IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S30 of 2019

BETWEEN:

DAMIEN CHARLES VELLA
First Plaintiff

JOHNNY LEE VELLA
Second Plaintiff

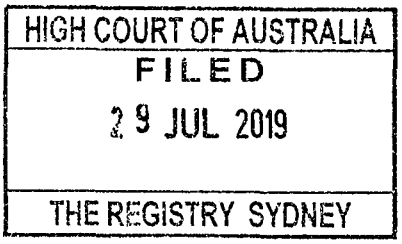
MICHAEL FETUI
Third Plaintiff

10 and

COMMISSIONER OF POLICE (NSW)
First Defendant

STATE OF NEW SOUTH WALES
Second Defendant

PLAINTIFFS' REPLY SUBMISSIONS



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PART I: CERTIFICATION

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

PART II: REPLY

Construction

2. The plaintiffs' constitutional arguments do not turn on some especially wide – or indeed any particular – construction of ss 5-6 being adopted (cf DS [42]). Nevertheless, it is necessary to construe the Act correctly before considering its validity. Victoria seeks to rewrite the legislation by asserting (Vic [12]–[15]) that s 5(1)(c) contains two cumulative conditions, namely that the making of the SCPO order would prevent, disrupt or restrict serious crime related activities and, independently of the first condition, "protect the public". Yet *by* does not mean *and*. The NSW Parliament equated protection with preventing, disrupting or restricting involvement in serious crime related activities.[1]

3. Contrary to the submissions of various interveners, s 6(1) does not impose an additional pre-condition to the making of a SCPO. It merely identifies the permissible content of an order made under s 5. In any event, the word "appropriate" imposes no substantial restriction in addition to s 5(1)(c). In each of the examples given by the Defendants (DS [56]) where the phrase "as the court considers appropriate" was used, there were either established common law principles, statutory purposes or express provisions that guided the exercise of discretion as to the appropriate criminal sentence, civil remedy or other order. But there are no common law principles concerning when "preventive detention" is appropriate.[2] Nor are there statutory purposes or factors which must be balanced against others: cf DS [59]. The only statutory purpose is to protect the public by preventing, restricting or disrupting involvement in serious crime related activities. Apart from s 5(1)(c), nothing assists the relevant courts in determining the "appropriate" price that should or should not be paid in terms of liberty to achieve that purpose; cf *Fardon* and *Thomas*. As explained at PS [26]–[27] and [31], the language of s 5(1)(c) imposes little restriction: all that is necessary is reasonable grounds to believe (including by reason of surmise/conjecture) that the terms of the order sought, if made, will prevent, disrupt or restrict involvement by the person in serious crime related activities.

4. Thus, while South Australia's submission (SA [25]) that an SCPO must be "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" reflects a theory about what the legislation should say, it is not reflected in the statutory language. So too the Commonwealth's theory (Cth [10]) that the order must "not [be] disproportionate to [the]

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1 See also Explanatory Note, p 1; NSW Parliament, Legislative Council, *Hansard*, 4 May 2016, p 46.

2 *Veen v The Queen (No 2)* (1988) 164 CLR 465, 472, 473, 475 (Mason CJ, Brennan, Dawson and Toohey JJ), 485–486 (Wilson J), 490 (Deane J), 496 (Gaudron J).

impact on the liberty and property interests of the person affected". As Victoria concedes (Vic [23]), the reasoning of the English Court of Appeal in *R v Hancox* (also relied upon at SA [26]–[28]) importing proportionality turned on the European Convention on Human Rights. Likewise, the complex "balancing exercise" erected by the Defendant: DS [59]. The NSW Parliament deliberately chose not to enact such legislation.

5. As to the various submissions concerning detention, there is no textual or contextual basis to distinguish between "orders that affect individual liberties that would otherwise be lawful" and orders "that would operate to detain a person": cf DS [40]–[42]. Substantial restraints are authorised by the ordinary meaning of the words "prohibitions, restrictions, requirements and other provisions" in s 6(1). The Commissioner seeks an order restricting the plaintiffs' travel by vehicle at night. There is little difference between such an order and requiring them not to travel from a particular place for a certain period – perhaps for most or all of the day, such as to constitute in substance home detention.

Arguments concerning invalidity

6. Much of the Defendants' and interveners' submissions turn on the supposed mutual exclusivity between "protection" and "punishment" (see eg DS [9], [11], [13], [17], [21], [33]) and the suggestion that criminal justice is concerned with the latter whereas the SCPO Act is concerned with the former. However, "protection" and "punishment" are not mutually exclusive and the distinction between the two is "elusive" and "unstable".[3] The "purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform".[4] Thus the argument that the Act erects an alternative criminal justice regime is not answered by noting that, formally, the regime is stated to apply for public protection.

7. Nor is the argument answered by noting that the proceedings are stated or deemed to be civil proceedings: cf Vic [57], [62]; Cth [41]. The distinction between criminal and civil law is also elusive.[5] Important to a characterisation of a matter as criminal is the "conviction" of a defendant.[6] That involves "some act on the part of the court (by which) it has indicated a determination of the question of guilt".[7] The SCPO Act, insofar as it involves a finding that the defendant has engaged in serious crime related activity, provides for an adjudication by the court that the defendant has contravened the relevant offence provisions.[8] The relevant offences covered are broad in scope, ranging from the

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3 *ASIC v Rich* (2004) 220 CLR 129, [32], [35] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). Note also *Fardon* (2004) 223 CLR 575, [81]-[82] (Gummow J); *Totani* (2010) 241 CLR 1, [208]-[211] (Hayne J).

4 *Veen v The Queen (No 2)* (1988) 164 CLR 465, 476.

5 *CEO Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161, [114] (Hayne J).

6 *Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161, [136]-[137] (Hayne J).

7 *Maxwell v The Queen* (1996) 184 CLR 501, 529 (Gaudron and Gummow JJ, quoting a Victorian judgment); see also *Labrador Liquor Wholesale Pty Ltd*, [137].

8 Cf *Labrador Liquor Wholesale Pty Ltd*, [137].

serious to relatively minor: see PS [50]. The "prohibitions, restrictions, requirements and other provisions" that may be imposed under s 6 are extensive and replicate the sorts of punishments imposed in criminal sentencing in NSW:[9] cf Vic [36], [53]. A criminal trial and an application for an SCPO are closely linked by applicant, character, content, purpose and remedy (see PS [40]-[41]); they are not "an entirely different piece of fruit" (Vic [41]). What is involved here is no mere factum of the kind at issue in the administrative schemes upheld in cases such as *Today FM*. In practical terms, the SCPO Act can be used as an alternative, and easier, route for the State to seek to punish those suspected of committing crimes. And, in so doing, undermining finality of verdicts.

8. Finality is a defining feature of courts. A "central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances".[10] Any exceptions, such as for appeals, must be limited and consistent with maintenance of (and respect for) the judicial system.[11] By enabling reconsideration and punishment where there has been an acquittal (in particular), in the context of *this* Act, and in the absence of some requirement for fresh evidence or the like, impermissibly undermines this defining characteristic (cf eg SA [50]).

9. There is no inconsistency between a criminal trial for a criminal assault – brought on behalf of the state to vindicate the public interest – which leads to acquittal or conviction/punishment, and a subsequent civil proceeding for a civil assault brought by a private claimant which leads to damages: cf eg DS [22]–[26]. But there is an inconsistency between a criminal trial for a criminal assault which leads to an acquittal and a subsequent proceeding for the same criminal assault, by prosecutorial authorities, which leads to a sentence that might have been imposed in the criminal trial if there had been a conviction. It "would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again".[12] As for overlapping civil penalty and criminal regimes (eg Cth [33], Vic [50]), typically these involve distinct elements – civil penalty provisions do not generally have a mens rea element.

10. DS [17] accepts, correctly, that the application of the *Kable* principle depends on the precise statutory scheme in issue. Yet at DS [14] and [16] the Defendants seek to invoke

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9 Apart from imprisonment, sentencing courts in NSW may impose intensive correction orders (see *Crimes (Sentencing Procedure) Act 1999* (NSW), s 7), which are a form of custodial sentence, and which orders may include home detention, electronic monitoring, curfew, non-association and place restriction conditions (s 73A). Courts may also impose community correction orders (s 8) which orders may include limited curfew, non-association and place restriction conditions (s 89). Sentencing courts may also impose non-association and place restriction orders: see ss 17A, 100A.

10 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, [34]; see also *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, [31]-[35].

11 Note *D'Orta*, [35].

12 *Reichel v Magrath* (1889) 14 App Cas 665, 668 (Lord Halsbury LC); quoted in *R v Carroll* (2002) 213 CLR 635, [128] (McHugh J), note also [21]-[23] (Gleeson CJ & Hayne J), [86] (Gaudron & Gummow JJ).

the results in the previous cases whilst ignoring the obvious and fundamental textual differences between the legislation in those cases and the SCPO Act: see DS [14]; PS [41], [50], [51], [58], [61]. Contrary to various submissions, *Fardon* and *Thomas* do not support the proposition that every scheme of "preventive detention" is valid.

11. As to DS [30]–[31], it is true that the Supreme Court has a power to stay proceedings (including those of inferior courts) if those proceedings are an abuse of process.[13] However, what is an abuse of process must depend on what the statutory law permits: the SCPO Act expressly permits proceedings whether or not charges have been laid.

12. As to DS [34], neither the power of the DPP, with the consent of the coroner, to assist a coroner nor the DPP's powers with respect to proceedings seeking ADVOs affect the essential prosecutorial character of the DPP. The former must be understood in the context where the coroner is required by law to refer certain matters to the DPP;[14] in relation to the latter, the DPP Act treats proceedings for an order under the *Crimes (Domestic and Personal Violence) Act 2007* as if they were proceedings for an offence.[15]

13. The plaintiffs do not submit that the relevant courts are enlisted to do the Executive's bidding in the sense of being required to reach pre-determined outcomes; not even *Kable* itself involved a mandatory order: cf DS [35]–[39]. It is submitted that those courts are required to administer a second-grade of criminal justice to those whom the Executive singles out for its application. That is a form of enlistment which undermines the institutional integrity of the courts at least as much as the legislation considered in *Kable* and *Totani*. The Commonwealth's submission (Cth [16], see also Qld [44]) that State courts can validly be required to dispense different grades of criminal (or for that matter civil) justice to different classes of person chosen by the Executive should be rejected.[16] Section 80 also tells against that proposition.

14. Contrary to DS [43], the suggestion that the SCPO Act may be sought to be applied against a person who stole 5 jumpers from David Jones is no more fanciful than the suggestion that the *Criminal Assets Recovery Act 1990* (NSW) could be applied against such a person to forfeit her car and home. Yet that is what occurred to Ms Plizga.[17] Contrary to the submissions made by the interveners, the breadth of the offences (including minor offences) covered by the regime is important. It highlights that, in truth, the Act is not concerned with the "unacceptable risk" of a person committing heinous sexual or terrorism offences, but substantially overlaps with ordinary criminal justice.

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13 *Herron v McGregor* (1986) 6 NSWLR 246; *Walton v Gardiner* (1993) 177 CLR 378.
14 See *Coroners Act 2009* (NSW), s 78; see also former *Coroners Act 1980* (NSW), s 19.
15 *Director of Public Prosecutions Act 1986* (NSW), s 20A(3).
16 Note eg *Wainohu v New South Wales* (2011) 243 CLR 181, [105], which passage implies the principle is not limited to a simple comparison between federal and State courts.
17 See *NSW Crime Commission v D'Agostino* (1998) 103 A Crim R 113.

15. As to DS [46]–[47], the plaintiffs do not suggest that novelty is prohibited. However, both *International Finance Trust* and *Wainohu* show that marked or substantial departures from traditional judicial methods may be incompatible with institutional integrity: see PS [34]–[35]. The submissions at DS [48]–[53] that the SCPO Act does not amount to a marked departure from traditional judicial functions, methods and procedures are incorrect. Under the SCPO Act findings of criminal guilt as to serious indictable offences are made by judges not juries, on the balance of probabilities, with special rules of evidence and where the rule against double jeopardy does not apply.

16. Contrary to DS [54] and [60], the discretion conferred by s 5 is not a judicial function of an "entirely conventional" kind. In terms of the breadth and consequences of the orders that can be made, the only analogue is the criminal sentencing discretion. However, the statutory discretion in s 5 is not confined by ordinary sentencing principles; the purpose of the discretion is broad and ill-defined; the orders that can be made are extremely wide.

Severance

17. The submissions at DS [67]–[70] do not deal with the legislative history indicating that an important aspect of the legislative scheme was dealing with persons acquitted of offences. Further, contrary to DS [69]–[70] and Vic [69], the civil standard of proof is not relevant to s 5(1)(c): the requirement of "reasonable grounds to believe" requires less than the civil standard.[18] Further, because s 5(1)(c) does not require proof but permits surmise and conjecture, evidence adduced in support of the requirement in s 5(1)(c) would commonly not need to satisfy the hearsay rule in any event.[19] It follows that the ability to admit hearsay and the standard of proof are in substance directed to a case under s 5(1)(b)(ii), not s 5(1)(b)(i).

Costs

18. Partial success would ordinarily entitle the plaintiffs to at least part of their costs. Further, contrary to DS [71], if part of the SCPO Act is invalid, it will substantially weaken the prospect of any order being made against the plaintiffs; many of the past criminal offences relied upon by the Commissioner are more than 10 years old. In those circumstances, partial success by the plaintiffs should entitle them to the whole of their costs.

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18 In addition to *George v Rockett*, quoted at PS [25], see also *Prior v Mole* (2017) 261 CLR 265, [4] (Kiefel and Bell JJ), [24] (Gageler J), [73] (Nettle J), [99]–[100] (Gordon J).

19 For example, it is well-established that a reasonable suspicion may be based on hearsay: see, eg, *R v Rondo* (2001) 126 A Crim R 562, [52]–[53] (Smart AJ; Spigelman CJ and Simpson J agreeing).