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 OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

Marlo Baragwanath, Victorian Government Solicitor
Victorian Government Solicitor's Office
Level 25, 121 Exhibition St
Melbourne VIC 3000
Contact: Alice Wharldall

Dated: 22 July 2019

Telephone: (03) 8684 0269
Fax: (03) 8684 0449
Email: alice.wharldall@vgso.vic.gov.au

PART I, II & III: CERTIFICATION & INTERVENTION

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

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

PART IV: ARGUMENT

A. INTRODUCTION

3. Section 5(1) of the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) (**SCPO Act**), in summary, has the following relevant features:

   (1) It provides that the Supreme Court of New South Wales may make a serious crime prevention order (**SCPO**), on the application of the First Defendant, the NSW Director of Public Prosecutions or the NSW Crime Commission, against a person in circumstances where the Court is satisfied that the person has been convicted of a serious criminal offence or has been involved in serious crime related activity.[1]

   (2) Before making an SCPO the Court must also be satisfied that there are reasonable grounds to believe the order will protect the public by preventing or disrupting the person's involvement in serious crime related activities.

   (3) The order may contain such prohibitions, restrictions and requirements as the Court considers appropriate for the purpose of protecting the public by preventing, restricting or disrupting the person's involvement in serious crime related activities.

   (4) The Court may make an SCPO whether or not a person has been charged, tried, tried and acquitted, or convicted of a serious criminal offence.

4. Question 1 of the Special Case asks whether s 5(1) is invalid, in whole or in part, because it is inconsistent with and prohibited by Ch III of the Constitution. If the answer is "Yes", Question 2 asks to what extent s 5(1) is invalid, and whether the invalid part is severable.

5. As to Question 1, Victoria contends that the answer is "No": s 5(1) is valid in its entirety. As to Question 2, Victoria contends that it does not arise; however, if the court concludes that s 5(1) is in part invalid, then Victoria contends that severance is possible.

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1 In addition, the District Court may make an SCPO, but only where the person has been convicted of a serious criminal offence.

B. THE PROPER CONSTRUCTION OF SECTION 5(1) OF THE SCPO ACT

6. Before turning to the validity of s 5(1), it is appropriate to address some aspects of its construction.

B.1 Section 5(1)

7. Section 5(1) of the SCPO Act provides as follows:

> An appropriate court may, on the application of an eligible applicant, make an order (a ***serious crime prevention order***) against a specified person if:
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> (a) in the case of a natural person—the person is 18 years old or older; and
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> (b) the court is satisfied that:
>
> (i) the person has been convicted of a serious criminal offence, or
>
> (ii) the person has been involved in serious crime related activity for which the person has not been convicted of a serious criminal offence (including by reason of being acquitted of, or not being charged with, such an offence), and
>
> (c) the court is satisfied that there are reasonable grounds to believe that the making of the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime related activities.

8. A significant feature of the provision, to which the Plaintiffs advert only in passing (PS [22]), is that the power conferred is discretionary: the court ***may*** — but need not — make an SCPO in circumstances where the conditions in paragraphs (a)–(c) are satisfied.[2] That residual discretion is broad and unconfined, except insofar as it must be exercised "judicially, according to rules of reason and justice, and not arbitrarily or capriciously".[3]

9. Turning to the conditions for the exercise of the power, Victoria accepts that, for the purposes of s 5(1)(b)(ii), a court might be satisfied that a person has been "involved in serious crime related activity" by engaging in conduct that has facilitated another person engaging in serious crime related activity (s 4(1)(b)), or is likely to facilitate serious crime related activity (s 4(1)(c)), without any requirement of *mens rea*: PS [24].

10. However, that is neither surprising nor problematic once it is appreciated that, for the reasons submitted by the Defendants at DS [9]–[12], the purpose of an SCPO — and of the SCPO Act more generally — is to protect the public, not to adjudge or punish criminal guilt. That protective purpose is apparent from the requirement in s 5(1)(c) and

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2 See ss 5(2) and 9(1) of the *Interpretation Act 1987* (NSW) which together provide that, subject to a contrary intention in that Act or the Act concerned, "In any Act … the word 'may', if used to confer a power, indicates that the power may be exercised or not, at discretion". That is consistent with the position at common law: *Ward v Williams* (1955) 92 CLR 496 at 505 (the Court).

3 *House v The King* (1936) 55 CLR 499 at 503 (Starke J).

from the terms of s 6(1), which limit the nature of the restrictions that may be contained in an SCPO to those that are appropriate for the purpose of protecting the public. In that respect, as the Defendants observe at DS [13]–[17], the regime is analogous to those upheld by this Court in *Fardon v Attorney-General (Qld)*[4] and *Thomas v Mowbray*.[5]

11. The phrase "reasonable grounds to believe", in s 5(1)(c), is to be construed in the context in which it is found,[6] including by reference to the nature of the order that may be made under s 5 and the fact that the matter to which the reasonable belief is directed is forward-looking and thus predictive, rather than certain. In that context, belief, while not requiring proof on the balance of probabilities,[7] is more than "a state of conjecture or surmise where proof is lacking".[8] Victoria accepts, as the Plaintiffs submit at PS [25], that "reasonable grounds to believe" requires "the existence of facts which are sufficient to induce that [belief] in a reasonable person".[9] However, ultimately it is the court that must be satisfied, on the balance of probabilities, that there are objectively reasonable grounds for the relevant belief; whether the applicant is so satisfied is not to the point.[10]

12. Moreover, it is not the case that the words "protect the public" in s 5(1)(c) "add little, if anything, to what must be established": *cf* PS [26]. True it is that the relevant issue is whether the court is satisfied there are reasonable grounds to believe the public would be protected "by" preventing, restricting or disrupting involvement by the respondent in serious crime related activities. But it does not follow that, if the court is satisfied that there are reasonable grounds to believe that the making of the order would prevent, restrict or disrupt such involvement, the court necessarily will be satisfied there are reasonable grounds to believe the making of the order would protect the public: *cf* PS [27]. In other words, satisfaction that there are reasonable grounds to believe the making of the order would prevent, restrict or disrupt involvement by the respondent in serious crime related activities is a **necessary but not sufficient** condition for satisfaction

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4 (2004) 223 CLR 575.

5 (2007) 233 CLR 307.

6 *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at 240–241 [56] (French CJ).

7 *George v Rockett* (1990) 170 CLR 104 at 116 (the Court).

8 *George v Rockett* (1990) 170 CLR 104 at 115–116 (the Court), quoting *Hussein v Chong Fook Kam* [1970] AC 942 at 948 (Lord Devlin).

9 *George v Rockett* (1990) 170 CLR 104 at 112 (the Court).

10 *George v Rockett* (1990) 170 CLR 104 at 112–113 (the Court); *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 429 [10] (Gleeson CJ and Kirby J), 445 [59] (Hayne J).

of s 5(1)(c). Something more is required — namely, the court's satisfaction that there are reasonable grounds to believe that, by preventing, restricting or disrupting involvement by the respondent in serious crime related activities, the making of the order would, in fact, and not simply by definition, protect the public.

13. It may be accepted that in many, perhaps most, cases in which an SCPO is sought, if the court is satisfied there are reasonable grounds to believe the making of the order would prevent, restrict or disrupt involvement by the respondent in serious crime related activities, the court may readily be satisfied that the making of the order will protect the public. So much follows from the fact that "serious crime related activity" means anything done by a person that is or was at the time a "serious criminal offence", combined with the fact that the latter term is defined to include many offences that are objectively serious.[11] However, that conclusion will **not always** so readily follow, as the example provided by the Plaintiffs at PS [27] demonstrates. In that example, although a court might be satisfied there are reasonable grounds to believe the making of the order would prevent, restrict or disrupt involvement by the respondent in serious crime related activities as defined, it may well not be satisfied there are reasonable grounds to believe the making of the order would protect the public. And even if it is so satisfied, the court might decline, as a matter of discretion, to make the order sought.

14. In short, the vice of the Plaintiffs' construction is that it gives the words "protect the public" no work to do. Indeed, the effect of the Plaintiffs' case is that the provision is to be construed as if it read:

> (c) the court is satisfied that there are reasonable grounds to believe that the making of the order would ~~protect the public by~~ prevent~~ing~~, restrict~~ing~~ or disrupt~~ing~~ involvement by the person in serious crime related activities.

15. That is contrary to the long-established principle that a court must strive to give effect to every word of a provision and, where two constructions are open, one which avoids "surplusage" is to be preferred.[12]

16. Consequently, it is not the case that, as a matter of substance, the jurisdictional requirement in s 5(1)(c) is "largely subsumed" by consideration of the permissible content of a proposed order: *cf* PS [28]. Consideration of that content is important, because the court must be satisfied that there are reasonable grounds to believe that "the"

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11 See the definitions in s 3(1) of the SCPO Act.

12 See, eg, *Commonwealth v Baume* (1905) 2 CLR 405 at 414–415 (Griffith CJ).

order — that is, the particular order to be made — would protect the public by preventing, restricting or disrupting involvement by the respondent in serious crime related activities. As discussed below, an order may only contain such prohibitions, restrictions, requirements and other provisions as the court considers "appropriate" for that purpose: s 6(1). However, s 5(1)(c) has real work of its own to do.

17. Further, although conviction of a serious criminal offence and/or involvement in serious crime related activity is an important aspect of the regime, it is not the case that it is the "main requirement" or "dominant criterion" that must be established to obtain an SCPO: *cf* PS [31], [40]. The court is, of course, required by s 5(1)(b) to be satisfied of at least one of those matters for the power to make an SCPO to be enlivened. But s 5(1)(c) and its requirement that the court assess the future risk of involvement by the respondent in serious crime related activities is at least equally important — and in some cases may be more important to the court's exercise of its discretion.

B.2 Relevant UK authority

18. As the Plaintiffs observe at PS [10], the SCPO Act was substantially based on the *Serious Crime Act 2007* (UK) (the **UK Act**). Cases concerning that Act may thus assist in understanding the scope and operation of the SCPO Act.

19. Section 1(1) of the UK Act provides that the High Court in England and Wales may make a serious crime prevention order (**UK SCPO**) if—

> (a) it is satisfied that a person has been involved in serious crime (whether in England and Wales or elsewhere); and
>
> (b) it has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in England and Wales.

20. Section 19 of the UK Act extends jurisdiction to make a UK SCPO to the Crown Court in England and Wales but only where that Court is dealing with a person who has been convicted of having committed a serious offence in England and Wales.

21. The leading case in relation to the UK Act is *R v Hancox*,[13] an appeal from the Crown Court in relation to persons who had been convicted of serious criminal offences. The Court of Appeal in England and Wales relevantly observed as follows:[14]

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13 [2010] 1 WLR 1434.

> The vital provision is section 19(2). **The order may be made if but only if the court has reasonable grounds to believe that an order would protect the public** by preventing, restricting or disrupting involvement by the defendant in serious crime (as defined in section 2 and Schedule 1) in England and Wales. It follows that **the court, when considering making such an order, is concerned with future risk. There must be a real, or significant, risk (not a bare possibility)** that the defendant will commit further serious offences (as defined in s 2 and Schedule 1) in England and Wales.

22. That reasoning applies with equal force to s 5(1)(c). The consequence is that it is incorrect to say, as the Plaintiffs do at PS [31], that the "main focus" in obtaining an SCPO is "backwards-looking", not forwards-looking, and that once the condition in s 5(1)(b) is satisfied, "not much more will be required to found an inclination of the mind to consider that some restriction on future conduct will prevent, restrict or disrupt involvement by the person in serious crime related activity".

23. The Court in *Hancox* also observed that, although the statute provides for the making of a UK SCPO that is "appropriate", rather than "necessary", in practice the different wording may make no significant difference, because orders may only be made for the purpose for which the power is conferred, and must be proportionate.[15] The requirement of proportionality was derived, in part, from the *European Convention on Human Rights*,[16] and to that extent may not apply in the New South Wales context.

24. It is further to be noted that the Court in *Hancox* emphasised that an order made under the UK Act is "not an additional or alternative form of sentence. It is not designed to punish".[17] That is equally true of an order made under the SCPO Act, as noted above at paragraph 10.

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14 *Hancox* [2010] 1 WLR 1434 at 1437 [9] (the Court) (emphasis added), affirmed in *R v Hall* [2014] EWCA Crim 2046 at [26] (the Court). See also *R v Carey* [2012] EWCA Crim 1592 at [7], [12]–[14] (the Court), where the Court of Appeal set aside an order made where the trial judge had found the risk of re-offending to be "very low".

15 *Hancox* [2010] 1 WLR 1434 at 1437 [10] (the Court). See also *R v Barnes* [2012] EWCA Crim 2549 at [17] (the Court), where the Court of Appeal allowed an appeal in relation to an aspect of a UK SCPO that it considered was not necessary.

16 *Hancox* [2010] 1 WLR 1434 at 1437 [10] (the Court). See also *Hall* [2014] EWCA Crim 2046 at [27] (the Court).

17 *Hancox* [2010] 1 WLR 1434 at 1438 [12] (the Court). See also *Barnes* [2012] EWCA Crim 2549 at [9] (the Court).

B.3 Does the SCPO Act authorise an order for detention?

25. Finally, it may be doubted whether an order authorising detention (whether "home detention" or otherwise) could ever be made under the SCPO Act: *cf* PS [29], [54]. That is because, as Gleeson CJ observed in *Al Kateb v Godwin*:[18]

> Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.

26. Although some, perhaps substantial, interference with common law rights and freedoms, including of movement and association, is no doubt intended and authorised by the SCPO Act, s 6(1) does not "on its terms" authorise involuntary detention, let alone involuntary **detention in custody** (PS [29], [54]). There is no "clear and unambiguous language" directed to detention; and this Court should not imply a power to detain into the general words used in s 6(1).[19]

27. As the Defendants contend at DS [42], this constructional question need not be resolved in the present case, because no order for detention is sought against the Plaintiffs. The SCPO Act should therefore be evaluated by reference to the more limited understanding of its scope and operation — not by reference to the proposition that it authorises detention, particularly in a case where the issue of detention is hypothetical.[20]

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18 (2004) 219 CLR 562 at 577 [19] (dissenting in the result but not on this principle), citing *Coco v The Queen* (1994) 179 CLR 427 and *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30] (Gleeson CJ). See also, *Williams v The Queen* (1986) 161 CLR 278 at 292 (Mason and Brennan JJ); *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523 (Brennan J).

19 Further, the SCPO Act does not expressly empower the NSW Commissioner of Corrective Services to hold persons in detention under an SCPO. Persons who may be held in full-time detention under Pt 2 of the *Crimes (Administration of Sentences) Act 1999* (NSW) are "inmates", and defined exhaustively in s 4 of that Act. That definition does not extend to persons the subject of orders under the SCPO Act.

20 In that regard, as Nettle J observed in *Clubb v Edwards* (2019) 366 ALR 1 at 58 [230], "it is sufficient to dispose of an attack on the constitutional validity of a provision to conclude that, assuming without deciding that the impugned law would otherwise be invalid, it could be read down or severed in its operation in relation to the plaintiff and so be considered as valid to that extent"; see also at 33–34 [135]–[138] (Gageler J), 89 [336] (Gordon J), 106 [411] (Edelman J). Here, if it be assumed that s 5(1) authorise an order for detention and would otherwise be invalid for that reason, it (together with s 6(1)) could be read down so as to be valid in so far as it authorises the orders sought against the Plaintiffs (which fall short of detention).

C. QUESTION 1 – THE VALIDITY OF SECTION 5(1) OF THE SCPO ACT

28. With the above in mind, we turn now to the Plaintiffs' challenge to the validity of s 5(1) of the SCPO Act. They contend that s 5(1) is incompatible with the institutional integrity of the Supreme and District Courts of New South Wales and therefore invalid on three independent but cumulative bases (PS [36]-[37]), namely that, in the context of the SCPO Act as a whole, s 5(1):

(1) undermines the criminal justice system of New South Wales;

(2) requires or enlists the Supreme and District Courts of New South Wales in administering a different and lesser grade of criminal justice at the discretion of the Executive; and

(3) departs from traditional judicial functions, methods or procedures to a marked degree.

29. For the reasons that follow, none of those bases is established.

C.1 The scheme does not undermine the criminal justice system

30. The Plaintiffs' first assertion is that s 5(1) undermines the criminal justice system of the State courts. That is said to follow from the circumstances in which a person may be alleged to have been involved in serious crime related activities, which can then provide the basis for the making of an SCPO: PS [38]-[39].

31. Where a person has been previously charged and either convicted or acquitted of a serious criminal offence, the jurisdiction conferred by s 5 of the SCPO is said to undermine the finality of, and public confidence in, the adjudication and punishment of criminal guilt in New South Wales: PS [40]. It is necessary to consider conviction and acquittal separately.

Person has been charged and convicted

32. In the case where a person has been charged and convicted of a serious criminal offence, the Plaintiff contends that the making an SCPO would "add further restrictions on liberty by reference to their past offences, which have already been punished": PS [40].

33. However, an SCPO is not made solely "by reference to … past offences". Rather, as noted at paragraph 17 above, s 5(1)(c) requires an assessment to be made of the risk to the public posed by **future** involvement of the respondent in serious crime related activities. Assessment of that future risk is not limited to the fact of prior conviction —

indeed, it may be doubted whether the fact of prior conviction alone could ever satisfy a court that there are reasonable grounds to believe that the making of an SCPO would protect the public by preventing, restricting or disrupting involvement by the person in serious crime related activities.

34. Moreover, and in any event, the purpose of an SCPO is to protect the public, not to punish criminal guilt, whether for past offences or otherwise, as the Defendants contend at DS [21]. In that sense, the scheme created by the SCPO Act resembles the scheme upheld in *Fardon*.[21] The fact that the scheme in *Fardon* was limited to a smaller class of convicted offenders (those convicted of sexual offences), and involved a different level of future risk, does not relevantly alter the analysis: *cf* PS [41]; DS [16].

Person has been charged and acquitted

35. In the case of an application for an SCPO founded upon conduct for which a person has been charged and acquitted, the Plaintiffs assert that the finality of, and public confidence in, the criminal justice system is undermined because, notwithstanding the acquittal, the making of an SCPO involves the Court finding that the respondent **did** commit the relevant offence and that it is appropriate for restrictive orders, which are said to "strongly resemble a criminal sentence", to be made: PS [42].

36. It may immediately be noted that an SCPO will not, or will not necessarily, and certainly does not in the present case, "strongly resemble a criminal sentence", the paradigm of which is imprisonment and/or a fine. As submitted at paragraph 26 above, s 6(1) should be construed so as not to authorise detention, let alone detention in custody. Nor does it authorise a fine. If anything, the orders a court may make most closely resemble an apprehended violence order,[22] which does not constitute a criminal sentence.

37. More importantly, the "finality" of the acquittal is not undermined by the making of an SCPO because it remains that the respondent has not been convicted of a criminal offence. Nor is the acquittal controverted.[23] As a matter of law an acquittal establishes only that the court or jury (as the case may be) was not satisfied beyond reasonable doubt

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21 (2004) 223 CLR 575 at 596–597 [34] (McHugh J), 654 [216]–[217] (Callinan and Heydon JJ).

22 See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 35. And see discussion in *Thomas v Mowbray* (2007) 233 CLR 307 at 328–329 [16] (Gleeson CJ) and *South Australia v Totani* (2010) 242 CLR 1 at 143–144 [374] (Heydon J, dissenting).

23 Cf *R v Carroll* (2002) 213 CLR 635 at 663 [93] (Gaudron and Gummow JJ).

of the accused's guilt. It does not amount to a finding of innocence or even that the accused was innocent upon the balance of probabilities.[24]

38. Even accepting that the making of an SCPO may involve, in some cases, the court being satisfied, on the balance of probabilities, that the respondent has done something that is or was at the time a serious criminal offence, that is not the adjudging of criminal guilt. It is permissible for a court or an administrative body to determine whether a person has engaged in conduct that constitutes a criminal offence as a step in the decision to take disciplinary or other action. Thus, in *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd,* this Court observed that:[25]

> Not uncommonly, **courts exercising civil jurisdiction are required to determine facts which establish that a person has committed a crime**. Satisfaction in such a case is upon the balance of probability. In *Helton v Allen*, 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.

39. As the example there given demonstrates, acquittal of a criminal charge does not mean that the conduct the subject of the charge cannot be proved and have consequences under the civil law. Thus, by way of further example, the fact that a person has been acquitted of criminal assault does not preclude a civil action for damages for assault.[26]

40. Reference to an acquittal for an indictable Commonwealth offence tried before a jury pursuant to s 80 of the Constitution (PS [31], [43]) does nothing to bolster the argument.

41. As for the related suggestion that an application for an SCPO allows prosecutors "another bite at the cherry", such an application is directed at an entirely different piece of fruit: if successful, it provides the applicant with a civil order directed to protection of the public, falling short of detention or imprisonment. As noted above, it does not involve the adjudgment and punishment of criminal guilt by way of conviction and sentence, including, potentially, an order for imprisonment.

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24 *Kosanovic v Sarapuu* [1962] VR 321 at 330 (O'Bryan J).

25 (2015) 255 CLR 352 at 371 [32] (French CJ, Hayne, Kiefel, Bell and Keane JJ) (citations omitted, emphasis added). To similar effect, in *Davis v Gell* (1924) 35 CLR 275 at 296, Starke J observed that "a judgment of conviction or acquittal in criminal cases does not, in subsequent civil proceedings, ordinarily preclude the convicted person from setting up his innocence or any other person from endeavouring to show that he was guilty".

26 See, eg, *Kosanovic* [1962] VR 321. Nor does an acquittal preclude disciplinary proceedings being brought, founded in the same facts: *Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630 at 635–636 (the Court).

Person is facing a current charge

42. Where an application for an SCPO is made in relation to an alleged offence for which the respondent is facing a current charge, the Plaintiffs submit that the respondent is placed in the "invidious situation" of having to choose between giving evidence in the civil proceedings, and thereby aid the prosecuting authorities in the criminal proceeding, or remaining silent and thereby increase the risk of orders under the SCPO Act being made. This is said to undermine a fundamental principle of the system of accusatorial justice that a person charged with a criminal offence should not be required to testify or otherwise assist the prosecution to prove its case: PS [45].

43. There are two fundamental flaws in this argument.

44. ***First***, the court retains its inherent or implied power to stay the SCPO Act proceeding pending determination of the criminal charge in circumstances where the SCPO Act proceeding would prejudice the criminal trial.[27] There is nothing in the SCPO Act that revokes or modifies that inherent or implied power,[28] and no such revocation or modification should be implied.[29] That power is a complete answer to the Plaintiffs' complaint.

45. ***Second***, it is not the case that a *Jones v Dunkel* inference will necessarily be drawn from a respondent's failure to give evidence. Such an inference may be drawn only where there is an **unexplained** failure of a party to give evidence[30] — but where criminal charges are pending, that is likely to provide a clear explanation for the failure to give evidence.

Person has not been charged with any offence

46. Where an application for an SCPO is founded on conduct that has not been charged, the Plaintiffs contend that nothing in the SCPO Act precludes charges subsequently being

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27 See, eg, *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46.

28 Cf the *Proceeds of Crime Act 2002* (Cth) (**POC Act**), in issue in *Zhao,* in which s 319 made provision to the effect that the fact that criminal proceedings have been instituted or have commenced (whether or not under the POC Act) is not a ground on which a court may stay proceedings under the POC Act that are not criminal proceedings.

29 See, eg, *Electric Light & Power Supply Corporation Ltd v Electricity Commission of New South Wales* (1956) 94 CLR 554 at 560 (the Court).

30 *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at 384 [63] (Heydon, Crennan and Bell JJ).

brought, and that that possibility undermines the finality of litigation and places the respondent in the invidious position referred to earlier: PS [46].

47. Again, there are two fundamental flaws in that argument.

48. ***First***, an order under the SCPO Act cannot undermine the finality of litigation, as there is on this hypothesis no earlier litigation.

49. ***Second***, the court hearing any subsequent criminal proceeding retains its inherent or implied power to grant a stay to prevent an unfair trial.[31]

50. Of course, that power will not necessarily be exercised simply because a person has previously been subject to civil proceedings in relation to the same conduct. So, for example, in *Adler v Director of Public Prosecutions (NSW)*,[32] Mr Adler had been the subject of proceedings by ASIC alleging a breach of civil penalty provisions of the *Corporations Act 2001* (Cth). The Federal Court held that he had contravened those provisions and made consequential orders, including an order for a pecuniary penalty. Subsequently, Mr Adler was charged with criminal offences in relation to the same conduct. The New South Wales Court of Criminal Appeal declined to stay the criminal proceedings. Amongst other things, Mason P, with whom Grove and Barr JJ agreed, observed that this was "not a case involving repeated prosecutions" and that there was no abuse of process:[33]

> The criminal offences are different in important respects from all of the causes of action in the civil proceedings. **The findings and orders made by Santow J were based on the civil standard of proof. There is no attempt to eclipse or challenge a prior acquittal** (contrast *Carroll*). If the appellant is acquitted, this would not be inconsistent with the orders made by Santow J, having regard *inter alia* to the different standards of proof.

51. Similarly, in *Zhao*, when dealing with orders made under the *Proceeds of Crime Act 2002* (Cth), this Court observed that:[34]

> [T]he POC Act, in the provisions it makes both for restraining orders and for forfeiture orders, contemplates that such orders may be made regardless of whether a person is charged with an offence having some connection with the forfeiture proceedings. … **[T]he civil proceedings under the POC Act are separate and distinct from any criminal proceedings and it is possible that they may be conducted regardless of the criminal proceedings. They are**

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31 *Dietrich v The Queen* (1992) 177 CLR 292; *Carroll* (2002) 213 CLR 635 at 656–657 [70]–[71] (Gaudron and Gummow JJ); *Walton v Gardiner* (1993) 177 CLR 378 at 392–393 (Mason CJ, Deane and Dawson JJ).

32 (2004) 185 FLR 443.

33 *Adler* (2004) 185 FLR 443 at 451–452 [38], [40] (emphasis added).

34 (2015) 255 CLR 46 at 58 [34] (emphasis added).

> **unaffected by the outcome of criminal proceedings.** ... It follows that the fact that criminal proceedings have been brought may generally be considered not to be an impediment to the continuation of the forfeiture proceedings.

52. Finally, in the context of a person who has not been charged with an offence, it is said by the Plaintiffs that public confidence in the judicial system is undermined by knowledge that prosecuting authorities can "elect" to use the "easier route" of the SCPO Act instead of laying criminal charges: PS [47].

53. However, that argument is premised on the proposition that the two "routes" lead to the same destination — that is, that an SCPO can lead, in substance, to the same outcome as a criminal trial. For the reasons already advanced, that is not the case. A civil order, analogous to an apprehended violence order, and not authorising a fine or imprisonment, is fundamentally different from the adjudgment and punishment of criminal guilt.

54. Moreover, "elections" are often, if not always, available in the criminal justice system as a function of prosecutorial discretion, including as to whether to lay charges, which charges to lay, and how far to pursue them.[35] Just as in the case of applications under proceeds of crime legislation, the fact that an applicant might pursue a civil process in addition, or as an alternative, to a criminal process does not undermine public confidence in the judicial, or criminal justice, system.

C.2 The scheme does not enlist the courts to administer a lesser grade of criminal justice

55. The second basis on which the Plaintiffs allege s 5(1) of the SCPO Act infringes the *Kable* principle is that it requires or enlists the Supreme and District Courts of New South Wales in administering a different or lesser grade of criminal justice, at the discretion of the Executive: PS [48].

56. Victoria makes three points in response.

57. ***First***, the argument is premised on the Plaintiffs' characterisation of the SCPO Act as erecting in substance an alternative **criminal** justice regime: PS [48]. But, as the Plaintiffs elsewhere correctly recognise, proceedings under the Act are **civil**, not criminal: PS [45]. That follows not only from the express terms of s 13(1) of the Act but also from the fact that, for the reasons advanced above and by the Defendants, they do not involve the adjudgment or punishment of criminal guilt.

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35 See, eg, *Magaming v The Queen* (2013) 252 CLR 381 at 390 [20] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) and the authorities there cited.

58. Once that is appreciated, this aspect of the Plaintiffs' argument falls away, because the SCPO Act does not involve the Courts in administering "criminal justice" at all — let alone a "different or lesser grade" of criminal justice: *cf* PS [48]. The proposition that the Constitution does not permit of "different grades or qualities of justice" does not mean that no civil proceedings can be instituted in relation to conduct that is also criminal.

59. ***Second,*** for reasons similar to those advanced at paragraph 54 above, there is nothing improper in the fact that applications under the SCPO Act are made at the "discretion" of an executive body: *cf* PS [36(b)], [48], [56]. In our adversarial system, courts generally respond to applications, including by the executive. Indeed, the commencement of a criminal proceeding is almost always at the instigation of the executive. That that is so does not mean that the ultimate making of an order under the SCPO Act is at the discretion of the executive: that remains in the discretion of the relevant court.

60. Further, the Plaintiffs conflate the various entities eligible to make an application for an SCPO as "the Executive". But that fails to recognise the distinct nature of the three entities. Each is separate as a matter of statute and they should not be treated for the purposes of the law as the one entity.[36] For example, the office of the NSW Director of Public Prosecutions is created by statute and a number of statutory safeguards ensure that the Director's functions are performed independently of the Crown.[37]

61. ***Third,*** the fact that the SCPO Act applies to a broader range of offences than the legislation in issue in *Fardon* and *Thomas v Mowbray* is irrelevant to validity.

C.3 The scheme does not require the courts to depart from traditional judicial functions, methods and procedures

62. Once it is understood that proceedings under the SCPO Act are civil in nature, it is apparent that there is no departure from traditional judicial functions, methods and procedures. Rather, as the Defendants explain at DS [48], the SCPO Act requires courts to operate in a largely orthodox manner — with the exception of the permission of certain hearsay evidence. In relation to the particular features of the scheme fixed upon by the Plaintiffs at PS [58]–[59], Victoria makes the following submissions:

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36 See *R v Dalton* (2011) 111 SASR 170 at 182–185 [42]–[50] (Gray J; Sulan and Stanley JJ agreeing).

37 See, eg, *Director of Public Prosecutions Act 1986* (NSW), s 26(3), which provides that the Attorney General may not furnish a guideline to the Director in relation to a particular case; and s 31 and Sch 1 in relation to security of tenure.

(1) Authorising a court to make orders that it considers are "appropriate" to achieve the end of protection of the public is not a departure from judicial standards. Courts are frequently called on to apply tests of that kind.[38] It may be accepted that the SCPO Act does not expressly state the criteria by which the court is to determine what is "appropriate": PS [30]. However, the term "appropriate" requires that the order be rationally connected to achieving its protective purpose. Further, as the Defendants state at DS [59], s 6(1) will require the court to balance various factors, including the nature and extent of the serious criminal activity, the extent to which the proposed order will disrupt such activity, and the likely consequence of the SCPO for the subject of the order.

(2) The civil standard of proof is appropriate in the context of the making of a civil order, noting that the civil standard will be applied according to the *Briginshaw* principle.[39]

(3) As noted at paragraph 45 above, a *Jones v Dunkel* inference will rarely be open.

(4) Permitting the court to admit and act upon hearsay evidence is not a departure from judicial functions, methods and procedures. The *Evidence Act 1995* (NSW) contains various provisions that permit the admission of hearsay evidence.[40] As the plurality held in *Graham v Minister for Immigration and Border Protection*:[41]

> [T]he rules of evidence have traditionally been recognised as being an appropriate subject of statutory prescription. **The Parliament may, without offending Ch III of the Constitution, alter the onus of proof or standards of proof.** It may modify, or abrogate, common law principles such as those governing the discretionary exclusion of evidence.

In *Graham* the regime in issue prevented a court from obtaining and acting upon relevant evidence and so operated to shield a purported exercise of executive power from judicial scrutiny. In contrast, in the present case, the SCPO Act

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38 See, in addition to the examples given in DS [56], s 203 of the *District Court Act 1973* (NSW), which provides that on a referral from the District Court of an allegation of contempt of court, the Supreme Court may dispose of the matter in such manner as it considers "appropriate"; and s 26(3) of the *Drug Court Act 1998* (NSW), which provides that the Drug Court of NSW is not bound by the rules of evidence, but may inform itself on any matter in such manner as it considers "appropriate".

39 *Commissioner of Police (NSW) v Cole* [2018] NSWSC 517 at [35] (Davies J).

40 See, eg, ss 60, 63–66A, 69–75.

41 (2017) 263 CLR 1 at 22 [32] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) (emphasis added), citing *Nicholas v The Queen* (1998) 193 CLR 173 at 188–191 [23]–[26] (Brennan J).

permits (but does not require) a court to admit hearsay evidence that the court considers is "from a reliable source", is relevant and is probative, without displacing the court's general discretions to exclude or limit the use of evidence.[42] That does not transgress any constitutional limits.

(5) The absence of a jury is consistent with the proceedings being civil in nature, akin to the making of an apprehended violence order.

(6) The non-application of the rule against double jeopardy reflects the fact that, as discussed at paragraphs 37–39 above, that rule does not preclude civil proceedings in relation to a matter that has been the subject of criminal proceedings. Further, the rule against double jeopardy is not constitutionally entrenched. Even if the court making an SCPO were to be regarded as imposing double punishment, or as undermining the finality of an acquittal, it does not necessarily follow that that would lead to invalidity. *Autrefois convict* and *autrefois acquit*, and related doctrines, are creatures of the common law that are subject to statutory modification.[43] The Plaintiffs appear to recognise this at PS [42] — but then seek to confine the permissible modification in some undeveloped manner.

(7) Finally, it should be noted that the scheme contains multiple safeguards, including the ability of an affected person to apply for revocation or variation of an SCPO (s 12) and the ability to appeal the making of an SCPO, including as of right on a question of law (s 11).

C.4 Conclusion on Question 1

63. It follows from the foregoing that none of the bases for the Plaintiffs' challenge is made out. Nor are there any other bases on which to conclude that the SCPO Act is invalid. The SCPO Act does not undermine the relevant court's decisional independence, or its suitability as a recipient of federal jurisdiction, substantially or otherwise, because ultimately the court retains a discretion as to whether to make an SCPO in a given case. The scheme is distinguishable from the schemes struck down in *International Finance*

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42 See *Evidence Act 1995* (NSW), ss 135–136.

43 See, eg, *Crimes (Appeal and Review) Act 2001* (NSW), ss 100–101.

Trust Co Ltd v New South Wales Crime Commission,[44] *South Australia v Totani*[45] and *Wainohu v New South Wales*.[46] In particular:

(1) The court's role is not confined to implementing a decision of the Executive — in contrast to the legislation in issue in *Totani*.

(2) Nor does the scheme substantially impair the relevant court's control over its own processes — in contrast to the legislation in issue in *International Finance Trust*.

(3) Nor does the scheme provide for the relevant court not to give reasons — in contrast with the legislation in issue in *Wainohu*.

64. Rather, the SCPO Act is most closely analogous to the control order regime upheld in *Thomas v Mowbray* and to legislation that provides for apprehended violence orders. It is directed to the protection of the public. Orders of that kind have a long history[47] and, unless there is some feature that undermines the decisional independence of the court (as there was in *Totani* and *Wainohu*), legislation providing for such orders is not constitutionally invalid.

65. The answer to Question 1 is thus "No".

D. QUESTION 2 – EXTENT OF INVALIDITY AND SEVERANCE

66. If, as Victoria submits, the answer to Question 1 is "No", it follows that Question 2 does not arise.

67. However, the Plaintiffs raise the possibility that this Court might determine that only s 5(1)(b)(ii) of the SCPO Act — providing for an SCPO to be made in relation to persons who have been acquitted of, or not charged with, a serious criminal offence — is invalid (PS [64]). If the Court were to reach that conclusion, Victoria submits that that subparagraph can readily be severed from the remainder of the Act so as to give effect to the command in s 31(2)(b) of the *Interpretation Act 1987* (NSW) that, where a provision of an Act is construed as being in excess of the legislative power of Parliament, the remainder of the Act shall not be affected.

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44 (2009) 240 CLR 319.

45 (2010) 242 CLR 1.

46 (2011) 243 CLR 181.

47 See discussion in *Thomas v Mowbray* (2007) 233 CLR 307 at 328–329 [16] (Gleeson CJ).

68. The fact that the Legislative Council rejected amendments which would have prevented the SCPO Act applying to persons acquitted of serious criminal offences does not demonstrate that the Act "was intended to operate fully and completely according to its terms, or not at all":[48] *cf* PS [64]. That fact demonstrates that the Parliament intended for the Act to encompass acquitted persons — but it does not demonstrate any intention to displace s 31(2)(b) of the *Interpretation Act*, if the extension to acquitted persons is found to be invalid.

69. Nor is it the case that the ability to admit hearsay evidence and the application of the civil standard of proof are directed only to a case under s 5(1)(b)(ii), and not to a case under s 5(1)(b)(i): *cf* PS [64]. The suggestion seems to be that, if s 5(1)(b)(ii) is severed, ss 5(5) and 13 would have no work to do. But that is not so. In a case where s 5(1)(b)(i) is satisfied, those sections remain relevant and applicable to the condition in s 5(1)(c).

E. CONCLUSION

70. Questions 1 and 2 stated for the opinion of the Full Court should be answered as follows:

Question 1: No.

Question 2: Does not arise.

PART V: ESTIMATE OF TIME

71. The Attorney-General for Victoria estimates that she will require approximately 20 minutes for the presentation of her oral submissions.

Dated: 22 July 2019

KRISTEN WALKER
Solicitor-General for Victoria
Telephone: (03) 9225 7225
Facsimile: (03) 9670 0273
Email: k.walker@vicbar.com.au

ROWAN MINSON
Telephone: (03) 9225 8967
Email: rowan.minson@vicbar.com.au

[48] *Victoria v Commonwealth* (1996) 187 CLR 416 at 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ), quoting *Pidoto v Victoria* (1943) 68 CLR 87 at 108 (Latham CJ).