

SA 'bikie' laws struck down

James Eyers

The High Court has reminded governments that the independence of the judiciary is a hallmark of the constitution and the court will prevent the executive from intruding on the judicial function by striking down laws that interfere with courts' ability to decide cases independently and impartially.

In a six-to-one decision in *South Australia v Totani* yesterday, which struck down part of South Australia's so-called bikie legislation, Chief Justice Robert French began his judgment with the words: "Courts and judges decide cases independently of the executive government. That is part of Australia's common law heritage, which is antecedent to the constitution and supplies principles for its interpretation and operation."

In a separate case, the High Court found yesterday that the Migration Act and Australian court decisions were binding on those considering claims for refugee status by persons held in offshore processing centres.

The decision in *Totani* is but the latest using Chapter 3 of the constitution (which establishes the judiciary as the third arm of government) to strike down government legislation.

Last year in *Lane v Morrison*, the court found the Australian Military Court unconstitutional because it vested judicial power in a body that was not sufficiently independent and impartial. Three months later, in *IFTC v NSW Crime Commission*, the court struck down NSW's proceeds-of-crime legislation, finding it deprived judges of the "power to ensure, so far as practicable, fairness between the parties".

This year in *Kirk v Industrial Relations Commission*, the High Court said it was necessary to take into account Chapter 3 when considering state legislation and it overturned an occupational health and safety law conviction on the basis that the NSW Industrial Court had failed to uphold the standards of a Chapter 3 court.

However, in the February 2009 case of *K-Generation*, the High Court found a federal licensing law, which

infringed on the principle of open justice, was nevertheless valid because it did not compromise the judicial function of a court.

Chief Justice French said yesterday that SA's Serious and Organised Crime (Control) Act required the state's Magistrates Court to "make a decision largely preordained by an executive declaration" and it was a "substantial recruitment of the judicial function of the Magistrates Court to an essentially executive process".

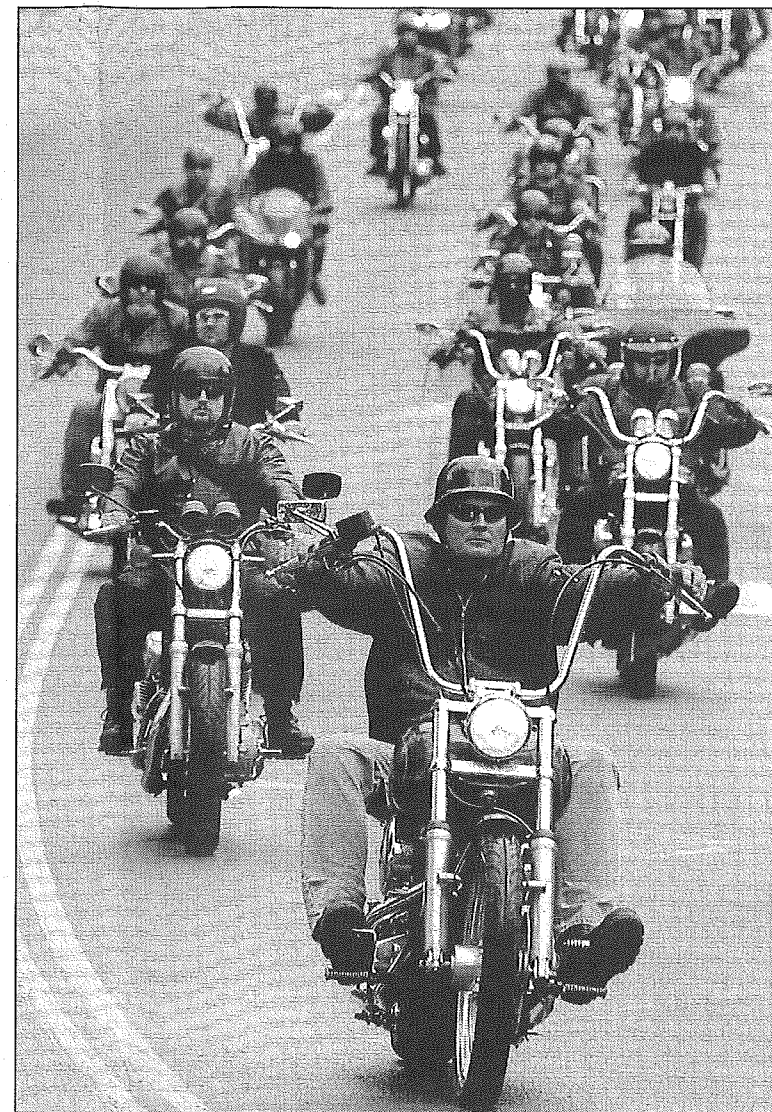
The act in question gave the South Australian Attorney-General the power to "declare" an organisation on the basis that its members are involved in "serious criminal activity" that represented a risk to public safety. The act also imposed on the Magistrates Court an obligation, on application by the Commissioner of Police, to make a control order against a member of a declared organisation.

In May 2009, the Finks Motorcycle Club was declared by then attorney-general Michael Atkinson. An application to the Magistrates Court was then made for a control order to be made against Sandro Totani, a Finks member, which was challenged on the basis that the executive was determining the crucial questions regarding criminality and merely recruiting the court to complete the process.

Chief Justice French said the application to the Magistrates Court requires it "to carry out a function which is inconsistent with fundamental assumptions, upon which Chapter 3 of the constitution is based, about the rule of law and the independence of courts and judges. In that sense it distorts that institutional integrity which is guaranteed for all state courts by Chapter 3 of the constitution."

Law Society of South Australia president Ralph Bönig said the laws denied individuals a fundamental right "to independently refute and challenge allegations made against them and impaired the independence of the courts. The consequences of control orders amounted to a serious restraint on their liberty. The High Court has recognised this."

The Australian Lawyers Alliance national president, Brian Hilliard,



Bikie gangs can face control orders in South Australia.

Photo: ADAM MCLEAN

described the decision as "a victory for democratic principle over political expediency".

Alliance director Greg Barns also backed the refugee decision.

The alliance had "always been opposed to moves by the Liberal and Labor governments to deny asylum seekers their fundamental human right to seek relief from the courts when they are adversely affected by

political decision making", he said.

Greens senator Sarah Hanson-Young said the refugee decision illustrated the need for "full and equal legal protection for all asylum seekers". The Greens would introduce a bill next week to repeal the excision policy and "introduce proper judicial review, challenging the presumption of detention", she said.

Offshore detention ruling, page 12 ■

'World of woe' in store for military

James Eyers

The government should reconsider its decision to establish a Chapter 3 court for military prosecutions and the system of court martial should be preferred in cases that were essentially professional disciplinary matters, NSW Supreme Court judge Paul Brereton, an Australian Army Reserve commander, said.

Speaking in a personal capacity at the Rule of Law Institute of Australia's conference at the weekend, Justice Brereton described preoccupation with the supposed benefits of a Chapter 3 court as "misconceived". He also defended director of military prosecutions Lyn McDade after she was criticised for charging three Australian soldiers with military offences following operations in Afghanistan where six civilians, including four children, were killed.

The trials will take place under the court martial system, following the decision of the High Court in 2009 to strike down the Australian Military Court as unconstitutional. The government is preparing to introduce legislation to create a new Chapter 3 military court, administered by the Federal Court.

But Justice Brereton said: "There is a risk that retrospective forensic

The military justice system was fundamentally a disciplinary, not a criminal, jurisdiction.

NSW judge Paul Brereton

analysis of an incident that required an immediate decision and response by soldiers in the urgency, danger and fog of battle, undertaken years later over days in a courtroom, may give insufficient weight to the pressures of the circumstances in which the soldiers were operating."

The military justice system was "fundamentally a disciplinary, not a criminal, jurisdiction", he said.

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