity associated with criminal organisations: *Telecommunications (Interception and Access) Act 1979* (Cth) s 5D(9), inserted by *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) sch 4, pt 2 [17]. Warrants under the Act can only be issued for the purpose of investigating a 'serious offence': *Telecommunications (Interception and Access) Act 1979* (Cth) ss 46(1)(d), 46A(1)(d).

⁴²⁸ The meaning of 'exempt proceeding' was amended to include a proceeding under an 'organised crime control law': *Telecommunications (Interception and Access) Act 1979* (Cth) ss 5(1) (definition of 'organised crime control law'), 5B(1)(ca), inserted by *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) sch 4, pt 2 [18A], [18D]. Intercepted information may then be given in evidence in exempt proceedings: *Telecommunications (Interception and Access) Act 1979* (Cth) ss 74(1).

⁴²⁹ Inserted by *Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2) 2010* (Cth) sch 4 [1].

⁴³⁰ *Criminal Code Act 1995* (Cth) s 390.3(1)(a)-(c).

⁴³¹ *Ibid* s 390.3(1)(d), (e).

⁴³² *Ibid* s 390.4(1)(a), (b), (f).

⁴³³ *Ibid* s 390.5(1)(a)-(b), (f), (2)(a)-(b), (f).

⁴³⁴ *Ibid* s 390.6(1)(a)-(b), (f), (2)(a)-(b), (f).

⁴³⁵ *Ibid* ss 390.4(1)(d)-(e), 390.5(1)(d)-(e), (2)(d)-(e), 390.6(1)(d)-(e), (2)(d)-(e).

⁴³⁶ *Ibid* ss 390.1 (definitions of 'constitutionally covered offence punishable by imprisonment for at least 12 months' and 'constitutionally covered offence punishable by imprisonment for at least 3 years'), 390.2.

offence under Part 9.9. This may be due to the apparent complexity of the elements of the offences as well as the evidentiary difficulty in proving the existence of criminal organisations.

It should be noted that the *Criminal Code Act 1995* (Cth) contains many substantive offences which more directly target the activities of criminal organisations, for example: people smuggling, firearms trafficking, drug importation and money-laundering.⁴³⁷

8.10 United States

The *Racketeer Influenced and Corrupt Organizations Act of 1970*, 18 USC §§ 1961-8 (RICO) was passed by the US Congress in 1970. It overlays existing state and federal criminal laws to provide a second-order means of targeting organised crime. RICO was enacted amid concerns about the Italian American mafia and was oriented – as its references to ‘loansharking’, ‘racketeering’ and property ‘fencing’ make clear – toward a highly ‘traditional’ model of criminal organisation and activity.⁴³⁸ It provides a useful point of comparison with COA in a number of respects, for the two pieces of legislation present a number of structural and conceptual parallels.

8.10.1 Enterprise

The RICO equivalent of COA’s ‘criminal organisation’ is the ‘enterprise’. This term embraces both any sort of official or legal entity (a partnership, corporation, association, union and so on) and any ‘group of individuals associated in fact although not a legal entity’.⁴³⁹ The courts have kept the definition of ‘enterprise’ broad and flexible in order to keep up with the fluid and changeable nature of criminal associations. Schools and political associations have been covered by RICO provisions, as have governmental units such as mayors’, governors’, legislators’ and judges’ offices, police departments, tax bureaux, sheriffs’ and prosecutors’ offices, fire departments, and even whole local and state governments.⁴⁴⁰

‘Enterprise’ covers both legal and illegal ventures, and the association-in-fact provisions capture nameless or informal associations for criminal purposes. Distilling the authorities, the US Supreme Court has held that three elements need to be proved in order to establish an association-in-fact enterprise: (1) a purpose; (2) relationships among those associated with the enterprise; and (3) longevity sufficient to permit these associates to pursue the enterprise’s purpose. Co-ordination and patterns of activity, joint commission of crimes, ‘interlocking’ or

⁴³⁷ Ibid ss 73.1, 271.2, 307.1-307.4, 361.2-361.3, 400.3-400.9.

⁴³⁸ See the Congressional Statement of Findings and Purpose in the *Organized Crime Control Act of 1970*, Pub L No 91-452, §1, 84 Stat 922.

⁴³⁹ 18 USC §1961(4).

⁴⁴⁰ US Department of Justice, *Criminal RICO: 18 U.S.C. §§ 1961-1968. A Manual for Federal Prosecutors* (5th ed, October 2009) 53-7.

'overlapping' wrongdoing, financial ties and shared interests or objectives are some of the factors that can support a finding that multiple individuals amount to a single enterprise.⁴⁴¹

The 'enterprise' is an entity distinct from the activity in which it engages and it must be proved separately from the element of a 'pattern of racketeering activity'.⁴⁴² Importantly, however, the American courts have accepted that the existence of an association-in-fact enterprise can and usually will be proved simply by what it *does*. That is, the criminal activity can, evidentially speaking, virtually constitute the enterprise in cases in which proof of the activity bears on or coalesces with proof of the group.⁴⁴³

8.10.2 Pattern of racketeering activity

The requirement of a 'pattern of racketeering activity' broadly aligns with COA's requirement that members of an organisation associate for the purpose of engaging in serious criminal activity.⁴⁴⁴ In a manner similar to 'serious criminal activity' (see ss 6 and 7 of COA), 'racketeering activity' is defined in RICO as any of a list of offences or types of offences.⁴⁴⁵ The list is extensive and includes acts or threats involving murder, kidnapping, gambling, arson, robbery, bribery, extortion and drug dealing. Various types of fraud, sexual exploitation, currency, immigration and terrorism-related offences are also covered.

The 'pattern' is constituted by at least two acts of racketeering activity not more than 10 years apart.⁴⁴⁶ The Supreme Court has also read in to the notion of 'pattern' a requirement for more than a sporadic or isolated incidence of the predicate acts within the statutory timeframe. There must be some 'relationship' between the acts, and the unlawful activity must be 'continuing'. Together these form what is known as the 'continuity plus relationship' requirement.⁴⁴⁷

Continuity may be established over a discrete past window of time that amounts to a 'substantial period'. No definitive period has been fixed as 'substantial' but there have been indications that mere weeks or months may not be sufficient. Cases exist suggesting that a year is a sort of base line for this form of continuity.⁴⁴⁸

Another way of establishing continuity is by showing that the predicate acts, though close in time, were part of the enterprise's ongoing or regular 'way of doing business', or were committed in furtherance of the affairs of an enterprise that itself existed for a longer period.⁴⁴⁹ This form of continuity can be established by looking beyond the predicate acts themselves to the nature of

⁴⁴¹ Ibid 62.

⁴⁴² *United States v Turkette*, 452 US 576, 583 (1981).

⁴⁴³ *United States v Jones*, 455 F 3d 134, 144 (2d Cir, 2006).

⁴⁴⁴ *Criminal Organisation Act 2009* (Qld) s 10(1)(b).

⁴⁴⁵ 18 USC §1961(1).

⁴⁴⁶ 18 USC §1961(5).

⁴⁴⁷ *Sedima SPRL v Imrex Co*, 473 US 479 (1985); US Department of Justice, above n 440, 90.

⁴⁴⁸ *Jackson v BellSouth Telecomm*, 372 F 3d 1250, 1266 (11th Cir, 2004).

⁴⁴⁹ *HJ Inc v Northwestern Bell Telephone Co*, 492 US 229, 242-3 (1989).

the enterprise, racketeering activity by other members or associates of it, and evidence of uncharged acts or crimes.

Finally, open-ended continuity may be established where the predicate acts involve a threat, whether implicit or explicit, of longer-term racketeering activity. Even though the number of acts may be small and carried out over a short period, they may manifest a threat of repetition into the future.⁴⁵⁰ Some types of offending, such as extortion or drug trafficking, will readily lend themselves to such an inference.

A *relationship* between predicate acts must be demonstrated such that they can be seen to possess some order or arrangement that justifies being characterised as a ‘pattern’. They may be related to each other, or to some external organising principle. Relationship can be established by similar purposes, victims, results, methods, or some other distinguishing characteristic(s) that prove that the acts are not isolated events.⁴⁵¹

The predicate acts need not be similar in nature or directly related to each other, as that would frustrate the Act’s purpose to cover the highly diversified activities that can constitute organised crime. The relationship accordingly need not be between the acts themselves but between the acts and the affairs of the ‘enterprise’. Such a link can be demonstrated by, for example, showing: (1) that the acts furthered the goals of, or benefited the enterprise; (2) that the enterprise enabled or facilitated the defendant committing the predicate acts; or (3) the acts were committed at the behest, or on behalf of the enterprise.⁴⁵²

8.10.3 The intersection of ‘enterprise’ and ‘pattern of racketeering activity’

Federal appeals courts were for some time bedevilled by the need to establish the ‘enterprise’ and the ‘pattern of racketeering activity’ as distinct elements of a RICO charge.⁴⁵³ In some circuits, the view took hold that the distinction required that even for an association-in-fact enterprise it was necessary to point to some identifiable structure that lay ‘behind’ the activity – a mafia family, a planning entity, some hierarchical network or the like.⁴⁵⁴ This is a problem with any legislation which seeks too neatly to target an organisation by extricating it from a messier context of members, associates, activities, informal ties and other features that are concomitant but not identical with the group. It is instructive that this is the same conceptual difficulty from which the shape shifting problem, which beset the Finks application under COA, arose.

The question was resolved in 2009 when the Supreme Court reiterated that while the ‘enterprise’ and the ‘activity’ are distinct *elements* of a RICO offence, they may be proved by the same *evidence*. Establishing the pattern of racketeering activity may therefore be sufficient, in

⁴⁵⁰ Ibid 242.

⁴⁵¹ Ibid 240.

⁴⁵² US Department of Justice, above n 440, 96-7.

⁴⁵³ Ibid 65-77.

⁴⁵⁴ The leading case being *United States v Bledsoe*, 674 F 2d 647 (8th Cir, 1982).

particular cases, to found an inference that an association-in-fact enterprise exists.⁴⁵⁵ In these cases the COA-type process of singling out an ‘organisation’ falls away. And with that step, among other things, the shape shifting problem is obviated.

8.10.4 RICO offences

The elements of an ‘enterprise’ and a ‘pattern of racketeering activity’ are combined with one of four further variables to create the substantive RICO offences.⁴⁵⁶ These variables — the substantive ones being investment, maintaining an interest and participation — provide links between the enterprise and the pattern. Thus it is an offence for a person who accrues income from a pattern of racketeering activity to invest that income in an enterprise. It is an offence for a person to acquire or maintain an interest in, or to control an enterprise, through a pattern of racketeering activity. And it is an offence for a defendant to participate in the affairs of an enterprise through a pattern of racketeering activity. The fourth variation consists of conspiracy to commit one of the aforementioned offences.

8.10.5 RICO and COA compared

RICO and COA have much in common. Both Acts focus on an entity relatively new to crime-related legislation — the ‘enterprise’ or ‘organisation’ rather than the individual. Both establish liability on the basis of participation by group members in criminal activity (‘serious criminal activity’ or ‘racketeering activity’). Both were informed by a deeply traditional and hierarchical model of organised crime.⁴⁵⁷

It can be observed, too, that RICO involves a level of forensic complexity that at least approaches and in some cases might surpass that of COA.⁴⁵⁸ In addition to establishing the necessary predicate acts (which may be complicated offences like fraud), a RICO prosecution must explain and prove to a jury the elements of ‘enterprise’ (possibly including its ‘association-in-fact’ variant), ‘pattern’ and ‘racketeering activity’.⁴⁵⁹ Unlike COA, the standard of proof is beyond reasonable doubt.

Yet RICO has been called ‘the most important substantive and procedural law tool in the history of organized-crime control’.⁴⁶⁰ Though it took perhaps a decade for investigators and prosecutors to become skilled in utilising RICO, since then it has proved a flexible, potent and high profile means of obtaining convictions that can cripple criminal organisations. Probably its

⁴⁵⁵ *Boyle v United States*, 556 US 938 (2009).

⁴⁵⁶ 18 USC §1962. For a schematic representation, see Andreas Schloenhardt, *Palermo in the Pacific: Organised Crime Offences in the Asia Pacific Region* (Martinus Nijhoff, 2010) 301.

⁴⁵⁷ With respect to RICO, see, for example, William R Geary, ‘The legislative recreation of RICO: Reinforcing the “myth” of organized crime’ (2002) 38 *Crime, Law and Social Change* 311.

⁴⁵⁸ Edward M Wise, ‘RICO and its Analogues: Some Comparative Considerations’ (2000) 27 *Syracuse Journal of International Law and Commerce* 303, 306-7.

⁴⁵⁹ Paul Coggins, ‘RICO versus Organized Crime in the United States’ (2003) 11 *US-Mexico Law Journal* 159, 161.

⁴⁶⁰ James Jacobs, Christopher Panarella and Jay Worthington, *Busting the Mob: The United States v Cosa Nostra* (NYU Press, 1994) 9-10.

most famous use was against the 'Five Families' of New York mafia when separate RICO indictments of each family were crowned with an overarching RICO charge that brought together their senior leaders as a single enterprise.⁴⁶¹

These proceedings were the culmination of a process that began in 1980 when FBI investigations into the Five Families began. Over 200 agents were involved in this evidence gathering process, which lasted five years. One hundred and seventy one listening devices and wiretaps were deployed and over 4000 hours of conversation recorded. Some devices required around-the-clock monitoring by pairs of agents for months. The trial lasted nine weeks and required three prosecutors to conduct it. Some of the evidence adduced dated back to 1959.⁴⁶² The process from investigation to final appeal took nine years.

The RICO experience suggests that care should be taken when assessing the efficacy of COA within a five-year timeframe. Innovations in the law, particularly when they require litigation, can take some years to 'bed down' and may involve initial mis-steps.⁴⁶³ RICO also suggests that the complex and laboured operation of organised crime statutes does not necessarily defeat their purpose. In light of their parallels and similarities, if COA is to be assessed at this stage as a less successful piece of legislation than RICO, it must be on the basis of identifying critical differences between them.

Such differences exist. In the first place RICO operates at the federal level of US law enforcement, which boasts far greater resources than any state (or international, at least among democracies) counterpart. Accordingly, the time- and resource-intensive compilation of evidence and preparation of cases have less of a deterrent effect than they do on smaller police bodies operating in a more constrained budgetary environment. There is much reason to doubt that Queensland police — funded by and serving a large state with a low but rather widely spread population — have the capacity to resource operations at the level of the FBI, for example.

Second, RICO provides for pre-trial freezing orders targeting the assets of accused persons.⁴⁶⁴ These provisions are broad, and notwithstanding the due process clause of the US *Constitution* they appear to admit of no exception allowing an accused to access frozen property in order to

⁴⁶¹ Reported on appeal as: *United States v Salerno*, 868 F 2d 524 (2d Cir, 1989); cert denied 491 US 907.

⁴⁶² Jacobs, Panarella and Worthington, above n 460, 80-3.

⁴⁶³ An early failure in using RICO was the prosecution of members of the Oakland chapter of the Hell's Angels motorcycle club. Among other things, this foundered on the inability of prosecutors to satisfy the jury that the *whole* club constituted an 'enterprise', rather than relying on the more nuanced approach of establishing the critical members of it as an 'association-in-fact': Wallace Turner, 'Prosecution of Hells Angels is dropped after 2d mis-trial' *New York Times* (online), 26 February 1981 <<http://www.nytimes.com/1981/02/26/us/prosecution-of-hells-angels-is-dropped-after-2d-mistrial.html>>; Ralph 'Sonny' Barger (with Keith and Kent Zimmerman), *Hell's Angel: The Life and Times of Sonny Barger and the Hell's Angels Motorcycle Club* (HarperCollins, 2000) ch 12, esp at 222. Subsequent prosecutions have been better focused and more successful: see, eg, FBI Columbia Division, 'Hells Angels Members Convicted of Racketeering Conspiracy for Their Dealings with Drugs, Guns, Armed Robbery, and Money Laundering' (Press Release, 20 March 2013) <<https://www.fbi.gov/columbia/press-releases/2013/hells-angels-members-convicted-of-racketeering-conspiracy-for-their-dealings-with-drugs-guns-armed-robbery-and-money-laundering>>.

⁴⁶⁴ 18 USC §1963(d).

fund his/her legal defence.⁴⁶⁵ While probable cause must be made out, the rules of evidence do not apply to a pre-trial freezing application.⁴⁶⁶ At the least, these provisions can be seen as forming a significant means of encouraging co-operation and guilty pleas – or, perhaps more accurately, discouraging the contrary.

Third, RICO benefits from what is, to Australian eyes, an extraordinary ‘liberal construction’ clause by which its provisions are broadly construed in order to effectuate what are said to be the statute’s ‘remedial purposes’.⁴⁶⁷ This runs contrary to the established common law canon of construction in Australia by which provisions that are penal are construed narrowly so as to give the accused the benefit of any doubt that exists.⁴⁶⁸ That principle applies more generally to non-criminal legislation (like COA) that restricts the rights and liberties of the individual.⁴⁶⁹

More broadly, this difference between RICO and COA speaks to a legal and cultural gap (approaching a gulf) between Australia and the United States in the approach to evidence. For example, the Five Families trial in the 1980s featured testimony from law enforcement officers concerning an organised crime meeting in the 1950s. None of the accused were said to have been present at that meeting, which long pre-dated their involvement in the relevant enterprise (the Mafia Commission that co-ordinated the families). Similarly, a defector from a Cleveland crime family testified on ‘the lives and careers of legendary gangsters’. In both instances, the recitation of this distant history (if not lore) was admitted as not unduly prejudicial and as relevant to the traditions, codes, structures and activities of the 1980s New York mafia.⁴⁷⁰ The Australian approach to such evidence is, it cannot be gainsaid, much more stringent.

Fourth, RICO is apt and willing to produce all-in-one mega-trials involving large numbers of individual defendants who are implicated in a sprawling enterprise. RICO indictments charging double-digit numbers of gang members simultaneously are common.⁴⁷¹ The flexible and broad

⁴⁶⁵ *United States v Monsanto*, 491 US 600 (1989); *United States v Farmer*, 274 F 3d 800 (4th Cir, 2001).

⁴⁶⁶ 18 USC §1963(d)(3).

⁴⁶⁷ *Organized Crime Control Act 1970*, Pub L No 91-452, IX, §904, 84 Stat 947.

⁴⁶⁸ *Beckwith v The Queen* (1976) 135 CLR 569, 576 (Gibbs J).

⁴⁶⁹ *R v Sillery* (1981) 180 CLR 353, 359 (Murphy J); *Byrne v McLeod* (1934) 52 CLR 1, 8 (Dixon J); *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 89 ALJR 382, 397 [67] (Gageler J).

⁴⁷⁰ Jacobs, Panarella and Worthington, above n 460, 83; *United States v Salerno*, 868 F 2d 524, 534-5 (2d Cir, 1989).

⁴⁷¹ See, for recent examples: FBI San Antonio Division, ‘Sixty-One Latin Kings Gang Members and Associates Arrested and Charged in Connection with a Racketeering and Drug Distribution Scheme’ (Press Release, 15 October 2015) <<https://www.fbi.gov/sanantonio/press-releases/2015/sixty-one-latin-kings-gang-members-and-associates-arrested-and-charged-in-connection-with-a-racketeering-and-drug-distribution-scheme>>; FBI Charlotte Division, ‘Thirty-Seven MS-13 Gang Members Indicted on Racketeering Conspiracy Charges; Some Also Charged with Murder, Attempted Murder, and Firearms Violations’ (Press Release, 20 May 2015) <<https://www.fbi.gov/charlotte/press-releases/2015/thirty-seven-ms-13-gang-members-indicted-on-racketeering-conspiracy-charges-some-also-charged-with-murder-attempted-murder-and-firearms-violations>>. This can contribute to the complexity of RICO trials: see Schloenhardt, *Palermo in the Pacific*, above n 456, 322-3.

operation of the association-in-fact enterprise allows for such wide-ranging indictments.⁴⁷² Additionally, the inability to adduce secret evidence in America means that the revelation of informants and methods is inevitable.⁴⁷³ Authorities therefore have an incentive to conduct long-term investigations and launch proceedings against the maximum possible number of defendants in one fell swoop.

COA, on the other hand, operates on the basis of three stages of significant hearings and culminates with orders that operate against a single organisation or individual each time. The possibilities for proceeding against multiple respondents for, say, a control order are, for reasons of relevance and fairness in the use of evidence, going to be significantly limited.

This again raises, as a related point, the effect of ‘criminal intelligence’ in making litigation under the Act much longer, more laborious and more complex than it otherwise would be. It adds a discrete stage of proceedings and many steps within the other stages, at all of which complex criteria must be applied and difficult balancing exercises undertaken. Given the inevitable prejudice it causes, challenges to it will be numerous at every step. The absence of criminal intelligence from RICO trials is therefore also a significant efficiency measure.

Finally, the greatest and most important difference between RICO and COA proceedings is the result. RICO is a criminal statute that imposes huge criminal penalties. Maximum sentences for violations range from twenty years to life imprisonment. The result, in the American context, is that sentences can take such imposing forms as ‘100 years’ or ‘three life sentences followed by 85 years’.⁴⁷⁴ In contrast, guilty pleas for broadly comparable offending can result in imprisonment for less than twenty years.⁴⁷⁵ Forfeiture provisions operate in addition upon any interest or property obtained directly or indirectly from racketeering activity.⁴⁷⁶ RICO also allows for civil remedies restraining the operation of the targeted enterprise.⁴⁷⁷ Business ‘fronts’ or other ventures implicated in the operation of a RICO enterprise can simply be dissolved by court order. Persons injured in their business or property by reason of a RICO violation can sue for threefold damages plus costs.⁴⁷⁸

In short, while a RICO prosecution has parallels with many of the complexities and difficulties of COA litigation, its result is incomparably more disruptive than anything the latter can offer. The

⁴⁷² *United States v Cintolo*, 818 F 2d 980, 984-5 (1st Cir, 1987) contains a now famous piece of wiretap transcript in which a RICO suspect explains to colleagues: ‘It might be me, you, him, him, and him, too. Nobody knows. Under RICO, no matter who ... we are, if we’re together, they’ll get every ... one of us’.

⁴⁷³ The confrontation clause grants accused persons a constitutional right ‘to be informed of the nature and cause of the accusation’ and ‘to be confronted with the witnesses against [them]’: *United States Constitution* amend VI. Through the Fourteenth Amendment, these protections have been applied at the state level as well: *In re Oliver*, 333 US 257 (1948); *Pointer v Texas*, 380 US 400 (1965).

⁴⁷⁴ All but one of the defendants in the Five Families trial received 100 years: *United States v Salerno*, 868 F 2d 524, 528 (1989). The other example provided can be found among many others in US Department of Justice, ‘Twenty-Two MS-13 members Sentenced for Violent Crimes’, *Justice News* (online), 31 July 2015 <<http://www.justice.gov/opa/pr/twenty-two-ms-13-members-sentenced-violent-crimes>>.

⁴⁷⁵ US Department of Justice, above n 474.

⁴⁷⁶ 18 USC §1963(a)-(c).

⁴⁷⁷ 18 USC §1964(a).

⁴⁷⁸ 18 USC §1964(c).

potential benefit accruing from a RICO prosecution can therefore be seen to make the considerable costs worthwhile. RICO's penalties provide a strong incentive for authorities to undertake the substantial labours required to mount a case. They present an enormous incentive for defendants to co-operate and plead guilty, and the result of such co-operation can be to inculcate further and more senior members of the enterprise.

Some scholars claim that RICO's complexity and resource-intensiveness make it relatively sparingly used (like COA).⁴⁷⁹ Others assert that its flexibility has led to very frequent use.⁴⁸⁰ Whatever be the case, it is clear that a successful RICO prosecution can result in once-in-a-generation or even final dismantling of substantial criminal enterprises. For similar or even greater labours, a COA application might issue in a series of control orders.

No greater contrast could be drawn between the two pieces of legislation nor any stronger explanation for their divergent results suggested.

8.11 Canada

8.11.1 Bill C-95 – participating in a criminal organisation and special peace bonds

During the 1990s violent gang rivalry played out in Quebec between two OMCGs: the Hells Angels and the Rock Machine. In 1997, in the lead up to a federal election, the Quebecois Attorney-General requested the federal government to take action on the issue.⁴⁸¹ As a result, the Canadian Parliament enacted Bill C-95.⁴⁸² The centrepiece of this legislation was a new offence of participation in a criminal organisation.⁴⁸³ 'Criminal organization' was originally defined to mean a group of five or more people, the primary activity of which is the commission of indictable offences punishable by at least five years in prison and whose members have committed a series of such offences in the previous five years.⁴⁸⁴ The first convictions for this offence came in 2001, when four members of the Rock Machine were found guilty of operating a drug ring.⁴⁸⁵

⁴⁷⁹ Coggins, 'RICO versus Organized Crime', above n 459, 161.

⁴⁸⁰ Schloenhardt, *Palermo in the Pacific*, above n 456, 320-1.

⁴⁸¹ Don Stuart, 'Time to Recodify Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution' (2002) 28(1) *Manitoba Law Journal* 89, 92.

⁴⁸² *An Act to Amend the Criminal Code (Criminal Organisations) and to Amend Other Acts in Consequence*, SC 1997, c 23.

⁴⁸³ Originally, *Criminal Code*, RSC 1985, c C-46, s 467.1, inserted by *An Act to Amend the Criminal Code (Criminal Organisations) and to Amend Other Acts in Consequence*, SC 1997, c 23, s 11.

⁴⁸⁴ Originally, *Criminal Code*, RSC 1985, c C-46, s 2, inserted by *An Act to Amend the Criminal Code (Criminal Organisations) and to Amend Other Acts in Consequence*, SC 1997, c 23, s 1.

⁴⁸⁵ Eileen Skinnider, *Defining Organised Crime in Canada – Meeting Our Obligations Under the UN Convention Against Transnational Organised Crime and Its Protocols Against Trafficking of Persons and Smuggling of Migrants?* (February 2006) International Centre for Criminal Law Reform and Criminal Justice Policy, 12

The judge in that case also found that the participation offence did not impose double punishment for the underlying offence of drug trafficking.⁴⁸⁶

Another measure introduced in 1997 was a new 'peace bond', designed to prevent organised crime before it has happened.⁴⁸⁷ Under this scheme, with the consent of the Attorney-General, anyone can apply to a provincial court judge for a peace bond if they reasonably apprehend that a person will commit a 'criminal organisation offence'.⁴⁸⁸ If the judge is satisfied there are reasonable grounds for the fear, they may require the defendant to enter into a recognisance to keep the peace and be of good behaviour.⁴⁸⁹ Originally, the recognisance could only last for 12 months, however, following an amendment in 2009, the recognisance can now extend for two years if the defendant has previously been convicted of a criminal organisation offence.⁴⁹⁰ The peace bond can include conditions which prohibit the defendant from going to certain places or from associating with certain people.⁴⁹¹ If a person refuses to enter into the recognisance or breaches a condition, they can be imprisoned for up to 12 months.⁴⁹² Apparently, peace bonds have been used with some success against lower-level gang members to break their links to organised crime.⁴⁹³

8.11.2 Bill C-24 – amended definition of criminal organisation and new offences of participating in a criminal organisation

Despite its successful use in some cases the participation offence in its original form was criticised for its 'complexity and limited application'.⁴⁹⁴ Following a review in 2000 by the House of Commons Subcommittee on Organized Crime,⁴⁹⁵ the Canadian Parliament introduced substantial changes in Bill C-24 enacted in 2001.⁴⁹⁶ This broadened the meaning of criminal

<<http://www.icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/ES%20paper%20-%20TOC%20and%20canadian%20implementation.pdf>>.

⁴⁸⁶ *R v LeClerc*, 2001 CanLII 16729 (QC CQ), 114 (Sansfaçon JQC); [2001] JQ no 426.

⁴⁸⁷ Inserted by *An Act to Amend the Criminal Code (Criminal Organisations) and to Amend Other Acts in Consequence*, SC 1997, c 23 ss 19, 26.

⁴⁸⁸ *Criminal Code*, RSC 1985, c C-46, s 810.01(1).

⁴⁸⁹ *Ibid* s 810.01(3).

⁴⁹⁰ *Ibid* s 810.01(3.1), inserted by *An Act to amend the Criminal Code (organized crime and protection of justice system participants)*, SC 2009 c 22, s 19.

⁴⁹¹ *Criminal Code*, RSC 1985, c C-46, s 810.01(4.1).

⁴⁹² *Ibid* s 810.01(4).

⁴⁹³ PJCACC, above n 208, 71 [4.82].

⁴⁹⁴ Dominique Valiquet, 'Bill C-14: An Act to Amend the Criminal Code (Organized Crime and Protection of Justice System Participants)' (Library Research Paper No LS-633E, Library of Parliament, Parliament of Canada, 2009) 2.

⁴⁹⁵ House of Commons, Subcommittee on Organized Crime of the Standing Committee on Justice and Human Rights, *Combatting Organized Crime* (October 2000) <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1031763&Language=E&Mode=1&Parl=36&Ses=2>>.

⁴⁹⁶ *An Act to amend the Criminal Code (organized crime and law enforcement) and to make consequential amendments to other Acts*, SC 2001, c 32.

organisation by reducing the minimum number of members and eliminating the need to show a pattern of activity in the last five years. Now, a criminal organisation is a group of three or more people, the main purpose or activity of which is the commission of serious offences that result in the organisation receiving a material benefit.⁴⁹⁷

Three new offences hinge off this definition. Under s 467.11, it is an offence to participate in or contribute to the activities of a criminal organisation in such a way as to enhance its ability to commit indictable offences. Under s 467.12, it is an offence to commit an indictable offence for the benefit of, at the direction of, or in association with a criminal organisation. Conversely, under s 467.13, it is an offence to instruct another person to commit an indictable offence for the benefit of, at the direction of, or in association with a criminal organisation. These offences carry a maximum penalty of five years, 14 years and life imprisonment respectively. These terms of imprisonment are to be served cumulatively upon any sentence for the underlying offence by virtue of s 467.14. More recently, in 2014, Canada introduced another offence of recruiting, punishable by five years in prison, with a minimum period of six months if the recruit is a child.⁴⁹⁸

The first case to test the 2001 laws was *Lindsay v The Queen* in 2005. In that case, the Ontario Supreme Court found that the Hells Angels motorcycle gang was a criminal organisation, having as one its main purposes or activities, the facilitation of drug trafficking. Two of its members were then found guilty of trying to extort money 'in association' with the Hells Angels contrary to s 467.12. The offences have been found not to fall foul of the Canadian Charter of Rights and Freedoms⁴⁹⁹ for being too vague or overbroad.⁵⁰⁰

In terms of effectiveness, there is no doubt that people have been prosecuted for participation offences, occasionally in large numbers. For example, in 1998, 35 members of an Aboriginal Street Gang – the Manitoba Warriors – were charged with participating in a criminal organisation. However, most pleaded guilty to other offences involving drugs after the participation charges were withdrawn as part of a plea bargaining deal.⁵⁰¹ On another occasion in the early 2000s, 42 members of the Hells Angels were charged with participation offences. However, many of those pleaded guilty to charges of murder, conspiracy to murder and drug trafficking, indicating that the ordinary criminal law had been sufficient.⁵⁰²

⁴⁹⁷ *Criminal Code*, RSC 1985, c C-46, s 467.1(1).

⁴⁹⁸ *Ibid* s 467.111, inserted by *An Act to amend the Criminal Code and the National Defence Act (criminal organization recruitment)*, SC 2014, c 17, s 9.

⁴⁹⁹ *Canada Act 1982* (UK) c 11, sch B pt I, esp s 7.

⁵⁰⁰ *R v Lindsay*, 2009 ONCA 532 (CanLII), [20]-[33] (MacPherson JA); 97 OR (3d) 567; *R v Lindsay* (2004), 2004 CanLII 16094 (ON SC); 70 OR (3d) 131 (Fuerst J); *R v Terezakis*, 2007 BCCA 384 (CanLII), [43] (Mackenzie J), [78] (Chiasson J); 223 CCC (3d) 344. Leave to appeal to the Supreme Court was refused in both cases: *Terezakis v The Queen*, 2008 CanLII 3191 (SCC); *Lindsay v The Queen*, 2010 CanLII 10089 (SCC).

⁵⁰¹ Stuart, above n 481, 97.

⁵⁰² Andreas Schloenhardt, Submission No 1 to Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, 4 April 2008, 36.

As one academic observed in 2008, '[d]espite the stated goals of the legislation, there has been no noticeable decline in organised crime activities in Canada since the introduction of these laws in 1997'.⁵⁰³

8.12 New Zealand

Like Canada, New Zealand enacted an offence of participation in a criminal gang in 1997, through the introduction of s 98A of the *Crimes Act 1961* (NZ). The definition of 'criminal gang' was originally a group of at least three people, at least three of whom had previously been convicted of serious offences committed on separate occasions.⁵⁰⁴ Due to the difficulty in establishing a criminal organisation under this test, in the first five years a total of only 16 prosecutions were brought under s 98A.⁵⁰⁵

The definition was significantly amended in 2002. After that, an 'organised criminal group' was defined as a group of at least three people who have as one of their objectives committing serious offences of violence or for obtaining material benefits.⁵⁰⁶ The mental element of participation was also extended to recklessness and the penalty for the offence was increased from three to five years in prison.⁵⁰⁷ The rate of prosecutions under s 98A 'increased dramatically' to 76 in 2003.⁵⁰⁸ In 2009, in order to 'better reflect the culpability of those involved in this insidious activity',⁵⁰⁹ the penalty was further increased to 10 years in prison.⁵¹⁰ Another amendment in 2009 made participation in an organised criminal group an aggravating circumstance for the purposes of sentencing.⁵¹¹ This might be seen as curious given that charges under s 98A are 'normally brought in conjunction with other charges'.⁵¹² That is, in practice the participation offence already operates as a circumstance of aggravation upon the underlying offence.

The trend of charging the participation offence with other offences calls into question its value as a separate offence. For example, in the recent case of *R v Dewar*,⁵¹³ the defendant was charged

⁵⁰³ Ibid.

⁵⁰⁴ *Crimes Act 1961* (NZ) s 98A, inserted by *Crimes Amendment (No 2) Act 1997* (NZ) s 2.

⁵⁰⁵ New Zealand, *Parliamentary Debates*, House of Representatives, 3 March 2004, vol 615, 11499 (Margaret Wilson, Acting Minister of Justice).

⁵⁰⁶ *Crimes Act 1961* (NZ) s 98A(2), as replaced by *Crimes Amendment Act 2002* (NZ) s 5.

⁵⁰⁷ *Crimes Act 1961* (NZ) s 98A(1), as replaced by *Crimes Amendment Act 2002* (NZ) s 5.

⁵⁰⁸ New Zealand, *Parliamentary Debates*, House of Representatives, 3 March 2004, vol 615, 11499 (Margaret Wilson, Acting Minister of Justice).

⁵⁰⁹ New Zealand, *Parliamentary Debates*, House of Representatives, 10 September 2009, vol 657, 6283 (Simon Power, Minister of Justice).

⁵¹⁰ *Crimes Act 1961* (NZ) s 98A(1), as replaced by *Crimes Amendment Act 2009* (NZ) s 5.

⁵¹¹ *Sentencing Act 2002* (NZ) s 9(1)(hb), inserted by *Sentencing Amendment Act (No 3) 2009* (NZ) s 4.

⁵¹² New Zealand, *Parliamentary Debates*, above n 508, 11500 (Margaret Wilson, Acting Minister of Justice).

⁵¹³ [2013] NZHC 2010 (9 August 2013).

with conspiracy to supply cannabis and theft. The addition of a charge of participation in an organised group added very little, if anything; involvement in any form of organised criminal association is already a circumstance of aggravation, and the extension of responsibility through the concept of a ‘conspiracy’ already captured the defendant’s criminality. As a result, the sentencing judge decided that ‘a specific uplift for the aggravating factor of gang involvement [was not] justified’ because it had already been taken into account as part of the milieu for the underlying offences.⁵¹⁴

8.13 United Kingdom

8.13.1 *Serious Organised Crime and Police Act 2005 (UK) c 15* – new investigative body

In the early 2000s the UK Home Office gave some consideration to adopting the American RICO model or the Canadian offence of participating in a criminal organisation.⁵¹⁵ The UK experience was, however, that serious crime tends to be committed by ‘career criminals who network with each other’ in fluid associations bearing no identifiable structure.⁵¹⁶ Accordingly, rather than ‘attempt[] to construct offences around organised crime’ as in the US and Canada, the UK decided instead to focus on increasing police powers to investigate and prosecute serious crime.⁵¹⁷ In March 2004, the UK government published a white paper to this effect,⁵¹⁸ and the following year, the UK Parliament passed the *Serious Organised Crime and Police Act 2005 (UK) c 15*.

The centrepiece of the Act was the creation of a single agency to lead the response to organised crime: originally the Serious Organised Crime Agency, recently renamed the National Crime Agency (NCA).⁵¹⁹ The NCA has general powers to investigate and prosecute serious organised crime.⁵²⁰ In addition, the NCA has information gathering and sharing functions, with police officers having a general duty to pass information on to it.⁵²¹

⁵¹⁴ Ibid [22] (Kos J).

⁵¹⁵ Michael Levi and Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales*, Home Office Online Report 17/02 (2002) <https://www.researchgate.net/publication/265497822_A_comparative_analysis_of_organised_crime_conspiracy_legislation_and_practice_and_their_relevance_to_England_and_Wales>.

⁵¹⁶ Peter Stelfox, ‘Policing lower levels of Organised Crime in England and Wales’ (1998) 37(4) *The Howard Journal of Criminal Justice* 393, 401.

⁵¹⁷ Attorney-General’s Department, Submission No 16, above n 415, 13 [55].

⁵¹⁸ Home Office, *One Step Ahead: A 21st Century Strategy to Defeat Organised Crime*, Cm 6167 (March 2004) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/251075/6167.pdf>.

⁵¹⁹ *Serious Organised Crime and Police Act 2005 (UK) c 15*, s 1.

⁵²⁰ Ibid s 2(1).

⁵²¹ Ibid ss 3(1), 36, 37.

Consistent with the UK government's strategy of targeting the financial incentives of crime, another feature of the Act was the introduction of Financial Reporting Orders ('FROs') as a sentencing option. Under Part 2, Chapter 3 of the Act, when a court is sentencing 'or otherwise dealing with' a person for one of several offences involving deception,⁵²² the court may impose a FRO if the risk of committing a similar offence is 'sufficiently high'.⁵²³ Such an order requires the person to provide detailed and regular information about their financial affairs for up to 20 years in the most serious cases. Failure to comply with the order carries a maximum penalty of between six months and 12 months in jail depending on the region of the UK.⁵²⁴

In addition, the Act strengthened the investigative powers of police and the Director of Public Prosecutions,⁵²⁵ provided for immunity and reduction of sentence for offenders who assist police investigations,⁵²⁶ and enhanced protections for witnesses.⁵²⁷

8.13.2 *Serious Crimes Act 2007 (UK) c 27 – offence of encouraging or assisting crime, and Serious Crime Prevention Orders (SCPOs)*

In 2007 the UK further consolidated its response to organised crime into one agency by giving the NCA responsibility for proceeds of crime.⁵²⁸ The UK also introduced a new offence of intentionally encouraging or assisting the commission of an offence.⁵²⁹ This means that anyone who encourages or assists a crime to be committed will be treated as though they themselves committed the offence. Victims of crime are not liable for the new offence, and a defence of acting reasonably is also available.⁵³⁰ The accompanying repeal of the common law offence of incitement suggests that 'encouraging' is to be treated as the modern equivalent of 'inciting'.⁵³¹ However, the concepts of 'aiding' and 'abetting' have survived.⁵³² It would appear that the only difference between the new concept of 'assisting' and the traditional concept of 'aiding' is that the former applies to attempted offences, whereas the latter does not.⁵³³ Thus, the new law

⁵²² *Theft Act 1968 (UK) c 60, ss 15, 15A, 16, 20(2); Theft Act 1978 (UK) c 31, ss 1, 2; Proceeds of Crime Act 2002 (UK) c 29, sch 2.*

⁵²³ *Serious Organised Crime and Police Act 2005 (UK) c 15, s 76(1), (2).*

⁵²⁴ *Ibid* ss 76(6), (7), 79.

⁵²⁵ *Ibid* pt 2, ch 1, pt 3.

⁵²⁶ *Ibid* pt 2, ch 2.

⁵²⁷ *Ibid* pt 2, ch 4.

⁵²⁸ *Serious Crimes Act 2007 (UK) c 27, pt 3, ch 2.*

⁵²⁹ *Ibid* ss 44-46.

⁵³⁰ *Ibid* ss 50-51.

⁵³¹ *Ibid* s 59.

⁵³² *Accessories and Abettors Act 1861 (UK) c 94, s 8.*

⁵³³ The Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report No 300, Cm 6878 (2006) 21 [3.2] <http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc300_Inchoate_Liability_for_Assisting_and_Encouraging_Crime_report.pdf>;

criminalises assisting another person to commit an offence, even though the offence does not eventuate.

A far bigger change was the introduction of Serious Crime Prevention Orders (SCPOs). Having for some years employed control orders to prevent terrorism, sexual offending and anti-social behaviour,⁵³⁴ in 2007 the UK applied the same model for the first time to serious crime.

Under the *Serious Crimes Act 2007* (UK), a SCPO can be made in one of two scenarios. The first is when a person is convicted of a serious offence in the Crown Court (the approximate equivalent of Queensland's District Court).⁵³⁵ Second, even if a person has not been convicted of an offence, the Director of Public Prosecutions can bring an application for a SCPO in the High Court (the rough equivalent of Queensland's Supreme Court).⁵³⁶ The High Court must be satisfied on the balance of probabilities that the person has been involved in serious crime. In both cases, the Crown Court or the High Court must also be satisfied that there are reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting the person's involvement in serious crime. According to the Crown Prosecution Service, implicit in this test is proof of a 'real risk' that the person will reoffend.⁵³⁷

As the imposition of a SCPO in the Crown Court follows conviction, it is essentially a sentencing option in the form of a post-conviction order. In the High Court, past criminal conduct must still generally be shown, though ostensibly only on the balance of probabilities rather than beyond a reasonable doubt.⁵³⁸ In this sense, the lower threshold may be said to carry with it the risk that prosecuting authorities will opt to bring applications in the High Court as a substitute for a criminal trial. This was certainly envisaged when the model was first proposed.⁵³⁹ However, during her second reading speech, Baroness Scotland said that it was not the government's intention that SCPOs would be used as a 'way for law enforcement agencies to get round troublesome prosecutions'.⁵⁴⁰

Moreover, the temptation to avoid a criminal trial may be tempered somewhat by the decision of *R (McCann) v Crown Court at Manchester*⁵⁴¹ in the context of control orders for anti-social

Home Office, *New Powers Against Organised and Financial Crime*, Cm 6875 (July 2006) 24
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272311/6875.pdf>.

⁵³⁴ *Prevention of Terrorism Act 2005* (UK) c 2, s 1 (abolished by *Terrorism Prevention and Investigation Measures Act 2011* (UK) c 23, s 1); *Sexual Offences Act 2003* (UK) c 42, s 104; *Crime and Disorder Act 1998* (UK) c 37, s 1.

⁵³⁵ *Serious Crimes Act 2007* (UK) c 27, s 19(2).

⁵³⁶ *Serious Crimes Act 2007* (UK) c 27, s 1(1)(b).

⁵³⁷ Crown Prosecution Service, *Serious Crime Prevention Orders Serious Crime Act 2007 – Sections 1-41 and Schedules 1 and 2*, [2.3]
<[http://www.cps.gov.uk/legal/s_to_u/serious_crime_prevention_orders_\(scpo\)_guidance/](http://www.cps.gov.uk/legal/s_to_u/serious_crime_prevention_orders_(scpo)_guidance/)>.

⁵³⁸ *Serious Crimes Act 2007* (UK) c 27, s 35(2).

⁵³⁹ Home Office, *New Powers Against Organised and Financial Crime*, Cm 6875 (July 2006) 31
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272311/6875.pdf>.

⁵⁴⁰ United Kingdom, *Parliamentary Debates*, House of Lords, 7 February 2007, vol 689, col 729 (Baroness Scotland, Minister of State, Home Office).

⁵⁴¹ [2003] 1 AC 787.

behaviour. In that case the House of Lords held that the standard of proof of anti-social behaviour is tantamount to the criminal standard of beyond a reasonable doubt.⁵⁴² By parity of reasoning, the same standard may be expected to apply to proof of criminal offences for SCPOs.⁵⁴³

In making a SCPO the court may impose any prohibition, restriction or requirement it thinks necessary to protect the public through the prevention of serious crime.⁵⁴⁴ This can include restrictions on associating or communicating with certain people, on the types of work a person is permitted to do, on the premises they may use and on where they can go, both within and outside of the UK.⁵⁴⁵ The order can go so far as to require the person to provide certain information, but not so as to require them to give evidence orally or violate legal professional privilege unless the order specifically requires it.⁵⁴⁶ According to the Crown Prosecuting Authority, '[w]hile the possible terms of an order could restrict the persons life [sic] in almost any respect, and to a very significant degree, ... any term will still have to be objectively justified as appropriate for the purpose of protecting the public by preventing involvement in serious crime'.⁵⁴⁷

The broad power to impose conditions would also be read down in light of the requirement in the *Human Rights Act 1998* (UK) c 42 that any interference with human rights be necessary and proportionate to a legitimate purpose.⁵⁴⁸ Thus, for example, '[a]n order could not include a requirement for house arrest, because such a measure would be incompatible with Article 5 of the European Convention on Human Rights'.⁵⁴⁹

The order can continue to apply for up to five years, though there is no limit on the number of subsequent orders that may be made.⁵⁵⁰ A breach of the order is punishable by up to five years imprisonment or an unlimited fine.⁵⁵¹ In addition, any property used in connection with the offence may be forfeited to the Crown.⁵⁵²

⁵⁴² Ibid 812 [37] (Lord Steyn), 825-826 [81]-[83] (Lord Hope of Craighead), 835 [114] (Lord Hutton), 836 [116] (Lord Hobhouse), 836 [117] (Lord Scott of Foscote).

⁵⁴³ Indeed, this was the Government's intention: United Kingdom, *General Committee Debates*, House of Commons, Public Bill Committee, 26 June 2007, col 17 (Vernon Coaker, Parliamentary Under-Secretary of State for the Home Department).

⁵⁴⁴ *Serious Crimes Act 2007* (UK) c 27, ss 1(3), 19(5).

⁵⁴⁵ Ibid s 5(3).

⁵⁴⁶ Ibid ss 5(5), 11, 12, 13(2)-(4).

⁵⁴⁷ Crown Prosecution Service, above n 537, [3.3].

⁵⁴⁸ *Human Rights Act 1998* (UK) c 42, sch 1, arts 5 (liberty and security), 8 (private life), 10 (freedom of expression), 11 (freedom of assembly and association).

⁵⁴⁹ United Kingdom, *Parliamentary Debates*, House of Lords, 25 April 2007, vol 691, col 675 (Baroness Scotland, Minister of State, Home Office).

⁵⁵⁰ *Serious Crimes Act 2007* (UK) c 27, s 16(2), (5).

⁵⁵¹ Ibid s 25(2)(b).

⁵⁵² Ibid s 26(1).

Aside from the potential to use SCPOs as post-conviction orders, there are a number of other differences from the control order regime under COA. One of the main differences is that whereas a control order under COA requires proof of *organised* crime, a SCPO only requires proof of *serious* crime. That is, the SCPO regime is not dependent on showing the existence of a criminal organisation, focusing instead on individual conduct. While the definition of ‘serious offence’ includes many offences typically associated with organised crime – such as trafficking, child sex offences and money laundering – some are not.⁵⁵³ For example, the definition potentially extends to include a ‘serious’ instance of ‘fishing for salmon with the wrong tackle and the unauthorised disposal of controlled waste’.⁵⁵⁴ Were SCPOs to be transplanted to Queensland, care should be taken to avoid including such trivial offences.

Another point of difference is that, in addition to individuals, SCPOs can apply to corporations, partnerships and unincorporated associations.⁵⁵⁵ Thus, rather than establish the existence of a criminal organisation and then seek to place restrictions on its members, the SCPO regime can be used to place restrictions on the organisation directly. If the organisation is convicted for breaching the SCPO, the Director of Public Prosecutions may apply to have it wound up.⁵⁵⁶

Lastly, in court proceedings for SCPOs criminal intelligence may only be used if it is admissible as evidence,⁵⁵⁷ and if it is admitted as evidence, it must be disclosed to the respondent.⁵⁵⁸ Given the large number of SCPOs which have been granted it would appear that the full disclosure of CI has not widely deterred prosecuting authorities from bringing applications. Conversely, if CI has not been relied upon because it is too sensitive or does not amount to evidence, that alone does not appear to have prevented courts from making a large number of SCPOs.

The SCPO regime came into force in early 2008.⁵⁵⁹ The commencement dates of many of the initial orders were delayed to take into account time in prison. Accordingly, it is only recently that an accurate picture has emerged of their use. As at 31 March 2014 the NCA (and its predecessor, the Serious Organised Crime Agency) had obtained 182 SCPOs. A further 136 were

⁵⁵³ Ibid ss 2(2) 3(2), sch 1, pts 1, 2.

⁵⁵⁴ Crown Prosecution Service, above n 537 [9.5].

⁵⁵⁵ *Serious Crimes Act 2007* (UK) c 27, ss 30-32.

⁵⁵⁶ Ibid ss 27(1), (4), (7), 28(1), (4), (7).

⁵⁵⁷ It should be noted that hearsay evidence is admissible in civil proceedings in the High Court with certain safeguards. For example, if the Director of Public Prosecutions adduces the hearsay evidence of a statement of a person and decides not to call them as a witness in support of an application for a SCPO, the respondent may do so for the purposes of cross-examination: *Civil Evidence Act 1995* (UK) c 38, ss 1(1), 3; *Civil Procedure Rules 1998* (UK) r 33.4. In the Crown Court, hearsay evidence is admissible in only very limited circumstances: *Criminal Justice Act 2003* (UK) c 44, s 114.

⁵⁵⁸ *Serious Crimes Act 2007* (UK) c 27, ss 35(1), 36(4); *Civil Procedure Rules 1998* (UK) pts 31 (disclosure), 32 (evidence), rr 33.1-33.4 (hearsay evidence); *Criminal Procedure Rules 2015* (UK) pts 15 (disclosure), 20 (hearsay evidence).

⁵⁵⁹ *Serious Crime Act (Commencement No.2 Transitional and Transitory Provisions and savings) Order 2008* (UK) SI 2008/755, O 15.

obtained by police forces or other agencies and notified to the NCA. Of these only one was sought in the High Court. The remainder were sought in the Crown Court.⁵⁶⁰

Thus, in the overwhelming majority of cases, SCPOs have been used as a post-conviction sentencing option rather than as a substitute for the criminal justice system.

Of the SCPOs currently on foot, the Lifetime Management Team within the NCA provides heightened supervision with respect to 47.⁵⁶¹ The NCA publishes a list of the names of the people subject to these orders, their dates of birth and the conditions of their orders.⁵⁶² This appears to be part of a broader shift in strategy in the UK to 'publicise more widely the identity and photographs of people convicted of offences related to organised crime'.⁵⁶³

The intensity of monitoring required is no doubt costly. However, the SCPO regime was always intended to be used 'in a targeted way'.⁵⁶⁴ As Baroness Scotland said in parliamentary debates, '[t]hese orders will not be lightly sought, because they are likely to be limited in number and directed to those cases where the seriousness of the activity is such that the [prosecuting] authorities believe it necessary to take this action'.⁵⁶⁵

Lastly, it should be noted that the SCPO model carries the approval of the Parliamentary Joint Committee on the Australian Crime Commission. After reviewing various legislative approaches to combat organised crime, the Committee concluded in its 2009 report that:

[o]f the approaches examined by the committee, the UK's Serious and Organised Crime Prevention Orders (SPCOs [sic]) seem to be an effective way of managing the activities of known criminals. One of the key advantages of SCPOs is that they can be targeted to specific individuals, and do not attract many of the concerns about criminalising entire groups. However, the committee is also cognisant of the costs of monitoring such orders, and for that reason considers that the orders would really only be cost-effective for use against the most high-risk criminals. The committee considers that such an approach may have significant benefits if applied in Australia and urges that further consideration be given to implementing SPCOs in Australia.⁵⁶⁶

⁵⁶⁰ Home Office, *Fact sheet: Improvements to Serious Crime Prevention Orders* (March 2015) 1[5] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415969/Fact_sheet_-_SCPOs_-_Act.pdf>.

⁵⁶¹ National Crime Agency, *Lifetime Management*, <<http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/organised-crime-command/lifetime-management>>.

⁵⁶² National Crime Agency, *Publication of Ancillary Orders* (August 2015) <<http://www.nationalcrimeagency.gov.uk/publications/621-ancillary-orders-aug-2015/file>>.

⁵⁶³ United Kingdom, *Serious and Organised Crime Strategy*, Cm 8715 (October 2013) 47 [5.19] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf>.

⁵⁶⁴ United Kingdom, *Parliamentary Debates*, above n 540, col 728 (Baroness Scotland, Minister of State, Home Office).

⁵⁶⁵ United Kingdom, *Parliamentary Debates*, House of Lords, 4 March 2007, vol 690, col 819 (Baroness Scotland, Minister of State, Home Office).

⁵⁶⁶ PJCACC, above n 208, 94 [4.188].

8.13.3 *Policing and Crime Act 2009* (UK) c 26 – injunctions to prevent gang-related crime violence

In 2009 the UK introduced another civil order regime targeted at lower-level organised crime. Under this new regime the police may apply for an injunction to prevent gang-related violence, either in the High Court or the County Court (the approximate equivalents of Queensland's Supreme Court and District Court, respectively).⁵⁶⁷

To grant an injunction the court must be satisfied of two conditions. The first is that the respondent has more likely than not engaged in, encouraged or assisted, gang-related violence.⁵⁶⁸ The second is that an injunction is necessary to prevent the respondent from engaging in further gang-related violence or that it would protect them from such violence.⁵⁶⁹ 'Gang-related' means the activities of a group of at least three people who can be identified in some way as a group associated with a particular area.⁵⁷⁰ Unlike control orders, where past criminal conduct must be proven beyond a reasonable doubt, for injunctions the Court of Appeal has confirmed that the past gang-related violence need only be proved on the balance of probabilities.⁵⁷¹

In fashioning the injunction, the court can prohibit or require 'anything'.⁵⁷² This can include requirements that the respondent not associate with certain people, go to certain places or wear 'particular descriptions of articles of clothing'.⁵⁷³ It can even include regular reporting requirements and house arrest for up to eight hours each day.⁵⁷⁴ Equally, it may include 'supportive, positive requirements' such as to 'participate in rehabilitative activities'.⁵⁷⁵ The injunction can last for up to two years, but after the first year the court must review the injunction and consider whether to vary or discharge it.⁵⁷⁶ If a person breaches the injunction, they may be arrested and brought back before the court.⁵⁷⁷

⁵⁶⁷ *Policing and Crime Act 2009* (UK) c 26, ss 37(1), 49(1) (definition of 'court').

⁵⁶⁸ *Ibid* s 34(2) (as enacted).

⁵⁶⁹ *Ibid* s 34(3) (as enacted).

⁵⁷⁰ *Ibid* s 34(5) (as enacted).

⁵⁷¹ *Birmingham City Council v James* [2014] 1 WLR 23, 30-31 [13] (Moore-Bick LJ), 32 [19] (Jackson LJ), 34 [32] (Maurice Kay LJ).

⁵⁷² *Policing and Crime Act 2009* (UK) c 26, s 34(4) (as enacted).

⁵⁷³ *Ibid* s 35(2)(a), (b), (d).

⁵⁷⁴ *Ibid* s 35(3)(b)-(c), (4).

⁵⁷⁵ Home Office, *Review of the operation of injunctions to prevent gang-related violence* (January 2014) 3 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/278786/ReviewInjunctionsGangRelatedViolence.pdf>.

⁵⁷⁶ *Policing and Crime Act 2009* (UK) c 26, s 36(2), (4), (5).

⁵⁷⁷ *Ibid* ss 36(6), 43(4).

In 2010, an amendment allowed gang injunctions to be sought against children between the ages of 14 and 17.⁵⁷⁸

The provisions authorising these injunctions only came into force in early 2011. The Home Office reviewed the operation of these injunctions in January 2014. Between 2011 and 2014, at least 88 injunctions had been granted, only two of which were against children. The most common conditions prohibited the respondent from going to certain places or associating with certain people. The injunctions were seen to be a 'valuable tool in tackling gang-related violence, and seemed to work most effectively in areas with strong multi-agency arrangements in place'.⁵⁷⁹

Police did report some difficulty in demonstrating association with a gang. Applications generally 'took a substantial amount of time and effort to complete, with evidence-gathering proving particularly resource-intensive'. Because of this, some police felt that 'the outcomes of injunctions were sometimes not commensurate with the resources invested in them'.⁵⁸⁰ Once an injunction had been obtained, monitoring for compliance was likewise felt to be 'difficult and quite resource-intensive'.⁵⁸¹ These difficulties appear to stem from the requirement to show the existence of a criminal organisation as well as the inutility of targeting relatively low-level criminality. SCPOs suffer neither of these drawbacks.

8.13.4 *Serious Crimes Act 2015 (UK) c 9* – amendments to Serious Crime Prevention Orders and gang-related violence injunctions, and new offence of participating in an organised crime group

Any enthusiasm to adopt a SCPO model in Australia is now subject to the caveat of amendments introduced earlier this year. In October 2013, the UK Government released its Serious and Organised Crime Strategy. As part of its key objective of 'preventing' serious crime, the strategy calls for increased use of SCPOs as a form of early intervention.⁵⁸² Minor amendments were made to the SCPO regime in 2015, such as inclusion of computer-related offences in the definition of 'serious crime',⁵⁸³ giving the Crown Court the power to replace a SCPO in the case of breach,⁵⁸⁴ and allowing for SCPOs to extend beyond their terms in the case of reoffending or a breach of the conditions.⁵⁸⁵ Noticeably, these amendments are not directed to shifting the use of SCPOs from a post-conviction tool to a purely preventative one. Presumably, this change will

⁵⁷⁸ *Crime and Security Act 2010 (UK) c 17, s 34*. See also *Crime and Courts Act 2013 (UK) c 22, s 18* providing that these applications for injunctions be heard in the Youth Court.

⁵⁷⁹ Home Office, above n 575, 5.

⁵⁸⁰ *Ibid.*

⁵⁸¹ *Ibid* 6.

⁵⁸² United Kingdom, *Serious and Organised Crime Strategy*, above n 563, 11 [1.19], 51 [5.36]-[5.37].

⁵⁸³ *Serious Crime Act 2007 (UK) c 27, sch 1, part 1 [11A], [27A]*, inserted by *Serious Crime Act 2015 (UK) c 9, s 47(4), (8)*.

⁵⁸⁴ *Serious Crime Act 2007 (UK) c 27, s 21*, as amended by *Serious Crime Act 2015 (UK) c 9, s 48*.

⁵⁸⁵ *Serious Crime Act 2007 (UK) c 27, s 22E*, inserted by *Serious Crime Act 2015 (UK) c 9, s 49*.

be engineered by a change in prosecution policy, re-enlivening fears that SCPOs may become an alternative to the criminal justice system.

The 2015 amendments also broadened the reach of gang-related injunctions with minor amendments. Now drug-dealing is included alongside violence as a basis for granting an injunction.⁵⁸⁶ The requirement that the gang be associated with a particular area was also removed, so that now there need only be at least three people who can be identified in some way as a group.⁵⁸⁷

As part of the objective of ‘pursuing’ serious crime, the UK government identified various ‘legislative gaps’ in need of filling.⁵⁸⁸ One of these was the absence of a crime specifically prohibiting participation in organised crime. The Strategy proposed introducing a new offence based on ‘legislation that is already being used elsewhere in the world’.⁵⁸⁹ In this connection, the Strategy refers to efforts by nations to implement Article 5 of the *United Nations Convention against Transnational Organized Crime* which requires the criminalisation of participation in a criminal group. Yet as the UN Office on Drugs and Crime notes, in implementing Article 5, ‘[c]ommon law countries have [typically] used the offence of conspiracy, while civil law jurisdictions have [typically] used offences that proscribe an involvement in criminal organizations’.⁵⁹⁰ The UK has for a long time criminalised conspiring with others to commit offences, including offences outside of the UK.⁵⁹¹

Nevertheless, in 2015, the UK enacted an offence of participating in the activities of an organised crime group. Now, a person commits an offence if they take part in the activities of an organised crime group, reasonably suspecting that those activities constitute an offence punishable by seven years or more in prison.⁵⁹² An organised crime group is defined to mean a group of at least three people who act, or agree to act, together for the purpose of committing offences punishable by at least seven years in prison.⁵⁹³ The participation offence carries a penalty of imprisonment for up to five years.⁵⁹⁴

The new offence came into force in May 2015.⁵⁹⁵ It remains to be seen whether ‘participating’ will capture activity that would not have been covered by the existing notions of conspiring, encouraging or assisting. According to the Crown Prosecution Service, the participation offence

⁵⁸⁶ *Policing and Crime Act 2009* (UK) c 26, 2 34(2)-(3), substituted by *Serious Crime Act 2015* (UK) c 9, s 51.

⁵⁸⁷ *Policing and Crime Act 2009* (UK) c 26, 2 34(5), substituted by *Serious Crime Act 2015* (UK) c 9, s 51.

⁵⁸⁸ United Kingdom, *Serious and Organised Crime Strategy*, above n 563, 37 [4.58].

⁵⁸⁹ *Ibid* 37 [4.60].

⁵⁹⁰ United Nations Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocol thereto* (2004) 21 [49] <http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf>.

⁵⁹¹ *Criminal Law Act 1977* (UK) c 45, ss 1, 1A (inserted by *Criminal Justice (Terrorism and Conspiracy) Act 1998* (UK) c 40, s 5).

⁵⁹² *Serious Crimes Act 2015* (UK) c 9, s 45(2)-(5).

⁵⁹³ *Ibid* s 45(6).

⁵⁹⁴ *Ibid* s 45(9).

⁵⁹⁵ *Serious Crime Act 2015 (Commencement No 1) Regulations 2015* (UK) c 52, reg 2(e).

is intended to be targeted at the bosses of criminal organisations who generally insulate themselves from criminal activity on the ground, as well as those on the periphery of criminal organisations who might turn a blind eye to the activities of the organisation.⁵⁹⁶ Moreover, it remains to be seen whether the view originally taken by the UK in the early 2000s will be vindicated or whether the participation offence will have a noticeable impact on organised crime.

8.14 Conclusion

COA provides a number of features adapted from other jurisdictions, including control orders, public safety orders and fortification removal orders. As in Queensland, none of these mechanisms have proved useful in the fight against organised crime in other Australian jurisdictions, with the possible exception of a variant of public safety orders in South Australia. Fortification removal orders are seldom sought or issued. Of the limited number of control orders made against organised criminals, only one has not been overturned following legal challenge.

However, the comparison of COA to other jurisdictions reveals that the control order model is not inherently flawed. The UK's version of control orders – SCPOs – have found frequent, though targeted, use. The reason for this is that the test for granting a SCPO turns on proof of *serious* crime, rather than *organised* crime, such that the difficulty of showing the existence of a criminal organisation does not arise. Further, SCPOs are overwhelmingly used as a post-conviction sentencing option. This means that the evidentiary burden is largely discharged in the course of a criminal trial. Lastly, the complex issues surrounding criminal intelligence are absent in applications for SCPOs for the simple reason that the court is bound by the rules of evidence.

Nonetheless, some care should be taken if SCPOs are to be adapted to the Australian context. For example, the power to impose conditions in SCPOs is on its face unconstrained. This, however, is in a legal environment in which the *Human Rights Act 1998* (UK) c 42 requires a judge to tailor conditions in a way that is compatible with human rights. The absence of a Charter of Rights in Queensland means that the power to impose conditions would need to be framed in a more limited way. Likewise, the UK parliament adopted the terminology of 'balance of probabilities' as the applicable standard, knowing that the House of Lords would likely require proof of previous criminal conduct beyond a reasonable doubt. In Australia, a similar legal principle requires that evidence have a higher probative value in order to satisfy the civil standard of proof where serious allegations are made or the consequences flowing from a particular finding of fact are grave.⁵⁹⁷ As yet, that principle has not been extended to requiring

⁵⁹⁶ Crown Prosecution Service, *Participating in Activities of an Organised Crime Group* <http://www.cps.gov.uk/legal/l_to_o/organised_crime_groups/>.

⁵⁹⁷ *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362 (Dixon J). As applied to control order legislation, see *South Australia v Totani* (2010) 242 CLR 1, 101 [257] (Heydon J); *Thomas v Mowbray* (2007) 233 CLR 307, 355 [113] (Gummow and Crennan JJ).

equivalence with the criminal standard of proof.⁵⁹⁸ Obviously this issue of adaptation would not arise if SCPOs were used exclusively on a post-conviction basis.

Contrasting the control order model with alternatives also demonstrates its utility. Consorting offences in other Australian jurisdictions have tended to cast a wide net, mostly capturing associations between low-level criminals, rather than serious organised criminals as intended. This appears to be a by-product of the ease of gathering evidence against people who tend to associate in public spaces, such as youth and homeless people. Its wide application is also a result of prohibiting association with *any* convicted person, regardless of their links to organised crime or the specific risk they present in drawing others into organised crime.

Likewise, where participation offences are utilised, they tend to be charged in conjunction with a substantive criminal offence. Used in this way, they amount to no more than a circumstance of aggravation. Accordingly, charges for participating in a criminal organisation merely lead to the same kinds of sentences that are currently available, not measures aimed at reducing the factors that lead to organised crime.

Control orders are uniquely placed to do just that. They offer the possibility of appropriately tailored restrictions against appropriately targeted offenders in order to combat the causes of organised crime.

⁵⁹⁸ *Rejtek v McElroy* (1965) 112 CLR 517, 521-522 (Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ). For a recent example, see *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) ALJR 382, 394 [49] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

8.15 Timeline of declaration and control order legislation

4.09.2008	The <i>Serious and Organised Crime (Control) Act 2008</i> (SA) came into force.
14.05.2009	The South Australian Finks Motorcycle Club was declared by the Attorney-General under the <i>Serious Organised Crime (Control) Act 2008</i> (SA).
19.05.2009	The <i>Crimes (Criminal Organisations Control) Act 2009</i> (NSW) came into force.
3.12.2009	Sections 1 and 2 of the <i>Criminal Organisation Act 2009</i> (Qld) came into force.
15.04.2010	Remaining provisions of the <i>Criminal Organisation Act 2009</i> (Qld) came into force.
6.07.2010	The Acting Commissioner of Police for New South Wales applied to an eligible judge for a declaration in respect of the New South Wales Hells Angels.
11.11.2010	The High Court handed down its decision in <i>South Australia v Totani</i> (2010) 242 CLR 1, striking down s 14(1) of the <i>Serious and Organised Crime (Control) Act 2008</i> (SA).
23.06.2011	The High Court handed down its decision in <i>Wainohu v New South Wales</i> (2011) 243 CLR 181, striking down the <i>Crimes (Criminal Organisations Control) Act 2009</i> (NSW).
1.12.2011	The <i>Serious Crime Control Act 2009</i> (NT) came into force.
1.12.2011	The <i>Serious Crime Control Amendment Act 2011</i> (NT) came into force.
6.12.2011	The <i>Criminal Organisation Amendment Act 2011</i> (Qld) came into force, clarifying criminal intelligence requirements and information sharing.
21.03.2012	The <i>Crimes (Criminal Organisations Control) Act 2012</i> (NSW) came into effect, curing defect identified in <i>Wainohu</i> .
1.06.2012	The Assistant Commissioner of the QPS filed an application in the Queensland Supreme Court for a declaration that the Gold Cost Chapter of the Finks Motorcycle Club and Pompano Pty Ltd are a criminal organisation.
17.06.2012	The <i>Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012</i> (SA) came into force, curing defects identified in <i>Totani</i> and <i>Wainohu</i> .
29.11.2012	Sections 1 and 2 of the <i>Criminal Organisations Control Act 2012</i> (WA) came into force.
13.03.2013	The <i>Criminal Organisations Control Act 2012</i> (Vic) came into force.
14.03.2013	The High Court upheld the <i>Criminal Organisation Act 2009</i> (Qld) in <i>Assistant Commissioner Condon v Pompano Pty Ltd</i> (2013) 252 CLR 38.
3.04.2013	The <i>Crimes (Criminal Organisations Control) Amendment Act 2013</i> (NSW) came into force, incorporating model upheld in <i>Pompano</i> .
11.08.2013	The <i>Serious and Organised Crime (Control) (Declared Organisations) Amendment Act 2013</i> (SA) came into force, incorporating model upheld in <i>Pompano</i> .
2.11.2013	Remainder of the <i>Criminal Organisations Control Act 2012</i> (WA) came into force.
1.10.2014	The <i>Criminal Organisations Control and Other Acts Amendment Act 2014</i> (Vic) came into force.

8.16 Table comparing key tests under declaration and control order legislation

	Test for criminal intelligence declaration	Test for criminal organisation declaration	Test for control order
QLD	<p>72 Deciding application</p> <p>(1) The court may declare that the information is criminal intelligence if the court is satisfied the information is criminal intelligence.</p> <p>(2) In exercising its discretion to declare information to be criminal intelligence, the court may have regard to whether matters mentioned in section 60(a)(i) to (iii) outweigh any unfairness to a respondent.</p> <p>(3) Subsection (2) does not limit the matters that the court may consider in exercising its discretion.</p> <p>(4) ...</p>	<p>10 Court may make a declaration</p> <p>(1) The court may make a declaration that the respondent is a criminal organisation if the court is satisfied that—</p> <p>(a) the respondent is an organisation; and</p> <p>(b) members of the organisation associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity; and</p> <p>(c) the organisation is an unacceptable risk to the safety, welfare or order of the community.</p>	<p>18 Court may make control order</p> <p>(1) The court may make a control order for the respondent if the court is satisfied that the respondent—</p> <p>(a) is, or has been, a member of a criminal organisation; and</p> <p>(b) engages in, or has engaged in, serious criminal activity; and</p> <p>(c) associates with any person for the purpose of engaging in, or conspiring to engage in, serious criminal activity.</p> <p>(2) Also, the court may make a control order for the respondent if the court is satisfied that the respondent—</p> <p>(a) engages in, or has engaged in, serious criminal activity; and</p> <p>(b) associates with any member of a criminal organisation for the purpose of engaging in, or conspiring to engage in, serious criminal activity.</p>
NSW	<p>3 Definitions</p> <p>(1) In this Act: <i>criminal intelligence</i> means information relating to actual or suspected criminal activity (whether in this State or elsewhere) the disclosure of which could reasonably be expected:</p> <p>(a) to prejudice criminal investigations, or</p> <p>(b) to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement, or</p> <p>(c) to endanger a person's life or physical safety.</p> <p>28B Objects of Part</p> <p>The objects of this Part are to:</p> <p>(a) allow evidence that is or contains criminal intelligence to be admitted in applications under this Act without the evidence:</p> <p>(i) prejudicing criminal investigations, or</p>	<p>7 Court may make a declaration</p> <p>(1) The Court may make a declaration that the respondent is a criminal organisation for the purposes of this Act if the Court is satisfied that:</p> <p>(a) the respondent is an organisation, and</p> <p>(b) members of the organisation in New South Wales associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity, and</p> <p>(c) the continued existence of the organisation is an unacceptable risk to the safety, welfare or order of the community in this State.</p>	<p>14 Court may make interim control order</p> <p>(1) The Court may, on application by the Commissioner, make an interim control order relating to one or more persons specified in the application pending the hearing and final determination of an application for a control order confirming (or confirming with variations) the interim control order.</p> <p>(2) ...</p> <p>(3) The Court is to make an interim control order in relation to a person if it is satisfied that the application and any further information supplied by the Commissioner satisfy the requirements under section 19 (1) for making a control order in relation to the person.</p> <p>19 Court may make control order</p> <p>(1) The Court may make a control order in relation to a person on whom notice of an interim control</p>

	<ul style="list-style-type: none"> (ii) enabling the discovery of the existence or identity of confidential sources of information relevant to law enforcement, or (iii) endangering anyone's life or physical safety, and <p>(b) prohibit the unlawful disclosure of particular criminal intelligence.</p> <p>28M Deciding criminal intelligence application</p> <p>(1) The Court may declare that information is criminal intelligence if the Court is satisfied the information is criminal intelligence.</p> <p>(2) In exercising its discretion to declare information to be criminal intelligence, the Court may have regard to whether matters mentioned in section 28B (a) (i)–(iii) outweigh any unfairness to a respondent.</p> <p>(3) Subsection (2) does not limit the matters that the Court may consider in exercising its discretion.</p> <p>(4) If the information was provided to the relevant agency by an informant, the Court may not declare that the information is criminal intelligence unless some or all of the information is supported in a material particular by other information before the Court.</p> <p>(5) The supporting information mentioned in subsection (4) may be other information before the Court that is declared criminal intelligence or that is the subject of a criminal intelligence application.</p> <p>(6) If the Court is not satisfied information is criminal intelligence or proposes to exercise its discretion not to make the declaration, it must, before deciding the application, give the Commissioner an opportunity to withdraw it.</p> <p>(7) In this section: <i>respondent</i> means a respondent to any existing or possible substantive application in which the information mentioned in subsection (1) may be considered.</p>		<p>order has been served under Division 1 if the Court is satisfied that:</p> <ul style="list-style-type: none"> (a) the person: <ul style="list-style-type: none"> (i) is a member of a particular declared organisation, or (ii) is or purports to be a former member of a particular declared organisation but has an on-going involvement with the organisation and its activities, and (b) sufficient grounds exist for making the control order.
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SA	<p>5A—Criminal intelligence</p> <p>(1) In any proceedings under this Act before a court, the court—</p> <p>(a) must, on the application of the Commissioner, take steps to maintain the confidentiality of information properly classified by the Commissioner as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives; and</p> <p>(b) may take evidence consisting of or relating to information so classified by the Commissioner by way of affidavit of a police officer of or above the rank of superintendent.</p> <p>(2) The duties imposed on a court by subsection (1) in relation to proceedings under this Act apply to any court dealing (whether on an appeal under this, or another, Act or otherwise) with information properly classified under this Act as criminal intelligence or with the question of whether information has been properly classified under this Act by the Commissioner as criminal intelligence.</p>	<p>11—Court may make declaration</p> <p>(1) The Court may make a declaration on an application made under this Part in relation to an organisation if satisfied that—</p> <p>(a) members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and</p> <p>(b) the organisation represents a risk to public safety and order in this State.</p>	<p>22—Court may make control order</p> <p>(1) ...</p> <p>(2) The Court may, on application by the Commissioner, make a control order relating to the respondent if the Court is satisfied that—</p> <p>(a) the respondent is a member of a declared organisation; or</p> <p>(b) the respondent—</p> <p>(i) has been a member of an organisation which, at the time of the application, is a declared organisation; or</p> <p>(ii) engages, or has engaged, in serious criminal activity, and associates or has associated with a member of a declared organisation; or</p> <p>(c) the respondent engages, or has engaged, in serious criminal activity and associates or has associated with other persons who engage, or have engaged, in serious criminal activity, and that the making of the order is appropriate in the circumstances.</p> <p>(3) ...</p>
WA	<p>110. Protection of criminal intelligence information in proceedings for declaration</p> <p>(1) ...</p> <p>(2) In proceedings to which this section applies [applications for a declaration], the designated authority must take all reasonable steps to maintain the confidentiality of information that the designated authority considers to be properly classified by the Commissioner of Police or the CC Commissioner as criminal intelligence information, including steps —</p> <p>(a) to receive evidence and hear argument about the information in private and in the absence of any party to the proceedings other than the Commissioner of Police or, as the case requires, the CC Commissioner or the representative of either of them; and</p>	<p>13. Designated authority may make declaration</p> <p>(1) On an application under this Part in relation to a respondent, a designated authority may make a declaration that the respondent is a criminal organisation if the designated authority is satisfied —</p> <p>(a) that the respondent is an organisation; and</p> <p>(b) that members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and</p> <p>(c) that the organisation represents a risk to public safety and order in this State.</p>	<p>57. Circumstances in which control order may be made</p> <p>(1) The court may make a control order in relation to a person if the court is satisfied —</p> <p>(a) that there is a ground for making a control order in relation to the person; and</p> <p>(b) that it is appropriate in the circumstances to make the order.</p> <p>(2) Any of the following is a ground for making a control order in relation to a person —</p> <p>(a) that the person is a member of a declared criminal organisation;</p> <p>(b) that the person —</p> <p>(i) is or purports to be a former member of an organisation that is a declared criminal organisation (whether or not the organisation was a declared</p>

	<p>(b) to prohibit the publication of evidence about criminal intelligence information.</p> <p>111. Protection of criminal intelligence information in court proceedings under this Act</p> <p>(1) ...</p> <p>(2) In proceedings to which this section applies [applications for control orders etc], the court must take all reasonable steps to maintain the confidentiality of information that the court considers to be properly classified by the Commissioner of Police or, as the case requires, the CC Commissioner as criminal intelligence information, including steps –</p> <p>(a) to receive evidence and hear argument about the information in private and in the absence of any party to the proceedings other than the Commissioner of Police or, as the case requires, the CC Commissioner or the representative of either of them; and</p> <p>(b) to prohibit the publication of evidence about criminal intelligence information.</p>		<p>criminal organisation at the time of the person's former membership); but</p> <p>(ii) has an ongoing involvement with the organisation and its activities;</p> <p>(c) that the person –</p> <p>(i) engages in, or has engaged in, serious criminal activity; and</p> <p>(ii) regularly associates with members of a declared criminal organisation.</p>
NT	<p>73 Criminal intelligence</p> <p>(1) ...</p> <p>(2) A court to which an application, objection or appeal to which this section applies is made, must take steps to maintain the confidentiality of classified information provided to it by the Commissioner, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings, their representatives and the public, if the court considers the classified information is criminal intelligence.</p> <p>(3) If the court considers classified information is not criminal intelligence, the court must allow the Commissioner to withdraw the classified information from consideration.</p> <p>(4) ...</p>	<p>12 Grounds for making declaration</p> <p>(1) The grounds for making a declaration under section 15 in relation to an organisation are:</p> <p>(a) that members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and</p> <p>(b) that the organisation represents a risk to public safety and order.</p> <p>15 Supreme Court may make declaration</p> <p>(1) ...</p> <p>(2) ...</p> <p>(3) The Supreme Court may:</p> <p>(a) if it determines there are grounds as mentioned in section 12(1)(a) and (b) for making a declaration in relation to the respondent and it is appropriate to do so – make a declaration that the respondent is a declared organisation for this Act; or</p>	<p>23 Grounds for making control order</p> <p>(1) Each of the following is a ground for making a control order in relation to a person:</p> <p>(a) the person is a member of a declared organisation;</p> <p>(b) the person is a former member of an organisation that is a declared organisation;</p> <p>(c) the person:</p> <p>(i) engages, or has engaged, in serious criminal activity; and</p> <p>(ii) regularly associates with members of a declared organisation;</p> <p>(d) the person:</p> <p>(i) engages, or has engaged, in serious criminal activity; and</p> <p>(ii) regularly associates with other persons who engage, or have engaged, in serious criminal activity.</p> <p>(2) ...</p>

		(b) if it determines otherwise - dismiss the application.	
VIC	<p>3 Definitions</p> <p>(1) In this Act: criminal intelligence means any information, document or other thing relating to actual or suspected criminal activity in Victoria or elsewhere, the disclosure of which could reasonably be expected to—</p> <p>(a) prejudice a criminal investigation, including by revealing intelligence gathering methodologies, investigative techniques or technologies, or covert practices; or</p> <p>(b) enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement; or</p> <p>(c) endanger a person's life or physical safety;</p> <p>75 Determining protection application</p> <p>(1) After hearing a protection application, the Court may make a criminal intelligence protection order in respect of all or any part of the information, document or other thing to which the application relates if the Court is satisfied that—</p> <p>(a) the information, document, thing or part is criminal intelligence; and</p> <p>(b) the reasons for maintaining the confidentiality of the criminal intelligence outweigh any prejudice or unfairness to the respondent to the substantive application.</p> <p>(2) If the Court declines to make a criminal intelligence protection order in respect of all or any part of the information, document or other thing—</p> <p>(a) the Chief Commissioner is not obliged to adduce that information, document, other thing or part in evidence in the proceeding on the substantive application; and</p> <p>(b) the Chief Commissioner may withdraw the substantive application.</p>	<p>19 Court may make declaration</p> <p>(1) The Court, on an application under section 14, may make a declaration—</p> <p>(a) in the case of an organisation the subject of the application—that the organisation is a declared organisation;</p> <p>(b) in the case of an individual the subject of the application—that the individual is a declared individual.</p> <p>(2) The Court may make a declaration under subsection (1)(a) (a <i>prohibitive declaration</i>) if—</p> <p>(a) the Court is satisfied beyond reasonable doubt that the matters set out in subsection (2B) apply to the organisation; and</p> <p>(b) the Court is satisfied on the balance of probabilities that the activities of the organisation pose a serious threat to public safety and order.</p> <p>(2A) The Court may make a declaration under subsection (1)(a) (a <i>restrictive declaration</i>) if the Court is satisfied on the balance of probabilities that—</p> <p>(a) the matters set out in subsection (2B) apply to the organisation; and</p> <p>(b) the activities of the organisation pose a serious threat to public safety and order.</p> <p>(2B) For the purposes of subsection (2)(a) and (2A)(a), the matters that apply to an organisation are, as the case requires—</p> <p>(a) the organisation—</p> <p>(i) has engaged in, organised, facilitated or supported serious criminal activity; or</p> <p>(ii) is engaging in, organising, facilitating or supporting serious criminal activity; or</p> <p>(b) any 2 or more members, former members or prospective members of the organisation have used or are using—</p> <p>(i) the organisation; or</p>	<p>43 Court may make control order</p> <p>(1) The Court may make a control order that applies to an organisation if the organisation is a declared organisation and the Court is satisfied that—</p> <p>(a) if the declaration which applies to the organisation is a prohibitive declaration—the making of the control order is likely to contribute to the purpose of preventing or disrupting serious criminal activity by—</p> <p>(i) the organisation; or</p> <p>(ii) any members, former members or prospective members of the organisation; or</p> <p>(b) if the declaration which applies to the organisation is a restrictive declaration—it is necessary or desirable to restrict, or to impose conditions on, the activities of—</p> <p>(i) the organisation; or</p> <p>(ii) any members, former members or prospective members of the organisation—</p> <p>in order to end, prevent or reduce a serious threat to public safety and order.</p> <p>(1A) ...</p> <p>(2) The Court may make a control order that applies to an individual if the Court is satisfied that—</p> <p>(a) the individual is a member, former member or prospective member of an organisation that is subject to a declaration; and</p> <p>(b) either—</p> <p>(i) if the declaration is a prohibitive declaration—the making of the control order is likely to contribute to the purpose of preventing or disrupting—</p> <p>(A) serious criminal activity by the individual; or</p> <p>(B) serious criminal activity by any other person that is being or may be facilitated by the individual; or</p>

		<p>(ii) their relationship with that organisation or with that organisation's members, former members or prospective members— for a criminal purpose; or</p> <p>(c) any 2 or more members or prospective members of the organisation are also members, former members or prospective members of an organisation to which a control order applies; or</p> <p>(d) control orders apply to any 2 or more members or prospective members of the organisation.</p> <p>(2C) ...</p> <p>(3) The Court may make a declaration under subsection (1)(b) if the Court is satisfied on the balance of probabilities that—</p> <p>(a) the individual is a member, former member or prospective member of the organisation identified in the application for the declaration in accordance with section 15(1)(ba); and</p> <p>(b) that individual and at least one other member, former member or prospective member of that organisation have used or are using—</p> <p>(i) that organisation; or</p> <p>(ii) their relationship with that organisation or with that organisation's members— for a criminal purpose; and</p> <p>(c) the activities of that individual and the member, former member or prospective member pose a serious threat to public safety and order. ...</p>	<p>(ii) if the declaration is a restrictive declaration—it is necessary or desirable to restrict, or to impose conditions on, the activities of the individual in order to end, prevent or reduce a serious threat to public safety and order.</p> <p>(2A) The Court may make a control order that applies to an individual if—</p> <p>(a) the individual is a declared individual; and</p> <p>(b) the Court is satisfied that it is necessary or desirable to restrict, or to impose conditions on, the activities of the individual in order to end, prevent or reduce a serious threat to public safety and order.</p> <p>(2B) ...</p>
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9 Policy Options

This chapter considers whether it is worthwhile preserving some or all of COA's principal elements and, if so, any necessary changes to them; or, if not, whether any should be preserved in different form in other legislation.

9.1 Criminal intelligence

The use of CI in proceedings under COA has been exhaustively considered at Chapters 4.1, 4.2 and 5.2. While the Act's attempt to address organised crime by using criminal intelligence was understandable in light of statutory approaches elsewhere at the time COA was promulgated, it has proved to have disadvantages.

Those drawbacks have the effect, ultimately, of negating any apparent benefit in persisting with the use of CI in the fashion envisaged in COA. Because it is, in effect, the bedrock of the Act, its apparent inutility removes any basis for COA's preservation in its current form. COA should, eventually, be repealed or allowed to lapse. That conclusion is tempered by the proviso, discussed in the following chapter, that final decisions about legislative reform should await the report of the Taskforce on Organised Crime Legislation due on 31 March 2016.

That said, the Act does contain some other statutory implements which warrant preservation, albeit through inclusion under other existing Queensland legislation, discussed below.

9.2 Criminal organisation declarations and control orders

The primary purpose of declaring a criminal organisation under COA is to enliven the power to grant control orders against its members. The fate of Part 2 (declarations) and Part 3 (control orders) is therefore inextricably entwined. Although neither feature of COA has been used, it is conceivable that these features in COA would have suffered the 'teething' issues of any new legal regime. The experience in the US is that it took nearly 10 years to 'bed down' the application of RICO. Had the 2013 suite not been enacted, it is possible that a renewed application might have been brought against the Mongols, resulting eventually in control orders against its members.

However, Queensland is not alone in experiencing difficulties with control orders which hinge upon declarations. None of the five other Australian jurisdictions with similar legislation has succeeded in obtaining a valid declaration-based control order, notwithstanding significant political will and the allocation of substantial public resources. It is thus reasonably clear that Parts 2 and 3 are unlikely to be effective in their current form.

There are two options to make them effective: one is to make it easier to obtain a declaration (option 1), which is not preferred, and the other is to remove the need for a declaration altogether by relying on a conviction-based scheme for control orders (option 2), which is preferred.

Option 1 – Change criminal organisation declarations: executive declaration as the basis for a control order

We know from the High Court's decisions in *Kuczborski* and *Totani* that it is constitutionally permissible for the executive to declare criminal organisations, provided that any subsequent role played by the courts is an independent one.¹ Giving the declaration function to the Governor-in-Council would no doubt speed up the declaration process, as it has done under the 2013 suite. It would, however, subvert fundamental ideas about the way power ought to be exercised in a society governed by the rule of law and imbued with notions of the separation of powers. In such a society, the criminal status of an entity ought not to be decided on the basis of secret untested evidence by a member of the executive whose decision is essentially unreviewable,² and therefore liable to arbitrary and capricious use. This option is not recommended.

Fortunately, a far more efficient alternative exists.

Option 2 – Change test for control order: post-conviction regime modelled on UK legislation

In each of the states and territories with an equivalent of COA, a control order may be made on the basis of a declaration. However, the legislation in South Australia and the Northern Territory also offers an alternative basis: proof that the respondent has engaged in serious criminal activity, and associates with others engaged in serious criminal activity.³ The only valid control order in Australia was made on this second ground in South Australia against a member of the Rebels Motorcycle Club.⁴

¹ *Kuczborski v Queensland* (2014) 89 ALJR 59, 70 [22], 73-74 [40]-[41] (French CJ), 100 [234], 102 [255] (Crennan, Kiefel, Gageler and Keane JJ), 111 [303] (Bell J); *South Australia v Totani* (2010) 242 CLR 1, 52 [82] (French CJ), 67 [149] (Gummow J), 92-93 [236] (Hayne J), 160 [436] (Crennan and Bell JJ), 173 [481] (Kiefel J).

² In principle, the Attorney-General's decision would always be reviewable for jurisdictional error: *Kirk v Industrial Relations Commission* (2010) 239 CLR 531, 581 [98]-[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *South Australia v Totani* (2010) 242 CLR 1, 27 [26] (French CJ), 62 [128] (Gummow J), 78 [193] (Hayne J), 105 [268] (Heydon J), 153 [415] (Crennan and Bell JJ); *Wainohu v New South Wales* (2011) 243 CLR 181, 195 [15] (French CJ and Kiefel J), 224 [89] (Gummow, Hayne, Crennan and Bell JJ). However, broad statutory criteria and undisclosed reasoning would make the decision unreviewable '[f]or all practical purposes': *Kuczborski v Queensland* (2014) 89 ALJR 59, 79 [84] (Hayne J).

³ *Serious and Organised Crime (Control) Act 2008* (SA) 22(2)(c); *Serious Crime Control Act* (NT) s 23(1)(d).

⁴ Alan Moss, *A review of the execution of the powers under the Serious and Organised Crime (Control) Act 2008 exercised during the period 1 July, 2010 to 30 June, 2011*, tabled in the South Australian House of Assembly 24 November 2011, 7-8 [10].

Despite the success of the application, it appears to have suffered the same drawbacks as COA: South Australian Police have reported that it required significant police resources, involving 18 months' police work, 21 police witnesses, nine civilian witnesses, a large volume of sworn affidavits and evidence, and 12 appearances before the Magistrate. According to the South Australian Police, the outcome was not justified by the time and effort required.⁵

The reason for this inefficiency is likely to be twofold. The first is that the test still labours under the difficulty of having to show an association between people who, by their nature, tend to operate clandestinely.

Second, in an attempt to create an alternative to the criminal justice system rather than an adjunct, the current control order regime creates a false economy. Rather than applying control orders at the close of criminal trials (which would already occur in the ordinary administration of justice), control orders presently duplicate proceedings or, worse, potentially incentivise prosecuting weak cases as civil applications because they would not succeed as criminal prosecutions.

The SCPO control order model in the UK, discussed in Chapter 8.13, suffers neither deficit. Under the *Serious Crimes Act 2007* (UK), the control order regime is enlivened if a person is convicted of a serious offence or (effectively, the same thing) they are proved beyond a reasonable doubt to have engaged in serious criminal activity. The court may then impose a control order if satisfied on the balance of probabilities that 'the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime'.⁶ Conditions can then be tailored to the offender's particular circumstances and risk factors. Unlike in Australia, this version has found frequent use, albeit reserved for serious offenders due to the cost involved in monitoring compliance with the orders.

In the same way, the type of control orders contemplated by COA could be inserted as a new sentencing option under the *Penalties and Sentences Act 1992* (Qld) to be available in sentencing defendants found guilty of offences typically associated with organised crime. As in the UK, if the sentencing judge is satisfied of a risk assessment on the balance of probabilities, they could impose conditions appropriate to the defendant's circumstances.

However, in adapting the UK version of control orders, two points should be noted. The power of the court to impose conditions in the UK is subject to the requirement that their impact on human rights be proportionate to the objective of preventing serious crime.⁷ In the absence of a Charter of Rights in Queensland it might be appropriate to cast the power to impose conditions in narrower terms. Conversely, the UK legislation is not subject to the implied freedom of political communication and association as Australian legislation is. By tying control orders to convictions, the justification for restricting the implied freedom would be more compelling, so that the risk of a successful constitutional challenge would be lower. In any event, a court is presumed to take into account the implied freedom when exercising a discretion to impose an

⁵ South Australian Police, Clarification of Evidence to Crime and Public Integrity Policy Committee, *Inquiry into Serious and Organised Crime Legislation*, 11.

⁶ *Serious Crimes Act 2007* (UK) c 27, ss 1(1)(b), (2)(b), 19(2).

⁷ *Human Rights Act 1998* (UK) c 42, s 9.

order. In this way, if a control order is not proportionate in a particular case, it may be appealed, but the legislation would remain constitutionally sound.⁸

Option 3 – No control order regime in Queensland

If existing sentencing options are sufficient, there would be no need to introduce control orders on a post-conviction basis. Currently, under the *Penalties and Sentences Act*, a sentencing judge can impose a probation order when sentencing a person for an offence punishable by imprisonment or for a regulatory offence.⁹ This would capture most offences associated with organised crime. As part of the probation order, the judge is able to set conditions they consider necessary ‘to stop the offender from again committing the offence’ or ‘from committing other offences’.¹⁰ Conceivably this might include conditions prohibiting criminogenic associations and other conditions currently available under s 19 of COA. However, a probation order may only be combined with a sentence of imprisonment with a maximum period of one year.¹¹

A similar power to impose conditions applies with respect to intensive correction orders,¹² however they may only be imposed as a substitute for imprisonment if the term would otherwise have been one year or less.¹³ Many serious offences committed in connection with criminal organisations warrant a longer term of imprisonment, such that a probation order or intensive correction order would not be available (and may not reflect the gravity of the offending).

Other sentencing options which provide an unsatisfactory substitute for control orders include: non-contact orders which prevent contact with a victim of an offence of violence;¹⁴ and banning orders targeted at offences of violence in or near licensed premises.¹⁵ While these tools could potentially capture some instances of organised crime, their focus is not aimed at reducing organised crime. They do not, for example, allow for restrictions on associating with fellow gang members.

If a person is sentenced to a term of imprisonment with a parole eligibility date (as distinct from a parole release date), when they become eligible for parole, the parole board may impose a condition ‘to stop the prisoner committing an offence’.¹⁶ This provision has been used to impose conditions prohibiting a prisoner from interacting with certain people, such as members of the media, and from attending certain places and events, such public meetings.¹⁷ The High Court has found that if the parole board sets conditions which breach the implied freedom of political

⁸ *Wainohu v New South Wales* (2011) 243 CLR 181, 231 [113] (Gummow, Hayne, Crennan and Bell JJ). See also 220 [72] (French CJ and Kiefel J).

⁹ *Penalties and Sentences Act 1992* (Qld) s 91.

¹⁰ *Ibid* s 94(b)(ii), (iii).

¹¹ *Ibid* s 92(1)(b)(i).

¹² *Ibid* s 115(b)(ii), (iii).

¹³ *Ibid* s 112.

¹⁴ *Ibid* ss 43B(1), 43C(1)(a).

¹⁵ *Ibid* ss 43J(1).

¹⁶ *Corrective Services Act 2006* (Qld) s 200(2)(b).

¹⁷ *Wotton v Queensland* (2012) 246 CLR 1, 12 [16] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

communication, the parole board's decision can be corrected by judicial review, but the provision itself is constitutionally valid.¹⁸

However, parole conditions are relatively narrowly focused on preventing 'an offence', whereas a control order imposed by a judge as a penalty could take into account broader considerations such as rehabilitation, deterrence and community protection. Moreover, control orders 'significantly affect the common law freedoms of individuals' including freedom of movement and association.¹⁹ It is therefore more appropriate that they be made by the courts.

Thus, there are no sentencing options currently available which would provide the same outcomes as a control order regime targeted at offenders involved in organised crime. It follows that the better option is to remove the need for declarations and adopt post-conviction control orders styled on the UK model (option 2).

9.3 Public Safety Orders

Curiously, no public safety orders have been sought or issued under COA, even though a criminal organisation declaration is not a prerequisite for the granting of such an order. It may be that the cumbersome procedures for declarations and control orders led to a loss of enthusiasm for the entire Act, including public safety orders.

The South Australian experience makes it clear that public safety orders can be 'very effective in preventing violent activity at public events'.²⁰ South Australian police have issued 155 public safety orders against individual OMCG members in respect of 12 to 15 major public events since 2010.²¹ In all except one case, the orders have met their purpose of dissuading certain people from attending certain events, thereby potentially avoiding public acts of violence.²² Indeed, there has only been one arrest for a breach of a public safety order in South Australia.²³

The use of public safety orders in South Australia shows that they may fill a need. The South Australian model allows senior police officers to issue public safety orders, whereas the model under COA provides for the order to be made by the court. There are then three options available in regards to what to do with public safety orders: retain a court-ordered model (option 1), move to a police-issued model (option 2), or do away with public safety orders altogether (option 3).

¹⁸ Ibid 16 [32]-[33] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

¹⁹ *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 56 [30] (French CJ).

²⁰ South Australian Police, above n 5, 12.

²¹ Evidence to Crime and Public Integrity Policy Committee, *Inquiry into Serious and Organised Crime*, Parliament of South Australia, Adelaide, 3 July 2015, 21 (Deputy Commissioner Stevens).

²² For a similar assessment of public safety orders, see: Moss, above n 4, 15 [13].

²³ South Australian Police, above n 5, 12.

Option 1 – Retain court-ordered public safety orders

Police ought to have the power to limit the conditions which give rise to the public acts of violence occasionally committed by OMCG members. Public safety orders currently give police that power, by allowing the court to make short-term orders which prohibit certain people from attending a certain place. However, there is a strong argument that if public safety orders are retained, there ought to be continued oversight by the courts, given that:

- public safety orders have the potential to significantly impact upon a person’s freedom of assembly and freedom of movement;
- owing to that impact upon liberty, there is an inherent risk of abuse of the power; and
- the making of a public safety order involves carefully weighing the risk to public safety against rights to partake in ‘advocacy, protest, dissent or industrial action’, which is a task better undertaken by a judge.²⁴

If public safety orders are retained in their current form as a court-ordered mechanism, it would be logical and sensible to group them with similar powers by transplanting Part 4 of COA into another Act such as the *Peace and Good Behaviour Act 1982* (Qld). That Act allows a person who has been threatened with assault or destruction of their property to make a complaint to a justice of the peace, who may in turn refer the matter to the Magistrates Court.²⁵ A Magistrate may then make an order that the person who made the threat is to ‘keep the peace and be of good behaviour for such time, specified in the order, as the Court thinks fit’.²⁶ It would be a natural complement to the scheme of that Act to include similar preventative orders on the application of police.

Option 2 – Amend Part 4 of COA in line with public safety orders in South Australia

Alternatively, consideration may be given to amending public safety orders to make it easier to issue them within urgent time frames. This would involve taking the power to make public safety orders away from the courts and giving it instead to police officers, in line with the legislation in South Australia²⁷ and the amendments proposed in New South Wales.²⁸

As a new form of police power, this version of public safety orders would logically be inserted into the *Police Powers and Responsibilities Act 2000* (Qld), perhaps as a new part following Chapter 2, Part 5 concerning ‘move on’ powers.

²⁴ *Criminal Organisation Control Act 2009* (Qld) s 28(2)(c). See also the proportionality analysis required in *Peaceful Assembly Act 1992* (Qld) s 5(2).

²⁵ *Peace and Good Behaviour Act 1982* (Qld) s 4(1), (2A).

²⁶ *Ibid* s 6(3)(b).

²⁷ *Serious and Organised Crime (Control) Act 2008* (SA) s 23.

²⁸ New South Wales Government, *Election Commitments 2015-19: Building Our Future*, 13 <www.budget.nsw.gov.au/__data/.../Election_Commitments_2015-19.pdf>.

However, owing to the concerns of potential misuse outlined above, strict safeguards should be built in to the new police power. These should include – in the very least – the opportunity for timely judicial review, a limit on the period of orders and the number of times they may be re-issued without recourse to the courts, a clear injunction on using them to prevent genuine political communication and protest, as well as a restriction by reference to rank on who may issue the orders (perhaps inspector or higher).

Option 3 – No public safety order regime for Queensland

It cannot be ignored that no public safety orders have been sought in Queensland in the more than five years since they became available. On the one hand, this suggests that they are not needed. However, the following analysis of existing laws reveals that a gap exists, such that either option 1 or 2 outlined above is preferable.

Police officers (and security personnel at South Bank²⁹) currently have the power to give a direction to people to leave a specified place and not return for a period of up to 24 hours.³⁰ The power applies to anyone whose behaviour is ‘disorderly, indecent, offensive, or threatening’,³¹ but also to people whose behaviour or mere presence causes anxiety, interferes with trade or business or disrupts the ‘peaceable and orderly conduct of any event, entertainment or gathering at the place’.³²

Although the power cannot be used prophylactically (the relevant behaviour must be present or past conduct), other powers can be. For example, if a police officer reasonably suspects ‘there is an imminent likelihood of the breach of the peace’, they are authorised to take reasonable steps to prevent it from happening.³³ A senior police officer may also authorise the use of out-of-control event powers if they reasonably believe an event may get out of control.³⁴ This can include giving a direction to immediately leave and not return to a specified place for up to 24 hours.³⁵ With the approval of a sergeant or higher-ranked police officer,³⁶ police may also issue a ‘police banning notice’ which can prohibit a person from entering licensed premises, being at public places in a safe night precinct or attending a public event at which alcohol will be sold.³⁷ The power is enlivened if a person has behaved in a ‘disorderly, offensive, threatening or violent way’ at any time in the past at or near one of those places, and their presence in one of those places ‘in the immediate future’ would pose an unacceptable risk of causing violence, impacting

²⁹ *South Bank Corporation Act 1989* (Qld) s 83.

³⁰ *Police Powers and Responsibilities Act 2000* (Qld) s 48. See also the extensive powers to control the movement of people in an emergency situation: *Public Safety Preservation Act 1986* (Qld) ss 8M, 31.

³¹ *Police Powers and Responsibilities Act 2000* (Qld) s 46(1)(c).

³² *Ibid* ss 46(1), 47(1).

³³ *Ibid* s 50(1)(b), (2).

³⁴ *Ibid* s 53BE(1)(b).

³⁵ *Ibid* s 53BG(2)(b).

³⁶ *Ibid* s 602C(2).

³⁷ *Ibid* s 602B(1). Ten areas have been prescribed as ‘safe night precincts, including areas in Broadbeach and Surfers Paradise: *Liquor Regulation 2002* (Qld) reg 3B; *Liquor Act 1992* (Qld) s 173NC(1).

on public safety or interfering with others' enjoyment of the place.³⁸ If the notice is in respect of a particular event, it remains in force until then, or otherwise for 10 days.³⁹ It can then be extended for up to a total of three months.⁴⁰

However, police banning orders are directed to alcohol-related behaviour and not criminal organisations. They therefore do not cover *anticipated* violence in other public places, such as airports or shopping centres. With respect to an out-of-control event, police do not have power to direct a person not to attend an event in the first place (but only to leave, and not return). Thus, while public safety orders largely overlap with existing police powers, they are not coextensive. If public safety orders were removed, some anticipated violence could not be prevented using other tools, especially violence anticipated to occur further in time than the imminent future. Accordingly, option 3 is not supported and public safety orders should be retained, either in their current form under legislation other than COA, or as police-issued orders with appropriate safeguards and oversight. The choice between options 1 and 2 is one between efficiency and accountability.

9.4 Fortification removal orders

Except for the ACT, all Australian states and territories have legislated for fortification removal orders, beginning with Western Australia in 2002 and most recently by Victoria in 2013.⁴¹ Although no fortification removal order has been sought in Queensland, in other jurisdictions they have occasionally been sought and made, suggesting they may hold some value. As with public safety orders, there are essentially three options: retain court-ordered fortification removal orders (option 1), move to a police-issued model (option 2), or remove fortification removal orders from Queensland's statute books, possibly in conjunction with an expansion of other police powers (option 3). As will be seen, the last option is preferred.

Option 1 – Retain court-ordered fortification removal orders

Fortifications are said to 'pose a significant obstacle in the execution of search warrants on criminal organisations',⁴² buying their members valuable time to escape or dispose of evidence. Thus, prior removal of fortifications may assist in the investigation of organised crime.

³⁸ *Police Powers and Responsibilities Act 2000* (Qld) ss 602A (definition of 'relevant public place'), 602C(3).

³⁹ *Ibid* s 602D.

⁴⁰ *Ibid* s 602F(3).

⁴¹ *Law Enforcement Powers and Responsibilities Act 2002* (NSW) pt 16A; *Serious Crime Control Act* (NT) pt 5; *Summary Offences Act 1953* (SA) pt 16; *Police Offences Act 1935* (Tas) pt 2, div 3; *Fortification Removal Act 2013* (Vic); *Corruption and Crime Commission Act 2003* (WA) pt 4.

⁴² Queensland, *Parliamentary Debates*, Legislative Assembly, 29 October 2009, 3030 (Cameron Dick, Attorney-General).

Fortification removal orders have also been justified on the basis that they help reduce the obvious presence of clubhouses.⁴³

No doubt due to the significant impacts on privacy and property rights, the Supreme Court presently oversees fortification removal orders under Part 5 of COA. A free society such as ours which values individual freedoms and liberties should not lightly allow such rights to be infringed without justification, and the courts are uniquely placed to determine whether such a justification exists in any particular scenario. For that reason, if fortification removal orders are to remain, they should continue to be granted by a court. To this end, fortification removal orders may be removed into other legislation allowing preventative orders made by a court, such as the *Peace and Good Behaviour Act 1982*.

Option 2 – Police-issued fortification removal orders modelled on Western Australian approach

Under COA, fortification removal orders are made by the court, whereas Western Australian legislation allows the Police Commissioner to issue a fortification removal notice (with vetting by the Corruption and Crime Commission) which is then subject to judicial review.⁴⁴

Arguably, removing the court from the process of issuing orders may make the scheme more efficient and therefore more likely to be used, but this is not borne out by the available evidence. The Western Australian scheme has only been engaged on three occasions in over a decade. In South Australia four fortification removal orders have been sought since 2003 and at least two in Victoria since 2013, even though in both jurisdictions the order is made by a Magistrate.⁴⁵ It would appear that each model is rarely used. This calls into doubt the underlying rationale for fortification removal orders, whether issues by a court or a police officer.

Option 3 – No fortification removal order regime for Queensland (but expansion of search warrant powers)

Emphasis on fortification removal seems to put the cart before the horse. If police receive intelligence that a clubhouse has installed fortifications to prevent discovery of evidence, seeking removal of the fortification can only give warning to remove the evidence. The better course would appear to be to remove the fortification in the course of executing a search warrant. Currently, a Supreme Court judge may issue a search warrant that authorises ‘caus[ing] structural damage to a building’.⁴⁶ That authorisation extends to ‘remov[ing] wall or ceiling linings or floors of a building ... to search for warrant evidence or property’, but does not extend to the removal of fortifications.⁴⁷ That may be rectified by including such a power in s 157(1) of the *Police Powers and Responsibilities Act*, so that with the specific authorisation by a Supreme

⁴³ See, for example, South Australia, *Parliamentary Debates*, House of Assembly, 26 June 2003, 3557 (MJ Atkinson, Attorney-General).

⁴⁴ *Corruption, Crime and Misconduct Act 2003* (WA) ss 68(2), 72(2), 76(1).

⁴⁵ *Summary Offences Act 1953* (SA) s 74BB; *Fortification Removal Act 2013* (Vic) s 11(2).

⁴⁶ *Police Powers and Responsibilities Act 2000* (Qld) s 157(3).

⁴⁷ *Ibid* s 157(1)(k).

Court judge, fortifications may be removed in the course of executing a search warrant. I do recognise, however, that this approach arguably would not have the same deterrent effect as fortification removal orders made pre-emptively.

It should also be noted that if fortifications are substantial enough to involve building works, they will almost always constitute 'assessable development' under planning legislation.⁴⁸ This means they will need to be approved as complying with relevant codes such as the Building Code of Australia, the Queensland Development Code and fire safety standards.⁴⁹ Constructing such fortifications without approval is an offence carrying a maximum penalty of nearly \$200,000.⁵⁰ Breaches of an applicable code can be remedied through a show-cause process, potentially resulting in an enforcement notice requiring demolition or removal of the fortification.⁵¹ Alternatively, proceedings may be brought in the Magistrates Court or the Planning and Environment Court.⁵² Generally only the local government may bring these proceedings,⁵³ however a simple amendment could give this right to QPS also.

Constructing some kinds of fortification may constitute the offence of setting a mantrap, if it is 'calculated to destroy human life or to inflict grievous bodily harm'.⁵⁴ There is an exception if the mantrap is set at night, for the protection of a dwelling house.⁵⁵

Thus, while there may be some limited utility in retaining fortification removal orders, on balance it makes more sense to deal with fortifications in the course of executing a search warrant – both in terms of police investigations and in terms of an adequate justification to interfere with property rights. Fortification removal should therefore be incorporated into the search warrant regime under the *Police Powers and Responsibilities Act*.

⁴⁸ *Sustainable Planning Act 2009* (Qld) s 232(1)(c); *Sustainable Planning Regulation 2009* (Qld) reg 9(1)(a), sch 3, pt 1, item 1.

⁴⁹ *Building Act 1975* (Qld) s 30.

⁵⁰ *Sustainable Planning Act 2009* (Qld) s 578(1); *Penalties and Sentences Act 1992* (Qld) s 5(1)(e)(i); *Penalties and Sentences Regulation 2015* (Qld) reg 3.

⁵¹ *Sustainable Planning Act 2009* (Qld) ss 588, 590, 592(1)(c).

⁵² *Ibid* ss 597, 601.

⁵³ *Ibid* ss 597(3), 601(2), sch 3 (definition of 'assessing authority').

⁵⁴ *Criminal Code* (Qld) s 327(1).

⁵⁵ *Ibid* s 327(3).

10 Conclusion — effective anti-organised crime (including anti-OMCG) legislation

10.1 Introduction

The Terms of Reference for this review include advising the government on whether any part of COA should be repealed or amended and, if so, on the form of any proposed amendments. For reasons which will already be apparent, I have concluded that COA should in due course be repealed (on the commencement of new legislation, discussed below) but some elements of it should be preserved in other legislation.

As canvassed in Chapter 9 and elsewhere in this report, both COA and the 2013 suite of laws suffer from serious deficits and drawbacks. Neither provides an effective and just legislative tool for combating organised crime in its many variations, including criminal activity by OMCG members.

The Byrne Report shows that particular categories of organised crime (for example, fraud and child sexual exploitation) are growing, dangerous and difficult to combat. The Report also shows that the 'organisations' engaged in those kinds of criminality range widely in terms of their structure and level of cohesion — from 'boiler rooms' where, it might be thought, there are clear operational rules and demarcations of roles and responsibilities, to others where actors liaise and coalesce in an unstructured and nebulous way, in some instances in digital environments, and with little that can be identified in terms of 'structure'. This is in quite vivid contrast, of course, with a distinguishing feature of OMCGs: unlike virtually all other allegedly 'criminal' organisations, they helpfully adopt a range of self-identifying advertisements for their members and groups such as 'colours', tattoos, bikes, clubhouses, and very public group gatherings and activities.

What is to be sought is a legislative approach which can encompass and negotiate these wide variations and distinctions and, so far as possible, address all of them effectively. The exercise begins, however, with the question asked so far back as Chapter 2.3: is special anti-organised crime legislation actually necessary, and warranted?

It may reasonably be assumed that COA and the 2013 suite reflect a community view that organised crime does warrant special attention and a concurrent view, within governments of all political hues, that legislation is an appropriate response. That is not, it should be remarked, an opinion universally held: in particular, senior criminal lawyers tend to express a preference for, and to advocate, the effective use of existing criminal laws (pre-COA and the 2013 suite) and the prosecution of individuals for crimes, supported by a properly resourced and trained police force utilising its usual methods of detection and evidence-gathering. In doing so, these lawyers also express confidence that QPS has a present and continuing capacity to do that.

Those dissenting views come up hard, now, against the fact that Australia's international obligations have required us to promulgate anti-organised crime legislation,¹ and the trend in this country over the last two decades has been all one way – towards attempts, of considerable variety, to deal with organised crime through Acts of Parliaments. The advent of COA, the 2013 suite, the Byrne Report, the Taskforce and the many official publications mentioned throughout this review (eg from the Australian Crime Commission) reflect a strong trend in our society towards the development of appropriate legislative tools to combat organised crime.

COA and the 2013 suite are symptoms of that trend although, for reasons which will already be apparent and are addressed again a little later, they have proved unsatisfactory. That does not mean that all attempts will fall short, or that the effort to fashion useful anti-organised crime laws should be abandoned. The framework of new legislation suggested shortly rests, it has to be conceded, on the same optimistic view that another attempt is worthwhile as, I am sure, drove the proponents of COA and the 2013 suite. But one good reason for continued optimism, it might be thought, is the lessons to be taken from past mistakes.

The work of reviewing COA and, coincidentally, chairing a Taskforce looking at organised crime legislation and receiving the Byrne Report has provided an opportunity to reflect upon the overall form that better legislation might take. There is, it occurs, a legislative path which can avoid the tensions and difficulties which the earlier legislation generated, and which also addresses the matters for concern that Commissioner Byrne QC raised. It has its foundation in the traditional approach to criminal prosecution *via* charges against an individual, while also acknowledging the large-scale efforts in current anti-organised crime legislation to meet the perceived challenge of organised crime.

The work of the Taskforce is ongoing and, presently, unfinished. That work, to date, suggests that within COA and the 2013 suite lie some legislative implements which might be used to frame anti-organised crime legislation that, coincidentally, can be used to address OMCG criminal activity, in a way which is proportionate to its nature and extent, and avoids the legitimate criticisms of the present legislation.

It would be presumptuous to anticipate the work of the Taskforce, and its final product. The government can rightly anticipate, in the ultimate report of the Taskforce, a comprehensive analysis of the 2013 suite and advice from what is, in effect, an eminent persons group in the domain of the criminal law.

The Terms of Reference for this review have, again, required that I consider whether COA should be retained in whole or in part, whether any amendments to it are desirable, and whether it is meeting its objects. The objects of COA are the disruption and restriction of the activities of organisations involved in serious criminal activity, and their members and associates. That has not, it is plain, been achieved by the Act. In the face of that conclusion it is appropriate to offer advice on legislation which might better meet those objects and, also in light of earlier conclusions about the existing legislation, address them more effectively and comprehensively.

¹ See *United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003) art 5(1) which commits state parties to introducing legislation which criminalises participation in an organised crime group. Australia ratified this Convention on 27 May 2004.

That said, final efforts to that end — ie, to shape new legislation — must properly await the report of the Taskforce, and should be postponed until that has occurred. The 2013 suite was wide-ranging and intruded into many diverse areas (eg vocational licensing) and the Taskforce workload is heavy. It can only be beneficial that the analysis of all its many aspects being undertaken by the Taskforce should be available before any final decision is made about the ultimate shape of new legislation; indeed, it would be offensive to the Taskforce not to do so. The delay will not be inordinate, or harmful — the Taskforce must report in just over three months, by 31 March 2016.

What follows is a précis of my own, present conclusions about a better legislative framework to replace COA and the 2013 suite. It reflects my perceptions of things to be learned from the work of the Taskforce to date, the Byrne Report and, in great measure of course, the work which has gone into this review.

Because I know some Taskforce members will disagree with some of my conclusions, and out of profound respect for the contribution they have made to the work of the Taskforce and concern they not be offended by this appearance of pre-empting its work, it is appropriate to reiterate in clear terms that:

- a) these are my own views, and not those of the Taskforce;
- b) they may require revision as the work of the Taskforce continues to completion; and,
- c) they do not represent and should not be taken as an attempt to divert the ultimate conclusions, and the final report, of the Taskforce.

With those provisos, the work of constructing a new, improved legislative approach sensibly begins with what exists — COA, and the 2013 suite — and the acknowledgment that any new framework must strive to avoid the problems which beset each of them; and, for that purpose, to briefly restate those problems.

10.2 Meeting criticisms of COA

A principal criticism of COA arises from the experience of the QPS in the Finks application relating to its cost and complexity and, of course, the apparent ease with which it was arguably rendered futile when the Finks ‘patched over’. Every consultation undertaken for this review drew the same response about COA: that its processes do not appear, on final balance, to be worth the candle — ie that declarations and control orders offer an insufficient return for the cost and effort required under COA’s required procedures to obtain them. A number of consultees also ventured that the resources devoted to obtaining COA orders might be better spent, and for better return, simply prosecuting persons alleged to be involved in organised crime in the usual way by collating evidence of criminal activity, proffering indictments and prosecuting them at a trial.

The other major criticism is the emphasis in COA on the use of secret evidence, ‘criminal intelligence’, which is hidden from the respondents and which they have no real prospect of answering. For the reasons explored at length in Chapter 4.2 its usefulness is very doubtful; the attempt in COA to give it something of the gloss of evidence, as traditionally used in our judicial

system, has not been shown to have a sound theoretical basis and has proved counter-productive in practice.

There are other obvious grounds for concern about COA (eg, the constitutional questions left unresolved in *Pompano*) but these are, for the purposes of addressing a legislative method of prosecuting organised crime, the most immediately relevant. They raise important questions about the utility of criminal intelligence, and of COA overall.

10.3 Meeting criticisms of the 2013 suite

In a joint article published on the ABC 'The Drum' website in early 2014 two people who are rightly venerated in Queensland for their work on the Fitzgerald Inquiry, Tony Fitzgerald AC QC and Gary Crooke QC, said this about the 2013 suite:

...a well-publicised 'bikie' brawl on the Gold Coast provided the Government with a 'bikie' crisis. Outlaw bikies and other organised crime groups have been around for years and such statistics as are publicly available suggest that bikie gangs are involved in less than 1 per cent of Gold Coast crime...

Nonetheless, that brawl was used to justify ill-considered, rushed, badly drafted and inevitably controversial legislation targeting bikies... A Queensland Government can declare almost any conduct and any group illegal; set aside fundamental expectations such as presumption of innocence, fair trial and proof beyond reasonable doubt; and impose almost any penalty for breach. However, organised crime, which is a major international problem, won't be eradicated by local political vigilantes fantasising about 'Dirty Harry' or enacting extreme laws which ignore evidence, experience and expertise; endorse anecdote-based ignorance and mindless fundamentalism; and oblige courts to act unfairly.

Our criminal justice system, which has been carefully developed over many generations, balances the interest of the individual and the state and protects 'ordinary people' against the exercise of arbitrary power by the state. Its principles are a cornerstone of our democracy and serve to distinguish our society from a totalitarian regime. Unjust laws are a particular concern for the judiciary which must enforce them... Respect for the courts is inevitably diminished if courts are instruments of state injustice.²

The 2013 legislation was a rapid reaction by parliament to what was, certainly, highly provocative conduct by apparent OMCG members. It was introduced very quickly after the Broadbeach incident and rushed through the Legislative Assembly with dizzying speed. Supporting speakers in the House properly made no attempt to disguise or excuse its draconian nature; according to their speeches and statements, the unabashed intention of the legislation was to make life in Queensland untenable for OMCGs and their members, and to drive them out of the state.

In doing so, however, the 2013 suite fell into the trap that Fitzgerald and Crooke warned about: the legislation went much too far in addressing a problem which, while serious and alarming,

² Gary W Crooke and Tony Fitzgerald AC QC, 'Abuse of power does nothing to protect us' on ABC Online, *The Drum* (3 February 2014) <<http://www.abc.net.au/news/2014-02-03/fitzgerald-crooke-queensland/5230272>>.

could (in most respects) be dealt with by laws which did not infringe so grossly upon important, traditional liberties and rights developed over centuries as part of the bedrock of our democratic system of government, or expose citizens to such grossly disproportionate, crushing sentences.

Its central elements offend and are contrary to a range of evolved, historically developed and carefully thought-out safeguards within our legal system, designed to reflect the rights and liberties which attend our democracy: the primacy of what is called the rule of law; equal treatment under the law; within proper limits, freedom of association and freedom of dress; and, the notion that any penalty should fairly fit the crime for which it is imposed, and not be grossly excessive and disproportionate.

Most alarmingly, it gives a government Minister a barely fettered power to recommend that an organisation be 'declared' to be criminal. It is important not to exaggerate this aspect; as the High Court recognised in *Kuczborski*, there must be limits upon the ministerial power,³ but it is remarkable that a government should ever seek the power to vilify and alienate (and imprison) any group within our society without any legislative or judicial safeguards; in particular, without allowing its members to have any say, any voice, in the process.

It had other obvious drawbacks. On a practical level, unless all Australian governments pass similar legislation the 'bikie problem' is likely to simply move around from state to state (although, as has become apparent, other states have not been unanimously prepared to go to such lengths).

While one part of the suite survived a challenge in the High Court in *Kuczborski*, there remain, as discussed at Chapter 7.6, serious doubts about the constitutionality of other elements of it, as well as swingeing criticism of the very high mandatory sentences imposed by VLAD and, also, the use of mandatory sentencing regimes (in VLAD, and elsewhere) at all. Sentences of 15 or 25 years under VLAD would, in most cases, be 'crushing' in the sense that word is used in case law, and academic research work, to describe imprisonment for a term which is likely to remove all incentive for rehabilitation, and is plainly disproportionate to the nature of the offending. The idea that punishment should fit the crime is usually called 'just punishment' and is enshrined in our legislation, which requires that all sentences be 'just in all the circumstances'.⁴ The common law principle of proportionality is supported in Australia by substantial and authoritative case law and academic writing.⁵

Mandatory sentencing, as an element of our justice system, attracts considerable debate and polarised, and sometimes strong, views. The fundamental problem is that it assumes that crimes, and the human beings who commit them, can be safely and effectively categorised and dealt with as though they have no differences or distinguishing features, when a moment's reflection will confirm that the range of criminal acts and perpetrators is as varied, as diffuse and as myriad as all other facets of human experience.

High mandatory sentences have not been shown to be an effective deterrent for serious crime and in the USA, where their use reached what might be called its zenith (or nadir), are now being

³ *Kuczborski v Queensland* (2014) 89 ALJR 59, 97 [211] (Crennan, Kiefel, Gageler and Keane JJ).

⁴ *Penalties and Sentences Act 1992* (Qld) s 9(1)(a).

⁵ Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) 53-54.

wound back.⁶ ‘One size fits all’ is never true, and how much more important is it to recognise and acknowledge that when questions of proper but fair and proportionate punishment, and incarceration, are concerned? As the eminent and well-respected former NSW Director of Public Prosecutions, Nicholas Cowdery AM QC, has said:

... numerous studies have shown they have no measurable deterrent effect, they are costly to administer and they disproportionately disadvantage the most vulnerable in society...⁷

The proponents of the 2013 suite openly acknowledged these aspects of the legislation but sought to defend them by reliance upon what was said to be the blatantly criminal nature of OMCGs, their regular overt flouting of the law, and the need to prevent any recurrence of events like the Broadbeach incident. As has been seen, however, OMCG members are responsible for a very small proportion of overall criminal activity. Events like the Broadbeach incident, and the ‘Royal Pines’ affray in 2006 are an affront to a well-behaved, law-abiding society but it can hardly be said that they are so frequent as to justify measures which violently traduce rights and liberties enshrined in our legal system, and our culture.

The only legitimate basis for determining the extent of the risk of criminal activity posed by OMCGs is by recourse to the available evidence. That evidence is that some OMCG members are associated with criminal activity but, in proportion to overall crime rates, at a level well below 1%. There is also evidence that, from time to time, OMCG members engage in violent public conduct which is offensive and alarming.

The question whether the risk presented by that kind of behaviour calls for such draconian measures as the 2013 suite involves a balancing exercise — traditional rights and liberties, like freedom of association, *versus* legislative measures which declare a group of people to be, by their mere act of associating, criminals.

That step is so extreme, so inimical to the precepts of our legal system and so potentially damaging to them, that it can never be taken unless the risk is itself extreme. The available evidence does not support that conclusion. Indeed, it points in the opposite direction.

10.4 The use of ‘criminal intelligence’ in court proceedings

It is compelling, for the reasons explored at Chapters 4.2 and 9.1, that attempts to use CI present significant, and probably insuperable, barriers to the effective operation of COA and, in fact, to any judicial process which purports to rely upon it. It should have no role in the prosecution of organised criminal activity, or in legislation to facilitate that.

That is very far, it must be emphasised, from suggesting that CI is without use or value. It is clear that law enforcement bodies can and do collect, exchange, and make effective practical use of CI

⁶ Michael Tonry, ‘Sentencing in America, 1975-2025’ in Michael Tonry (ed), *Crime and Justice in America 1975-2025* (University of Chicago Press, 2013) 141, 177-180.

⁷ Nicholas Cowdery, ‘Mandatory Sentencing’ (Speech delivered at the Sydney Law School, Distinguished Speakers Program, Sydney, 15 May 2014) 4.

in a wide variety of forms. It is not within the remit of this review to consider the benefits or constraints upon those uses of it. The relevant point is that it is anathema to our legal process, that efforts in COA to introduce it to that process have not worked, and that attempts to use it should be abandoned.

10.5 ‘Declaring’ groups to be ‘criminal organisations’

The new reality is that an entity can be listed as a criminal organisation, at the discretion of the government, without any procedural safeguards.⁸

That statement refers to the 2013 suite. The different COA process requires the gathering and presentation of evidence sufficient to satisfy a judge that members of a group associate to engage in crime, and are an unacceptable risk to the safety, welfare and order of the community.⁹ The 2013 suite removed any need to involve the courts and the judiciary in that process and placed the power entirely in the hands of a government Minister. The new process requires no evidence to be produced; allows the OMCG no right of response or, even, notice that the Minister has a declaration within contemplation; and removes all need to satisfy a court that such a drastic step is warranted, to the requisite legal standard.¹⁰

Regardless of the process, the question whether there is any benefit to be found in a process which leads to this kind of declaration was considered in detail at Chapters 4.3 and 9.2. It was concluded, in short, that there must be doubt that any benefit accrues, not only in the context of self-identifying groups like OMCGs but, even more, where less visible and more innovative groups might be involved. A better solution may lie in the traditional approach, involving prosecution of individuals – with, if the circumstances require, the opportunity to show that their crime was part of an organised criminal activity (with additional penalties for that aggravating circumstance).

10.6 Necessary features of new anti-organised crime legislation

It is an unassailable proposition that any legislative attempt to meet the risk posed by organised crime should be evidence-based; it should reflect and respond to the *actual* nature and extent of that risk, as it is revealed in the available evidence.

⁸ Anna Capellano, ‘Queensland’s New Legal Reality: Four Ways in which we are no longer Equal under the Law’ (2014) 2(1) *Griffith Journal of Law and Human Dignity* 109, 112.

⁹ *Criminal Organisation Act 2009* (Qld) s 10(1)(b) and (c).

¹⁰ Capellano, above n 7.

It is equally unassailable that the best evidence is found in crime statistics and the reports of those who analyse and understand them. The Byrne Report has very recently undertaken just such an exercise.

The available evidence points to these conclusions:

- the most dangerous organised-crime threat to the public safety and well-being of Queenslanders comes from clandestine drug rings, child abuse syndicates, and persons promoting sophisticated investment frauds;
- OMCGs represent only a very small part of organised criminal activity in Queensland, although their members are more likely to be involved in anti-social criminal behaviour; and,
- a balanced legislative response to organised crime should be proportional to the risk posed by its various facets — ie, to the level of danger and potential harm presented by different kinds of organised criminal activity.

The second factor to be taken into account in propounding a suitable legislative response arises from the obvious need to avoid the perceived deficits of the existing legislation. It must not be unwieldy (as COA has been seen to be) nor excessive, disproportionate and constitutionally dubious (the problems which attend the 2013 suite).

The third is that desirable legislation will have the potential for broad use against the myriad different forms organised crime may take — ranging across, and able to satisfactorily address, criminal activity by members of OMCGs, of small temporary alliances, and of major criminal organisations.

Our criminal law has developed over centuries in such a way that it now rests primarily upon the central proposition that a person's criminality should be determined by their individual conduct, rather than their incidental association with others. The definition of 'offence' in s 2 of our *Criminal Code* centres upon the person: '[a]n act or omission which renders *the person* doing the act or making the omission liable to punishment is a called an offence'.¹¹

This review has shown in Chapter 4 that laws which first attempt, instead, to attach criminality to an individual's connection with an association rather than his or her individual criminal act give rise to a number of practical and legal problems which, whether they contain putative safeguards like COA or directly attack the relationship like the 2013 suite, render them less than obviously useful or worthwhile. It also shows that efforts to use information which may not qualify as evidence in a court to establish that connection is, on balance, unsatisfactory and unsafe.

These laws also attract, and indeed may be said to court, high-level concerns of a theoretical, philosophical and constitutional kind: for example, that they run the risk of impinging upon traditional rights of free communication, and association. Those rights are recognised constitutionally and jealously guarded and enforced in some other Western democracies similar to ours; for example, under the First Amendment of the US *Constitution*. In the USA there is high-level judicial authority that the right of free association extends to include the rights of OMCG

¹¹ Emphasis added.

members to congregate.¹² While the Australian *Constitution* does not advert to a positive right to this effect, decided High Court cases have discussed its implication.¹³

Any anti-organised crime legislation attempting to impose criminal sanctions arising from an individual's association with others, or a group, should recognise the ongoing relevance of those constitutional 'rights' and reflect a careful balance around them. Any new laws must also, of course, attempt an equal balance around important questions of procedural fairness and natural justice, canvassed in detail at Chapter 4.2.3.

The task is not, in light of these important strictures, an easy one.

10.7 Framework for new anti-organised crime legislation

What is proposed is a new legislative framework which effectively abandons attempts, epitomised in COA and the 2013 suite, to address the risk of organised crime by focusing primarily upon the organisations themselves. The stratagems and mechanisms in that legislation to use CI, and to identify and 'declare' organisations to be criminal, have been shown to be far from optimal. They have little or no utility against criminal groups which cannot be readily identified and against those who can, like OMCGs, they have been shown to have flaws and deficits which seriously, indeed I think fatally, undermine their efficacy. That failure warrants revisiting the question whether traditional, well-proven methods of crime detection and prosecution might offer a more effective response. They are the bedrock of our criminal law system, and are known to work. The framework suggested below seeks to build on that secure foundation.

The proposed framework involves discarding those efforts to combat organised crime *via* the organisation itself, and a reversion to that traditional approach in our criminal law, by the bringing of charges against an individual. That does not mean ignoring, or not addressing, the fact that a crime may have involved criminal activity by other persons in concert with the accused, in what can be classified as an 'organisation'. Rather, organised crime would not be treated as a discrete form of offending but, instead, potentially as a circumstance of aggravation in indictments against individuals for existing crimes, with consequences in sentence and penalty.

A logical starting point for this different legislative approach is a generic, all-purpose definition of 'criminal organisation', which should be used consistently throughout all Queensland's criminal statutes. It might be phrased, for example, in terms of a group of three or more persons (whether formally or informally organised) who engage in or have as their purpose, or one of their purposes, to engage in 'serious criminal activity' and who represent an unacceptable risk to the

¹² See Anthony Gray, 'Constitutionality of criminal organisation legislation' (2010) 17 *Australian Journal of Administrative Law* 213, 221 and the US Court of Appeal (9th Circuit) cases cited therein at fn 45.

¹³ As a corollary of an implied freedom of political communication: *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 234 [148] (Gummow and Hayne JJ); *Wainohu v New South Wales* (2011) 243 CLR 181, 230 [112] (Gummow, Hayne, Crennan and Bell JJ); *Tajjour v New South Wales* (2014) 88 ALJR 860, 886 [95] (Hayne J), 891 [134] (Crennan, Kiefel and Bell JJ), 891 [136] (Gageler J), [242]-[244] (Keane J). Cf. 867 [4], 878 [46] (French CJ).

safety, welfare and order of society. The definition would, in turn, be complemented by a new and comprehensive definition of 'participant' in a criminal organisation, to cover all types of membership or joinder including informal associations and connections.

It follows, of course, that the power in COA for the court to 'declare' an organisation, and in the 2013 suite for a Minister to do so, would fall away; rather, whether a group falls within the new definition will be a question of fact, to be determined on a case by case basis (ie, in the context of the charges against an individual, and through admissible evidence tested before a jury, or a judge in a judge-alone trial).

A central feature of a new legislative package would be the promulgation of a new circumstance of aggravation which would attach to a list of prescribed, serious offences when the accused is proved to have committed that crime whilst, also, a participant in a criminal organisation. If both the offence and that aggravating circumstance are proven, then the offence would be declared to be a 'serious organised crime offence'.

In that event a new sentencing regime, to be installed in the *Penalties and Sentences Act 1992*, would apply so that (absent significant cooperation, to be proved to the sentencing court) the offender must (for example) serve 80% of the sentence before parole eligibility and be the subject, upon release from imprisonment, of a new post-conviction 'organised crime control order', with features similar to those appearing in Part 3 of COA.

10.7.1 What to do with COA, and the 2013 suite?

The primary focus, in COA, on an approach to criminal offending which involves using criminal intelligence to prove the existence of an organisation and, thence, to impose restrictions upon it and its members has been shown to be largely unworkable. The primary focus, in the 2013 suite, on the creation of an incentive for alleged criminal organisations to disband by threatening persons who are alleged to be members, or anyone who associates with them, with grossly disproportionate penalties is (in light of the available research and statistical evidence) excessive and unnecessary, lacking transparency and fairness and, in the long term, probably unworkable.

COA has two elements worth preserving in a new regime: control orders (but to be used, as in the UK, on a post-sentence basis to minimise the risk that a criminal organisation might re-form); and public safety orders, which may be used to prevent, forestall or disrupt potential incidents of 'barbarian' violence by OMCG members. Both may be transferred to other legislative homes, discussed below. Once that has occurred, COA should be repealed or allowed to lapse.

The central elements of the 2013 suite (VLAD, and aspects of the changes to the *Criminal Code*) should also be repealed or significantly amended. As has been seen, many of its features are excessive, and anathema to the rule of law, and to sound principles of deterrence and proportionate punishment. It imposes a new punishment regime but, illogically, outside the *Penalties and Sentences Act 1992*, a piece of legislation whose announced objects include the collection, within it, of all of Queensland's sentencing powers and procedures, and for all purposes.¹⁴

¹⁴ *Penalties and Sentences Act 1992* (Qld) s 3(a). Save, of course, for young offenders, for whom similar overarching provision is made in the *Youth Justice Act 1992* (Qld) s 2.

10.7.2 Changes to existing legislation

Mention has already been made of a change at the foundations, as it were, of legislation about organised crime by introducing new definitions which will logically appear in the *Criminal Code*.

Otherwise, the analysis of the current nature and extent of organised crime contained in the Byrne Report indicates that the kinds of offending which predominate relates to drug syndicates, paedophile rings, fraud, violence and weapons. A list of offences which should, if committed as part of an organisation, attract an additional penalty because of that aggravating circumstance must be settled and will include all the *Criminal Code* offences within the usual ambit of crimes of those kinds.

Again, the new circumstance of aggravation will attach to that list, and incorporate the new definitions. If an offender is, then, proven to have committed a prescribed offence while a participant in a criminal organisation, the offence would be categorised or declared to be a serious organised crime offence. The consequence of conviction for the offence charged and a declaration that the aggravating circumstance applied would be that an offender must serve a set proportion of imprisonment before release (80%, or even 100%) *and* be subject, on release, to a control order with conditions directed to preventing further similar offending.

That sentencing regime may, in individual cases, be ameliorated if the offender provides an undertaking to cooperate with law enforcement under s 13A of the *Penalties and Sentences Act*, or provides information under s 13B. The cooperation must be of significant use to law enforcement in the detection or prosecution of an offence, with its utility being determined not by the Commissioner of Police (see VLAD) but the court, and on the basis of submissions from both prosecution and defence. If the sentencing judge assesses that the cooperation meets the necessary test, the offender may avoid serving the mandatory term and the imposition of a post-conviction control order.

As discussed in Chapter 9.2, control orders in COA can be removed into the *Penalties and Sentences Act* to be available in sentencing defendants found guilty of offences typically associated with organised crime. As in the UK, if the sentencing judge is satisfied of a risk assessment on the balance of probabilities, they could impose conditions appropriate to the defendant's circumstances.

In addition, public safety orders may be taken from a defunct COA and grouped with similar powers by transplanting Part 4 into another Act such as the *Peace and Good Behaviour Act 1982* (Qld), on the lines discussed at Chapter 9.3 (under Option 1). Anti-fortification measures may likewise be preserved by including such a power in s 157(1) of the *Police Powers and Responsibilities Act 2000* (Qld) so that with specific authorisation by a Supreme Court judge, fortifications may be removed in the course of executing a search warrant.

The perceived advantages of this approach will be apparent: it abandons failed attempts to address criminality through the medium of an offender's associations, and reverts to the traditional approach of our criminal law which is to prefer charges against individual citizens, not groups. At the same time it recognises the possibility that criminal activity may involve group effort and, if the crimes are serious, deters group criminal activity of that kind by exposing the offender(s) to additional, high levels of punishment through imprisonment for long and certain terms — while avoiding the serious, and apparently insurmountable, pitfalls of mandatory

sentencing. It leaves the determination of the facts which establish both the commission of the crime, and the question whether it was undertaken by the offender as part of the activity of a criminal organisation, to the courts and a jury – and, requires that guilt in both respects be proven in the time-honoured way: by the production, in the courtroom, of evidence which is both admissible and sufficient to that end.

The proposed framework, it will be seen, is a large step back and away from the attempts at a different approach epitomised by COA and the 2013 suite. That step should be taken because, as this report establishes, the approach has not worked and shows no promise of doing so. Reversion to the use of traditional methods, supplemented by a penalty regime which reflects society's concerns about, and condemnation of, organised crime, is in my view the better course.

10.8 Conclusion

COA, despite creditable intentions, has not worked. The 2013 suite had immediate effects on the visible presence of OMCGs and their members but at a price, in terms of subverting principles seen as fundamental to our legal system, that has been shown to be too high. In any event the focus, in both, on OMCGs is too narrow. Organised crime in our society is diverse, nebulous and difficult to categorise and, if it is to be fought effectively, requires legislative weapons which are equally adaptable.

A new legislative framework is proposed which has a foundation in existing criminal law and acknowledges its fundamental precepts, while also addressing the many shapes and facets of modern organised crime in a relatively straightforward way: that is, by providing a mechanism under which crimes committed by individuals in concert with others can be prosecuted (and deterred) by making them the subject of special attention, in terms of their punishment. Some elements of COA and the 2013 suite have a place within this framework and may be preserved in other existing legislation, with amendments.

That said, the report of the Taskforce on Organised Crime Legislation due on 31 March 2016 should be awaited before any final decision, or any step, is taken in that direction.

Attachment 1: Terms of Reference

Terms of Reference

Review of the *Criminal Organisation Act 2009*

I, YVETTE D'ATH, Attorney-General and Minister for Justice and Minister for Training and Skills, ask the Honourable Alan Wilson QC to conduct a review under to section 130 of the *Criminal Organisation Act 2009* (Qld) (COA) in accordance with the requirements of Part 9, Division 6 of the COA.

In undertaking this reference, you will:

1. review the operation of the COA;
2. have regard to the content, manner and form of all applications made under the COA since its commencement including applications made under Part 6 of the COA;
3. have regard to the annual reports of the Criminal Organisation Public Interest Monitor;
4. have regard to the decision of the High Court of Australia in the matter of *Assistant Commissioner Michael James Condon v Pompano Pty Ltd [2013] HCA 7 (Pompano)* and other related case law;
5. ensure that, subject to section 131 (2) of the COA, you do not disclose any criminal intelligence as defined in section 59 of the COA;
6. ensure that you do not publicly expose details of current or anticipated intelligence collection strategies and investigation methods where such detail is not already in the public domain;
7. have regard to the operation of the following similar legislation operating in other Australian jurisdictions:
 - a. *Serious and Organised Crime (Control) Act 2008* (SA);
 - b. *Serious Crime Control Act* (NT);
 - c. *Crimes (Criminal Organisations Control) Act 2012* (NSW);
 - d. *Criminal Organisations Control Act 2012* (WA); and
 - e. *Criminal Organisations Control Act 2012* (VIC).
8. have regard to section 137 of the COA which effectively provides for the expiry of the COA on 15 April 2017;
9. have regard to the terms of reference for the Taskforce on Organised Crime Legislation in Queensland and note that a copy of this report will be provided to the Taskforce for its consideration; and

10. have regard to any relevant issues that are raised by the work being conducted by the Taskforce on Organised Crime Legislation in Queensland and/or the Organised Crime Commission of Inquiry; and you are permitted to have regard to and to take into account any information or materials that you receive as Chair of the Taskforce on Organised Crime Legislation in Queensland, relevant to this reference.

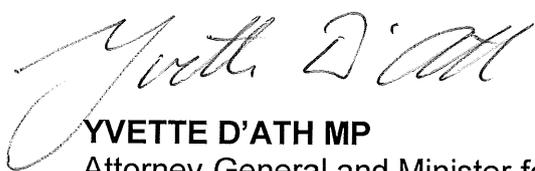
In conducting this review you may invite or receive submissions or information from external sources where it is relevant to these terms of reference.

Without limiting the scope of any recommendations you may wish to make, the recommendations should:

- determine whether the COA has operated effectively and in the way that it was intended to operate by the Queensland legislature;
- determine whether COA is meeting its objects under section 3 of the COA;
- determine whether the COA has adequately supported or is able to adequately support information sharing to support its objects;
- determine whether the COA facilitates the Police Commissioner seeking and obtaining orders from the Supreme Court in a timeframe that is appropriate to ensure the safety, welfare or order of the community;
- determine whether the COA has facilitated or is able to facilitate an efficient and agile response to changing circumstances; for example when a respondent to an application dissipates and reforms as a new entity;
- advise whether any part of the COA should be retained, repealed or amended; and
- provide details of the form any proposed amendments should take which should include advice about the constitutional validity of any proposal.

You will provide your review to the Honourable Yvette D'Ath MP, Attorney General and Minister for Justice and Minister for Training and Skills, on or before **Tuesday, 15 December 2015.**

Dated the second day of October 2015



YVETTE D'ATH MP
Attorney-General and Minister for Justice
Minister for Training and Skills

Attachment 2: Submissions Received

Professor Anthony Gray, School of Law and Justice, University of Southern Queensland, 26 October 2015

Bar Association of Queensland, 12 October 2015

Julie Steel, Executive Director, Supreme, District and Land Courts Service, 11 November 2015

GR Cooper, Crown Solicitor, 5 November 2015

Mark Furner, MP, Chair of the Legal Affairs and Community Safety Committee, 11 November 2015

Queensland Council for Civil Liberties, 13 November 2015

Dr Greg Martin, School of Social and Political Sciences, Sydney University, 13 November 2015

Crime and Corruption Commission, 13 November 2015

Law and Justice Institute (Qld) Inc, 16 November 2015

Michael J Halliday, Criminal Organisation Public Interest Monitor, 13 November 2015

Queensland Police Service, 1 December 2015

United Motorcycle Council of Queensland, 1 December 2015

Office of the Director-General, Department of Justice and Attorney-General, 14 December 2015