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The Rule of Law and the Courts
The Motor Cycle Gang Case

Wainohu v NSW [2011] HCA 24

Who is Derek Wainohu?

Mr Wainohu has been a member of the Hells Angels Motorcycle Club of NSW for 20 years and for some time was the President of its Sydney branch.



Mr Wainohu's concerns

Under the *Crimes (Criminal Organisations Control) Act 2009* (NSW) the NSW Supreme Court was given the power to “declare” control and regulation of members of certain organisations. These organisations were ‘declared organisations’.

The NSW Police Commissioner obtained a declaration from the NSW Supreme Court for the ‘Hells Angels’ to be a ‘declared organisation’

The NSW Police Commissioner sought orders from the NSW Supreme Court to declare certain members to be ‘controlled members’ according to the Act

Under the Act it is illegal for ‘controlled members’ to associate with one another

‘Controlled members’ are not permitted to work in numerous occupations and industries -section 27

Prohibited Work Activities under the *Crimes (Criminal Organisations Control) Act 2009*.

section 27

- (a) operating a casino within the meaning of the *Casino Control Act 1992* , or being a special employee within the meaning of Part 4 of that Act,
- (b) carrying on a security activity within the meaning of the *Security Industry Act 1997* ,
- (c) carrying on the business of a pawnbroker within the meaning of the *Pawnbrokers and Second-hand Dealers Act 1996* ,
- (d) carrying on business as a commercial agent or private inquiry agent within the meaning of the *Commercial Agents and Private Inquiry Agents Act 2004* ,
- (e) possessing or using a firearm, or an imitation firearm, within the meaning of the *Firearms Act 1996* or carrying on business as a firearms dealer within the meaning of that Act,
- (f) operating a tow truck within the meaning of the *Tow Truck Industry Act 1998* ,
- (g) carrying on business as a dealer within the meaning of the *Motor Dealers Act 1974* ,
- (h) carrying on business as a repairer within the meaning of the *Motor Vehicle Repairs Act 1980* ,
- (i) selling or supplying liquor within the meaning of the *Liquor Act 2007* ,

cont'd

- (j) carrying on the business of a bookmaker within the meaning of the *Racing Administration Act 1998* ,
- (k) carrying out the activities of an owner, trainer, jockey, stablehand, bookmaker, bookmaker's clerk or another person associated with racing who is required to be registered or licensed under the *Thoroughbred Racing Act 1996* ,
- (l) carrying out the activities of an owner, trainer or other person associated with greyhound or harness racing who is required to be registered under the *Greyhound and Harness Racing Administration Act 2004* ,
- (m) any other activity prescribed by the regulations.

Penalties for Breaches of the *Crimes (Criminal Organisations Control) Act 2009*.

Breaches of control orders in the first instance would be heard in the Local Court which was empowered to fine or to order up to two years' imprisonment.

Second offences could result in terms of imprisonment of up to five years.

Introduction of the Bill into Parliament

Premier Nathan Rees introduced the Bill on 2nd April 2009 to the Legislative Assembly, NSW Parliament and said:

The legislation is a proportionate response to an escalation in violence crime involving outlaw motorcycle gangs that has spilled into public places and is threatening the lives and safety of innocent bystanders...These laws will give our police the power they need to disrupt and ultimately dismantle these criminal gangs...

I am advised that these laws are backed by...expert legal advice...[the provisions of the Bill] are well protected against any future High Court appeals.

DPP Nicholas Cowdery AM QC criticised the Legislation stating:

[T]his very troubling legislation...is another giant leap backward for human rights and the separation of powers- in short, the rule of law in NSW...The Act provides that an “eligible” judge is not required to provide any grounds or reasons for his or her decision...judges should give public reasons for their decisions.

Comments on Organisation/ Association Legislation – “Bikie Gangs”, May 2009.

High Court Case: *Wainohu v The State of NSW*

On 23 June 2011 the High Court released its decision on *Wainohu v the State of NSW* [2011] HCA 24

Key Questions for High Court to consider:

Is the *Crimes (Criminal Organisations Control Act) 2009 (NSW)* or any provision or part of it invalid on the grounds that:

- it undermines the institutional integrity of the Supreme Court of New South Wales;
- it is outside the legislative powers of the NSW Parliament;
- It infringes on the implied constitutional freedoms of political communication and political association?

Key Issues with the High Court Case

The case is of interest because the judgement provides guidance on:

- The separation of powers principal.
- The role of the courts and, in particular, judges in deciding cases, and the duty to provide reasons for a decision.
- What is the right of association and can laws be passed which deny individuals the rights of joining a club or association? To what extent does the Constitution protect a right of association?
- Can courts declare that certain groups of people or association are illegal, and should there be laws which do this?

Mr Wainohu challenged the validity of the Act on the basis that the law:

- Undermined the institutional integrity of that Court in a way that is inconsistent with the national integrated judicial system by:
 - conferring powers and functions on eligible judges of the Supreme Court of NSW which were not judicial in nature, including permitting decisions to be made without the giving of reasons;
 - undermining the essential characteristics of a court including the reality and appearance of the court's independence and its impartiality, the application of procedural fairness and adherence to the principle of an open court, inconsistently with Chapter III of the Australian Constitution
- Infringed the implied constitutional freedoms of political communication and political association

The legislation contained a critical provision that was contrary to established rule of law principles:

Section 13

Conduct of hearings of applications for declarations under this Part (Court not bound to follow rules of evidence)

- (1) The rules of evidence do not apply to the hearing of an application for a declaration under this Part.
- (2) If an eligible Judge makes a declaration or decision under this Part, the eligible Judge is not required to provide any grounds or reasons for the declaration or decision (other than to a person conducting a review under section 39 if that person so requests). If reasons are provided that include criminal intelligence, section 28 applies.

This section is contrary to the established rule of law principles because the duty of judges to give reasons for their decisions after trials and in important interlocutory proceedings is well established.

The obligation to give reasons:

- Promotes good decision making
- Promotes public confidence in decisions of Courts
- It is consistent with the idea of democratic institutional responsibility to the public that those who are entrusted with the power to make decisions, affecting the lives and property of their fellow citizens, should be required to give, in public, an account of the reasoning by which they came to those decisions
- It is an expression of the open court principal which is an essential characteristic of the judicial function



What did the High Court decide?

The High Court held, by majority (6-1) that:

- The Act was invalid.
- The Act provided that no reasons need be given for making a declaration. The jurisdiction of the Supreme Court to make control orders was enlivened by the decision of an eligible Judge to make a declaration.
- That, in those circumstances, the absence of an obligation to give reasons for the declaration after what may have been a contested application was repugnant to, or incompatible with, the institutional integrity of the Supreme Court. Because the validity of other parts of the Act relied on the validity of Part 2, the whole Act was declared invalid.

(extract from High Court media release on judgement of 23 June 2011)



What else did the court conclude?

- That the constitution of New South Wales does not include a strict *separation of powers doctrine* like the federal Constitution. Because of the history of state government in Australia, and the context of state constitutions, the Federal doctrine of separation of powers does not prohibit the conferral of executive / administrative functions on a court of the State or on judges of a state court, subject of course to the requirement that they are not incompatible and do not substantially impair its essential and defining characteristics as a court.
- That legislation cannot confer on a state court a function that would lessen the court's independence and integrity under the federal Constitution and which should apply equally to justice throughout Australia – to do otherwise would create a system where there are levels or degrees of justice.
- That judges have a duty under the federal Constitution to give reasons for their decisions which is also an expression of the open court principle, and also can provide the defendant with a basis to lodge an appeal to a higher court.
- There is no general freedom of communication in the Constitution beyond that which is necessary for the effective operation of representative government (sections 7, 24, 64 and 128).

Questions

1. What is the separation of powers and how can this principal be found in the Australian Constitution? (Give a brief description of each power.)
2. What is meant by an open court? (be sure to discuss whether the public can attend, whether evidence is denied to one of the parties to the proceedings, whether the media can report on the proceedings, whether witnesses are allowed to be heard in secret and/or have their identities protected).
3. Why are open courts important?
4. In what circumstances might one expect for there to be a closed court?
5. Are open courts a universal practice across the world, can you find some notable exceptions (*Stern Hu* case is one example, see RoLIA website www.ruleoflaw.org.au)
6. In Wainohu's case were there likely to be restrictions in relation to an open court?
7. Under the NSW law what employment restrictions could have been imposed had Wainohu been declared a 'controlled' member?
8. Can you suggest why certain occupations were identified in the legislation?
9. A key rule of law principal is that all should be equal before the law, do you think that the legislation respects this principal?
10. Another key rule of law principle is that people should be innocent before proven guilty. Does the Bill appear to cut across this principle and if so how?
11. If the police cannot use this provision to enforce the law what other powers do police have to stop crime and corruption which the Act was designed to address?
12. What do sections 7, 24, 64 and 128 of the Australian Constitution have to say about rights and liberties?

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Thank you

Other Rule of Law Resources:

1. Henry VIII Clauses and The Rule of Law Slides
2. The Rule of Law; Case Studies and Their Relevance to Legal Studies, *Legal Studies State Conference 2011*
3. *Judicial Reflections on the Rule of Law* Jim Spigelman AC QC

Available at our website

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