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

10 and

COMMISSIONER OF POLICE (NSW)
First Defendant

STATE OF NEW SOUTH WALES
Second Defendant

PLAINTIFFS' SUBMISSIONS

PART I: CERTIFICATION

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

20 ## PART II: STATEMENT OF ISSUES

2. The questions of law referred to the Full Court concern the validity of the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) (the **SCPO Act**). The questions, and the answers that the plaintiffs contend for, are as follows:

Question 1. **Is subsection 5(1) of the SCPO Act invalid (in whole or in part) because it is inconsistent with and prohibited by Chapter III of the Constitution?**

Answer: *Yes.*

Question 2. **If the answer to Question 1 is "Yes":**

a. to what extent is that subsection invalid?;

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b. is that part of the subsection severable for the remainder of the Act?

Answer: *The whole of subsection 5(1) is invalid and that subsection cannot be severed from the remainder of the Act.*

Question 3. Who should pay the costs of the special case?

Answer: *The defendants.*

3. The plaintiffs submit that s 5(1) of the SCPO Act is incompatible with or substantially impairs the institutional integrity of the Supreme Court and District Court of New South Wales, so that, applying the principle in *Kable v Director of Public Prosecutions (NSW)* (***Kable***),[1] it is prohibited by Ch III of the Constitution.

PART III: SECTION 78B NOTICES

4. Appropriate notices have been given in compliance with s 78B of the *Judiciary Act*.

PART IV: FACTS

5. The factual background is set out in the Special Case agreed by the parties.

6. In brief, each of the plaintiffs is a defendant to proceedings in the Supreme Court of New South Wales commenced on 5 October 2018 by the first defendant (the **Commissioner**) seeking orders pursuant to s 5 of the SCPO Act against the plaintiffs: SC [1(c)] (SCB 37). The Commissioner seeks orders, for a period of 2 years, restraining the plaintiffs from, inter alia (see SCB 53–54):

   (a) approaching, contacting or associating directly or indirectly with certain persons;

   (b) travelling in a vehicle between 9pm to 6am, except in case of a genuine medical emergency;

   (c) attending or approaching certain specified premises; and

   (d) possessing more than one mobile telephone or possessing or having access to certain communications devices or applications.

7. In the Supreme Court proceeding, the Commissioner alleges that the plaintiffs are members of the "Rebels", which is alleged to be an "Outlaw Motorcycle Gang": SC [5(b)]

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[1] (1996) 189 CLR 51.

(SCB 38). The Commissioner also alleges that each of the plaintiffs have been convicted of a serious criminal offence (referring to s 5(1)(b)(i) of the SCPO Act) and/or have been involved in serious crime related activity of which he has not been convicted (referring to s 5(1)(b)(ii) of the SCPO Act): SCB 54–55.

8. As regards s 5(1)(b)(i), each of the plaintiffs has been convicted and sentenced in respect of at least one offence which the Commissioner alleges to be a "serious criminal offence": SC [5(d)], [6(b)] (SCB 38–41). In respect of the first and second plaintiffs, the convicted offences occurred in 2001 and 2006, and for which the penalties ranged between a fine of $500 and imprisonment for 2 ½ years: see SC [5(d)(i), (ii)] (SCB 38–39). In respect
10 of the third plaintiff, the convicted offences occurred between 2009 and 2018, and the penalties ranged between a good behaviour bond and imprisonment for 12 months: see SC [5(d)(iii)] (SCB 39–40).

9. As regards s 5(1)(b)(ii), the serious crime related activity alleged against the plaintiffs includes offences for which each has been acquitted, or where the charges were withdrawn or not proceeded with: SC [5(e)], [6(c)] (SCB 40–41). For the third plaintiff, it includes two alleged offences for which he is facing criminal charges in Queensland: SCB 60, [5].

PART V: ARGUMENT

Legislative provisions

20 *Key provisions and definitions*

10. The SCPO Act is based substantially on the *Serious Crime Act 2007* (UK), adapted to NSW.[2] The key provisions of the SCPO Act are ss 5 and 6. Section 5(1) provides that an "appropriate court" may, on the application of an "eligible applicant" make an order (a "serious crime prevention order" or **SCPO**) against a specified person if:

> (a) in the case of a natural person—the person is 18 years or older; and
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> (b) the court is satisfied that:
>
> (i) the person has been convicted of a serious criminal offence, or
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> (ii) the person has been involved in serious crime related activity for which the person has not been convicted of a serious criminal offence

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2 See New South Wales Parliament, Legislative Council, *Hansard*, 4 May 2016, pp 45–46. See ss 1(1), 2(1) and 5 of the UK Act.

(including by reason of being acquitted of, or not being charged with, such an offence), and

(c) the court is satisfied that there are reasonable grounds to believe that the making of the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime related activities.

11. Where the ground for the application is that the person has been convicted of a serious criminal offence (s 5(1)(b)(i)), the "appropriate court" is the Supreme Court or the District Court of New South Wales: s 3(1). Where the ground for the application is that stated in s 5(1)(b)(ii), the appropriate court is the Supreme Court: ibid.

12. An "eligible applicant" is any of the Commissioner of Police, the New South Wales Director of Public Prosecutions and the New South Wales Crime Commission: s 3(1).

13. "Serious criminal offence" has the same meaning as in s 6(2) of the *Criminal Assets Recovery Act 1990* (NSW). The term includes:

(a) various drug related offences, including almost all indictable drugs offences against the *Drug Misuse and Trafficking Act 1985* (NSW) – see s 6(2)(a), (b), (c), (e1);

(b) an offence that is punishable by imprisonment for 5 years or more and involves theft, fraud, obtaining financial benefit from the crime of another, money laundering, extortion, violence, bribery, corruption, harbouring criminals, blackmail, obtaining or offering a secret commission, perverting the course of justice, tax or revenue evasion, illegal gambling, forgery or homicide – s 6(2)(d);

(c) various offences concerning the manufacture or supply of firearms or parts of firearms – s 6(2)(e);

(d) sexual servitude (s 6(2)(f)), child prostitution and child abuse offences (s 6(2)(g));

(e) participation in, or receiving material benefit derived from the criminal activities of, a criminal group – s 6(2)(g1);

(f) dishonestly destroying or damaging property with a value of more than $500 – s 6(2)(h);

(g) an offence under the law of the Commonwealth or a place outside NSW which, if the offence had been committed in NSW, would be a serious criminal offence – s 6(2)(i); and

(h) attempting, conspiracy or incitement to commit, or aiding or abetting an offence which is a serious criminal offence: s 6(2)(j).

14. "Serious crime related activity" means anything done by a person that is or was a serious criminal offence, whether or not the person has been charged, tried, tried and acquitted, or convicted: SCPO Act, s 3(1). A person is "involved in serious crime related activity" if the person has (a) engaged in serious crime related activity, (b) engaged in conduct that has facilitated another person engaging in serious crime related activity, or (c) engaged in conduct that is likely to facilitate serious crime related activity (whether by the person or another person): s 4(1).

15. Section 6 provides for the content of an SCPO. Subsection (1) provides that a serious crime prevention order:

> may contain such prohibitions, restrictions, requirements and other provisions as the court consider appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person in serious crime related activities.

Subsection (2) identifies certain orders that cannot be made.

16. An SCPO may last for a period up to 5 years: s 7. There is no limit on a further SCPO then being sought, including by reference to the same alleged offences. Contravention of an order is a criminal offence, with a possible 5 year term of imprisonment: s 8.

17. The Act applies in respect of serious criminal offences and serious crime related activities, whether they occurred before, on or after the commencement of the Act: Sch 2, item 2.

Procedure for making of SCPO

18. Section 5(2) requires that if the ground relied upon involves an acquittal, the application must include certain information about the acquittal. Unless otherwise ordered, an application under s 5 must be served at least 14 days before the hearing of the application (s 5(3)); the person against whom the order is sought, or any other person whose interests may be affected, may appear at the hearing: s 5(4).

19. In determining an application under s 5, the ordinary rules against hearsay evidence do not apply. The court may admit and take into account hearsay evidence if satisfied that

the evidence "is from a reliable source and is otherwise relevant and of probative value"[3] and the person against whom the order is sought has been served with the evidence before its admission: s 5(5).

20. Proceedings on an application for an SCPO are civil proceedings: s 13(1). The civil standard of proof applies, and the applicable rules of evidence are those that apply in civil proceedings: s 13(2)(b). The rules of construction applicable only in relation to the criminal law generally do not apply to interpretation of provisions of the Act: s 13(1)(a).

21. Once an SCPO is made, the order may be varied or revoked, but only where there has been substantial change in the relevant circumstances since the order was made or last varied: ss 12(1), (2). There is an appeal to the Court of Appeal against a decision relating to the making of an SCPO; the appeal is of right on a question of law and with leave on a question of fact: ss 11(1), (2).

Construction of section 5

22. In the case of an SCPO sought against an adult, there are two jurisdictional facts which enliven the appropriate court's discretionary power to make an SCPO.

23. *First*, the court must be satisfied, on the balance of probabilities, that the person has either (i) been convicted of a serious criminal offence, or (ii) that the person has been involved in serious crime related activity for which the person has not been convicted of a serious criminal offence: s 5(1)(b).

24. It is apparent from the inclusion within the definition of "involved in serious crime related activity" of conduct that is objectively *likely* to facilitate serious crime related activity (see s 4(1)(c)) – whether by themselves or others – that the concept of involvement does not itself import a requirement of knowledge or other mens rea. Proposed Opposition amendments to require that "facilitation" required knowledge were defeated in the Legislative Council.[4]

25. *Secondly*, the court must be satisfied that there are "reasonable grounds to believe" that the making of the SCPO order sought "would protect the public by preventing, restricting

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3 Having regard to s 56 of the *Evidence Act 1995* (NSW), the requirement that it is "relevant and of probative value" is superfluous.

4 New South Wales Parliament, Legislative Council, *Hansard*, 4 May 2016, pp 80–82.

or disrupting involvement by the person is serious crime related activities": s 5(1)(c). The phrase "reasonable grounds to believe" requires the existence of facts which are sufficient to induce the state of belief in a reasonable person.[5] However, it does not require:[6]

> that the objective circumstances must establish on the balance of probabilities that the subject matter [of the belief] in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something or surmise or conjecture.

10 26. Importantly, s 5(1)(c) does not require the appropriate court to be satisfied that the making of the order is necessary, or even reasonably necessary,[7] for the purpose of protecting the public. There is nothing in s 5(1)(c) that requires the court to be satisfied that the order is necessary, or that no lesser order would sufficiently protect the public, or whether the degree of risk to the public is sufficient so as to justify an order.[8] Again, Opposition amendments to impose such requirements were defeated in the Legislative Council.[9] Rather, s 5(1)(c) merely requires the court be satisfied that there are reasonable grounds to believe *that the making of the order itself* would protect the public *by* "preventing, restricting or disrupting involvement by the person in serious crime related activities". Thus the words "protect the public" add little, if anything, to what must be established.

20 27. Accordingly, provided that there are reasonable grounds to incline the judge's mind towards the view that the order sought would have the effect of preventing, restricting, or disrupting involvement in serious crime related activities, s 5(1)(c) will be satisfied. That requirement may be satisfied readily. For example, consider an adult charged with the crime of larceny for stealing 5 jumpers from David Jones.[10] The offence of larceny is

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5 *George v Rockett* (1990) 170 CLR 104, 112 (the Court).

6 *George v Rockett* (1990) 170 CLR 104, 116 (the Court).

7 Cf the control orders considered in *Thomas v Mowbray* (2007) 223 CLR 307, which required the court to be satisfied that the provisions of the order were "reasonably necessary, and reasonably appropriate and adapted" to achieve a particular purpose.

8 This may be contrasted with the position in the UK where it is has been held that art 8 of the European Convention on Human Rights (as enacted by the *Human Rights Act 1998* (UK)) has the effect that an SCPO under the *Serious Crime Act 2007* (UK) must be proportionate: *R v Hancox* [2010] 1 WLR 1434, [10] (Hughes LJ, for the Court).

9 New South Wales Parliament, Legislative Council, *Hansard*, 4 May 2016, pp 82–84.

10 See *NSW Crime Commission v D'Agostino* (1998) 103 A Crim R 113.

punishable by imprisonment for 5 years,[11] is an offence involving theft and is therefore a "serious criminal offence".[12] An order requiring the person charged to reside at, and not to leave, their home – or, less severely, not to enter department stores – could readily be considered, in fact, to prevent, restrict or disrupt involvement by the person in serious crime related activities.

28. Consequently, as a matter of substance, the jurisdictional requirement in s 5(1)(c) is largely subsumed by consideration of the permissible content of a proposed order. That directs attention to s 6. Section 6(1) is expressed in broad terms. Subject to s 6(2), the only limit on the kinds of "prohibitions, restrictions, requirements and other provisions" that the order may contain is that the court considers that such provisions are "appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person in serious crime related activities". Section 6(2) contains a limited number of exceptions to the kind of provisions that an order may contain.

29. It is apparent from the breadth of the language used in s 6(1), the limited number of exceptions in s 6(2), and the relevant extrinsic materials, that an SCPO may severely restrict the liberty of a person subject to an order. In the Second Reading Speech in the Legislative Council it was said that an order "could include restrictions in relation to an individual's financial, property or business dealings or holdings, working arrangements, communication means, premises to which an individual has access, an individual's use of an item or an individual's travel".[13] This list did not purport to be exhaustive. On its terms, s 6(1) permits orders requiring a person to reside at their home (home detention orders) or at some other place for a period of up to 5 years. Orders could encompass restrictions on movement, communication, association or conduct. They could require positive action ("requirements"), including answering questions or providing information/documents, subject to the limits in ss 6(2) and (3). The section permits interferences such as the orders sought in this case which, if made, would restrict the ability of the plaintiffs to go to certain places or travel in a vehicle at night.

30. Unlike s 5(1)(c), s 6(1) does require the court to make an assessment whether the order sought is "appropriate" to achieve the stated purpose of protecting the public "by

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11 *Crimes Act 1900* (NSW), s 117.

12 *Criminal Assets Recovery Act 1990* (NSW), s 6(2)(d).

13 See New South Wales Parliament, Legislative Council, *Hansard*, 4 May 2016, p 47.

preventing, restricting or disrupting involvement by the person in serious crime related activities". However, it is not required that the order be "necessary", nor does the statute provided any criteria by which the court must determine what is "appropriate".

31. A key point here is this: the main requirement that must be established to obtain an SCPO is conviction of a serious criminal offence and/or involvement in a serious crime related activity. If that is established, not much more will be required to found an inclination of the mind to consider that some restriction on future conduct will prevent, restrict or disrupt involvement by the person in serious crime related activity. If that is established, the issue then becomes just what SCPO is "appropriate" to achieve the stated purpose. The main focus in obtaining an order, thus, is backwards-looking, to past participation/involvement in crime – which may have already been tried, perhaps acquitted, perhaps punished. Any such acquittal may have been in a jury trial on indictment of a federal offence, where a jury was required by s 80 of the Constitution.

The *Kable* principle

32. A law of a State which would be incompatible with or repugnant to, or which "would substantially impair", the institutional integrity of a court of a State so as to be incompatible with its role as a potential repository of federal jurisdiction under Ch III of the Constitution is invalid.[14] This *Kable* principle has been applied by this Court in *International Finance Trust Co Ltd v New South Wales Crime Commission,*[15] *South Australia v Totani*[16] and *Wainohu v New South Wales.*[17]

33. What is incompatible or repugnant to a court's institutional integrity is incapable of definition in terms which dictate future outcomes.[18] However, some high-level principles can be drawn from previous cases. *First*, institutional integrity includes the notion that courts are independent and impartial from the Executive.[19] *Secondly*, following from the

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14 See, eg, *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Knight v Victoria* (2017) 261 CLR 306, [5] (the Court).

15 (2009) 240 CLR 319.

16 (2010) 242 CLR 1.

17 (2011) 243 CLR 181.

18 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [124] (Hayne, Crennan, Kiefel and Bell JJ).

19 See, eg, *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [125] (Hayne, Crennan, Kiefel and Bell JJ) and the cases cited.

first proposition, laws which may be thought to "enlist" courts to implement decisions of the Executive, or to act at the "behest" of the Executive, may be incompatible with a court's institutional integrity.[20] *Thirdly*, linked to the first and second propositions, the Constitution does not permit of "different grades or qualities of justice".[21]

34. *Fourthly,* the Court's decisions in *International Finance Trust* and *Wainohu* establish that laws which involve State courts in departing to a marked degree from traditional judicial functions, methods or procedures may also substantially impair the courts' institutional integrity.[22] In the former case, laws providing for the mandatory ex parte sequestration of property, with no ability to dissolve the order, were held to be invalid. In *Wainohu*, a provision which exempted judges from the obligation to provide reasons when making declarations in respect of declaration organisations was held invalid.

35. *Fifthly*, whether the legislative departure from traditional judicial functions, methods and procedures is so great or significant so as to substantially impair a State court's institutional integrity is a question of fact and degree, to be determined having regard to the whole of the relevant statutory scheme.[23]

Section 5 of the SCPO Act is invalid

36. Section 5 of the SCPO Act, in the context of the Act as a whole:

    (a) undermines the criminal justice system of the State courts;

    (b) requires or enlists the relevant courts in administering a different and lesser grade of criminal justice, doing so at the discretion of the Executive; and

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20 *South Australia v Totani* (2010) 242 CLR 1, [82] (French CJ), [149] (Gummow J), [236] (Hayne J), [436] (Crennan and Bell JJ), [481] (Kiefel J).

21 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 103 (Gaudron J), approved in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [101] (Gummow J); *Wainohu v New South Wales* (2011) 243 CLR 181, [105] (Gummow, Hayne, Crennan and Bell JJ); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [123] (Hayne, Crennan, Kiefel and Bell JJ).

22 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, [57] (French CJ), [97]–[98] (Gummow and Bell JJ), [158]–[159] (Heydon J); *Wainohu v New South Wales* (2011) 243 CLR 181, [59] (French CJ and Kiefel J), [104], [109] (Gummow, Hayne, Crennan and Bell JJ).

23 See, eg, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [104] (Gummow J); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [124] , [129] (Hayne, Crennan, Kiefel and Bell JJ); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, [126] (Gageler J).

(c) departs from traditional judicial functions, methods and procedures to such a degree as to substantially undermine the relevant courts' institutional integrity.

37. In so doing it is not compatible with the institutional integrity of the Supreme and Districts Courts, and is invalid. The following matters, which overlap, together and individually support that conclusion.

The scheme established undermines the criminal justice system

38. A person may be alleged to be involved in serious crime related activities founding an application for an SCPO when, inter alia, they have been:

(a) previously charged and convicted of an offence;

(b) previously charged and acquitted of the offence;

(c) currently charged with the offence; and/or

(d) not been charged with the offence (yet, at least).

39. Each of these possibilities tends to undermine the criminal justice system. Whilst the undermining of public confidence is not the *Kable* test, it is an important aspect of institutional integrity.[24] Maintaining public confidence in the administration of justice is no mere platitude. For example, it is an important basis upon which a court will stay proceedings as an abuse of process.[25]

40. As regards the first two possibilities, the jurisdiction conferred by s 5 of the SCPO Act is apt to undermine the finality of, and public confidence in, the process of the adjudication and punishment of criminal guilt in NSW. If the person has been charged and convicted of an offence, then to pursue an SCPO is to add further restrictions on liberty by reference to their past offences which have already been punished. For the reasons given above concerning the construction of s 5, read in light of s 6, the substantive jurisdictional requirements for the making of an SCPO against an adult are (a) that the person has been involved in serious crime related activity and (b) that the provisions in the order are

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24 See *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [102] (Gummow J); *South Australia v Totani* (2010) 241 CLR 1, [206] (Hayne J).

25 See, eg, *Williams v Spautz* (1992) 174 CLR 509, 520 (Mason CJ, Dawson, Toohey and McHugh JJ); *Walton v Gardiner* (1993) 177 CLR 378, 394, 396 (Mason CJ, Deane and Dawson JJ); *Ridgeway v The Queen* (1995) 184 CLR 19, 77 (Gaudron J); *Moti v The Queen* (2011) 245 CLR 456, [57] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person in serious crime related activities. And it is the former which is the dominant criterion. Yet those criminal acts have already been punished, including by reference to the key sentencing factor of protection of the public.[26]

41. The ability of the DPP or the Commissioner to seek an SCPO in addition to the offender's sentence, but without being part of that sentence, is apt to undermine the finality of and public confidence in the sentencing process. In contrast, the scheme considered in *Fardon v Attorney-General (Qld)* was limited to a limited class of convicted sexual offender and required the existence of an "unacceptable risk that the prisoner will commit a serious sexual offence". The primary focus of that scheme was future risk, as identified by reference to a list of matters identified in the statute to which the court was required to have regard.[27] Here, the definition of "serious criminal offence" is so broad that it captures a very large proportion of ordinary criminal offences, and there is no high level of future risk required. The breadth of the scheme is thus apt to undermine ordinary finality and confidence in the ordinary sentencing process.

42. In the case of an application made where the person has been acquitted, findings by the Supreme Court that notwithstanding the previous court's decision, the person:

    (a) did commit the offence for which the person was acquitted; *and*

    (b) that it is "appropriate" that restrictive orders be made against the person, which orders may strongly resemble a criminal sentence;

    is apt both to undermine the finality of all acquittals in NSW and public confidence in the process of criminal justice. That occurs not by reference to some express qualification to the principle of double jeopardy, involving some identified criteria permitting a new charge (eg significant fresh evidence), but rather by the indirect means of allowing an SCPO based on the alleged offence. That approach allows lip-service to be paid to the acquittal, but diminishes it by prosecutors having another bite at the cherry.

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26 *Veen v The Queen (No 2)* (1988) 164 CLR 465, 473, 476 (Mason CJ, Brennan, Dawson and Toohey JJ), 487 (Wilson J; Deane J agreeing on this point), 491 (Deane J). The *Crimes (Sentencing Procedure) Act 1999* (NSW), particularly s 21A, sets out a range of matters that a court must take into account in sentencing.

27 See s 13 of the Act, quoted at *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [211] (Gummow J).

43. Further, an application may be made where the acquittal in question was for a relevant Commonwealth offence tried before a jury, as required by s 80 of the Constitution. The significance of that constitutional guarantee is thereby also undermined.

44. Where an application is made in relation to an alleged offence for which the defendant is facing a current charge, then they are subject to the burden of having to defend both matters. That is the situation for one of the allegations against the third plaintiff, being a charge under Queensland law.

45. Moreover, because proceedings under the Act are civil proceedings, a court may draw *Jones v Dunkel* type inferences if the defendant does not give evidence, so as to more readily accept the evidence of the prosecuting authorities.[28] In such cases, the defendant is placed in the invidious situation of having to choose whether to give evidence in the civil proceedings – and thereby aid the prosecuting authorities with respect to a possible future criminal prosecution for the same offence – or choose to remain silent, increasing the risk of orders being made under the SCPO Act. More broadly, even apart from choosing whether to give evidence themselves, defendants have to choose how much of their defence to the charges they should reveal in the course of defending the SCPO application. Proceedings under the Act thereby undermine a fundamental principle of the system of accusatorial justice that a person charged should not be required to testify or otherwise assist the prosecution prove its case.[29]

46. Where the application is made in relation to an alleged office which has not been charged, nothing in the SCPO Act precludes criminal charges subsequently being brought by reference to the allegations tried in the SCPO application (there being no general limitation periods that apply with respect to serious criminal offences in NSW). That possibility itself tends to undermine finality of litigation, and places the defendant in the invidious position just identified.

47. Moreover, it tends to undermine public confidence in the judicial system for the public to know that where charges have not been laid against accused persons – either on the basis

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28 As held in *Commissioner of Police v Cole* [2018] NSWSC 517, [35] (Davies J). As a general rule, a "*Jones v Dunkel*" direction should not be given in criminal proceedings: *Dyers v R* (2002) 210 CLR 285.

29 See, eg, *CFMEU v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375, [36]–[37] (French CJ, Kiefel, Bell, Gageler and Keane JJ); *R v Independent Broad-based Anti-corruption Commissioner* (2016) 256 CLR 459, [46]–[47] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

that there is no reasonable prospect of conviction or that the prosecution is not in the public interest – the prosecuting authorities can always elect to use the easier route of the SCPO Act instead. That point indicates a range of further problems with the scheme.

SCPO Act enlists the Courts to administer a different, and lesser, grade of criminal justice

48. The SCPO Act erects in substance an alternative criminal justice regime,[30] significantly more favourable to the State and less favourable to accused persons, which the prosecuting and investigatory authorities of the State may choose to apply against those that they suspect of committing or being involved in "serious criminal offences". The scheme created by the Act thus requires the Supreme and District Courts to administer different grades or qualities of criminal justice, depending on the discretion of the Executive. The enlistment of those Courts in such a process is incompatible with and substantially impairs the institutional integrity of those courts. There are a number of features of the SCPO Act that support this characterisation.

49. *First*, an SCPO may be sought by the Director of Public Prosecutions. The functions of the DPP under the *Director of Public Prosecutions Act 1986* (NSW) are concerned with the prosecution of criminal offences. Section 7(1) of that Act specifies that the principal functions of the DPP are to prosecute prosecutions for indictable offences in the Supreme and District Courts; to institute and conduct appeals in respect of such prosecutions; and to conduct, as respondent, any appeal in respect of such prosecutions. The DPP may also institute and conduct committal proceedings, proceedings for summary offences and summary proceedings for indictable offences.[31] The DPP also has functions in relation to finding a bill of indictment, or determining that no bill be found.[32] The inclusion of the DPP as an "eligible applicant" points strongly to the regime having a character involving the prosecution of suspected offenders. That is also supported by the inclusion of the Commissioner of Police as an eligible applicant: police prosecutors prosecute most summary offences in NSW, and commence committal proceedings for indictable offences.

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30 The principal Acts that regulate the ordinary processes of criminal justice in NSW are the *Criminal Procedure Act 1986*, *Jury Act 1977*, *Crimes (Sentencing Procedure) Act 1999* and the *Criminal Appeal Act 1912*.

31 *Director of Public Prosecutions Act 1986* (NSW), s 8(1).

32 *Director of Public Prosecutions Act 1986* (NSW), s 7(2).

50. *Secondly*, the range of possible offences to which the regime relates is very broad. In contrast, the control orders considered in *Thomas v Mowbray* were limited to terrorism offences, and the continuing detention orders considered in *Fardon* were concerned with serious sexual offences, and could only be brought against existing prisoners. Here, the definition of "serious criminal offence" covers most of the offences specified in the *Crimes Act 1900* (NSW).[33] Whilst it includes obviously serious offences (e.g. murder, manslaughter) it also includes all larcenies, possession of a prohibited plant (which includes cannabis cultivated by any means),[34] and the dishonest destruction or damage of property valued at more than $500.[35] The fact that the statutory regime can be used for relatively trivial offences is not merely theoretical: one of the offences upon which the Commissioner relies against the second plaintiff is larceny committed on 9 August 2001, for which he was convicted and fined $500. The broad scope of the offences covered, and the inclusion of activities which "facilitate" or are "likely to facilitate" such offences, points to a statutory scheme which substantially overlaps with the ordinary criminal justice regime.

51. *Thirdly*, and in contract to the scheme upheld in *Fardon* (which applied to prisoners), the regime extends to persons who have not been convicted. Thus the DPP (or the Commissioner) may elect to institute proceedings under the SCPO Act rather than institute or continue (institute, in the case of the Commissioner) an ordinary criminal prosecution. Again, a decision by the prosecuting authorities not to commence a criminal prosecution and instead to go down the easier route provided by the SCPO Act is not merely a theoretical possibility. In this case, one basis for the orders sought is that the plaintiffs have been involved in the offence of participating in a criminal group contrary to s 93T of the *Crimes Act 1900* (NSW), an offence for which none has been charged.

52. *Fourthly*, complementing the third point, orders may be obtained against persons with respect to serious criminal offences for which they have been acquitted. That this is a key aspect of the scheme is evidenced by the fact that Opposition amendments to prevent SPCOs being made in respect of acquitted persons were rejected by the Government in

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33 One significant exception is common assault, where the maximum penalty is 2 years imprisonment. It includes most other assaults including assaults occasioning actual bodily or grievous bodily harm.

34 See *Drug Misuse and Trafficking Act 1985* (NSW), s 23(1)(c).

35 *Crimes Act 1900* (NSW), s 197.

the Legislative Council.[36] This aspect again illustrates how the SCPO Act operates as an alternative to the ordinary criminal justice system. In the case of a serious criminal offence which is an indictable offence against a federal law, the statutory scheme also undermines s 80 of the Constitution, by exposing persons, at the discretion of the State Executive, to a method of trial other than trial by a jury. Yet the s 80 requirement for a trial by jury is mandatory and cannot be waived.[37]

53. *Fifthly*, as set out at paragraphs 58-59, the SCPO Act lacks many of the safeguards of the ordinary system of criminal justice that are protective of the individual against the State.

54. In that regard, an SCPO may impose significant restrictions on liberty, up to the substantial deprivation thereof (eg by requiring home detention). Yet "loss of liberty is 'ordinarily one of the hallmarks reserved to criminal proceedings conducted in the courts, with the protections and assurances that criminal proceedings provide'".[38] In *Chu Cheng Lim*, the plurality stated that "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt".[39] As has been noted,[40] that passage was applied as a step in the reasoning of two members of the majority in *Kable*, and was reflected in that of the other two members of the majority. In *Fardon*, Gummow J preferred a somewhat different formulation of the *Lim* principle to the effect that "the 'exceptional cases' aside, the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts".[41] Either way, in general involuntary detention follows only from a determination of criminal guilt. Yet the SCPO Act involves deprivation of liberty, including potential detention, without a determination of criminal guilt in criminal proceedings in the ordinary manner still provided for in NSW.

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36 New South Wales Parliament, Legislative Council, *Hansard*, 4 May 2016, pp 79–80.

37 See *Alqudsi v The Queen* (2016) 258 CLR 203.

38 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [80] (Gummow J), quoting in turn *CEO Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161, [56] (Kirby J). Note further *South Australia v Totani* (2010) 242 CLR 1, [202] (Hayne J).

39 *Chu Cheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

40 *Fardon* (2004) 223 CLR 575, [77] (Gummow J). See similarly *Totani* (2010) 242 CLR 1, [208] (Hayne J).

41 *Fardon* (2004) 223 CLR 575, [80].

55. In sum, whether a person is subject to the application of the SCPO Act depends on the discretion of the prosecuting and investigatory authorities of the State, who are ultimately emanations of the Executive. Thus, whether a person suspected of committing, or being criminally involved in, a serious criminal offence is prosecuted and tried in the ordinary way or is subject instead to proceedings under the SCPO Act, with its reduced safeguards, is solely a matter for the Executive Government.

56. The SCPO Act thus has the vice of erecting a statutory scheme which requires the Supreme and District Courts, at the instigation of the Executive Government, to dispense two grades of criminal justice. As is apparent from the Minister's concluding speech in the Legislative Assembly,[42] by conferring the jurisdiction created by s 5 of the SCPO Act on the Supreme and District Courts, the Parliament sought to clothe the lesser second grade of justice provided by the SCPO Act with the character of the higher standard that has traditionally been dispensed. Consistently with the authorities referred to in paragraph 33 above, to require the courts to dispense different grades of justice, particularly where the decision as to which grade applies to which persons turns on the discretion of the Executive, undermines their institutional integrity.

Marked departure from traditional judicial functions, methods and procedures

57. Tied to the points above, and in any case, the jurisdiction created by s 5(1) of the SCPO Act, read in light of the balance of the Act, exhibits such a departure from traditional judicial functions, methods, procedures and power as to substantially undermine the courts' institutional integrity.

58. *First*, s 5, read in light of s 6, purports to authorise the making of SCPOs up to 5 years of almost unrestricted scope without specifying any meaningful objective criteria by which the court is to determine what orders are "appropriate" to prevent, disrupt or restrict "serious crime related activities". As noted, the legislature made a deliberate decision to refrain from specifying statutory criteria to allow the court to make a decision about whether an SCPO should be made. In circumstances where:

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[42] New South Wales Parliament, Legislative Assembly, *Hansard*, 3 May 2016, p 59 ("Serious crime prevention orders are to be made by judges", "The making of serious crime prevention orders by judges is a fundamental safeguard").

(a) the purpose of preventing, disrupting or restricting involvement in "serious crime related activities" is so broadly stated and covers so many criminal offences, ranging from the most serious to the trivial, as well as activity that is not criminal (e.g. engaging in activity, without mens rea, that is likely to facilitate another person's criminal conduct);

(b) the potential scope of provisions that may be made in an SCPO is largely unconfined and unspecified; and

(c) the consequences of an SCPO may involve a serious infringement on liberty;

the absence of criteria points to a function that is being exercised otherwise than be reference to a purely judicial standard. The legislation in question stands in stark contrast to both the provisions in Div 104 of the *Criminal Code* (Cth) concerning control orders which the majority in *Thomas v Mowbray* concluded involved an exercise of judicial power, and the detailed scheme upheld in *Fardon*.

59. *Secondly*, the departures in the SCPO Act from established judicial methods and procedures in making findings of criminal conduct are substantial, both in number and importance:

(a) The standard of proof under the SCPO Act – including in relation to the making of findings of criminal conduct – is on the balance of probabilities, rather than the higher standard of beyond reasonable doubt.

(b) As noted at paragraph 45 above, because proceedings under the Act are civil proceedings, a court may draw inferences if the defendant does not give evidence so as to more readily accept the evidence of the prosecuting authorities.

(c) The ordinary rules in relation to hearsay evidence do not apply. The only substantive requirement is that the evidence is from a "reliable source".

(d) Proceedings under the SCPO Act are conducted before a judge alone, rather than before a judge sitting with a jury, which is the ordinary mode of trial in the case of "serious criminal offences" that are offences against NSW law, and mandatory for "serious criminal offences" that are indictable offences against federal law.

(e) The rule against double jeopardy does not apply.

60. Whilst it may be accepted that Parliaments may ordinarily alter the rules of evidence or the onus of proof in proceedings,[43] substantial departures may be indicia of a lack of institutional integrity.

61. *Thirdly*, it is significant that these departures take place in the context of a scheme which authorises the imposition of very significant potential restrictions on liberty for an extended period – up to 5 years – in contrast, notably, to the requirement for annual reviews in the scheme upheld in *Fardon*.

Conclusion

62. Section 5(1) of the SCPO Act confers a non-judicial power on the Supreme Court and District Court, the scheme of which undermines the criminal justice system and the principle of finality of litigation; places defendants in an invidious position in deciding how to defend themselves; undermines s 80 of the Constitution; requires the Supreme and District Court to administer a second grade of criminal justice in a manner which is non-judicial; undermines public confidence in the judicial system; and departs from traditional judicial methods and procedures to a marked degree. As such, s 5(1) substantially impairs the Supreme and District Court's institutional integrity.

Severance

63. For the reasons above the whole of s 5(1) is invalid. The defendants admit at [25] of their Further Amended Defence (see SCB 35) that s 5(1) cannot be severed from the remainder of the Act, but they do not admit that s 5(1)(b)(ii) cannot be severed from the remainder of the Act.

64. If the Court were to conclude that only s 5(1)(b)(ii) is invalid, the plaintiffs submit that that subsection cannot be severed validly from the Act. The purpose of the legislation stated by the Deputy Premier in the Second Reading debate was "to keep our community safe and to disrupt the behaviour and activities of those engaged in or about to engage in serious crime".[44] As noted above, the Legislative Council rejected amendments which would have prevented the legislation applying to persons acquitted of serious criminal offences. The ability to admit hearsay evidence and the application of the civil standard

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43 See *Nicholas v The Queen* (1998) 193 CLR 173; *Graham v Minister for Immigration and Border Protection* (2017) 261 CLR 1, [32] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

44 New South Wales Parliament, Legislative Assembly, *Hansard*, 3 May 2016, p 60.

of proof are directed to a case under s 5(1)(b)(ii), not s 5(1)(b)(i). Having regard to these matters, the plaintiffs submit that s 5(1)(b)(ii) plays an integral part of the SCPO Act, so that it "was intended to operate fully and completely according to its terms, or not at all".[45] It follows that if s 5(1)(b)(ii) is invalid, it is inseverable.

Costs

65. If the Court finds that any part of s 5 is invalid, the defendants should pay the plaintiffs' costs of the special case.

PART VI: ORDERS SOUGHT

66. The questions reserved for the Full Court should be answered as follows:

Question 1 – *Yes.*

Question 2 – *The whole of subsection 5(1) is invalid and that subsection cannot be severed from the remainder of the Act.*

Question 3 – *The defendants.*

PART VI: ESTIMATE OF TIME REQUIRED

67. The plaintiffs will require some 2 hours in chief, and some 30 minutes in reply.

24 June 2019

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45 *Wainohu v New South Wales* (2011) 243 CLR 181, [102] (Gummow, Hayne, Crennan and Bell JJ), citing *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).