IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE 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

DEFENDANTS' SUBMISSIONS

PART I: INTRODUCTION AND OVERVIEW

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

PART II: CONCISE STATEMENT OF ISSUES

2. The questions that have been referred for the opinion of the Full Court (see Special Case Book (SCB) at 41) and the answers contended for by the Defendants are as follows:

Question 1: Is subsection 5(1) the Crimes (Serious Crime Prevention Orders) Act 2016 (NSW) invalid (in whole or in part) because it is inconsistent with and prohibited by Chapter III of the Constitution?

Answer 1: No.

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

a. to what extent is that subsection invalid?;

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

Answer 2: Does not arise.

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

Answer 3: The Plaintiffs.

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PART III: SECTION 78B NOTICES

3. The Defendants consider that the notice of a constitutional matter at page 17 of the SCB satisfies the requirements of s 78B of the Judiciary Act 1903 (Cth).

PART IV: MATERIAL FACTS

4. The material facts are set out in the Special Case (SCB at 37ff).

PART V: ARGUMENT

Overview

5. The Plaintiffs assert (see PS at [36]) that s 5 of the Crimes (Serious Crime Prevention Orders) Act 2016 (NSW) (**SCPO Act**):

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

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

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

6. Each of those assertions is wrong. The Plaintiffs' argument based on the principle for which Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 ("Kable") stands therefore cannot succeed.

The SCPO Act does not undermine the criminal justice system

7. A critical element of the Plaintiffs' argument in this Court is that the SCPO Act purports 20 to establish what it describes as "an alternative criminal justice regime": PS at [48]; see also PS at [50], [56], [59(d)-(e)].

8. That submission mischaracterises the SCPO Act.

9. The SCPO Act is not criminal in nature either in form (see SCPO Act, s 13) or in substance. It does not seek to punish for past conduct: see Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 70 (McHugh J). Rather, the SCPO Act is forward-looking: in certain circumstances, it authorises – but, notably, does not require – the Supreme Court or District Court of New South Wales to make a serious crime prevention order where the court is satisfied that there are reasonable grounds to believe that the making of the order would (that is, in the future) protect the public: 30 see SCPO Act, s 5(1)(c); cf PS at [31].

10. It is true that one of the preconditions for the exercise of that power is that the court is satisfied that the person against whom the order is proposed to be made has either been convicted of a serious criminal offence or has been involved in serious crime related activity for which he or she has not been convicted: see SCPO Act, s 5(1)(b)(ii). But it does not follow that the SCPO Act amounts to an "alternative criminal justice regime" or that the Act empowers restrictions on liberty "by reference to" past offences: cf PS at [40].

11. Instead, s 5(1)(b) (read with the age requirement in s 5(1)(a)) establishes the classes of persons against whom serious crime prevention orders may be made in the exercise of a court's discretion where appropriate circumstances exist. The SCPO Act does not empower a court to punish (or further punish) a person for the past acts that caused him, her or it to become a member of a class against whom serious crime prevention orders might be made.

12. Rather, the extent of the power conferred by s 5(1) of the SCPO Act is to impose prohibitions, restrictions, requirements and other provisions that the court considers are appropriate for the forward-looking purpose specified by the statute – the purpose of protecting the public from serious crime related activities: see SCPO Act, s 6(1).

13. In this way, the SCPO Act is analogous to the Queensland legislation held by this Court to be constitutionally valid in Fardon v Attorney-General (Qld) (2004) 223 CLR 575 ("Fardon"). In that decision, this Court upheld the constitutional validity of a Queensland law of general application that authorised the making of detention and supervision orders against certain classes of convicted sexual offenders. Like the SCPO Act, the legislation considered in Fardon is "not designed to punish": Fardon at 597 [34] (McHugh J). Rather, it is preventative in nature: see Fardon at 592 [20] (Gleeson CJ), 608 [68] (Gummow J), 658 [234] (Callinan and Heydon JJ).

14. The SCPO Act is also analogous to the legislation upheld in Thomas v Mowbray (2007) 233 CLR 307 ("Thomas"). Under the provisions of the Criminal Code (Cth) considered in that case (see 342 [64]), an "issuing court" might make an "interim control order" where, inter alia:

    (a) the court is satisfied on the balance of probabilities:

        (i) that making the order would substantially assist in preventing a terrorist act; or

(ii) that the person has provided training to, or received training from, a listed terrorist organisation; and

(b) the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

The obligations, prohibitions and restrictions that might be imposed include prohibitions or restrictions on the person being at specified areas or places, leaving Australia, communicating or associating with specified individuals and also requirements to wear a tracking device and to report to specified persons at specified times and places: see Thomas at 339 [49] (Gummow and Crennan JJ).

15. The interim control order in that case included a requirement that Mr Thomas remain at his home (or at another address notified in writing to the Australian Federal Police) between midnight and 5.00am each day, that he report to the police three times a week and that he be prohibited from leaving Australia without the permission of the police. Justices Gummow and Crennan noted (at 338 [48]) that the relevant provisions contemplated an ex parte procedure and (at 340 [56]) that the proceedings were taken to be interlocutory proceedings so that the hearsay rule did not apply if evidence of the source of the hearsay evidence was adduced by the party leading it.

16. The Plaintiffs' attempts (at [26] (fn 7), [41], [50], [51], [58], [61]) to distinguish the decisions in Fardon and Thomas are unconvincing. While it is true that the classes of persons against whom a serious crime prevention order may be made under the SCPO Act are different to the classes of persons against whom an order may be made under the legislation considered in Fardon or Thomas and that the preconditions to the exercise of power are differently framed in the different legislative regimes (PS at [41], [50], [58(a)]), there is no basis for reading the reasoning in Fardon or Thomas as only applying to legislation that authorises the making of preventative orders against a small class of people in respect of whom "future risk" has been established to a "high level" (whatever that means): cf PS at [41].

17. Rather, Fardon and Thomas support the proposition that legislation of general application will not offend the Kable principle merely because it authorises a court to make preventative rather than punitive orders.

18. Legislation of that kind will only be invalid where it undermines a court's independence by purporting to render it an instrument of the legislature or executive (as in Kable and South Australia v Totani (2010) 242 CLR 1 ("Totani")); where legislation purports to engage a court or a judge thereof in an activity which is repugnant to the judicial process in a fundamental degree (as in International Finance Trust Company Ltd v NSW Crime Commission (2009) 240 CLR 319 ("IFTC") and Wainohu v New South Wales (2011) 243 CLR 181 ("Wainohu")); or where legislation otherwise substantially impairs the institutional integrity of a court so as to be incompatible with its role as a repository of federal jurisdiction. The SCPO Act does not contain any of those vices.

19. In particular, the SCPO Act does not impair (whether substantially or at all) the institutional integrity of NSW courts by "undermin[ing]" criminal verdicts or sentences or the criminal process more generally: cf PS at [40], [62].

20. It is convenient to consider the Plaintiffs' submissions to the contrary by reference to the four categories of circumstances identified in paragraph 38 of the Plaintiffs' submissions.

21. Where a person has been convicted of a serious criminal offence and that conviction is relied on to enliven the power under the SCPO Act to make a serious crime prevention order, the making of such an order is not apt to undermine any sentence imposed by a criminal court in relation to the serious criminal offence. As observed above (at [11]), serious crime prevention orders are preventative in nature; there is no power under the SCPO Act to make a serious crime prevention order to penalise (or further penalise) a person. That being so, there is no inconsistency between a serious crime prevention order and a criminal penalty – each of those things is directed to different purposes and each can stand without "undermin[ing]" the other: cf PS at [41].

22. As for cases in which an appropriate court finds that a person has been involved in serious crime related activity for which that person has not been convicted or has been acquitted, there is no inconsistency between such a finding and the lack of conviction or an acquittal: cf PS at [42], [52].

23. As Lord Salmon explained in Director of Public Prosecutions v Shannon [1975] AC 717 (HL(E)) at 772 (in a passage quoted by this Court with approval in The Queen v Darby (1982) 148 CLR 668 at 677 (Gibbs CJ, Aickin, Wilson and Brennan JJ)):

> A verdict of not guilty may mean that the jury is certain that the accused is innocent, or it may mean that, although the evidence arouses considerable suspicion, it is insufficient to convince the jury of the accused's guilt beyond reasonable doubt. The verdict of not guilty is consistent with the jury having taken either view. The only effect of an acquittal, in law, is that the accused can never again be brought before a criminal court and tried for the same offence [or, it may be added, for another offence where criminal proceedings for that offence would be amount to an abuse of process because, for example, it raised the same ultimate issue as that in a previous criminal trial that resulted in an acquittal: see The Queen v Carroll (2002) 213 CLR 635 ("Carroll")]

24. Consistent with this, on the same facts, both a criminal jury and a civil judge may be satisfied on the balance of probabilities that a person was involved in serious crime related activity but not so satisfied beyond reasonable doubt. In those circumstances, the criminal jury would be obliged to acquit and the civil judge entitled to find that the power to make a serious crime prevention order is enlivened (if the other preconditions to the existence of that power are satisfied). There is no inconsistency in that result (cf PS at [42], [43]); it is simply a reflection of the different standards of proof that apply in criminal and civil proceedings.

25. That point also explains why it is possible for a person to be found liable for a civil assault even if that person has been acquitted of a criminal assault in relation to the same facts (even where, unusually, the parties to the civil proceedings are the same as the parties to the criminal proceedings): see, eg, Kosanovic v Sarapuu [1962] VR 321 (Full Court); see also El Alam v Northcote City Council [1996] 2 VR 672.

26. In any event, there is no general constitutional impediment to a State Parliament enacting laws that require a judgment or verdict to be treated differently to the way in which it would be treated but for that law (provided that such laws do not interfere with the judicial process itself: see Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth (1986) 161 CLR 88 at 96). For example, this Court held in Re Macks; Ex parte Saint (2000) 204 CLR 158 ("Re Macks") that the State laws considered in that case were valid even though they brought about an outcome that was different to that which would have ensued from this Court's decision in Re Wakim; Ex parte McNally (1999) 198 CLR 511 in the absence of legislative intervention. Similarly, the SCPO Act would not be invalid on Chapter III grounds even if (which is denied) it has the effect of permitting acquittals to be treated differently to the way in which they are required to be treated at common law.

27. As for situations in which a person who is alleged to have been involved in serious crime related activity has, for example, been charged but not tried or has not been charged at all, proceedings under the SCPO Act do not "undermine" pending or possible criminal proceedings: cf PS at [44]-[47].

28. Like proceedings under the Proceeds of Crime Act 2002 (Cth) considered by this Court in Commissioner of the Australian Federal Police v Zhao (2015) 255 CLR 46 ("Zhao"), proceedings under the SCPO Act are (Zhao at 58 [34]):

> separate and distinct from any criminal proceedings and it is possible that they may be conducted regardless of the criminal proceedings. They are unaffected by the outcome of criminal proceedings.

29. The fact that criminal proceedings have been or may be brought is therefore not properly seen as an impediment (at least in and of itself) to the continuation of proceedings under the SCPO Act.

30. This is not to deny that there may be circumstances in which a court may conclude that particular proceedings under the SCPO Act may be apt to cause substantial prejudice to an accused (or a person who might later be an accused) in the conduct of his or her defence. In such an event, the court would be empowered to exercise its discretion to adjourn or stay the proceedings under the SCPO Act if the court concluded that it was in the interests of justice to take such a course: see, by analogy, Assistant Commissioner v Pompano Pty Ltd (2013) 252 CLR 38 at 107 [187] (Gageler J). The point for present purposes is that the Plaintiffs are wrong to submit that proceedings under the SCPO Act necessarily and in all cases undermine the fairness of pending or possibly pending criminal proceedings.

31. If a substantial risk of unfairness is shown to exist in a particular case, a court may adjourn or stay SCPO Act proceedings if it considers that it is in the interests of justice to do so. The power to make such an order is not expressly or impliedly excluded by the SCPO Act.

32. In the result, the SCPO Act does not "undermine" any aspect of the criminal justice system either on the facts of the particular case or at all. There is thus no basis for the assertion that the SCPO Act is apt to undermine "public confidence" in the criminal justice system: cf PS at [39]-[42], [47], [62] (noting, as the Plaintiffs correctly acknowledge at [39], "public confidence" is not a touchstone of constitutional validity: see, in particular, Totani at 49 [73] (French CJ)).

The SCPO Act does not "enlist" the courts to administer a different, and lesser, grade of criminal justice

33. The Plaintiffs' assertion (at [36(b)], [48]) that the SCPO Act "requires or enlists the relevant courts in administering a different and lesser grade of criminal justice" fails at the threshold – for the reasons already explained, the SCPO Act does not erect an "alternative criminal justice regime": cf PS at [48], [56].

34. That position is unaffected by the fact that the NSW Director of Public Prosecutions and Commissioner of Police are "eligible applicants" under the SCPO Act: cf PS at [49]. Although (as the Plaintiffs correctly observe at [49]), the Director of Public Prosecutions plays a number of important roles in the criminal justice process, it does not follow that the Director's role is restricted to criminal proceedings or that everything the Director does has a criminal character. As well as his functions in and in connection with criminal proceedings, the Director of Public Prosecutions has a number of important functions in relation to proceedings that are not criminal proceedings such as assisting a coroner in any inquest or inquiry (Director of Public Prosecutions Act 1986 (NSW) ("DPP Act"), s 12) and seeking apprehended domestic violence orders (DPP Act, s 20A). Likewise, the Commissioner of Police has roles in the administration of legislation as diverse as the Liquor Act 2007 (NSW), Scrap Metal Industry Act 2016 (NSW) and the Gambling (Two-up) Act 1998 (NSW). There is therefore no basis for concluding that proceedings under the SCPO Act take their "character" from the identity of the persons who are "eligible applicants" for orders under that Act.

35. The Plaintiffs are also wrong to seek to invoke the concept of "enlistment" in their challenge to the SCPO Act: PS at [36(b)], [48].

36. As this Court explained in Totani (at 52 [82] (French CJ), 67 [149] (Gummow J), 160 [436] (Crennan and Bell JJ), 173 [481] (Kiefel J)) legislation may offend the Kable principle where its legal or practical operation is to enlist a court of a State to act at the behest of the legislature or executive. The SCPO Act does no such thing. Unlike the legislation held to be invalid in Totani, the SCPO Act provides for a "genuine adjudicative process" (see Fardon at 656 [219] (Callinan and Heydon JJ)) pursuant to which an appropriate court is authorised to decide whether the power to make a serious crime prevention order is enlivened and, if so, whether such an order should be made (and, if so, what the scope of such an order should be).

37. In this regard, it is important to emphasise that (again, unlike the legislation held to be invalid in Totani, but like the legislation held to be valid in Fardon and Thomas (see 340-341 [57] (Gummow and Crennan JJ))) the power to make a serious crime prevention order under the SCPO Act is discretionary both in form and substance: even where a court is satisfied that there are reasonable grounds to believe that making a serious crime prevention order would protect the public and that the other preconditions to the making of a serious crime prevention order are satisfied, the court may nevertheless refuse to make an order in the exercise of its discretion (or may exercise its discretion to make an order imposing different and lesser prohibitions, restrictions or requirements than those sought by the eligible applicant).

38. The "decisional independence" of the "appropriate court" under the SCPO Act is thus secured and confirmed: see, eg, Totani at 43 [62] (French J).

39. That conclusion is unaffected by the fact that proceedings under the SCPO Act are commenced at the "elect[ion]", "discretion" or "instigation" of an eligible applicant: cf PS at [51], [55], [56]. The same may be said of any criminal or civil proceedings. "[D]ecisional independence" is focussed on the role of the courts when their jurisdiction is invoked, not on the identities of the persons who may invoke that jurisdiction.

40. It should also be observed that, given that the SCPO Act authorises the making of orders that affect individual liberties by prohibiting conduct that would otherwise be lawful, courts will, in the usual way, construe and apply the SCPO Act in such a way as to limit its operation and application to cases where, all things considered, it is appropriate that particular prohibitions, restrictions, requirements or other provisions be imposed on a particular person with a view to achieving the identified statutory purpose – the protection of the public by preventing, restricting or disrupting that person's involvement in serious crime related activities.

41. Consistent with this, the Defendants contend that the SCPO Act does not as a matter of construction empower a court to make a serious crime prevention order that would operate to detain a person: cf PS at [29], [54]. Such an order would not be a prohibition, restriction, requirement or provision of the kind contemplated by s 6(1) of the SCPO Act.

42. This Court need not determine whether the submission just made is correct as no order for detention is sought against any of the Plaintiffs to this proceeding (see SCB at 53-54).

The point for present purposes is to observe that the Plaintiffs in this proceeding have adopted one of the forensic strategies criticised in Kuczborski v Queensland (2014) 254 CLR 51 at [206]-[207] (Crennan, Kiefel, Gageler and Keane JJ) – to urge a wider operation of impugned laws than would ordinarily be accorded to legislation which affects basic freedoms apparently on the assumption that the greater the extent of the potential intrusions on the liberty of the subject appear to be, the stronger would become the prospect of the impugned law being held to be invalid.

43. The validity of a given law is to be assessed bearing in mind practical realities and likelihoods, not remote or fanciful possibilities: Wainohu at 241 [153] (Heydon J). As a matter of practical reality, it is fanciful to think that the SCPO Act would be construed and applied to, for example, make a serious crime prevention order against a person where all the evidence demonstrated was that he stole five jumpers from David Jones: cf PS at [27]. Fanciful suggestions of that kind do not advance the Plaintiffs' arguments of invalidity. The Plaintiffs' arguments of constitutional invalidity are to be assessed by reference to the legal and practical operation of the SCPO Act. On that approach, the Plaintiffs' submission that the SCPO Act "enlists" courts to act at the behest of the Executive government must be rejected.

The SCPO Act does not depart from traditional judicial functions, methods and procedures to such a degree as to substantially undermine the relevant courts' institutional integrity

44. The Court should also reject the Plaintiffs' submission that the SCPO Act undermines the institutional integrity of the NSW Supreme and District Courts by purporting to require them to depart from "traditional judicial functions, methods and procedures": cf PS at [36(c)], [57].

45. In considering that submission, the starting point is to recognise that – generally speaking – it is within the power of a State Parliament to modify the procedures that are to be adopted in criminal or civil proceedings including by changing the onus or standard of proof or the rules of evidence: see, eg, Williamson v Ah On (1926) 39 CLR 95; Milicevic v Campbell (1975) 132 CLR 307; Nicholas v The Queen (1998) 193 CLR 173; Graham v Minister for Immigration and Border Protection (2017) 263 CLR 1 at 22 [32] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

46. As Hayne, Crennan, Kiefel and Bell JJ explained in Pompano at 94 [138], departure from hitherto established judicial processes is not, without more, constitutionally prohibited. Novelty, at most, presents the question as to whether a legislative provision is constitutionally invalid. It does not, without more, supply the answer to the question of validity. Novelty of procedure will only lead to invalidity where such a procedure is repugnant to or incompatible with the continued institutional integrity of a State court.

47. As McHugh J explained in Fardon at 600-601 [41]:

> The bare fact that particular State legislation invests a State court with powers that are or jurisdiction that is repugnant to the traditional judicial process will seldom, if ever, compromise the institutional integrity of that court to the extent that it affects that court's capacity to exercise federal jurisdiction impartially and according to federal law. State legislation may alter the burden of proof and the rules of evidence and procedure in civil and criminal courts in ways that are repugnant to the traditional judicial process without compromising the institutional integrity of the courts that must administer that legislation. State legislation may require State courts to exercise powers and take away substantive rights on grounds that judges think are foolish, unwise or even patently unjust. Nevertheless, it does not follow that, because State legislation requires State courts to make orders that could not be countenanced in a society with a Bill of Rights, the institutional integrity of those courts is compromised.

48. In any event, the procedures required and contemplated by the SCPO Act do not depart in any significant way from traditional judicial functions, methods and procedures. On the contrary, the SCPO Act in an entirely conventional way:

(a) contains express provisions directed to ensuring that persons who may be affected by serious crime prevention orders are accorded procedural fairness including:

(i) a requirement that a copy of an application for a serious crime prevention order be served on the person against whom that order is sought at least fourteen days before the application is heard: SCPO Act, s 5(3) (the SCPO Act therefore does not contain the vice held to exist in the legislation considered in IFTC); and

(ii) the conferral of an express entitlement on the person against whom a serious crime prevention order is sought and on any other person whose interests may be affected by the making of a serious crime prevention order to appear and make submissions in relation to an application : SCPO Act, s 5(4);

(b) includes an implied indication that applications for serious crime prevention orders will be determined at a "hearing" of the court at which evidence will be received and "submissions" will be heard after which the court will make findings of fact and apply the law to those facts: see reference to "hearing" and "submissions" in SCPO Act, s 5(4); noting also the general presumption that a conferral of jurisdiction on a court will carry with it the adoption of the procedures of that court: see, eg, Mansfield v Director of Public Prosecutions (WA) (2006) 226 CLR 486 at 491 [7] (Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ), quoting Electric Light and Power Supply Corp Ltd v Electricity Commission (NSW) (1956) 94 CLR 554 at 560;

(c) empowers a court to make orders on being satisfied of certain matters through a genuine adjudicative process: see [36]-[38] above;

(d) confers a discretion on the court not to make a serious crime prevention order even when the preconditions to the exercise of the power to make such an order have been satisfied: see the word "may" in SCPO Act, s 5(1);

(e) provides that, subject to the question of hearsay considered below, the rules of evidence applicable in civil proceedings apply to proceedings under the SCPO Act: SCPO Act, s 13(2)(b); and

(f) contains provision for appeals (as of right on questions of law and by leave on questions of fact): SCPO Act, s 11.

49. There are only two aspects of the SCPO Act that depart from procedures that are at present ordinarily adopted by courts in civil proceedings:

(a) first, the SCPO Act confers a general power on appropriate courts to revoke or vary a serious crime prevention order where there is a substantial change of circumstances: SCPO Act, s 12; cf Bailey v Marinoff (1971) 125 CLR 529 (the Defendants do not understand the Plaintiffs to be calling this feature of the SCPO Act in aid of their arguments as to invalidity);

(b) secondly, the SCPO Act modifies the hearsay rule by providing that hearsay evidence "may" be received if the court is satisfied that the evidence is "from a reliable source and is otherwise relevant and of probative value": SCPO Act, s 5(5).

50. This statutory modification of the hearsay rule does not amount to a "[m]arked departure from traditional judicial functions, methods and procedures": cf PS at [57].

51. Exceptions to the hearsay rule are commonplace. They also vary in content between jurisdictions within Australia and overseas. For example, the exceptions to the hearsay rule are different in jurisdictions that apply the Uniform Evidence Act (ie, the Evidence Act 1995 (Cth) and its counterparts) as compared with those jurisdictions that rely on a combination of common law and statutory rules. The hearsay rule has been all but abolished in England and Wales in civil cases (subject to various "safeguards" and "supplementary provisions": see Civil Evidence Act 1995 (UK)) and does not apply in criminal cases where it is in the interests of justice for hearsay evidence to be admitted (Criminal Justice Act 2003 (UK), s 114). In Canada, the "set of ossified judicially created categories" of exceptions to the hearsay rule have been abandoned in favour of what has been described as a "principled analysis": R v Smith [1992] 2 SCR 915 ("Smith") at 930.

52. Despite these differences in approach, as the Canadian Supreme Court explained in Smith at 929-930, two fundamental "principles" or considerations underlie the hearsay rule and its exceptions: reliability and "necessity". Subsection 5(5) of the SCPO Act does not depart from those principles. On the contrary, that subsection does not apply unless the court is satisfied that the hearsay evidence that is sought to be admitted is from a "reliable" source; "necessity" (that is, where it is reasonably necessary to receive hearsay evidence rather than direct evidence because it is impossible, impracticable or otherwise undesirable to call the person who made the previous representation to give direct evidence: see R v Khan [1990] 2 SCR 531 at 546 (McLachlin J)) is a factor to be taken into account in deciding whether evidence should be admitted in the exercise of a court's discretion under s 5(5) of the SCPO Act.

53. In this way, s 5(5) of the SCPO Act does not amount to a "marked departure" from traditional judicial procedures and is certainly not apt to undermine the institutional integrity of NSW courts: cf PS at [57], [59(c)], [62].

54. Next, the Court should reject the Plaintiffs' submission (at [58]) that the SCPO Act departs from judicial functions, methods and procedures by authorising courts to make serious crime prevention orders without specifying any "meaningful" criteria by which the court should decide whether to make such an order and, if so, what the scope of that order should be.

55. The SCPO Act does not purport to give courts carte blanche authority to make serious crime prevention orders unconstrained by any "meaningful" criteria. On the contrary, s 6(1) of the SCPO Act makes clear that serious crime prevention orders may only be made for a specified purpose – the purpose of protecting the public by preventing, restricting or disrupting involvement in serious crime related activities – and, even then, only where such an order is considered by the court to be "appropriate".

56. The word "appropriate" is not devoid of meaningful content: cf PS at [58]. It is commonplace for a court to be empowered to make such orders as it thinks "appropriate" for a specified purpose once it is satisfied that the preconditions to making such orders have been satisfied. Examples include s 87 of the Competition and Consumer Act 2010 (Cth) (which empowers a court, in certain circumstances, to make such order or orders as it thinks "appropriate" against a wrongdoer), s 4B of the Crimes Act 1914 (Cth) (which permits a court to impose a pecuniary penalty in lieu of or in addition to a penalty of imprisonment where the court thinks that to be "appropriate") and r 8.07.2 of the High Court Rules 2004 (Cth) (which authorises this Court or a Justice thereof to make such orders as are "appropriate" admitting a person in custody to bail).

57. It is true (as the Plaintiffs note at [58(a)-(c)]) that there is a range of conduct that constitutes "serious crime related activity", that there are a wide range of "prohibitions, restrictions, requirements and other provisions" that may potentially be contained in a serious crime prevention order and that a serious crime prevention order may affect a person's liberty (sometimes in a substantial way).

58. But that only serves to confirm the appropriateness of a criterion of "appropriate[ness]".

59. Under the SCPO Act, it is not enough for the court to be satisfied that an order proposed by an eligible applicant would be likely to prevent, restrict or disrupt involvement in serious crime related activities. Rather, the court must also be satisfied that particular prohibitions, restrictions, requirements and/or other provisions are "appropriate" in the particular case. That necessarily requires a court to engage in something in the nature of a balancing exercise in which the court must balance factors such as the demonstrated extent to which a proposed order is likely to prevent, restrict or disrupt serious crime related activity, the nature and extent of the serious crime related activity likely to be so prevented and the likely consequences of a serious crime prevention order for the subject of the order.

60. Undertaking such a balancing exercise involves an entirely conventional approach of a kind that is performed daily in Australian courts in a range of different jurisdictions and circumstances. It is absurd to suggest that the requirement in SCPO Act to perform such an exercise interferes with the institutional integrity of NSW courts.

61. Finally, the Court should reject the suggestion (at [59(e)]) that the Plaintiffs' arguments in this Court are supported by the "rule against double jeopardy".

62. As McHugh, Hayne and Callinan JJ explained in Pearce v The Queen (1998) 194 CLR 610 ("Pearce") at 614 [9], "double jeopardy" is "an expression that is employed in relation to several different stages of the criminal justice process: prosecution, conviction and punishment". The phrase is better understood as a rubric under which several "disparate principles" are "lumped together" each of which reflects "a broader precept or value": Carroll at 640 [9], 643 [22] (Gleeson CJ and Hayne J), 652 [55], 660 [84] (Gaudron and Gummow JJ).

63. None of those principles are offended by the SCPO Act:

    (a) serious crime prevention orders may not be made for the purposes of punishing a person in relation to an offence of which he or she has been convicted: see [9]-[12] above. The SCPO Act therefore does not offend what may be described as the rule against double punishment: see Pearce at 621 [34]ff (McHugh, Hayne and Callinan JJ);

    (b) proceedings under the SCPO Act do not operate to undermine the effect of an acquittal: see [21]-[24] above). They therefore do not undermine the aspect of the double jeopardy principle reflected in the doctrine of autrefois acquit (or related principles of abuse of process such as those discussed in Carroll).

Conclusion as to validity of the SCPO Act

64. The SCPO Act falls outside of the "extraordinary" categories of cases in which legislation will invalid for offending the Kable principle: see Kable at 98. The Court should answer the questions set out in the Special Case accordingly.

Reading down and severance

65. The Defendants concede that s 5(1) of the SCPO Act (which confers the power to make serious crime prevention orders) is not severable from the remainder of the Act. It follows that the Defendants concede, if the Court concludes that s 5(1) is invalid, the whole of the SCPO Act is invalid.

66. The Defendants do not make the same concession in relation to the component parts of s 5(1). For example, if the Court was to conclude that it was beyond the power of the NSW Parliament to provide that the power to make serious crime prevention orders is enlivened upon proof that a person has been involved in serious crime related activity for which he or she has been acquitted but that it was not otherwise beyond the power of the NSW Parliament to enact the SCPO Act, the Defendants contend that s 5(1)(b)(ii) could and should be read down accordingly. Similarly, if the Court was to conclude that the whole s 5(1)(b)(ii) was invalid, that subparagraph could be severed from the balance of the SCPO Act.

10 67. Section 31 of the Interpretation Act 1987 (NSW) provides that an Act shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of the NSW Parliament. There is nothing in the text or context of the SCPO Act rebutting that default rule. In particular, there is no basis to conclude that – if the legislative power of the NSW Parliament only extends to empowering courts to make serious crime prevention orders in relation to part of the class of persons contemplated by s 5(1)(b) of the SCPO Act – the NSW Parliament's intention was that serious crime prevention orders should not be available to be made against anyone within that class.

68. The Plaintiffs' submissions to the contrary (at [63]-[64]) should be rejected.

69. In so doing, the Court should reject the submission made by the Plaintiff in passing
20 (at [64]) that "[t]he ability to admit hearsay evidence and the application of the civil standard of proof are directed to a case under s 5(1)(b)(ii), not s 5(1)(b)(i)". That is not so.

70. The provisions of the SCPO Act concerning standard of proof and evidence apply to all proceedings under that Act. Hearsay evidence from a reliable source may, for example, be relevant to and probative of the question of whether there are reasonable grounds to believe that making a serious crime prevention order would protect the public and, if so, whether such an order should be made: SCPO Act, s 5(1)(c). Factual questions relating to those issues are, by s 13(2)(b), to be determined on the application of the civil standard of proof.

30 **Costs**

71. Costs should follow the event. If the Court was to conclude that s 5(1) of the SCPO Act is invalid in part, the "event" should be regarded as one in the Defendants' favour.

That is because the practical consequence of such a conclusion would be that the Plaintiffs have failed to demonstrate that the underlying Supreme Court proceedings against the Plaintiffs cannot proceed. It is to be recalled that, in the pending Supreme Court proceedings, the First Defendant in this Court (the Commissioner of Police) relies on convictions for serious criminal offences and serious crime related activity for which the present Plaintiffs have not been convicted: see SCB 54.

Answers to questions referred

72. The Court should answer the questions that have been referred for opinion as follows:

> **Question 1:** Is subsection 5(1) the Crimes (Serious Crime Prevention Orders) Act 2016 (NSW) invalid (in whole or in part) because it is inconsistent with and prohibited by Chapter III of the Constitution?
>
> **Answer 1:** No.
>
> **Question 2:** If the answer to Question 1 is "Yes":
>
> c. to what extent is that subsection invalid?;
>
> d. is that part of the subsection severable from the remainder of the Act?
>
> **Answer 2:** Does not arise.
>
> **Question 3:** Who should pay the costs of the special case?
>
> **Answer 3:** The Plaintiffs.

PART VI: ARGUMENT ON CONTENTION/CROSS-APPEAL

73. Not applicable.

PART VII: TIME ESTIMATE

74. The Defendants estimate that they will require up to 1.5 hours for the presentation of their oral argument.

Dated 15 July 2019

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