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

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

Filed on behalf of the Attorney-General for the State of Queensland (intervening)

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PART I: Internet publication

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

PART II: Basis of intervention

2. The Attorney-General for the State of Queensland intervenes in this proceeding in support of the defendants pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART III: Reasons why leave to intervene should be granted

3. Not applicable.

PART IV: Submissions

SUMMARY OF ARGUMENT

4. The Attorney-General for Queensland makes the following submissions:

a) Although it would not lead automatically to constitutional invalidity, the characterisation of Serious Crime Prevention Orders (SCPOs) as punitive, rather than preventive, is critical to the way in which the plaintiffs frame their case.

b) That characterisation of SCPOs cannot be sustained once the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) (the Act) is properly construed. The plaintiffs' construction of ss 5(1)(c) and 6(1) of the Act ignores their stated purpose of protecting the public, and requires reading 'appropriate' in s 6(1) in a manner that is divorced from its purpose and context. Moreover, the provisions are not backward-looking: they look forward to the protection of the public from particular risks presented by particular persons.

c) Once the Act is properly construed, and SCPOs are characterised as preventive in nature, it follows that:

i. the SCPO scheme does not undermine the criminal justice system as it does not purport to authorise a court to adjudge and punish criminal guilt;

ii. the scheme does not require or enlist the court to deliver any grade of criminal justice, let alone a lesser one; and,

iii. there is no marked departure from traditional judicial functions, methods and procedures.

5. For these reasons, the plaintiffs' contentions for invalidity on the basis of the *Kable* principle fail. There is no other basis on which the Act can be said to infringe the *Kable* principle. The questions in the special case should be answered accordingly.

10 **STATEMENT OF ARGUMENT**

Relevance of a preventive construction of the SCPO scheme

6. Where a Commonwealth law confers on the executive a power to detain, characterisation of that detention as punitive may be decisive of the constitutional question of whether the law infringes the separation of powers.[1]

20 7. The constitutional question in this case is different. State legislation which would infringe the separation of powers (had it been enacted by the Commonwealth) may not infringe the *Kable* principle.[2] In State and Territory Courts, 'penal ends may be pursued in civil proceedings which result in additional punishment.'[3] Moreover, in this case – as in *Thomas v Mowbray* – we are not 'concerned with detention in custody; and we are not concerned with executive detention. We are concerned with preventive restraints on liberty by judicial order.'[4] It is simply not the case that court-ordered restraints on 30 liberty exist 'only as an incident of adjudging and punishing criminal guilt'.[5] Accordingly, characterisation of SCPOs as either preventive or punitive is not decisive of the question of constitutional validity.

8. Nonetheless, the plaintiffs have framed their *Kable* arguments around a central proposition that SCPOs are properly characterised as punitive. The plaintiffs contend

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40 1 *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 340 [15] (Kiefel CJ, Bell, Keane and Edelman JJ) ('*Falzon*'); *Duncan v New South Wales* (2015) 255 CLR 388, 407 [41] (French CJ, Hayne, Kiefel, Bell, Gageler, Keane and Nettle JJ).

2 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 598 [36] (McHugh J), 614 [86]-[87] (Gummow J) ('*Fardon*'); *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 561-2 [14] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Duncan v New South Wales* (2015) 255 CLR 388, 410 [51] (French CJ, Hayne, Kiefel, Bell, Gageler, Keane and Nettle JJ).

3 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 435 [72] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) ('*Emmerson*').

4 *Thomas v Mowbray* (2007) 233 CLR 307, 330 [18] (Gleeson CJ).

5 Ibid. See also at 356 [114]-[116] (Gummow and Crennan JJ), 526 [651] (Heydon J agreeing generally).

that the Act impairs the institutional integrity of the Supreme and District Courts on three separate but overlapping bases: (i) the Act undermines the criminal justice system, (ii) it requires the courts to administer a different and lesser grade of criminal justice at the behest of the executive, and (iii) it departs from the traditional judicial functions, methods and procedures in criminal trials.

9. A major premise underlying each of those three limbs is that the SCPO scheme has the same purpose and effect as the criminal justice system: the adjudging and punishment of criminal guilt. On this view, an application for an SCPO involves a determination of criminal guilt, and the resulting order is an instrument of punishment: it is punitive, rather than preventive, in nature.

10. For the reasons that follow, that premise cannot be sustained, with the result that the plaintiffs' *Kable* arguments hinge upon a misconception of the SCPO scheme and founder at the outset.

The SCPO scheme is preventive, not punitive

11. 'Before considering the constitutional validity of any statute, it is necessary to consider its construction and operation.'[6] Whether limits on liberty are to be characterised as punitive must also begin with the construction and operation of the statute authorising the limits.[7] Purpose is of particular relevance when characterising limits on liberty.[8]

12. As the name of the Act makes plain, the purpose of the Act is to 'prevent[]' 'serious crime' through 'serious crime prevention orders'. That preventive purpose is given effect by the notion of 'protect[ion] of the public', both in the conditions enlivening the court's power to make an order (s 5) and in the criterion limiting the content of an order (s 6).

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6 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 581 [11] (French CJ, Kiefel and Bell JJ) ('*NAAJA*'). See also *Coleman v Power* (2004) 220 CLR 1, 21 [3] (Gleeson CJ), 68 [158] (Gummow and Hayne JJ), 84 [219]-[220] (Kirby J); *Brown v Tasmania* (2017) 261 CLR 328, 479-81 [485]-[487] (Edelman J).

7 *Falzon* (2018) 262 CLR 333, 341 [19] (Kiefel CJ, Bell, Keane and Edelman JJ), 356 [83] (Gageler and Gordon JJ).

8 Ibid 341 [19] (Kiefel CJ, Bell, Keane and Edelman JJ), 360 [96] (Nettle J).

Section 5

13. Section 5(1)(c) requires the court, before making an order, to form a view that 'the making of the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime related activities.' Contrary to the plaintiffs' submissions,[9] s 5(1)(c) cannot be read as though the words 'protect the public' were omitted. That approach not only ignores the principle of construction that all words must be given meaning and effect,[10] it ignores the central focus of the paragraph. Section 5(1)(c) conditions the making of an SCPO on a necessary connection between the order and the protection of the public: 'the order would protect the public'.

14. Two further considerations, which qualify and limit the way in which an SCPO is to protect the public, highlight their preventative purpose. First, the manner in which the protection of the public is to be effected is specified: it is to be achieved 'by preventing, restricting or disrupting...'[11] Second, the future risk against which the SCPO would protect must be identified with some precision – it is the 'involvement by the person in serious crime related activities'. That risk is not at large. It is limited to the risk presented by a particular person being involved in particular kinds of activities.

15. The plaintiffs' attempt to collapse the requirement that the order 'protect the public' into the subsequent words of qualification and limitation[12] should be rejected as altering the provision's meaning and obfuscating its protective purpose. In any event, those words of qualification and limitation are all directed to prevention of criminogenic associations, not their punishment. Laws that target the causes of crime may be properly characterised as 'precautionary and preventative'.[13]

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9 See Plaintiffs' submissions, 7 [26]-[27].

10 *Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffith CJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [71] (McHugh, Gummow, Kirby and Hayne JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 266 [39] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

11 In this way, the Act confers a power more confined than that conferred by s 104.4 of the *Criminal Code* (Cth) considered and upheld in *Thomas v Mowbray* (2007) 233 CLR 307. Section 104.4(1)(d) stipulated that the purpose of an interim control order was 'protecting the public from a terrorist act', but provided no guidance as to how an order was to achieve that protective purpose.

12 Plaintiffs' submissions, 7 [26].

13 *Dias v O'Sullivan* [1949] SASR 195, 202 (Mayo J). See also *Lee Fan v Dempsey* (1907) 5 CLR 310, 321 (Isaacs J); *Tajjour v New South Wales* (2014) 254 CLR 508, 536-7 [10] (French CJ), 598-9 [216] (Keane J).

Section 6

16. Protection of the public also governs the content of an SCPO. The 'prohibitions, restrictions, requirements and other provisions' that may be included in an SCPO are limited under s 6(1) to those that are 'appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person in serious crime related activities'.

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17. The potential scope of an SCPO is further limited by s 6(2). Under s 6(2), an SCPO may not contain provisions that require a person to self-incriminate, waive legal professional privilege or breach certain confidences.

18. It is no doubt true, as the plaintiffs submit,[14] that a test of 'appropriateness' in s 6(1) is broad.[15] However, like all statutory powers, however widely expressed, the power is
20 confined by the subject matter, scope and purpose of the statute.[16] The word 'appropriate' 'takes its meaning from the context'.[17] Thus, for example, in the recent case of *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union*, this Court held that, properly construed, a power to make an 'appropriate' order under s 545(1) of the *Fair Work Act 2009* (Cth) was limited to a power to make preventative, remedial and compensatory orders, rather than penal orders.[18]

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19. Implicit in the plaintiffs' written submissions is a contention that 'appropriate' in s 6(1) requires no more than a rational connection between the making of the SCPO and the prevention, restriction or disruption of the person's involvement in serious crime related activities.[19] On this analysis the section would permit severe restrictions on liberty in

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[14] Plaintiffs' submissions, 8 [28].

40 [15] *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157, 190-1 [103] (Keane, Nettle and Gordon JJ) ('*ABCC*').

[16] *Wotton v Queensland* (2012) 246 CLR 1, 9 [9] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 348-9 [23]-[24] (French CJ), 363-4 [67] (Hayne, Kiefel and Bell JJ), 370-1 [90] (Gageler J); *NAAJA* (2015) 256 CLR 569, 591 [34] (French CJ, Kiefel and Bell JJ).

[17] *Penetanguishene Mental Health Centre v Ontario (Attorney-General)* [2004] 1 SCR 498, 518 [51] (Binnie J, delivering the judgment of the Supreme Court).

[18] *ABCC* (2018) 262 CLR 157, 193 [110] (Keane, Nettle and Gordon JJ). See also at 168-9 [23], 171 [33] (Kiefel CJ), 174 [51] (Gageler J).

[19] Plaintiffs' submissions, 8-9 [29]-[31].

order to avert trivial risks. It may be that in other contexts, 'appropriateness suggests an inquiry as to the suitability of the means for the designated purpose'.[20] But in this context such a reading is untenable. Read in light of its context and purpose, the test of appropriateness in s 6(1) requires the liberty of the defendant to be taken into account for three reasons.

10 20. *First*, on an ordinary reading, what is 'appropriate' will depend on the circumstances,[21] and the circumstances may involve consideration of competing interests. Thus, for example, a power to terminate a residential tenancy if 'appropriate' in the circumstances involves consideration of the lessee's and lessor's competing interests, and an attenuated form of balancing between those two sets of interests.[22] Here, the subject-matter of the SCPO scheme strongly suggests that appropriateness turns on the competing interests of the protection of the community, on the one hand, and the liberty
20 of the defendant, on the other. Like other statutes which balance competing interests, the Act and SCPOs made under it are not intended to pursue their protective purpose at any cost,[23] and certainly not at any cost to the defendant's liberty. The legislature's selection of the word 'appropriate' reflects its intention that those interests are to be balanced by the court in the particular circumstances of each case.

21. *Second*, 'appropriate' must be read in light of the presumption that Parliament does not
30 intend to 'overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness'.[24] Restraints

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20 *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 134 [435] (Kiefel J). Cf *Monis v The Queen* (2013) 249 CLR 92, 182 [246] (Heydon J) ('appropriate' and 'adapted' mean the same thing); *Clubb v Edwards* (2019) 93 ALJR 448, 544 [461] (Edelman J) ('reasonably appropriate and adapted' is a hendiadys).

21 *Mul v Hutton Construction Ltd* [2014] EWHC 1797, [27] (Akenhead J) ('The use of the term "appropriate deduction" in Clause 2.30 is a relatively neutral term. What may be appropriate in one set of circumstances
40 may be inappropriate in another. In my judgment, what "appropriate deduction" means is a deduction which is appropriate in all the circumstances').

22 See *Dattilo v Commonwealth* (2017) 249 FCR 347, 355-7 [33]-[39], 394 [215], 400 [250]-[251] (Kenny, Robertson and Griffiths JJ).

23 *Carr v Western Australia* (2007) 232 CLR 138, 143 [5] (Gleeson CJ), quoted with approval in *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, 632-3 [40]-[41] (Crennan, Kiefel, Bell, Gageler and Keane JJ). See also *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 249-50 [126] (Crennan J) ('*Lee [No 1]*').

24 *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J), quoted with approval in *Bropho v Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ). See also *Fardon* (2004) 223 CLR 575, 590 [14] (Gleeson CJ).

on liberty falling short of detention in custody engage the principle of legality.[25] It is not to the point that any construction of 'appropriate' will authorise restrictions on liberty. As French CJ, Kiefel and Bell JJ noted in *North Australian Aboriginal Justice Agency Ltd v Northern Territory*, the principle of legality is:[26]

> a principle of construction which is not to be put to one side as of 'little assistance' where the purpose of the relevant statute involves an interference with the liberty of the subject. It is properly applied in such a case to the choice of that construction, if one be reasonably open, which involves the least interference with that liberty.

22. In light of the impact of SCPOs on the liberty of defendants, it is highly improbable that Parliament intended for 'appropriate' to mean no more than 'suitable', such that the liberty of the defendant is to be disregarded in the process of considering what prohibitions, restrictions, requirements and other provisions an SCPO should contain. Parliament should be taken to have intended for the criterion of appropriateness to require that consideration be given to the impact of the order on the defendant's liberty.

23. *Third*, the content of SCPOs is expressly limited to what is appropriate for 'the purpose of protecting the public'. To be 'appropriate', an SCPO must be framed so as to come within the limits set by that purpose.[27]

24. In that regard, the impact of an SCPO on liberty interests may be relevant to determining whether the order would serve a permissibly preventive purpose, rather than an impermissibly punitive purpose. That is because logically, elements of proportionality may be used to test whether the true purpose of a particular proposed SCPO is protection of the public. For example, a proposed order that would severely limit liberty without any commensurate increase in prevention of serious crime may be

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[25] Eg, restraints on liberty to move freely through public streets: *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206-7 (Higgins J). As to the common law's systemic concern with even minor deprivations of liberty, see: *Antunovic v Dawson* (2010) 30 VR 355, 359 [6] (Bell J); *Uittenbosch v Chief Executive, Department of Corrective Services* [2006] 1 Qd R 565, 569 [14] (Atkinson J).

[26] *NAAJA* (2015) 256 CLR 569, 582 [11] (French CJ, Kiefel and Bell JJ). Cf *Lee [No 1]* (2013) 251 CLR 196, 310-11 [314] (Gageler and Keane JJ).

[27] *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 625 (Deane J).

said to have a different purpose,[28] and therefore not be 'appropriate' for the required purpose: protection of the public.

25. Similar reasoning can be seen in authorities concerning s 23 of the *Federal Court of Australia Act 1976* (Cth), which empowers the Federal Court to make such orders as it considers 'appropriate' to ensure the effective exercise of its jurisdiction. 'Wide though that power is',[29] it is not 'at large'.[30] One limitation on the exercise of power under s 23 is that it 'must be exercised for the purpose for which [it is] conferred', namely, to ensure the effective exercise of the court's jurisdiction.[31] Accordingly, orders under s 23 must be framed 'so as to come within the limits set by the purpose which [the order] can properly be intended to serve'.[32] Generally, an interlocutory order will only come within the limits set by the purpose where it is 'needed' to protect the integrity of the processes of the court.[33]

26. In *Jackson v Sterling Industries*, this Court held that an order requiring a party to pay money into court as security '[went] beyond' the permissible purpose of preserving assets pending judgment.[34] That is, the order went so far in pursuit of a different purpose (to create security for the plaintiff) that it could no longer be said to be an appropriate way of achieving the purpose of ensuring the effective exercise of the court's jurisdiction. To be within power, and hence 'appropriate', an order under s 23 'should make clear that it goes no further than to deprive the defendant of possession of [the assets] for the purpose of precluding his disposal of them so as to defeat a

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28 *Falzon* (2018) 262 CLR 333, 343-4 [29] (Kiefel CJ, Bell, Keane and Edelman JJ). See also *Spence v Queensland* [2019] HCA 15, [62] (Kiefel CJ, Bell, Gageler and Keane JJ).

29 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 622 (Deane J).

30 Ibid 620 (Brennan J).

31 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1, 32 [35] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ).

32 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 623, 625 (Deane J).

33 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1, 33 [35] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ); *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, 400-1 [41]-[42] (Gaudron, McHugh, Gummow and Callinan JJ); *ABCC* (2018) 262 CLR 157, 193 [109] (Keane, Nettle and Gordon JJ).

34 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 621 (Brennan J), 625 (Deane J, Mason CJ, Wilson, Dawson and Brennan JJ agreeing).

judgment'.[35] The lack of fit between means and ends meant that the order for security was not 'within the power of the Federal Court to make as "appropriate".'[36]

27. The relevance of impacts on liberty to 'appropriateness' is a complete answer to the plaintiffs' attempt to recharacterise SCPOs as punitive by reference to their potential severity (or 'depth'). The plaintiffs point out that SCPOs can potentially impose significant restrictions on liberty, up to the extreme possibility of 'home detention'.[37] However, the possibility of significant restrictions on liberty under an SCPO cannot be assessed in the abstract. Such restrictions will only be imposed in any given case if they are 'appropriate' in the circumstances for the preventive purpose of protecting the public. If it is obvious that a restriction on liberty imposed by an SCPO goes further than required to achieve the purpose of protecting the public, it may be that the restriction is in truth punitive.[38] However, in those circumstances, it could not be said that the restriction would be 'appropriate' for the purpose of protecting the public. Such a restriction on liberty would not be authorised by the statute.

28. That is not to say that the word 'appropriate' imports a test of structured proportionality of the kind applied in the context of the implied freedom of political communication. In this context, there is no constitutional right or freedom which might be 'optimised'.[39] Just as there is no 'constitutionally guaranteed freedom from executive detention',[40] there is no broader constitutional freedom from punitive restraints on liberty otherwise than as a consequence of adjudging and punishing criminal guilt. Instead, there is a rule which invalidates State legislation which is repugnant to the institutional integrity of State courts. For that reason, the tools of analysis provided by structured proportionality are ill-suited to the inquiry.[41] Nonetheless, the task of characterising a law and the orders made under it may be aided by concepts of proportionality, without optimising any particular competing characterisation.[42] It is in this sense that proportionality may assist in determining whether restraints on liberty imposed by an SCPO are properly

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35 Ibid 626 (Deane J, Mason CJ, Wilson, Dawson and Brennan JJ agreeing).
36 Ibid.
37 Plaintiffs' submissions, 8 [29], 16 [54].
38 *Falzon* (2018) 262 CLR 333, 344 [29] (Kiefel CJ, Bell, Keane and Edelman JJ).
39 *Clubb v Edwards* (2019) 93 ALJR 448, 531 [397] (Gordon J).
40 *Falzon* (2018) 262 CLR 333, 343 [25] (Kiefel CJ, Bell, Keane and Edelman JJ).
41 Ibid 344 [31] (Kiefel CJ, Bell, Keane and Edelman JJ).
42 See, eg, *Spence v Queensland* [2019] HCA 15, [62] (Kiefel CJ, Bell, Gageler and Keane JJ).

characterised as preventive (and therefore appropriate) or punitive (and therefore inappropriate).

29. For these reasons, Davies J was, with respect, correct to hold in *Commissioner of Police (NSW) v Bowtell [No 2]* that under ss 5(1)(c) and 6(1), 'a balancing exercise is involved between the need to protect the public … and the restrictions that will be imposed on the defendants' activities.'[43]

30. A similar position obtains in the United Kingdom in respect of SCPOs under the *Serious Crime Act 2007* (UK), upon which the New South Wales Act was based. In the UK, it has been held that the order must be 'necessary', even though the power to make an order is 'not expressly couched in terms of necessity'.[44] Contrary to the plaintiffs' submissions,[45] that position follows primarily as a matter of ordinary statutory construction[46] (although the *Human Rights Act 1998* (UK) 'also' leads to that construction).

The SCPO scheme is forward-looking, not backward-looking

31. Once the SCPO scheme is properly construed, the plaintiffs' submission that the 'main focus' in obtaining an SCPO is 'backwards-looking' must be rejected.[47] It is true that s 5(1)(b) directs attention to past conduct, but ss 5(1)(c) and 6(1) reveal that the power to grant a SCPO is fundamentally forward-, rather than backward-looking.[48] The position in the UK too is that 'the court, when considering making such an order, is concerned with future risk'.[49]

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[43] *Commissioner of Police (NSW) v Bowtell [No 2]* [2018] NSWSC 520, [81] (Davies J). See also Defendants' submissions, 14 [59].

[44] *R v Hancox* [2010] 1 WLR 1434, 1437 [10] (Hughes LJ, for the Court of Appeal).

[45] Plaintiffs' submissions, 7 [26] n 8.

[46] See *R v Mee* [2004] EWCA Crim 629; [2004] 2 Cr App Rep (S) 434, 437-8 [8] (Newman J, for the Court), adopted in *R v Hancox* [2010] 1 WLR 1434, 1437 [10] (Hughes LJ, for the Court).

[47] Plaintiffs' submissions, 9 [31]. See also 12 [41] which suggests that the SCPO scheme is not concerned with future risk.

[48] Much like the way in which previous criminal conduct may be relevant to a decision to refuse or cancel a visa on character grounds under s 501 of the *Migration Act 1958* (Cth): see *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1, 40-1 [192] (Buchanan J). See, similarly, *Thomas v Mowbray* (2007) 233 CLR 307, 508 [597] (Callinan J).

[49] *R v Hancox* [2010] 1 WLR 1434, 1437 [9] (Hughes LJ, for the Court). See also *R v Mangham* [2012] EWCA Crim 973, [21] (Cranston J, for the Court); *R v Barnes* [2012] EWCA Crim 2549, [9] (Rafferty LJ, for the Court); *R v Carle* [2013] EWCA Crim 392, [19] (Leveson LJ, for the Court); *R v Guest* [2013] EWCA Crim

32. That does not mean that evidence of past conduct is irrelevant to determining future risk. Indeed, in the binding over jurisdiction, 'evidence of past events ... was relevant [but] only as suggesting reasons why a breach of the peace was apprehended in the future'.[50] Reference to past conduct to determine future risk did not alter the nature of binding over as 'a precautionary measure to prevent a future crime, and ... not by way of punishment for something past'.[51] The same is true in the present case: past conduct is relevant to the protection of the public because it is a significant guide to determining future risk.

33. Conversely, it is not to the point that sentencing may involve elements that are forward-looking.[52] That protection of the public may be relevant to sentencing does not mean that it is the exclusive concern of criminal proceedings. In *Fardon v Attorney-General (Qld)*, this Court upheld a power to detain certain prisoners after they had served their sentences. The purpose of the further detention was ensuring 'the adequate protection of the community'.[53] The detention was therefore preventive in nature, notwithstanding that the detainees had already been sentenced, including by reference to the key sentencing factor of protection of the public.[54] Likewise, in *Falzon v Minister for Immigration and Border Protection*, this Court held that '[t]he exercise of a power of cancellation of a visa by reference to the fact of previous criminal offending does not involve the imposition of a punishment for an offence'.[55] The existence of a previous sentence is no bar to characterising an order as preventive.

Conclusion

34. For the foregoing reasons, SCPOs are, like their UK counterparts, 'preventative in character':[56] 'Like other forms of preventive order, a SCPO is not an additional or

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1437, [17] (Treacy LJ, for the Court); *R v Hall* [2014] EWCA Crim 2046, [16], [25]-[26] (Laing J, for the Court); *R v McGrath* [2017] EWCA Crim 1945, [10] (Flaux LJ, for the Court).

50 *Laidlaw v Hulett; Ex parte Hulett* [1998] 2 Qd R 45, 50 (McPherson JA).

51 *Ex parte Davis* (1871) 35 JP 551, 551-2 (Blackburn J). See also *Thomas v Mowbray* (2007) 233 CLR 307, 329 [16] (Gleeson CJ), quoting Blackstone, *Commentaries on the Laws of England* (1769) book IV, 248.

52 Cf Plaintiffs' submissions, 12 [40].

53 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 3.

54 *Fardon* (2004) 223 CLR 575, 592 [19] (Gleeson CJ), 597 [34] (McHugh J), 654 [216]-[217], 658 [234] (Callinan and Heydon JJ).

55 *Falzon* (2018) 262 CLR 333, 347-8 [47]-[48] (Kiefel CJ, Bell, Keane and Edelman JJ). See also at 357 [89] (Gageler and Gordon JJ), 358 [93] (Nettle J).

56 *R v Mangham* [2012] EWCA Crim 973, [21] (Cranston J, for the Court).

alternative form of sentence. It is not designed to punish. It is not to be imposed because it is thought that the defendant deserves it.'[57]

The Act is not invalid for infringing the Kable principle

The scheme does not undermine the criminal justice system

35. The SCPO scheme cannot undermine the criminal justice system when it does not purport to authorise a court to adjudge and punish criminal guilt. In part, like the legislation considered in *Fardon*, the SCPO scheme 'operate[s] by reference to the [plaintiffs'] status deriving from [their] conviction.'[58] In part, and similarly to the legislation considered in *Thomas*,[59] the SCPO scheme operates by reference to a finding that a defendant has been involved in serious crime related activity.[60] Either way, the Act 'then set[s] up its own normative structure'.[61] Proceedings on an application for an SCPO are – as s 13 of the Act states – 'not criminal proceedings'.

36. There is nothing surprising in our system of justice about parallel proceedings directed to different purposes. Since at least 1607, the common law has grappled with parallel tortious and criminal actions.[62] Over the centuries, the courts adopted a number of approaches to parallel proceedings[63] before settling on the present position that a court having control of civil proceedings may grant a stay where justice requires, but that the mere existence of concurrent criminal proceedings will not always require a stay.[64]

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[57] *R v Hancox* [2010] 1 WLR 1434, 1438 [12] (Hughes LJ, for the Court). See also *R v Hall* [2014] EWCA Crim 2046, [28] (Laing J, for the Court).

[58] *Fardon* (2004) 223 CLR 575, 610 [74] (Gummow J).

[59] Section 104.4(1)(c)(ii) of the *Criminal Code* (Cth) provided that the court could make an order if, amongst other things, it was 'satisfied on the balance of probabilities … that the person has provided training to, or received training from, a listed terrorist organisation'.

[60] There is nothing objectionable about that: 'Not uncommonly, courts exercising civil jurisdiction are required to determine facts which establish that a person has committed a crime': *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352, 371 [32] (French CJ, Hayne, Kiefel, Bell and Keane JJ) ('*Today FM*').

[61] *Fardon* (2004) 223 CLR 575, 610 [74] (Gummow J).

[62] *Higgins v Butcher* (1607) Yelv 89; 80 ER 61. See also Matthew Dyson, 'The Timing of Tortious and Criminal Actions for the Same Wrong' (2012) 71 *Cambridge Law Journal* 86.

[63] *The Midland Insurance Co v Smith* (1881) 6 QBD 561, 568 (Watkin Williams J).

[64] *Jefferson Ltd v Bhetcha* [1979] 1 WLR 898, 904-5 (Megaw LJ). See also *Smith v Selwyn* [1914] 3 KB 98, 103 (Kennedy LJ), 106 (Swinfen Eady LJ), 106-7 (Phillimore LJ); *Rochfort v John Fairfax & Sons Ltd* [1972] 1 NSWLR 16, 20-3 (Sugerman ACJ, Holmes and Mason JJA agreeing) (subsequently overruled on the law as to defamation, not parallel proceedings). The legislation considered in *Lee [No 1]* (2013) 251 CLR 196 was said to reflect these common law developments: at 256 [143] (Crennan J).

37. In the context of parallel tortious and criminal proceedings, it is unsurprising that different standards of proof might lead to different outcomes. In 1810 in *Crosby v Leng*, Mr Crosby was permitted to proceed against Mr Leng for tortious assault, even though Mr Leng had already been acquitted on a charge of felonious assault.[65] In *Helton v Allen*,[66] Mr Helton's acquittal of the murder of the testatrix was no bar, on the trial of the civil suit arising out of the will, to the finding that he had unlawfully killed her. Likewise, the court could exercise its binding over jurisdiction in any proceeding in which the defendant had been charged but acquitted of an offence.[67]

38. Having said that, it is clear that a finding of criminal conduct in an application for an SCPO would require application of the *Briginshaw* principle, such that the civil standard of proof would be engaged in a more searching and rigorous fashion.[68]

39. Nonetheless, in proceedings on an application for an SCPO, the court does not make a finding of criminal conduct in order to adjudge and punish criminal guilt. Accordingly, there is no reason in principle why such proceedings would need to accord with the accusatorial nature of the criminal justice system. While the applicant bears the onus of proof in an application for an SCPO, that should not be equated with the 'fundamental principle' that the onus of proof rests with the prosecution.[69] Nor is there any work for the 'companion rule' that an accused person cannot be compelled to assist the prosecution in the discharge of its onus of proof.[70]

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65 *Crosby v Leng* (1810) 12 East 409; 104 ER 160, 161 (Lord Ellenborough).

66 (1940) 63 CLR 691, 709-10 (Dixon, Evatt and McTiernan JJ). See also *Today FM* (2015) 255 CLR 352, 371 [32] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

67 *Laidlaw v Hulett; Ex parte Hulett* [1998] 2 Qd R 45, 50 (McPherson JA), citing *Ex parte Davis* (1871) 35 JP 551.

68 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362 (Dixon J). As applied to control order legislation, see: *South Australia v Totani* (2010) 242 CLR 1, 101 [257] (Heydon J, albeit in dissent in the result); *Thomas v Mowbray* (2007) 233 CLR 307, 355 [113] (Gummow and Crennan JJ). There is no reversal of the onus of proof which might displace the *Briginshaw* principle: cf *Henderson v Queensland* (2014) 255 CLR 1, 9 [15] (French CJ), 14 [32] (Bell J), 44 [171] (Keane J). See also at 29-30 [91] (Gageler J, albeit in dissent in the result).

69 *Lee v The Queen* (2014) 253 CLR 455, 467 [32] (French CJ, Crennan, Kiefel, Bell and Keane JJ); *Lee [No 1]* (2013) 251 CLR 196, 266 [176] (Kiefel J), 313 [318] (Gageler and Keane JJ); *X7 v Australian Crime Commission* (2013) 248 CLR 92, 119-20 [46] (French CJ and Crennan J), 135-6 [100]-[102] (Hayne and Bell JJ), 153 [159] (Kiefel J).

70 *Lee v The Queen* (2014) 253 CLR 455, 467 [33] (French CJ, Crennan, Kiefel, Bell and Keane JJ); *Lee [No 1]* (2013) 251 CLR 196, 212-3 [20] (French CJ), 248-9 [125] (Crennan J), 261 [159], 265-6 [175] (Kiefel J).

40. Of course, as the plaintiffs point out,[71] a defendant may face the burden of defending a charge as well as an application for an SCPO. However, that possibility should not be overstated. The companion rule is not engaged at all until an accused person is charged,[72] and in accordance with its rationale it remains engaged only for so long as the charge has not been finalised. So, for example, in the application against the plaintiffs in the Supreme Court, the companion rule is only engaged by the third plaintiff's charges in Queensland.[73] Otherwise, the Commissioner of Police only relied upon criminal conduct which was the subject of charges that have been finalised,[74] as well as an allegation that the three plaintiffs have participated in a criminal group contrary to s 93T of the *Crimes Act 1900* (NSW).[75] Nothing in the special case indicates that that allegation is the subject of a criminal proceeding which remains on foot.

41. Even where criminal proceedings are on foot, the requirement to defend an SCPO application will not always produce unfairness in the parallel criminal proceeding.[76] The requisite unfairness must be shown in the circumstances of the individual case; more is required 'than abstract assertion'.[77] The right to silence is not absolute and it 'is not constitutionally entrenched'.[78]

42. Moreover, nothing in the Act disturbs any of the powers of the Supreme Court or District Court to prevent unfair trials or an abuse of their processes.[79] The Supreme Court retains its inherent power – confirmed by s 137 of the *Evidence Act 1995* (NSW) – to exclude evidence which would be unfair to the accused to admit.[80]

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71 Plaintiffs' submissions, 13 [45].

72 *'R' v Independent Broad-based Anti-corruption Commissioner* (2016) 256 CLR 459, 472 [43] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

73 Special Case Book, 41 [5(e)(iii)(2)].

74 Ibid 38-41 [5].

75 Ibid 40 [5(e)(i)].

76 *X7 v Australian Crime Commission* (2013) 248 CLR 92, 124 [58] (French CJ and Crennan J); *Zanon v Western Australia* (2016) 50 WAR 1, 31 [166] (McLure P).

77 *Lee [No 1]* (2013) 251 CLR 196, 314 [320] (Gageler and Keane JJ).

78 *Strickland v Director of Public Prosecutions (Cth)* (2018) 93 ALJR 1, 24 [101] (Kiefel CJ, Bell and Nettle JJ).

79 The conferral of jurisdiction in s 5 is to be understood as bringing with it the usual incidents of the exercise of jurisdiction: *Electric Light and Power Supply Corporation Ltd v Electricity Commission (NSW)* (1956) 94 CLR 554, 560 (Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 555 [19] (Gummow, Hayne, Heydon and Kiefel JJ).

80 *Lee [No 1]* (2013) 251 CLR 196, 254 [137] (Crennan J). Eg, in *R v Seller* (2015) 89 NSWLR 155, the New South Wales Court of Criminal Appeal confirmed an exercise of this power to exclude the evidence of an

43. In addition, as with the legislation considered in *Condon v Pompano Pty Ltd*,[81] there is nothing in the Act to restrain the court from permanently or temporarily staying a criminal trial where practical unfairness becomes manifest.[82] As the joint judgment noted in *Commissioner of Australian Federal Police v Zhao*, 'The prospect that civil proceedings may prejudice a criminal trial and that such prejudice may require a stay of the civil proceedings is hardly novel.'[83] In the particular circumstances of that case, this Court ordered a temporary stay of civil forfeiture proceedings, pending the outcome of a criminal trial. This Court accepted that, as a general rule, criminal proceedings were not an impediment to civil proceedings under the *Proceeds of Crime Act 2002* (Cth). However, nothing in the *Proceeds of Crime Act* required the court to continue to hear forfeiture proceedings 'where to do so would put a respondent at risk of prejudice in his or her criminal trial'.[84] The same conclusion applies here. Nothing in the SCPO scheme prevents the courts from ensuring a fair trial in parallel criminal proceedings.

The SCPO scheme is not administered as a different grade of criminal justice

44. The plaintiffs rely on statements in this Court that the Constitution does not permit 'different grades or qualities of justice',[85] to submit that Act infringes the *Kable* principle because it 'requires the Supreme and District Courts to administer different grades or qualities of criminal justice'.[86] With respect, the statements do not support that submission. The source of those statements is Gaudron J in *Kable v Director of Public Prosecutions (NSW)*. Her Honour there said that the Constitution does not permit different grades or qualities of justice as between 'State courts or federal courts created by the Parliament'. Those comments say nothing about the permissibility of parallel

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Australian Taxation Office investigator because he had had access to compelled evidence: at 176-8 [109]-[123] (Bathurst CJ), 194 [229] (Fullerton J agreeing), 197 [243] (Bellew J agreeing).

81 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 105 [178], 115 [212] (Gageler J) ('*Pompano*').

82 *R v Seller* (2013) 273 FLR 155, 184 [106], 185 [112], [114] (Bathurst CJ), 186 [119] (McClellan CJ at CL agreeing), 186 [122] (Rothman J agreeing in part); *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J), 332 (Deane J).

83 *Commissioner of Australian Federal Police v Zhao* (2015) 255 CLR 46, 60 [47] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

84 Ibid 61 [49] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

85 Plaintiffs' submissions, 10 [33].

86 Plaintiffs' submissions, 14 [48].

criminal and civil proceedings in the same court.[87] That there are different standards of proof and rules of evidence applicable in civil proceedings does not mean that civil proceedings are delivered with less justice.

45. The shorter point is that, properly construed, the SCPO scheme does not deliver any grade of criminal justice, let alone a lesser one.

10 The discretion to bring an application is not 'enlistment'

46. The plaintiffs are, with respect, wrong to suggest that the Director of Public Prosecutions and the Commissioner of Police have a discretion to either commence a prosecution or apply for an SCPO.[88] In truth, they have two distinct discretions: a prosecutorial discretion, and a discretion to apply for an SCPO. One, both or neither discretion may be exercised. In that sense, the discretion to apply for an SCPO is no
20 different from the Director's discretion to apply for confiscation orders under civil forfeiture laws, separate and distinct from the Director's prosecutorial discretion. As this Court held in *Attorney-General (NT) v Emmerson*:[89]

> That the controversy is initiated by an officer of the Executive, the DPP, does not deprive the Supreme Court of its independence. The DPP's decision to make an application to the Supreme Court in respect of an individual [under the impugned civil forfeiture laws] is a discretionary
> 30 decision, similar to the well-recognised prosecutorial discretion to decide who is to be prosecuted and for what offences ... The role of the DPP in the statutory scheme reflects no more than procedural necessity in the adversarial system.

47. While the discretion to bring an SCPO application is no doubt broad,[90] the discretion is constrained by considerations of fairness and the purpose for which the proceeding is to

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[87] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 103 (Gaudron J). There is no indication that the various references to different grades or qualities of justice are directed to something other than the exercise of judicial power as between State and federal courts in: *Fardon* (2004) 223 CLR 575, 617 [101] (Gummow J); *Wainohu v New South Wales* (2011) 243 CLR 181, 229 [105] (Gummow, Hayne, Crennan and Bell JJ); *Pompano* (2013) 252 CLR 38, 89 [123] (Hayne, Crennan, Kiefel and Bell JJ).

[88] Plaintiffs' submissions, 17 [55].

[89] (2014) 253 CLR 393, 432 [61] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), citing *Magaming v The Queen* (2013) 252 CLR 381, 390 [20] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

[90] See *Likiardopoulos v The Queen* (2012) 247 CLR 265, 269 [2] (French CJ). See also *Today FM* (2015) 255 CLR 352, 365 [11] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

be commenced.[91] To the extent the discretion may be exercised unfairly in a particular case, the Supreme Court has inherent power to prevent an abuse of process.[92]

48. In any event, the Director or Commissioner's exercise of discretion to bring an application is not the operative decision which determines whether a person is subject to an SCPO and the content of that order. Those things are determined by the Supreme or District Court, through the ordinary adjudicative process of applying the facts as found to the law as determined.[93] The SCPO scheme is far removed from the legislation considered in *South Australia v Totani*, which not only mandated that a control order be made by the Magistrates Court upon application, but also specified the terms of the order.[94] Here, the outcome of every application will depend upon a determination by the court on the merits.

Criterion of 'appropriateness' is sufficiently precise

49. The plaintiffs submit that the criterion of 'appropriateness' in s 6(1) of the Act is devoid of 'any meaningful objective criteria', such that in applying that criterion, the Supreme and District Courts are exercising a function 'otherwise than b[y] reference to a purely judicial standard'.[95] It is unclear what is meant by the phrase 'purely judicial standard'. In any event, State Parliaments may confer upon State courts powers which are 'wholly non-judicial'.[96] Accordingly, even if the plaintiffs' characterisation of the function were accurate, it would not support a conclusion of 'repugnancy' or 'inconsistency' with the court's institutional integrity. State courts are not required to apply a 'purely judicial standard'.[97]

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91 *Emmerson* (2014) 253 CLR 393, 432 [63] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

92 Ibid 433 [64], 435 [72] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

93 *Kuczborski v Queensland* (2014) 254 CLR 51, 118-9 [226] (Crennan, Kiefel, Gageler and Keane JJ).

94 *South Australia v Totani* (2010) 242 CLR 1, 52 [82] (French CJ), 67 [149] (Gummow J), 86-7 [222], 92-3 [236] (Hayne J), 160 [436] (Crennan and Bell JJ), 173 [481] (Kiefel J). See also *Kuczborski v Queensland* (2014) 254 CLR 51, 117-8 [222]-[224] (Crennan, Kiefel, Gageler and Keane JJ).

95 Plaintiffs' submissions, 17-8 [58]. See also at 9 [30].

96 *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, 106 (Gaudron J); *Fardon* (2004) 223 CLR 575, 600 [40] (McHugh J).

97 See also the distinction between judicial power and the judicial power of the Commonwealth: *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 137 (Gummow J); *Momcilovic v The Queen* (2011) 245 CLR 1, 62 [83] (French CJ).

50. Thus, in *Fardon*, McHugh J held that the test of 'unacceptable risk' was 'a standard sufficiently precise to engage the exercise of State judicial power. Indeed, it would seem sufficiently precise to constitute a "matter" that could be conferred on or invested in a court exercising federal jurisdiction'.[98] That is, the criterion could have been applied in federal jurisdiction, though it need only have met the less rigorous standard required in the exercise of State jurisdiction.

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51. In any event, once the Act is properly construed in light of its preventive purpose, it is clear that the Act does provide sufficient criteria to determine what is appropriate. Section 6(1) requires the court to take into account the competing interests of the protection of the community and the liberty of the defendant. That is an ordinary judicial function, which cannot be said to be 'inherently too vague for use in judicial decision-making'.[99] Further, '[c]ourts are often called on to make predictions about
20 dangers to the public'.[100] If anything, the criterion in s 6(1) is more precise than the criteria considered in *Fardon* and *Thomas v Mowbray*, in that it specifies the manner in which the SCPO is required to protect the community.[101]

52. To the extent that a penumbra of uncertainty remains, 'it is for the Court to develop and elaborate criteria regulating the discretion',[102] which is 'a commonly encountered phenomenon in judicial decision-making'.[103] Indeed, this Court undertook that task in
30 *Cardile v LED Builders Pty Ltd*, in respect of the test of appropriateness in s 23 of the *Federal Court of Australia Act*.[104] That the criterion for the exercise of power may be imprecise 'does not deprive it of the character of judicial power'.[105] Thus, the test of appropriateness is sufficiently precise that it could apply in federal jurisdiction, and certainly in State jurisdiction.

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40 [98] *Fardon* (2004) 223 CLR 575, 597 [34] (McHugh J).
[99] *Thomas v Mowbray* (2007) 233 CLR 307, 333 [27] (Gleeson CJ).
[100] *Pompano* (2013) 252 CLR 38, 96 [143] (Hayne, Crennan, Kiefel and Bell JJ). See also *Emmerson* (2014) 253 CLR 393, 418 [19] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
[101] Cf Plaintiffs' submissions, 18 [58].
[102] *R v Joske; Ex parte Shop Distributive and Allied Employees' Association* (1976) 135 CLR 194, 216 (Mason and Murphy JJ).
[103] *Thomas v Mowbray* (2007) 233 CLR 307, 351 [92] (Gummow and Crennan JJ).
[104] *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, 394 [26] (Gaudron, McHugh, Gummow and Callinan JJ).
[105] *Pompano* (2013) 252 CLR 38, 54 [24] (French CJ).

Departure from features of criminal trial is irrelevant

53. Finally, given that the SCPO scheme is directed to prevention, rather than punishment, it is entirely orthodox that applications for SCPOs would not be conducted as if they were criminal trials. That the standard of proof, rules of evidence and procedure are different from what would apply in a criminal trial is beside the point.[106]

10 54. As to the admissibility of hearsay evidence,[107] nothing in the Act suggests that the Supreme Court or District Court is deprived of the task of determining what weight to give to that evidence.[108]

55. The plaintiffs' assertion that '[t]he rule against double jeopardy does not apply' is, with respect, misconceived.[109] Like a continuing detention order under the legislation upheld in *Fardon*, an SCPO does 'not punish [a defendant to an application] twice, or increase
20 his punishment for the offences of which he had been convicted'.[110]

56. In any event, even for criminal proceedings, it is clear that a State Parliament may alter the standard of proof and rules of evidence, and even reverse the onus, without infringing the *Kable* principle.[111]

The *Kable* principle is not otherwise infringed

30 57. The plaintiffs' arguments aside, there is no other basis on which the SCPO scheme could be said to impair the institutional integrity of the Supreme and District Courts. Those courts retain their defining features as courts, including the reality and appearance of independence and impartiality.[112] The ordinary adjudicative processes of the courts remain intact. An application for an SCPO is heard in open court, in circumstances where the defendant has a right to be heard, may have legal

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[106] Cf Plaintiffs' submissions, 18 [59].
[107] Plaintiffs' submissions, 18 [59(c)].
[108] See *Pompano* (2013) 252 CLR 38, 75 [76], 80 [88], 81 [92] (French CJ), 102 [166] (Hayne, Crennan, Kiefel and Bell JJ).
[109] Plaintiffs' submissions, 18 [59(e)].
[110] *Fardon* (2004) 223 CLR 575, 610 [74] (Gummow J).
[111] *Kuczborski v Queensland* (2014) 254 CLR 51, 122-3 [240]-[244] (Crennan, Kiefel, Gageler and Keane JJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 560 [39] (Gummow, Hayne, Heydon and Kiefel JJ); *Fardon* (2004) 223 CLR 575, 601 [41] (McHugh J).
[112] *NAAJA* (2015) 256 CLR 569, 593-4 [39(1)-(2)] (French CJ, Kiefel and Bell JJ).

representation, and may make submissions and receive reasons.[113] SCPOs may be varied or revoked, and there is a right of appeal (ss 11 and 12).

58. It follows that once the SCPO scheme is properly construed as preventive, the plaintiffs' *Kable* arguments based on a punitive reading of the scheme fail to engage. Further, there is no other *Kable* argument available to assist the plaintiffs. The questions in the special case should be answered accordingly.

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PART V: Estimate of time

59. The Attorney-General estimates that no more than 10 minutes will be required for oral argument.

20 20 Dated 22 July 2019.

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[113] *Emmerson* (2014) 253 CLR 393, 433 [65] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *NAAJA* (2015) 256 CLR 569, 594 [39(3)] (French CJ, Kiefel and Bell JJ).