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 OF THE COMMONWEALTH (INTERVENING)

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Date of this document: 22 July 2019

File ref: 19002712

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PART I FORM OF SUBMISSIONS

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

PARTS II AND III INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth) in support of the defendants.

PART IV ISSUES PRESENTED BY THE CASE

3. The questions of law that have been stated for the opinion of the Full Court ask:

   (1) Is s 5(1) of the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) (**the SCPO Act**) invalid (in whole or in part) because it is inconsistent with and prohibited by Ch III of the Constitution?

   (2) If the answer to Question 1 is 'yes': (a) to what extent is that subsection invalid?; (b) is that part of the subsection severable from the remainder of the Act?

4. In summary, the Commonwealth submits that:

   4.1. The function exercised by the Supreme Court of New South Wales pursuant to s 5(1) of the SCPO Act is consistent with the requirements of Ch III of the Constitution, because the power conferred by ss 5(1) and 6(1), when conferred on an appropriate court, is judicial in character. That follows because:

      4.1.1. that function must be exercised for a protective purpose, and in accordance with tests and standards capable of judicial application;

      4.1.2. the court must exercise the function in a manner consistent with ordinary judicial processes.

   4.2. The consequence of those conclusions is that the Commonwealth Parliament could validly enact legislation in the same terms as the SCPO Act without contravening Ch III. It necessarily follows that the SCPO Act does not, in whole

or in part, contravene the principle derived from this Court's decision in *Kable v Director of Public Prosecutions (NSW)*[1] (**the *Kable* principle**).

4.3. Accordingly, Question 1 should be answered 'no' and Question 2 should be answered 'unnecessary to answer'.

The proper construction of the SCPO Act

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5. The plaintiffs summarise the relevant statutory provisions at **PS [10]-[21]** in a way that is not contentious. However, at **PS [22]-[31]**, they then make various submissions as to the construction of those provisions. The Commonwealth contends that, in the respects identified below, the plaintiffs' construction of those provisions should not be accepted.

6. The evident purpose of the SCPO Act is to protect the public by preventing, restricting or disrupting persons from engaging in serious crime related activities. The Act is clear in its terms in specifying (ss 5(1)(c), 6(1)):

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6.1. the broad purpose to 'protect the public' and, more precisely, the threat to the public to be guarded against ('involvement by ... persons in serious crime related activities') (collectively the '**protective purpose**');

6.2. the practical objective to be achieved to respond to the threat ('preventing, restricting or disrupting' such involvement); and

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6.3. the particular measures to be taken in order to achieve that practical objective and protect the public by addressing that threat, in the form of a serious crime prevention order (**SCPO**) that can be issued by an 'appropriate court' if certain conditions are satisfied.

7. Subsections 5(1) and 6(1) set out, respectively, the conditions of which the appropriate court must be satisfied before an SCPO can be made, and before particular prohibitions, restrictions, requirements or other provisions can be imposed on a person. The Second Reading Speech identified the kinds of measures that it was contemplated may be made by a court under an SCPO, including orders placing restrictions on 'an individual's financial, property or business dealings or holdings, working arrangements,

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[1] (1996) 189 CLR 51 (*Kable*).

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communications means, premises to which an individual has access, an individual's use of an item or an individual's travel.'[2] These are the kinds of measures in fact sought against the plaintiffs by the Commissioner in the Supreme Court proceedings (**SCB 2-3; Annexure 2**).

8. The Commonwealth submits that ss 5 and 6 of the SCPO Act, when read together, vest a discretionary power in an appropriate court to make an SCPO having particular content when the criteria set out in those provisions are satisfied. The statutory criteria involve both backward-looking and forward-looking inquiries. They involve a series of cumulative requirements. As such, the Court must be satisfied of the matters identified in s 5(1)(a) and (b) before it reaches the inquiries under s 5(1)(c) and 6(1). Within that framework, and as the defendants submit, the work performed by ss 5(1)(a) and (b) is to identify 'the classes of persons' against whom SCPOs can be made (**DS [11]**). Paragraph 5(1)(a) involves an inquiry into the existence of a prevailing fact (ie, that 'the person is 18 years old or older'). Paragraphs 5(1)(b)(i) and (ii) direct the appropriate court to backward-looking inquiries, by requiring the appropriate court to be satisfied, on the balance of probabilities according to the standard in *Briginshaw v Briginshaw*,[3] that the relevant person 'has been convicted of a serious criminal offence' (s 5(1)(b)(i)) or 'has been involved in serious crime related activity for which the person has not been convicted of a serious criminal offence' (s 5(1)(b)(ii)). The inquiries undertaken under each alternative limb of s 5(1)(b) both involve the relevant court assessing whether past facts ('has been') satisfy a statutory criterion so as to enliven the possibility of an order being made under the Act.

9. By contrast, ss 5(1)(c) and 6(1) involve forward-looking inquiries that are directed to the identification and mitigation of risk to the public. When properly construed, ss 5(1)(c) and 6(1) identify overlapping inquiries consisting of two steps (although in practice they are unlikely to be undertaken separately). ***First***, the court must engage in an evaluative inquiry under s 6(1) in order to determine the content of the SCPO. While that may at first sight appear to invert the relevant steps, the inquiry to be undertaken

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2 NSW, *Parliamentary Debates*, Legislative Assembly, 22 March 2016, 2 (Troy Grant).

3 (1938) 60 CLR 636 (*Briginshaw*). The proceedings on an application for an SCPO are not criminal proceedings, and the rules of evidence applicable in civil proceedings apply: s 13(2) of the SCPO Act.

under s 5(1)(c) can be answered only on the assumption that, if an SCPO is made, it will have a particular content[4] (cf **PS [26]-[27]**). That follows because, without knowing the proposed content of the SCPO, the court cannot rationally assess whether there are reasonable grounds to believe that making 'the order' would have the effect identified in s 5(1)(c). Accordingly, before deciding whether an SCPO will be made, the appropriate court must consider what prohibitions, restrictions, requirements and other provisions would be 'appropriate' for the purpose of protecting the public by preventing, restricting or disrupting the involvement of the potential subject of the order in serious crime related activity.

10. The requirement under s 6(1) that the court decide that the particular measures imposed pursuant to an SCPO are 'appropriate' requires the court to consider not just that those measures rationally advance the identified protective purpose, but also that the contribution they make to that purpose is not disproportionate to their impact on the liberty and property interests of the person affected (**DS [59]**); cf **PS [26]**).[5] For that reason, contrary to the plaintiffs' submissions (**PS [30]**), the statutory scheme does require the appropriate court to take account of the impact of the measures on the relevant persons and the extent to which the protective purpose justifies the taking of those measures. The NSW Supreme Court has correctly described the task as a 'balancing exercise ... between the need to protect the public ... and the restrictions that will be imposed on the defendants' activities'.[6] For that reason, as will be further developed below, the assessment that is required under s 6(1) is relevantly equivalent to that undertaken by the relevant court under s 104.4(1)(d) of the *Criminal Code* (Cth), which was considered and upheld by this Court in *Thomas v Mowbray*.[7]

11. ***Second***, having identified the measures that would be appropriate under s 6(1) were an SCPO to be made, the appropriate court must then consider whether it is 'satisfied'

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4 See *Commissioner of Police v Bowtell (No 2)* [2018] NSWSC 520 at [79] (Davies J) (*Bowtell*).

5 See, eg, the NSW Court of Appeal's consideration of the word 'appropriate' in s 87 of the *Trade Practices Act 1974* (Cth) in *Akron Securities v Iliffe* (1997) 41 NSWLR 353 at 366E, 368C, where Mason P (with Priestley JA agreeing) considered in that statutory context that the discretion to make 'appropriate' orders required consideration of 'all the circumstances', including the interests of the parties 'in moulding a just response'.

6 *Bowtell* [2018] NSWSC 520 at [81] (Davies J).

7 (2007) 233 CLR 307 (*Thomas*).

under s 5(1)(c) that there are 'reasonable grounds to believe' that the making of that order (ie, an SCPO containing all measures that the court thinks 'appropriate') 'would protect the public by preventing, restricting or disrupting involvement by the person in serious crime related activities'. That is, the subject matter of the requisite belief is that the proposed SCPO 'would' achieve the protective purpose. 'Would' is a word that connotes a 'real likelihood' or 'probability', rather than 'possibility'.[8] However, while 'would' is a strong word, Parliament has accommodated the inevitable uncertainty in any assessment about the future by conditioning the power to make an SCPO not on certainty as to the achievement of the protective purpose, but on the existence of 'reasonable grounds to believe' that the purpose would be achieved. A 'belief' is 'an inclination of the mind towards assenting to ... a proposition', which may 'leave something to surmise or conjecture'.[9] As such, an appropriate court has power to make an SCPO only if it has both: (i) actually formed the subjective belief that the SCPO would protect the public in the relevant sense; and (ii) done so on objectively reasonable grounds.[10] That is, the requisite belief to be formed is to the appropriate court's satisfaction on 'reasonable grounds'; the inquiry is not as to the 'state of belief in a reasonable person' (cf PS [25]).

12. The content of the 'reasonable grounds' standard is 'ascertained by regard to the subject, scope and purpose of the Act'.[11] As such, the facts that go to the existence of that belief include those that caused the prospective subject of the SCPO to fall within s 5(1)(b). In that way, the statute allows these matters to be taken into account in the discretionary assessment that must be undertaken under s 5(1)(c). But the mere fact of satisfying s 5(1)(b)(i) or (ii) alone will not be sufficient to give rise to the requisite standard of satisfaction for an exercise of power under s 5(1)(c). Paragraph 5(1)(c) is an

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8 See *Taylor v New South Wales* (1999) 46 NSWLR 322 at 332 [43] (Giles JA) and 338 [64] (Sheppard A-JA), and the dissenting judgments in *New South Wales v Taylor* (2001) 204 CLR 461 at 481 [63]-[64] (Kirby J) and 491 [100] (Callinan J). While the majority in this Court overturned the Court of Appeal, they neither approved nor disapproved the discussion of the meaning of 'would': see at 467 [14] (Gleeson CJ, McHugh and Hayne JJ). See also, *Australian Gas Light Company v Australian Competition and Consumer Commission* (2003) 137 FCR 317 at 414 [341] (French J).

9 *George v Rockett* (1990) 170 CLR 104 at 116.

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

11 *Wainohu v NSW* (2011) 243 CLR 181 at 230 [111] (*Wainohu*), where Gummow, Hayne, Crennan and Bell JJ dismissed a challenge to the use of the words 'sufficient grounds' to condition the making of a control order by the NSW Supreme Court under s 19(1)(b) of the *Crimes (Criminal Organisations Control) Act 2009* (NSW).

independent and critical limb in the statutory scheme.

13. In light of the forward-looking risk assessment to be undertaken by the appropriate court under ss 5(1)(c) and 6(1), the plaintiffs are simply incorrect to contend that 'the main requirement that must be established to obtain an SCPO is conviction of a serious criminal offence and/or involvement in a serious crime related activity' (cf **PS [31]**, see also at **[40]**). The hypothetical example provided by the plaintiffs (at **PS [27]**) appears to be based on that flawed premise.

The *Kable* principle

14. Recent majority statements by this Court have summarised the *Kable* principle in the following way:[12]

> The principle for which *Kable* stands is that because the *Constitution* establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid.

15. Except for two matters, the Commonwealth does not dispute the statements of principle set out by the plaintiff at **PS [32]-[35]**. The two caveats are as follows.

16. The first caveat concerns the proposition that 'the Constitution does not permit of "different grades or qualities of justice"' (**PS [33]**). That proposition has its foundations in *Kable*, where Gaudron J explained that, given the integrated judicial system established by Ch III, in which State courts could be repositories of federal jurisdiction, it followed that 'State courts are neither less worthy recipients of federal jurisdiction than federal courts nor "substitute tribunals"'. To put the matter plainly, there is nothing anywhere in the Constitution to suggest that it permits of different grades or qualities of justice, depending on whether judicial power is exercised by State courts or federal

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[12] *Attorney-General v Emmerson* (2014) 253 CLR 393 at 424 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (*Emmerson*); *Kuczborski v Queensland* (2014) 254 CLR 51 at 98 [139] (Crennan, Kiefel, Gageler and Keane JJ) (*Kuczborski*). See also *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 88 [122] (Hayne, Crennan, Kiefel and Bell JJ) (*Condon*); *Pollentine v Bleijie* (2014) 253 CLR 629 at 648 [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (*Pollentine*).

courts created by Parliament'.[13] Justice McHugh made the same point in observing that 'the Constitution contemplates no distinction between the status of State courts invested with federal jurisdiction and those created as federal courts. There are not two grades of federal judicial power'.[14] In making the above comments, Gaudron J and McHugh J were explaining the constitutional foundation for placing limits on State Parliaments with respect to State courts. They were not purporting to identify a meaningful measure of those limits. Further, their focus was upon denying the existence of grades of justice as between federal and State courts. As such, the plaintiffs take their Honours' remarks entirely out of context in deploying them to attack an asserted distinction between two different kinds of jurisdiction conferred by a State on its own courts. Furthermore, the plaintiffs' deployment of the 'different grades or qualities of justice' statement as if it were a free-standing measure of invalidity (**PS [48]-[56]**) runs the risk of 'imply[ing] into the Constitutions of the States the separation of judicial power mandated for the Commonwealth by Ch III'.[15] That would be a 'serious constitutional mistake'.[16] For State courts, the 'essential notion' in testing validity remains 'that of repugnancy to or incompatibility with that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system'.[17]

17. The second caveat is that, while the plaintiffs correctly acknowledge that public confidence is 'not the *Kable* test' (cf **PS [39]**), they then proceed to apply it as a criterion of invalidity (**PS [41]-[42], [47]**). They never go beyond public confidence, by developing how the SCPO Act is said to undermine the institutional integrity of the 'appropriate courts'. Their submissions therefore are not consistent with authority that

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13 *Kable* (1996) 189 CLR 51 at 103. That statement has been referred to on a number of occasions: see *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617 [101] (Gummow J) (*Fardon*); *Wainohu* (2001) 243 CLR 181 at 228-9 [105] (Gummow, Hayne, Crennan and Bell JJ); *Condon* (2013) 252 CLR 38 at 89 [123] (Hayne, Crennan, Kiefel and Bell JJ).

14 *Kable* (1996) 189 CLR 51 at 115 (McHugh J).

15 *Fardon* (2004) 223 CLR 575 at 614 [86] (Gummow J); *Condon* (2013) 252 CLR 38 at 89 [124] (Hayne, Crennan, Kiefel and Bell JJ). See also *Pollentine* (2014) 252 CLR 629 at 649 [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

16 *Fardon* (2004) 223 CLR 575 at 598 [36] (McHugh J). See also *Condon* (2013) 252 CLR 38 at 89 [124]-[125] (Hayne, Crennan, Kiefel and Bell JJ).

17 *Fardon* (2004) 223 CLR 575 at 617 [101] (Gummow J); *Condon* (2013) 252 CLR 38 at 89 [123] (Hayne, Crennan, Kiefel and Bell JJ).

has disfavoured public confidence as a useful criterion for establishing validity.[18]

Application of *Kable*

18. The plaintiffs contend that the SCPO Act infringes the *Kable* principle on three principal bases (which overlap). They contend that it (**PS [36]**):

    18.1. undermines the criminal justice system of the State courts (**the first submission**);

    18.2. requires or enlists the relevant courts in administering a different and lesser grade of criminal justice, doing so at the discretion of the executive (**the second submission**); and

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

19. Each of those submissions ought be rejected. As will be developed, the function conferred by the SCPO Act could be conferred on courts by the Commonwealth Parliament and, *a fortiori*,[19] the conferral of it by the New South Wales Parliament on State courts does not infringe the *Kable* principle.

First argument: The power to make an SCPO for a protective purpose does not undermine the criminal justice system

20. It is well-accepted that there are powers that are neither exclusively judicial nor exclusively non-judicial, and that take their character from the body in which they are reposed.[20] In *Thomas*, Gleeson CJ treated the power to issue a control order as an example of a 'governmental power that is sometimes exercised legislatively, sometimes

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18 *Fardon* (2004) 223 CLR 575 at 592-3 [21] (Gleeson CJ), 617 [102] (Gummow J), 629-30 [144] (Kirby J); *South Australia v Totani* (2010) 242 CLR 1 at 49 [73] (French CJ), 82 [206] (Hayne J), 96 [245] (Heydon J) (*Totani*); *Moti v The Queen* (2011) 245 CLR 456 at 494-6 [100]-[101] (Heydon J).

19 *Bachrach (HA) Pty Ltd v Queensland* (1998) 195 CLR 547 at 562 [15] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181 at 186 [10] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); *Baker v The Queen* (2004) 223 CLR 513 at 526-7 [22]-[24] (McHugh, Gummow, Hayne and Heydon JJ); *Condon* (2013) 252 CLR 38 at 90 [126] (Hayne, Crennan, Kiefel and Bell JJ).

20 See, eg, *Pasini v United Mexican States* (2002) 209 CLR 246 at 253-4 [12] (Gleeson CJ, Gaudron, McHugh and Gummow JJ) (*Pasini*).

administratively, and sometimes judicially'. His Honour said:[21]

> Deciding whether a governmental power or function is best exercised administratively or judicially is a regular legislative exercise. If, as in the present case, Parliament decides to confer a power on the judicial branch of government, this reflects a parliamentary intention that the power should be exercised judicially, and with the independence and impartiality which should characterise the judicial branch of government.

21. When a power to make orders for a protective purpose of the kind conferred by s 5(1) of the SCPO Act is conferred on a court and is exercised in accordance with judicial process, that power is judicial in character.[22] In *Thomas*, that conclusion was supported in part by the fact that the imposition by a court of 'preventative restraints on liberty by judicial order'[23] is a function that historically has been exercised by courts.[24] For example, binding over orders were historical exercises of power by judicial officers that 'support a notion of protection of public peace by preventative measures imposed by court order, but falling short of detention in the custody of the State'.[25] These matters point strongly (perhaps decisively) against the conferral of the power by s 5 of the SCPO Act being contrary to the *Kable* principle.

22. Like the legislative regimes upheld in *Thomas* and *Fardon*, the power to make an SCPO is protective not punitive.[26] So much appears expressly from the terms of ss 5(1)(c) and 6(1). As such, the regime forms part of the system of 'preventative justice',[27] rather than some parallel or lesser form of criminal justice. That is so even if an SCPO may 'impose significant restrictions on liberty' (cf **PS [54]**). However, two points should be made in that regard.

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21 See *Thomas* (2007) 233 CLR 307 at 326-7 [12], see also at 327-9 [13]-[17] (Gleeson CJ).

22 *Thomas* (2007) 233 CLR 307 at 327-9 [15]-[16] 334 [28] (Gleeson CJ), 355 [109]-[110] (Gummow and Crennan JJ), 507-8 [595]-[596] (Callinan J), (Heydon J agreeing at 526 [651]); *Condon* (2013) 252 CLR 38 at 96 [143] (Hayne, Crennan, Kiefel and Bell JJ); *Wainohu* (2011) 243 CLR 181 at 230 [111] (Gummow, Hayne, Crennan and Bell JJ).

23 *Thomas* (2007) 233 CLR 307 at 330 [18] (Gleeson CJ).

24 See also *Totani* (2010) 242 CLR 1 at 50-1 [76] (French CJ): '[t]he control order is an order of the kind which, in its effect upon personal liberty, is ordinarily within the domain of judicial power'.

25 *Thomas* (2007) 233 CLR 307 at 357 [121] (Gummow and Crennan JJ). See also at 328-9 [16] (Gleeson CJ), 507 [595] (Callinan J).

26 *Thomas* (2007) 233 CLR 307 at 356-7 [115]-[121] (Gummow and Crennan JJ); *Fardon* (2004) 223 CLR 575 at 592 [19]-[20] (Gleeson CJ), 597 [34] (McHugh J), 653-4 [215]-[217], 655 [219] (Callinan and Heydon JJ). See also *Hogan v Hinch* (2011) 243 CLR 506 at 548 [69] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Falzon v Minister for Immigration* (2018) 262 CLR 333 at 344 [33] (Kiefel CJ, Bell, Keane and Edelman JJ).

27 Blackstone, *Commentaries on the Laws of England* (1769), Bk IV, 248, quoted in *Thomas* (2007) 233 CLR 307 at 329 [16] (Gleeson CJ).

23. ***First***, the phrase 'restrictions on liberty' does not align with the relevant constitutional criterion derived from Ch III, which was identified in *Lim* as turning on 'detention in custody'.[28] Even if the SCPO Act authorises orders that require a person to remain at a specified address for specified periods (a matter that need not be determined, given that no such order has been sought:[29] **DS [41]-[42]**), it clearly does not authorise 'detention in custody' of the kind that would require further examination against the principle in *Lim*. So much is confirmed by *Thomas*, where this Court observed, in the course of upholding Commonwealth legislation that authorised the imposition of a control order that required the plaintiff to remain at a specified address for a lengthy period each day, that '[d]etention in the custody of the State differs significantly in degree and quality'[30] from the restraints of liberty that arose from the control order. *Thomas* therefore illustrates that, even if a restriction on liberty effected by an SCPO is 'substantial'[31] (cf **PS [29]**), that is not sufficient to attract the principle that such a restriction can be imposed only following a determination of criminal guilt.

24. ***Second***, even if (contrary to the above) the SCPO Act did authorise orders that would result in 'detention in custody', it would not follow that it was contrary to the *Kable* principle. That is demonstrated by *Fardon*, where a power conferred on a court to make orders for preventive detention in a prison after a criminal sentence had expired was upheld, having regard to its protective purpose.[32] *Fardon* is one case in a line of authority that indicates that legislation can validly authorise the imposition of detention in custody otherwise than in the exercise of the judicial power following a determination of criminal guilt, provided that is done for a non-punitive purpose.[33]

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28 Cf *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ) (*Lim*); *Duncan v New South Wales* (2015) 255 CLR 388 at 407 [41] (the Court) (*Duncan*).

29 *Knight v Victoria* (2017) 261 CLR 306 at 324-5 [32]-[33] (the Court); *Clubb v Edwards* (2019) 93 ALJR 448 at 466 [36] (Kiefel CJ, Bell and Keane JJ); 479-80 [135]-[138] (Gageler J), 519 [329]-[330], 520 [336] (Gordon J), 541 [443] (Edelman J).

30 *Thomas* (2007) 233 CLR 307 at 356 [115] (Gummow and Crennan JJ), with the agreement of Callinan J (at 509 [600]) and Heydon J (at 526 [651]).

31 *Thomas* (2007) 233 CLR 307 at 330 [18] (Gleeson CJ).

32 (2004) 223 CLR 575 at 592-3 [19]-[24] (Gleeson CJ), 596-7 [34] (McHugh J), 621 [114]-[115] (Gummow J), 648 [198] (Hayne J), 658 [234] (Callinan and Heydon JJ).

33 See, eg, *Al-Kateb v Godwin* (2004) 219 CLR 562 at 584 [45] (McHugh J), 650-651 [267] (Hayne J, with whom Heydon J agreed at 662-3 [303]-[304]), 660 [294] (Callinan J); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 25-6 [60] (McHugh J), 85 [261]-[263] (Callinan J); *Duncan* (2015) 255

25. Nothing about the criteria specified under ss 5(1)(c) and 6(1) (the forward-looking inquiries) undermines the criminal justice system. Indeed, those provisions are not relevantly distinguishable from those held by this Court to be valid on numerous occasions.[34] Pursuant to those provisions, an appropriate court is required to assess, on the balance of probabilities according to the *Briginshaw* standard, the threat that is posed to the public, on the basis of a prediction about a person's future involvement in serious crime related activities, and the measures that are 'appropriate' to respond to that threat. It must assess whether there are 'reasonable grounds' for a belief that the SCPO 'would' achieve the protective purpose (ie, a high level of likelihood) by reducing that threat. The authorities just cited establish that risk assessments and predictions of this kind, based on the evidence and informed by common knowledge and the consequences of making an order, are not foreign to the judicial function. (cf **PS [58]**).

26. Similarly, the evaluative exercise required to be undertaken in determining whether a measure is 'appropriate' pursuant to s 6(1) involves the court in a familiar exercise of considering whether the protective purpose justifies the burden placed on the affected person's liberty and property interests. Statutory formulae such as 'appropriate' are commonly employed[35] to condition the exercise of a power by a court where it is intended that judicial discretion should not be confined by precise definition or criteria.[36] Such criteria are not 'so indefinite as to be insusceptible of strictly judicial application'.[37] Indeed, '[b]roadly stated standards are commonplace in statutes and in the common law' and '[g]iven a broad standard, the technique of judicial interpretation

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CLR 388 at 409-410 [47]-[50] (the Court). Justice Gummow's reasons to the contrary in *Fardon* (2004) 223 CLR 575 at 613 [84] (which were adopted by Gummow and Crennan JJ in *Thomas* (2007) 223 CLR 307 at 356 [114]-[115]) have not been accepted by a majority of the Court, and are not consistent with the *Lim* analysis.

34 *Thomas* (2007) 233 CLR 307 at 328-9 [15]-[16] (Gleeson CJ), 347-8 [79], 351 [92] (Gummow and Crennan JJ), 508 [597] (Callinan J); *Wainohu* (2011) 243 CLR 181 at 230 [111] (Gummow, Hayne, Crennan and Bell JJ); *Fardon* (2004) 223 CLR 575 at 593 [22] (Gleeson CJ), 597 [34] (McHugh J), 657 [225] (Callinan and Heydon JJ).

35 See, eg, s 87 of the *Competition and Consumer Act 2010* (Cth). The defendants have identified other examples at DS [56]. See also *Judiciary Act 1903* (Cth), s 40(4) (removal of causes), s 68(5A) (court of a State may decline to exercise jurisdiction in relation to the summary conviction of certain persons).

36 *Thomas* (2007) 233 CLR 307 at 328 [15], 331-4 [20]-[28] (Gleeson CJ), 347 [78] (Gummow and Crennan JJ); *Condon* (2013) 252 CLR 38 at 96 [143] (Hayne, Crennan, Kiefel and Bell JJ).

37 *Hogan v Hinch* (2011) 243 CLR 506 at 551 [80] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

is to give it content and more detailed meaning on a case by case basis'.[38]

27. Nor is there anything in the backward-looking inquiries that are required under s 5(1)(b) of the SCPO Act that undermines the criminal justice system.

28. As to the condition under s 5(1)(b)(i), it is clearly permissible for either a federal or State court to be required by legislation to determine whether a person has previously been convicted of a criminal offence, for the purpose of identifying the relevant class of persons in relation to whom a power may be exercised. Such a requirement was, for example, upheld in *Fardon*,[39] where the Supreme Court of Queensland was authorised to make a continuing detention order against persons who had been convicted of certain serious sexual offences. Similarly, in *Emmerson*,[40] the Court upheld provisions under which the Supreme Court of the Northern Territory was authorised to declare a person to be a 'drug trafficker' if satisfied that the person had been found guilty of certain offences within a specified period, with the consequence that forfeiture provisions were thereby attracted. Chief Justice French and Justices Hayne, Crennan, Bell and Keane considered that the function conferred on the court was 'an unremarkable example of conferring jurisdiction on a court to determine a controversy between parties which, when determined, will engage stated statutory consequences'.[41] That must be even more so where consideration of whether a previous offence has been committed gives rise not to immediate statutory consequences (as in *Emmerson*), but to a discretionary judgment by the court as to whether and what order should be made (as is the case under ss 5(1)(c) and 6(1) of the SCPO Act).

29. Given the above, it is not surprising that the plaintiffs focus their attack particularly on s 5(1)(b)(ii). The legal operation of that condition turns on the definitions of being 'involved in serious crime related activity' (s 4), and of 'serious crime related activity' (s 3), each of which have multiple limbs. Having regard to those definitions, the

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38 *Condon* (2013) 252 CLR 38 at 54 [23]-[24], quoting from Zines, *The High Court and the Constitution* (1997, 4th ed) at 195. See also *Baker v R* (2004) 223 CLR 513 at 532 [42] (McHugh, Gummow, Hayne and Heydon JJ) and *Thomas* (2007) 233 CLR 307 at 351 [91] (Gummow and Crennan JJ).

39 (2004) 223 CLR 575.

40 (2014) 253 CLR 393.

41 (2014) 253 CLR 393 at 431 [60]. That was so even though 'the determination of whether the statutory criteria are satisfied may readily be performed, because of the ease of proof of the criteria' (at 433 [65]).

Commonwealth makes two points.

30. ***First***, irrespective of whether or not a person has been or may be charged, and if charged whether the person has been convicted or acquitted, the task of the court in applying s 5(1)(b)(ii) is not to determine, in accordance with the criminal standard of proof, whether conduct has or will constitute a criminal offence, so as to attract a penal sanction (cf **PS [42]**). Instead, in all cases that task is to determine, on the balance of probabilities, whether specified conduct satisfies a specific statutory test, so as to enliven a statutory discretion to make an order for the express purpose of protecting the public. The fact that the statutory test is expressed in part by reference to satisfaction as to the commission of a crime of which a person has not been convicted does not present any constitutional difficulty. This Court has held on several occasions that an administrative body can be required, without any contravention of Ch III, to determine whether it is satisfied that a person has committed a crime as a step in the exercise of a statutory power.[42] That being the case, there is no reason why a power that is conferred on a court cannot be conditioned in the same way. Where a civil court makes a protective order having been satisfied to the civil standard that a crime was committed, the result 'would not be, in form or in substance, the imposition of punishment for the commission of an offence against a Commonwealth, State or Territory law' nor would it be 'declaring or enforcing any existing criminal liability'[43] (cf **PS [42]**). The difference between the criminal and civil standards of proof, and the protective rather than punitive purpose of the SCPO Act, denies the plaintiffs' argument that any conclusion of the civil court under s 5(1)(b)(ii) that 'serious crime related activity' has occurred would be inconsistent with, or would undermine, any verdict of a criminal court with respect to the same alleged conduct.[44] That is clearly illustrated by *Thomas*, where the issuing court made the interim control order that was at issue in that case very shortly after Mr Thomas' conviction on terrorism related charges had been quashed on appeal, without there being any suggestion that the making of that order undermined the verdict of the criminal court.

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42 See, eg, *Duncan* (2015) 255 CLR 388 at 407-8 [41]-[42] (the Court); *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at 371-2 [33] (French CJ, Hayne, Kiefel, Bell and Keane JJ), 380 [63], 386 [79] (Gageler J) (*Today FM*).

43 Adapting the words of Gageler J in *Today FM* (2015) 255 CLR 352 at 386 [79] (Gageler J).

44 See, eg, *R v Darby* (1982) 148 CLR 668 at 677 (Gibbs CJ, Aickin, Wilson and Brennan JJ).

31. ***Second***, the determinations that can be made under s 5(1)(b)(ii) are not limited to whether past conduct is or was at the time a serious criminal offence: they extend to a wider set of inquiries directed to whether a person has engaged in conduct that has 'facilitated' another person engaging in serious crime related activity or 'is likely to facilitate' that activity 'whether by the person or another person' (s 4(1)(b) and (c)). Quite plainly, the conduct caught by these provisions may not itself constitute a criminal offence, which illustrates that the SCPO regime is not an alternative way to punish the conduct identified in s 5(1)(b)(ii). The fact that s 5(1)(b)(ii) extends to conduct 'that has facilitated' or 'is likely to facilitate' serious crime related activity confirms that it is directed to the consequences of the conduct, so as to empower the taking of protective measures. It is not an indirect means of establishing criminal guilt.

32. It is of no consequence to the validity of the SCPO Act that it potentially applies to persons who have committed a broad range of criminal offences, by reason of the width of the definition of 'serious criminal offence'[45] (cf **PS [41], [50]-[51]**). While Parliament may choose to enact a protective regime that focuses on a relatively narrow group or risk, it is not required to confine itself in that way. While the legislation that was upheld in *Fardon* was an example of a narrowly focused regime, nothing in that case suggests that the fact that that regime was confined to persons who had committed a 'serious sexual offence'[46] was important to its validity. To the contrary, reflecting a judgment that is constitutionally open to the legislature,[47] protective regimes have been enacted with broader coverage and their validity has been upheld. Indeed, in *Wainohu* and *Condon*, this Court has already considered two regimes that were directed to protecting the public from 'serious criminal activity'.[48]

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45 Section 3 of the SCPO Act provides that the 'serious criminal offence' has the same meaning as in the *Criminal Assets Recovery Act 1990* (NSW).

46 Defined as 'an offence of a sexual nature … involving violence or against children': *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), ss 3, 5(6), Schedule.

47 See *Kuczborski* (2014) 254 CLR 51 at 116 [217] (Crennan, Kiefel, Gageler and Keane JJ); *Magaming v The Queen* (2013) 252 CLR 381 at 397-8 [50]-[52] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 413-4 [103]-[108] (Keane J).

48 See also *Totani* (2010) 242 CLR 1 at 65 [140], where Gummow J said of s 18 of the *Criminal Organisation Act 2009* (Qld): '[i]t conditions the power of the court upon its satisfaction that the respondent engages in, or has engaged in, serious criminal activity'. See also at 159 [434] (Crennan and Bell JJ) where their Honours contrast the impugned provision with s 14(2) of the Act and the provisions considered in *Thomas*.

32.1. *Wainohu* concerned s 9(1) of the *Crimes (Criminal Organisations Control) Act 2009* (NSW), which empowered an eligible judge to make a declaration if satisfied that members of an organisation associated for the purpose of engaging in 'serious criminal activity' and 'represented a risk to public safety and order'. If such a declaration was made, the New South Wales Supreme Court was then authorised by Pt 3 of that Act to impose control order measures on a member of a declared organisation. 'Serious criminal activity' was defined broadly to include obtaining material benefits from conduct that constitutes a serious indictable offence or a serious violence offence. While s 9(1) was held invalid on the basis that the eligible judge was not required to give reasons, Gummow, Hayne, Crennan and Bell JJ considered that 'similar functions to those of the eligible judge ... could be susceptible of exercise under federal law by a Ch III court'.[49] A challenge to Pt 3 of the Act was otherwise rejected by the Court.[50] As such, *Wainohu* is directly contrary to the plaintiffs' contention that the operation of the SCPO Act with respect to 'serious criminal offences' bespeaks invalidity.

32.2. *Condon* concerned s 10 of the *Criminal Organisation Act 2009* (Qld), which empowered the Queensland Supreme Court to declare an organisation to be a criminal organisation if satisfied that its members associated for the purpose of engaging in 'serious criminal activity' and the organisation presented 'an unacceptable risk to the safety, welfare or order of the community'. In considering whether to make such a declaration, the Court was required to consider information suggesting that current or former members have been, or are, involved in 'serious criminal activity'. That expression was defined to mean a 'serious criminal offence', which included an indictable offence punishable by at least 7 years imprisonment and an extensive range of offences included in Schedule 1 to that Act. Once a declaration were made, the Court could then impose control order measures under s 18(1) on a member of the organisation if satisfied that the person 'engages in, or has engaged in, serious criminal activity' and 'associates with any member of a criminal organisation for the purpose of

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49 *Wainohu* (2011) 243 CLR 181 at 225 [91] citing *Pasini* (2002) 209 CLR 246 at 253-4 [12] (Gleeson CJ, Gaudron, McHugh and Gummow JJ).

50 *Wainohu* (2011) 243 CLR 181 at 230 [110]-[111] (Gummow, Hayne, Crennan and Bell JJ).

engaging in, or conspiring to engage in, serious criminal activity'. The Court was also empowered under s 18(2) to impose a control order upon any person who was not a member of the organisation who otherwise satisfied those conditions. The validity of the legislation was upheld. Justices Hayne, Crennan, Kiefel and Bell rejected a submission that the criterion in s 10 of 'an unacceptable risk to the safety, welfare or order of the community' presented a question that was not suitable for judicial determination, holding that that submission was contrary to the decisions in *Fardon* and *Thomas* 'and the reasoning that underpinned them'. Their Honours concluded:[51]

> To determine whether a disfavoured status should be accorded to an organisation based on an assessment of what its members have done, are suspected of having done, and may do in the future is not different in any relevant way from the tasks held to be validly assigned to courts by the legislation in issue in those cases. Courts are often called on to make predictions about dangers to the public.

33. There is no substance in the argument that the SCPO Act is invalid by reason of the possibility that a person subject to an application for an SCPO may be subject to parallel civil or criminal proceedings (cf **PS [44]-[45]**). That is not a novel feature of the justice system.[52] Any unfairness that may arise can be appropriately managed by the relevant courts in the ordinary way. In particular, as the 'appropriate court' must be the Supreme Court in any case where an SCPO is sought on the basis of s 5(1)(b)(ii), any unfairness that might arise from a finding that a person has been involved in serious crime related activity in circumstances that the prosecution of a criminal offence is pending or not yet commenced could, if necessary, be addressed by the Supreme Court exercising its inherent jurisdiction to order a permanent stay of the SCPO Act proceeding to prevent an abuse of its process.[53]

34. ***Finally***, for completeness, the plaintiffs' submissions in relation to s 80 of the Constitution are misplaced (**PS [43], [62]**). To the extent that the appropriate court considers the limb of the definition of 'serious criminal offence' that includes 'an

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51 *Condon* (2013) 252 CLR 38 at 96 [143].

52 A number of Commonwealth statutory schemes contemplate that substantially the same conduct might be the subject of both criminal and civil proceedings, eg the *Corporations Act 2001* (Cth), *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and *Competition and Consumer Act 2010* (Cth).

53 *Emmerson* (2014) 253 CLR 393 at 432 [63], [64], 435 [72] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Condon* (2013) 252 CLR 38 at 115 [212] (Gageler J).

offence under the law of the Commonwealth',[54] it does not, for the reasons already addressed, engage in the adjudgment and punishment of criminal guilt, and therefore cannot undermine the jury's constitutional role under s 80. In any event, that limb of the definition of 'serious criminal offence' does not give an appropriate court any role in determining that a Commonwealth offence has been committed. It is simply a deeming provision that operates to extend the coverage of the SCPO Act to include offences under Commonwealth (and other State and Territory) laws that would have been NSW offences of the kind identified in that provision if committed in NSW.

35. In summary, the SCPO Act does not undermine the criminal justice system in New South Wales. It confers on the appropriate courts a judicial function that involves the application of standards capable of judicial application. That function can validly be performed in civil proceedings in pursuit of a protective purpose. The submission to the contrary is inconsistent with authorities that are not distinguishable.

Second argument: There is no enlistment of the courts to act at the discretion of the executive in administering a different and lesser grade of criminal justice

36. The plaintiffs' second submission is premised on the contention that the SCPO Act authorises a lesser grade of criminal justice (cf **PS [48]**). However, for the reasons already addressed, the SCPO Act, has a protective purpose. It does not involve any kind of criminal justice, let alone a 'lesser grade' thereof. As such, the premise of the plaintiffs' second submission is unsound, and the submission must fail.

37. Nor is there anything in the SCPO Act to indicate that the court has been enlisted by or is required to act at the discretion or behest of the executive (cf **PS [36](b), [48]**). In particular, the SCPO Act does not suffer from the same vice as the control order schemes in *Totani* or *Wainohu*, being schemes that this Court held created impermissible relationships between the executive governments and courts in question. An impermissible relationship is not created by merely authorising instrumentalities of the executive government to make discretionary judgments about which persons should

[54] SCPO Act s 3, referring to the *Criminal Assets Recovery Act 1990* (NSW) s 6(2)(i).

be subject to applications for control orders under the Act[55] (cf **PS [49]**). Both *Thomas* and *Condon* illustrate that point, as in both cases proceedings for control orders had to be instituted by officers of the executive.[56]

38. Once an application for an SCPO is made, no further role is played by the executive in the decision-making process. The appropriate courts are left with discretion as to whether to make an order[57] and, if an order is to be made, with responsibility to make the evaluative judgment necessary to decide for themselves the content of the order that would be 'appropriate' in pursuit of the identified protective purpose.

Third argument: The SCPO Act retains all the incidents of the judicial process

39. The conferral of jurisdiction under the SCPO Act on the Supreme Court (or, where relevant, the District Court) under s 5(1) brings with it all of the usual incidents of the exercise of that Court's jurisdiction.[58] As such, a court hearing an application under the SCPO Act must exercise its power in a judicial manner by following a judicial process, in which natural justice is afforded, the burden of proof is on the applicant, and evidence can be led and the facts found to the extent necessary.[59] The fact that a court making a control order would follow ordinary judicial processes was significant to the reasoning in both *Fardon* and *Thomas*.[60] Indeed, as Gleeson CJ said in *Thomas*, 'the evident purpose of conferring this function on a court is to submit control orders to the judicial process, with its essential commitment to impartiality and its focus on the

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55 *Emmerson* (2014) 253 CLR 393 at 432 [61], 435 [72] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

56 *Criminal Code Act 1995* (Cth), s 104.3 and *Criminal Organisation Act 2009* (Qld), s 63(1).

57 The discretion in s 5(1) is akin to that given to the Magistrates Court by s 14(2) of the *Serious and Organised Crime (Control) Act 2008* (SA), about which Gummow J said in *Totani*: '[the provision] uses the term "may" to confer a discretion rather than a power with a duty to exercise it if the requisite satisfaction is attained by the Court': *Totani* (2010) 242 CLR 1 at 55 [97].

58 *Electric Light and Power Supply Corporation Ltd v Electricity Commission (NSW)* (1956) 94 CLR 554 at 559-60 (the Court); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 (*Gypsy Jokers)* at 555 [19] (Gummow, Hayne, Heydon and Kiefel JJ); *Wainohu* (2011) 243 CLR 181 at 230 [111] (Gummow, Hayne, Crennan and Bell JJ).

59 *Cominos v Cominos* (1972) 127 CLR 588 at 599 (Gibbs J); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [56]-[57] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

60 *Fardon* (2004) 223 CLR 575 at 592 [19]-[20] (Gleeson CJ), 596-7 [34], 602 [44] (McHugh J), 614-7 [90], [93]-[99], 621 [115]-[116] (Gummow J), 655-6 [219], 657 [225] (Callinan and Heydon JJ); *Thomas* (2007) 233 CLR 307 at 335 [30] (Gleeson CJ), 355-6 [111]-[113] (Gummow and Crennan JJ), 508 [598] (Callinan J).

justice of the individual case'.[61]

40. The ordinary requirements of the judicial process summarised above are supplemented and confirmed by specific provisions in the SCPO Act that require the person against whom an SCPO is sought to be given sufficient notice of the application (s 5(3)), and that entitle that person to appear at the hearing of that application and to make submissions (s 5(4)). Further, the Act expressly provides a right of appeal (s 11(2)),[62] and the appropriate court retains the power to vary or revoke an order at any time (s 12).[63] Nor is there anything in the SCPO Act that requires the court to deny notice of the application to a person affected,[64] to keep information upon which the applicant relies secret,[65] or to depart from the ordinary duty of the court to provide reasons.[66] In light of the above, the SCPO Act clearly does not establish a 'distinct regime' so as to exclude those usual incidents of the judicial process and the rules that are applicable to civil proceedings.[67]

41. That the proceedings are deemed to be 'civil' in nature, rather than 'criminal', obviously does not imperil the Act's validity. Both the Commonwealth Parliament and State Parliaments can fix the standard of proof in new proceedings that they create without contravention of Ch III,[68] and where the civil standard is chosen the *Briginshaw* principle will calibrate that standard in the ordinary way.[69] A judicial process corresponding with that which would apply in proceeding for adjudgment and punishment of criminal guilt is not required for the Act to be valid (cf **PS [59]-[61]**).

42. The fact that s 5(5) of the SCPO Act provides that the appropriate court may admit or

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61 (2007) 233 CLR 307 at 335 [30].

62 See *Hogan v Hinch* (2011) 243 CLR 506 at 551 [83] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Emmerson* (2014) 253 CLR 393 at 434 [66] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

63 *Fardon* (2004) 223 CLR 575 at 620-1 [112]-[113] (Gummow J).

64 Cf *International Finance Trust Co Ltd v New South Wales* (2009) 240 CLR 319 (*IFTC*).

65 *Gypsy Jokers* (2008) 234 CLR 532; *Condon* (2013) 252 CLR 38.

66 Cf *Wainohu* (2011) 243 CLR 181.

67 Cf *IFTC* (2009) 240 CLR 319 at 350 [44] (French CJ), 361-2 [79]-[80] (Gummow and Bell JJ), 387-8 [162]-[165] (Heydon J). The rules of civil procedure will apply to the extent that they are applicable: *Civil Procedure Act 2005* (NSW) and the *Uniform Civil Procedure Rules 2005* (NSW).

68 *Thomas* (2007) 233 CLR 307 at 355-6 [113] (Gummow and Crennan JJ), 508 [598] (Callinan J); *Nicholas v The Queen* (1998) 193 CLR 173 (*Nicholas*).

69 *Thomas* (2007) 233 CLR 307 at 355 [113] (Gummow and Crennan JJ).

take into account hearsay evidence, provided it is satisfied that the evidence is 'from a reliable source and is otherwise relevant and of probative value' (s 5(5)(a)), is likewise irrelevant to the validity of the Act. It is well settled that the legislature can change the rules of evidence without contravening Ch III (**PS [59(c)]**).[70] As Brennan CJ said in *Nicholas*, '[a] law prescribing a rule of evidence does not impair the curial function of finding facts, applying the law or exercising any available discretion in making the judgment or order which is the end and purpose of the exercise of judicial power'.[71] Indeed, as was the case in *Nicholas*, the effect of s 5(5) is that the court determining an application under the SCPO Act will have more evidence upon which to make a determination than would otherwise be the case (if in fact the court exercises its discretion under the SCPO Act to admit the hearsay evidence), and it may then place such weight as is appropriate on that evidence.[72]

43. In truth, the success of the plaintiffs' third submission depends on the success of their other submissions (cf **PS [53], [57]**). Once it is recognised that the power to make an SCPO does not involve the imposition of punishment following a finding of criminal guilt, and that instead the SCPO Act confers a judicial power that is to be exercised for a protective purpose according to tests and standards capable of judicial application and in accordance with ordinary civil processes, the plaintiffs arguments fall away.

PART V ESTIMATE OF TIME

44. It is estimated that 45 minutes will be required to present the Commonwealth's oral argument.

Dated: 22 July 2019

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70 *Nicholas* (1998) 193 CLR 173.
71 *Nicholas* (1998) 193 CLR 173 at 189 (Brennan CJ).
72 See *Condon* (2013) 252 CLR 38 at 102 [166] (Hayne, Crennan, Kiefel and Bell JJ).