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

BETWEEN:

DAMIEN CHARLES VELLA
First Plaintiff

JOHNNY LEE VELLA
Second Plaintiff

MICHAEL FETUI
Third Plaintiff

AND

COMMISSIONER OF POLICE (NSW)
First Defendant

STATE OF NEW SOUTH WALES
Second Defendant

ORAL OUTLINE OF SUBMISSIONS ON BEHALF OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

Date of Document: 7 August 2019

Filed on behalf of the Attorney General for Western Australia by:

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

Six Points of Construction: *Crimes (Serious Crime Prevention Orders) Act* ("Act")

2. **Purpose of Prevention Order:** The purpose of a prevention order is to protect the public from serious crime related activity, not punish a defendant who becomes so involved. Such orders are called "serious crime prevention orders" (s.5(1)). A Court may only make the order if it is satisfied that there are reasonable grounds to believe that such an order would "protect" the public (ss.5(1)(c), 6(1)). A person who becomes involved in serious crime related activity, notwithstanding such an order, may be punished separately in any event.

3. **Class of Defendants:** Prevention orders can only be made against a limited class: those convicted of a "serious criminal offence" or proved (on balance) to have been involved in a "serious crime related activity" (s.5(1)(b)). That class is defined by past actions. It does not affect the evaluation under s.5(1)(c).

4. **Level of Risk to Public:** 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, *would* (on balance) protect the public by preventing, restricting or disrupting the involvement by the defendant in the serious crime related activity. Logically, the essential steps to reach such a state of satisfaction are that the Court must first be satisfied that, unless a prevention order is made, there presently exist reasonable grounds to believe (on balance) that the defendant will be involved in serious crime related activity; and that an order in particular terms *would* prevent, restrict or disrupt that activity.

5. **Belief of Court:** The Court must itself be satisfied that there are reasonable grounds to believe that a prevention order would protect the public. The requirement that there be reasonable grounds for belief is a requirement that there exist facts which are sufficient to induce a particular state of mind in a reasonable person: ***George v Rockett*** (JBA 3/28) at 112. The same facts ought to induce the same state of mind in both the Court and a reasonable person. As well, the Court must itself actually consider the terms of an order to be appropriate (s.6(1)).

6. **Restrictions must be "Appropriate":** What is "appropriate" means what is suitable or proper in the circumstances (OED, 2nd ed). This criterion therefore

both *permits* an order which is suitable or proper; and *limits* such an order only to what is suitable or proper.

7. An assessment of what is "appropriate" depends upon the particular relationship between the potential for public harm; the reasonable grounds for a Court believing that a defendant will be involved in serious crime related activities; and the nature of the serious crime related activities which need to be prevented, restricted or disrupted.

8. **No Preventative Detention:** Prevention orders may contain such prohibitions, etc, to prevent future public harm. No words expressly authorise a Court to make an order detaining a defendant in custody. Nor should they be so construed.

No Inherently Unconstitutional Function

9. The Act confers a function upon the NSW Supreme and District Courts to assess whether there are reasonable grounds to believe that a defendant from within a limited class will be involved in serious crime related activities. If so, these Courts have the function of determining whether to make an order, and the terms of an order, to prevent, restrict or disrupt that person from being so involved.

10. There is nothing inherently unconstitutional in conferring such functions upon Ch III courts. They involve both assessing a risk, and then making orders to prevent the risk eventuating. That is unlike ***Totani*** (JBA 4/38). The Court there was enlisted to make orders to prevent a risk which the Executive had assessed.

11. Prevention orders do not undermine a punitive criminal justice system. They have a different legal basis and purpose from punitive orders. A civil jurisdiction to restrain possible breaches of criminal law has always existed in Ch III Courts (if only exceptionally exercised).

12. Finality of a previous criminal prosecution is not undermined. Finality here means the end of the claim for criminal penalties. It has never meant the end of all legal consequences arising from a factual incident. As well, NSW Courts retain their supervisory power to regulate the conduct of proceedings. They may adopt an appropriate process to protect the integrity of pending or concurrent criminal proceedings.

13. Prevention orders ought not to practically undermine confidence in the justice system, once their different basis and purpose are recognised. Even the function of making preventative detention orders is constitutionally acceptable: ***Fardon*** (JBA 3/27), ***Thomas v Mowbray*** (JBA 5/41).

14. Prevention orders do not involve conferring the function of administering a different and lesser grade of punitive justice upon NSW Courts. Such orders are not concerned with punitive justice. It does not matter that applications are made by prosecuting authorities. Such authorities make other, non-punitive forms of application, eg applications for confiscation and compensation orders.

10 **No Unconstitutional Intrusion into Judicial Decision Making**

15. Unlike ***Kable*** (JBA 3/30), ***International Finance*** (JBA 3/29) and ***Wainohu*** (JBA 5/43), the Act does not require NSW Courts to adopt a procedure in performing their functions which either involves the NSW legislature impermissibly impairing the fundamental nature of judicial decision making; or which effectively dictates the outcome of a judicial decision.

16. A standard of proof upon balance of probabilities is not unconstitutional. It is a recognised standard for civil proceedings, and is appropriate for assessments about the future. Modification of the hearsay rule in civil proceedings is not constitutionally invalid, eg ***Pompano*** (JBA 2/17) at [76].

20 17. The test of what prohibitions, etc, are "appropriate" to prevent, restrict or disrupt future serious crime related activities is a judicial standard. It requires a Court to assess the particular relationship between future serious crime related activities; the basis for the Court's satisfaction that there are reasonable grounds to believe that these activities would occur; and the role of the defendant in these activities. That is a task based upon objective criteria. It is similar to assessing "unacceptable risk", which was held valid in ***Fardon*** (JBA 3/27).

18. The upper limit for a prevention order is 5 yrs. The length of an order must be based upon what is "appropriate". If circumstances change, an application may be made to vary or alter a prevention order with leave of the Court (s.12).

30 Dated: 7 August 2019

J A Thomson SC

K J Chivers