Control orders and 'declared organisations'

Wainohu v New South Wales [2011] HCA 24; (2011) 278 ALR 1

Derek Wainohu (centre), former Sydney president of the Hells Angels Motorcycle Club, accompanied by colleagues, arrive for hearing at the Supreme Court. Photo: Brad Hunter /Newspix.

In *Wainohu*, the majority of the High Court declared invalid the *Crimes (Criminal Organisations and Control) Act 2009* (NSW), an act that enables the making of control orders affecting members of organisations declared to be criminal.

The legislation

The Act is intended to disrupt and restrict the activities of criminal organisations and their members. It provides for a two-step process for the making of control orders.

Part 2 of the Act governs the first step, involving the appointment of a judge of the Supreme Court as an 'eligible judge' by the attorney general. The commissioner of police may, by s 6(1) of the Act, apply to an eligible judge for a declaration that a particular organisation is a 'declared organisation' for the purposes of the Act. The application must set out the grounds on which the declaration is sought and the information supporting those grounds, and be verified by affidavit of the commissioner or senior police officers.

Section 9(1) of the Act provides that a judge may make a declaration if satisfied that 'members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity' and 'the organisation represents a risk to public safety and order.'

Such a declaration may, but need not, be made after hearing submissions from affected members of the organisation. Affected members may be excluded from those parts of the hearing that concern 'criminal intelligence' or 'protected submissions' by affected persons found to be in fear of reprisal for the making of the submissions.

By section 13(1) of the Act, the rules of evidence do not apply to the hearing of any application for a declaration. By section 13(2) of the Act, the eligible judge is not required to give grounds or reasons for the making of a declaration. The state did not dispute that the making of a declaration was an administrative act.

Part 3 of the Act governs the second step. Its operation

is contingent on the making of a declaration under Part 2. Part 3 confers jurisdiction on the Supreme Court to make control orders affecting members of declared organisations. Those made subject to a control order are restricted, by section 26, from associating with other members of the organisation also subject to control orders and are, by section 27, not authorised to carry on a number of regulated occupations or activities.

Declarations and (subject to a right of appeal to the Court of Appeal) control orders are covered by a broad privative clause restraining challenge in any proceedings before a court or administrative body (the effectiveness of which is limited by *Kirk v Industrial Court (NSW).* (2010) 239 CLR 531).

Challenge by Hells Angels member

Derek Wainohu has been a member of the Hells Angels Motorcycle Club in New South Wales for over 20 years.

On 6 July 2010, the acting commissioner of police for New South Wales applied to an eligible judge for a declaration in respect of the Hells Angels. The application was supported by an affidavit of a senior police officer and 35 volumes of material concerning the activities of 47 members of the Hells Angels, including Mr Wainohu.

Mr Wainohu challenged the validity of the Act on two relevant bases: first, that it confers functions on eligible judges which undermine the institutional integrity of the court in a manner incompatible with Chapter III of the Constitution of the Commonwealth; and second, that it infringes the freedom of political communication and association implied in the Constitution.

New South Wales defended the challenge and the other states and the Commonwealth intervened.

Invalidity – impairment of the institutional integrity of the Supreme Court

The majority in separate joint judgments held that the provisions were invalid because the appointment of Supreme Court judges to perform non-judicial functions as eligible judges was incompatible with the exercise of their judicial functions.

French CJ and Kiefel J observed that there was no prohibition on the performance by judicial officers of non-judicial functions. Judges are commonly and constitutionally appointed to perform administrative functions, the most readily identifiable of which included service on administrative tribunals and the issue of warrants to search or install surveillance devices.

Gummow, Hayne, Crennan and Bell JJ confirmed that the doctrine in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 was founded on the same constitutional principle as that governing the appointment of federal judges to non-judicial positions (as expressed in *Grollo v Palmer* (1995) 184 CLR 348 and *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1), namely, the protection of the institutional integrity of courts. Institutional integrity was described by French CJ and Keifel J as the court's possession of its 'defining characteristics', including independence, open justice and procedural fairness.

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The majority rejected a submission by the solicitor-general for Victoria that there were no limitations on the functions that the states can confer on their judges as *personae designatae*. French CJ and Kiefel J held that appointment of state judicial officers as *personae designatae* is subject to the limitation that the appointment must not substantially impair the institutional integrity of the court. A non-judicial appointment will impair a court's institutional integrity where it creates an impression that the independence of the judicial officer from the state executive government is compromised.

French CJ and Kiefel J made clear that the *Kable* doctrine precludes the enactment of any state law authorising a persona designata appointment that is incompatible with the exercise by the judge's court of the judicial power of the Commonwealth, including appointments that may impair the institutional integrity of the state court. This limitation holds regardless of whether the appointment of a judge as eligible judge is properly

to be described as a *persona designata* appointment or not.

For French CJ and Kiefel J, the proximity of an eligible judge's function in making a declaration to the Supreme Court's jurisdiction to make a control order was significant, as was the nature of the inquiry to be undertaken by the eligible judge in making a declaration decision. In that respect, the exclusion of the obligation to give reasons in s 13(2) of the Act was critical: section 9 requires the eligible judge to make complex and contested findings of fact as to whether the organisation was involved in criminal activity, and an evaluative judgment that the organisation presents a risk to public order and safety. It is unsatisfactory that these findings, which found the jurisdiction of the Supreme Court to make control orders with significant consequences to members of the designated organisation, should be left unexplained.

French CJ and Kiefel J concluded that the absence of a requirement to give reasons in s 13(2) divorces the exercise of the eligible judge's power to make declarations from the exercise of his or her judicial functions, while creating a perception that declaration decisions are to be made by a judge. The consequence of this is to affect public perceptions of the role of the court.

Gummow, Hayne, Crennan and Bell JJ, agreed that the appointment of eligible judges was of such a nature as to create a perception that the making of declarations would be exercised judicially, while s 13(2) conferred a function that was not judicial, producing as it did inscrutable decision making. The language of section 13(2) did not permit a construction that required an eligible judge to give reasons for a declaration decision, nor could it be read down to impose any requirement to give reasons. It was of no significance to the majority that an eligible judge may provide reasons for a declaration decision despite not being required to do so.

For those reasons, sections 13(2) and 9 of the Act were held to be invalid and with them, the practical operation of Part 2 and consequently Part 3. The majority observed that the legislation was potentially capable of being saved by amending s 13(2) to require the giving of reasons (subject, if necessary, to the protection of material of the nature of criminal intelligence).

Dissent

Heydon J's dissent dealt with the broader submissions on the invalidity of Part 2 put by Mr Wainohu. Significantly, his Honour rejected the contention that the absence of rules of evidence in hearings for declarations was a basis for invalidity, observing that many statutes modify the rules of evidence without infringing the *Kable* doctrine, and that judges commonly serve on administrative tribunals in which the rules of evidence do not apply. Further, his Honour rejected a contention that the combination of removal of the rules of evidence and the requirement to give reasons, together with restrictions on the disclosure of evidence, brought about invalidity.

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In relation to s 13(2), Heydon J agreed with the majority that there was no available construction that would impose a duty on an eligible judge to give reasons for a declaration. An attempt by the solicitor-general of New South Wales to concede that a duty existed in respect of contested applications was rejected.

Heydon J departed from the majority in taking into account the likely behavior of eligible judges when making declaration decisions. For his Honour, the fact that s 13(2) did not compel an eligible judge to withhold reasons, the availability of judicial review of declaration decisions, and the customs and traditions of judges, assembled to create a conclusion that reasons are likely to be given where the interests of justice require them. Invalidity should not follow upon

supposition of the extreme possibility that reasons for a contentious decision may not be given.

Heydon J also departed from the majority in holding that the making of a declaration did not fail the tests posed by the plurality in *Wilson*, because the making of a declaration is not a step in the process of the executive government, but rather a precursor to judicial processes in the form of control orders. Eligible judges are expressly not subject to the control of the attorney-general or another minister, and the discretion to make declarations is governed by prescribed statutory formulae rather than any political considerations, and subject to (qualified) obligations of procedural fairness. These factors brought about the conclusion that the absence of a duty to give reasons does not impair the independence or impartiality of eligible judges when making declaration decisions, particularly because a declaration does not itself affect the rights of organisation members. His Honour further questioned the utility of public confidence in the courts as a criterion of invalidity.

Finally, Heydon J accepted Victoria's submission that the *Kable* doctrine, concerned as it is with the separation of Commonwealth judicial power, does not apply to the conferral of functions on state judicial officers as personae designatae. His Honour was not satisfied that there was a reason for the doctrine to be extended to so apply.

Other submissions rejected

Gummow, Hayne, Crennan and Bell JJ (with whom French CJ and Keifel J agreed) rejected other arguments put by Mr Wainohu as to the invalidity of the Act.

First, the majority rejected the contention that Part 3 of the Act was independently invalid, holding that the conferral of jurisdiction on the Supreme Court to make control orders was subject to the usual incidents of the exercise of judicial power, and significantly, that the exercise of judicial power mandated the court's determination of whether there are 'sufficient grounds' for making the order by reference to the scope and purpose of the Act. Part 3 of the Act did not suffer the same defect as the South Australian provision invalidated in *South Australia v Totani* (2010) 242 CLR 1, in that the making of a control order was not directed by the making of a declaration by an eligible judge.

Heydon J also rejected the attack on Part 3 of the Act based on a contention that, by reason of the application for a control order being made on what was likely to be the same information as that before the eligible judge during the declaration application, the court was effectively 'directed' to the grant of an order. His Honour observed that there was nothing in the Act that prevented the subject of a control order application from expanding the material that is placed before the court, and otherwise agreed with the findings of the majority.

The court unanimously rejected the contention that the Act infringed the implied freedom of political communication and was thus beyond the legislative power of the state, because the Act was not directed at political communication or association, and sufficient protections were contained in the Act to enable control orders to be limited so as to preserve freedom of political communication or permit review of control orders that restricted political communication.

By Catherine Gleeson