CASTLE OR CLUBHOUSE?
AUSTRALIAN ANTI FORTIFICATION LAWS

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As State and Territory Governments expand laws to attack organised crime, so too has there been a dilution of the rights of those pursued. One innovative area has been anti-fortification laws aimed at the clubhouses of Outlaw Motorcycle Gangs. What do these laws intend to achieve and at what price? The legislative scheme introduced in Western Australia may in part be a breach of the Constitution of Australia as being contrary to the principles established by the High Court in Kable's case.

In the last decade, Governments in Australia have introduced various laws to tackle groups and individuals associated with organised crime or acts of terrorism. In many cases, the laws have been regarded as exceptional powers to fight these types of illegal activities. In introducing these exceptional laws, the cost for those citizens the subject of such laws has often been a reduction in fundamental rights that apply to people the subject of investigation or trial in the criminal justice system, or a dilution of the fundamental rules of natural justice or procedural fairness.

The anti-fortification laws which have been passed in some States of Australia are a direct attack on criminal gangs or Outlaw Motorcycle Gangs and in particular, as to the premises that are owned or used by them, sometimes referred to as "clubhouses". In recent times, Western Australia, South Australia[1] and New South Wales[2] have passed such legislation. The legislation in South Australia and Western Australia has been the subject of a review by the highest Courts of Appeal in those two States.

This paper focuses on the judicial consideration of the anti-fortification legislation in Western Australia in light of action taken by the then Assistant Commissioner of the Western Australian Police concerning the Gypsy Jokers Motorcycle clubhouse in Perth, Western Australia. We present an overview of the litigation to date which is yet to draw to its conclusion.

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[1] As to the law in South Australia, see Part 16 of the Summary Offences Act 1953 and Osenkowski v Magistrates Court (SA) (2006) 96 SASR 456.

[2] As to the law in New South Wales, see Part 16A of the Law Enforcement (Powers and Responsibilities) Act 2002, commenced 15 December 2006.

1. Western Australia's Anti-Fortification Legislation

Western Australia's anti-fortification legislation is contained in the Corruption and Crime Commission Act 2003 ("the Act") which commenced on 1 January 2004. Previously, the proposed anti-fortification legislation had been included in the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 ("the Bill"). This Bill was introduced into State Parliament of Western Australia on 6 November 2001, but the provisions of the Bill were subsequently contained in the Act.

The State Attorney-General, the Honourable Mr Jim McGinty, in his second reading speech to the Western Australian Parliament concerning the Bill generally said the following:

> "This Bill targets organised crime. It will give Western Australia the toughest laws in Australia for combating the sinister and complex activities of criminal gangs.
>
> I make no apologies for this Government being tough on crime. We will not tolerate the violence and lawlessness associated with organised crime. This Bill specifically addresses the major problems identified by law enforcement authorities in investigating these crimes and bringing the perpetrators to justice.
>
> Our primary targets are drug traffickers, outlaw motorcycle gangs and others associated with organised crime. These people have a complete disregard for the law."[3]

When referring to the provisions regarding removal of fortifications, the State Attorney-General said the following:

[3] Western Australia, Parliamentary Debates, Legislative Assembly, 6th November 2001, 5038 (J McGinty, Attorney-General)

> "Members may be aware that premises owned or used by criminal gangs are often heavily fortified. The effect of this fortification is to prevent the police from obtaining access to these premises. The result is that investigations are hindered because searches cannot be conducted or cannot be conducted in a timely manner.
>
> These heavily fortified premises become a safe haven for organised criminals and their activities.
>
> In order to carry out successful investigations and obtain evidence the police must be able to obtain entry to these premises. The Government recognises that on occasion, this will require demolition of existing fortifications. The Bill sets out the process and circumstances on which these fortifications can be removed."

Part 4 Division 6 of the Act, comprising Sections 67-80, establishes a regime for the compulsory removal of fortifications from premises in certain circumstances. "Fortification" is defined in Section 67(1) of the Act as meaning "any structure or device that, whether alone or as part of a system, is designed to prevent or impede, or to provide any form of countermeasure against, uninvited entry to premises." Section 67(2) of the Act provides that "premises are heavily fortified if there are, at the premises, fortifications to an extent or of a nature that it would be reasonable to regard as excessive for premises of that kind."

Section 68 of the Act provides for the issue of a fortification warning notice by the Corruption and Crime Commission established under the Act ("the Commission") on application by the Commissioner of Police. The warning notice must contain an explanation of how a person who is an owner or interested person can make a submission to the Commissioner of Police that a fortification removal notice should not be issued.

Section 72(1) of the Act provides for the issue of a fortification removal notice by the Commissioner of Police after the expiry of the submission period (14 days). Section 72(2) provides that the Commissioner of Police cannot issue such a notice unless, after considering each submission, he or she reasonably believes that the premises are:

"(a) heavily fortified; and

(b) habitually used as a place of resort by members of a class of people a significant number of whom may reasonably be suspected to be involved in organised crime."

Section 75(1) of the Act provides, in broad terms, that if the fortifications at the premises are not removed or modified as required, the Commissioner of Police may cause the fortifications to be removed or modified to the extent required by the fortification removal notice. Section 75 of the Act also provides for the seizure and sale of fortifications and the forfeiture of the proceeds of sale to the State.

Section 76(1) of the Act confers a limited right of review of a decision of the Commissioner of Police to issue a fortification removal notice:

"(1) If a fortification removal notice relating to premises has been issued, the owner or an interested person may, within 7 days after the day on which the notice is given to the owner of the premises, apply to the Supreme Court for a review of whether, having regard to the submissions, if any, made before the submission period elapsed and any other information that the Commissioner of Police took into consideration, the Commissioner of Police could have reasonably had the belief required by section 72(2) when issuing the notice."

Section 76(2) of the Act provides that the Commissioner of Police may identify certain material as confidential in which case it is for the court's use only and cannot be disclosed to any other persons:

> "(2) The Commissioner of Police may identify any information provided to the court for the purposes of the review as confidential if its disclosure might prejudice the operations of the Commissioner of Police and information so identified is for the court's use only and is not to be disclosed to any other person, whether or not a party to the proceedings, or publicly disclosed in any way."

(Underlining added)

By Section 76(7) of the Act there is no right of appeal from the Supreme Court's decision on an application for review.

2. The Fortification Notices Issued Against the Gypsy Jokers Motorcycle Club Inc. Perth Chapter

The Gypsy Jokers Motorcycle Club Inc. ("the Club") is an incorporated association formed as defined in the Club's constitution for the purpose of fostering and promoting the enjoyment of motor cycling pursuits. Chapters of the Club exist in most States of Australia.

The Club is the registered proprietor of premises situated at 10 Lower Park Road, Maddington in the City of Gosnells, Western Australia ("the premises") which it uses as the Club's Perth clubhouse. The area where the clubhouse is situated is a light industrial area of east metropolitan Perth.

On 12 February 2004, the then Assistant Commissioner of Police for Western Australia, Mr Mel Hay, applied pursuant to s 68(1) of the Act to the Commission for the issue of a fortification warning notice in respect of the premises.

On 31 March 2004, the Commission heard the application and was satisfied that a fortification warning notice should be issued to the Club. A copy of the notice was served on the Club on 1 April 2004.

On 14 April 2004, the Club, through its solicitors, provided submissions to the then Assistant Commissioner of Police as to why a fortification removal notice should not be issued. The submissions included a videotape of the Clubhouse and a key to the front gate.

On 5 May 2004, the then Assistant Commissioner, acting as delegate of the Commissioner of Police, issued a fortification removal notice pursuant to Section 72(1) of the Act. That notice required the Club to remove and modify specified structures and fittings on the premises.

3. The Western Australian Legal Proceedings

By originating motion filed on 12 May 2004, the Club applied to the Supreme Court of Western Australia for a review of the Assistant Commissioner's removal notice under s 76(1) of the Act.

On 5 November 2004, Mr Hay swore an affidavit which identified and annexed materials which he had taken into account in making the decision to issue the notice. The affidavit identified a good deal of that information as confidential for the purpose of Section 76(2) of the Act. The Club was served with a copy of the affidavit in which the information identified as confidential had been edited out.

During the hearing of the application for review by the Club in the Supreme Court of Western Australia on 1 May 2006, Blaxell J decided that the following questions should be referred to the Court of Appeal of the Supreme Court of Western Australia under Section 43 of the *Supreme Court Act* 1935 (WA):

(a) Is Section 76 of the Act valid?

(b) In the alternative, is Section 76(2) of the Act valid?

The contention of the Club was that Section 76(2) was invalid. The Commissioner of Police contended in response that Section 76 was valid, but if Section 76(2) was invalid, then it could not be severed and the whole of Section 76 was invalid.

At the hearing before the Court of Appeal on 13 September 2006, a third question was also argued, namely whether the whole of Pt 4 Div 6 of the Act, dealing with fortifications, was invalid.

By majority in Gypsy Jokers Motorcycle Club Inc v Commissioner of Police [2007] WASCA 49 on 27 February 2007, Martin CJ, Steytler P with Wheeler JA dissenting found that the impugned provisions of the Act were valid.

Martin CJ considered that the critical question in the appeal was whether Section 76(2) of the Act compromises the institutional integrity of the Supreme Court of Western Australia to such an extent that it is no longer a Court of the kind contemplated by Chapter III of the Commonwealth Constitution and would not therefore be an appropriate repository of federal judicial power. If so, the legislation exceeds the legislative power of the Parliament of the State of Western Australia, as constrained by the Constitution. (See Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51).[4]

[4] Gypsy Jokers Motorcycle Club Inc v Commissioner of Police [2007] WASCA 49 at [4] per Martin CJ

It was the Applicant's argument that Section 76(2) of the Act had that effect in three ways:

1. It enabled one party to contested proceedings, namely the Commissioner of Police representing the Executive arm of government, to definitively determine the extent to which the other party, the Club, would be aware of the case which has to be met by it.

2. The effect of Section 76(2) of the Act might compel the denial of procedural fairness by the Court.

3. The effect of Section 76(2) of the Act might preclude the Court from giving adequate or comprehensible reasons for its decision in a context where there is no right of appeal.

Martin CJ in his decision reviewed similar legislative provisions that applied in Europe, New Zealand, Canada and the United States. The review of the various decisions led to Martin CJ concluding that Courts in those jurisdictions have not concluded that the right of a party to have unrestricted access to early information, on which a Court relies, is an essential or indisputable component of a fair trial.

Martin CJ further concluded that a legislative provision, apparently enacted in the protection of a legitimate public interest in maintaining the confidentiality of investigative information empowering a Court to act upon that information, even though it not be disclosed to a party to the proceedings, cannot, for that reason only, necessarily be said to be unfair and compromise the institutional integrity of the Court concerned.[5]

[5] Martin CJ at [58]

Martin CJ did not consider that Section 76 of the Act was unique and on the contrary, found that it was a recognised feature of legislation in the various jurisdictions which he had considered.[6]

Martin CJ further concluded that Section 76 of the Act should be construed as being consistent with the overriding and inherent obligation of a Court to do justice as between the parties to proceedings before it.

Steytler P in his judgement, gave a detailed analysis as to whether the so called "Kable principle" would apply in determining the validity of Section 76(2) of the Act.

In considering section 76 of the Act, Steytler P found the following:

> "In my opinion there are, in the present case, aspects of s 76 that are antithetical to the judicial process. It is unfair to give to one party to a controversy (that directly affects property rights) a power, effectively, to prevent evidence, relevant to and potentially decisive of the controversy, from being disclosed to the other party to that controversy. The unfairness of this process seems to me to be incontrovertible, no matter how well-intentioned the former party might be thought to be and even if (which is not suggested by either party) it might be implicit in the section that the Supreme Court is itself able to make some (necessarily limited) assessment as regards the question whether disclosure "might" in fact prejudice operations of the Commissioner and therefore whether confidentiality has properly been claimed. There is no doubt that s 76(2) has the potential to result in a serious denial of natural justice (as to which see ***Bennett & Co (a firm) v Director of Public Prosecultions (WA)*** (2005) 31 WAR 212 at 222). The situation is made worse by the inability of the court to publicly explain its decision by way of adequate reasons (as to which see ***Soulemezis v Dudley (Holdings) Pty Ltd*** (1987) 10 NSWLR 247 at 269,

[6] Martin CJ at [62]

278; ***Public Service Board (NSW) v Osmond*** (1986) 159 CLR 656 at 666-667) when its decision turns upon the confidential information, as it often will, and by the denial of any right of appeal. However (and notwithstanding what was said in the ***Re Criminal Proceeds Confiscation Act 2002***), these considerations, alone, seem to me to be insufficient to result in invalidity."[7]

Steytler P, although ultimately finding the provision of Section 76(2) of the Act to be valid, did consider that the Supreme Court's ability to conduct an effective review was limited by the Commissioner of Police's right to claim confidentiality, and hence to limit the extent to which the information relied upon by him should be disclosed, was a troubling feature of the legislation.[8]

Wheeler J in her dissenting judgement on the validity of Section 76(2) of the Act, found the following:

"The features which in combination have that effect are these. The Commissioner of Police, who is an officer of the Executive Government, decides conclusively what information the court may publish or disclose, both to a party to litigation and (in any reasons which may be published) to the public at large. That Executive decision, once made, has the potential significantly to disadvantage the individual litigant opposed to the Executive. The respondent to an application in the Supreme Court (the Commissioner of Police) is empowered conclusively to determine whether and to what extent information which that party makes available to the court can be disclosed to the opposing party. The court is required to make a determination affecting the property rights of a party in circumstances in which that party may have had no opportunity whatever to consider (even in a summarised or truncated way) the material put against it. Finally, the court's ability to provide intelligible reasons for its decision, or otherwise to perform its functions in that public way which is

[7] Steytler P at [106]
[8] Steytler P at [110]

generally the hallmark of justice is impaired or destroyed, because of the court's inability to disclose material which may be critical to its determination. It may be that no one of these factors individually would be sufficient. However, it seems to me that collectively they represent such a departure from the requirement of independence of the Executive and such a departure from that impartiality which is the hallmark of the judicial process, as the render of legislation invalid."[9]

4. The High Court of Australia Proceedings

Subsequent to the decision of the Court of Appeal, the Club filed an application for special leave in the High Court of Australia. The grounds of the application were the following:

(i) The Court of Appeal erred in finding that Sub-Section 76(2) of the Act was a valid exercise of the legislative power of the Parliament of Western Australia;

(ii) The Court of Appeal ought to have found that Sub-Section 76(2) of the Act is invalid on the ground that it infringes Chapter III of the Commonwealth Constitution.

The Application for special leave came on for hearing before a bench comprising Kirby JJ, Hayne JJ and Crennan JJ on 15 June 2007.

The submission on behalf of the Club in support of the application is best summarised in the opening statement made by Senior Counsel for the Club:

[9] Wheeler J at]159]

> "State legislation which purports to confer upon a State Supreme Court a function which substantially impairs its institutional integrity is incompatible with that Court's role as a suppository of Federal jurisdiction and is therefore invalid. This Court has not previously considered whether legislation which requires a State Supreme Court to act in a matter which has the potential to result in a serious denial of natural justice and is antithetical to the judicial process is incompatible with the institutional integrity of the State Courts required by Chapter III of the Constitution. It is submitted that this case therefore raises an important issue of constitutional principle, not merely an application of established principles to the facts of this case."

The High Court granted special leave and it is likely the matter will be heard by a full bench of the High Court of Australia in the latter part of 2007.

The ultimate decision of the High Court in relation to the challenged legislative provision will have far reaching effects on the future ability of State and Territory legislatures to legislate in a similar manner.