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The Constitutionality Of The Criminal Organisation Acts In Australia: Where To Now In 2014?

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THE CONSTITUTIONALITY OF THE CRIMINAL ORGANISATION ACTS IN AUSTRALIA: WHERE TO NOW IN 2014?

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Abstract

Efforts to disrupt and limit criminal organisations involved in serious criminal activity as well as directly control members and their associates were introduced in Queensland with the Criminal Organisation Act 2009 (Qld). The purpose for this legislation and the debate over the head of power under which it operates has received much attention and has been again examined this year in the high court case Pompano (2013). The active and applicable laws across a number of states in Australia that can be categorised as control order legislation have proven themselves problematic and still have broader societal application beyond bikie gangs. While the issues instantiated by this legislation are clearly identified it is the operational difficulties from a legal perspective that has heightened tension as to its constitutional underpinnings and the manner in which it manifests itself.

“Those who would give up essential Liberty, to purchase a little temporary Safety, DESERVE neither Liberty nor Safety” (Benjamin Franklin LLD, 1812).

KEYWORDS: AUSTRALIA, LAW, CONSTITUTION, CRIMINAL ORGANISATION, CONTROL ORDERS

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Introduction

In the last few years new legislative efforts to disrupt and limit “criminal organisations” (Criminal Code Act 1899 (Qld), sch 1 pt 1 ch 1 s 1 (Austl.)) involved in “serious criminal activity/offence” (Criminal Organisation Act 2009 (Qld), ss 6-7 (Austl.)) as well as directly control members and their associates were introduced in Queensland with the Criminal Organisation Act 2009 (Qld) (“the COA”). Schloenhardt (2009) summarised the stated reasons for its introduction as: an acknowledgement that criminal organisations, in particular, motorcycle gangs are of
serious concern; the protection of the public from violence associated with such
criminal organisations; to address concerns of intimidation and aggression that
frustrate investigations; and acknowledgement that current mechanisms are ill suited
to address issues in prosecution. As will be discussed the legislation has the potential
for much broader interpretation and application than to “bikie gangs.” Prior to this,
similar legislation was also introduced in both South Australia (Serious and
Organised Crime (Control) Act 2008 (SA), (Austl.)) and New South Wales (Crimes
(Criminal Organisations Control) Act 2009 (NSW), (Austl.)). The legislation between
the states is not identical, as will be discussed but is substantively similar, as
Queensland was significantly influenced by NSW that in turn was influenced largely
by South Australia (Schloenhardt, 2009, p. 100). All three states’ legislation has been
the focus of High Court challenges in terms of constitutionality as well as human
rights claims (Assistant Commissioner Condon v Pompano Pty Ltd [2013] HCA 7;
South Australia v Totani (2010) 242 CLR 1; Wainohu v New South Wales (2011) 243
CLR 181). The Constitution s 109 requires that state law must be consistent with
commonwealth law/The Constitution. As such one of the foci of this paper is to
examine the constitutionality with particular reference to Chapter III – The Judicature
of the Constitution as it applies to the currently active laws in Australia. Also, advice
on the constitutionality of the consorting provisions in the NSW Crimes Act will be
addressed to highlight comparable issues and linkages to the discussion of control
orders legislation.

South Australia v Totani (2010) 242 CLR 1

To examine firstly the Queensland legislation it is important to identify and address
the differences that exist when compared to the South Australian and New South
Wales legislation. Gray in his 2010 analysis of the constitutionality of the Queensland
legislation treated as equivalent for constitutional issues New South Wales’
legislation, citing only minor variations (Gray, 2010, p. 213). In the South Australian
High Court case South Australia v Totani (Totani) there were a number of key
implications to note in terms of both similarities and differences when compared with
the Queensland Act. Procedural aspects in this case when taken in their totality
created an outcome that drew particular attention. For example, the South Australian
legislation empowered the Attorney-General (on application of the Commissioner of
Police) to declare an organisation a “criminal organisation” (Serious and Organised
Crime (Control) Act 2008 (SA), s 10(1) (Austl.). This declaration could be made if the Attorney-General was satisfied as outlined in s 10(3) of the Serious and Organised Crime (Control) Act 2008 (SA) (SOCCA) that identified the matters for consideration. Once an organisation is so identified as a criminal organisation then the court on receiving an application by the Commissioner of Police is compelled to make a control order against a person if the court is satisfied that they are a member of the identified criminal organisation. SOCCA s 14(5)(a) states that the control order can prohibit an individual’s association with persons, places, or things of specified classes and as a breach of a control order is punitive in nature it attracts a maximum penalty of 5 years imprisonment. It was held by the High Court that s 14(1) of the South Australian act was invalid and mentioned two key components: allowing the Magistrates Court to implement decisions of the executive incompatible with its federal judicial function; and a control order that did not consider past or future behaviour was “repugnant to the institutional integrity of the court” (South Australia v Totani (2010) 242 CLR 1, , 236) To examine this decision from a constitutional perspective and then as a result examine legislation we have to first look to the separation of judicial and legislative powers and from whence they draw their authority and delineation. This when examined along with associated case law will clarify the issues, their resolutions, and continuing tensions.

It is within Chapter III of the Constitution that we will first examine the embedded functionality, powers, and limitations that can be conferred by a state parliament to their respective supreme courts. While there is no strict separation of powers at the state level the supreme courts vested with federal jurisdiction, nevertheless, are subject to the separation of powers at the federal level. The commonwealth when vesting federal judicial power must, as a general rule must take the state courts as they find them (Le Mesurier v Connor (1929) 42 CLR 481). The High Court agreed that no separation of powers explicit at state level, however, the supreme courts in each state respectively exercise a conferred federal jurisdiction. This when conjoined with the requirement of the Federal Constitution prescribes a separation of powers at the state level thus proving its existence (including territories) (NAALAS v Bradley (2004) 78 ALJR 977). There are some general differences of opinion as to whether the separation of powers applies to all decisions made by the court or only those involving the exercise of federal jurisdiction. State constitutions do not establish or
delineate the separation of judicial power (Clarke, Keyzer, Stellios, & Trone, 2013, p. 1063). As such, it is within this nexus between separation at the federal level and its absence at the state level that enlivened discourse occurs. Separation of powers consideration is also present here. This discourse is an international one, with criminal sentencing existing in the US at the intersection of legislative, judicial and executive prerogatives (Mistretta v United States, 488 US 361 (1989)). If Chapter III requires that state courts not exercise particular powers, the parliaments of the States cannot confer those powers upon them, per Gaudron J (Kable v Director of Public Prosecutions NSW (1996) 189 CLR 51, 102).

The argument in Kable v Director of Public Prosecution (NSW) invoked federal jurisdiction when arguing inconsistency with the Australian Constitution. It is from this case that we derive the “Kable principle” (Elizabeth Southwood, 2011; Fiona Wheeler, 2005, p. 2; Gray, 2009, p. 29). Chapter III in particular s 71 of the Australian Constitution vests federal judicial powers with the supreme courts. In fact judicial review cannot be removed by the Commonwealth Parliament, as it is embedded in the Constitution (Australian Constitution, s 75(v)). Therefore, any privative clause in legislation that claims that something is judicially unreviewable, against the Hickman principle (R v Hickman; Ex parte Fox and Clinton (1945) 70 CLR 598), the High Court will read down and declare invalid (Plaintiff S157/2002 v Commonwealth of Australia [2003] HCA 2). Chapter III of the Constitution also for example prohibits the introduction of a law that would identify an individual as guilty of a crime because this too would breach the separation of judicial and legislative power (Nicholas v R [1998] HCA 9; Polyukhovich v Commonwealth (War Crimes Act Case) (1991) 172 CLR 501). Decisions in Kirk v Industrial Relations Commission of New South Wales (2010) 239 CLR 531and Wainohu v NSW (2011) 243 CLR 181 (Wainohu) according to Clarke et al “signal an extension and further development of the Kable principles” (Clarke, et al., 2013, p. 1097). The constitutional meaning of State Supreme Court was examined in Kirk which is also of particular interest here. The constitutional integrity of Australia’s integrated court system and the required characteristics and recognizable existence of a Supreme Court was also addressed in Forge v Australian Securities and Investments Commission (Anna Dziedzic, 2007, p. 129). Simply put, “…[it] is beyond the legislative power of a State so to alter the
constitutional character of its Supreme Court that it ceases to meet the constitutional description” (*Kirk v Industrial Relations Commission* (2010) HCA 1, 76).

The Kable principles were found inviolate in *Fardon v Attorney-General (Qld)* in which it was determined that the detention orders were compatible with federal judicial power and that there was a higher standard required than for Kable. It was further noted by the majority ruling of Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ that the intention of this act was to protect the community rather than punish the individual. Kirby J in dissent claimed the Act invalid and found it substantively punitive in nature citing principles of double jeopardy and retrospective punishment (*Fardon v Attorney-General (Qld)* [2004] HCA 46, 74, 180, 185). Kirby J further argued that the law was the antithesis of legal process and cautioned that this kind of legislation was promulgated in the 1930’s in Germany and that such a law unchecked would be extended to other categories of offender (*Fardon v Attorney-General (Qld)* [2004] HCA 46, 188-189). Appleby (2012) notes the shifting composition of the High Court and a reconceptualization of the *Kable* principle in terms of scope.

An important problem for the South Australian legislation in *Totani* is that it involves the government Minister and Police Commissioner in a judicial role when the process is examined holistically. Key aspects of the South Australian legislation is that it provided under section 8 for the declaration of an organisation, while an advertisement was required under section 9 there was not the requirement to notify directly the organisation in question. Most importantly while there were listed considerations the Attorney General was not required to provide any reasons or rationale for their decision and therefore was not judicially challengeable or as indicated earlier, judicially reviewable. This feature is not in either the Queensland or New South Wales legislation as they both utilise a judge who makes this determination based on criteria in the legislation on the identification of an organisation as criminal. According to Gray, this is a “significant improvement in terms of separation of powers and the Kable principle” as it is for the court’s discretion to determine a criminal organisation and the imposition of a control order (and not the executive as in the South Australian example) in the determination of the dangers posed by a criminal organisation and its members (Gray, 2010, p. 213). "… the 'trigger' for the court to act is an executive declaration of something akin to
criminal guilt, which is a task traditionally reserved for the judiciary … the declaration does not, however, create a norm or rule of conduct, and the court is therefore required to create such a norm, which is a traditionally executive or legislative task" (Elizabeth Southwood, 2011, p. 91).

There is another important question of definition and determination to be addressed and that is with regard to “criminal intelligence,” (Criminal Organisation Act 2009 (Qld), pt 6) particularly its categorisation and reviewability by a court. As Gray (2010, p. 220) notes, it is important whether or not evidence meets the definition of criminal intelligence and therefore not disclosed to the individual/organisation as per the legislation i.e. un-constitutional aspects of the South Australian legislation are not as visibly evident by comparison in the Queensland and New South Wales Acts. The result of this, however, is that when accepting criminal intelligence it is in a closed hearing and the ordinary rules of evidence are therefore not applicable. This causes some problem because in Russell v Russell (1976) 134 CLR 495, the court held that the Commonwealth could not require judges to sit in a closed court. If the court is to adjudicate disputes then how can one argue a case without representation (in real terms), which is effectively what the now unanimously upheld Queensland legislation does in Pompano (2013). This will be explored further, however, before we do, it is necessary to probe the various components in this judicial instrument in more detail.

Wainohu v New South Wales (2011) 243 CLR 181

To do this requires further examination of the arguments in Wainohu (2011), as per the High Court 6-1 decision in Wainohu the Crimes (Criminal Organisations Control) Act 2009 (NSW) (CCOCA) which was found to be invalid. As stated previously, this legislation distinguished itself from the South Australian legislation through the use of an “eligible judge” instead of a member of the executive the CCOCA. This was found to remain problematic in terms that s 13(2) did not require the eligible judge to provide reasons for their decision thus rendering the control order scheme incompatible with the independence and integrity of the Supreme Court of New South Wales (Rebecca Welsh, 2011, p. 260). It must be noted, however, that since that time the Act has been re-introduced, this time with judges giving reasons (Crimes (Criminal Organisations Control) Act 2012 (NSW), s 28). Could this indeed foreshadow yet another High Court challenge? If so, considering the recent High
Court result in *Pompano* it would appear that the legislation this time would probably be upheld. On the basis of this probability we now see a renewed confidence with the introduction in South Australia of the *Serious and Organised Crime (Control) (Declared Organisations) Amendment Bill 2013 (SA)*. The intention is as described by the Attorney General to align South Australia with other states (Attorney-General's Department, 2013).

The *Boilermakers Case* (1956) case is one whereby the making of a control order is not judicial but legislative in the fact that it was conferring/denying rights rather than determining a controversy. In this argument both the High Court and the Privy Council found that this offended Chapter III of the Constitution with a literal interpretation of the separation of powers doctrine. This case is the authority for the principle that non-judicial powers cannot be given to federal courts unless they are incidental to a judicial function or traditionally exercised (Rebecca Welsh, 2011, p. 261). While the use of judges in their personal capacity (as persona designata) has been a practice and exception to the decision in *Boilermakers*, this procedure was ratified and further clarified in *Grollo v Palmer* (1995). In this case judges as persona designata could perform non-judicial functions on two conditions:

1. A non-judicial function that is not incidental to the judicial powers, cannot be conferred upon a judge without their consent; and

2. No function can be conferred that is incompatible with:
   
   (a) the judge’s performance of their judicial powers or
   
   (b) the judiciary’s discharge of its responsibilities as an institution exercising judicial power.

The Grollo test has also been significantly applied in *Wilson v Minister for Aboriginal & Torres Strait Islanders Affairs* (1996). In *Nicholas v The Queen* (1998) Gaudron J described judicial power as encompassing the constitutional requirement of a fair trial in Chapter III while Brennan J denied the existence of such a right (Clarke, et al., 2013, p. 1277). According to Gray (2009, p. 292) there is no implied constitutional right to a fair trial as evidenced by the lack of majority support for this notion in the High Court. The notion of procedural fairness is an important point in *Pompano*. 

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While there is some debate this case exemplified the notion that the Constitution contains a due process limitation requiring that the federal judicial power act “to some minimum standard of judicial process… that the legislature cannot usurp judicial function by conferring judicial power on non-judicial bodies” (Clarke, et al., 2013, p. 1278). It is the line of demarcation that is proving elusive. Further in this case: courts impartiality in question when instructed by the legislature to exercise judicial power in a predetermined way (Brennan CJ at 188), in a manner inconsistent with its nature (Gummow J at 232), or “…required or authorised to proceed in a manner that does not ensure, inter alia, the right of a party to meet the case made against him or her” (Gaudron J at 208) (Clarke, et al., 2013, p. 1086). A mechanism that supports the High Court’s judicial independence and immunity to political pressure is through tenure (Harris v Caladine (1991) 172 CLR 84). The separation of powers in section 71 of the Constitution examined in Harris v Caladine (1991) whereby the Family Law Act 1975 (Cth) validity was questioned because it delegated power. The “chameleon principle” is that powers are to be exercised either judicially or non-judicially based on the type of body the power is given to for example in R v Hegarty where the question of whether a board was required to exercise judicial power of the Commonwealth (R v Hegarty; Ex parte City of Salisbury [1981] HCA 51).

The exclusivity of judicial character includes the most important feature of determination and punishment of criminal guilt by law in Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 (Denise Meyerson, 2008, p. 211). This being the case Chapter III precludes any law that attempts to vest any part of that function with the Commonwealth executive. “Every citizen is ‘ruled by law, and by the law alone’ and ‘may with us be punished for a breach of law, but he can be punished for nothing else”(Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1, 23). The principle of what is given by one law cannot be taken away by another applies so as to prohibit the court from ordering the release of a person, thus limiting its constitutionally vested power is ultra vires executive action.

In Bass v Permanent Trustee (1999) it was held essential that parties be given an opportunity to be able to challenge the evidence against them, if this is not provided then it fails the Nicholas test. This test is outlined by Gaudron J in Nicholas v R. that a court must not be required to proceed in a manner that does not ensure the following:
equality before the law

impartiality and the appearance of impartiality

the right of a party to meet the case made against him or her

the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and,

in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law.

(Nicholas v R [1998] HCA 9, 74)

Clarke (2013) the notion of procedural fairness or natural justice is a key judicial function and exercised based on Chapter III of the Constitution, the elements of which include impartiality, and opportunity to be heard, advance a case by evidence and argument that which is put against it. It has been demonstrated in case law that attempts by the legislature to influence a court to act contrary to these principles has resulted in the argument of non-judicial function. “Natural justice is not remote from the principle which inspires the theory of separation of powers” (Clarke, et al., 2013, p. 1087).

Assistant Commissioner Condon v Pompano Pty Ltd [2013] HCA 7

On March 14 of this year the High Court decided the Pompano Case. Precedent does not bind the High Court and this includes matters of a constitutional nature (Street v Queensland Bar Association (1989) 88 ALR 321). This also goes for individual judges; for example two of the judges that presided over Kable which struck down the legislation was then upheld in Fardon (Gray, 2005, p. 177). Reviewability by a court of a decision by a member of the Executive as being key in deciding the constitutionality of legislation in the recent High Court decisions (Gray, 2010, p. 218) see also (Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (2008) 234 CLR 532; K-Generation Pty Ltd v Liquor Licensing Court (2009) 237 CLR 501). Provisions of legislation were upheld in appeals as there was considered judicial reviewability involved in information designated as criminal intelligence. Such a determination also came as a surprise along with the most recent decision in Pompano
this year whereby all but one of the High Court judges also presided over Wainohu. While the author acknowledges there are significant differences between both legislative instruments as they are currently crafted couple with the fact that the High Court is not bound by previous decisions, it still however based and distinguished its judgement on the cases previously discussed; in particular Kable, International Finance, Totani and Wainohu. Many of the issues raised in these cases do not appear to have been thoroughly addressed in the court report available. It even goes to the extent to mention that some of these cases were not raised by the appellant; which the author finds of particular interest. All these matters increase the chances for further discourse and potential avenues for future challenges. While much has already been written it is clearly evident from the Pompano decision when situated against the case history timeline and current social context there is still more to come.

Also the author believes, in Part 6 and Part 7 of the COA, particularly with the criminal organisation public interest monitor (the COPIM), that notable mechanisms do not go far enough to allay concerns of Chapter III. There is still quite a significant degree of legislative direction provided to the judicial branch and while they describe these processes as novel do not find them repugnant, this time. Albeit, the author’s personal perspective would have thought a different result more likely, it appears that the High Court has concerned itself and been satisfied with a rather narrow prescriptive and administrative determination of legislative Chapter III compliance only. On further reflection, it is not entirely surprising as the High Court has not prohibited the use of preventative measures as we see in this case control order legislation (Criminal Code Act 1995 (Cth), div 104; Fardon v Attorney-General (Qld) [2004] HCA 46; McGarrity, 2012, p. 166; Thomas v Mowbray (2007) HCA 33). That a requirement is imposed by s 395 “evidence in other proceedings” of the Uniform Civil Procedure Rules 1999 (Qld) apply to Supreme Court applications under the COA is seen in Pompano. This kind of admissibility thus suspends the usual rules of evidence. eg. Hearsay evidence (Evidence Act 1995 (Cth), ch 3 pt 3.2 div 1).

Gray (2009) stated that the degree to which legislation is consistent with the right to due process and natural justice is of particular issue along with its compatibility with the Kable principle. The Queensland legislation could be argued to abrogate, treat non-existent, some well established (case law) judicial principles that have been discussed here in terms of due process and natural justice that has implied
constitutional protection. However, the High Court has disagreed stating that novel does not equate to unconstitutional.

There is, however, a view that Chapter III contains implied open justice along with the application of the rules of natural justice (Re Nolan; Ex parte Young (1990) 172 CLR 460, 498). In particular, procedural due process and whether through the discussion of the concept of judicial power there was included under the Australian Constitution a minimum standard of procedural fairness (Bateman, 2009). The debate around this notion and its associated meaning is key to whether one believes there are constitutional implications for Queensland's COA legislation or not.

The notion expressed in Wilson (1996) that judges must behave judicially and in Leeth v Commonwealth (1992) that Dean and Toohey JJ outlined “… it may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power … a fundamental principle which lies behind the concept of natural justice is not remote from the principle which inspires the theory of separation of powers” (Leeth v Commonwealth (1992) 174 CLR 455, 30). Even if the legislature may restrict a person’s freedom of association without a judicial determination of guilt, the fact that legislation operates in this way will be relevant in the overall evaluation of the legislation in determining the application of the Kable principle as in SA v Totani (2010). The European human rights court has stated “…not to assume guilt from association. There must be more than friendship or consorting with those who are believed to be involved in international terrorism” (Padmanabhan, 2009). This is also a notable point when considering the constitutionality of Part 3A Division 7 of the Crimes Act 1900 (NSW) (consorting provisions).

The importance of impartiality and non-partisanship are key to the legitimacy and reputation of the judicial branch and this reputation should not be usurped by political branches to “cloak” their activity (Mistretta v United States, 488 US 361 (1989), 88). The drafting of Commonwealth legislation has had to be mindful of the distinction between judicial and non-judicial functions so that they are assigned to an appropriate entity to address.
The High Court does provide comparison to Trade secrets as justification for its position with regard to the legislations "novel procedures" which it feels does not impair its function with regard to procedural fairness (Assistant Commissioner Condon v Pompano Pty Ltd [2013] HCA 7, 157). A key point with regard to the decision in Pompano concerns also the notion of the right to a fair trial and the range of views as to whether a particular circumstance is defined as fair. The case in Dietrich v The Queen (1992) is an important case where some implications for human rights from the constitution were identified by some members of the High Court. It is particularly interesting to note that according to Deane J that while strict interpretation of the law states a fair trial according to law this is nevertheless a judicial matter. He separates to a meta level of extraction the notion of fairness as it permeates legal rules, principles, and provides the foundational rationale to which common law adheres. As a principle, therefore, and on this argument made by Deane J it leads one to consider that juxtaposition of legislated law and fairness and that it is not always in concert. That being the case the law does not dictate fairness or by its nature is not automatically fair, that then leads the interpretation of fair to be entirely a judicial decision, and situated within a process that has been previously established in common law. At present we have witnessed the High Courts positioning of the issue of fairness so as to avoid “practical injustice” which in the opinion of the author has deviated and is not consistent with previous case law as has been evidenced in this paper. Indeed, this has lacked any clear articulation in the published proceedings save for the assertion of as much fairness according to the COA procedure is acceptable. However, it is the author's opinion that this appears to be a compromised position of principle that then invites the question of whether these kinds of decisions are an indication of things to come.

The judgement of Pompano (2013, para. 79) distinguished itself from International Finance (2009) in terms of proceedings ex parte. The issues associated with closed ex parte hearings have also been faced in the International community. Both the UK and Canada have legislation utilising special procedures and the use of special advocates to try to address human rights concerns as seen in Chahal v United Kingdom (1996). This however, has not always proved successful as seen in Charkaoui v Canada (Citizenship and Immigration) (2007). Another possible solution could require some representation akin perhaps to an amicus curiae (Allen v Sir Alfred McAlpine & Sons...
Australia does not have a bill of rights like America underpinning its Constitution save for the examples of ACT (*Human Rights Act 2004 (ACT)*)) and Victoria. Therefore, the need for the construction of meaning becomes even more relevant for our system of government as the drafters of the constitution believed human rights to best protected by the parliamentary process (McGarrity, 2012). “Rights can be declared upon construction of the Constitution, construction of a Statute, or by judicial development of the rules of the common law” (Clarke, et al., 2013, p. 1278). Control orders legislation is likened to pre-crime that embodies a trend towards integrating national security into criminal justice that encompasses both a temporal and geographical extension (McCulloch & Pickering, 2009, p. 628). Gray (2009) criticises the Control Acts as “… offensive to well-established principles of due process, natural justice, the *Kable* incompatibility principle, as well as freedom of association, as they are articulated in Australian constitutional law” (Gray, 2009, p. 305). Indeed, in Montesquieu's political anthropology he instructed politicians and judges to "cloak power" by locating the "robed power" [judges] at the centre of politics and conceal them behind juries and subtle reforms (Carrese, 2003, p. 3).

**Points specific to the Constitutionality of Part 3A Division 7 of the Crimes Act 1900 (NSW) – Consorting Provisions**

As stated previously while there is no equivalent in Australia to the Bill of Rights as per the United States that restricts the legislature encroaching on certain basic freedoms and rights (eg. freedom of speech, freedom of association, freedom of religion etc.) there, nevertheless, have been some freedoms that have been implied from the words of the constitution. The High Court has recognised that “there is an implied restriction on the legislative and executive power of the Commonwealth and of the States and Territories protecting freedom of communication on governmental and political matters” (Commonwealth of Australia, 1901, p. 10). This being said, it could be argued that the narrow list of defences cited in the *Crimes Act 1900 (NSW)* pt 3A div 7 s 93(y) do indeed negatively impact a human right of freedom of association. In fact, the small list of defences which also reverses the burden of proof could be considered a catch all, with an extremely broad legislative instrument that
extends well beyond its purpose and could extend significantly beyond the class of individual/activity it is intended for. For example, Charlie Foster the first person convicted under the NSW laws (Crimes Act 1900 (NSW), pt 3A div 7 s 93(x)) does not exactly fit the profile/class of individual for which this law was conceived. However, while consorting laws have existed for some time as seen in Ex parte Finney; Re Miller (1936) 53 WN (NSW) 190 he is the first person under the new law. It could also be suggested that the law goes further than is necessary to achieve its purpose, seen in Leask v Commonwealth (1996) 187 CLR 579 and whether existing laws already satisfy the same ends. Potentially this could be read in such a manner that the default position here is guilty until proven innocent. Similarly, it could also be viewed comparable to the previously discussed preventative detention mechanisms that have already been highlighted throughout. These ideas find support in the Law Reform Commission of Western Australia that stated consorting laws are inconsistent with the principles of criminal law and that it should not be a criminal offence to associate with particular people, whether or not they form part of a particular category/class (Steel, 2003, p. 567). Further, the Victorian Scrutiny of Acts and Regulations Committee similarly determined its problematic nature. Some of the reasons they gave for its abolition include: predication on guilt by association (against freedom of association); confers an undesirably wide power to charge individuals in the absence of a substantive offence; applies a reverse onus of proof in breach of modern legislative practice (in Victoria - this defence not available in NSW); may unfairly discriminate against certain already marginalised individuals; and is based on a logic counter to contemporary principles of jurisprudence and criminal justice (Steel, 2003, p. 601).

It is legislation of this nature that is usually political, driven by a perceived fear, reactionary and usually has not been sufficiently researched and assessed before implementation. However, fostering a culture of fear leads to more restrictions on freedom than are necessary or appropriate (McSherry, 2006, p. 237). Legislation of consorting and control orders are seen by governments as law enforcement tools to disrupt the structures and associations that enable criminal activity, however, they have proven dissonant with rule of law principles, the separation of powers doctrine, human rights, along with general criticisms of their breadth and effectiveness.
Pill's (2012) argument is that laws have sought to remove the mental element of the offence thus creating a strict liability implicitly inferring intention based on association. He then follows the logic to the inevitable conclusion that it criminalises the individual rather than the act, thus resulting in transformative conceptions of criminal justice which are of significant concern for civil liberties. Among developed nations, we in “Australia have become an outlier with our lack of enshrined civil liberties protections and this deficit has begun to show” (Pill, 2012, p. 23). Pill (2012) further believes that the Australian government’s power goes unchecked and that legislative overreach will continue while the temptation remains present. As far as civil liberties are concerned, consorting laws may represent a crossing of the Rubicon in law enforcement much similar to what Kirby J said in the Work Choices legislation case “Once a constitutional Rubicon such as this is crossed, there is rarely a going back” (New South Wales v Commonwealth [2006] HCA 52, 614; Stewart & Williams, 2007).

To address constitutional issues of this legislation in its most direct and narrow way it can, in this author’s view be considered unconstitutional in that it does not include consorting for the purpose of communication on governmental and political matters as a defence. The Lange Test (Lange v Australian Broadcasting Corporation (1997)) modified in Coleman v Power (2004) being the relevant authority. The two-stage test reads:

1st Limb: Does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect?

2nd Limb: If so, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the system of government prescribed by the Constitution?

“If the answer to the first question is yes and the second no, the law is invalid … and [this] has been used to challenge State legislation” (Gray, 2009, p. 303). Therefore, one could argue section 109 of the Constitution to the extent of the inconsistency. Another debateable constitutional matter to test is the existence of an implied freedom of movement and association as has been discussed in Kruger v Commonwealth (1997).
A significant body of case law indicates the level of support for the notion of natural justice. This includes the right for a defendant to challenge the evidence against them and that deviation from these characteristic judicial activities support Chapter III constitutional claims (*Thomas v Mowbray* (2007); *Bass v Permanent Trustee Co Ltd* (1999)). Therefore, legislation which empowers the legislature (Chapter II – Constitution) to make a determination of criminal guilt before punishment is an invalid “bill of attainer” or “bill of pains and penalties” (*Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *Polyukhovich v Commonwealth* (War Crimes Act Case) (1991) 172 CLR 501).

While the purpose of this paper has been to focus on the relevant constitutional matters associated with control orders and consorting legislation (expressed by Lynch (2009, p. 237) as a jurisprudence of control) it must be noted that a creeping culture of secrecy in terms of secret evidence and criminal intelligence that is subsequently manifested in a corresponding jurisprudence of secrecy is also of concern (Martin, 2012, p. 189). This normalisation perspective as identified in McGarrity's taxonomy is considered by Martin as highly relevant to the bikie control order laws, whereby, what were once seen as extraordinary measures (eg. counter terrorism laws) have normalised into the ordinary criminal law. Indeed, political rights and general civil liberties have been in historical decline in Australia for some time. Finally however, Martin does illuminate an anomaly in that in a jurisdiction that rests on the common law principle of open justice being the default then decisions in *Thomas v Mowbray* evidence formally the weakness of open justice as a constitutional value in Australia.

This law also brings to mind the ancient common law right to habeas corpus.

“Better that the future guilty go free than the future innocent be (further) incarcerated”

(Ricketts, 2002, p. 133)

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“Protection of the legal and constitutional rights of minorities in a representative democracy such as the Australian Commonwealth is sometimes unpopular. This is so whether it involves religious minorities, communists, illegal drug importers, applicants for refugee status, or persons accused of offences against anti-terrorist laws. Least of all is it popular in the case of prisoners convicted of violent sexual offences or offences against children. Yet it is in cases of such a kind that the rule of law is tested. As Latham CJ pointed out long ago, in claims for legal protection, normally, ‘the majority of the people can look after itself’: constitutional protections
only really become important in the case of ‘minorities, and, in particular, of unpopular minorities.’ It is in such cases that the adherence of this Court to established constitutional principle is truly tested, as it is in this case.”

(Kirby J at 143 in Fardon v Attorney-General (Qld) [2004] HCA 46)

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