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

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

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Part I:

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

Part II:

2. The Attorney-General for the State of South Australia ("**South Australia**") intervenes in support of the defendants pursuant to s 78A of the *Judiciary Act 1903*.

Part III:

3. Not applicable.

Part IV:

Introduction

4. South Australia submits as follows:

4.1. The *Kable* doctrine is centrally concerned with the institutional integrity of State courts. The analysis requires a functional assessment of how the impugned legislation requires the court to act, and whether as a result the court is deprived of its defining or essential characteristics, including the reality and appearance of its independence and impartiality from the political branches of government. Consideration of whether *"public confidence"* in the institutional integrity of courts is *"undermined"* may be an indicator of invalidity, but should not be substituted for the established *Kable* test. Moreover, the analysis is not assisted by positing that an aspect of *the legal system* as it has hitherto been established, has been undermined by some new facility, as distinct from the institutional integrity of the courts. The *Kable* doctrine does not prevent State Parliaments from adopting novel solutions to contemporary problems.

4.2. For the same reason, it is insufficient simply to demonstrate that the impugned legislation requires State courts to depart in some respects from the traditional manner of conducting court proceedings, or abrogates some common law principle, to establish invalidity. While the historical practices of courts are relevant, it is necessary to tie any mandated departure to institutional integrity.

4.3. The *Prevention Order Act* could not, as a matter of logic, either *"undermine the criminal justice system"* or involve the administration of a *"lesser grade of criminal justice"* unless the powers conferred upon the court could be exercised to achieve

the central aim of the criminal justice system: punishment. That feature must necessarily be established by the present challenge (although it would not be sufficient). Yet on its proper construction, the *Prevention Order Act* is not capable of being characterised as permitting the imposition of an order for the purpose of punishment. Serious crime prevention orders are made for the purpose of protecting the community by preventing, restricting or disrupting involvement by the respondent in further serious crime related activities. Any hardship thereby imposed is merely consequent on this protective purpose.

Construction and the protective purpose of serious crime prevention orders

10 5. The first step in the *Kable* analysis is to construe the impugned legislation.[1] Before an *"appropriate court"* is empowered to exercise the discretion to make an order under s 5(1), the court must first be satisfied under s 5(1)(b) that the respondent has been:

5.1. convicted of a serious criminal offence; or

5.2. *"involved in serious crime related activity"* for which the person has *not* been convicted of a serious criminal offence (including by reason of being acquitted of, or not being charged with, such an offence).

6. The definition of *"serious criminal offence"* in the *Criminal Assets Recovery Act 1990* (NSW) is adopted in s 3 of the *Prevention Order Act*. It includes drug trafficking offences, prescribed indictable offences similar in nature to drug trafficking offences,
20 certain drug cultivation, supply and possession offences, firearms offences, and offences of attempting to commit, or of conspiracy or incitement to commit, or of aiding and abetting, an offence referred to therein.

7. Like s 6(1) of the *Criminal Assets Recovery Act 1900* (NSW), the definition of serious crime related activity in s 3 of the *Prevention Order Act,* means anything done by a person that is or was at the time a serious criminal offence, whether or not the person has been charged with the offence or, if charged:

(a) has been tried, or

(b) has been tried and acquitted, or

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[1] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [11] (Gummow, Hayne, Heydon and Kiefel JJ).

(c) has been convicted (even if the conviction has been quashed or set aside).

8. In focusing upon the conduct of the person, the *Prevention Order Act* makes clear that the outcome or progress of criminal proceedings has no relevant bearing upon proceedings for a serious crime prevention order, to which the civil standard of proof applies.

9. Section 4 extends the concept of a person being *involved in* serious crime related activity to circumstances where:

   9.1. the person has engaged in serious crime related activity, or

   9.2. the person has engaged in conduct that has facilitated another person engaging in serious crime related activity, or

   9.3. the person has engaged in conduct that is likely to facilitate serious crime related activity (whether by the person or another person).

10. In determining whether a person has *"engaged in conduct that has facilitated serious crime related activity"*, a court may take into account whether the conduct was reasonable in all the circumstances.[2]

11. This extended definition of *"involvement"* in serious crime related activity reinforces the protective purpose of the *Prevention Order Act.* Consistent with the pursuit of public order beyond the criminal law, s 5(1)(b) does not require a finding of the commission of an offence. Reliance upon conduct that has facilitated or is likely to facilitate serious crime related activity does not require proof that the relevant conduct is or was a serious criminal offence. Facilitation is not defined as a secondary form of liability: there is no norm of conduct that prescribes a punishment for the crime of *"facilitation"*.

12. As such, in determining whether a person has engaged in conduct that has facilitated, or is likely to facilitate, serious crime related activity, the *Prevention Order Act* prescribes an objective enquiry about conduct: *mens rea* need not be proved.[3]

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[2] *Prevention Order Act*, s 4(2).

[3] *Clingham (formerly C (a minor)) v Royal Borough of Kensington and Chelsea; Regina v Crown Court at Manchester Ex parte McCann* [2003] 1 AC 787 at [22] (Lord Steyn, with whom Lord Hobhouse of Woodborough and Lord Scott of Foscote agreed).

Section 5(1)(c) and section 6: Reasonable grounds to believe and protection of the public

13. A finding under s 5(1)(b) does not have the consequence that a serious crime prevention order will be made: it empowers the court to make an order and enlivens the discretion. It is a step in the determination of the application.[4] Section 5(1)(c) then provides that the court *may* make an order it 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.

14. The evident purpose of s 5(1)(c) is protection of the public, to be achieved through the prohibition, restriction and disruption of serious crime related activities by the respondent. This guides the exercise of the discretion to make an order, informs the duration of the order under s 7 and the nature of the conditions to be imposed under s 6.

15. By reference to the words "*reasonable grounds to believe*", the plaintiffs seek to downplay the significance of the requirement in s 5(1)(c), contending that the "*main focus in obtaining an order ... is backwards-looking, to past participation/involvement in crime*".[5] This construction must be rejected.

16. First, s 5 confers a discretion upon the court to make a serious crime prevention order. That discretion must be exercised for the purpose for which it was conferred. Like the concept of *"unacceptable risk"* at the heart of the challenge in *Assistant Commissioner Condon v Pompano Pty Ltd* ("***Pompano***"), the criterion in s 5(1)(c) is "*evaluative and purposive*".[6]

17. In addition to the indicia of the scheme's protective purpose considered above from [8]-[12], the purpose which the discretionary power to make an order must serve is expressly stated in s 6: "*for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person in serious crime related activities*".[7] Sections 5(1)(c) and 6 are complementary and overlapping. It is through the conditions imposed under s 6 that the order has normative effect.

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[4] *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at [33], [44] (French CJ, Hayne, Kiefel, Bell and Keane JJ) at [58] (Gageler J).
[5] Plaintiff's Submissions (**PS**) at [25]-[27]; [30], [31].
[6] (2013) 252 CLR 38 at [23] (French CJ).
[7] *Prevention Order Act*, s 6(1).

18. The fact that the statutory discretion must be exercised for the purpose of preventing future involvement by the person is serious crime related activities necessitates an additional factual finding concerning the risk of the person engaging in such activities in the future. The choice of past behaviour as a *factum*[8] to enliven the court's jurisdiction to make a serious crime prevention order imposes a minimum evidentiary foundation for any prediction regarding future behaviour. However, other factors will necessarily intrude into the analysis of risk and may ultimately play a decisive role in the assessment. Objectively heinous conduct may be unlikely to be repeated due to factors such as old age, rehabilitation or mental illness at the time of the offending. It is not possible to reason directly from past involvement in crime to a future likelihood of recidivism.

19. Secondly, it is wrong to describe the preconditions established by s 5(1)(b) and s 4 as *"backwards looking"*. The extended definition of involvement in serious crime related activity in s 4(1)(c) permits the imposition of an order to prevent a person from continuing to engage in conduct that is *likely* (in the future) to facilitate serious crime related activity by another person, without the need to demonstrate *mens rea* or the past commission of any offence by any person. This indicates that proceedings under the *Prevention Order Act* are intended to be fundamentally forward-looking and protective.

20. Thirdly, the *"reasonable grounds to believe"* test is well-adapted to an assessment of future *risk*. The notion of risk (and hence the protection of the public) comprises both the gravity of the consequences should the risk eventuate and the probability of the risk eventuating. The statutory formulation requires an ultimately evaluative exercise that weighs multiple factors in an attempt to predict and characterise that future risk.

21. The full statutory test should be emphasised: *"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"* (emphasis added). The determinative connotations of "*would*" and "*by preventing*" are subjected to the *"reasonable grounds to believe"* threshold. The court is not asked to *speculate* whether or not the appellant will commit a serious criminal act, nor whether the imposition of

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[8] It is the province of the legislature to "select whatever factum that it wishes to trigger a consequence it determines": *Kuczborski v Queensland* (2014) 254 CLR 51at [303] (Bell J); *Baker v The Queen* (2004) 223 CLR 513 at [43] (McHugh, Gummow, Hayne and Heydon JJ). See also *Crump v State of New South Wales* (2012) 247 CLR 1 at [60] (Gummow, Hayne. Crennan, Kiefel and Bell JJ).

conditions *could possibly* assist in preventing future criminality: it is asked to assess risk of involvement by the person in serious crime related activity and exercise its discretion to make an order based upon that assessment.[9]

22. Finally, the plaintiffs' contention that the main focus "*in obtaining an order*" is backwards-looking ignores the residual discretion imparted by the use of the word "*may*" in the chapeau of s 5(1). This is not a circumstance in which the word "*may*" could be construed as meaning "*must*", or where the statutory context indicates that there is little scope for the application of the discretion once the statutory preconditions are met. The *Prevention Order Act* does not render irrelevant the impact of the order upon the liberty of the subject when determining both whether to make an order at all under s 5(1), and if so, what conditions are "*appropriate*" to impose under s 6.

23. Similarly, a rule establishing that hearsay evidence is admissible says nothing as to the weight that such evidence ought to be given by the court. The *Prevention Order Act* does not bind the court to act upon evidence it finds to be unreliable. Admission of hearsay evidence, including in the form of witness statements and police evidence of what has been reported to them by complainants, has been accepted as a way of encouraging witnesses to give evidence who would not otherwise do so for fear of reprisal, harassment or intimidation for turning to law enforcement agencies.[10] In this light, s 5(5) can be seen as adapted to the purpose of prevention, disruption and restriction of serious crime related activity.

24. To adapt the words of Gleeson CJ in *Gypsy Jokers*, s 5 does not empower an eligible applicant to dictate anything.[11] The court has a discretion to refuse to make an order where the circumstances dictate that making a serious crime prevention order would not be proportionate to the risk to the community posed by a particular individual, having regard to the impact upon the individual.

25. It therefore takes the analysis no further to submit that the *Prevention Order Act* does not expressly require the court to be satisfied that a lesser order would protect the

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[9] Cf *Kable v Director of Public Prosecutions* (NSW) (1995) 189 CLR 51 at 122 (McHugh J).
[10] *Clingham (formerly C (a minor)) v Royal Borough of Kensington and Chelsea; Regina v Crown Court at Manchester Ex parte McCann* [2003] 1 AC 787 at [44] (Lord Hope of Craighead), at [85], [88] (Lord Hutton).
[11] (2008) 234 CLR 532 at [7] (Gleeson CJ).

public.[12] The requirement that the order be appropriate guides the discretion. Conditions are tailored bearing in mind past conduct but proportionally to what the respondent might do again.[13] The *"appropriate"* order is the minimum necessary to protect the public, recognising that there is a public interest in having no greater curtailment of liberty than is necessary to address the risk.[14] The determination of that minimum is entirely a matter for the court.

26. This analysis is consistent with the construction that has been given to cognate provisions in other jurisdictions. In *R v Hancox,*[15] the Court of Appeal considered the same statutory requirement in s 1(1) of the *Serious Crimes Act 2007* (UK), upon which the *Prevention Order Act* was modelled. It held that the assessment of future risk must be "*a real, or significant, risk (not a bare possibility) that the defendant will commit further serious offences*".[16] It was of no significance that an order made under s 1(1) was not "*couched in terms of necessity*": it was evident that orders could only be made for the purpose for which the power was given, and be proportionate to the legitimate end sought to be achieved.[17] Noting that the requirement for proportionality was rooted in the text of the Act, as well as consistent with the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, the Court held that meant it was:[18]

> *"not enough that the order* ***may*** *have some public benefit in preventing, restricting or disrupting involvement by the defendant in serious crime; the interference which it will create with the defendant's freedom of action must be justified by the benefit; the provisions of the order must be commensurate with the risk."*

27. The Court accepted that the purpose of the order was protective:[19]

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[12] Cf PS at [26].
[13] *R v Hancox* [2010] 1 WLR 1434 at [21] (Hughes LJ, Rafferty and Hedley JJ).
[14] In the context of an order for indefinite detention, an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that the intrusions of the Act upon the liberty of the subject are exceptional, and the liberty of the subject should be constrained to no greater extent than is warranted by the statute which authorised such constraint: see *Attorney General for the State of Queensland v Francis*, [2007] 1 Qd R 396 at [39] (Keane and Holmes JJA and Dutney J), which approach was followed in *Attorney-General (Qld) v Lawrence* [2014] QCA 220 at [25], *Attorney-General for the State of Queensland v Yeo* [2010] QCA 69 at [42] and *R v Schuster* (2016) 125 SASR 388 at [83] (Kourakis CJ, Blue and Doyle JJ). See also in respect of curtailment of the constitutional implied freedom of political communication:*Clubb v Edwards/Preston v Avery* (2019) 93 ALJR 44 at [181] (Gageler J) citing *Levy v Victoria* (1997) 189 CLR 579 at 614 (Toohey and Gummow JJ).
[15] [2010] 1 WLR 1434.
[16] *R v Hancox* [2010] 1 WLR 1434 at [9] (Hughes LJ, Rafferty and Hedley JJ).
[17] *R v Hancox* [2010] 1 WLR 1434 at [10] (Hughes LJ, Rafferty and Hedley JJ).
[18] *R v Hancox* [2010] 1 WLR 1434 at [10] (Hughes LJ, Rafferty and Hedley JJ) (original emphasis).
[19] *R v Hancox* [2010] 1 WLR 1434 at [12] (Hughes LJ, Rafferty and Hedley JJ).

"Like other forms of preventive order, a serious crime prevention order is not an additional or alternative form of sentence. It is not designed to punish. It is not to be imposed because it is thought that the defendant deserves it."

28. This was borne out by the Court's acceptance that in principle, at least, the question being one of risk, factors such as age and ill-health could ameliorate the risk such that a serious crime prevention order is not required.[20]

The *Kable* doctrine does not accommodate a freestanding concept of "*undermining*" an aspect of the legal system

29. The *Kable* doctrine is an implied limitation upon State legislative power. The source of that implication is the role of State courts, under Ch III of the Constitution, as part of the integrated Australian court system, as potential repositories of federal jurisdiction. The implication operates to prevent the conferral upon a State court of a function which substantially impairs its institutional integrity as such a potential repository; that is to say, by depriving it of the defining or essential characteristics of a *"court"*, being principally the reality and appearance of its decisional independence and impartiality from the political branches of government.[21]

30. The analysis requires a functional assessment of how the impugned legislation requires the court to act, and whether as a result the court is deprived of its defining or essential characteristics, including the reality and appearance of its independence and impartiality from the political branches of government.[22]

31. Notwithstanding the focus in some of the judgments in *Kable* upon *"public confidence"*, the concept has subsequently been recognised as merely *"an indicator, but not the touchstone, of invalidity"*.[23] That discussion itself must be seen in its proper context: the idea of *"undermining public confidence"* is not freestanding, but refers to undermining public confidence in State courts *as courts* by reason of the effect of the law upon their institutional integrity, and thereby affecting perception of the independent

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[20] *R v Hancox* [2010] 1 WLR 1434 at [19]-[20] (Hughes LJ, Rafferty and Hedley JJ).
[21] *North Aboriginal Justice Agency Limited and Anor v Northern Territory of Australia* (2015) 256 CLR 569 at [39]-[40] (French CJ, Kiefel and Bell JJ); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [63]–[64] Gummow, Hayne and Crennan JJ); *Wainohu v New South Wales* (2011) 243 CLR 181 at [44] (French CJ and Kiefel J); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [183] (Gageler J).
[22] *Kuczborski v The State of Queensland* (2014) 254 CLR 51 at [231] (Crennan, Kiefel, Gageler and Keane JJ).
[23] *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at [102]; *South Australia v Totani* (2010) 242 CLR 1 at [206] (Hayne J); *North Aboriginal Justice Agency Limited and Anor v Northern Territory of Australia* (2015) 256 CLR 569 at [40] (French CJ, Kiefel and Bell JJ).

role of the judiciary as an institution to impartially discharge their responsibilities in the exercise of judicial power.[24]

32. By positing an alternative test of *"undermining the criminal justice system"*, the plaintiffs' approach falls into the error identified by the majority in *North Aboriginal Justice Agency Limited and Anor v Northern Territory of Australia*: to "*use an imputed effect upon 'public confidence' to infer that a law impairs the institutional integrity of a court*".[25] The plaintiffs fail to specify *how* the legislation requires the courts to act in a manner that is inconsistent with the reality and appearance of their impartiality and independence from the executive.

10 33. Equally, in seeking to distinguish the scheme in *Fardon v Attorney-General (Qld)* and the largely indistinguishable scheme in *Thomas v Mowbray*,[26] the plaintiffs' submissions appear to criticise the policy choices adopted by the NSW Parliament, by emphasising the *"breadth"* of operation of the scheme. Yet neither the breadth of operation of a measure, nor the fact that it may produce unjust results,[27] is a relevant feature of institutional integrity. Such criticisms, assuming the court retains a *"genuine adjudicative role"* and does not otherwise have its processes co-opted to the benefit of the political arms, may be answered by the fact that it is *"abundantly clear that the responsibility for any perceived harshness or undue encroachment on the liberty of the subject by these laws lies entirely with the political branches of government"*.[28] The
20 institutional integrity of State courts is maintained by the faithful application of otherwise valid laws: *"the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice"*.[29]

34. For the same reason, it is insufficient for the plaintiffs to point to *"departures from the established judicial methods and procedures"*, as if enumerating a sufficient number of such departures can itself establish an absence of institutional integrity.[30] That a function

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[24] *Grollo v Palmer* (1995) 184 CLR 348 at 367-368 (Brennan CJ, Deane, Dawson and Toohey JJ) at 378 (McHugh J).
[25] (2015) 256 CLR 569 at [40] (French CJ, Kiefel and Bell JJ).
[26] PS at [50]; cf Defendant's Submissions (**DS**) at [14]-[16].
[27] *Kuczborski v The State of Queensland* (2014) 254 CLR 51 at [217], [208]-[209], [228] (Crennan, Kiefel, Gageler and Keane JJ).
[28] *Kuczborski v The State of Queensland* (2014) 254 CLR 51 at [229] (Crennan, Kiefel, Gageler and Keane JJ).
[29] *The Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
[30] Cf PS [58]-[61].

may be novel in some respects does not mean its conferral on a State court thereby impairs its institutional integrity.[31] The *Kable* doctrine does not prevent State Parliaments from adopting legislative techniques to extend the operation of law into novel areas. In describing the social problem which led to the enactment of the *Crime and Disorder Act 1998* (UK), a progenitor to the *Serious Crime Act 2007* (UK), Lord Steyn highlighted the operation of the Act in a perceived *"gap"* in the criminal law. He said:

> *"Before the issues can be directly addressed it is necessary to sketch the social problem which led to the enactment of section 1(1) and the technique which underlies the first part of section 1. It is well known that in some urban areas, notably urban housing estates and deprived inner city areas, young persons, and groups of young persons, cause fear, distress and misery to law abiding and innocent people by outrageous anti-social behaviour. It takes many forms. It includes behaviour which is criminal such as assaults and threats, particularly against old people and children, criminal damage to individual property and amenities of the community, burglary, theft and so forth. Sometimes the conduct falls short of cognizable criminal offences..... In many cases, and probably in most, people will only report matters to the police anonymously or on the strict understanding that they will not directly or indirectly be identified. In recent years this phenomenon became a serious social problem. There appeared to be a gap in the law. The criminal law offered insufficient protection to communities. Public confidence in the rule of law was undermined by a not unreasonable view in some communities that the law failed them."*

35. It is apparent that the *Prevention Order Act* is designed to work within a *"gap"* in the NSW criminal law, alongside the *Criminal Legislation Amendment (Organized Crime and Public Safety) Act 2016* (NSW) and the creation of new offences to target the activities of criminal groups, "*to ensure that law enforcement agencies continue to respond quickly and forcefully to the organized crime threat.*"[32]

36. It is open to the NSW Parliament to so determine. As Hayne, Crennan, Kiefel and Bell JJ said in *Pompano*:[33]

> *"Because the CO Act provides for the Supreme Court to follow novel procedures with respect to criminal intelligence, it is no doubt possible to say of them that they depart from hitherto established judicial processes. But the central question is whether the CO Act's provisions about the declaration and subsequent use of*

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[31] *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [138] (Hayne, Crennan, Kiefel and Bell JJ); *Kuczborski v The State of Queensland* (2014) 254 CLR 51 at [206]-[207] (Crennan, Kiefel, Gageler and Keane JJ); [304] (Bell J); *Momcilovic v The Queen* (2011) 245 CLR 1, 207 at [534] (Crennan and Kiefel JJ).

[32] Legislative Assembly, *Second Reading of the Crimes (Serious Crime Prevention Orders) Bill 2016*, the Honourable David Clarke MP, Tuesday 3 May 2016, p. 60.

[33] *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [138] (Hayne, Crennan, Kiefel and Bell JJ).

declared criminal intelligence are repugnant to or incompatible with the continued institutional integrity of the Supreme Court. The fact that the procedures prescribed by the Act are novel presents the question. Novelty does not, without more, supply the answer to that question."

Invocation of constitutional principles derived from the separation of powers

37. Two aspects of the plaintiffs' submissions raise questions of construction by reference to principles derived from the separation of powers. The *Kable* doctrine does not introduce a constitutional separation of powers at the State level.[34] State legislatures retain, within the boundaries of the implied limitation, the flexibility to vest both judicial and non-judicial functions in State courts.

The "reasonable grounds to believe" standard is an ordinary judicial function

38. The plaintiffs' contention that in considering whether to make an order and what conditions to impose, *"the absence of criteria points to a function that is being exercised otherwise than by reference to a purely judicial standard"*[35] should be rejected.

39. First, were the function conferred by the *Prevention Order Act* to make a serious crime prevention order non-judicial, it would be necessary to further demonstrate how the conferral of the function upon the court was inconsistent with its institutional integrity.

40. In any event, the power is judicial. The essential elements of ss 5(1) and 6 involve the court making findings concerning past events, making predictions about future behaviour, and conducting a balancing exercise concerning the appropriateness of conditions (proposed by the eligible applicant in an *inter partes* proceeding) designed to prevent such behaviour. There is no aspect of the jurisdiction that is intrinsically non-judicial: courts are *"often called on to make predictions about dangers to the public"*,[36] and courts have historically exercised jurisdictions to create new norms of behaviour tailored to preventing undesirable behaviour.[37]

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[34] *Wainohu v New South Wales* (2011) 243 CLR 181 at [52] (French CJ and Kiefel J); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [88] (French CJ, [153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

[35] PS at [58].

[36] *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [143] (Hayne, Crennan, Kiefel and Bell JJ) citing *Thomas v Mowbray* (2007) 233 CLR 307 at [28] (Gleeson CJ).

[37] *Thomas v Mowbray* (2007) 233 CLR 307 at [16]-[17] (Gleeson CJ). Examples include bail, apprehended violence and restraining orders, and the historical jurisdiction of binding over.

41. As to the absence of criteria, South Australia repeats its submissions concerning the purposive construction of s 5.[38] The criteria are no more broad and uncertain than the concept of *"unacceptable risk"*.[39] Courts have seldom accepted that a broadly phrased expression is incapable of being applied judicially.[40] Rather, recognising the beneficial aspect that the *"width of the discretion which Parliament has created ... maximizes the possibility of doing justice in every case"*,[41] the approach of the courts given a broad standard has been to apply *"the technique of judicial interpretation ... to give it content and more detailed meaning on a case to case basis."*[42]

42. The imposition of a *"reasonable grounds to believe"* test as a precondition to the exercise of a power to create new norms of behaviour was upheld by a majority of the Full Court of the Federal Court in *Civil Aviation Safety Authority v Boatman* as an exercise of judicial power appropriately conferred upon a Ch III court.[43]

Detention does not arise for consideration

43. Insofar as the plaintiffs seek to place reliance upon the principles in *Chu Kheng Lim v Minister for Immigration* (**"Lim"**),[44] they do so upon a hypothetical basis.[45] It is unnecessary to answer the question of whether a condition requiring any form of detention may be imposed upon a serious crime prevention order under the *Prevention Order Act*.[46] It must be accepted that there is no clear intention, manifested by unmistakable and unambiguous language, that the *Prevention Order Act* authorises

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[38] See above at paragraphs [5]-[28].
[39] *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38; *Fardon v Attorney-General* (2004) 223 CLR 575.
[40] Even in *R v Spicer; Ex parte Australian Builders Labourers' Federation* (1957) 100 CLR 277, where the criterion was whether a rule was *"tyrannical, oppressive or impose[d] unreasonable conditions upon the membership of any member"*, the absence of any discernible legal standard was a small part of the overall analysis: see at 290 (Dixon CJ).
[41] *Norbis v Norbis* (1986) 161 CLR 513 at 519 (Mason and Deane JJ).
[42] *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [24] (French CJ); *Thomas v Mowbray* (2007) 233 CLR 307 at [91] (Gummow and Crennan JJ); see also *Norbis v Norbis* (1986) 161 CLR 513 at 519 (Mason and Deane JJ): *"it does not follow that, because a discretion is expressed in general terms, Parliament intended that the courts should refrain from developing rules or guidelines affecting its exercise..."*
[43] (2004) 138 FCR 384 at [25]-[27], [47], [58]-[59] (Sundberg and Stone JJ). Selway J (dissenting) considered the impugned provision to be invalid in that it amounted to an exercise of administrative power, but not upon the grounds that the statutory language (*"satisfied that there are reasonable grounds to believe that the holder... is likely to engage in... contributing to or resulting in a serious and imminent risk to air safety"*) was incapable of judicial application: at [73]-[74].
[44] (1992) 176 CLR 1.
[45] PS at [54].
[46] *Clubb v Edwards/ Preston v Avery* (2019) 93 ALJR 448 at [135] (Gageler J), [329] (Gordon J), citing *Knight v Victoria* (2017) 261 CLR 306 at [33] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

imprisonment.[47] Rather, the plaintiffs submit that the *Prevention Order Act* authorises *"significant restrictions on liberty, up to the substantial deprivation thereof (eg by requiring home detention)"*.[48] The Commissioner does not seek a prohibition in the form of *"home detention"* of the plaintiffs. The liberty afforded to the subject of a *"home detention"* order can vary – from an order permitting the person to leave their home to undertake employment and with permission, to a far more restrictive order.

44. Although it is not necessary to decide, the plaintiffs' reliance on the principle in *Lim* is misguided. Leaving aside the fact that the *Lim* principle was formulated in the context of the strict separation of powers applicable at the Commonwealth level, the principle refers to *"the involuntary **detention** of a citizen in **custody** by the State"*. It is by no means clear that the legislative imposition of new norms of conduct that individually or collectively may operate to effect *"substantial deprivation"* of liberty of a citizen *within the community* can attract the operation of the *Lim* principle. In *Thomas,* where the orders sought included a curfew, Gummow and Crennan JJ observed that *"detention in the custody of the State differs significantly in degree and quality from what may be entailed by observance of an interim control order"*.[49] Gleeson CJ noted that *"control orders may involve substantial deprivation of liberty, but we are not here concerned with detention in custody"*.[50]

45. It is appropriate to leave these questions for a setting of greater *"concrete adverseness"*[51] than the hypothetical basis upon which the plaintiffs make this argument.

No essential characteristics of the Court are eroded

46. The plaintiffs' contentions that the *Prevention Order Act* is *"apt to undermine the finality"* of *"the ordinary sentencing process"*[52] and of acquittals[53] must fail because the measure is not punitive. It is well-established that the imposition of *"involuntary hardship or detriment"* by the State is not necessarily punishment. [54] Whether such

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[47] *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at [19] (Gleeson CJ).
[48] PS at [29].
[49] *Thomas v Mowbray* (2007) 233 CLR 307 at [115] (Gummow and Crennan JJ).
[50] *Thomas v Mowbray* (2007) 233 CLR 307 at [18] (Gleeson CJ).
[51] *Baker v Carr* 369 US 186 at 204 (1962) cited in *Kuczborski v Queensland* (2014) 254 CLR 51 at [207] (Crennan, Kiefel, Gageler and Keane JJ).
[52] PS at [41].
[53] PS at [42].
[54] *Re Wooley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at [17] (Gleeson CJ).

hardship or detriment does amount to punishment is answered by a process of characterisation, in which the *purpose* of a measure, rather than its consequences or effects, are of primary significance.[55]

47. As demonstrated above at paragraphs [11] to [28], the function conferred upon the court by the *Prevention Order Act* is exercisable only for the expressly stated "*purpose of protecting the public by preventing, restricting or disrupting involvement by the person in serious crime related activities*".[56] Involuntary hardship or detriment imposed upon such a basis is not punitive, however much it may appear to be so from the perspective of the respondent to an order. The character of the scheme, like the schemes upheld in *Fardon* and *Thomas*, and like disciplinary sanctions,[57] is protective in nature.

48. Additionally, the plaintiffs' submissions must fail because they seek wrongly to elevate concepts of "*finality*", "*double punishment*" and the "*right to silence*" to the status of essential and constitutionally-protected characteristics of State courts as repositories of Ch III judicial power.

49. In any attempt to reason from the abrogation of some historical common law principle to *Kable* invalidity, it must be borne firmly in mind that "*very few common law rules were the manifestation of some fundamental characteristic of judicial power*".[58]

50. There is no constitutional prohibition against double punishment, nor any constitutional requirement of finality. Both the rule[59] against double punishment and the value of finality within the criminal justice system are manifestations of the concept of double jeopardy.[60] The common law or statutory foundation[61] of that concept renders it amenable to legislative modification.[62] To criticise the measure by reference to the fact

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[55] *R v Governors of X School* [2009] PTSR 1291; *Kariapper v Wijesinha* [1968] AC 717.
[56] *Prevention Order Act*, s 5(1)(c).
[57] In *Kariapper v Wijesinha* [1968] AC 717 at 737, Sir Douglas Menzies said that "the principal purpose" served by the disabilities there imposed "is clearly enough not to punish but to keep public life clean for the public good".
[58] *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia & Anor* (2013) 251 CLR 533 at [35] (French CJ and Gageler J).
[59] If it can be characterised as anything more than *"good sentencing practice"*: *Pearce v The Queen* (1998) 194 CLR 610 at [41] (McHugh, Hayne and Callinan JJ).
[60] *Carroll v The Queen* (2002) 213 CLR 635 at [9]; [22].
[61] *Pearce v The Queen* (1998) 194 CLR 610 at [9]-[10], [34]-[38], [40] (McHugh, Hayne and Callinan JJ), [66] (Gummow J), [92] (Kirby J).
[62] *Pearce v The Queen* (1998) 194 CLR 610 at [40] (McHugh, Hayne and Callinan JJ).

that there is no *"express qualification to the principle of double jeopardy... (eg significant fresh evidence)"*[63] is simply a complaint about legislative policy choices.

51. Thus in *Attorney-General (NT) v Emmerson*,[64] the statutory forfeiture scheme operated with an intention to further punish convicted persons, as well as to achieve the *"common aims of deterrence and retribution and ... incapacitation"*.[65] In upholding the validity of the measure, and in particular the DPP's discretionary role within the scheme, the majority noted that consistently with Ch III, *"penal ends may be pursued in civil proceedings which result in additional punishment"*.[66]

52. No invalidity arises from the fact that in order to establish an element of the jurisdiction conferred by the *Prevention Order Act*, an eligible applicant may need to prove the commission of criminal acts by the respondent. The law is familiar with the *"invidious situation"* referred to by the plaintiffs.[67] The same situation arises in disciplinary proceedings, in proceedings brought by a regulator for a civil penalty (who would have been equally empowered to commence and prosecute criminal proceedings) and in civil proceedings, for example for the intentional tort of battery following a potentially criminal assault. The law reserves to the courts a discretion to stay civil proceedings where criminal proceedings are threatened for substantially the same conduct.[68] At the intersection between criminal and quasi-criminal proceedings, ordinary judicial processes are relied upon to ensure that court processes are used *"fairly by State and citizen alike"*, to avoid abuses of process and to ensure integrity and fairness.[69] The *Prevention Order Act* does not expressly or implicitly abrogate that jurisdiction.

Conclusion

53. In vesting the jurisdiction to determine whether a person has "*engaged in serious crime related activity*" exclusively in the Supreme Court, the legislature has identified the

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[63] PS at [42].
[64] (2014) 253 CLR 393.
[65] *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [20] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
[66] *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [72] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
[67] PS at [45].
[68] *Cameron's Unit Services Pty Limited v Whelpton & Associates Pty Limited* (1984) 4 FCR 428 at 434 (Wilcox J); *McMahon v Gould* (1982) 7 ACLR SC 202 at 206-207.
[69] *R v Moti* (2015) 245 CLR 456 at [57] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) citing *Williams v Spautz* (1992) 174 CLR 509 at 520 (Mason CJ, Dawson, Toohey and McHugh JJ).

significance of such a finding as befitting independent consideration by the Supreme Court. It must be presumed that Parliament intended the Court to exercise that power in accordance with the standards characterising ordinary judicial processes.[70] There is no express or implicit legislative indication to the contrary.

54. The Court retains a broad but purposively-guided discretion as to whether to make an order, the content of any order, and the procedural manner in which it carries out its judicial function. Any error of law or fact in reaching the necessary state of satisfaction for the purpose of s 5(1)(c) is liable to correction through exercise of the right of appeal conferred by s 11 of the *Prevention Order Act.* There is no basis to consider that the legislation affects the institutional integrity of any State court.

Part V:

55. South Australia estimates that 15 minutes will be required for the presentation of oral argument.

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[70] *Electric Light & Power Supply Corporation Ltd v Electricity Commission* (NSW) (1956) 94 CLR 554 at 560 (Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ); *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [58] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Thomas v Mowbray* (2007) 233 CLR 307 at [55] (Gummow and Crennan JJ).