

Issues relating to anti-association laws
National Access to Justice and Pro-bono Conference
Brisbane 27th August, 2010

Mark Polden



'Bikies in airport brawl were 'crazy, like raging bulls'...



NSW Premier 30 March 2009

...We are going to smash them straight away-once a court declares the gang a criminal organisation, all bets are off. They won't have the chance to get together and plan their criminal pursuits. By driving them apart, we will make it impossible for them to continue as a group and their gangs will simmer out.

10—Attorney-General may make declaration

(1) If, on the making of an application by the Commissioner under this Part in relation to an organisation, the Attorney-General is satisfied that—

(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,

the Attorney-General may make a declaration under this section in respect of the organisation.

Adelaide 1950s..



**SERIOUS AND ORGANISED CRIME (CONTROL)
REGULATIONS 2008 (NO 248 OF 2008) - REG 4
4—Serious criminal offences—prescribed offences**

For the purposes of paragraph (b) of the definition of "serious criminal offences" in section 3 of the Act, the following summary offences are prescribed:

- (a) offences under section 25 or 33K(1)(b) of the *Controlled Substances Act 1984* ;
- (b) offences under section 20(3) of the *Criminal Law Consolidation Act 1935* (being basic offences within the meaning of that Act);
- (c) offences under section 12, 23 or 48 of the *Explosives Act 1936*
- (d) offences under section 11, 14 or 14A of the *Firearms Act 1977* (being summary offences under any of those sections);
- (e) offences under section 75, 76 or 90 of the *Lottery and Gaming Act 1936* ;
- (f) offences under section 6(1), 15, 15A, 25A, 26, 28, 29, 51 or 61 of the *Summary Offences Act 1953* ;

SUMMARY OFFENCES ACT 1953 - SECT 26

26—Living on the earnings of prostitution

(1) A person who knowingly lives, wholly or in part, on the earnings of prostitution of another person is guilty of an offence.

Maximum penalty: \$2 500 or imprisonment for 6 months.

(2) In proceedings for an offence against subsection (1), the fact that a person lives with, or is habitually in the company of, a prostitute and has no visible lawful means of support is, in the absence of proof to the contrary, proof that that person is knowingly living on the earnings of prostitution.

SERIOUS AND ORGANISED CRIME (CONTROL) ACT 2008 - SECT 3

3—Interpretation

In this Act, unless the contrary intention appears—

"member", in relation to an organisation, includes—

- (a) in the case of an organisation that is a body corporate—a director or an officer of the body corporate; and
- (b) in any case—
 - (i) an associate member or prospective member (however described) of the organisation; and
 - (ii) a person who identifies himself or herself, in some way, as belonging to the organisation; and
 - (iii) a person who is treated by the organisation or persons who belong to the organisation, in some way, as if he or she belongs to the organisation;

SERIOUS AND ORGANISED CRIME (CONTROL) ACT 2008 – SECT 14

14—Court may make control order

- (1) The Court must, on application by the Commissioner, make a control order against a person (the "defendant") if the Court is satisfied that the defendant is a member of a declared organisation.
- (3) A control order may be issued on an application made without notice to any person.



**SERIOUS AND ORGANISED CRIME
(CONTROL) ACT 2008 - SECT 22**

22—Offence to contravene or fail to comply with control order

(1) A person who contravenes or fails to comply with a control order is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

(2) A person does not commit an offence against this section in respect of an act or omission unless the person knew that the act or omission constituted a contravention of, or failure to comply with, the order or was reckless as to that fact.

**SERIOUS AND ORGANISED CRIME
(CONTROL) ACT 2008 - SECT 41**

41—Protection from proceedings

- (1) Except as otherwise provided in this Act, no proceeding for judicial review or for a declaration, injunction, writ, order or other remedy may be brought to challenge or question—
- (a) a decision, determination, declaration or order under this Act or purportedly made under this Act; or
 - (b) proceedings or procedures under this Act or purportedly under this Act; or
 - (c) an act or omission made in the exercise, or purported exercise, of powers or functions under this Act; or
 - (d) an act, omission, matter or thing incidental or relating to the operation of this Act.
- (2) The validity and legality of a declaration under Part 2 cannot be challenged or questioned in any proceedings.
- (3) The validity and legality of a control order or a public safety order cannot be challenged or questioned in proceedings for an offence against this Act.

**The State of South Australia v Totani & Anor [2010]
HCA Trans 95 (20 April 2010)**

GUMMOW J

Is that the view of those instructing you? It is not an amusing question either?

FRENCH CJ

It shows a fine contempt for the judiciary.

Polyukhovic v The Queen (the War Crimes Act Case) (1991) 172 CLR 501

Per Brennan J at 606.

the Parliament cannot, consistently with Chapter III of the Constitution, usurp the judicial power of the Commonwealth by itself purporting to exercise judicial power in the form of legislation. Nor can it infringe the placing of the judicial power in the judicature by requiring that it be exercised in a manner which is inconsistent with the essential requirements of the court or the nature of judicial power.

Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51

Per Gaudron J, at [107]:

the public's confidence cannot be maintained in the courts and their criminal processes if..... the courts are required to deprive persons of their liberty, not on the basis that they have breached any law, but on the basis that an opinion is formed, by reference to material which may or may not be admissible in legal proceedings, that on the basis of probabilities, they may do so.

Per McHugh J, at [124]:

ordinary reasonable members of the public might reasonably have seen the Act as making the Supreme Court a party to or responsible for implementing the political decision of the executive government..... That being so, public confidence in the impartial administration of the judicial functions of the Supreme Court must inevitably have been impaired. The Act therefore infringed Chapter III of the Constitution and was and is invalid.

**NSW Legislation Review Committee, Legislation Review
Digest, No 5 of 2009, paragraph 21**

The fundamental right to a presumption of innocence established by article 14 (2) of the International Covenant on Civil and Political Rights may be eroded..... since the..... interim control orders and control orders.....will be applied to people without being convicted of a specific crime such as associating with another person for any particular purpose.....

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