



**SUPREME COURT  
OF WESTERN AUSTRALIA**  
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*This statement is not intended to be a substitute for the reasons of the Court of Appeal or to be used in any later consideration of the Court's reasons.*

### **Summary - Gypsy Jokers Motorcycle Club Inc v Commissioner of Police CACV 52 of 2006**

In a decision published today, the Court of Appeal, by a majority, has upheld the validity of the provisions of the *Corruption and Crime Commission Act* which empower the Commissioner of Police to issue a notice requiring the removal of fortifications from premises which he believes are attended by persons suspected to be involved in organised crime.

The main feature of the appeal was a provision of the Act which empowers the Commissioner of Police not to disclose to the owner of the premises the information on which he relied in issuing the notice.

#### **Summary of the Facts**

The case arose in respect of premises situated in Lower Park Road, Maddington, which are used by the Gypsy Jokers Motorcycle Club as a clubhouse. The premises are situated in an industrial area. On 5 May 2004, then Assistant Commissioner of Police, Mel Hay, acting as the delegate of the Commissioner of Police, issued a notice under the *CCC Act* requiring the owner of the premises (the club) to remove the fortifications.

Shortly after the issue of the notice, the club applied to the Supreme Court for review of the decision to issue it. As part of those review proceedings, Mr Hay filed an affidavit which identified and annexed materials which he had taken into account in making his decision to issue the notice. Pursuant to section 76(2) of the *CCC Act*, he designated a significant portion of that information as confidential on the ground that its disclosure might prejudice the operations of the Commissioner of Police. The consequence of that designation, under section 76 of the *CCC Act*, is to require the Court to act upon that information but to prevent the Court from disclosing it to either any party to the proceedings (in this case the motorcycle club), or any other person.

The application for review came on for hearing before Justice Blaxell on 5 December 2005. At that hearing, David Grace QC, on behalf of the motorcycle club, submitted section 76 of the *CCC Act* was constitutionally invalid. Before proceeding to hear the argument, in accordance with the provisions of the *Judiciary Act*, Blaxell J required that notices be issued to each of the State and Commonwealth Attorneys General before the matter proceeded further.

Those notices were issued and the matter came back before Blaxell J on 1 May 2006. He referred the questions of constitutional validity to the Court of Appeal. In the course of the proceedings before the Court of Appeal, the club argued that all of the provisions of the *CCC*

*Act* relating to fortifications were constitutionally invalid because of the invalidity of section 76 of the *Act*.

### **The Issues in the Case**

The club relied upon the principle enunciated by the High Court in its decision in *Kable v Director of Public Prosecutions*. In very general terms, the principle is to the effect that because the Commonwealth Constitution presumes an integrated Australian court system which includes the Supreme Courts of the States, for the exercise of the judicial power of the Commonwealth, it is beyond the legislative powers of the States to require their Supreme Courts to act in such a way as to so compromise their institutional integrity as to make them an inappropriate forum for the exercise of Commonwealth judicial power. The club argued that the provisions of the *CCC Act* had this effect because they enabled one party to contested proceedings to definitively determine the extent to which the other party would be made aware of the case which it had to meet, that they required the Court to deny procedural fairness to an applicant for review of a fortification notice, and that they might well prevent the Court from giving adequate or comprehensible reasons for its decision from which there is neither an appeal nor any avenue for judicial review without the consent of the Parliamentary Inspector.

### **The Decision**

By a majority of 2 to 1, the Court of Appeal rejected the club's argument and held that the legislation is within the legislative power of the State and valid.

The judgment of President Steytler sets out the factual history of the case and reviews the principle enunciated by the High Court in *Kable's* case and in subsequent decisions on the same topic. After reviewing the particular legislative provisions in the *CCC Act*, he concluded that there are aspects of section 76 that were inconsistent with the judicial process and which could result in a serious denial of natural justice. However, notwithstanding those undesirable attributes, in his view, the legislation did not impact on the Court's institutional impartiality or independence.

Chief Justice Martin agreed with President Steytler. He also reviewed a number of decisions in the United Kingdom and Europe, New Zealand, Canada and the United States, from which he concluded that in all of those jurisdictions, the Courts had accepted that in some circumstances the public interest in the protection of the confidentiality of investigative or security material justified the modification of the normal requirement that a party be given full notice of the case that he or she has to meet.

Justice Wheeler disagreed. After reviewing a line of cases concerning the limitations upon the legislature's ability to appoint Judges to perform non-judicial functions, her Honour concluded that a combination of the features of section 76 (2) of the *CCC Act* collectively represented such a departure from the requirement that the judiciary be independent of the Executive and from core notions of impartiality as to be inconsistent with the Commonwealth Constitution.

The case will now return to Justice Blaxell for him to complete the review. It would, however, be open to the motorcycle club to seek special leave to appeal from the decision of the Court of Appeal to the High Court of Australia.

For the full judgment of the Court of Appeal in this matter, please go to [\[2007\] WASCA 49](#).