

ANSWER SHEET

Danny and his motorbike*

* Thanks to Nikki Bromberger from the Law School at the University of Western Sydney for providing this creative scenario. If you have an idea for a scenario that students would enjoy and which would help to deepen their understanding of statutory interpretation, please let us know.

The Chapter 11 scenario 'Danny and his motorbike' on pages 343–50 of the textbook asks for advice to a client on whether harsh new laws could affect him.

It is not uncommon for students to find learning and understanding the rules of statutory interpretation fairly straight forward, and understanding the IRAC method of problem solving (Issue, Rule, Application, Conclusion) fairly basic, but when it comes to actually using their knowledge, they are unsure how to actually set out their reasoning.

Read the scenario and the legislative provisions in the textbook, and then prepare a memo addressing each question. After that, read over the sample answer below to see how you went.

PAISLEY, BROWN AND FINCH

INTERNAL MEMORANDUM

To: John Biggs, Partner
From: Max Maximum, Paralegal
Date: 13 October 2010
Re: Matter No. 23456: Sydney Bikieboys

Dear John

Thank you for the briefing sheet regarding Danny Jones, and the five specific matters you have requested that I research in relation to the impact that the *Crimes (Criminal Organisation Control) Act 2009* (NSW) ('the Act') may have on him.

Jurisdiction

The Act is NSW legislation, and the client resides and rides in NSW, so the jurisdictional requirement has been met. I note that he rides to Canberra on occasion, which is outside NSW jurisdiction, but s 4 of the Act allows for extraterritorial application, thus overriding the statutory presumption against extraterritoriality.

Commencement

Section 2 of the Act provides for commencement on the date of assent, which overrides the general rule under s 23 of the *Interpretation Act 1984* (NSW) ('the Interpretation Act') that legislation comes into force 28 days from the date of assent. The date of assent was 3 April 2009,¹ and therefore the Act is now in force.

1 Whether Sydney Bikieboys could be made a Declared Organisation under the Act

The relevant provision is s 9 of the Act, which provides that an 'eligible judge' (defined in s 5 as a judge of the Supreme Court who is given consent in writing by the Attorney General to be an

[continued next page]

¹ NSW Government Gazette No.58, 3 April 2009, Week No. 14/2009, <http://www.gazette.nsw.gov.au/pdfs/2009/3rdApril.pdf>

'eligible judge' for the purposes of this legislation) may make a declaration in relation to a particular organisation. The use of the word 'may' shows that the decision is discretionary, pursuant to section 9(1) of the Interpretation Act.

In order for s 9 to be triggered, the Commissioner must make an application under Part 2 of the Act. Section 6 contains the power for the Commissioner of Police to make the application in writing, identifying the particular organisation (broadly defined under s 3 as any incorporated or unincorporated group, however structured) and describing its nature and distinguishing characteristics, plus the names of people believed to be members of it, the groups on which the declaration is sought, and information regarding any previous such applications. Pursuant to s 6(h), there must be supporting affidavit(s) of the Commissioner and other senior police officers. The briefing document did not disclose that an application has been made. If this does occur, we will need to obtain a copy of it in order to advise Danny on whether it has been validly made under s 6.

Assuming the application by the Commissioner was in order, before making an organisation a declared organisation the eligible judge must be satisfied under s 9(1) of the Act that *members 'associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity'*, and the organisation '*represents a risk to public safety and order*' (emphasis added).

Although Danny is not actually a member of Sydney Bkieboys, the word 'member' is given a special definition under s 3 of the Act as including prospective members and those who are treated as if they belong to the organisation. Danny regularly goes on Wednesday night rides with the Sydney Bkieboys and so is likely to come within this definition.

The term 'associate' is defined under s 3 of the Act as being in company with or communicating by any means. Danny rides with Sydney Bkieboys and thereby associates with them. However, there is no evidence that the purpose of the rides is 'serious criminal activity' – they are social events. The fact that police are not allowed to be members is not sufficient evidence of criminality. Also, unless the mere fact of several motorbikes riding together on the road creates a risk to public safety and order, it is unlikely that the organisation represents a risk. This is in keeping with the purpose of the Act, considered pursuant to s 33 of the Interpretation Act, which is stated in the Long Title to be focused on 'disrupting and restricting the activities of criminal organisations and their members', i.e. not traffic congestion.

Under s 9(2) of the Act, the Judge may take into account the fact that Danny's uncle Graham and Graham's friend Uri both have criminal convictions, although Graham's conviction is for fraud which is not 'serious criminal activity' as defined in s 3 which refers to serious indictable offences and serious violence offences.

Therefore Sydney Bkieboys *could* be made a declared organisation under the Act, but it is unlikely given that the members associate for social bike rides, do not represent a risk to public safety, and, based on current knowledge, do not have criminal activities.

2 Whether Danny could be subject to a control order under the Act

Under s 19 of the Act, the Court 'may'² make a control order if:

- the person has been served with notice of an interim control order under s16;
- the person is a member of a particular declared organisation; and
- sufficient grounds exist for making the control order.

Even if Sydney Bkieboys becomes a declared organisation, the Court makes it a declared organisation, and Danny is served with notice of an interim control order, there still have to be 'sufficient grounds' pursuant to s 19(3). This term is not defined, and is somewhat ambiguous.

[continued next page]

2 *Interpretation Act 1984* (NSW) s 9.

3 NSW Legislative Assembly Hansard and Papers, Thursday 2 April 2009, [http://www.parliament.nsw.gov.au/prod/PARLMENT/nswbills.nsf/d6079cf53295ca7dca256e66001e39d2/383d6b6a0233c80dca25758c0000d70b/\\$FILE/LA%200609.pdf](http://www.parliament.nsw.gov.au/prod/PARLMENT/nswbills.nsf/d6079cf53295ca7dca256e66001e39d2/383d6b6a0233c80dca25758c0000d70b/$FILE/LA%200609.pdf) (10 October 2009).

Section 34(1)(b) of the Interpretation Act allows use of extrinsic materials to determine the meaning of an ambiguous provision. In the second reading speech Nathan Rees said the Act was to 'deal with violent outlaw motorcycle gangs', referring to violence at Sydney airport 10 days prior.³ It may therefore be inferred that control orders are to control violent outlaws, which Danny does not appear to be, and so is unlikely that a Court would consider there to be sufficient grounds for making a control order.

3 Whether Danny would lose his job if he was subject to a control order under the Act

Section 27(1) automatically suspends any authorisation for a controlled member of a declared organisation to carry on a prescribed activity. Even though the company Danny works for installs house alarms, which would come within the meaning of a 'security activity' in s 4 of the *Security Industry Act 1997* (NSW) as referred to in s 27(7) of the Act, he only works part-time in the office and so he is not a licensed locksmith or alarm technician. Even if he was, he would only be suspended, and would not necessarily lose his job.

4 Whether, if Danny and Graham are both subject to control orders, Danny could be charged under s 26(1) of the Act

Section 26(1) of the Act makes it an offence for a controlled member to associate with another controlled member. The definition of 'associate with' under s 3 of the Act is very broad, and covers being in company with, or communicating by any means. Given this is a penalty provision (with up to two years imprisonment for first offence or five years for second or subsequent offences), there is a presumption that the Court will strictly construe the section in favour of the accused.

An interpretation that promotes the purpose of the Act is preferred to one that does not.⁴ Using intrinsic materials, the Long Title says the purpose is for 'disrupting and restricting the activities of criminal organisations and their members'. In parliament Nathan Rees, referring to the proposed s 26(1) penalties, said 'To help take these gang members off the streets there will be no presumption in favour of bail for this offence'.⁵ To override such a fundamental common law right there must be express words in the Act. They are not in the Act, and words of a parliamentarian may not be substituted for the words of the statute.⁶ Given the seriousness of the penalty, it may be inferred that the association between controlled members must be for a criminal purpose, so that any contact, such as sending a Christmas card, should not result in charges being laid.

Danny could potentially argue an exception under s 26(5) and (8), of close family members, if he had been brought up by his uncle Graham. He could also try to argue under s 19(7) that there is an otherwise good reason he should be able to associate with Graham.

5 Whether Danny could be charged under s 26(1) of the Act if other members of 'Motormouths' are subject to control orders

If Danny blogged or posted to the discussion board on the Motormouths online social forum, this would meet the definition of 'associate with' in s 3 of the Act, which includes electronic communications. But, as reasoned in (d) above, it is arguable that merely posting information about motorbikes and social events should not result in charges being laid. Danny could also argue under s 26(3) that he didn't know and could not reasonably be expected to know that other Motormouths members were controlled members.

Please let me know if you would like to discuss this matter, or would like me to undertake further research.

Regards

Max

⁴ *Interpretation Act 1984* (NSW) s 33.

⁵ NSW Legislative Assembly Hansard and Papers, above n 3.

⁶ *Re Bolton; Ex Parte Beane* (1987) 162 CLR 514 at 518, per Mason CJ, Wilson and Dawson JJ.