

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



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PLAINTIFFS' OUTLINE OF ORAL ARGUMENT

LawyersCorp Pty Ltd
Level 5, 233 Castlereagh Street
Sydney NSW 2000

Telephone: 0414 559 558
Fax: 02 9281 5596
Email: adam@lawyerscorp.com.au
Ref: 18303469

Birchgrove Legal
Level, 233 Castlereagh Street
Sydney NSW 2000

Telephone: 02 9018 1067
Fax: 02 8088 6173
Email: mkheir@birchgrovelegal.com.au
Ref: 191850

PART 1: PUBLICATION ON THE INTERNET

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

PART 2: PROPOSITIONS TO BE ADVANCED

Crimes (Serious Crime Prevention Orders) Act 2016 (NSW)

2. Note the terms of the Act.
3. SCPOs may contain a broad range of provisions substantially overlapping with the sentences that may be imposed in NSW under the *Crimes (Sentencing Procedure) Act 1999* (NSW): PS [28]-[29], Reply [5], [7].
4. The argument that the SCPO Act is “protective” not “penal” is based on a false premise.
10 The categories of punishment and protection are not mutually exclusive. The distinction
between “civil” and “criminal” proceedings is similarly elusive.
 - *Rich v ASIC* (2004) 220 CLR 129, [30], [32], [35]
 - *CEO Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161, [114]
5. Key features of the statutory scheme created by the SCPO Act, which inform its true character, are the following (see generally PS [49]-[54], [59]):
 - a. The scope of the offences covered by the legislation is extensive and covers most of the criminal offences in the *Crimes Act 1900* (NSW) and the indictable offences in the *Drug Misuse and Trafficking Act 1985* (NSW): PS [13]-[14], [50]. The offences range from the most serious to the relatively minor.
 - 20 b. The persons who may apply for a SCPO are the prosecuting authorities of the State (DPP and Commissioner of Police) and authorities who investigate crime to assist the DPP in prosecuting crime (Commissioner of Police and New South Wales Crime Commission): PS [49]; Reply [12].
 - c. The key criterion for the operation of the legislation is a finding of past criminal conduct (or facilitating such conduct). The forward-looking element that the the making of the SCPO will prevent, disrupt or restrict serious crime related activities is relatively readily satisfied: PS [22]-[28], [31]; Reply [3].
 - d. The legislation applies to persons who have been acquitted of an offence, or who have not been charged.
 - 30 e. The SCPO may extend for up to 5 years and may impose significant restrictions on liberty: PS [29].

- f. SCPOs substantially overlap with ordinary criminal sentences. The fact that SCPOs are not labelled as “sentences” and are said to be for “protecting the public” does not detract from their objective character as imposing punishment for past criminal conduct: Reply [6]-[7].
- g. There is no provision for any annual review of SCPOs, and to vary the order the person subject to it needs leave, which can only be granted if there has been a material change in circumstances. This supports the view that the Act is more concerned with past conduct, rather than the risk of future conduct.
- 10 h. The standard of proof is on the balance of probabilities, rather than the higher standard of proof beyond reasonable doubt: PS [58].
- i. The proceedings are before a judge alone, rather than a jury. That is so even though the legislation may apply to Commonwealth indictable offences to which s 80 of the Constitution applies: PS [52], [58].
- j. The proceedings are deemed to be civil proceedings so inferences may be drawn against a person who does not give evidence: PS[58].
- k. The civil, not the criminal, rules of evidence apply, and the ordinary civil rules of evidence are modified: PS [58].

Application of the Kable principle to the SCPO Act

- 20 6. What is incompatible with, or repugnant to, or “would substantially impair” a State’s court institutional integrity is incapable of precise definition: PS [33]. The application of the principle derived from *Kable* requires a close examination of the statutory scheme in issue.
7. Section 5 of the SCPO Act undermines the criminal justice system of New South Wales in substantial respects:
- a. The ability to impose an SCPO on a person *previously convicted and sentenced* for that offence – doing so at the instigation of State authorities – impermissibly undermines the finality of, and public confidence in, the sentencing process: PS [40]-[41].
- 30 b. The ability to impose an SCPO on a *person acquitted* of offences impermissibly undermines the finality of, and public confidence in, the system of criminal justice: PS [42]-[43]; Reply [9]. There is no analogy with cases where civil proceedings for damages are brought following an acquittal, or where a body is required to consider whether a person has committed a crime in the course of civil proceedings.

- *R v Carroll* (2002) 213 CLR 635

c. Proceedings to impose an SCPO on a *person charged, but not yet tried*, with an offence undermine the fundamental principle of the accusatorial system of justice that a person charged should not be required to testify or otherwise assist the prosecution: PS [44]-[47].

- *R v Independent Broad-Based Anti-corruption Commissioner* (2016) 256 CLR 459

10 d. Proceedings under the SCPO Act against a *person who has not been charged* undermine public confidence in the criminal justice system because it allows the prosecuting authorities to use the easier route of the SCPO Act instead: PS [47].

8. Having regard to the features of the legislative scheme identified, s 5 of the SCPO Act:

a. has the effect of requiring the relevant State courts to administer a different and lesser grade of criminal justice to those selected by the Executive for its application;

- *Wainohu v New South Wales* (2011) 243 CLR 181, [105]

b. can be used by the Executive as an alternative, and easier, route for the State to seek to punish and sentence those suspect of committing criminal offences; and

c. requires the Supreme Court and District Court to implement the decisions of the Executive as to which persons should and should not be entitled to the benefit of the ordinary protections of criminal justice: PS [48], [56]; Reply [6]-[7], [13]-[14].

20 9. None of the Court's previous decisions are determinative of the validity of the SCPO Act: PS [33]; Reply [10].

- *Kable v DPP (NSW)* (1996) 189 CLR 51, 106, 122, 124-125
- *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 610, 654
- *Thomas v Mowbray* (2007) 223 CLR 307, 330

Severance

10. No part of section 5 of the SCPO Act can be severed from the remainder of the Act: PS [63]-[64]; Reply [17].

6 August 2019

