



## HIGH COURT OF AUSTRALIA

6 November 2019

### DAMIEN CHARLES VELLA v COMMISSIONER OF POLICE (NSW) & ANOR [2019] HCA 38

Today the High Court answered questions in a special case, holding by majority that s 5(1) of the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) ("the SCPO Act") was validly enacted as it is not inconsistent with, or prohibited by, Ch III of the *Constitution*.

Section 5(1) of the SCPO Act, read with s 6, empowers the District Court or Supreme Court of New South Wales to make an order, in civil proceedings, restraining the liberty of a person who has been convicted of a serious criminal offence or who has been involved in serious crime related activity, if the court is satisfied that there are reasonable grounds to believe that the making of the preventive order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime related activities.

On 5 October 2018, the Commissioner of Police commenced proceedings in the Supreme Court against the plaintiffs seeking orders under the SCPO Act to restrain and prohibit the plaintiffs, for two years, from various activities, including associating with persons associated with any Outlaw Motorcycle Gang, attending the premises associated with any Outlaw Motorcycle Gang; travelling in a vehicle between 9 pm and 6 am except in the case of genuine medical emergency; and possessing more than one mobile phone. The plaintiffs challenged the validity of s 5(1) of the SCPO Act on the basis that it was incompatible with the institutional integrity of the District Court and Supreme Court, relying upon the principles developed from the decision in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 ("the *Kable* principle").

A majority of the High Court held that there are six required steps before a court can exercise the power to grant a prevention order under ss 5 and 6 of the SCPO Act. The steps are: (i) the natural person must be at least 18 years old; (ii) the person must have been convicted of, or there be proof of involvement in, serious criminal offending; (iii) the court must assess whether there is a real likelihood that the person against whom the order is sought will be involved in serious crime related activity; (iv) the court must consider whether the facts establish reasonable grounds to believe that the potential order would prevent, restrict or disrupt serious crime related activities; (v) the order must be appropriate for the purpose of protecting the public by preventing, restricting or disrupting further serious criminal related activities; and (vi) the court must consider whether any appropriate order should be made.

The High Court has previously held that other preventive order regimes, which involve a court making assessment of the likelihood of future possibilities and the appropriateness of orders to prevent the risk eventuating, do not infringe the *Kable* principle, including preventive orders concerning terrorism, sexual offenders and organised crime.

The majority explained that when making a prevention order, the Court has substantial judicial discretion and is not acting at the behest of the executive. There is nothing antithetical to the judicial process, and nothing that could impair the institutional integrity of a State Supreme Court, in open-textured legislation, such as the SCPO Act, that establishes broad principles that are to be developed and applied by the courts. In fact, there are good reasons why such powers,

if they are to exist, should be exercised by the judiciary. Therefore, s 5(1) of the SCPO Act is not invalid.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*