This supplement has been prepared by
George Williams, Sean Brennan and Andrew Lynch

SUPPLEMENT TO CHAPTER 15

South Australia v Totani
[2010] HCA 39

South Australia enacted the *Serious and Organised Crime (Control) Act 2008* (SA) ("the SOCC Act") with the stated object of disrupting and restricting the activities of organisations involved in serious crime and their members and associates so as to protect the public from the violence associated with such organisations. In his second reading speech to the Act, Attorney-General Michael Atkinson was direct in saying that it was intended to target motorcycle clubs (or "bikie gangs"). Despite this, the legislation is drafted in general terms. It applies generally without specifying any particular class of organisation to which it does or does not apply.

Under s 10(1) of the SOCC Act, the Attorney-General is, on the making of an application by the Commissioner of Police, empowered to "make a declaration" if satisfied of two criteria: "(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 deciding whether or not to make the declaration, s 10(3) states that the Attorney-General may consider "any information suggesting that a link exists between the organisation and serious criminal activity". Under s 10(4), it is no impediment to the Attorney-General being satisfied that members of an organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity if only some do so for that purpose, so long as those members "constitute a significant group within the organisation, either in terms of their numbers or in terms of their capacity to influence the organisation or its members".

Section 13 states that the Attorney-General need not provide reasons for his or her decision, and is prohibited from disclosing any "criminal intelligence" provided by the Commissioner of Police. Section 3 defines "criminal intelligence" as "information relating to actual or suspected criminal activity (whether in this State or elsewhere) the disclosure of which could reasonably be expected to prejudice criminal investigations, to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement or to endanger a person's life or physical safety".

The effect of the Attorney-General's declaration is not to outlaw the organisation in question, nor to render membership of it a criminal offence. It does, however, serve to identify persons in respect of whom the Commissioner of Police may seek control orders from the Magistrates Court of South Australia on the basis of their connection with the declared organisation. Section 14(1) provided that the Court "must" make a control order "if the Court is satisfied that the defendant is a member of a declared organisation". (By contrast, the Court's power to make a control order under s 14(2) in respect of a person not currently a member of a declared organisation is expressed in discretionary terms ("may" rather than "must")). Under s 14(5)(b), a control order made under s 14(1) "must prohibit the defendant" from, firstly, associating with other members of declared organisations and, secondly, possessing articles of a kind whose possession, without lawful excuse, is an offence under s 15 of the *Summary Offences Act 1953* (SA), "except as may be specified in the order". Even though, as Hayne J said, the second of these conditions "does no more than require the defendant to obey the law", a breach of either of these or any additional conditions of a control order is an offence punishable by five years imprisonment.

The Finks Motorcycle Club was the subject of a declaration made by the Attorney-General under s 10(1) of the SOCC Act. On 25 May 2009, the Magistrates Court issued a control order on an ex parte application by the Commissioner of Police in respect of Donald

Hudson, a member of the Finks, prohibiting him from associating with other members, except under strict conditions. An application made by the Commissioner of Police on 4 June for a control order in respect of Sandro Totani was adjourned on the latter's motion pending resolution of proceedings initiated in the Supreme Court by Mr Hudson contending that s 14(1) of the SOCC Act "impairs the institutional integrity of the Magistrates Court of South Australia, contrary to the requirements of Chapter III of the Constitution". It was common ground that both Hudson and Totani were members of the Finks.

On the basis of infringement of the *Kable* principle, the Full Court of the Supreme Court in *Totani v South Australia* (2009) 259 ALR 673 held s 14(1) invalid by 2:1 (White J dissenting).

An appeal to the High Court by the South Australian government was dismissed by 6:1 (Heydon J dissenting). French CJ set out the limited role afforded to the judiciary in reviewing the constitutionality of legislation impacting upon common law rights.

> **French CJ:** The SOCC Act, in effect, empowers the executive government to restrict the exercise of the common law freedoms of expression and assembly by members of declared organisations, persons the subject of control orders and members of the public who might wish to communicate or meet with them. It authorises the imposition of restrictions regardless of whether the persons affected by them have ever engaged in, or are ever likely to engage in, criminal conduct of any kind or have actively associated with, or are likely to associate with, persons who have engaged or might at some time in the future engage in criminal conduct.
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> The effect of the SOCC Act on personal freedoms was a matter for consideration by the South Australian Parliament which enacted it. Its merit as a legislative measure is not a matter for this Court to judge. Applying the "principle of legality", courts will, of course, construe statutes, where constructional choices are open, so as to minimise their impact upon common law rights and freedoms. That principle, well known to the drafters of legislation, seeks to give effect to the presumed intention of the enacting Parliament not to interfere with such rights and freedoms except by clear and unequivocal language for which the Parliament may be accountable to the electorate. Save to the extent that it imposes something approaching a formal requirement of clear statutory language, the principle of legality does not constrain legislative power. Whether, beyond that imposition, State legislative power is constrained by rights deeply rooted in the democratic system of government and the common law was a question referred to but not explored in *Union Steamship Co of Australia Pty Ltd v King* [(1988) 166 CLR 1]. Whatever the answer to the unexplored question, it is self-evidently beyond the power of the courts to maintain unimpaired common law freedoms which the Commonwealth Parliament or a State Parliament, acting within its constitutional powers, has, by clear statutory language, abrogated, restricted or qualified. That having been said, a constitutionally supported freedom of association has been suggested in dicta in this Court as an incident of the implied freedom of political communication. That suggestion may draw some support from the historical connection between freedom of association and the right to petition Parliament under s 5 of the *Bill of Rights*. No issue arose in this appeal concerning any implied constitutional freedom of association. Nor did any issue arise in relation to the interaction between s 92 of the Constitution and the restrictions on communication imposed by reason of the extended definition of "associate". On the other hand, the extent of the intrusions upon personal freedom effected by a control order is relevant to the characterisation of the duty imposed upon the Magistrates Court under s 14(1) of the Act and to whether, contrary to assumptions reflected in Ch III of the Constitution, s 14(1) removes or impairs that independence from the executive that is a defining characteristic of courts of law in Australia.

In turning to this question, French CJ was explicit about the methodological approach he favoured. He insisted: "One does not look first to overarching principles of constitutionalism as a source of the limitations on State legislative power which have been expounded under the general rubric of the '*Kable* doctrine'. Rather, it is necessary to focus upon the text and structure of Ch III and the underlying historically based assumptions about the courts, federal

and State, upon which the judicial power of the Commonwealth can be conferred. It is in the need for consistency with those assumptions that the implied limitations find their source". After establishing, both as a general proposition and a matter of fact, that the Magistrates Court of South Australia is a court of the State for the purpose of receiving federal jurisdiction, French CJ stated:

French CJ:

Constitutional assumptions about courts

The essentials of the British justice system travelled to and settled in the Australian colonies long before the Federation movement began. The courts of Britain's colonies, including the Australian colonies: "in exercising their power to hear and determine, ... did so in the manner of their judicial counterparts in the place of the law's origin" [McPherson, *The Reception of English Law Abroad*, (2007) at 405].

As Windeyer J said in *Kotsis v Kotsis* [(1970) 122 CLR 69 at 91]:

> "The nature of a court and the functions of court officers were matters that were well known in England long before the Australian colonies began. The meaning of the word 'court' has thus come to us through a long history; and it is by the light of that that it is to be understood in ss 71, 72 and 73 of the Constitution."

The 19th-century understanding of a "court of justice", extant at the time of the drafting of the Constitution, was explained in part in the frequently cited judgment of Fry LJ in *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [[1892] 1 QB 431]. His Lordship spoke of "the fairness and impartiality which characterize proceedings in Courts of justice, and are proper to the functions of a judge" [at 447]. He described courts as "for the most part, controlled and presided over by some person selected as specially qualified for the purpose" and said "they have generally a fixed and dignified course of procedure, which tends to minimise the risks that might flow from [their] absolute immunity" [at 447]. The application of that concept to courts contemplated as repositories of the judicial power of the Commonwealth was accepted by Isaacs and Rich JJ in *Waterside Workers' Federation of Australia v J W Alexander Ltd*, citing Fry LJ in connection with the proposition that [(1918) 25 CLR 434 at 467]: "the Federal Constitution is specific that judicial power shall be vested in Courts, that is, Courts of law in the strict sense". The understanding of what constitutes "Courts of law" may be expressed in terms of assumptions underlying ss 71 and 77(iii) in relation to the courts of the States.

There are three overlapping assumptions which, as a matter of history and as a matter of inference from the text and structure of Ch III, underlie the adoption of the mechanism reflected in s 77(iii) of the Constitution. The first is the universal application throughout the Commonwealth of the rule of law, an assumption "upon which the Constitution depends for its efficacy" [*Thomas v Mowbray* (2007) 233 CLR 307 at 342 per Gummow and Crennan JJ]. The second is that the courts of the States are fit, in the sense of competent, to be entrusted with the exercise of federal jurisdiction. As Professor Sawer observed [Sawer, *Australian Federalism in the Courts*, (1967) at 20-21]:

> "The State Supreme Courts were of a very high and uniform calibre – a situation in marked contrast with that which obtained in the United States shortly after its establishment – and there was no substantial ground for fearing that they would be biased or parochial in their approach to federal questions."

The generality of the wording of ss 71 and 77(iii) indicates that the assumption of competence extends to all courts of the States, albeit the supervisory role of the Supreme Courts, as was submitted by the Solicitor-General of the Commonwealth, reinforces the independence and impartiality of inferior State courts and contributes to the fulfilment of the constitutional imperative recognised in *Kable*.

The third assumption is that the courts of the States continue to bear the defining characteristics of courts and, in particular, the characteristics of independence, impartiality, fairness and adherence to the open-court principle. This formulation is deliberately non-exhaustive. In considering the attributes of courts contemplated by Ch III of the Constitution it is necessary to bear in mind the cautionary observation of Gummow, Hayne and Crennan JJ in *Forge* that [(2006) 228 CLR 45 at 76]: "It is

neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court." Nevertheless, as their Honours added:

> "An important element, however, in the institutional characteristics of courts in Australia is their capacity to administer the common law system of adversarial trial. Essential to that system is the conduct of trial by an independent and impartial tribunal."

At the heart of judicial independence, although not exhaustive of the concept, is decisional independence from influences external to proceedings in the court, including, but not limited to, the influence of the executive government and its authorities. Decisional independence is a necessary condition of impartiality. Procedural fairness effected by impartiality and the natural justice hearing rule lies at the heart of the judicial process. The open-court principle, which provides, among other things, a visible assurance of independence and impartiality, is also an "essential aspect" of the characteristics of all courts, including the courts of the States.

The Convention Debates reveal implicit reflection on the principle of separation of powers in the context of a provision, later omitted, which would have barred any person holding judicial office from being appointed to or holding any executive office. The limited record of consideration of judicial independence by delegates to the Convention otherwise centred around debate about the mechanism for the removal of federal judges. A leading contributor in this respect was the South Australian Charles Kingston. He spoke of his desire "to preserve intact the absolute independence of the judges, both in relation to the Federal Executive and the Federal Parliament; that they may have nothing to hope for, and nothing to fear either; and that in doing their duty they may feel secure in their office" [*Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 20 April 1897 at 947]. The absence of any recorded debate about the principle of independence enunciated by Kingston indicates that it was uncontroversial. The historical record does not indicate that the members of the Convention expressly adverted to the broader concept of the separation of judicial power in their debates. However, that does not detract from the conclusion that the Constitution was framed on the basis of common assumptions, at least among lawyers of the day, about the nature of courts and their independence in the discharge of judicial functions.

The assumption of the continuity of the defining characteristics of the courts of the States as courts of law is supported by ss 106 and 108 of the Constitution, which, by continuing the constitutions and laws of the former colonies subject to the Constitution of the Commonwealth, continued, inter alia, the courts of the colonies and their various jurisdictions. That continuity could accommodate the extension, diminution or modification of the organisation and jurisdiction of courts existing at Federation, the creation of new courts and the abolition of existing courts (other than the Supreme Courts). Those powers in State legislatures are derived from the constitutions of the States. Until 1986, they were also derived from s 5 of the *Colonial Laws Validity Act* 1865 (Imp). Since 1986, they can be derived from s 2(2) of the *Australia Acts*.

The assumption that all Australian courts would retain the defining characteristics of courts of law after Federation is also implicit in covering cl 5 of the Constitution, which provides that "[t]his Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth". Those words represent what Quick and Garran called "a distinctly national feature of the Constitution" [Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 353]. Within their jurisdictions the courts of the States had, by operation of covering cl 5, "jurisdiction to declare and apply the laws of the Commonwealth in all cases in which the judicial power of the Commonwealth is not necessarily exclusive of the judicial power of the States" [*MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 620 per Gleeson CJ, Gummow and Hayne JJ]. Whether covering cl 5 also provides a source of authority for judicial review of the validity of legislation need not be explored here.

There was at Federation no doctrine of separation of powers entrenched in the constitutions of the States. Unsuccessful attempts to persuade courts of the existence of such a doctrine were made in New South Wales, Western Australia and South Australia in the 1960s and 1970s, and Victoria in 1993, relying, inter alia, upon the decision of the Privy Council in *Liyanage v The Queen*. The absence of an entrenched doctrine of separation of powers under the constitutions of the States at Federation and

thereafter does not detract from the acceptance at Federation and the continuation today of independence, impartiality, fairness and openness as essential characteristics of the courts of the States. Nor does the undoubted power of State Parliaments to determine the constitution and organisation of State courts detract from the continuation of those essential characteristics. It is possible to have organisational diversity across the Federation without compromising the fundamental requirements of a judicial system.

The diversity of State courts

Griffith CJ said in *Federated Sawmill, Timberyard and General Woodworkers' Employes' Association (Adelaide Branch) v Alexander* ("the *Sawmillers' Case*") that "when the Federal Parliament confers a new jurisdiction upon an existing State Court it takes the Court as it finds it, with all its limitations as to jurisdiction, unless otherwise expressly declared" [(1912) 15 CLR 308 at 313]. The proposition in the *Sawmillers' Case*, as developed in later decisions of this Court including *Le Mesurier v Connor* [(1929) 42 CLR 481], recognised that the Parliaments of the States retain the legislative power to determine the constitution of their courts and the organisational arrangements through which they will exercise their jurisdiction and powers. As Gummow, Hayne and Crennan JJ said in *Forge* [228 CLR at 75]: "The provisions of Ch III do not give power to the federal Parliament to affect or alter the constitution or organisation of State courts."

The statement made by Griffith CJ in the *Sawmillers' Case* should not be over-generalised. As Gaudron J explained in *Kable*, it was "a vastly different statement from the unqualified proposition that the Commonwealth must take a State court as it finds it" [(1996) 189 CLR 51 at 102]. The Parliament of a State does not have authority to enact a law which deprives a court of the State of one of its defining characteristics as a court, or impairs one or more of those characteristics. The statement in *The Commonwealth v Hospital Contribution Fund* about the unrestricted legislative competency of the States in relation to the composition, structure and organisation of their courts "as appropriate vehicles for the exercise of invested federal jurisdiction" [150 CLR at 61 per Mason J] must be read in the light of *Kable* and those decisions which further explain the principles which it enunciated. The point was made by Gummow J in *Kable* [189 CLR at 137], commenting on the decision in *Le Mesurier*:

> "But this decision did not determine that a State legislature has power to impose upon the Supreme Court of that State functions which are incompatible with the discharge of obligations to exercise federal jurisdiction, pursuant to an investment by the Parliament of the Commonwealth under s 77(iii) of the Constitution."

That limitation on State legislative power nevertheless makes ample allowance for diversity in the constitution and organisation of courts.

Application of the principles

The text and structure of Ch III of the Constitution postulate an integrated Australian court system for the exercise of the judicial power of the Commonwealth with this Court at its apex. There is no distinction, so far as concerns the judicial power of the Commonwealth, between State courts and federal courts created by the Parliament. The consequences of the constitutional placement of State courts in the integrated system include the following:

1. A State legislature cannot confer upon a court of a State a function which substantially impairs its institutional integrity and which is therefore incompatible with its role as a repository of federal jurisdiction.
2. State legislation impairs the institutional integrity of a court if it confers upon it a function which is repugnant to or incompatible with the exercise of the judicial power of the Commonwealth.
3. The institutional integrity of a court requires both the reality and appearance of independence and impartiality.
4. The principles underlying the majority judgments in *Kable* and further expounded in the decisions of this Court which have followed after *Kable* do not constitute a codification of the limits of State legislative power with respect to State courts. Each case in which the *Kable*

doctrine is invoked will require consideration of the impugned legislation because [*Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 618 per Gummow J]: "the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes".

For legislators this may require a prudential approach to the enactment of laws directing courts on how judicial power is to be exercised, particularly in areas central to the judicial function such as the provision of procedural fairness and the conduct of proceedings in open court. It may also require a prudential approach to the enactment of laws authorising the executive government or its authorities effectively to dictate the process or outcome of judicial proceedings.

5. The risk of a finding that a law is inconsistent with the limitations imposed by Ch III, protective of the institutional integrity of the courts, is particularly significant where the law impairs the reality or appearance of the decisional independence of the court.

The validity of s 14(1) of the SOCC Act falls for consideration against that background.

The Solicitor-General for South Australia submitted that the true question in determining whether legislation "impairs" or "detracts from" the institutional integrity of a State court is whether that court no longer satisfies the constitutional description "court of a State". He reformulated the question as: "[D]oes a State Court exercising the impugned function nevertheless bear sufficient relation to a court of a state within the meaning of the Constitution?". However, the true question is not whether a court of a State, subject to impugned legislation, can still be called a court of a State nor whether it bears a sufficient relation to a court of a State. The question indicated by the use of the term "integrity" is whether the court is required or empowered by the impugned legislation to do something which is substantially inconsistent or incompatible with the continuing subsistence, in every aspect of its judicial role, of its defining characteristics as a court. So much is implicit in the constitutional mandate of continuing institutional integrity. By way of example, a law which requires that a court give effect to a decision of an executive authority, as if it were a judicial decision of the court, would be inconsistent with the subsistence of judicial decisional independence.

It has been accepted by this Court that the Parliament of the Commonwealth may pass a law which requires a court exercising federal jurisdiction to make specified orders if some conditions are met even if satisfaction of such conditions depends upon a decision or decisions of the executive government or one of its authorities. The Parliament of a State may enact a law of a similar kind in relation to the exercise of jurisdiction under State law. It is also the case that "in general, a legislature can select whatever factum it wishes as the 'trigger' of a particular legislative consequence" [*Baker v The Queen* (2004) 223 CLR 513 at 532 per McHugh, Gummow, Hayne and Heydon JJ**]**. But these powers in both the Commonwealth and the State spheres are subject to the qualification that they will not authorise a law which subjects a court in reality or appearance to direction from the executive as to the content of judicial decisions. In *International Finance Trust Co Ltd* this Court held invalid a law of the State of New South Wales which imposed upon the Supreme Court of New South Wales a process which, at the option of the executive, in substance required [(2009) 240 CLR 319 at 366 per Gummow and Bell JJ]: "the mandatory ex parte sequestration of property upon suspicion of wrong doing, for an indeterminate period, with no effective curial enforcement of the duty of full disclosure on ex parte applications".

It follows from what has already been said in these reasons, and is reflected in the decisions of this Court, that one of the characteristics required of all courts capable of exercising the judicial power of the Commonwealth (including the courts of the Territories) is that they be, and appear to be, independent and impartial tribunals. Forms of external control of courts "appropriate to the exercise of authority by public officials and administrators" are inconsistent with that requirement. The requirement is not a judicially generated imposition. It derives from historically based assumptions about courts which were extant at the time of Federation.

It is not necessary, in this case or any other, to mediate the constitutional assumption of actual and apparent independence and impartiality through its effect upon "public confidence" in the courts. That is a criterion which is hard to define, let alone apply by reference to any useful methodology. It may be the case from time to time that a law which trespasses upon the independence and impartiality of a

court will have substantial popular support. That is not the measure of its compliance with the requirements of the Constitution. Were it otherwise, the strength of the protections for which the Constitution provides could fluctuate according to public opinion polls. The rule of law, upon which the Constitution is based, does not vary in its application to any individual or group according to the measure of public or official condemnation, however justified, of that individual or that group. The requirements of judicial independence and impartiality are no less rigorous in the case of the criminal or anti-social defendant than they are in the case of the law-abiding person of impeccable character. In any event, as has been pointed out, the effect of the control order under challenge in this case reaches beyond Mr Hudson. It potentially touches members of the public at large and well beyond the boundaries of South Australia.

The question in the present case is whether s 14(1) of the SOCC Act requires the Magistrates Court of South Australia to do something which is not consistent with the assumption of independence and impartiality of courts underlying Ch III of the Constitution. As Gummow J observes in his reasons, the question directs attention to the practical operation of s 14(1) and the significance for that practical operation of the Attorney-General's declaration under s 10(1).

Section 14(1) of the SOCC Act confers upon the Magistrates Court the obligation, upon application by the Commissioner, to make a control order in respect of a person by reason of that person's membership of an organisation declared by the Attorney-General. The declaration rests upon a number of findings including, in every case, a determination by the Attorney-General that members of the organisation, who need not be specified, have committed criminal offences, for which they may never have been charged or convicted. The findings, of which the Magistrates Court may be for the most part unaware and which in any event it cannot effectively or readily question, enliven, through the declaration which they support, the duty of the Court to make control orders against any member of the organisation in respect of whom the Commissioner makes an application. That is so whether or not that member has committed or is ever likely to commit a criminal offence. Membership of a declared organisation is not made an offence by the SOCC Act.

The control order involves a serious imposition upon the personal liberty of the individual who is the subject of the control order and subjects him or her to criminal penalties for breach of the order. It enlivens restrictions upon members of the public limiting their capacity to communicate with the person the subject of the control order. Breaches of those restrictions are criminal offences. A person exposed to such a restriction and to criminal liability for its breach may be an entirely law-abiding citizen unlikely, on any view, to engage in contravention of the law. The control order is an order of the kind which, in its effect upon personal liberty, is ordinarily within the domain of judicial power. I should add that I agree with the reasons of Gummow J for rejecting the submission by the State of Western Australia that the validity of s 14(1) is supported by the proposition that the State of South Australia could have vested the power to make a control order in the Attorney-General himself.

Submissions made by the State of South Australia identified findings which the Magistrates Court would have to make before issuing a control order under s 14(1). Those submissions sought to effect a kind of forensic inflation of the function of the Court under s 14(1) in aid of the characterisation of that function as "a genuine adjudicative process". The following points were made:

1. Section 14(1) of the SOCC Act directs the Magistrates Court to make a control order *only* when satisfied of specified matters, namely, that there has been a declaration with respect to the organisation in question pursuant to s 10(1) and that the defendant is a member of that organisation.
2. The defendant may collaterally challenge the Attorney-General's declaration.
3. The Court is required to satisfy itself that the person is a member of a declared organisation. It must consider affidavit material presented by the Commissioner and choose whether or not to act on the basis of that evidence, applying the civil standard of proof. That material is testable and the defendant may adduce evidence to the contrary.
4. To the extent that the Commissioner relies upon criminal intelligence to prove membership, the Court and the defendant are entitled to insist upon strict proof that the material has been properly so classified. The admission of such material and the weight to be given to it is a matter for the Court.

5. The Court has discretion to compose the content of a control order and make ancillary or consequential orders pursuant to s 14(5).

It was submitted, having regard to the above matters, that the Court, exercising its power under s 14(1), undertakes a genuine adjudicative process free from any interference from the executive. Reliance was also placed upon the availability of the objection procedure and the Court's discretion in framing a control order in that context.

The fact that the impugned legislation provides for an adjudicative process does not determine the question whether it impairs the institutional integrity of the Magistrates Court by impairing the reality or appearance of judicial decisional independence. The laws held invalid in *Kable* and *International Finance Trust Co Ltd* both allowed for an adjudicative process by the court to which they applied.

The submission of the State of South Australia rightly identified the question of membership of a declared organisation as "[t]he central issue raised by an application for a control order". Although it was acknowledged that membership may be easy to prove with the practical result that the making of a control order would be inevitable, it was said not to follow that this would always be the case. It could not be said, so the argument went, that the outcome of the Commissioner's application would be directed.

In submissions made on behalf of Messrs Totani and Hudson, emphasis was placed on the standard of proof in an application for a control order, which, by virtue of s 5 of the SOCC Act, is the balance of probabilities. But that is not determinative or even more than marginally relevant to any consideration of the relationship between the executive declaration and the making of a control order, which is under scrutiny in the present case.

The submissions made on behalf of the State of South Australia did not, with respect, diminish the dominance of the executive act of declaration of an organisation and the findings of fact behind it in determining for all practical purposes the outcome of the control order application. While it is true that membership can be contested, the breadth of the definition of "member" is such that, given any evidential basis for the contention that the defendant is a member, the practical burden of disproof is likely to fall upon the defendant.

Section 14(1) represents a substantial recruitment of the judicial function of the Magistrates Court to an essentially executive process. It gives the neutral colour of a judicial decision to what will be, for the most part in most cases, the result of executive action. That executive action involves findings about a number of factual matters including the commission of criminal offences. None of those matters is required by the SOCC Act to be disclosed to the Court, nor is the evidence upon which such findings were based. In some cases the evidence, if properly classified as "criminal intelligence", would not be disclosable. Section 14(1) impairs the decisional independence of the Magistrates Court from the executive in substance and in appearance in areas going to personal liberty and the liability to criminal sanctions which lie at the heart of the judicial function. I agree with the conclusion of Gummow J, Crennan and Bell JJ and Kiefel J that s 14(1) authorises the executive to enlist the Magistrates Court to implement decisions of the executive in a manner incompatible with that Court's institutional integrity. I agree also with the conclusion reached by Hayne J about the operation of s 14(1) in permitting the executive to enlist the Magistrates Court for the purpose of applying special restraints to particular individuals identified by the executive as meriting application for a control order and the repugnancy of that function to the institutional integrity of the Court.

In the exercise of the function conferred on it by s 14(1), the Magistrates Court loses one of its essential characteristics as a court, namely, the appearance of independence and impartiality. In my opinion, s 14(1) is invalid.

Hayne J: Section 14(1) of SOCCA exhibits three, connected, features that are critical to consideration of its validity. First, the court that makes an order under s 14(1) does not ascertain, declare or enforce any right or liability that exists at the time the proceedings are instituted. Secondly, the court's order creates new and particular restrictions on association. The restrictions are particular in two respects. They are particular in that they are directed only to the defendant in question. They are also particular in that they do not reflect, let alone give effect to, any more general legislative proscription of any and every act of association between or with members of a declared organisation. Thirdly, the court must

make the order against the particular defendant, without the court making any inquiry for itself about what the subject of the order has done, or may do in the future, or any inquiry about what the executive may have concluded that the subject of the order has done, or may do in the future.

Section 14(1) of SOCCA thus stands in sharp contrast with the provisions of the *Criminal Code* (Cth) that were in issue in *Thomas v Mowbray*. Provisions of Div 104 of Pt 5.3 of the *Criminal Code* permitted the making of control orders in relation to a person in certain circumstances. Those circumstances included the issuing court being satisfied that "making the order would substantially assist in preventing a terrorist act" or that the person against whom the order was to be made was a person who "has provided training to, or received training from, a listed terrorist organisation". Moreover, s 104.4(1)(d) of the *Criminal Code* provided that an issuing court may make a control order of the kind in issue in *Thomas v Mowbray* "*only if* ... satisfied ... that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act" (emphasis added).

Unlike s 14(1) of SOCCA, the provisions of the *Criminal Code* in issue in *Thomas v Mowbray* thus required the issuing court to be satisfied either that the person against whom the order was to be made *had engaged* in particular past conduct, or that the order would have an *identified consequence*. The past conduct in issue under the *Criminal Code* provisions was conduct which the *Criminal Code* made unlawful. The relevant consequence (of protecting the public from a terrorist act) had to be related directly to the defendant (as did the fact of past conduct), because a control order could be made only if each particular aspect of the proposed order (as it operated against the defendant) was both reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act. And, as explained in *Thomas v Mowbray*, other forms of preventive order, like apprehended violence orders, depend upon inquiries no different in substance from those that were required under the provisions in issue in that case.

In summary, then, s 14(1) requires the Magistrates Court to perform functions that have the following characteristics:

(a) upon application by the Executive, the Magistrates Court must make a control order against a person who is shown to be a member of a declared organisation;
(b) a control order imposes significant restrictions on the defendant's freedom of association, over and above the restrictions that are generally applicable to others dealing with members of declared organisations;
(c) a control order must be imposed without any judicial determination (and without the need for any executive determination) that the defendant has engaged, or will or may engage, in criminal conduct;
(d) a control order will preclude the defendant's association with others in respect of whom there has been no judicial determination (and without the need for any executive determination) that those others have engaged, or will or may engage, in criminal conduct;
(e) a control order creates new norms of conduct, contravention of which is a crime;
(f) making a control order neither depends upon, nor has the consequence of, ascertaining, declaring or enforcing any existing right or liability, whether of the defendant, any other member of the subject organisation, the subject organisation itself, or any other organisation (declared or not).

All of these features of the task that is given to the Magistrates Court are important to the conclusion that performance of that task is repugnant to, or incompatible with, the institutional integrity of the Court. The task is repugnant to, or incompatible with, the institutional integrity of the Court because the Court is enlisted, by the Executive, to make it a crime, for particular persons upon whom the Executive fixes, to associate together when, but for the Court's order, the act of association (as distinct from repeated and persistent associations of the kind with which s 35 deals) would not be a crime. Those whom the Executive chooses, for the compulsory imposition of a special regime by order of the Magistrates Court, must be drawn from a group determined by the Executive to be an organisation that "represents a risk to public safety and order in [the] State". But it is no part of the function of the

Magistrates Court under SOCCA to determine what the particular defendant has done, or may do in the future. The Court is required to act on the assumption that "membership" of a declared organisation requires imposition of limitations on the freedom of the defendant which are not otherwise imposed, when the legislation does not make either the fact of membership of the organisation, or the continued existence of the organisation, unlawful. That is, upon the motion of the Executive, the Court is required to create new norms of conduct, that apply to a particular member of a class of persons who is chosen by the Executive, on the footing that the Executive has decided that some among the class (who may or may not include the defendant) associate for particular kinds of criminal purposes. It is not the business of the courts, acting at the behest of the executive, to create such norms of conduct without inquiring about what the subject of that norm has done, or may do in the future. To be required to do so is repugnant to the institutional integrity of the courts. It is desirable to amplify a number of aspects of these points.

In considering the nature of the task that s 14(1) requires the Magistrates Court to perform, it is important to recall that, as Kitto J said in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [(1970) 123 CLR 361 at 374-375]:

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

Section 14(1) of SOCCA does not permit or require the Magistrates Court to determine the existence of any right or obligation. The Court is required to make a control order without enquiring how, if at all, that order will contribute to the legislative object of disrupting the criminal activities of identified groups, or the criminal activities of any individual. The obligations which are created by the Court's order are not imposed on account of what the person against whom the order is directed has done, will do, or may do.

It is next important to recognise that the Court must act at the behest of the Executive. It is the Executive which chooses whether to apply for an order, and the Executive which chooses the members of a declared organisation that are to be made subject to a control order. So long as the person named as a defendant falls within the definition of "member", the Court cannot refuse the Executive's application; the Court must make a control order. That the Court must decide whether the defendant falls within the definition of "member" does not detract from the conclusion that the Court is acting at the behest of the Executive. In that regard, it is to be recalled that, under the legislation considered in *Kable*, and held to be beyond the legislative power of the State, the Supreme Court of New South Wales had to be satisfied that Mr Kable was "more likely than not to commit a serious act of violence", and that it was "appropriate, for the protection of a particular person or persons or the community generally" that he be held in custody. Yet the conclusion was reached that, under the legislation in issue in *Kable*, "[t]he judiciary is apt to be seen as but an arm of the executive which implements the will of the legislature" [(1996) 189 CLR 51 at 134]. The same observation is to be made about s 14(1) of SOCCA.

The courts are not to be used as an arm of the Executive to make unlawful the association between individuals when their associating together is not otherwise a crime, where such prohibition is to be imposed without any determination that the association of the *particular* individuals has been, will be, or even may be, for criminal purposes.

SUPPLEMENT TO CHAPTER 15

The significance of "membership"

Membership of an organisation, affiliation with that organisation, or association with one or more of its members does not in every case demonstrate support for all of the aims or purposes of the group, or all of the methods that it uses to achieve its aims or purposes. It may, perhaps it often does, at least if membership of the group is sought out and maintained. But the conclusion is not inevitable, and is all the harder to draw as the premise for it varies from active membership, through affiliation, to mere association with members. And it is to be recalled that the definition of "member" in s 3 of SOCCA is so wide that it would readily embrace many cases beyond those in which a person actively seeks out and maintains formal membership of the relevant organisation. It is not to be assumed that the organisations that are intended to be the subject of declarations under SOCCA will be ordered according to the standards applicable to a listed public company, or that membership of the relevant body can be determined with the certainty that might be possible under corporations legislation. The extended definition of "member" given in SOCCA reflects that fact. But by doing so, it brings persons within the reach of s 14(1) in respect of whom a finding of membership will do no more than show that the defendant has associated with persons who, in turn, associate with persons who the Attorney-General has concluded associate with each other for criminal purposes.

A central and informing principle of criminal liability in Australia, as elsewhere, is that guilt is personal and individual. The debates about the ambit of doctrines of complicity and joint enterprise demonstrate the continued vitality and importance of the principle by seeking to chart one boundary to it. That guilt is personal and individual is intrinsic in the notion of the rule of law. As Dixon J said in *Australian Communist Party v The Commonwealth* [(1951) 83 CLR 1 at 193], one of the assumptions in accordance with which the Constitution is framed is the rule of law. It was on that footing ("[i]n such a system") that he concluded that:

> "it would be impossible to say of a law of the character [then in issue], which depends for its supposed connection with the power upon the conclusion of the legislature concerning the doings and the designs of the bodies or person to be affected and affords no objective test of the applicability of the power, that it is a law upon a matter incidental to the execution and maintenance of the Constitution and the laws of the Commonwealth".

That is, the legislative determination, recorded in the recitals to the *Communist Party Dissolution Act* 1950 (Cth), that the Communist Party "also engages in activities or operations designed to bring about the overthrow or dislocation of the established system of government of Australia", did not conclude the issue about engagement of the defence power.

As has later been observed, by reference to this aspect of the decision of Dixon J in the *Communist Party Case*, "Ch III gives practical effect to the assumption of the rule of law upon which the Constitution depends for its efficacy" [*Thomas v Mowbray* 233 CLR at 342]. And the implication which was drawn from Ch III in *Kable*, about the legislative power of the States, is also to be seen as giving practical effect to the same assumption. But that then invites attention to what the rule of law requires.

The legislature has not chosen to make the fact of membership of a declared organisation a crime. It has not made that kind of legislative judgment, spoken of in decisions of the Supreme Court of the United States concerning legislation directed against the Communist Party or its members, that seeks to bridge the gap that may exist between membership of an organisation and personal possession of particular purposes or characteristics. And although the legislature may be said to have acted on the footing that the gap between identifying the purposes and conduct of some members of a group, and attributing those purposes to all the group's members, should be ignored, it has not attributed, and could not attribute, guilt of specific crime (past or future) to any, let alone all, members of an organisation that is declared under s 10. As was said in one of the United States cases, dealing with the activities of those identified as Communists, "[t]he designation of Communists as those persons likely to cause political strikes is not the substitution of a semantically equivalent phrase". So too here, the identification of an organisation as including, even being constituted by, persons who "associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity" does not entail that every individual who falls within the extended definition of "member" in relation to that organisation necessarily has those purposes or characteristics. And it does not entail that every

individual who falls within the definition of "member" has committed, or will commit, any crime. Yet the Magistrates Court is required, by s 14(1), to impose disadvantageous consequences upon any person who falls within that extended definition of "member", regardless of what the person has or has not done, and regardless of what purposes that person has had, or may now or later harbour, for having a connection with the organisation.

History, including recent history, provides many examples of legislative attempts to suppress associations thought, at the time, to pose some danger to the common good. In the late 18th century, 39 Geo III c 79 was enacted, as its long title said, "for the more effectual Suppression of Societies established for Seditious and Treasonable Purposes; and for better preventing Treasonable and Seditious Practices". Less than 20 years later, 57 Geo III c 19 was enacted "for the more effectually preventing Seditious Meetings and Assemblies" and to suppress and prohibit "certain Societies or Clubs calling themselves *Spenceans* or *Spencean Philanthropists*". A century and a half later, in Australia and elsewhere, legislation was enacted, and existing legislation administered, to bring an end to the existence of the Communist Party, and to disadvantage those who were identified as its supporters.

The legislation now in issue does not go down the path of seeking to outlaw particular organisations, or kinds of organisation. SOCCA does not make membership of any organisation (declared or not) a crime. It does not dissolve any organisation, or seek to forfeit or deal with any property that an organisation may own, use or occupy. What s 14(1) does is permit the Executive to enlist the Magistrates Court to create new norms of behaviour for those particular members who are identified by the Executive as meriting application for a control order. They are to be subjected to special restraint, over and above the limitations that the Act imposes on the public at large, not for what they have done or may do, and not for what any identified person with whom they would associate has done or may do, but because the Executive has chosen them. That function is repugnant to the institutional integrity of the Court that is required to perform it.

Section 14(1) is invalid. The appeal should be dismissed with costs.

There was agreement across the High Court that the majority of the Full Court of the Supreme Court of South Australia had fallen into error in two important respects. First, a key consideration in the latter's decision was the assessment that the Attorney-General's determination of the factual matters supporting a declaration under s 10(1) was unreviewable. But, although conceding that, as Hayne J put it, "the forensic difficulties of mounting such a challenge ... would be very large", members of the High Court pointed to its recent decision in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 as confirming the supervisory jurisdiction of the Supreme Court in respect of jurisdictional error. Second, the Full Court had found that the safeguards on use of "criminal intelligence" which had preserved the legislation in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 and *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 from the operation of the *Kable* principle were "notably absent" from the Attorney-General's consideration of such information in deciding whether or not to make a declaration. Gummow J, with the agreement of his colleagues, rejected this view by emphasising the presence of s 21(2) of the SOCC Act, as a provision preserving the Magistrates Court's power to independently determine the classification of information by the Commissioner of Police as "criminal intelligence" in "any proceedings relating to the making, variation or revocation of a control order". Although not explicit, the apparent implication of this response is that so long as the ability of the court to scrutinise the restricted classification of information adduced before it is preserved, then the constitutional requirements of their independence and impartiality are not transgressed by the lack of similar constraints upon the executive's use of "criminal intelligence" to decide anterior facts.

In dissent, Heydon J concurred in the majority's rejection of the Full Court reasoning on both these points, though as part of a comprehensive rejection of the respondent's arguments, which he characterised as "a remorseless attempt to demonstrate the frightfulness of the legislation by construing it favourably to ease of conviction and adversely to constitutional validity ... They invited the hearer again and again to shrink in civilised disgust and loathing from each supposed disregard for orthodox judicial procedures." He began his opinion with the following observations:

> **Heydon J:** Most crime in Australia is, so far as it can be, investigated, prosecuted and punished by the States. Many of their officials are responsible for preserving public order. Some of them pursue that responsibility by keeping legislation relating to crime under constant review. Of course in a federal system it is the unhappy fate of legislatures, federal or State, and the electors who elected them, sometimes to have their desires thwarted when it becomes necessary for a court to hold that legislation reflecting those desires is constitutionally invalid. But if officials and legislators see it as their duty to procure legislation to prevent crime, to obstruct those endeavours by invalidating it is a serious step.
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> It is a serious step partly because there are very limited respects in which the Constitution explicitly prohibits a State from enacting legislation ... To that list of express limitations on State legislative power must be added various limitations arising out of constitutional implications, some rather recently perceived. One of these concerns the freedom of political communication – for 90 years unrecognised, then the subject of wide claims, now much reduced in scope. Another concerns "due process", which at one stage showed a little vigour but is apparently dormant, at least under that name, though perhaps only for a time. Another is the "*Kable* doctrine", invoked in this case.
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> Lawyers commonly think that the *Kable* doctrine has had a beneficial effect on some legislation. But it is a doctrine which intermediate appellate courts have found difficult to understand. Many constitutional scholars have welcomed it. But not all. No counsel has ever sought leave to argue that *Kable's* case be overruled. Hence it must be faithfully applied, whatever its meaning. That meaning remains controversial. Some aspects of its reasoning are now given less significance than formerly, others more. For example, the decision itself turned on the legislative requirement of detention without proof of criminal guilt. That requirement is not sufficient for invalidity. There are statements in *Kable's* case indicating that the jurisdiction conferred on State courts must not damage "public confidence" in them. But that damage is not now seen as a criterion of invalidity, merely an indication of it.
>
> Speaking very generally, the meaning of the *Kable* doctrine and other constitutional implications affecting the States must in part be limited by the lack of restrictions on State legislative power to be found in the express terms of the Constitution. The Constitution must be read as a whole. It would be surprising if the quite wide field left for State legislatures by the relatively precise express prohibitions were to be radically constricted by somewhat general implications. It would also be surprising if the role of the States as jurisdictions in which experiment may be conducted and variety may be observed were to be significantly reduced by doctrines resting on opinions – which are very likely to be divergent – about the fitness of a State court to exercise federal jurisdiction.
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> Government seeks to achieve its goals by many non-coercive techniques. But if they fail, in the end, at least in many fields, government depends on the exercise of coercive power. The States have routinely adopted the practice of resting their coercive power in important matters on the procurement of court orders. An implication like the *Kable* doctrine, which centres on the structure and functions of State courts, is therefore capable of being peculiarly damaging to the States. That is one reason why this is an extremely important appeal. Another is that its dismissal is likely to tempt the States into legislating to exert their coercive power through means other than their courts. If legislation of that kind is valid, the outcomes it generates are less likely to be congenial to civil liberties than legislation employing the courts. If legislation of that kind is not valid, the capacity of the States to fulfil their obligations to protect their residents is severely impaired. Either way the rule of law is significantly diminished.

Heydon J rejected the proposition that the Magistrates Court operated "as a rubber stamp for the Attorney-General's opinion. It is engaged in a sensitive, difficult and potentially complex task of great importance for civil liberty". He accepted the submissions made by South Australia and some other States as interveners that the SOCC Act fell into a well-established category of statutes "which provide for a non-curial decision made by the executive which, when taken with other matters found by a court in proceedings initiated by the executive, obliges the court to make orders". The main examples of such legislation that Heydon J discussed concerned the classification by the executive of narcotic substances. In arguing an equivalence between these laws and the SOCC Act, he made plain his thoughts on the Court's role in determining the fact of an individual's membership of a declared organisation:

> **Heydon J:** The Solicitor-General of the State of Queensland correctly submitted that it is not possible to discern differences between the *Controlled Substances Act* and the impugned Act. Under one Act a drug is proscribed by regulation because of an executive judgment about the actions of a drug and the predicted effect of those actions upon people. Under the other Act an organisation is declared by the Attorney-General because of an executive judgment about the actions of the members of that organisation, which can only act through or by its members, and the predicted effect of their actions upon people. Each decision may involve elaborate technical inquiries of experts. Each may require the detailed examination of complicated facts and the need to draw inferences from them. Each may involve reliance on information that would not be admissible as evidence. Each is ultimately concerned with the safety of human beings.
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> In any event, as the Solicitor-General for the Northern Territory submitted, "assessments of and judgment about human behaviour and its effects" are not within the exclusive province of the judiciary. An executive or legislative determination that a particular crime should attract a particular maximum penalty involves assessing and making a judgment about human behaviour and its effects as much as a decision by a sentencing judge in a particular case.
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> *The respondents' distinction between s 14 and other legislation.* How did the respondents deal with the examples posed by the Solicitor-General of the State of Queensland? They submitted that:
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> > "there is a greater risk of impairment of the requisite appearance of institutional separation and independence between the Executive and the Court where the Court's role is essentially one of determining whether a person fits within a class of persons which the Executive has determined meets the statutory criteria (and is thus worthy of the consequences that follow), than there is where the Court's role is to determine whether a particular person has engaged in proscribed conduct (even if the Executive has a role in determining what that proscribed conduct is)."
>
> This reasoning rests on a false distinction. It wrongly assumes that proof of membership is merely proof of a particular status and involves no conduct. It is true that a person can be a member of an organisation without doing anything. Many clubs have passive members who do nothing but pay the subscriptions (if any) and leave their name on the books (if any). But the organisations with which s 10 is concerned are likely to have many members whose membership is evidenced by their engaging in a great deal of conduct. Paragraph (b) of the definition of "member" contemplates this, for when persons identify themselves as belonging to an organisation they engage in conduct. And treatment of persons by the organisation or its members as if they belong to the organisation involves conduct. The role of the Magistrates Court under s 14 thus involves determination of whether a particular person has engaged in conduct.

These remarks stand in clear contrast to those above of Hayne J on the significance of membership as a criterion. Heydon J went on to find that in making a control order under s 14(1), the Court was required to consider substantive questions of the individual's involvement in criminal activity in order to determine the conditions of the order. This was not, he argued, displaced by the statutory imposition of apparently mandatory conditions on any order made under s 14(1). But as to the extent of the restriction on association

automatically imposed by s 14(5)(b)(i), Heydon J insisted that on a correct construction of the relevant provisions, it could not be said that the Court had no obligation to inquire into and determine the defendant's past conduct.

Heydon J: The next flaw in the respondents' submission is the contention that the Magistrates Court is required to issue the control order *without inquiring into what the defendant has done*. The contention takes no account of the fact that the Magistrates Court is obliged to inquire into one thing the defendant has done – become a member of a declared organisation. A declared organisation is, to put it shortly, a criminal gang. Although it is possible to be a member of a declared organisation without having committed any crimes, it is not, depending on what the member knew, creditable to be a member of such an organisation.

There is a further flaw. It is true that the Magistrates Court is under a duty to make a control order against a member even if the member has not committed any crimes. The form of that order is another matter. Although s 14(5)(b)(i) provides that where the defendant is a member of a declared organisation, the control order "must prohibit" the defendant from "associating with other persons who are members of declared organisations", that duty is subject to the concluding words of s 14(5)(b) – "except as may be specified in the order." The discretionary judicial power conferred on the Magistrates Court by s 14(5) is to be construed without making implications or imposing limitations not found in the express words. And Parliament is not to be taken by s 14(5)(b)(i) to have deprived persons of fundamental rights without using clear, unmistakable and unambiguous language. There is no such language, and the last eight words are the opposite of that language. The Magistrates Court's power to leave out the terms described in s 14(5)(b)(i) negates any duty to impose them.

Various matters of fact in s 14(6) are relevant to whether there should be a specification in the order to the contrary of s 14(5)(b)(i). It is not the case, contrary to the respondents' submission, that the Magistrates Court is forbidden to inquire into these various matters of fact. On the contrary, it is required to do so. Section 14(6)(a) obliges the Magistrates Court, in considering the prohibitions "that may be included" in a control order, to have regard to whether the defendant's *behaviour*, or *history of behaviour*, suggests that there is a risk that the defendant will engage in serious criminal activity. Section 14(6)(b) obliges the Magistrates Court to have regard to the extent to which the order might assist in preventing the defendant from engaging in serious criminal activity. And s 14(6)(c) obliges the Magistrates Court to have regard to the prior criminal record (if any) of the defendant and any persons specified in the application as persons with whom the defendant regularly associates.

In view of these provisions, it is open to the Magistrates Court to conclude that no prohibition on a defendant's freedom of association, whether of the s 14(5)(b)(i) kind or any other kind, is warranted given the negligible risk that the defendant will engage in serious criminal activity by reason of the past record of the defendant and the defendant's regular associates. One object of the impugned Act is to protect members of the public from violence associated with criminal organisations. It would not advance that object to make a prohibition under s 14(5)(b)(i) if any association between the defendant and others carries no risk of violence to the public. It follows that the Magistrates Court is not required to grant a control order without inquiry into what the defendant has done or may do. The opposite is the case: the Magistrates Court cannot grant a control order without making that inquiry.

The respondents submitted that it was not possible to frame a control order which had no prohibition on association without draining the notion of "control order" of content in defiance of the duty to make one created by s 14(1). The Solicitor-General for the State of South Australia accepted that it would not be possible to make a "control order" having no content; but the respondents' submission goes too far. The principles of construction referred to above mean that if there is a choice between a construction protecting liberty and a construction by which it was obligatory for a control order to prohibit association, the former construction must be preferred so long as the control order has some content. This difficulty in the impugned Act can be palliated by limiting the control order to the matters in s 14(5)(b)(ii) [which concern the illegal possession of a weapon or dangerous article].

This interpretation of the SOCC Act was most explicitly rejected in the reasons of Kiefel J who emphasised the required "minimum content" of control orders made under s 14(1) against members of a declared organisation, and the corresponding limitation on the Court's role:

Kiefel J: It is no part of the Court's function under s 14(1) to inquire into the participation of the defendant to an application for a control order in any criminal activities. It is obliged to make a control order without any determination other than whether that person's membership of a declared organisation has been proved.

The role of the Court under s 14(1) is to be distinguished from, and contrasted with, that given to the Court by s 14(2). Pursuant to s 14(2) the Court is not obliged to make a control order. It may do so when a person has been a member of a declared organisation, or engages or has engaged in serious criminal activity, and regularly associates with members of a declared organisation. It may also do so where it is shown that the person engages or has engaged in serious criminal activity and regularly associates with other persons who engage or have engaged in such activity. Moreover, the Court is entitled, under s 14(2), to consider the appropriateness of a control order in the circumstances pertaining to the person.

Section 14(6) requires the Court, when considering whether to issue a control order under s 14(2) or the prohibitions to be included in an order, to have regard to the following matters:

"(a) whether the defendant's behaviour, or history of behaviour, suggests that there is a risk that the defendant will engage in serious criminal activity;

(b) the extent to which the order might assist in preventing the defendant from engaging in serious criminal activity;

(c) the prior criminal record (if any) of the defendant and any persons specified in the application as persons with whom the defendant regularly associates;

(d) any legitimate reason the defendant may have for associating with any person specified in the application;

(e) any other matter that, in the circumstances of the case, the Court considers relevant."

Section 14(6) is also expressed to apply to the prohibitions which may be included in a control order under s 14(1). However, as will be explained, because of the provisions of s 14(1) and (5)(b), s 14(6) only provides the Court with a basis for adding further prohibitions to those which automatically follow upon the making of a control order under s 14(1). Section 14(6) does not permit the Court to consider the above factors in connection with whether to make a control order, nor does it permit the Court to limit the order to prohibitions that are necessary in the circumstances of the case.

The only matter which is the subject of a determination by the Court before a control order is made under s 14(1), apart from the existence of the declaration, is whether the defendant is a member of the organisation the Attorney-General has identified in the declaration. Where the Court finds that the defendant is a member, as defined, s 14(5)(b) requires that a control order *must* prohibit the defendant from associating with other persons who are members of declared organisations "except as may be specified in the order."

The Solicitor-General for South Australia submitted that the exception provided by s 14(5)(b) allows the Court to reach a conclusion as to the content of a control order made under s 14(1), based upon what is reasonably required, appropriate and adapted to achieve the object of the legislation. A provision such as that described by the Solicitor-General, which incorporates aspects of the principle of proportionality, was a feature of the legislation in *Thomas v Mowbray*, but no such provision appears in this Act. Moreover, the Act does not allow the Court to undertake such a process.

Section 14(5)(b) forecloses the prospect of excepting any member of a declared organisation from the operation of a control order made under s 14(1). These persons must be made the subject of the prohibitions outlined in s 14(5)(b). A possible use of the exception, one which would not negate the prohibition in s 14(5)(b), may be to except some type of association. The order made in the present case provides an example. It excepts associations for political purposes. However, the exceptions which might be made cannot significantly enlarge the function of the Court under s 14(1) and (5)(b).

These provisions do not permit the Court to consider the case at hand or the involvement of the particular defendant in criminal activities.

The Solicitor-General for South Australia submitted that s 14(6) could be used so that, when a control order is made under s 14(1), the order could "be tailored to meet the circumstances of the individual and the part they play within the organisation that is declared", thereby indicating a greater role for the Court in its determinations. It is difficult to see how this can be so, given that s 14(5)(b) provides the minimum content for an order under s 14(1), regardless of the matters listed under s 14(6).

Clearly, the matters referred to in s 14(6) may be considered and applied in the way described by the Solicitor-General when an order is made under s 14(2). But it does not seem possible that such considerations could be applied to alter, or negate, the prohibition required by s 14(5)(b). In the context of an order made under s 14(1), it would seem that s 14(6) could only apply to any *further* prohibitions sought by the Commissioner of Police.