Outlaw Motorcycle Gangs and Secret Evidence: Reflections on the Use of Criminal Intelligence in the Control of Serious Organised Crime in Australia

Greg Martin*

Abstract

In *Assistant Commissioner Condon v Pompano Pty Ltd*, the High Court of Australia upheld the constitutional validity of provisions in Queensland's *Criminal Organisation Act 2009* (Qld) relating to criminal intelligence relied upon to make a declaration that an organisation is a criminal organisation. This is the latest in a line of cases where the High Court has endorsed the judicial use of criminal intelligence, but it is the first time it has ruled constitutionally valid state legislation for the control of criminal organisations. While the case might indicate issues to do with the use of secret criminal intelligence in Australia have finally been resolved, the article considers some important matters that remain contentious in this field of law in Australia and elsewhere, which are discussed under the following headings: special advocates in closed hearings; bill of rights and equality of arms; legal grey holes, deep secrets and pseudo-inquisitorial proceedings; rules of evidence and public interest immunity; judicialisation of intelligence; and representative and responsible government. Among other things, the article explores some of the ways that procedural unfairness might be mitigated when the use of secret evidence undermines due process of law.

* Senior Lecturer in Socio-Legal Studies, University of Sydney. I would like to thank the anonymous referees for their insights, and Steven Churches for his forensic feedback on earlier drafts of the article.

I Introduction

> The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law.[1]

Recently, the High Court of Australia has used the doctrine in *Kable v Director of Public Prosecutions (NSW)*[2] to rule constitutionally invalid state legislation providing for the control of criminal organisations. In *Kable*, the High Court identified the principle that:

> a State legislature cannot confer upon a State court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role, under Ch III of the *Constitution*, as a repository of federal jurisdiction and as a part of the integrated Australian court system.[3]

In *South Australia v Totani*,[4] a majority of the High Court applied the *Kable* principle, holding s 41(1) of the *Serious and Organised Crime (Control) Act 2008* (SA) invalid 'because it authorised the Executive to enlist the Magistrates Court to implement the decisions of the Executive in a manner repugnant to or inconsistent with its continued institutional integrity'.[5] In *Wainohu v New South Wales*[6], a majority of the High Court applied *Kable* to decide that the *Crimes (Criminal Organisations Control) Act 2009* (NSW) was invalid 'because it exempted eligible judges from any duty to give reasons in connection with the making or revocation of a declaration of an organisation as a declared organisation'.[7]

On 14 March 2013, for the first time, the High Court ruled constitutionally valid state legislation for the control of criminal organisations. In *Pompano*,[8] six justices of the High Court unanimously held provisions of the *Criminal Organisation Act 2009* (Qld) ('*CO Act*') relating to 'criminal intelligence' relied upon to declare a 'criminal organisation' do not impair the essential and defining characteristics of the Supreme Court of Queensland so as to transgress the limitations on state legislative power derived from Ch III of the *Australian Constitution*. However, rather than relying on the principle in *Kable*, as it had done in the earlier cases, in *Pompano* the High Court

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1 Walter V Schaefer, 'Federalism and State Criminal Procedure' (1956) 70 *Harvard Law Review* 1, 26.

2 *Kable v DPP (NSW)* (1996) 189 CLR 51 ('*Kable*').

3 *Wainohu v New South Wales* (2011) 243 CLR 181, 208 [44] (French CJ and Kiefel J) ('*Wainohu*').

4 *South Australia v Totani* (2010) 242 CLR 1.

5 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638, 676 [133] (Hayne, Crennan, Kiefel and Bell JJ) ('*Pompano*').

6 *Wainohu* (2011) 243 CLR 181.

7 *Pompano* (2013) 295 ALR 638, 676 [135] (Hayne, Crennan, Kiefel and Bell JJ).

8 *Pompano* (2013) 295 ALR 638.

followed its own 'jurisprudence of secrecy',[9] affirming the previous decisions of *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*[10] and *K-Generation Pty Ltd v Liquor Licensing Court*.[11] In those cases, the High Court endorsed the judicial use of criminal intelligence, which is a species of secret evidence; that is, material adduced in judicial proceedings, but not disclosed to an affected party or their legal representative.[12] The High Court resolved the tension between reliance upon criminal intelligence and fair trial principles in favour of secrecy, so long as courts retain discretion to independently assess classified information.[13]

Hence, *Pompano* is the latest in a line of judgments whereby the High Court of Australia has endorsed the use of secret criminal intelligence, which has finally come to maturity in the control of criminal organisations.[14] Accordingly, the line of reasoning through *Gypsy Jokers*, *K-Generation*, and now, *Pompano*, is that:

> evidence that formerly would not have been available to the affected party, pursuant to public interest immunity, on which basis it was not utilised by the court, may now still not be available to the affected party but *can* be used by the court.[15]

By finding that a superior court can make a declaration that particular information is criminal intelligence, and that to do so does not infringe upon its judicial function as a Ch III court, it has been observed that a doctrine of 'curial fairness' has emerged to replace the requirements of procedural fairness.[16]

Even though the decisions of the High Court in *Pompano*, *Gypsy Jokers* and *K-Generation* have established a precedent for the judicial use of secret evidence in Australia, this article argues some important and contentious issues remain, which may become pertinent in future. Indeed, as will be apparent over the course of the article, which has a sizable comparative content, many issues relating to criminal evidence and procedure register increasingly in an

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9 Greg Martin, 'Jurisprudence of Secrecy: *Wainohu* and Beyond' (2012) 14(2) *Flinders Law Journal* 189, 189.

10 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 ('*Gypsy Jokers*').

11 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 ('*K-Generation*').

12 Andrew Lynch, Tamara Tulich and Rebecca Welsh, 'Secrecy and Control Orders: The Role and Vulnerability of Constitutional Values in the United Kingdom and Australia' in David Cole, Federico Fabbrini and Arianna Vedaschi (eds), *Secrecy, National Security and the Vindication of Constitutional Law* (Edward Elgar Publishing, 2013) 156.

13 Ibid 168.

14 Greg Martin, '*Pompano* and the Short March to Curial Fairness' (2013) 38(2) *Alternative Law Journal* 118, 119.

15 Steven Churches, 'Paradise Lost: But the Station is Always There' (2010) 12(1) *Flinders Law Journal* 1, 20 (emphasis in original).

16 Ibid. See also Martin, above n 14.

international context, where, it is argued, there is some convergence of adversarial and inquisitorial systems, and the concomitant emergence of a common set of evidentiary principles (and problems) across the traditional common law/civil law divide.[17]

Previously, judicial decision-making and scholarly discussion about the control of criminal organisations in Australia have tended to focus on strict matters of constitutional law to the neglect of broader issues relating to the increased use of criminal intelligence.[18] However, this article adopts as a guiding principle the comment of the Independent Monitor of Australia's national security legislation, Bret Walker SC, that being constitutional — as the *CO Act* was found to be — does not, of itself, provide favourable answers to questions about the qualities of a law.[19] The focus of the article is on procedural fairness from the perspective of evidence and procedure, where the specific inquiry is directed at questioning whether a fair hearing is possible when information is kept from respondents, and they are thereby unable to defend themselves properly. While special advocates or security-cleared counsel may be appointed to mitigate any potential unfairness resulting in such circumstances, cross-jurisdictional experience suggests this is a limited means of providing fairness.

After setting out the High Court's reasoning in *Pompano*, the article considers some important, but by no means exhaustive, topics that may require further interrogation. These are discussed under the following headings: special advocates in closed hearings; bill of rights and equality of arms; legal grey holes, deep secrets and pseudo-inquisitorial proceedings; rules of evidence and public interest immunity; judicialisation of intelligence; and representative and responsible government. This is an area of the law in which 'seepage' of extraordinary legal measures from the counterterrorism context has occurred, such that there is a very real sense in which the 'war on terror' has morphed into a 'war on organised crime'.[20] In fact, in Australia, so-called 'outlaw motorcycle gangs', or 'bikies' as they are known colloquially — the intended target of criminal organisation

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17 John D Jackson and Sarah J Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge University Press, 2012).

18 Martin, above n 9. For a recent example, see Anthony Gray, 'Constitutionally Protected Due Process and the Use of Criminal Intelligence Provisions' (2014) 37 *University of New South Wales Law Journal* 125.

19 Bret Walker SC, *Independent National Security Legislation Monitor: Annual Report*, 16 December 2011, 61 <http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20111216.pdf >.

20 See Andrew Lynch, Nicola McGarrity and George Williams, 'The Emergence of a "Culture of Control"' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge, 2010) 4; Nicola McGarrity, 'From Terrorism to Bikies: Control Orders in Australia' (2012) 37(3) *Alternative Law Journal* 166; Lynch, Tulich and Welsh, above n 12, 167–8.

control laws — have been referred to as 'organised criminals' and labelled 'terrorists' who threaten community safety and national security.[21] Accordingly, the control order regimes directed at the curtailment of organised crime by bikie gangs introduced across a number of Australian states and territories ape Commonwealth anti-terrorism laws.[22] And that is why many of issues discussed below resonate with the counterterrorism and national security context where, it has been observed, a 'security versus due process' dynamic is as important as the theme of 'security versus liberty'.[23]

II The Reasoning in *Pompano*

On 1 June 2012, Assistant Commissioner Condon of the Queensland Police Service filed an application in the Supreme Court of Queensland under s 8 of the *CO Act*, seeking a declaration under s 10 that the Finks Motorcycle Club, Gold Coast Chapter and Pompano Pty Ltd, said to be 'part of' that Chapter (together 'the respondents'), constituted a criminal organisation ('the substantive application'). Pursuant to s 8(2)(d), the application provided supporting information that had been declared 'criminal intelligence' by the Supreme Court under s 72. Section 59 of the *CO Act* defines 'criminal intelligence' as information relating to actual or suspected criminal activity, the disclosure of which could reasonably be expected to:

> (a) prejudice a criminal investigation; or
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> (b) enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement; or
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> (c) endanger a person's life or physical safety.

As required by ss 66 and 70 of the *CO Act*, the Supreme Court considered the application to declare certain information criminal intelligence without notice to the respondents and in a 'special closed hearing'. A person appointed as a kind of statutory 'amicus curiae' under s 83 and designated as the criminal organisation public interest monitor ('COPIM') attended the hearing. That attendance was permitted by s 70. The COPIM made submissions. The Supreme Court made the declaration sought. All or part of the information that was the

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[21] Martin, above n 9, 210; see also George Morgan, Selda Dagistanli and Greg Martin, 'Global Fears, Local Anxiety: Policing, Counterterrorism and Moral Panic Over "Bikie Gang Wars" in New South Wales' (2010) 43(3) *The Australian and New Zealand Journal of Criminology* 580, 585.

[22] See, eg, McGarrity, above n 20, 166. Like federal counterterrorism laws, criminal organisation control legislation involves a two-stage process: first, to declare an organisation, which enlivens the second stage to issue a control order; although the organised crime legislation initially requires that there is a closed hearing to declare criminal intelligence.

[23] Adam Tomkins, 'National Security and the Due Process of Law' (2011) 64(1) *Current Legal Problems* 215, 215.

subject of the declaration, was relied upon in support of the grounds of the substantive application.

The respondents challenged the validity of certain provisions of the *CO Act* on the basis that they, or any of them, infringed Ch III of the *Australian Constitution*. The respondents' principal submission 'was that the institutional integrity of the Supreme Court is impaired because the *CO Act* permits the Court to receive and act upon material which must not be disclosed to a respondent to an application for a declaration or to any representative of the respondent'.[24] The central complaint of the respondents was 'that the impugned provisions of the *CO Act* deny procedural fairness to a respondent to an application for a declaration that it is a criminal organisation'.[25]

All members of the High Court made it clear that, under the relevant provisions of the *CO Act*, the role of the COPIM is not to represent and act in the interests of a respondent to a substantive application.[26] Hence, according to French CJ, any analogy between the COPIM and special advocates used in closed hearings in the United Kingdom ('UK') and Canada would be 'imperfect'[27] and 'very limited'.[28] However, notwithstanding the fact that 'the provisions of the *CO Act* relating to the COPIM adopt a fairly minimalist approach to the protection of the respondent's interests', his Honour stated, 'they are relevant to the effect of the impugned provisions of the *CO Act* on the ability of the Supreme Court to provide procedural fairness'.[29] Thus:

> in making submissions as to the appropriateness or validity of the application, the COPIM will be bound to do so by reference to the statutory criteria upon which the Supreme Court must act. The COPIM's submissions may also direct attention to any apprehended failure on the part of the applicant to comply with its duty of disclosure and may propose to the Supreme Court that a witness or witnesses should be called by the applicant or by the Supreme Court itself.[30]

While other members of the High Court recognised there were significant differences between the Supreme Court's discretion under s 72(1) to declare information criminal intelligence and determinations of public interest immunity at common law in the exercise of inherent powers,[31] French CJ thought the process of determining public interest

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24 *Pompano* (2013) 295 ALR 638, 667 [97] (Hayne, Crennan, Kiefel and Bell JJ).

25 Ibid 671 [111].

26 Ibid 671 [112] (Hayne, Crennan, Kiefel and Bell JJ), 655 [54], 662 [77] (French CJ), 693 [208] (Gageler J).

27 Ibid 654 [50] (French CJ).

28 Ibid 655 [54].

29 Ibid 658 [65].

30 Ibid 662 [77].

31 For example, in *Pompano* (2013) 295 ALR 638, 692 [204], Gageler J stated that the 'critical difference' between the Supreme Court's declaration of criminal intelligence under s 72(1) and public interest immunity determinations is that:

immunity claims in the exercise of the inherent powers of the Supreme Court sufficiently analogous to declaring criminal intelligence,[32] to conclude that, '[t]he provisions of Pt 6 relating to an application for a criminal intelligence declaration do not impair the essential and defining characteristics of the Supreme Court so as to transgress the limitations on State legislative power derived from Ch III of the *Constitution*'.[33] Ultimately, his Honour held that, in spite of the significant effect of pt 6 of the *CO Act* upon normal procedural fairness protections, 'the Supreme Court performs a recognisably judicial function in determining an application under that Part [and] is not able to be directed as to the outcome'.[34]

Hayne, Crennan, Kiefel and Bell JJ held that, '[w]here, as here, a novel procedure is said to deny procedural fairness, attention must be directed to questions of fairness and impartiality',[35] although because 'the Supreme Court can and will be expected to act fairly and impartially [that] points firmly against invalidity'.[36] Their Honours' reasoning proceeded in three parts. First, their Honours acknowledged the 'procedural unfairness'[37] of keeping criminal intelligence from the respondent, but said, 'it is not apparent how that unfairness could be cured by telling the respondent's lawyer that the applicant intends to rely on identified criminal intelligence'.[38] Second, any unfairness is remedied by the fact that 'fairness to a respondent is a matter to which the Supreme Court may have regard in deciding whether to declare information to be criminal intelligence'.[39] Third, their Honours considered the respondents' argument for invalidity based on the assertion that:

> in deciding any dispute a State Supreme Court *must always* follow an adversarial procedure by which parties (personally or by their representatives) know of *all* of the material on which the Court is being asked to make its decision.[40]

In response, Hayne, Crennan, Kiefel and Bell JJ held:

> the consequence of finding the balance in favour of making a declaration of criminal intelligence is not simply that the information is to be kept secret from a respondent but that the information may be deployed in secret against a respondent in a subsequent substantive application.

See also at 680 [152] (Hayne, Crennan, Kiefel and Bell JJ).

32 Ibid at 662 [78] (emphasis added). French CJ stated that, '[t]he process [of declaring criminal intelligence] is analogous *in some respects* to that used in the determination of public immunity claims in the exercise of the inherent power of the Supreme Court'.

33 Ibid.

34 Ibid.

35 Ibid 684 [169] (Hayne, Crennan, Kiefel and Bell JJ).

36 Ibid.

37 Ibid 682 [159].

38 Ibid 682 [160].

39 Ibid 683 [162].

40 Ibid 672 [118] (emphasis in original).

> Consideration of other judicial systems may be taken to demonstrate that it cannot be assumed that an adversarial system of adjudication is the only fair means of resolving disputes. But if an adversarial system is followed, that system assumes, as a general rule, that opposing parties will know *what* case an opposite party seeks to make and *how* that party seeks to make it. As the trade secrets cases show, however, the general rule is not absolute. There are circumstances in which competing interests compel some qualification to its application. And, if legislation provides for novel procedures which depart from the general rule described, the question is whether, taken as a whole, the court's procedures for resolving the dispute accord both parties procedural fairness and avoid 'practical injustice'.[41]

While recognising that '[i]t is not difficult to see how unfairness to a respondent might arise',[42] Gageler J opined, 's 72(1) would not be exercised to make a declaration in respect of information assessed at the time of the exercise of the discretion to be necessary to be disclosed for a respondent fairly to meet a substantive application'.[43] Agreeing with Hayne, Crennan, Kiefel and Bell JJ, Gageler J expressed the view that although 'Ch III of the *Constitution* mandates the observance of procedural fairness as an immutable characteristic of a Supreme Court and of every other court in Australia',[44] the content of procedural fairness is 'variable'.[45] Moreover, the object of procedural fairness or natural justice is the avoidance of 'practical injustice'.[46] However, Gageler J diverged from other members of the High Court by acknowledging that, '[t]he centrality of procedural fairness to institutional integrity is implicit in the description of the inherent jurisdiction of a superior court to *stay* proceedings on grounds of abuse of process'.[47] To Gageler J, the procedural problem posed in the case required a procedural solution, which his Honour held:

> lies in the capacity of the Supreme Court of Queensland to stay a substantive application in the exercise of its inherent jurisdiction in any case in which practical unfairness to a respondent becomes manifest. The criminal intelligence

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41 Ibid 682 [157] (emphasis in original).

42 Ibid 692 [202] (Gageler J).

43 Ibid 692 [204].

44 Ibid 686 [177].

45 Ibid. See also Hayne, Crennan, Kiefel and Bell JJ, for whom, '[t]he rules of procedural fairness do not have immutably fixed content': at 681 [156]; Steven Churches, 'How Closed Can a Court be and Still Remain a Common Law Court?' (2013) 20(3) *Australian Journal of Administrative Law* 117, 117, citing *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118 (Tucker LJ): '[t]he variable parameters of content to natural justice in an administrative context are a commonplace, but procedural fairness had been assumed as a sine qua non for judicial proceedings'.

46 *Pompano* (2013) 295 ALR 638, 688 [188] (Gageler J). See also at 681 [156] (Hayne, Crennan, Kiefel and Bell JJ).

47 Ibid 688, [187] (emphasis added). See also Churches, above n 45, 120.

> provisions are saved from incompatibility with Ch III of the *Constitution* only by the preservation of that capacity.[48]

III Special Advocates in Closed Hearings

With the decision in *Pompano*, it may seem the High Court has effectively resolved any issues to do with the use of secret evidence in Australia. However, a number of critical concerns and questions remain. The first relates to the use of special advocates, which was raised in *Pompano* specifically with respect to any analogy that may exist with the office of the COPIM. It will be recalled that the High Court determined any likeness was strictly limited, not least because '[t]he COPIM does not act as an advocate for a respondent'.[49] Moreover, the decision of the UK Supreme Court in *Al Rawi v Security Service*[50] was distinguished in *Pompano* partly because *Al Rawi* involved the use of special advocates.[51] Indeed, the decision in *Pompano*, being an application of the precedent established in *K-Generation*, reinforces a key difference between UK and Australian jurisprudence of secrecy.[52] In the UK, natural justice operates 'as traditionally understood: allegations and evidence against a party to be disclosed to that party';[53] while, in Australia, courts can 'hear evidence on an ex parte basis'.[54] Hence, it has been argued that in *K-Generation* the majority decided, 'natural justice was adequate in a form in which the affected party had no notice of the allegation or evidence against him, but a judge did have that knowledge, and could thus safeguard the affected party's interest'.[55]

By contrast, in *Al Rawi (SC)*, the UK Supreme Court not only held a 'closed material procedure' ('CMP') involves a departure from the principles of both open justice and natural justice,[56] but also that, in

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48 *Pompano* (2013) 295 ALR 638, 694 [212].

49 Ibid 693 [208]. See also 655 [54], 662 [77] (French CJ), 671 [112] (Hayne, Crennan, Kiefel and Bell JJ). The *Crimes (Criminal Organisations Control) Act 2012* (NSW) similarly provides for the appointment of a 'criminal intelligence monitor', who will be 'a retired judicial officer, or a person qualified to be appointed as a judicial officer' (s 28C). However, like the function of the COPIM under the Queensland legislation, the criminal intelligence monitor's role is not to represent or advocate for respondents. Accordingly, the NSW Act provides that, 'the monitor must not make a submission to the Court while a respondent or a legal representative of a respondent is present' (s 28F(3)), and that, in its discretion, the Supreme Court of NSW may 'exclude the monitor from the hearing while a respondent or a legal representative of a respondent is present' (s 28F(4)).

50 *Al Rawi v Security Service* [2012] 1 AC 531 ('*Al Rawi (SC)*').

51 *Pompano* (2013) 295 ALR 638, 654 [50] (French CJ).

52 Martin, above n 9.

53 Steven Churches, 'The Silent Death of Common Law Rights' (2013) 20(2) *Australian Journal of Administrative Law* 64, 68.

54 Ibid.

55 Ibid 66.

56 *Al Rawi (SC)* [2012] 1 AC 531, 542 [14] (Lord Dyson).

the absence of statutory authority, the court had no inherent power to order a CMP.[57] Previously, the Court of Appeal delivered a judgment that, according to Tomkins, 'read more like a statement of first principles than an essay in the analysis of precedent',[58] holding that 'an aspect of the cardinal requirement that the trial process be fair' is the principle that, '[u]nder the common law, a trial is conducted on the basis that each party and his lawyer, sees and hears all the evidence and all the argument seen and heard by the court'.[59] The Court of Appeal in *Al Rawi (CA)* also considered statutory sources permitting the use of closed material and special advocates as 'encroachments into these principles'.[60]

In *Pompano*, it was for the High Court to determine not the scope of the inherent power of the Supreme Court of Queensland, but 'constitutional questions about the statutory procedure',[61] or 'the radically different question of the ambit of legislative power'.[62] In contrast to the decision in *Al Rawi (SC)*, the High Court in *Pompano* held that the exercise by the Supreme Court of the statutory authority to hold a special closed hearing (s 70) and declare criminal intelligence (s 72) — both of which involve the very real prospect of unfairness to respondents — does not impair the defining and essential characteristics of the Supreme Court or its continued institutional integrity under Ch III of the *Australian Constitution*.

It has been argued this amounts to a situation whereby Australia is now out of step with recent decisions in the UK, Canada and the United States ('US') because 'in the absence of a Bill of Rights requirement, Australian courts can be legislatively ordered to delete natural justice hearing requirements from their repertoire, to be replaced by curial administration of fairness'.[63] However, if we look more closely at the UK situation, for example, we see it is a little more complex. The position in the UK was initially impacted by the decision in *A v United Kingdom*, where, having regard to art 6 of the *European Convention on Human Rights* (right to a fair trial),[64] the European Court of Human Rights held that parties to legal proceedings need be provided with 'sufficient information about the allegations against them' so as to give 'effective instructions in relation to those allegations'.[65]

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57 Ibid 552 [59].

58 Tomkins, above n 23, 248.

59 *Al Rawi v Security Service* [2010] 4 All ER 559, 564 [14] (Neuberger MR) ('*Al Rawi (CA)*').

60 Ibid 567 [27].

61 *Pompano* (2013) 295 ALR 638, 654 [49] (French CJ).

62 Ibid 685 [170] (Hayne, Crennan, Kiefel and Bell JJ).

63 Churches, above n 15, 3. See also Churches, above n 53, 68.

64 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('ECHR').

65 *A v United Kingdom* [2009] II Eur Court HR 137, 234 [220].

That decision was followed by the House of Lords in *Secretary of State for the Home Department v AF*,[66] where it was held unanimously that even where statutory authority exists for CMPs, a person must be given sufficient information about the allegations against them;[67] although that 'gisting' requirement is restricted to cases where a person's liberty is affected, and does not extend, for instance, to cases where a person's livelihood is involved.[68] It should be noted that *AF (No 3)* was preceded by *Secretary of State for the Home Department v MB*,[69] which raised the issue of the compatibility of art 6 with the special advocate procedure under the *Prevention of Terrorism Act 2005* (UK). The ratio in *AF (No 3)* flows from Lord Bingham's speech in *MB*, which regarded art 6 as importing a 'core, irreducible minimum of procedural protection' that cannot be satisfied if the case against an affected party contains closed material.[70] To satisfy art 6 requirements, Lord Bingham held that a person potentially subject to a control order must be told the 'gist' or 'essence' of the case against him. However, in his Lordship's view, *MB* was 'confronted with a bare, unsubstantiated assertion which he could do no more than deny'.[71] Thus, according to Lord Bingham, while the presence of 'special advocates enhanced the measure of procedural justice available to controlled persons, it could not remedy that fundamental defect in the hearing'.[72]

More recently, in the case of *Bank Mellat v HM Treasury*, Lord Neuberger MR added what Tomkins sees as 'an important gloss to *AF*',[73] holding that information given by the UK Government must not merely enable a party to deny the case against it, but the party must be provided with 'sufficient information to enable it actually to refute, insofar as that is possible, the case made out against it'.[74] Notwithstanding the hard fought advances to preserve a core 'irreducible minimum'[75] of procedural fairness in the law of national security, Tomkins argues, the situation in the UK 'remains precarious'.[76] For him, contemporary views expressed by the UK Parliament's Joint Committee on Human Rights, the Court of Appeal

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66 *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 ('*AF (No 3)*').

67 Rebecca Scott Bray, 'Executive Impunity and Parallel Justice? The United Kingdom Debate on Secret Inquests and Inquiries' (2012) 19(1) *Journal of Law and Medicine* 569, 592.

68 *Home Office v Tariq* [2012] 1 AC 452.

69 *Secretary of State for the Home Department v MB* [2008] 1 AC 440 ('*MB*').

70 Aileen Kavanagh, 'Special Advocates, Control Orders and the Right to a Fair Trial' (2010) 73(5) *Modern Law Review* 824, 839.

71 *MB* [2008] 1 AC 440, 481 [41] (Lord Bingham).

72 Kavanagh, above n 70, 839.

73 Tomkins, above n 23, 219.

74 *Bank Mellat v HM Treasury* [2012] QB 91, 99 [21] (Lord Neuberger MR) ('*Bank Mellat*').

75 Ibid 99 [18].

76 Tomkins, above n 23, 251.

of England and Wales, and the European Court of Justice about the indispensability of procedural fairness in national security and the due process of law are evidence that 'grave concerns as to the fairness of closed material exist at the very highest levels both of law and of politics and that these concerns are only partly tempered by the use of special advocates'.[77]

Precisely that concern was expressed by the UK Supreme Court in the final instalment of *Bank Mellat*, where a 6:3 majority of the Court ruled that it had the power to go into secret session, and a 5:4 majority decided to exercise that power.[78] As it happened, the Court found unanimously that there was no need to do so, with Lord Hope accusing the Government not only of over-using the CMP, but also of misusing it, 'because they invited the court to look at the closed judgment when there was nothing in it that could not have been gathered equally well from a careful scrutiny of the open judgment'.[79] His Lordship added that the 'experience should serve as a warning that the State will need to be much more forthcoming if an invitation to this court to look at closed material were to be repeated in the future'.[80] Delivering the majority judgment, Lord Neuberger (now President of the UK Supreme Court) held that:

> an appellate court should, of course, only be asked to conduct a closed hearing if it is strictly necessary for fairly determining the appeal[, that] the initiation of a closed material procedure … should be avoided if at all possible[, and that] the court itself is under a duty to avoid a closed material procedure if that can be achieved.[81]

In Australia, no *AF*-style 'gisting' requirement exists; though the majority judgment in *Pompano* motions towards something resembling it (albeit only very vaguely). Thus, since the criminal intelligence provisions of the *CO Act*:

> deny a respondent knowledge of *how* the Commissioner seeks to prove an allegation; they do not deny the respondent knowledge of *what* is the allegation that is made against it … a respondent to an application for a declaration of an organisation as a criminal organisation, its representatives and those who are alleged to be its members will know from the application the case that the Commissioner seeks to make.[82]

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77 Ibid 223.

78 *Bank Mellat v HM Treasury (No 2)* [2013] 3 WLR 179, 210 ('*Bank Mellat (No 2)*'). See also Owen Bowcott, 'UK supreme court goes into secret session for first time', *The Guardian* (online), 21 March 2013 <http://www.guardian.co.uk/law/2013/mar/21/uk-supreme-court-secret-session>.

79 *Bank Mellat (No 2)* [2013] 3 WLR 179, 210 [100] (Lord Hope).

80 Ibid.

81 Ibid 203 [70] (Lord Neuberger PSC).

82 *Pompano* (2013) 295 ALR 638, 683 [163] (Hayne, Crennan, Kiefel and Bell JJ) (emphasis in original).

In that application, the Commissioner must show that some or all of the organisation's members engage in, or conspire to engage in, serious criminal activity, and therefore will need to provide particulars of that activity, particulars of those who are alleged to have engaged in the activity, and evidence of whether persons engaged in the activity are alleged to be or have been members of the organisation.[83] Previous prosecution and conviction of members for conduct constituting the kind of activity alleged could be relied upon by the Commissioner as proof of involvement in criminal activity, and, to the extent it is, their Honours held, 'the respondent can dispute the conclusions which the Commissioner seeks to draw from those facts'.[84] Moreover, the majority stated:

> to the extent that prior criminal activity is not established by proving the prior convictions of persons shown to have been members of the organisation at relevant times, the respondent, its members and its representatives would know that the case to be met is founded on assertions and allegations not yet made and established in a court.[85]

Such would be the case if criminal intelligence — declared at an earlier closed hearing — was relied upon by the Commissioner in an application to declare an organisation a criminal organisation. It is here where any gesture towards 'gisting' disappears from view, and faith is placed in the Supreme Court. The Supreme Court, knowing 'evidence of those assertions and allegations that constituted criminal intelligence had not been and could not be challenged directly',[86] and that 'the respondent and its members could go no further than make general denials of any wrongdoing of the kind alleged',[87] is required to 'take account of the fact that a respondent cannot controvert criminal intelligence'.[88] In other words, the impugned provisions of the *CO Act* do not detract from the Court's 'capacity to act fairly and impartially'.[89]

Even if Australia had a special advocate system, it is doubtful that this alone would provide a sufficient and effective means of protecting fairness. Commentary on special counsel/advocates in Canada, and in the UK especially, is critical of those systems for ultimately denying fairness to defendants. For instance, Tomkins identifies three particular problems making the exercise of the functions of special advocates 'extremely difficult in practice'.[90] First, 'special advocates have no ability in practice to adduce evidence to

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83 Ibid.
84 Ibid 683 [165].
85 Ibid.
86 Ibid 684 [166].
87 Ibid.
88 Ibid 684 [167].
89 Ibid.
90 Tomkins, above n 23, 217.

rebut allegations made in the closed material'.[91] Second, 'special advocates struggle to find ways of mounting effective challenges to government objections to disclosure of material'.[92] Third, 'special advocates are gravely hampered by the rules which severely restrict communications between the special advocate and the party they "represent" once the closed material has been served'.[93]

By contrast, Roach notes that a key feature of the Canadian model is that it allows 'counsel to have contact with the affected person after counsel has reviewed the closed or secret evidence without anything but self-imposed restrictions on the risk of inadvertent disclosure of secret information'.[94] Consequently, special counsel in Canada are able to make effective adversarial challenges to secret evidence, and Canadian judges have actually become aware of the dangers of government overclaiming secrecy and national security partly as a result of effective challenges by special counsel who have access to secret material.[95] Having said that, special counsel in Canada are restricted by being unable to call witnesses, seek further disclosure, and contact a detainee and others after seeing secret evidence.[96]

In Australia, Whealy J in *R v Lodhi* raised the prospect of appointing special advocates to represent the interests of defendants and assist courts in determining national security claims.[97] More recently, his Honour chaired the Council of Australian Governments ('COAG') Committee charged with reviewing federal counterterrorism legislation, which, among other things, provides for the issuance of control orders. Two of the Committee's recommendations are significant for the purpose of the present discussion insofar as they seek to protect the right to a fair trial.

First, the Committee recommended that the Federal Government consider amending the *Criminal Code* (Cth) to provide for the introduction of a national system of special advocates to participate in control order hearings. The Committee recognised that defence lawyers 'dislike the notion of a security clearance and the personal intrusion it entails',[98] and also noted that 'the intelligence agencies and the Government wish to restrict disclosure of that information as much as

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91 Ibid.

92 Ibid 217–18.

93 Ibid 218. See also Kavanagh, above n 70, 838.

94 Kent Roach, 'Secret Evidence and its Alternatives' in Aniceto Masferrer (ed), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer, 2012) 186.

95 Ibid 188.

96 Ibid 189.

97 *R v Lodhi* (2006) 163 A Crim R 475. See also Anthony G Whealy, 'Difficulty in Obtaining a Fair Trial in Terrorism Cases' (2007) 81(9) *Australian Law Journal* 743, 750.

98 Council of Australian Governments ('COAG'), *Review of Counter-Terrorism Legislation* (2013), 60 [237] <http://www.coagctreview.gov.au/Report/Documents/Final%20Report.PDF>.

possible and consistently with its obligations to other countries'.[99] However, it nevertheless stated that, 'an appropriate moderate compromise is the use of the Special Advocates system'.[100] Such a system, the Committee said, could enable states and territories to have a panel of security-cleared barristers and solicitors who may participate in CMPs, including, but not limited to, matters involving control orders.[101] Moreover, a special advocate system is preferable to a national system of public interest monitors, which, the Committee thought 'would be a more difficult, less effective, and more expensive system to implement on a practical level'.[102]

Second, the Committee recommended that the legislation provide a minimum standard of disclosure of information to controlees. This protection is quite separate from the recommendation for a nationwide special advocate system, because it is intended to enable a person and his or her 'ordinary legal representative of choice' to insist upon a minimum level of disclosure to them.[103] The Committee recommended the minimum standard as: '*the applicant must be given sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations*'.[104] Essentially, this is a recommendation that an *AF*-style 'gisting' requirement be introduced in cases involving control orders under federal counterterrorism legislation. But this could quite feasibly be extended to apply to other control order regimes, such as the one under review in *Pompano*, since a common feature of control order proceedings is that prospective controlled persons and their legal representatives are excluded from court during crucial parts of the hearing; thus being oblivious to the detail of the case against them, they are unable to contest secret evidence being relied upon. Indeed, the COAG Committee hoped that 'the use of Special Advocates may become more commonplace, and hence more effective, in other litigation where national security matters arise'.[105]

IV Bill of Rights and Equality of Arms

As stated in the introduction to this article, in Australia, the approach to the 'war on terror' has spread to the 'war on organised crime'. As in the counterterrorism context, the war on organised crime has entailed the development of 'novel procedures', such as those provided for under

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99 Ibid.
100 Ibid 60 [238].
101 Ibid xiv.
102 Ibid 60 [238].
103 Ibid xiv.
104 Ibid (emphasis in original).
105 Ibid 60 [239].

the *CO Act*,[106] and the normalisation of extraordinary legal measures as part of a 'preventative paradigm'[107] mobilised to safeguard national security. Among other things, the use of special pre-emptive measures radically transforms the role of evidence, blurring the distinction between evidence and intelligence, such that the protections traditionally afforded to individuals by the rules of evidence are diminished.[108] Moreover, as with legislation aimed at the control of criminal organisations, key concerns with Commonwealth counterterrorism legislation have been that the hearing of all security sensitive information in closed court will become normalised,[109] and that there are few effective means to help mitigate any unfairness that may result from keeping secret material from affected parties. Thus, while the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ('*NSI Act*') provides the opportunity for adversarial challenge at the final stage of confirming an interim control order, as with hearings to declare criminal organisations under the *CO Act*, and other organised crime legislation, *NSI Act* proceedings follow earlier decisions made on the basis of secret evidence not disclosed to affected parties and therefore not subject to challenge.[110]

In the UK and Canada, special counsel help provide some modicum of fairness in those circumstances, and in both jurisdictions there is a national human rights instrument enshrining fundamental rights and freedoms. Australia has neither a special advocate system nor a bill of rights.[111] As often happens in cases of 'policy transfer' between jurisdictions, the migration of national security initiatives after 9/11 has been selective. In Australia, that has meant many of the safeguards built into the UK control order regime — which has now been replaced by terrorism prevention and investigation measures, known as 'TPIMs' — were ignored or omitted, including those contained in the ECHR.[112] Nevertheless, a bill of rights will not necessarily save Australia.[113] Instructive here is the experience of the US, where over the past decade the Supreme Court has deployed the

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106 *Pompano* (2013) 295 ALR 638, 677 [138], 682 [157], 684 [169] (Hayne, Crennan, Kiefel and Bell JJ), 688 [188], 690 [193] (Gageler J).

107 Lynch, McGarrity and Williams, above n 20, 5.

108 For discussion, see Lynch, McGarrity and Williams, above n 20; Martin, above n 9; McGarrity, above n 20.

109 Martin, above n 9, 222.

110 Tamara Tulich, 'Adversarial Intelligence? Control Orders, TPIMs and Secret Evidence in Australia and the United Kingdom' (2013) 12(2) *Oxford University Commonwealth Law Journal* 341, 359. See also Lynch, Tulich and Welsh, above n 12, 164–6.

111 There are statutory bills of rights in the Australian Capital Territory (*Human Rights Act 2004* (ACT)) and in the State of Victoria (*Charter of Human Rights and Responsibilities Act 2006* (Vic)).

112 Lynch, Tulich and Welsh, above n 12, 162–3; Tulich, above n 110, 352.

113 For discussion, see Kieran Hardy, 'Bright Lines and Open Prisons: The Effect of a Statutory Human Rights Instrument on Control Order Regime' (2011) 36(1) *Alternative Law Journal* 4.

Fourth Amendment[114] 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures' contrary to the protection of basic rights. In the case of *Atwater v City of Lago Vista*,[115] for example, 'the majority five determined that the arrest, handcuffing and detention in cells of the appellant while being charged with the misdemeanour of driving with children unrestrained by seat belts, did not offend the Fourth Amendment'.[116] Similar developments have occurred in some Australian states where police have 'sneak and peek' powers like those contained in the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* ('*USA PATRIOT Act 2001*'), authorising entry to a subject premises without the occupier's knowledge.[117]

Human rights guarantees are the poor relation of common law principles. Thus, in *Natunen v Finland*,[118] the European Court of Human Rights found that the right to a fair trial in art 6 of the ECHR had been breached because intercepted material had been destroyed prior to Mr Natunen's trial for drug trafficking. However, it has been argued that the real issue here is:

> not whether the admission of intercept evidence is consistent with the ECHR; but rather whether the failure to disclose this evidence to the defence violates the "equality of arms" principle.[119]

Such was also the case in *Edwards v United Kingdom*,[120] which involved an application for public interest immunity to shield police investigative techniques where the accused claimed entrapment defences. In that case, the European Court of Human Rights held that art 6(1) of the ECHR had been infringed:

> because the accused had been denied access to important evidence that might have presented a basis for an entrapment defence, and because the procedure used did not comply 'with the requirements to provide adversarial proceedings and equality of arms or incorporated adequate safeguards to protect the interests of the accused'.[121]

Arguably, in Australia too the High Court's endorsement of the judicial use of criminal intelligence offends the equality of arms principle

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114 *United States Constitution* amend IV: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures'.

115 *Atwater v City of Lago Vista*, 532 US 318 (2001).

116 Churches, above n 53, 67.

117 Greg Martin, 'No Worries? Yes Worries! How New South Wales Is Creeping Towards A Police State' (2010) 35(3) *Alternative Law Journal* 163, 164.

118 *Natunen v Finland* (2009) 49 EHRR 32.

119 Jessie Blackbourn and Nicola McGarrity, 'Listening and Hearings: Intercept Evidence in the Courtroom' [2012] *Journal of Commonwealth Criminal Law* 257, 279.

120 *Edwards v United Kingdom* [2004] X Eur HR 61, 77 [46] ('*Edwards*').

121 Roach, above n 94, 194, quoting *Edwards* [2004] X Eur Ct HR 61, 77 [46].

(a limb of natural justice), since, it is contended, this 'deep lying principle in the law', which assumes that 'the parties in court should be armed with equal weaponry, and that the judge should keep equidistant from them', has been 'displaced in favour of court controlled "fairness"'.[122]

V Legal Grey Holes, Deep Secrets and Pseudo-inquisitorial Proceedings

In the UK, it is argued that the function performed by special advocates in CMPs is fundamentally flawed because 'precisely at the point at which the accused's participation is most important ... he is excluded', and 'no matter how skilled or conscientious the special advocate is, he has become part of the system to which the accused is subject rather than in which the accused participates'.[123] Partly because they 'occupy an interstitial space somewhere between amicus curiae and an ordinary legal representative',[124] special advocates acting in CMPs is regarded as an example of a 'legal grey hole';[125] that is, 'a situation in which the state seeks to use legal or quasi-legal rules, processes and institutions to disguise the erosion of the rule of law and the culture of legality in the exercise of state power'.[126]

To Murphy, legal grey holes occur where the culture of control meets the rule of law, and only then if the legal system is complicit in their creation: 'If only one organ of the state, or one state agency, sought to violate the rules of law or erode the culture of legality it might be checked by another'.[127] Thus, in democracies such as the UK, Canada and Australia, the doctrine of parliamentary sovereignty means that the executive will require the cooperation of the legislature to create legal grey holes. The position of the judiciary however is more complex. While the judiciary will endeavour to uphold the rule of law, 'the prohibition of a particular state action may involve the permission of action short of that which is prohibited'.[128] The perils faced by human rights advocates provide a poignant example:

> The dangers of such advocacy were most vividly displayed in the *Chahal* case when an amicus brief directed the European Court of Human Rights towards the Canadian model. A key feature of the Canadian model, permitted communication between subject and counsel after the secret evidence had been

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122 Churches, above n 15, 29–30. See also Martin, above n 14.
123 Cian C Murphy, 'Counter-Terrorism and the Culture of Legality: The Case of Special Advocates', 23 February 2012, 18 <http://ssrn.com/abstract=2009902>.
124 John Ip, 'The Rise and Spread of the Special Advocate' [2008] *Public Law* 717, 735.
125 David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006).
126 Murphy, above n 123, 19.
127 Ibid.
128 Ibid 20.

> seen, was overlooked. Thus the European Court of Human Rights' ill-informed description of the Canadian model allowed the UK to create closed material proceedings.[129]

Arguably, the decision in *Pompano* amounts to a similar judicial sleight of hand, which, along with the other criminal intelligence cases,[130] creates a legal grey hole in which the executive has co-opted parliament, and to which the High Court has been conscripted, finding constitutionally valid state legislation that purports to invest courts with power to hold closed sessions, which exclude affected parties.[131] Previously, however, the High Court held the view that 'the essential character of a court … necessitates that a court not be required or authorised to proceed in a manner that does not ensure … the right of a party to meet the case made against him or her',[132] and that the judicial process 'requires that the parties be given the opportunity to present their evidence and to challenge the evidence led against them'.[133] Thus, it has been suggested that in an about-face, the High Court's former concern with curial 'unfairness', evident in the late 20th century, has given way, in the 21st century, to the concept of 'curial fairness'.[134]

Another way in which the concept of a legal grey hole might apply to *Pompano* concerns controversy flowing from the hybrid nature of control orders, which are civil orders that attract criminal liability if breached. Hence, in spite of the fact secret evidence cannot be used against the accused in criminal trials,[135] control orders enable the state to 'impose significant restrictions upon an individual's liberty while "side-stepping" the enhanced procedural protections that attach to the criminal justice system';[136] although, as shown above, UK courts and the European Court of Human Rights have ruled a combination of special advocates and 'gisting' can provide a degree of procedural protection sufficient to afford fairness to detainees.[137]

Murphy's arguments indicate that legal grey holes could arise out of judicial reasoning that involves not only conceptual misunderstanding — such as in the case of the European Court of Human Rights' confusion over *Chahal* (cited above) — but also stretched analogising. In *Pompano*, for instance, the majority briefly compared the special procedures contained in the criminal intelligence

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129 Ibid.
130 *Gypsy Jokers* (2008) 234 CLR 532; *K-Generation* (2009) 237 CLR 501.
131 See Churches, above n 45, 120.
132 *Nicholas v The Queen* (1996) 193 CLR 173, 208 [74] (Gaudron J).
133 *Bass v Permanent Trustee Co* (1999) 198 CLR 334, 359 [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
134 Churches, above n 15, 9–10, 12, citing *Nicholas v The Queen* (1996) 193 CLR 173, 208 [74] (Gaudron J).
135 Roach, above n 94, 194.
136 Tulich, above n 110, 344.
137 Lynch, Tulich and Welsh, above n 12, 159–61.

provisions of the *CO Act* with trade secrets cases.[138] However, this is rather like comparing apples and oranges. One reason why control order cases, such as *Pompano*, are qualitatively different from trade secrets cases relates to the fact that questions of secrecy versus fairness are heightened by the liberty context within which control orders operate.[139] So, unlike cases of trade secrets 'in which specific evidence given to a court is withheld from a party to protect commercial confidentiality',[140] and where presumably a person's liberty is not at stake, control order cases involve the possible imposition of serious limits on a person's freedom.

Despite the very different contexts within which trade secrets and criminal intelligence operate, scholars writing about legal secrets in both private and public law have expressed common concerns about the scope of secrecy. Scheppele, for instance, looks mainly at transactional relationships, like those involving trade secrets and other areas of private and commercial law. She draws a distinction between 'deep secrets' and 'shallow secrets'. The former refers to a situation in which the 'target' of a secret is 'completely in the dark, never imagining that relevant information might be had'.[141] The latter refers to a situation in which the target 'has at least some shadowy sense' they are not privy to all information.[142] Unlike Scheppele, who does not consider how the deep/shallow distinction might apply to state secrets,[143] such as those involving matters of national security, Gutmann and Thompson are interested in the impact of secrecy upon democratic values. For them, deep secrets present obstacles to public scrutiny because they are utterly hidden from citizens, whereas shallow secrets at least allow citizens the ability to respond to and challenge secret-keepers.[144] Regardless of the public law or private law context, however, deep secrets are regarded as generally problematic:

> Just as deep secrets present a contractarian problem for Scheppele because they impair the ability of the individual to exercise meaningful choice, undermining values such as fairness and autonomy, they present a democratic problem for Gutmann and Thompson because they impair the ability of the citizenry to exercise meaningful oversight, undermining values such as deliberation and consent.[145]

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138 *Pompano* (2013) 295 ALR 638, 672 [117], [157] (Hayne, Crennan, Kiefel and Bell JJ).

139 Tulich, above n 110, 343.

140 *Pompano* (2013) 295 ALR 638, 689 [192] (Gageler J).

141 Kim Lane Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law* (University of Chicago Press, 1988) 21.

142 Ibid 76.

143 See David E Pozen, 'Deep Secrecy' (2010) 62(2) *Stanford Law Review* 257, 263–4.

144 Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Harvard University Press, 1996) 121–3.

145 Pozen, above n 143, 264.

According to these arguments, the use of criminal intelligence provided for in the *CO Act*, and similar legislation, poses something of a challenge not only to fairness but also to democratic accountability. Although there is no bright line separating deep and shallow secrets,[146] and the use of criminal intelligence is probably somewhere in the middle of the 'depth continuum' identified by Pozen,[147] it nonetheless appears, prima facie, to have characteristics more akin to a deep secret than a shallow secret. That is because even though respondents know a clandestine process is at work (ie a special closed hearing to determine an application to declare criminal intelligence), since they and their representatives are excluded from that process,[148] they are unable to challenge information therein disclosed.

It would be folly to always require full disclosure — especially in cases where there is a real threat to a person's life, or where vulnerable witnesses are involved, or confidential police methodology in undercover work might be revealed. However, to avoid the prospect of injustice and unfairness, it may be prudent, as a matter of principle, to adopt an approach like Kitrosser. Believing that secrecy must be minimised, Kitrosser has argued, in relation to the effect of executive privilege upon interbranch relations and constitutional values in the US, that:

> the apparatus for information control between the branches should be such as to funnel information, to the extent possible, into a state of minimal to very shallow secrecy and away from a state of minimal to very deep secrecy.[149]

In practical terms, this could entail protections afforded by minimum disclosure requirements as discussed above, including a role for special advocates empowered by procedures enabling them to challenge sensitive material.

However, putting these principles into practice is not so easy, for special advocates themselves have argued minimum disclosure may encompass more than the term 'gisting' implies,[150] stating, 'the disclosure that may require to be given pursuant to *AF (No 3)* may go well beyond "gisting"'.[151] Indeed, as Lord Hope held in that case, 'detail must be met with detail'.[152] Accordingly, while providing summarised information may appear a viable means of meeting minimum disclosure requirements, as the COAG Committee points out, it also 'has the capacity to threaten the right of a fair trial', as it 'may

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146 Ibid 261, 265, 273–4.
147 Ibid 274.
148 *CO Act* s 70.
149 Heidi Kitrosser, 'Secrecy and Separated Powers: Executive Privilege Revisited' (2007) 92 *Iowa Law Review* 489, 515.
150 Tulich, above n 110, 362.
151 Special Advocates, *Justice and Security Green Paper: Response to Consultation from Special Advocates*, 16 December 2011, [33].
152 *AF (No 3)* [2010] 2 AC 269, 362 [87] (Lord Hope).

once again be limited because of national security concerns'.[153] Such was the case in *Kadi v Commission*, where the European Union's General Court held that providing Kadi with an outline narrative summary of reasons as to why his assets should be frozen 'cannot reasonably be regarded as satisfying the requirements of a fair hearing and effective judicial protection'.[154]

Furthermore, as Tulich observes, while 'the minimum disclosure requirement injects the closed material procedure with basic fairness, it does not overcome the inequality of the parties nor remedy the fairness-inhibiting features of the closed material procedure',[155] such as, in the case of *Al Rawi (SC)*, the handing 'over to one party considerable control over the production of relevant material and the manner in which it is to be presented'.[156] Thus, we return to the equality of arms principle, about which the reasoning in *Pompano* provides little guidance. For example, the majority say simply that it is unclear how procedural unfairness might be remedied by informing the respondent's lawyer that the applicant intends to rely on criminal intelligence.[157] The majority's gesture towards some form of 'gisting' (discussed above) also fell well short of the mark established by the English case law where, as seen above, it has been held detail must meet detail,[158] so as to enable affected parties to mount an effective challenge to allegations made against them.[159]

By contrast, the majority judgment in *Pompano* — recognising that a respondent would not be able to challenge directly assertions and allegations constituting criminal intelligence, and could only make general denials of any alleged wrongdoing[160] — held that, retaining its capacity to act fairly and impartially, the Supreme Court of Queensland must consider the fact that a respondent cannot controvert criminal intelligence and assess the weight to be given to such evidence.[161] For this reason, it has been argued that, in cases involving criminal intelligence, procedural fairness has been replaced by 'curial fairness' whereby 'fairness might be achieved by allowing one-sided evidence before the court, with the court self-regulating its use of the material'.[162] Because this approach relies heavily upon 'the bankroll of goodwill towards courts as arbiters of fairness',[163] it indicates the existence of shallow secrecy rather than deep secrecy, which more

153 COAG, above n 98, 59 [233].
154 *Kadi v Commission* (T-85/09) [2010] ECR-SC II-5181 [157].
155 Tulich, above n 110, 362.
156 *Al Rawi (SC)* [2012] 1 AC 531, 592 [93] (Lord Kerr).
157 *Pompano* (2013) 295 ALR 638, 682 [160] (Hayne, Crennan, Kiefel and Bell JJ).
158 *AF (No 3)* [2010] 2 AC 269, 362 [87] (Lord Hope).
159 *A v United Kingdom* [2009] II Eur Court HR 137, 234 [220].
160 *Pompano* (2013) 295 ALR 638, 684 [166] (Hayne, Crennan, Kiefel and Bell JJ).
161 Ibid 684 [166]–[167].
162 Churches, above n 45, 120. See also Martin, above n 14.
163 Churches, above n 45, 120.

often than not involves bad faith.[164] And whereas deep secrets can open up black holes 'into which the powers of a coordinate branch and the rule of law disappear',[165] shallow secrets 'may function as singular points of privilege that preserve the separation of powers',[166] and therefore might be regarded not to encroach upon constitutional values. Hence, shallow secrecy may entail the creation of legal grey holes.

Finally, it could be said that the approach of the Australian High Court in the criminal intelligence cases highlights some of the dangers of what the Canadian Supreme Court in *Charkaoui v Canada*[167] identified as the 'pseudo-inquisitorial' role played by Federal Court judges in cases heard under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Canada). In that case, the Supreme Court held that, despite their best efforts to seriously test protected documentation and information, a judge in such matters 'is not afforded the power to independently investigate all relevant facts that true inquisitorial judges enjoy'.[168] Moreover, 'since the named person is not given a full picture of the case to be met, the judge cannot rely on the parties to present missing evidence'.[169] Accordingly, the Court concluded that, 'at the end of the day, one cannot be sure that the judge has been exposed to the whole factual picture'.[170] Ultimately, the Supreme Court held that the use of secret evidence deprives a detainee of a fair hearing — although, like the High Court in *Pompano*, it did not rule the use of secret evidence is intrinsically unconstitutional — and thus suggested some 'adequate substitutes' may be found where 'the context makes it impossible to adhere to the principles of fundamental justice in their usual form'.[171]

VI Rules of Evidence and Public Interest Immunity

In *Pompano*, French CJ engaged with the respondents' claim that the *CO Act* 'abrogated the rules of evidence',[172] holding that 'subject to one qualification, the rules of evidence are generally applicable in substantive proceedings under the [*CO Act*]'.[173] His Honour noted s 61 removes the bar on the admissibility of hearsay evidence, although that 'does not overcome the requirement that the evidence be relevant'.[174]

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164 Pozen, above n 143, 263.
165 Ibid 316.
166 Ibid.
167 *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350, 383 [51].
168 Ibid.
169 Ibid.
170 Ibid.
171 Ibid 372 [23].
172 *Pompano* (2013) 295 ALR 638, 649 [35] (French CJ).
173 Ibid 649 [34].
174 Ibid 649 [36].

Moreover, the Supreme Court of Queensland is not required to admit an affidavit containing hearsay, and, indeed, under r 395 of the *Uniform Civil Procedure Rules 1999* (Qld), the Commissioner would require the leave of the Supreme Court before relying upon such an affidavit.[175] When hearing an application for a criminal organisation declaration, the Supreme Court may consider the probative value of hearsay material and any unfairness that may result in admitting it.[176] Moreover, if an affidavit did contain hearsay material, the Supreme Court would need to determine the weight given to it.[177] Thus, French CJ concluded that:

> The [*CO Act*] does not, as a general proposition, displace the operation of the rules of evidence in an application for a declaration that an organisation is a criminal organisation. Nor should it be taken, in the absence of clear words, to displace the inherent powers of the Supreme Court.[178]

However, a substantive application to declare a criminal organisation,[179] where, as shown above, hearsay evidence may be adduced and admitted, is procedurally distinct from a criminal intelligence application that is heard first,[180] and where information (hearsay or otherwise) may be considered without the knowledge of the respondent or its legal representatives,[181] and in closed session excluding a respondent and its representatives.[182] In their reasons, Hayne, Crennan, Kiefel and Bell JJ recognised the procedural distinction between a criminal intelligence hearing and proceedings to declare a criminal organisation, noting that in any application to declare an organisation as a criminal organisation, 'the Supreme Court must take account of the fact that a respondent cannot controvert criminal intelligence',[183] and judge the weight given to that evidence.[184] But this does not escape the fact that, as discussed above in relation to the *NSI Act*, at a crucial early stage in proceedings, respondents may not know, nor will they be able to respond to, allegations made against them.

Hayne, Crennan, Kiefel and Bell JJ rejected the respondents' submission that 'the criminal intelligence provisions expand "the nature of the evidence beyond what would ordinarily be admissible"'.[185] Their Honours held that those provisions 'do not provide for the reception of evidence that would otherwise be irrelevant or inadmissible' so much as '[t]hey provide for the admission of evidence which would otherwise

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175 Ibid.
176 Ibid 649 [37].
177 Ibid.
178 Ibid 650 [38].
179 *CO Act* s 10.
180 *CO Act* s 67.
181 *CO Act* s 66
182 *CO Act* s 70.
183 *Pompano* (2013) 295 ALR 638, 684 [167] (Hayne, Crennan, Kiefel and Bell JJ).
184 Ibid 684 [166].
185 Ibid 679 [144].

not be adduced'.[186] That is to say, the criminal intelligence provisions enable the Police Commissioner to use information that is relevant, which ordinarily would not be advanced on public interest immunity grounds, because of the adverse consequences that could reasonably be expected to follow from its tender. Those adverse consequences are stated in the definition of criminal intelligence under s 59(1) of the *CO Act*, namely 'prejudicing a criminal investigation, enabling the discovery of the existence or identity of a confidential source of information relevant to law enforcement or endangering anyone's life or physical safety'.[187]

Hence, in allowing 'evidence' that is, or contains, criminal intelligence in applications under the *CO Act* without the evidence having any of those adverse effects listed under s 60, the Queensland Parliament has circumvented public interest immunity. But it has done so at the expense of fairness to the respondent, since secret intelligence, otherwise excluded on the basis of public interest immunity, can now be adduced in closed proceedings. And that is why some have argued that the approach adopted in Australian criminal intelligence cases not only relies upon the good faith of courts to act fairly and impartially, but also depends upon 'a fallacious analogy with public interest immunity procedures',[188] which involve the non-disclosure of sensitive material that, if a claim of public interest immunity is successfully made, is excluded altogether from any decision-making processes of the court.[189] Given that claim, it is worth considering principles in the law of public interest immunity.

Reconciling public interest immunity and CMPs is something that has recently been subject to scrutiny and debate in the UK with the enactment of the *Justice and Security Act 2013* (UK) ('*JS Act*'), which extends the availability of CMPs and use of special advocates generally to civil proceedings. Previously, CMPs were only available in the UK at hearings of the Special Immigration Appeals Commission, in control order cases, and in terrorist asset-freezing cases.[190] The introduction of the *JS Act* was precipitated by the case of *Al Rawi*, which was a damages action in tort law brought by six claimants who had been detained at Guantanamo Bay. They alleged that the UK Government had contributed to their detention, rendition and mistreatment.[191] The Government sought to have the case tried under a CMP, while the claimants argued the ordinary principles of public interest immunity

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186 Ibid 679 [148].
187 Ibid 679 [145].
188 Churches, above n 45, 120.
189 Ibid; Lynch et al, n 12 above, 156; Miiko Kumar, 'Protecting State Secrets: Jurisdictional Differences and Current Developments' (2013) 82(5) *Mississippi Law Journal* 853, 854.
190 Adam Tomkins, 'Justice and Security in the United Kingdom' (2014) 47(3) *Israel Law Review* 305.
191 Ibid.

ought to apply. Ultimately, the case was settled out of court, but it nevertheless proved significant not only in terms of setting out principles in relation to the use of CMPs and special advocates (discussed above), but also because it provided the impetus for UK Government proposals now contained in the *JS Act*.

In the case law, and during the passage of the *JS Act* through both Houses of Parliament, the differences between public interest immunity and CMPs have been highlighted. In *Al Rawi (SC)*, Lord Dyson, delivering the leading judgment, held that 'unlike the law relating to [public interest immunity], a closed material procedure involves a departure from both the open justice and natural justice principles'.[192] Lord Dyson also stated later in his judgment that 'a closed procedure is the antithesis of a [public interest immunity] procedure', and that '[t]hey are fundamentally different from each other'.[193] Indeed, unlike the operation of public interest immunity, a CMP involves no balancing exercise, which is central to the rule in the law of public interest immunity. As enunciated by Lord Templeman in *Wiley*, 'a claim to public interest immunity can only be justified if the public interest in preserving the confidentiality of the document outweighs the public interest in securing justice'.[194] The other key difference is that material subject to public interest immunity is inadmissible, whereas closed material is admissible, which, in the national security context, 'may be relied on not only by the Government but also by the court (who will deal with issues arising on the closed material in a closed judgment)'.[195]

When the House of Lords considered the Justice and Security Bill (HL Bill 27 of 2012–13), it sought a number of amendments, some of which reflected the Law Lords' prior ruling in *Al Rawi (SC)*, including that the *Wiley* balancing exercise at the core of public interest immunity law be built into the CMP process, and that a trial conducted under a CMP be a genuine measure of last resort.[196] For present purposes, it is sufficient to note that these and other Lords amendments have, in various guises, found their way into the *JS Act*. It is more important, however, to consider the Australian approach to public interest immunity, the means by which information prejudicial to national security is withheld under Commonwealth legislation, and how both of these might relate to the use of criminal intelligence in closed hearings under state and territory organised crime legislation.

Like the English cases, the Australian approach to public interest immunity at common law requires courts conduct a balancing

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192 *Al Rawi (SC)* [2012] 1 AC 531, 573 [14] (Lord Dyson).
193 Ibid 580 [41].
194 *R* v *Chief Constable of the West Midlands Police; Ex parte Wiley* [1995] AC 274, 280 (Lord Templeman).
195 Tomkins, above n 190, 311.
196 Ibid.

exercise,[197] with authority for that proposition deriving from *Conway v Rimmer*[198] (the origin of the *Wiley* balancing exercise), which the High Court of Australia followed in *Sankey v Whitlam*.[199] Generally, the law governing public interest immunity is regulated by the Evidence Acts of the various Australian states and territories, which reflect the common law position that a claim of public interest immunity requires a court to conduct a balancing exercise.[200] Australian national security legislation also provides that a balancing exercise be carried out when considering whether in criminal and civil proceedings disclosure of information is 'likely to prejudice national security'.[201] As with the UK,[202] in making such an assessment, courts must determine whether the threat, harm or risk run by disclosure is real.[203] And while, as noted above, the *NSI Act* allows for a security-cleared legal representative of an affected party to challenge government minister arguments for non-disclosure on the basis of likely prejudice to national security, ultimately the legislation 'subjugates the individual's rights to a fair and open judicial hearing'[204] by providing that 'greatest weight' must be given to national security considerations in both criminal[205] and civil[206] proceedings.[207]

How, if at all, might the principles in the law of public interest immunity apply to state and territory legislation for the control of criminal organisations in Australia? Clearly, police have legitimate concerns to keep secret certain of their investigative techniques and methods, and to protect vulnerable witnesses and confidential sources of information. It is also in the public interest to do so. Why, then, are courts prevented from making public interest immunity assessments based on a balancing exercise at the first stage of proceedings to declare criminal intelligence under criminal organisation control legislation? Why is it for courts to determine the weight given to the

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197 Kumar, above n 189, 857–8.
198 *Conway v Rimmer* [1968] AC 910.
199 *Sankey v Whitlam* (1978) 142 CLR 1.
200 Kumar, above n 189, 858.
201 *NSI Act* s 3(1).
202 Tomkins, above n 190, 308.
203 *NSI Act* s 17(1).
204 Lynch, Tulich and Welsh, above n 12, 165. See also Kumar, above n 189, 864.
205 *NSI Act* ss 31(7)(a), 31(8).
206 *NSI Act* ss 38L(7)(a), 38L(8).
207 That is why, particularly in cases involving national security claims, it has been argued that instead of balancing rights against the public interest, there should be a presumption in favour of rights whereby courts 'over-enforce' rights and judges are forced to prioritise principals over consequences in dealing with conflicts between rights and the public interest. In this way, an analogy can be drawn between rights and promises: we keep promises as a matter of principle, regard them as binding in all but the most exceptional circumstances, and do not normally think of breaking them: Denise Meyerson, 'Why Courts Should Not Balance Rights Against the Public Interest' (2007) 31(3) *Melbourne University Law Review* 873.

inability of a respondent to challenge criminal intelligence only *after* a criminal intelligence declaration has been made?

It is unclear why a security-vetted legal representative of a respondent must be excluded from a special closed hearing to declare criminal intelligence.[208] Inclusion of such a person in a confidentiality ring would serve the dual purpose of representing the interests of a respondent *and* providing a potential adversary to a public interest monitor (Queensland) or criminal intelligence monitor (New South Wales) who, under the respective legislation, should not ordinarily cross paths with respondents or their legal representatives.[209] Moreover, if a special advocate were admitted into a closed hearing to declare criminal intelligence, that would increase the likelihood of intelligence being subject to established procedures and rules of evidence, including assessments as to the veracity of claims that disclosure would be against the public interest. Once intelligence has been assessed in such a way, it could be confidently relied upon (though not thereafter disclosed in open court) in substantive proceedings to declare criminal organisations.

Indeed, this scenario echoes precisely the point that Walker makes in relation to the tendency in recent times to blur intelligence and evidence. He has argued that there are 'no fundamental objections to the melding of intelligence into the evidence-led legal process', so long as intelligence is tested properly (as we expect evidence to be tested properly), and it is assessed for reliability and relevance, 'which must be weighed in the overall context of infringement of liberty, just as if "evidence" was being taken into account'.[210] Similarly, Tomkins believes there must be an evidential basis for intelligence and national security claims whereby evidence should be produced of serious risk if secret intelligence is revealed, which was the approach adopted by the Divisional Court in *Mohamed (No 2)*.[211] In that case, it was determined 'there must be an evidential basis for the Secretary of State's view as to what is required in the interests of national security'.[212]

All of this is not to say that full disclosure is always necessarily desirable, as states need to keep secrets, police investigations should

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208 This is all the more perplexing given that under Victoria's *Criminal Organisations Control Act 2012* (Vic), the Supreme Court may appoint a special counsel to represent the interests of the respondent to a substantive application (s 79), including a substantive application in relation to which the Chief Commissioner of Police has applied for a 'criminal intelligence protection order' (s 71).

209 *CO Act* ss 89(3)–(4); *Crimes (Criminal Organisations Control) Act 2012* (NSW) ss 28F(3)–(4).

210 Clive Walker, 'Intelligence and Anti-terrorism Legislation in the United Kingdom' (2005) 44 *Crime, Law and Social Change* 387, 409.

211 Tomkins, above n 23; *R* (*Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 WLR 2653, 2679 [67], 2717 [95] ('*Mohamed (No 2)*').

212 Tomkins, above n 23, 240.

not be compromised, and people's lives ought not to be put in jeopardy. Indeed, in *Edwards*, the European Court of Human Rights declared that entitlement to disclosure of relevant evidence is not an absolute right, and factors such as the protection of witnesses at risk of reprisals, and the keeping secret of police methods of investigation must be weighed against the rights of the accused;[213] a principle affirmed by that Court more recently in *Kennedy v United Kingdom*.[214]

Examples from the UK and Canada are also instructive for exploring the interface between the scope of disclosure obligations and public interest immunity to protect sensitive information *and* safeguard fairness. For instance, in *R v H*,[215] the House of Lords considered proper procedures and approaches to public interest immunity, stressing that 'means to reconcile the demands of secrecy and disclosure through devices such as court-approved editing or summarising the evidence, or having the prosecution make admissions of facts'.[216] The House of Lords acknowledged that, in appropriate cases, special advocates may be appointed to assist in public interest immunity determinations, but also recognised the limits of the special advocate system (such as those outlined above). According to Roach, the UK experience indicates that questions of public interest immunity cannot be separated from scope of disclosure obligations, as well as demonstrating the utility of special advocates in public interest immunity proceedings. However, he also notes that the UK has moved away from relying on courts to define prosecutor disclosure obligations, instead bringing in legislation that has simultaneously reduced disclosure obligations and made them more certain.[217]

Likewise, s 38 of the *Canada Evidence Act*, RSC 1985, c C-5 *(Canada)* provides procedures 'to give judges an array of flexible options in reconciling trial fairness with protection of secrets'.[218] However, although they are empowered to stay proceedings, which may curtail a terrorism prosecution, Canadian trial judges are unable to revise non-disclosure orders made by specially designated Federal Court judges, to ensure public interest immunity does not threaten the right to a fair trial. By contrast, says Roach, 'both the House of Lords and the European Court of Human Rights have placed considerable emphasis on the ability of the trial judge to revisit initial decisions that the disclosure of sensitive information is not required'.[219]

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213 *Edwards and Lewis* [2004] X Eur Ct HR 61, 77 [46].
214 *Kennedy v United Kingdom* (2011) 52 EHRR 4, 60 [184]. See also *Jasper v United Kingdom* (2000) 30 EHRR 441, 471 [52]; *A v United Kingdom* [2009] II Eur Court HR 137, 229 [205].
215 *R v H* [2004] 2 AC 134.
216 Roach, above n 94, 193.
217 Ibid 194.
218 Ibid 193.
219 Ibid 194.

While the *Pompano* decision does not provide for that exact scenario, as discussed previously, the majority judgment does contemplate that the Supreme Court of Queensland may take into account any potential unfairness to a respondent that a criminal intelligence declaration might have on later proceedings to declare a criminal organisation (ie the substantive application).[220] Similarly, French CJ held that the Supreme Court 'would have a discretion to refuse to act upon criminal intelligence where to do so would give rise to a degree of unfairness in the circumstances of the particular case which could not have been contemplated at the time that the criminal intelligence declaration was made'.[221] However, it is the judgment of Gageler J that is closest to the UK and Canadian positions. To reiterate, in his Honour's opinion, the impugned provisions of the *CO Act* were saved from invalidity 'only by the capacity for the Supreme Court of Queensland to stay a substantive application in the exercise of inherent jurisdiction in a case where practical unfairness becomes manifest'.[222] Commentators see this not only as throwing down the gauntlet to other judges in future litigation of this kind,[223] but also to Queensland's Supreme Court, since the respondent in *Pompano* 'is now armed to make application to the Supreme Court seeking a stay of intended proceedings, to the extent that criminal intelligence, with its sequelae of a closed court, is intended to be employed'.[224]

VII Judicialisation of Intelligence

Experience from across a range of jurisdictions since the terrorist attacks of 11 September 2001 ('9/11') has shown how reconciling justice and security is a tricky, if not intractable, business. One proposed way of achieving a realistic balance is through the 'judicialisation of intelligence' in legal processes, whereby the legitimacy of secrecy is challenged 'as a means of courts holding lawmakers to account when prosecutors adduce patchy, fragile and fragmentary intelligence as evidence of guilt'.[225] Accordingly, to the complaint that 'law has intruded into the world of intelligence in recent decades', Walker retorts, 'legalism in the field of intelligence is desirable, since law is a necessary condition of constitutionalism'.[226]

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220 *Pompano* (2013) 295 ALR 638, 683 [162], 684 [166] (Hayne, Crennan, Kiefel and Bell JJ).

221 Ibid 665 [88] (French CJ).

222 Ibid 686 [178] (Gageler J).

223 Cheryl Saunders, 'Organised Crime Control and the Promise of Procedural Fairness: *Condon v Pompano Pty Ltd*' (22 July 2013) <http://blogs.unimelb.edu.au/opinionsonhigh/2013/07/22/saunders-pompano/>.

224 Churches, above n 45, 120.

225 Martin, above n 9, 222.

226 Walker, above n 210, 411.

The need to challenge the legitimacy of secrecy and use of intelligence has been highlighted repeatedly in the post-9/11 context, where much of what is now known about governments' involvement in the US policies of extraordinary rendition and use of torture to gather intelligence 'has only seen the light of day because of litigation or the release of previously classified documents by foreign governments'.[227] And, for this very reason, Tomkins argues, the courts should not be 'dazzled by overblown Government claims as to sensitivity, risk, and security', which the record has shown 'may often be exaggerated and are sometimes wholly spurious'.[228] Moreover, he says, just because something bears the 'top secret' stamp associated with the work of MI5 or MI6, the courts should not accept it uncritically 'without a second thought as to whether the matter really is secret at all'.[229]

While courts in the UK and Canada have apparently been more resistant than Australian courts to increased reliance upon secret evidence and intelligence,[230] it must be noted that in the UK, the judiciary has tended generally to defer to the executive in matters involving national security.[231] For instance, in *Mohamed (No 2)*, the Divisional Court ruled that 'the judgment as to whether the national security of the United Kingdom will be compromised … is a matter on which the Foreign Secretary is the expert and not ourselves'.[232] However, in cases challenging the control order regime, 'the courts have displayed a relative boldness that contrasts strongly with the approach taken in much earlier decisions'.[233] Conversely, argues Tulich, 'the Australian judiciary has not played a significant role with respect to secret evidence in control order proceedings'.[234]

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227 UK Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In*, House of Lords Paper No 86, House of Commons Paper No 111, Session 2009–10 (March 2010), [107].

228 Tomkins, above n 23, 252. Spurious national security claims have also been used in cases of contentious death at the hands of state agents where the real issues have 'hinged upon police use of intelligence and surveillance techniques in relation to suspected firearms and drug offences, not national security': Greg Martin and Rebecca Scott Bray, 'Discolouring Democracy? Policing, Sensitive Evidence, and Contentious Deaths in the United Kingdom' (2013) 40(4) *Journal of Law and Society* 624, 648.

229 Tomkins, above n 23, 241.

230 Martin, above n 9, 205–6, 214–5.

231 See, for example, *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2011] QB 218, 265 [131] where Lord Neuberger MR held that the Foreign Secretary was:

> far better informed, as well as having far more relevant experience, than any judge, for the purpose of assessing the likely attitude and actions of foreign intelligence services as a result of the publication of the redacted paragraphs, and the consequences of any such actions so far as the prevention of terrorism in this country is concerned.

232 *Mohamed (No 2)* [2009] 1 WLR 2653, 2678 [64].

233 Helen Fenwick and Gavin Phillipson, 'Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond' (2011) 56(4) *McGill Law Journal* 863, 916. See also Martin, above n 9, 205–6, 211, 223.

234 Tulich, above n 110, 364.

Efforts by government ministers and officials to keep certain information deemed sensitive from public gaze often rely on the 'control principle', whereby the disclosure of documentation and information is resisted because, it is argued, that would seriously harm intelligence sharing arrangements (and diplomatic relations) between countries, as well as cause considerable damage to national security.[235] In the case of *Mohamed (No 2)*, discussed earlier, the UK Foreign Secretary, David Miliband, made a public interest immunity application claiming that the disclosure of documents and information in his possession, originating in the US, pertaining to Mohamed's detention, rendition, and maltreatment would threaten intelligence sharing between the UK and US, and ultimately threaten lives. In his public interest immunity certificate, the Foreign Secretary also objected to the publication of paragraphs originally redacted from the judgment of the Divisional Court, which contained the Court's findings as to the complicity of MI5 and MI6 in the unlawful detention and torture of Mohamed.

By the time the case came before the UK Court of Appeal, the US District Court for the District of Columbia had ruled Mohamed's allegations of mistreatment were true and his mistreatment amounted to torture.[236] Thus, Mohamed's 'torture while in custody at the behest of the US authorities had been judicially found to be a matter of *fact* and was in the *open*; there was accordingly no remaining confidentiality in the matter, and there was therefore no reason for the various paragraphs of the Divisional Court's judgments to remain redacted'.[237] Nevertheless, but for the US District Court's ruling, Lord Neuberger and Sir Anthony May would have held that the Divisional Court erred in deciding the redacted paragraphs be released. Worryingly to Tomkins, Lord Neuberger's description of his approach was that 'it is "inherent in the doctrine of the separation of powers" that, "as a matter of principle, decisions in connection with national security are primarily entrusted to the executive, ultimately to Government ministers, and not to the judiciary"'.[238]

The approach of the Divisional Court, by contrast, was to ponder why

> a democracy governed by the rule of law would expect a court in another democracy to suppress a summary of the evidence contained in reports by its own officials … where the evidence was relevant to allegations of torture … politically embarrassing though it might be.[239]

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235 Tomkins, above n 23, 226.
236 Ibid 239.
237 Ibid (emphasis in original).
238 Ibid, quoting Lord Neuberger MR in *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2011] QB 218, 265 [131].
239 *Mohamed (No 2)* [2009] 1 WLR 2653, 2706 [69].

The Divisional Court also expressed the view 'that the requirements of open justice, the rule of law and democratic accountability demonstrate the very considerable public interest in making the redacted paragraphs public, particularly given the constitutional importance of the prohibition against torture'.[240]

Although *Pompano* can be distinguished from *Mohamed (No 2)* on the basis the latter was a case involving unlawful detention, rendition and torture, many of the same basic principles apply. *Mohamed (No 2)* provides a cautionary tale not only as to the dangers of allowing closed hearings and redacted summaries of secret material, but also of courts seeming to accept uncritically the word of members of the executive.[241] Moreover, it demonstrates that public interest immunity can hide a multitude of sins — for, indeed, as Tomkins puts it, 'if public interest immunity is the answer, we may be asking the wrong question'.[242] In the Australian context too, it would seem wise to exercise a healthy skepticism towards what the COAG Committee report on federal counterterrorism legislation states as 'the intelligence agencies and the Government wish to restrict disclosure of [national security] information as much as possible and consistently with its obligations to other countries'.[243] From one perspective, '[t]hat is not an unreasonable position by any means'.[244] However, as the UK cases clearly demonstrate, 'national security risks come in varying shades and degrees and are largely a matter of probabilities — they are least convincing of all when set forth as unwaivable absolutes'.[245]

Hence, the COAG Committee's proposal that 'the stand-off between the Government and defence lawyers in relation to national security'[246] be resolved by both sides relenting on the issue, to arrive at 'an appropriate moderate compromise' by, for example, 'the use of the Special Advocates system'.[247] Indeed, there is a groundswell of opinion that in order to regain public confidence in the security intelligence agencies,[248] and police forces,[249] 'some disclosure and perhaps revelation about surveillance techniques or "trade-craft" might have to be tolerated';[250] some degree of shallow secrecy, in other words.

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240 Ibid 2702 [54].
241 Tomkins, above n 23, 241–2.
242 Ibid 250.
243 COAG, above n 98, 60 [237].
244 Ibid.
245 Ian Leigh, 'Changing the Rules of the Game: Some Necessary Legal Reforms to United Kingdom Intelligence' (2009) 35 *Review of International Studies* 943, 945. See also Martin and Scott Bray, above n 228.
246 COAG, above n 98, 60 [237].
247 Ibid 60 [238].
248 Leigh, above n 235, 945; Roach, above n 94, 196–7; Walker, above n 210, 388.
249 Martin and Scott Bray, above n 228.
250 Ibid 650.

In Australia, it remains to be seen what reactions there will be to the COAG Committee's recommendations that in control order proceedings, applicants must be given a minimum level of information sufficient for them to give instructions so as to enable effective challenge to allegations made against them;[251] and that special advocates be used in control order cases[252] and other litigation involving national security claims[253] (which we should take to include the control of criminal organisations). However, while the introduction of a national special advocate system in Australia would be a desirable first step to aid fairness when secret evidence is used, as we have seen, experience from other jurisdictions suggests that only papers over the cracks of the damage done to open justice and procedural fairness. What, it seems, is actually required is a return to first principles, in much the same way the Court of Appeal asserted in *Al Rawi (CA)* that an aspect of the cardinal requirement of a fair trial is that 'each party and his lawyer, sees and hears all the evidence and all the argument seen and heard by the court',[254] which is a variant of the COAG Committee's proposed minimum disclosure requirement set out above.

VIII Representative and Responsible Government

Another means of attempting to attain a balance between security and justice is through democratic institutions and parliamentary processes, which in Australia are especially significant because there is no Commonwealth bill of rights to safeguard human rights, and only limited constitutional provision for the protection of individual rights and freedoms.[255] This is because the founding fathers of the Australian federation thought that the doctrines of representative and responsible government would be sufficient to provide these protections, and they did not envision a time when that might cease to be the case.

Indeed, some Australian legal scholars and commentators have said that parliaments should exercise restraint when considering the enactment of exceptional measures, such as the judicial use of secret evidence, that may become normalised, thus causing the 'erosion of civil liberties and human rights and damage to the rule of law and democratic values'.[256] Another version of this view places faith in

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251 COAG, above n 98, xiv, 15 [59].

252 Ibid.

253 Ibid 60 [239].

254 *Al Rawi* (CA) [2010] 4 All ER 559, 564 [14] (Neuberger MR).

255 McGarrity, above n 20, 168; Martin, above n 9, 191.

256 Martin, n 9 above, 196. See also McGarrity, above n 20, 170; David Lyon, 'Surveillance, Security and Social Sorting: Emerging Research Priorities' (2007) 17(3) *International Criminal Justice Review* 161, 162; Nicola McGarrity and George Williams, 'When Extraordinary Measures Become Normal: Pre-emption in Counter-terrorism and Other Laws' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge, 2010) 145.

'democratic deliberation', which in the UK has enabled 'criticisms to be aired and some improvements to be made in curbing both the fairness-inhibiting features of the closed material process and the stringent aspects of the control order regime'.[257] Unfortunately, though, if recent experience in Australia is anything to go by, extreme 'law and order politics' will continue unabated,[258] and unchecked by democratic processes. And, as the decision in *Pompano* and the other criminal intelligence cases bears out, judicial deference,[259] rather than resistance, to executive discretion and enhanced police powers will be the order of the day, as security triumphs over due process of law.[260]

To be sure, calls for Australian politicians to exercise legislative restraint have largely gone unheeded. Since the decision in *Pompano*, the Queensland Government has introduced a raft of measures designed to deal with bikie gang related crime, including legislation imposing mandatory sentences of 15 years' imprisonment in addition to the original sentence for a declared offence on a 'vicious lawless associate',[261] such as a bikie club member, and an extra 10 years (ie 25 years on top of the original sentence) for a vicious lawless associate who was an office bearer of the relevant association at the time or during the commission of the offence.[262] Sentences for these offences are to be served in a maximum security 'super jail' where, among other things: inmates are subject to constant monitoring, including monitoring of personal calls and mail; they spend 22 hours a day in solitary confinement; they are allowed only one hour of non-contact visits with family per week; and they are required to wear fluorescent pink jumpsuits,[263] in a move presumably intended to mimic Arizona Sheriff Joe Arpaio's policy of emasculating male prisoners by having them wear pink underwear.[264] As this extreme punishment regime is aimed at 'encouraging vicious lawless associates to cooperate with law enforcement agencies',[265] it has been suggested that it is medieval in nature: 'The threat of 15 or 25 years extra imprisonment unless the prisoner produces information is not much more subtle than the extraction of such information by torture in England before 1640'.[266]

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257 Tulich, above n 110, 363. See also Tomkins, above n 190.

258 See, eg, Martin, above n 117.

259 See Kenneth M Hayne, 'Deference — An Australian Perspective' [2011] *Public Law* 75.

260 See Tomkins, above n 23.

261 One is struck by the similarity between this as an exceptional category of person in Queensland's 'war on organised crime' and the designation of 'enemy combatants' in the US's 'war on terror'.

262 *Vicious Lawless Association Disestablishment Act 2013* (Qld) s 7(1).

263 Andrew Trotter and Harry Hobbs, 'The Great Leap Backward: Criminal Law Reform with the Hon Jarrod Bleijie' (2014) 36(1) *Sydney Law Review* 1, 20–1.

264 See Catherine A Traywick, 'Australia's angels', *Miami Herald* (online), 23 October 2013 <http://www.miamiherald.com/2013/10/23/3706507/australias-angels.html>.

265 *Vicious Lawless Association Disestablishment Act 2013* (Qld) s 2(2)(c).

266 Trotter and Hobbs, above n 263, 38.

While it is not beyond the realms of possibility that the Queensland Government feels it has been given licence to intensify its legislative assault on bikies in light of the High Court's decision in *Pompano*, anti-bikie measures nevertheless form part of the Queensland Government's broader law and order campaign. Among other things, the campaign aims generally to enhance police powers, including at special major events,[267] and at 'out-of-control' events that may involve disorderly, offensive, threatening or violent conduct, such as using offensive, obscene, indecent, abusive or threatening language.[268] Although granting police extraordinary powers at high-profile international events is not in itself unusual,[269] what is worrying, apart from the fact that many of those powers subsequently become normalised,[270] is the potential there now is for those laws to interact with the legislation directed at bikies, as Galloway and Ardill explain:

> If for example an otherwise peaceful (and lawful) assembly turns violent, there is the possibility for people to be charged with affray, one of the offences listed as a trigger for operation of the *VLAD* [*Vicious Lawless Association Disestablishment*] *Act*. Carrying out such an act with three others deemed to be participants in a serious crime then renders the accused a participant in a criminal organisation. This would attract the additional mandatory sentences.[271]

That the Queensland Government rushed through the new anti-bikie laws, bypassing parliamentary committee and public consultation processes,[272] is made even more parlous given Queensland's unicameral system, whereby, since the abolition of the Legislative Council in 1922,[273] there is no upper house to act as a check on power exercised by the Government and executive branch.[274] The concept of representative government then is, in Queensland, at least, something of a misnomer, given the acute concentration of power in the executive, and the fact that, despite the claims of the State's Attorney General that 70 per cent of Queenslanders support the new laws,[275] the

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267 *G20 Safety and Security Act 2013* (Qld).

268 *Police Powers and Responsibilities Act 2000* (Qld) ss 53BB–BC.

269 Greg Martin, 'Showcasing Security: The Politics of Policing Space at the 2007 Sydney APEC Meeting' (2011) 21(1) *Policing and Society* 27. See also Martin, above n 117.

270 Ibid.

271 Kate Galloway and Allan Ardill, 'Queensland: A Return to the Moonlight State?' (2014) 39(1) *Alternative Law Journal* 3, 6.

272 AAP, 'Human rights lawyers slam Queensland bikie laws', Brisbane Times (online), 27 October 2013 <http://www.brisbanetimes.com.au/queensland/human-rights-lawyers-slam-queensland-bikie-laws-20131027-2w9c6.html>.

273 Galloway and Ardill, above n 271, 4.

274 Gabrielle Appleby, 'Bikies crackdown: Did the Constitution fail Queensland?', *The Conversation* (online) 21 October 2013 <http://theconversation.com/bikies-crackdown-did-the-constitution-fail-queensland-19359>.

275 Galloway and Ardill, above n 271, 7.

present Government's overwhelming parliamentary majority is disproportionate to the 49.66 per cent of the overall vote it won in the 2012 state election.[276]

The principle of responsible government also seems inapplicable in the case of Queensland, where the implementation of 'simplistic solutions' (ie passing laws with alacrity to give the public the impression something is being done about a problem)[277] highlights the dangers of 'overcriminalisation',[278] which refers to an increased recourse to criminal law and penal sanctions to solve particular problems that may be better addressed through alternative means, such as increasing state resources or allocating them more efficiently. Indeed, the need for bikie control order laws has been questioned on the basis there is adequate provision in the extant criminal law to deal with organised crime (eg money laundering and drug offences), and that lack of law enforcement resources are more of a problem than lack of laws.[279]

Ignoring the efficacy of existing statutes, and introducing quick-fix solutions, can also impose greater, sometimes unforeseen, burdens on the criminal justice system, including the possibility for the erosion of the rule of law.[280] Moreover, it has been argued anti-bikie legislation may be counterproductive, as it drives organised crime groups (further) underground,[281] and it is likely that criminal organisations will adapt to the legislation by modifying their communications and associations to become more sophisticated, which will make them harder to detect.[282] It is no surprise then that police now complain that identifying bikies is difficult because they no longer wear club colours or insignia, which has led to a proposal that all Queensland bikers, whether outlaw or not, give police prior notice of rides before heading out on the road.[283]

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276 Ibid 6.

277 Ibid 4–5, 8.

278 See Douglas Husak, *Overcriminalization: The Limits of Criminal Law* (Oxford University Press, 2008). See also Arlie Loughnan, 'Drink Spiking and Rock Throwing: The Creation and Construction of Criminal Offences in the Current Era' (2010) 35(1) *Alternative Law Journal* 18.

279 McGarrity, above n 20, 169. See also Letter from Bernard Coles QC, President, The New South Wales Bar Association to Attorney General, The Hon Greg Smith SC MP, 21 February 2012, 1.

280 Galloway and Ardill, above n 271, 8.

281 McGarrity, above n 20, 169.

282 Letter from Coles, above n 279, 2.

283 Kristian Silva, 'Bikers asked to give police notice of rides' *Brisbane Times* (1 November 2013) <http://www.brisbanetimes.com.au/queensland/bikers-asked-to-give-police-notice-of-rides-20131031-2wm1l.html>.

IX Conclusion

Time will tell as to how things will pan out in Australia, although presently there appears neither the political nor judicial will to halt the creep of secrecy in forensic settings. In fact, there appears to exist a 'deliberative deficit', stemming 'from the tyranny of a powerful minority — the national security executive and its operative principles of secrecy, pre-eminence and pre-emption'.[284] This is not, however, a situation unique to Australia, as is borne out by the ever-increasing push for secrecy in the UK.[285] Although contrary to the Australian experience, in the UK there has been an 'energetic judicial stance' toward recent attempts by executive officers to shroud their actions, and those of other government officials and agents, in secrecy.[286]

On a more fundamental level, it has been argued that control orders are unnecessary in Australia,[287] which, unlike the UK, allows for the admissibility of intercept evidence;[288] although, one of the few exceptions to the UK's prohibition on intercept evidence is that it 'may be used in control order proceedings, where special advocates represent the interests of suspects'.[289] Because intercepted telecommunications are admissible in criminal proceedings in Australia, law enforcement agencies there are able to arrest suspects at a very early stage in the preparation of terrorist acts,[290] which is one reason control orders are seldom used in Australia;[291] yet '[i]n each of Australia's terrorism trials, intercept evidence has played a crucial role'.[292]

A final point worth mentioning pertains to the curly problem of reconciling the use of secret evidence and public interest immunity. Essentially, the problem is that public interest immunity is a 'blunt instrument' because it excludes evidence altogether.[293] That might mean so much material is excluded on a public interest immunity certificate as to prevent litigation proceeding, which is a key reason the UK Government has extended the use of CMPs to civil cases under the

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284 Joo-Cheong Tham, 'Parliamentary Deliberation and the National Security Executive: The Case of Control Orders' [2010] *Public Law* 79, 81.

285 See Martin and Scott Bray, above n 228; Rebecca Scott Bray and Greg Martin, 'Closing Down Open Justice in the United Kingdom?' (2012) 37(2) *Alternative Law Journal* 126.

286 Walker, above n 210, 235.

287 Greg Martin, 'Control Orders: Out of Control? High Court Rules South Australian "Bikie" Legislation Unconstitutional' (2011) 35(2) *Criminal Law Journal* 116, 122.

288 *Telecommunications (Interception and Access) Act 1979* (Cth).

289 Scott Bray, above n 67, 576.

290 Blackbourn and McGarrity, above n 119, 268.

291 Ibid 270. See also Lynch, Tulich and Welsh, above n 12, 163; Tulich, above n 110, 352.

292 Ibid 267. To date, Australian authorities have charged 38 people, and convicted 25 with terrorism offences: ibid 258.

293 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98, (2004), [8.209].

JS Act. However, in such circumstances, a case, or part of a case, can only be tried under a CMP if 'it is in the interests of the fair and effective administration of justice',[294] which according to Tomkins gives effect to the House of Lords' 'last resort' amendment (mentioned above),[295] and, indeed, was the view taken by the UK High Court in the first case decided under the *JS Act*.[296]

Accordingly, despite the doom and gloom that preceded the introduction of the *JS Act*, Tomkins believes the use of CMPs will undoubtedly be conditioned (and, thus, limited) by the *Human Rights Act 1998* (UK) (which incorporates the ECHR art 6 right to a fair trial), as well as by the common law — including the Supreme Court rulings in *Al Rawi (SC)* and *Bank Mellat (No 2)*, and the 'principal of legality',[297] the lynchpin of which is that when it enacts legislation infringing fundamental rights and freedoms, 'Parliament must squarely confront what it is doing and accept the political cost'.[298] There are far more grounds for pessimism in Australia, however, where unfortunately the case law does not offer such a forthright and robust defence of the principles of open justice and procedural fairness;[299] there is no bill of rights to protect human rights and freedoms; and politicians are steadfastly intent on pursuing punitive law and order agendas, seemingly regardless of any potential political cost.

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294 *Justice and Security Act 2013* (UK) s 6(5).
295 Tomkins, above n 190, 326.
296 *CF v Foreign and Commonwealth Office* [2014] 1 WLR 1699.
297 Tomkins, above n 190, 326–7.
298 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffmann).
299 Cf Dan Meagher, 'The Common Law Principle of Legality' (2013) 38(4) *Alternative Law Journal* 209.