Australia: Labor governments vow to retain "bikie laws" despite High Court ruling

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Australian Labor governments, federal and state, have declared they will maintain legislation giving them sweeping powers to outlaw any "criminal organisation," despite a High Court decision in November that ruled an aspect of South Australia's laws unconstitutional. In the *Totani* case, a 6-1 majority on Australia's highest court overturned a provision of the South Australian Serious and Organised Crime (Control) Act 2008—universally mis-described in the mass media as "anti-bikie" legislation.

Premier Mike Rann responded defiantly to the ruling, pledging to quickly introduce new legislation to overcome its impact. The Australian Broadcasting Corporation reported the South Australian (SA) premier as saying, "My advice to the bikies is: if you celebrate now, wait and see what we're doing next."

In reality, the legislation, like its counterparts in other states, makes no reference to "bikies", "motorcycle gangs" or any related group. The laws can be used against any organisation—including a political one—alleged to be involved in "serious criminal activity", and their effect is to extend the scaffolding for a police state that has been erected over the past decade by both Liberal and Labor governments, under the pretext of the "war on terror". The legislation incorporates key features of the anti-terrorism laws, including the executive banning of organisations, use of secret evidence and "control orders".

After the High Court ruling, the New South Wales (NSW) and Queensland attorneys general immediately defended their states' versions of the South Australian legislation. According to Sky News, Labor's Attorney General Robert McClelland, speaking for the federal Gillard government, declared: "It's important that all states have these laws in place." Earlier, the governments of NSW, Victoria, Queensland and Western Australia, as well as the Northern Territory and the Commonwealth, had intervened in the trial to defend the SA laws.

The SA legislation gave the government, acting though the attorney general and state police commissioner, powers to criminalise association between "members" of any "organisation" deemed to be engaged in "serious criminal activity" where the organisation posed a "risk to public safety and order".

In "declaring" an organisation, the attorney general was not bound by the rules of evidence, nor required to give reasons, and could rely on secret "criminal intelligence" that organisation members were not permitted to see. Once a declaration was made, the legislation said a magistrates court "must" grant applications by the police commissioner to make a "control order" against an alleged member, prohibiting him or her from associating with other members, or face five years' imprisonment.

The court was obligated to make such orders, irrespective of whether the person had ever engaged in criminal conduct or was even likely to do so. The court's only tasks were to determine whether the person was, in fact, an organisation "member", and to then set the control order's specific terms.

Applying the precedent of the 1996 High Court decision in *Kable*, six of the court's seven justices ruled that the legislation offended the separation of powers in the Australian Constitution, by emasculating the judicial character of a court. Chief Justice Robert French objected to the "substantial recruitment" of the "judicial function of the Magistrate's Court" to an "essentially executive process".

The facts of the *Totani* case demonstrate how the control order regime could be used to monitor political groups. In 2009, two members of the Finks Motorcycle

Club were placed under control orders. They were prohibited from associating with other members of "declared organisations," except with "members of a registered political party" at an "official meeting of the party". Even then, they were instructed to provide the police "State Intelligence Branch" with written notice of the "time, date and place of the association".

The NSW and Queensland governments have asserted that the *Totani* decision would not invalidate their laws. In NSW, the legislation empowers the police commissioner to ask an "eligible judge"—a Supreme Court judge approved by the state government—to "declare" an organisation. The Hells Angels motorcycle club is challenging the law in the High Court.

Chief Justice French said there were differences between the SA legislation and that of other states and territories. He left open the question of whether "eligible judges" performed an "administrative" rather than a genuine "judicial function" in making control orders.

If the NSW laws remain intact, this will only highlight the narrow basis of the *Totani* ruling. The judges found no constitutional barrier to the use of secret evidence. They relied on the High Court's unanimous 2009 judgment in *K-Generation*, which said secret "criminal intelligence" was legitimate in civil proceedings. As the WSWS commented at the time, the use of secret evidence allows for the unchecked victimisation and persecution of individuals and groups, laying the basis for authoritarian forms of rule.

In *Totani*, the court also reaffirmed its 2007 ruling in *Thomas v Mowbray* that a control order could be imposed on an individual without any finding of criminal guilt, as long as a court had a role in determining whether the order should be made. The SA control order regime was ruled invalid because it was mandatory for a court to issue an order. According to this logic, the court could find a revamped SA scheme valid, so long as some role was given to a court.

Justice Dyson Heydon's dissenting judgment was notable for its open support for executive power. He asserted that the "primary duty" of a government seeking to foster the "rule of law" was to preserve personal safety and "the government itself" from "criminal violence and other criminal activities". Heydon defended the power of the SA attorney general to unilaterally determine someone's criminality. "If members associate for the purpose of organising, planning or engaging in serious criminal activity," he stated, it would not be difficult for the attorney general "to infer that they are guilty of conspiracy to commit offences". Furthermore, "a declared organisation is, to put it shortly, a criminal gang," he said.

Another part of the SA legislation, not challenged in the *Totani* proceedings—and which therefore remains in force—makes it an offence for any person to associate with a member of a declared organisation six times or more in a 12-month period. There are narrow exceptions, such as for close family members. Someone can be jailed for five years under this section, regardless of whether their contact with a member of an outlawed group had anything to do with the organisation or any "serious criminal activity". This is a potentially far-reaching provision that also seriously erodes basic legal and democratic rights.

On the whole, the High Court's ruling provides a relatively minor obstacle to the rolling out of authoritarian, anti-organisation laws across Australia, which can be used against a wide range of individuals, and for political purposes.