

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



**OUTLINE OF ORAL SUBMISSIONS OF THE  
ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**

**PART I: Internet publication**

1. This outline is in a form suitable for publication on the Internet.

**PART II: Outline of propositions**

**Relevance of preventive construction of the SCPO scheme**

2. Central to the plaintiffs' case is a submission that proceedings on an application for a Serious Crime Prevention Order (SCPO) are directed to the same purpose as criminal proceedings: the adjudging and punishment of criminal guilt.  
  
- Qld [8]-[9], DS [7], Cth [43], SA [4.3], Vic [53].
3. Notwithstanding that there may be overlap between 'protection' and 'punishment', as well as between civil and criminal proceedings (PR [6]-[7]), the characterisation of the SCPO scheme as adjudging and punishing criminal guilt remains essential to the plaintiffs' case which is based on there being an 'alternative criminal justice regime'.

Outline of oral submissions  
Filed on behalf of the Attorney-General for the  
State of Queensland  
Form 27F; Rule 44.08.2  
Dated: 6 August 2019  
Per Kent Blore  
Ref PL8/ATT110/3898/BLK  
Document No: 9419314

Mr GR Cooper  
CROWN SOLICITOR  
11<sup>th</sup> Floor, State Law Building  
50 Ann Street, Brisbane 4000

Telephone 07 3031 5619  
Facsimile 07 3031 5605

### Properly construed, the SCPO scheme is preventive

4. Properly construed, SCPOs are not directed to the purpose of adjudging and punishing criminal guilt. They are preventive in nature: Qld [12]-[15], [34].
5. Read in light of its context and purpose, the test of ‘appropriateness’ in s 6 requires the competing interests of the protection of the public and the liberty of the defendant to be taken into account when framing an SCPO, for three reasons:

10

- a. on an ordinary reading, ‘appropriate’ turns on the circumstances (including competing interests);
- b. ‘appropriate’ should be read in light of the principle of legality; and,
- c. to be ‘appropriate’, an SCPO must be framed so as to come within the limits set by the express ‘purpose of protecting the public’; an SCPO which goes too far in pursuit of a different purpose may be said to fall outside those limits.

20

- Qld [19]-[29], DS [59], Cth [10], SA [25]-[28], Vic [62(1)]. Cf PS [30], PR [3]-[4].
- *Cmmr of Police (NSW) v Bowtell [No 2]* [2018] NSWSC 520, [81]; *R v Hancox* [2010] 1 WLR 1434, 1437 [10] (**JBA 4.35, 1618**).
- See also test of appropriateness applied in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 625.

30

### Consequences of preventive construction

7. The SCPO scheme does not undermine the criminal justice system as it does not purport to authorise a court to adjudge and punish criminal guilt. Rather, the scheme operates by reference to a status and ‘then set[s] up its own normative structure’ directed to a preventive purpose.

- Qld [35], *Fardon v A-G (Qld)* (2004) 223 CLR 575, 610 [74] (**JBA 3.27, 1183**).

40

8. As the Court is not adjudging and punishing criminal guilt, the ‘fundamental principle’ and the ‘companion rule’ have a very limited role to play. Those principles are only engaged where there are parallel criminal proceedings on foot (that is, the person has been charged, and the charge has not been finalised). In any event, the court retains its powers to prevent an unfair trial or abuse of its processes.

- Qld [39]-[43], DS [30]-[31], Cth [33], Vic [44]. Cf PS [44]-[45], PR [11].

- *R’ v IBAC* (2016) 256 CLR 459, 472 [43] (**JBA 4.36, 1635**).

- *AFP v Zhao* (2015) 255 CLR 46, 60-1 [47], [49] (**JBA 3.24, 1091-2**).

9. The court is not required to deliver *any* grade of criminal justice, let alone a lesser one.

- Qld [44], Cth [16], [36], Vic [58]. Cf PS [48], PR [13].

- *Kable v DPP (NSW)* (1996) 189 CLR 51, 103 (**JBA 3.30, 1377**).

- *Wainohu v NSW* (2011) 243 CLR 181, 229 [105] (**JBA 5.43, 2215-6**). Cf PR fn 16.

10 10. The discretion to apply for an SCPO is not enlistment. It is indistinguishable from a discretion to apply for confiscation / civil forfeiture orders.

- Qld [46]-[48], DS [39], Cth [37], Vic [54], [59], WA [43]. Cf PS [55].

- *A-G (NT) v Emmerson* (2014) 253 CLR 393, 432-3 [61]-[64] (**JBA 2.18, 698-9**).

11. State courts are not required to apply a 'purely judicial standard'. In any event, the criterion of 'appropriateness' is sufficiently precise (especially given [5] above) to engage the exercise of judicial power.

20 - Qld [49]-[52], DS [55]-[56], Cth [26], SA [39]-[41]. Cf PS [58].

- *Fardon v A-G (Qld)* (2004) 223 CLR 575, 597 [34] (**JBA 3.27, 1170**).

12. Given that proceedings on application for an SCPO are not directed to punishment, it is unsurprising that they are not conducted as if they were criminal trials.

- Qld [53], Vic [62]. Cf PS [59].

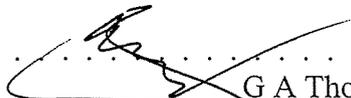
30 13. The *Kable* principle is not otherwise infringed: Qld [57], Vic [63].

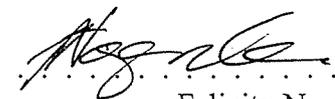
- *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 95-6 [140]-[143] (**JBA 2.17 636-7**).

14. The questions in the special case should be answered in favour of the defendants.

Dated: 6 August 2019.

40

  
G A Thompson QC  
Solicitor-General  
Telephone: 07 3180 2222  
Facsimile: 07 3236 2240  
Email: [solicitor.general@justice.qld.gov.au](mailto:solicitor.general@justice.qld.gov.au)

  
Felicity Nagorcka  
Counsel for the Attorney-General for the  
State of Queensland  
Telephone: 07 3224 7407  
Facsimile: 07 3239 6382  
Email: [felicity.nagorcka@crownlaw.qld.gov.au](mailto:felicity.nagorcka@crownlaw.qld.gov.au)