

TERRORISTS AND BIKIES:

The Constitutional Licence for laws of control

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In just a few short years, Australian law has seen a burgeoning of pre-emptive controls on the liberty of certain individuals so as to prevent criminal activity. Starting with sex offenders around the turn of the century, more recently the net has widened so as to catch would-be terrorists and now also members of motorcycle clubs or 'bikie gangs'. Despite attempts to portray these Commonwealth, state and territory legislative developments as a contemporary extension of historical antecedents,¹ it is undeniable that so-called 'control orders' imposing specific restrictions on individuals, absent any prior criminal conviction, are an unprecedented phenomenon in Australia.²

The purpose of this article is twofold. First, I consider the role which incremental developments in the constitutional jurisprudence of the High Court have played in facilitating the emergence of such orders and argue that the Court has steadily cleared the way for greater experimentation by Australian legislatures in devising pre-crime schemes of this sort. Second, I examine the recent enactments of South Australia³ and New South Wales⁴ enabling the proscription of certain groups, which although publicly justified as measures to curb bikie-related violence could easily be employed against any organisation. Both schemes are clumsy amalgams of the preventative mechanisms of proscription and control orders featured in recent Commonwealth anti-terrorism legislation. The article concludes with a brief discussion of the recent South Australian Supreme Court decision⁵ which found the law in that jurisdiction to be unconstitutional. Far from being a major victory for civil liberties, I shall argue that the result, while not insignificant, is merely a setback for the advance of the preventative justice project in the longer term.

The new jurisprudence of 'Control'

In the mid-1990s High Court authority strongly suggested that the strict separation of judicial power under Chapter III of the Commonwealth Constitution ('the *Boilermakers* principle')⁶ limited the extent to which legislation could confer powers of detention upon the executive or the courts. Although the case of *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*⁷ upheld the executive detention of aliens under the *Migration Act 1958* (Cth), Brennan, Deane and Dawson JJ famously declared the significance of the separation of judicial power for the liberty of citizens as follows:

putting to one side exceptional cases,⁸ the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.⁹

The effect of this appeared to be twofold: first, involuntary detention is, subject to some exceptions, the domain of the judicial arm of government; and second, its use is restricted to punishment of persons found guilty of a criminal offence. The idea that the legislature could authorise a federal court to deprive citizens of their freedom on some other basis involving the application of non-judicial power was firmly rejected by their Honours as inconsistent with the insulation of Chapter III courts from the political arms of government by the *Constitution*.¹⁰

In *Kable v Director of Public Prosecutions (NSW)*¹¹ the Court struck down the *Community Protection Act 1994* (NSW) on the basis that it conferred upon the Supreme Court of that state a function which was incompatible with its occasional exercise of federal judicial power under section 77(iii) of the *Constitution*. Curiously, the Act applied in respect of only a specified individual against whom s 5(1) empowered the Supreme Court to make a detention order if satisfied on reasonable grounds that:

- (a) the person is more likely than not to commit a serious act of violence; and
- (b) it is appropriate, for the protection of a particular person or persons or the community generally, that the person be held in custody.

The majority of the High Court found that this scheme compromised the institutional integrity of the Supreme Court by making it appear an instrument of the executive's policy to maintain the imprisonment of the individual in question without recourse to ordinary legal processes.¹² This was offensive to the integrity of judicial power under the *Constitution*.¹³

While the use of the *Constitution's* separation of judicial power to invalidate a state Act was a surprising offshoot of the *Boilermakers* principle, *Kable* did not simply extend that principle to the states. The majority recognised that a State Court could still hold non-judicial powers — it just required these not be incompatible with judicial power.

In *Baker v R*, Kirby J lamented the fact that the course of later decisions had rendered *Kable* 'a constitutional guard-dog that would bark but once'.¹⁴ In his Honour's view, 'a principle of general operation was stated',¹⁵

REFERENCES

1. *Thomas v Mowbray* (2007) 233 CLR 307, 334 (Gleeson CJ), 347–8 (Gummow and Crennan JJ), 507 (Callinan J).
2. They are, however, directly influenced by the introduction of similar measures in the United Kingdom: Andrew Lynch, 'Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law' (2008) 8 *Oxford University Commonwealth Law Journal* 159.
3. *Serious and Organised Crime (Control) Act 2008*.
4. *Crimes (Criminal Organisations Control) Act 2009*.
5. *Totani v South Australia* [2009] SASC 301 (25 September 2009).
6. *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
7. *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.
8. An acknowledgment of instances referred to earlier in the reasons, such as quarantine, mental health and migration controls.
9. *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27.
10. *Ibid*.
11. *Kable v DPP (NSW)* (1996) 189 CLR 51.
12. *Kable v DPP (NSW)* (1996) 189 CLR 51, 98 (Toohey J); 106 (Gaudron J); 121 (McHugh J); 134 (Gummow J).
13. *Ibid* 103 (Gaudron J); 114 (McHugh J); 139 (Gummow J).
14. (2004) 223 CLR 513, 535. Just prior to his retirement, Kirby J appeared to accept this state of affairs: *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4, [256] (2 February 2009).
15. *Ibid* 536.

but later cases have stressed the narrow significance of the *Kable* decision for individual freedom. This became most apparent in the 2004 case of *Fardon v Attorney-General (Queensland)*,¹⁶ in which the court considered the validity of *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) granting the Supreme Court the power to make interim or continuing detention orders against a prisoner currently serving time for a serious sexual offence. A 6:1 majority of the Court found the law to be valid, assisted by the several procedural features which distinguished the Act from that which was challenged in *Kable* — not least of which being that it was of general application.

Crucially, 'the common and defining constitutional characteristic — that they imposed punishment for possible rather than proven criminal conduct'¹⁷ — was not seen by the *Fardon* majority as dictating the result through an application of *Kable*. Although the latter was preserved as a source of principle,¹⁸ it was effectively focused on issues of process rather than substance. On whether the central function conferred by the legislation was antithetical to judicial power, *Fardon* gave no clear answer. Although Justice McHugh found that 'when determining an application under the Act, the Supreme Court is exercising judicial power',¹⁹ and Justices Gummow and Kirby appeared to take the contrary position,²⁰ the remainder of the Court confined themselves to finding that the legislation did 'not confer functions which were incompatible with the proper discharge of judicial responsibilities or with the exercise of judicial power'²¹ — all that was required in order for the Act to stave off a challenge under the *Kable* principle.

In *Thomas v Mowbray*²² there was no avoiding this question, since Division 104 of the *Criminal Code Act 1995* (Cth) empowers the federal judiciary to issue control orders against individuals merely when satisfied on the balance of probabilities that this will 'substantially assist in the prevention of a terrorist act'.²³ A repetition of the fairly coy indications given by the majority in *Fardon* would clearly have been insufficient to decide the case.

The Chief Justice said:

The power to restrict or interfere with a person's liberty on the basis of what that person might do in the future, rather than on the basis of a judicial determination of what the person has done, which involves interfering with legal rights, and creating new legal obligations, rather than resolving a dispute about existing rights and obligations, is in truth a power that has been, and is, exercised by courts in a variety of circumstances.²⁴

These powers, while not distinctly judicial, may however take their character as such from their exercise by judicial bodies. His Honour found that control orders were within this class and gave examples of similar powers, such as bail and apprehended violence orders (AVOs), though he conceded that these 'analogies are not exact'.²⁵

While there is undoubtedly both a predictive and protective dimension to much judicial work, two fundamental characteristics of terrorism control orders

distinguish them from other preventative orders currently existing in Australia. First, as the orders are issued by federal courts, and the strict separation between judicial and non-judicial power must therefore be observed, their similarity to state orders such as AVOs can hardly be determinative. Second, Division 104 orders are available irrespective of whether the subject has already been found guilty of a crime (a feature of sex offender community protection orders) or is at least a party to court proceedings currently on foot (such as bail or injunctive relief under the *Family Law Act 1975* (Cth)).

The breadth of at least one of the two threshold tests for the making of a control order — that it would 'substantially assist in preventing a terrorist act' — is hard to square with the concept of judicial rather than executive power, no matter what legal technique may be developed around its exercise. In particular, as the Court itself admitted, it is not necessary for the subject to be even suspected of any terrorism-related activity.²⁶ If there is anything to be thankful for in the new legislation targeting bikies it is that the grounds for making a control order are at least dependent on the individual's alleged behaviour or status in some way.

Clearly, the High Court has come quite some way from the joint judgment in *Chu Kheng Lim*. Although the majority in *Thomas* distinguished the joint judgment in that case on the basis that their Honours had spoken only of 'detention in custody by the State',²⁷ it seems reasonable to suspect that the arrival of control orders in Australian law was simply beyond their imagining. No clear rationale has been given in the years since as to why we should be more accepting of major curtailments of individual liberty stopping just short of incarceration.

The very idea of judicial power affording protection to the individual has been steadily diminished by expansions of the judicial function to include measures which are generally protective of the community from the dangers presented by paedophiles, terrorists and now bikies. In *Thomas*, the Chief Justice argued that it is better for individual liberty if the judicial arm accepts a primary role in considering what may be necessary for the 'protection of the public'.²⁸ It might actually be more complex than that, but in pursuit of this logic the Court seemed little troubled by the *Boilermakers* doctrine. Therefore, the message sent by the High Court in *Thomas* was not just that federal judicial power is far more flexible and accommodating than perhaps previously thought, but that State Courts, constrained by that doctrine only via the apparently modest ambit of the *Kable* principle, may proceed to fulfil protective and preventative functions with increasingly unorthodox features. This has occurred without much attention to the extent which it is desirable to harness the judiciary to the preventative project and what ramifications this might have on the standing of this arm of government.

The state bikie laws

The focus of this section is to examine how state legislatures have responded to the judicial cues

16. (2004) 223 CLR 575.

17. Dan Meagher, 'The status of the *Kable* principle in Australian constitutional law' (2005) 16 PLR 173, 185.

18. (2004) 223 CLR 575, 591 (Gleeson CJ).

19. Ibid 596.

20. Ibid 610–14 (Gummow JJ); 633–35 (Kirby JJ).

21. Ibid 592 (Gleeson CJ).

22. (2007) 233 CLR 307.

23. *Criminal Code Act 1995* (Cth), s 104.4(1)(c)(i).

24. *Thomas v Mowbray* (2007) 233 CLR 307, 328.

25. Ibid 329. Other members of the majority, notably Gummow and Crennan JJ made similar arguments: above n 1.

26. Ibid 352 (Gummow and Crennan JJ).

27. Ibid 330 (Gleeson CJ); 356 (Gummow and Hayne JJ).

28. Ibid 329.

The crime of terrorising the Australian community has no equivalent among any other illegal activity and it trivialises the law's contribution to counter-terrorism to suggest that the same measures can be applied in other, lesser contexts.

considered above. In particular, I will explain key features and points of divergence between the *Crimes (Criminal Organisations Control) Act 2009* ('COCA') of New South Wales and South Australia's *Serious and Organised Crime (Control) Act 2008* ('SOCA'). In doing so, I hope to highlight the debt which both Acts owe to Divisions 102 and 104 of the Commonwealth *Criminal Code Act*, introduced earlier this decade in response to the 'war on terror'.

Use of that now discredited phrase serves to emphasise the very extreme context in which the Commonwealth provisions were enacted. When proscription and control orders were introduced by the Howard government, the justification for such a departure from traditional criminal justice processes focused on the need to prevent the potentially catastrophic consequences of terrorism. It has been perplexing to observe how easily such logic has been applied by state governments to the threat of bikies, despite the obvious fact that, even at its most extreme, gang violence cannot approximate the mass killings and destruction of modern terrorism. Quite simply, the case for an extension of these extraordinary measures to deal with 'serious crime' is insupportable. The crime of terrorising the Australian community has no equivalent among any other illegal activity and it trivialises the law's contribution to counter-terrorism to suggest that the same measures can be applied in other, lesser contexts.

In both states, the Commissioner of Police decides when to apply for an organisation to be listed.²⁹ The NSW Director of Public Prosecutions, Nicholas Cowdery, has queried the appropriateness of vesting this responsibility in an unelected official and warns that 'the spectre of a police state' lurks in such a law.³⁰ His fear is exacerbated, rather than allayed, by the use of 'eligible judges' in s 5 of the COCA to issue the declaration banning the organisation. An 'eligible judge' is not just a Supreme Court judge who consents to receive and determine applications, but is one whom the Attorney-General endorses as 'eligible'. The Attorney-General has the power to revoke his endorsement of a particular judge at any time.³¹ Of this arrangement, Cowdery has been blunt:

if an Attorney-General should so desire, he or she has unfettered power to 'stack' the hearing of applications for declarations of organisations under the Act with judges willing to enforce it and to revoke or qualify the authority of a judge to determine applications ... if he or she does not perform to the government's satisfaction.³²

This is a fair criticism, but it is hard to know whether the NSW approach is better or worse than South Australia where, in keeping with its close adherence to the Commonwealth's anti-terrorism laws, the Attorney-General personally makes the declaration to proscribe an organisation.³³

In both States,³⁴ the grounds for declaration are the same, being satisfaction that:

- (a) Members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and
- (b) The organisation represents a risk to public safety and order in the State.

In determining these elements, the judge (in NSW) or the Attorney-General (in SA) may have regard to information linking the organisation and serious criminal activity, convictions of current or former members of the organisation or its associates, public submissions and 'any other matter' considered relevant.³⁵ The decision-maker may be satisfied of (a) above:

- 'whether or not' all the members associate for that purpose or just some of them (who are significant in numbers or influence) do so;
- whether they associate for the same serious criminal activity or different — and possibly unrelated — activities; and
- whether they also associate for some other purpose such as social activity.³⁶

Despite its use of the judiciary, the COCA contains some striking departures from usual judicial practices. Influenced by the latitude the SA Attorney-General enjoys when making a similar declaration,³⁷ the NSW Parliament dispensed with both the rules of evidence and any requirement for reasons to accompany a declaration made by an eligible judge.³⁸ This reflects the priority placed on maintaining the secrecy of 'criminal intelligence'.³⁹

Just as the preservation of national security information has, admittedly with far greater justification, produced distortions to judicial process in terrorism-related court proceedings,⁴⁰ the bikie laws seek to defend police-gathered information at all costs. Consequently, section 28 of the COCA requires an eligible judge in declaration or control order proceedings to:

take steps to maintain the confidentiality of information that they consider to be properly classified by the Commissioner as criminal intelligence, including steps to

29. SOCA, s 8; COCA, s 6.

30. Nicholas Cowdery, 'Comments on Organisation/Association Legislation — "Bikie Gangs"', Sydney, May 2009, 2, <odpp.nsw.gov.au/speeches/speeches.html> at 28 October 2009.

31. COCA, s 5(6).

32. Cowdery, above n 30.

33. SOCA, s 10. See *Criminal Code Act 1995* (Cth), s 102.1.

34. SOCA, s 10(1); COCA, s 9(1).

35. SOCA, s 10(2); COCA, s 9(2).

36. SOCA, s 10(4); COCA, s 9(4).

37. SOCA, s 13(1).

38. COCA, s 13.

39. COCA, s 3(1).

40. Phillip Boulton, 'Preserving National Security in the Courtroom: A New Battleground' in Andrew Lynch, Edwina MacDonald & George Williams (eds), *Law and Liberty in the War on Terror* (2007), 96–103.

receive evidence and hear argument about the information in private in the absence of the parties, their legal representatives and the public.

The equivalent provision in the SOCA control order regime is section 21. Both sections are worded so as to expressly preserve the discretion of the Court to decide whether the information has been 'properly' classified by the Commissioner as 'criminal intelligence'.⁴¹ Thus, they avoid the ambiguity which provoked a constitutional challenge to section 28A of the *Liquor Licensing Act 1997* (SA), in *K-Generation Pty Ltd v Liquor Licensing Court*.⁴² The High Court saved that provision by inferring an ability on the part of the Court to determine the correct classification of the information.⁴³ Additionally, the Court found that although the requirement to 'take steps' to preserve the confidentiality of the intelligence was mandatory, the judge retained absolute discretion as to exactly what measures were appropriate to be taken.⁴⁴ The closing of the court to the affected parties and their legal representatives was found not to be directed by the legislation.

Once an organisation is listed, the focus switches to individuals. In SA crimes of association immediately apply once a person associates (which includes communicating by letter, telephone or facsimile or by email or other electronic means)⁴⁵ on not less than six occasions during a 12-month period with a member of a declared organisation, and he or she knew or was reckless as to the second person's membership status.⁴⁶ One may 'associate' on the necessary 'six occasions' by communicating or meeting just once with six different members.⁴⁷ The maximum penalty for this offence is five years jail. By contrast, NSW does not criminalise any association or activity as a consequence of the proscription of an organisation.

The laws of both states facilitate the making of control orders against an individual who is a 'member' of the declared organisation.⁴⁸ Section 14(1) of the SOCA provides that the Magistrates Court 'must' make an order against a person if satisfied he or she is a member of a declared organisation. The SOCA also enables an order to be made against an individual who engages in serious criminal activity but is not a member, so long as he or she 'regularly associates' with members.⁴⁹ In NSW membership is an essential requirement for the issue of an order, along with the existence of other 'sufficient grounds'.⁵⁰

In SA the effect of an order is to prohibit any subject who is still a member of a declared organisation from associating with other members and also possessing dangerous articles or weapons.⁵¹ Additionally, an order may prohibit the individual from associating or communicating with other people of a specific class, being in certain places or possessing specified things.⁵² This is rigorously prescriptive when contrasted to section 19(6) of the COCA which simply says the Supreme Court may 'make any consequential or ancillary orders it thinks fit'.

There are three direct consequences of the issue of a control order in NSW. Under section 26, it is an offence

for one controlled person to associate with another, with the onus being on the defendant to establish that he or she did not and could not reasonably have known of the other person's status. Additionally, section 27 cancels any licence or authority to run certain businesses, including casinos, security and car repairer businesses held by a controlled person. Lastly, section 26A was added to make it an offence for controlled members to recruit others to the organisation.

In SA, the only offence enlivened as a result of an order being issued is simply that of breaching the terms of the order.⁵³ Oddly, there is no similar offence in NSW (other than the specific prohibitions in sections 26 and 26A).

In SA, a control order may be issued without giving notice to any affected person.⁵⁴ Once the order is served on the individual, he or she is able to lodge an objection in the Magistrates Court, which may confirm, vary or revoke the order.⁵⁵ Appeal to the Supreme Court lies from this proceeding, requiring leave on a question of fact.⁵⁶ Crucially, aside from this, section 41 of the Act seeks to exclude review of the validity and legality of any other issues — including the original declaration by the Attorney-General and, in any related criminal proceedings, the making of a control order. Section 35 of the COCA is in similar terms, excluding review except as specifically provided for in the Act.

In NSW, an interim order may be made in the subject's absence with notice being served within 28 days of its making.⁵⁷ The interim control order ceases on the making of any final order,⁵⁸ which, in turn, persists until it is revoked. Leave to apply for revocation may only be granted if the Court is satisfied there has been a substantial change in the relevant circumstances since the order was made or last varied.⁵⁹ Section 24 recognises a right for either party to appeal a decision of the Supreme Court in respect of an order but the order remains in force while this occurs.

The Constitutional challenge to SOCA

Despite the course of judicial decisions accommodating successive incursions of preventative justice into Australian law, in September 2009 the Supreme Court of South Australia determined in the case of *Totani v South Australia*⁶⁰ that the power to issue control orders under section 14(1) of SOCA was constitutionally invalid under the *Kable* principle. The win by 'controlled' members of the Finks motorcycle club has been hailed as a victory for civil liberties,⁶¹ but as always the reality is rather more complex. In this section of the article, I aim to briefly describe the basis for the 2:1 judgment and explain why its limitations ensure that the preventative project will continue largely unabated.

Justice Bleby, with whom Kelly J concurred, devoted a substantial part of his judgment to a survey of the major cases since *Kable* to produce a list of 'eleven matters which, in themselves, will not amount to an impermissible impediment to the institutional integrity of a State Court'.⁶² This is stark evidence of just how high the bar has been set for an infringement of *Kable*. That may explain the reluctance of Bleby J to accept the principal submission of the plaintiffs that the procedure

41. *Totani v South Australia* [2009] SASC 301, [122] (Bleby J).

42. [2009] HCA 4 (2 February 2009).

43. *Ibid* [136], [143]–[144], [148] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). See also *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4 (7 February 2008), [33], Gummow, Hayne, Heydon and Kiefel JJ).

44. *Ibid* [146]–[147] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

45. SOCA, s 35(1)(a).

46. SOCA, s 35(1).

47. SOCA, s 35(5).

48. SOCA, s 14(1).

49. SOCA, s 14(2).

50. COCA, s 19(1).

51. SOCA, s 14(5)(b).

52. SOCA, s 14(5)(a).

53. SOCA, s 22.

54. SOCA, s 14(3).

55. SOCA, ss 17 and 18.

56. SOCA, s 19.

57. COCA, s 14.

58. COCA, s 17.

59. COCA, s 25(2).

60. *Totani v South Australia* [2009] SASC 301 (25 September 2009).

61. Australian Lawyers Alliance, 'Alliance welcomes decision re freedom of association in South Australia', Media Release, 25 September 2009.

62. *Totani v South Australia* [2009] SASC 301, [77].



under section 14(1) was toward a 'directed outcome' which, taken in combination with the special provisions for handling criminal intelligence under section 21, amounted to 'too close a connection either in actuality or appearance' between the judicial and legislative arms of government.⁶³ Justice Bleby identified a number of issues requiring judicial determination under section 14(1) and refused to read the law as compelling an *ex parte* hearing of the application.

His Honour went on to assess the legislation in its totality against the *Kable* principle. Describing the Attorney-General's power to proscribe an organisation under section 10 of SOCA to be an 'essential feature' of the Act,⁶⁴ Bleby J found that it operated to prevent the Court when making a control order from inquiring into 'the most factually complex matters that have to be established'⁶⁵ — that members of the organisation associate for a criminal purpose and that the entity represents a risk to public safety and order. Under section 41(2), the validity and legality of a declaration is expressly barred from being 'challenged or questioned in any proceedings', leading Bleby J to find that the Attorney-General's findings in making the declaration were 'unreviewable ... in effect, binding on the Court'.⁶⁶

Additionally, Bleby J considered the quality of the process underpinning the Attorney-General's decision. Not only was the absence of evidentiary rules worrying, but it was at this juncture that restrictions

on the use of criminal intelligence raised alarm.

The Attorney-General was entitled to rely on such information as the Commissioner provided, subject to an almost water-tight non-disclosure requirement.⁶⁷ The protections found in relation to use of such intelligence by courts in both *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*⁶⁸ and *K-Generation* had no relevance to the making of the declaration.

This led Bleby J to conclude that:

the process of depriving a person of their right to and freedom of association on pain of imprisonment for up to five years, although formally performed by a State court which exercises Federal jurisdiction, is in fact performed to a large extent by a member of the Executive Government in a manner which gives the appearance of being done by the Court. But the process is devoid of the fundamental protections which the law affords in the making of such an order, namely the right to have significant and possibly disputed factual issues determined by an independent and impartial judicial officer and the right to be informed of and to answer the case put against the person.⁶⁹

Justice Bleby declined to strike out the Attorney-General's power of proscription which 'by itself is a valid exercise of the legislative power of the State'.⁷⁰ Instead, it was section 14(1) which fell as requiring the

unacceptable grafting of non-judicial powers onto the judicial process in such a way that the outcome is controlled to a significant and unacceptable extent, by an arm of the Executive Government which destroys the Court's integrity as a repository of Federal jurisdiction.⁷¹

63. *Ibid* [129]–[131].

64. *Ibid* [144].

65. *Ibid* [154].

66. *Ibid* [155].

67. SOCA, s 13(2). Only a retired judicial officer reviewing the annual operation of the Act can access this information without the authorisation of the Commissioner.

68. [2008] HCA 4.

69. *Totani v South Australia* [2009 SASSC 301, [166].

70. *Ibid* [168].

71. *Ibid* [157].

The central ground on which White J dissented from this result was his belief that the Court could take into account a contrary conclusion it reached on the issues considered by the Attorney-General when declared an organisation. His Honour thought these might be applied by the Court when setting the conditions of a control order made under s 14(1). While that may be correct, it seems to strain the point to say that this means that when the Court is making a determination 'it is not bound by the conclusion of the Attorney-General' concerning those circumstances which give rise to the declaration.⁷²

Observers might be forgiven a feeling of *déjà vu*. After all, the Queensland Supreme Court applied *Kable* 2:1 to strike down the sex offender legislation in *Fardon* before the High Court reversed it on appeal. The result in *Totani* may prove rather more durable given the way in which Bleby J has stressed the interaction of SOCA's provisions as so seriously affecting the liberty of individuals. But predicting the response of the present High Court to the matter is a difficult exercise. As Bleby J's judgment makes clear, the tenor of the cases since *Kable* has been to discover virtues in legislation which might not be so apparent on a plain reading. And as the judgment of White J indicates, such a task is not impossible in this case.

Conclusion

Regardless of the judicial or legislative aftermath of the Supreme Court's finding in *Totani*, the tide is most unlikely to turn against the penchant of Australian governments for preventative measures such as control orders. NSW can probably be confident that its drafting of COCA avoids the extreme elements which rendered its SA counterpart vulnerable to the 'constitutional guard-dog' of the *Kable* doctrine. Nothing in *Totani* suggests that any deficiencies of process around the use of control orders cannot be remedied so as to comply with constitutional imperatives. The hope that the separation and quality of judicial power might, as a matter of principle, frustrate laws which harness courts to the preventative project of the State must be seen as well and truly dashed.

There is a certain irony in all this since, while the political class appears enamoured of such innovative measures, police are discernibly unenthusiastic about actually using them. Only one declaration was made in SA and to date none has been sought in NSW, despite the COCA having been rushed through Parliament with indecent haste. Similarly, the Commonwealth's terrorism control orders have been applied to only two individuals, both post-trial and with no order currently in force. Limited use of these laws highlights nothing but their unnecessary nature. Quite apart from their latent potential for misuse, they are highly corrosive of core legal values and incongruous in a liberal democratic state. The lack of stronger judicial resistance to these measures as they have unfolded in recent years is to be lamented.

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72. Ibid [198].