IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **NO S30 OF 2019**

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

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Filed on behalf of the Attorney-General of the Commonwealth (intervening)

The Australian Government Solicitor
4 National Circuit, Barton, ACT 2600

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File ref: 19002712

Telephone: 02 6253 7557
Lawyer's E-mail:
Danielle.Gatehouse@ags.gov.au/Simon.Thornton@ags.gov.au
Facsimile: 02 6253 7354 / 02 6253 7287

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the Internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

I. Proper construction of the SCPO Act (CS [5]-[13])

2. Sections 5 and 6 of the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) (**Vol 1, Tab 3**) vest a discretionary power in an appropriate court to make a protective order on the satisfaction of statutory criteria of two kinds.

   2.1. Sections 5(1)(a) and (b) involve inquiries into past or present facts.

   2.2. Sections 5(1)(c) and 6(1) involve forward-looking inquiries directed to the identification of risk to the public, and the appropriate steps to mitigate that risk.

3. "**Appropriate**": Under s 6(1), the court must consider whether, in all the relevant circumstances, each prohibition, restriction or requirement that is sought is justified by reference to its contribution to protecting the public, in the sense that it does not impose a greater degree of restraint than the reasonable protection of the public requires (**CS [10]**; **cf PS [30]**). That is so for four reasons.

   3.1. First, that submission accords with the ordinary meaning of the words Parliament has used.

   3.2. Second, that submission is consistent with the interpretation given by courts in the United Kingdom to the legislation upon which the SCPO Act was modelled: *R v Hancox* [2010] 1 WLR 1434 at [9]-[10], [12] (**Vol 4, Tab 35**); *R v Mee* [2004] 2 Cr App R (S) 434 at [5], [8], [11]-[14].

   3.3. Third, that submission accords with the way that the Supreme Court actually exercises its power under ss 5 and 6 of the Act: *Commissioner of Police v Bowtell (No 2)* [2018] NSWSC 520 at [81], [90], [92], [96]-[99], [102].

   3.4. Fourth, nothing in the text suggests that the inquiry as to "appropriateness" is required to be a one-sided inquiry directing attention solely to whether an order has a rational connection to its identified purpose. To the contrary, it envisages that the court will hear from both sides: ss 5(3) and (4).

4. **"reasonable grounds to believe ... would protect the public"**: Under s 5(1)(c) the court, having identified the measures that would be appropriate were an SCPO to be made, must then consider whether it is "satisfied" that there are "reasonable grounds to believe" that making that order (ie, an SCPO containing all measures that the court thinks "appropriate") "would protect the public".

4.1. "Would" connotes a "real likelihood" or "probability", rather than "possibility": *Taylor v New South Wales* (1999) 46 NSWLR 322 at 332 [43] and 338 [64] (**Vol 4, Tab 40**); *NSW v Taylor* (2001) 204 CLR 461 at 481 [63]-[64] and 491 [100] (**Vol 4, Tab 32**); *R v Hancox* [2010] 1 WLR 1434 at 1437 [9] (**Vol 4, Tab 35**).

10 4.2. Section 5(1)(c) therefore empowers a court to make an SCPO only if it has a positive inclination of mind (a "belief"), based on objectively reasonably grounds, that there is a real likelihood or probability that making an order in the terms proposed would prevent, restrict or disrupt involvement by the person in serious crime related activities: *George v Rockett* (1990) 170 CLR 104 at 116 (**Vol 3, Tab 28**). That is an independent and important condition on the availability of the power to make an SCPO.

II. The function conferred by the SCPO Act could be conferred on courts by the Commonwealth Parliament (CS [18]-[43])

20 5. The Commonwealth Parliament could validly confer the functions conferred by the SCPO Act on courts. As such, the conferral of those functions by the NSW Parliament on State courts does not infringe *Kable* (see cases cited in **CS fn 19**).

6. In *Thomas v Mowbray*, this Court upheld the conferral of a power on federal courts to make control orders that was relevantly indistinguishable from the power to make an SCPO.

6.1. *Criminal Code 1995* (Cth), ss 104.1 and 104.4 (**Vol 1, Tab 6**).

6.2. *Thomas v Mowbray* (2007) 233 CLR 307 (**Vol 5, Tab 41**) at 326-30 [12]-[18], 347 [79], 352 [95]-[96], 354-5 [108], 356 [116], 357 [120]-[121], 488 [537], 509 30 [600], 526 [651].

7. The fact that the statutory test under s 5(1)(b)(ii) requires a court to make findings about conduct that, if it were to be proved to the criminal standard by admissible

evidence, would constitute a criminal offence, does not raise any Ch III issue.

7.1. *ACMA v Today FM* (2015) 255 CLR 255 at 371 [32] (**Vol 2, Tab 19**)

7.2. *Duncan v NSW* (2015) 255 CLR 388 at 407-8 [41] (the Court) (**Vol 3, Tab 25**).

7.3. *Falzon v Minister for Immigration* (2018) 262 CLR 333 at 347-8 [47]-[48] (**Vol 3, Tab 26**).

8. It is of no consequence to validity that, by reason of the width of the definition of "serious criminal offence", the SCPO Act may apply to persons who have committed a broad range of criminal offences (cf **PS [41], [50]-[51]**).

10 8.1. *Wainohu v NSW* (2011) 243 CLR 181 at 225 [90]-[91], 230 [110]-[111] (**Vol 5, Tab 43**), considering the *Crimes (Criminal Organisations Control) Act 2009* (NSW) ss 3, 9 and 19 (**Vol 5, Tab 43**).

8.2. *Assistant Commissioner Condon v Pompano* (2013) 252 CLR 38 at 82 [99], 84 [104] and 96 [143] (**Vol 2, Tab 17**), considering the *Criminal Organisation Act 2009* (Qld) (**Vol 1, Tab 12**), ss 6, 7, 10, 18 and 19.

Date: 6 August 2019

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STEPHEN DONAGHUE **JAMES STELLIOS** **SELENA BATEMAN**

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