

**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

No S30 of 2019

BETWEEN:

DAMIEN CHARLES VELLA
First Plaintiff

JOHNNY LEE VELLA
Second Plaintiff

MICHAEL FETUI
Third Plaintiff

and

COMMISSIONER OF POLICE (NSW)
First Defendant

STATE OF NEW SOUTH WALES
Second Defendant



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DEFENDANTS' OUTLINE OF ORAL ARGUMENT

20 **Part I:**

1. This outline is in a form suitable for publication on the internet.

Part II:

2. Before a serious crime prevention order will be made under the Crimes (Serious Crime Prevention Orders) Act 2016 (NSW) ("SCPO Act"), an appropriate court must:

- (a) be satisfied that the person against whom the order is sought falls within one of the classes of persons against whom an order may be made, namely, persons convicted of a serious criminal offence (s 5(1)(b)(i)) or involved in serious crime related activity for which they have not been convicted (s 5(1)(b)(ii)) (Defendants' Submissions ("DS") [10]-[11]);
- 30 (b) be satisfied that there are "reasonable grounds to believe" that the making of the order (containing such prohibitions, restrictions, requirements and other provisions as are appropriate in the terms of s 6(1)) will, in some way, prevent,

restrict or disrupt the person's involvement in serious crime related activity (s 5(1)(c));

- (c) be satisfied that there are "reasonable grounds to believe" that, by preventing, restricting or disrupting the person's involvement in serious crime related activity (as referred to in (b)), the making of the order "would protect the public" (s 5(1)(c)), having regard to such predictions as the court may make about likely future dangers to the public (see Thomas v Mowbray (2007) 233 CLR 307 at 334 [28] (Gleeson CJ); Condon v Pompano Pty Ltd (2013) 252 CLR 38 at 96 [143] (Hayne, Crennan, Kiefel and Bell JJ); DS [9]);
- 10 (d) consider that the court should make the order in the exercise of its discretion under s 5(1) (DS [37]); and
- (e) consider that the prohibitions, restrictions, requirements and other provisions of the order are "appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person in serious crime related activities" (s 6(1)), that being a broad, but not unusual, standard which involves a balancing exercise and is to be understood in light of the legislative object (see Pompano (2013) 252 CLR 38 at 54 [23]-[24] (French CJ) (by analogy); Baker v The Queen (2004) 223 CLR 513; DS [56]-[59]).
- 20 3. A court called upon to make a serious crime prevention order engages in a forward-looking "genuine adjudicative process" (see Fardon v Attorney General (Qld) (2004) 223 CLR 575 at 656 [219] (Callinan and Heydon JJ)).
4. The provisions of the SCPO Act are relevantly analogous to the provisions upheld by this Court in Thomas v Mowbray and in Fardon (DS [13]-[14]). The SCPO Act is similarly preventative in nature (see Fardon at 592 [20] (Gleeson CJ), 597 [34] (McHugh J), 608 [68] (Gummow J), 658 [234] (Callinan and Heydon JJ)).
- 30 5. As a matter of construction, the SCPO Act does not authorise custodial detention (see Al-Kateb v Godwin (2004) 219 CLR 562 at 577 [19] (Gleeson CJ); North Australian Aboriginal Justice Agency Ltd v Northern Territory (2015) 256 CLR 569 at 582 [11] (French CJ, Kiefel and Bell JJ); DS [41]). (In any event, no such order is sought against the plaintiffs.) Nor are orders made under the SCPO Act equivalent to custodial detention (see Thomas v Mowbray at 330 [18] (Gleeson CJ), 356 [116] (Gummow and Crennan JJ)).

6. The SCPO Act neither establishes an alternative criminal justice regime, nor undermines the criminal justice system. Where s 5(1)(b)(i) is relied upon, the person's past conviction is simply a factum, chosen by the legislature, that may enliven the court's power to make a serious crime prevention order (DS [21], [26]). Where s 5(1)(b)(ii) is relied upon, there is no difficulty with a court determining facts that establish, on the balance of probabilities, that a person engaged in criminal conduct (see Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd (2015) 255 CLR 352 at 371 [32] (French CJ, Hayne, Kiefel, Bell and Keane JJ); DS [22]-[25]).
- 10 7. In determining whether a serious crime prevention order should be made, a court is not enlisted by the legislature or the Executive (see Fardon at 656 [219] (Callinan and Heydon JJ); South Australia v Totani (2010) 242 CLR 1 at 43 [62] (French CJ); DS [36]). The court's power to make a serious crime prevention order is discretionary in form and substance and is only enlivened after the court engages in a "genuine adjudicative process" (DS [36]-[38]).
- 20 8. The SCPO Act retains indicia of traditional judicial functions and methods, including those relating to procedural fairness (s 5(3)-(4)) and appeals (s 11) (DS [48]; Fardon at 658 [234] (Callinan and Heydon JJ)). Noting that it is open to State legislatures to modify procedures to be adopted in certain proceedings (see Nicholas v The Queen (1998) 193 CLR 173; DS [45]-[47]), there is nothing in the SCPO Act amounting to a significant departure from traditional judicial functions and methods (DS [49]-[53]).
9. The court hearing an application for a serious crime prevention order also retains its ordinary powers to stay or adjourn serious crime prevention order proceedings where the court considered that the interests of justice require that course (DS [30]-[31]).

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