

BETWEEN:

DAMIEN CHARLES VELLA

First Plaintiff

JOHNNY LEE VELLA

Second Plaintiff

MICHAEL FETUI

Third Plaintiff

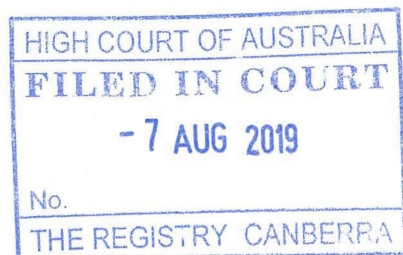
and

COMMISSIONER OF POLICE (NSW)

First Defendant

STATE OF NEW SOUTH WALES

Second Defendant



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OUTLINE OF ORAL ARGUMENT OF THE ATTORNEY-GENERAL FOR THE
STATE OF SOUTH AUSTRALIA (INTERVENING)

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Part I: Certification:

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

Part II: Outline of Propositions:

2. South Australia adopts the submissions of the Commonwealth in respect of the construction issue.
3. Further:
 - 3.1. In s 6(1) the word “appropriate” recognises a public interest in there being no greater curtailment of liberty than is sufficient to address the risk (WS [25]);
 - 3.2. The factum of historical serious crime related activity is unlikely to be sufficient to establish the risk contemplated by s 5(1)(c) (WS [28]);
 - 3.3. The parliamentary debates assist in the ordinary way in construing the word “appropriate” as importing proportionality.

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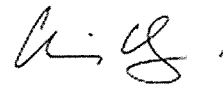
No freestanding concept of “undermining” the legal system

4. The plaintiffs’ challenge hinges on the proposition that sections 5 and 6 undermine “the criminal justice system”. This challenge is particularly abstract.
5. The existence of this “parallel” process does nothing to require the court to act in a manner that is inconsistent with the reality and appearance of its impartiality and independence. The test must focus on the institutional integrity of the court.
6. The plaintiffs’ characterisation of the scheme as a lesser grade of criminal justice is based on the existence of a factum of past criminal conduct and the prospect of orders that are in some sense restrictive of liberty. The construction exercise demonstrates the
10 inadequacy of this characterisation.

The scheme is protective

7. It remains meaningful to characterise the scheme as protective rather than punitive, this being a function of the purpose of the measure rather than its consequences or effects.
8. There is a principled distinction between protection of society as a material factor in fixing an appropriate sentence and protection of society by way of other legislative intervention to address social harms not caused by offending alone. The plaintiffs’ complaint, that the defendants and interveners simply note the purpose of the PO Act to answer the plaintiffs’ argument that the Act erects an alternative criminal justice regime, understates the primary significance of purpose in the functional assessment
20 required by *Kable* of the legal and practical operation of the PO Act (cf Reply [6]).

Dated: 7 August 2019



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CD Bleby