IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S30 of 2019**

B E T W E E N:

DAMIEN CHARLES VELLA
First Plaintiff

JOHNNY LEE VELLA
Second Plaintiff

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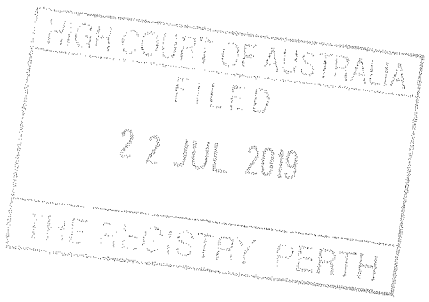

MICHAEL FETUI
Third Plaintiff

AND

COMMISSIONER OF POLICE (NSW)
First Defendant

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STATE OF NEW SOUTH WALES
Second Defendant

ANNOTATED WRITTEN SUBMISSIONS ON BEHALF OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

1. These submissions are in a form suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

30 2. The Attorney General for Western Australia (**Western Australia**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Defendants.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

Date of Document: 22 July 2019

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PART IV: SUBMISSIONS

4. The Attorney General of WA makes the submissions below in respect of question 1, ie whether section 5(1) of the *Crimes (Serious Crime Prevention Orders) Act 2016 (NSW)* (the "**Act**") is invalid because it is inconsistent with and prohibited by Ch III of the Constitution. The Attorney General of WA submits that section 5(1) is valid, and that question 1 should be answered "No".

5. The Attorney General of WA adopts the submissions of NSW in relation to question 2, relating to severance.

Operation of Section 5(1)

10 6. Section 5(1) provides that the Supreme Court or District Court of NSW may make a type of order described as a "serious crime prevention order". A prevention order may only be made:

(a) against a specified person; and

(b) if the Court is satisfied of certain matters.

7. Sections 5(1)(a) and (b) of the Act define the jurisdiction of the Court by reference to the characteristics of the person about whom the application is made. In the case of a natural person, a specified person must be 18 years or older: section 5(1)(a). In any case, a specified person is a person who the Court is satisfied, on balance, has been convicted of a serious criminal offence; or a
20 person who has been involved in serious crime related activity where that person has not been convicted of a serious criminal offence. That includes a person who has been acquitted of an offence or who has not been charged with an offence. See section 5(1)(b). These requirements define the class of persons against whom a prevention order may be made, and are factual matters which can be objectively established because they have already happened.

8. Section 5(1)(c) then requires the Court to make an evaluative determination as to whether the making of the order against the specified person would protect the public by preventing, restricting or disrupting involvement by the person in serious crime related activity. A determination of this type is at the core of the
30 judicial function. It requires an assessment of evidence, reasoned conclusion

and an exercise of discretion as to whether the order would achieve its statutory purposes.

9. Although expressed in a rolled-up way, the matters in section 5(1)(c) essentially involve the Court assessing two separate matters. First, the Court must be satisfied that, unless a prevention order is made, there presently exist reasonable grounds to believe (on balance) that the specified person will be involved in serious crime related activity. Secondly, the Court must be satisfied that if a prevention order is made, there are reasonable grounds to believe that the terms of the order, if obeyed or enforced, will (on balance) protect the public by preventing, restricting or disrupting the involvement by the specified person in the serious crime related activity in which the specified person would otherwise be involved.

10. The matters referred to above only need to be demonstrated on the balance of probabilities, due to section 13. This section prescribes that proceedings for a prevention order are not criminal proceedings, and that the rules of evidence applicable in civil proceedings (including as to burden of proof) apply.

11. By reason of section 6(1), a prevention order may contain such prohibitions, restrictions, requirements and other provisions as a court considers "appropriate" for the purpose of protecting the public by preventing, restricting or disrupting involvement by a person in serious crime related activities.

12. Contrary to the plaintiffs' submissions at [54], WA submits that this provision does not justify an order for preventative detention of a person. As the defendants say in their submissions at [41], a preventative detention order would not be a prohibition, restriction, requirement or provision of the kind contemplated by section 6(1). Clear words would be required to authorise preventative detention. The Act does not provide any machinery of the type which would be expected if preventative detention was a possibility, eg, there is no reference to how a person should be taken into detention. The Act contemplates that proceedings for prevention orders are civil proceedings. The deprivation of liberty as a result of civil proceedings generally does not occur.

13. A prevention order must not be for a duration of greater than 5 years: section 7(2). An applicant for a prevention order, or a person subject to such an order, may appeal against a decision in relation to the making of a prevention order: section 11. The court making a prevention order may vary or revoke it at any time, on application by the applicant for the order or by the person against whom the order is made: section 12.

Critical Ch III Issues

14. Having regard to the operation of section 5(1)(c), the critical constitutional issue is whether it is consistent with the institutional integrity of a Court capable of exercising federal jurisdiction to confer upon that Court the function of determining whether to make a prevention order, if there are reasonable grounds to believe (on balance) that a specified person will be involved in serious crime related activity.

15. At a substantive level, the plaintiffs say that it is inconsistent with the institutional integrity of a Ch III Court to make a prevention order if there are reasonable grounds to believe (on balance) that a specified person will be involved in serious crime related activity because:

(a) the circumstances in which such an order will be made undermines the criminal justice system of the State; and/or

(b) a Court asked to make such an order is essentially being enlisted by the Executive to administer a different and lesser grade of justice.

16. At a procedural level, the plaintiffs contend that the prescribed statutory process for making a prevention order departs so substantially from the traditional functions, methods and procedures that the statutory process undermines the Court's institutional integrity.

Framework for the Constitutional Challenges to Section 5(1)

17. In evaluating the constitutional validity of section 5(1), it is essential to distinguish between the distinct areas of operation of sub-sections 5(1)(a) and (b), on the one hand, and sub-section 5(1)(c) on the other hand. As explained, sub-sections 5(1)(a) and (b) are concerned with the objective

identification of the class of specified persons against whom a prevention order may be made. Sub-section 5(1)(c) requires the Court to make an evaluative determination about whether the order will protect the public from serious crime related activity in which a specified person may engage in the future.

18. Two examples serve to illustrate the distinct operation of the requirements in sub-sections 5(1)(a) and (b), and sub-section 5(1)(c). No prevention order will be needed in the future to protect the public against a specified person who has been convicted of a serious criminal offence, if the specified person is still imprisoned for that offence. Conversely, if a person was convicted of a serious criminal offence many years ago, and has subsequently been rehabilitated, that person may be a specified person, but there would no reason for a Court to make a prevention order.

19. It is erroneous to elide the two distinct areas of operation just described. This occurs where a prevention order is characterised as a further punishment for, or consequence of, a past conviction for a serious criminal offence or for past involvement in a serious crime related activity. Such a characterisation is incorrect. The purpose of a prevention order is solely to protect the public against future serious crime related activity. Of course, past matters may provide a factual basis for assisting in drawing inferences about future action. However, as the examples in the last paragraph demonstrate, past matters are not decisive of whether a prevention order should be made. See further at paragraphs [35]-[40] below.

20. At a general level, this characterisation error infects much of the analysis of the plaintiffs about the constitutional validity of section 5(1), at paragraphs [38]-[56] of the plaintiffs' submissions. The plaintiffs claim that the prevention orders regime:

(a) authorises additional penalties for those convicted of past serious criminal offences, or penalties for those not yet convicted, acquitted of or not charged with past serious criminal offences, which undermine and supplant the existing criminal justice system (particular (iii) and (vi), paragraph [23] of the Further Amended Statement of Claim (**FASOC**)); and/or

(b) creates an alternative justice system which undermines and supplants the existing criminal justice system with a different and lesser grade of justice, and applies new standards of proof and penalties for those suspected of being involved in past serious crime related activity which has not been established (particulars (i), (iii), (v) and (vi), paragraph 23 of the FASOC).

21. There is only one attack which is made upon the constitutional validity of section 5(1), which is not affected by the characterisation error just identified. It is that section 5(1) purports to authorise a prevention order of almost unlimited scope, including orders imposing detention for up to 5 years, or orders imposing substantial restraints upon a person's liberty such as home detention, without specifying any meaningful criteria by which the court is to determine what orders are "appropriate" and while also departing from traditional judicial standards (particular (ii), paragraph [23] of the FASOC; paragraphs [57]-[61] of the plaintiffs' submissions). While the plaintiffs' submissions refer to the test of "reasonable grounds to believe" in section 5(1)(c), at paragraphs [25]-[29], they do not rely upon the nature of this test as an independent ground for constitutional invalidity.

The Requirements of Ch III

22. By reason of Ch III of the *Constitution*, a State legislature:

(a) cannot confer a function or power upon a State Court which substantially impairs the institutional integrity of the Court, or confer a non-judicial function upon a judge of a State Court which is substantially incompatible with the functions of that judge's Court; and

(b) cannot effect an impermissible Executive intrusion into the processes or decisions of a Court, which includes enlisting the Court to implement a decision of the Executive.

See ***North Australian Aboriginal Justice Agency Ltd v Northern Territory*** [2015] HCA 41; (2015) 256 CLR 569 at [39].

23. There have been four cases where legislation has been held invalid by reason of conferring functions upon a Court, or prescribing processes for a Court, which

have been contrary to the requirements of the institutional integrity of a Court. The core significance of these cases is summarised by Hayne, Crennan, Kiefel and Bell JJ in ***Condon v Pompano Pty Ltd*** [2013] HCA 7; (2013) 252 CLR 38 at [127]-[135].

24. In three cases, the function or power conferred upon a Court was not necessarily inconsistent, by itself, with a Ch III Court's functions. However, in each case, the process provided for carrying out the functions was inconsistent with the institutional integrity of a Court because it required resolution of an issue which involved imposing a process upon the Court which impermissibly intruded into a Court's decision-making role, or effectively enlisted the Court (by reason of a narrowly prescribed process) into making a decision dictated by the Executive.

25. In ***Kable v Director of Public Prosecutions*** [1996] HCA 24; (1996) 189 CLR 51, the relevant law empowered a State Court to order the detention of a named person where, upon considering the relevant statute as a whole, the NSW Parliament was using the Court to implement a plan to keep that person detained in custody upon the basis of evidence which was not admissible in legal proceedings. In ***International Finance Trust Co Ltd v NSW Crime Commission*** [2009] HCA 49; (2009) 240 CLR 319, the relevant law conferred the function of making a freezing order upon a Court, where the process involved an ex parte order with ongoing effect, based upon a suspicion of wrongdoing and without scope for release of that order if the duty of full disclosure on an ex parte application had been breached. In ***Wainohu v NSW*** [2011] HCA 24; (2011) 243 CLR 181, the law conferred the function of making declarations about criminal organisations upon judges of a State Court. However, the prescribed process was incompatible with the institutional integrity of the State Court as it exempted judges from giving reasons for decision.

26. In the fourth case, ***South Australia v Totani*** [2010] HCA 39; (2010) 242 CLR 1, the function conferred upon the Court was, by itself, inherently inconsistent with the functions of a Ch III Court. The legislation required a Court to impose and enforce a control order following a declaration by the Executive that an organisation was a criminal organisation. The findings that formed the basis for

the declaration made by the Executive could not be tested or challenged judicially. The conferral of that function enlisted the Court to do the will of the Executive. It crossed the line between conferring jurisdiction upon a Court, and the legislature directing the exercise of jurisdiction: [133].

27. It has been accepted that the institutional integrity of a Court is not substantially impaired, and there is nothing inconsistent or repugnant to the institutional integrity of a Court, by reason of conferring a function or power upon a Court to make preventative orders restricting the actions or liberty of a person in order to protect the public. Even preventative detention orders may be justified upon this basis, as was accepted in ***Fardon v Attorney-General of Queensland*** [2004] HCA 46; (2004) 223 CLR 575 and ***Thomas v Mowbray*** [2007] HCA 33; (2007) 233 CLR 307.

28. These cases rejected an argument which is close to one of the arguments advanced in the present case. That is, the power to make a preventative order restricts a person's liberty; and the restriction of a person's liberty is exclusively a judicial function which can only be used (apart from in exceptional cases) for punishing criminal guilt. In ***Fardon*** and ***Thomas***, this argument was unsuccessfully based upon ***Chu Kheng Lim v Minister for Immigration*** [1992] HCA 64; (1992) 176 CLR 1 at 28.

29. In fact, ***Fardon*** and ***Thomas*** were stronger cases for such an argument to succeed, if it had any merit. Those cases concerned preventative detention orders. As explained previously, the legislation here does not go as far as authorising preventative detention. Just as the argument in ***Fardon*** and ***Thomas*** failed, it should also be rejected here.

30. There is nothing inherently inconsistent with a State Court having the ability to make preventative orders to protect the public against possible criminal conduct. In ***Fardon*** and ***Thomas***, such orders were held to be analogous to recognisance orders and it was also pointed out that a sentencing court often takes into account prevention in arriving at an appropriate punishment. See particularly ***Fardon*** at [2], [11], [83], [107], [216]-[217] and ***Thomas*** at [16]-[18], [116].

The Act does not undermine the Criminal Justice System

31. The claims by the plaintiffs that the prevention order regime undermines the criminal justice system, and provides a different and lesser grade of justice, are connected and, to some extent, overlapping. However, it is helpful to separate them conceptually for analytical purposes.

32. The claim that the prevention order regime undermines the criminal justice system is effectively a claim that the function of a State Court in determining an application for prevention orders is inconsistent with the function of a Court to adjudicate criminal guilt: plaintiffs' submissions, [38]-[47]. That must be because the legal or practical effect of having a prevention order regime is to impair, or "undermine", the operation of the orthodox criminal justice system.

33. On the other hand, the claim that the prevention order regime provides a different and lesser grade of justice, appears to be substantially a claim that the nature of the prevention order regime is inherently at odds with the institutional integrity of a Ch III Court.

34. To the extent that the submission about undermining depends upon assessing the compatibility of the legal (as opposed to the practical) operation of the criminal justice system and the prevention order regime, it suffers from the general difficulty that the legal tests applied for adjudicating criminal guilt are entirely different from the legal basis for making a prevention order. As well, the two regimes have different purposes.

35. At its most basic, criminal guilt depends upon adjudicating and punishing past conduct, whereas a prevention order concerns protecting the public from prospective conduct.

36. Further, the outcome of a successful criminal prosecution for a serious crime is a conviction, and likely imprisonment. The outcome of a prevention order application is for a different purpose. It gives rise to restrictions upon a person's associations and actions, not imprisonment. There is no question of an outcome for one purpose undermining a qualitatively different outcome for a different purpose.

37. As the criminal justice system and prevention order regime ultimately require a decision about different conduct (past as opposed to future), and for different purposes (punishment as opposed to protection), they do not have a legal operation which collides. Of course, it is possible that an intermediate step in making a decision about a prevention order is a conclusion that a respondent has, in the past, committed a serious criminal offence or has been involved in serious crime related activity. However, that is for the sole purpose of evaluating the prospect of future conduct against which the public may need protection. It is not for any punitive purpose.

10 38. Even in a more extreme case where a deceased person was deemed to have committed an offence, without any trial or finding to this effect, but only for the purposes of activating the operation of confiscation legislation, there was no inconsistency between the criminal justice system and the confiscation legislation: ***Silbert v The Director of Public Prosecutions (WA)*** [2004] HCA 9; (2004) 217 CLR 181 at [11]-[13].

39. Likewise, further support for this argument may be found in ***Falzon v Minister for Immigration and Border Protection*** [2018] HCA 2; (2018) 262 CLR 333. In that case, the Court held that a power to cancel a visa in the case of a person with a "substantial criminal record" who is also serving a custodial sentence did
20 not impose a second punishment upon the appellant. Rather, the selection of having a "substantial criminal record" as the factum upon which the power to cancel a visa was enlivened was within the power of the Parliament: [45]-[47], [89]. Similarly, in the present case, the fact of having been convicted of a serious criminal offence or involved in serious crime related activity is simply the jurisdictional criterion upon which the Court's power to make a control order is enlivened. Of course, ***Falzon*** was concerned with *executive* power, but the distinction between a criterion upon which jurisdiction is enlivened and the consequences of an exercise of that jurisdiction is apposite.

40. These difficulties mean that the plaintiffs' submissions should not be accepted
30 in so far as they claim legal inconsistency upon the basis that the prevention order regime effectively:

(a) imposes an additional punishment where a person has already been convicted: [40]; or

(b) allows prosecutors to have a second "bite of the cherry" after an acquittal: [42]; or

(c) allows prosecuting authorities "to elect to use the easier route of the ... Act instead": [47].

41. Turning to the practical operation of the criminal justice system and the prevention order regime, the plaintiffs appear simply to submit that the existence of two parallel regimes will undermine public confidence in the administration of justice: [39]. However, maintaining public confidence in the administration of justice is not a substitute test or proxy for maintaining the institutional integrity of Courts. See, for example, ***Fardon*** at [23], [102], ***North Australian Aboriginal Justice Agency Ltd*** at [40]. Further, public confidence in the administration of justice will not be undermined where a member of the public appreciates the different legal operation and purposes for the criminal justice system and the prevention order regime.

The Act does not involve a different and lesser grade of justice

42. The plaintiffs' submissions at [48]-[56] commence with the proposition that the Act "erects in substance an alternative criminal justice regime". That starting point should not be accepted. The five separate points which the plaintiffs make in respect of this argument do not demonstrate that the institutional integrity of the NSW Courts is substantially impaired by having the function of administering the prevention order regime.

43. First, the plaintiffs claim that it is significant that the applicants for a prevention order may be the DPP or the Commissioner of Police: [49]. However, the identity of these applicants is entirely consistent with the fact that the prevention order regime is concerned with preventing future conduct which may amount to a criminal offence. Moreover, the identity of the applicants shows that the Executive is submitting the application to the jurisdiction of the NSW Courts, not enlisting or supplanting them.

44. Secondly, the plaintiffs refer to the width of the prevention order regime to demonstrate that the "statutory scheme ... substantially overlaps with the ordinary criminal justice regime": [50]. The width of the regime does not, by itself, demonstrate that a Court has been conferred with a function which is incompatible with Ch III. It is the nature of the function, not the width of its application, which is relevant. As well, the overlap mentioned by the plaintiffs is based upon the misassumption that the purpose of the prevention order regime is to punish the same conduct which is the subject of the criminal justice regime.

45. Thirdly and fourthly, the plaintiffs say that prosecuting authorities may decide "not to commence a criminal prosecution and instead ... go down the easier route provided by the ... Act": [51]. Likewise, the plaintiffs say that "orders may be obtained against persons with respect to serious criminal offences for which they have been acquitted": [52]. The plaintiffs also allege that the operation of section 80 of the *Constitution* may be undermined, because the prevention orders regime may be used in a civil proceeding where a serious federal criminal offence would be required to be tried by a jury. These submissions are essentially the same as the arguments addressed in the last section, and are based upon the view that prevention orders are substitute punitive measures.

46. Fifthly, the plaintiffs say that the Act lacks many of the safeguards of the ordinary system of criminal justice that are protective of the individual against the State: [53]. This submission is based upon a construction of the Act which permits a preventative detention order. That is not a correct view of the Act. In any event, as explained, it is not inconsistent with the institutional integrity of a Court to make preventative detention orders, where appropriate: ***Fardon***; ***Thomas***.

No departure from traditional judicial functions, methods and procedures

47. While it is not possible to define the traditional judicial functions, methods and procedures exhaustively, the defining characteristics of a court's processes generally include: decisional independence; the application of procedural fairness; the open court principle; and provision of reasons for decision. See

Pompano at [67]; ***North Australian Aboriginal Justice Agency Ltd*** at [39]. These features are all present in relation to the prevention orders regime.

48. The plaintiffs submit that it is inconsistent with the institutional integrity of a Court making a prevention order to do so upon the basis of what terms of the order would be "appropriate" to prevent, disrupt or restrict serious crime related activities. That is because what is "appropriate" is not a "purely judicial standard": [58].

49. That submission should be rejected. This Court has used "appropriate" as a judicial standard to define the third question in the tests set out in ***McCloy v NSW*** [2015] HCA 34; (2015) 257 CLR 178 at [2]. It is evidently a judicial standard. See also ***Cardile v LED Builders Pty Ltd*** [1999] HCA 18; (1999) 198 CLR 380 at [41], [108]; ***Mitchell v R*** [1996] HCA 45; (1996) 184 CLR 333 at 346.

50. The use of a criterion based upon whether the Court considers that a prevention order is "appropriate" is similar to the test of "unacceptable risk" for making a preventative detention order. The test of "unacceptable risk" was not considered unconstitutional in ***Fardon***, esp. at [22], [60], [225]-[226].

51. The plaintiffs also submit that there are departures from "established methods and procedures in making findings or criminal conduct": [59]. However, there is no reason why preventative orders should be based upon procedures relevant to criminal conduct. They are orders to protect the public, based upon an evaluation of what is likely to occur in the future. This affects the processes which a Court should be required to adopt.

52. For example, almost nothing could ever be proved beyond a reasonable doubt about what will happen in the future. Hence, a standard of persuasion based upon balance of probabilities is appropriate.

53. Another matter upon which the plaintiffs rely in their written submissions to show a departure from established methods and procedures is the modification of the hearsay rule in section 5(5) of the Act: plaintiffs' submissions, [59](c). This allows admission of hearsay evidence when the court is satisfied of its reliability (among other matters).

54. The admissibility of hearsay evidence was not regarded as a constitutional problem in ***Pompano***, esp at [76].

55. Further, modification of hearsay is not "novel". The Uniform Evidence Acts adopted by the Commonwealth, NSW, Victoria, Tasmania, ACT and Northern Territory all include modifications to the hearsay rule, including a provision which excludes the operation of the hearsay rule in criminal proceedings where a representation is "made in circumstances that make it highly probable that the representation is reliable". See sections 63 to 66A of the *Evidence Act 1995* (Cth), *Evidence Act 1995* (NSW), *Evidence Act 2008* (Vic), *Evidence Act 2001* (Tas), *Evidence Act 2011* (ACT), and *Evidence (National Uniform Legislation) Act 2011* (NT).

56. Finally, the plaintiffs also say, at [61], that the potential duration of a prevention order, for up to 5 years, is too long to be compatible with the institutional integrity of a Court.

57. The ability to make a prevention order of up to 5 years is a matter for the Court exercising jurisdiction. Prevention orders are not required to be 5 years long. There is nothing incompatible with the integrity of a Court to confer an extensive jurisdiction, which it can choose whether to exercise.

Conclusion

58. For these reasons, the prevention orders regime and section 5(1) of the Act do not confer any function or power upon a Court which is inconsistent with the institutional integrity of a State Court and the requirements of Ch III. Nor does section 5(1) require a State Court to determine an application for a prevention order using a process which is inconsistent with the institutional integrity of a Ch III Court. Section 5(1) is valid.

PART V: LENGTH OF ORAL ARGUMENT

51. It is estimated that the oral argument for the Attorney General for Western Australia will take 15 minutes.

Dated: 22 July 2019

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