HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

DAMIEN CHARLES VELLA & ORS PLAINTIFFS

AND

COMMISSIONER OF POLICE (NSW) & ANOR DEFENDANTS

Vella v Commissioner of Police (NSW)
[2019] HCA 38
Date of Hearing: 6 & 7 August 2019
Date of Judgment: 6 November 2019
S30/2019

ORDER

The questions of law referred to this Court in the special case should be answered as follows:

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

Answer: *No.*

Question 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?*

Answer: *Unnecessary to answer.*

Question 3: *Who should pay the costs of the special case?*

Answer: *The plaintiffs.*

Representation

J K Kirk SC with T O Prince for the plaintiffs (instructed by LawyersCorp Pty Ltd and Birchgrove Legal)

M G Sexton SC, Solicitor-General for the State of New South Wales, with S Robertson for the defendants (instructed by Crown Solicitor's Office (NSW))

S P Donaghue QC, Solicitor-General of the Commonwealth, with J S Stellios and S R Bateman for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

C D Bleby SC, Solicitor-General for the State of South Australia, with M E Boisseau for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor's Office (SA))

K L Walker QC, Solicitor-General for the State of Victoria, with R A Minson for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

J A Thomson SC, Solicitor-General for the State of Western Australia, with K J Chivers for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor's Office (WA))

G A Thompson QC, Solicitor-General of the State of Queensland, with F J Nagorcka for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

CATCHWORDS

Vella v Commissioner of Police (NSW)

Constitutional law (Cth) – Judicial power – *Constitution* – Ch III – State Parliament – Institutional integrity of State courts – Where s 5(1) of *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) provides that State court may make order if satisfied that specified person has been convicted of serious criminal offence or involved in serious crime related activity and satisfied that reasonable grounds to believe that making of order would protect public by preventing, restricting or disrupting involvement by that person in serious crime related activities – Where s 6(1) of Act provides that order against that specified person may contain such prohibitions, restrictions, requirements and other provisions as court considers appropriate for purpose of protecting public by preventing, restricting or disrupting involvement by that person in serious crime related activities – Where proceedings under Act are civil proceedings – Whether making order exercise of judicial power – Whether powers conferred by Act incompatible with State court's role as repository of federal judicial power – Whether powers conferred by Act substantially impair institutional integrity of State court.

Words and phrases – "appropriate", "balancing", "facilitates or is likely to facilitate", "future risk", "institutional integrity", "judicial power", "*Kable v Director of Public Prosecutions (NSW)*", "open-textured", "preventing, restricting or disrupting", "preventive orders", "real or significant risk", "reasonable grounds to believe", "risk assessment", "serious crime related activities", "serious criminal offence".

Constitution, Ch III.
Crimes (Serious Crime Prevention Orders) Act 2016 (NSW), ss 3, 5, 6.

1 KIEFEL CJ. The first question stated for the opinion of the Full Court is whether "[s] 5(1) of the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) [('the SCPO Act') is] invalid (in whole or in part) because it is inconsistent with and prohibited by Chapter III of the Constitution". It requires in the first place that s 5(1) be construed in order to determine its operation and what it requires an eligible court to do.

2 Section 5(1) provides:

> "An appropriate court may, on the application of an eligible applicant, make an order (a ***serious crime prevention order***) against a specified person if:
>
> (a) in the case of a natural person – the person is 18 years old or older, and
>
> (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
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> (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."

3 "Serious criminal offence" has the same meaning as in the *Criminal Assets Recovery Act 1990* (NSW) ("CARA"). It is not necessary to set out the definition[1]. It may simply be observed that it is very wide. "Involved in serious crime related activity" refers to the person having engaged in serious crime related activity, conduct that has facilitated another person's engagement in such activity, or conduct that is likely to facilitate such activity[2].

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1 CARA, s 6(2), (3) and (4).

2 SCPO Act, s 4(1).

4 Section 6(1) provides:

> "A serious crime prevention order may contain such prohibitions, restrictions, requirements and other provisions as the court considers appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person in serious crime related activities."

5 Were the operation of s 5(1) free from judicial interpretation at the time that it was enacted, I would have been inclined to a construction of s 5(1), according to its terms, which gives an eligible court such a limited role that it could be concluded that the court had been enlisted by the legislature to do the work of the executive[3]. If that conclusion were reached, the answer to Question 1 would be "Yes".

6 Before turning to the context provided by legislative history, I should outline the construction of s 5(1) which may give it the operation to which I have referred.

7 The scheme which ss 5(1) and 6(1) create comprehends an application to an eligible court for an order against an individual by an eligible applicant, such as the Commissioner of Police[4]. The order sought will contain, as s 6(1) requires, prohibitions, restrictions, requirements or other provisions such as will affect the person's freedom of movement and association.

8 So long as the person is at least 18 years of age and the court is satisfied that the person has been convicted of a serious criminal offence, or has been involved in some serious crime related activity, there remains only one other matter in s 5(1) of which a judge of an eligible court need be satisfied before an order is made. It is that "there are reasonable grounds to believe that the making of the order" would prevent, restrict or disrupt involvement by the person in serious crime related activities. The question under s 5(1) for the eligible court is as to the efficacy of the proposed order, and no more.

9 Section 5(1) does refer to the protection of the public, but it does so in a way which assumes both that that is necessary and that it may be achieved by the making of the order. The need to protect the public follows, inferentially, from the fact of conviction or a finding of involvement in crime and from there being no enquiry as to the risk to the public to be undertaken by the court. The enquiry

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3 *South Australia v Totani* (2010) 242 CLR 1.

4 And also the Director of Public Prosecutions and the New South Wales Crime Commission: see SCPO Act, s 3(1).

is not expressed to be whether the public needs protection from the person. Rather, it is as to the efficacy of the order if made. If the making of the order will be effective to prevent, restrict or disrupt the person's involvement in crime, the public is protected. On this construction, much turns on the use of the word "by". The court is only required to have reasonable grounds to believe that the making of the order would protect the public *by* preventing, restricting or disrupting the person's involvement in serious crime related activities.

10 Moreover, given the nature of the orders to which s 6(1) refers, it will invariably be the case that they will at the least "disrupt" the potential involvement of the person in crime. It would follow that an order would be made in any case in which prohibitions, restrictions, requirements and other provisions of the kind referred to in s 6(1) are sought. There is no other factor in s 5(1) which would militate against the making of an order. On this construction, the discretion suggested by the use of the word "may" in the sub-section would be illusory.

11 Reading s 5(1) with s 6(1) cannot expand the court's role. Section 6(1) is concerned with the types of orders that may be made against a person under s 5(1). True it is that the court is required to consider whether the orders are "appropriate", but once again, the enquiry is not whether they are appropriate "for the purpose of protecting the public", but rather whether they are appropriate "for the purpose of protecting the public *by* preventing, restricting or disrupting involvement by the person in serious crime related activities". The enquiry is whether they are appropriate, which is to say effective, for the purpose of achieving the necessary disruption.

12 It may be accepted that an assessment of whether orders are appropriate may involve consideration of whether the orders go further than is necessary to achieve that outcome, given the effects of the orders upon the person. The exceptions to some of the orders sought against the plaintiffs in this case furnish examples: the order prohibiting association with known members of a motorcycle gang is expressed not to extend to pre-arranged and approved family events; and the order preventing the plaintiffs from travelling by motor vehicle during certain hours exempts a circumstance of a genuine medical emergency. But it is to give the word "appropriate" in s 6(1) far too much work to do to read it as requiring or permitting the court to assess the risk to the public. Especially is this so when the terms of ss 5(1) and 6(1) make plain that that is an assumed fact. Importantly, it is a fact assumed in the provision which contains the power to make the orders, s 5(1).

13 In *South Australia v Totani*[5], s 10(1) of the *Serious and Organised Crime (Control) Act 2008* (SA) gave the Attorney-General, on the application of the Commissioner of Police, power to make a declaration in relation to an organisation if the Attorney-General was satisfied that its members associated for the purpose of organising serious criminal activity and the organisation represented a risk to public safety and order in the State. Section 14(1) of the Act provided:

> "The Court must, on application by the Commissioner, make a control order against a person (the ***defendant***) if the Court is satisfied that the defendant is a member of a declared organisation."

A control order could contain prohibitions concerning the persons with whom the person could associate, and other restrictions.

14 Section 14(1) was held invalid by a majority of the Court on the ground that it authorised the executive to enlist the court to implement decisions of the executive in a manner incompatible with the proper discharge of its federal judicial responsibilities and with its institutional integrity. Section 5(1) of the SCPO Act does not implement a decision of the Commissioner of Police, or other person eligible to apply for serious crime prevention orders. But in identifying a person with a criminal record or involvement with crime, and requiring the making of an order of the kind referred to in s 6(1) so long as it is effective to disrupt that person's possible involvement in criminal activities, s 5(1) enlists the courts. It gives effect to the outcome sought with respect to the person[6].

15 Such a conclusion is not open where the statute gives the court the task, when making an order to prevent future wrongdoing, of undertaking its own assessment of the connection between the order proposed and the past or likely future conduct of the person, or its own assessment of the connection between the orders and a continuation of past and possible future acts[7]. The question whether, properly construed, s 5(1) permits the court to assess the risk to the public is therefore essential to its validity.

16 It is explained in the joint reasons of Bell, Keane, Nettle and Edelman JJ that the SCPO Act was modelled on United Kingdom legislation[8]. In *R v*

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5 (2010) 242 CLR 1.

6 *South Australia v Totani* (2010) 242 CLR 1 at 170 [470].

7 See *South Australia v Totani* (2010) 242 CLR 1 at 86 [219].

8 At [31].

Hancox[9], the Court of Appeal of England and Wales construed an equivalent provision of the *Serious Crime Act 2007* (UK)[10] to require, before an order of this kind is made, that there be a "real, or significant, risk" that the person will be involved in further serious offences, and that the court undertake this future risk assessment. That decision has consistently been followed[11].

17 The Court of Appeal went on[12] to determine, in connection with an equivalent provision to s 6(1) of the SCPO Act[13], that for an order to be appropriate, it must be necessary. It must be justified by the benefit to be gained from the order, and the provisions of the order must be commensurate to the risk, which is to say it must be proportionate.

18 The Court of Appeal, clearly enough, did not interpret the words "by" in the analogue to s 5(1) and "appropriate" in the analogue to s 6(1) in the way described above. The operation which that Court saw as intended must, inferentially, have focused on the word "would" in the analogue to s 5(1) as importing an assessment of future risk. It involves a greater role for the courts in the process leading to the making of the order; one which would not suffer from the problems identified in *South Australia v Totani*.

19 The decision of the Court of Appeal in *R v Hancox* was reported in 2010. The SCPO Act was enacted by the New South Wales Parliament in 2016. Where words have been judicially interpreted, it is possible to interpret a subsequent statute as having the meaning so assigned to those words[14]. It may be assumed that the legislature has adopted the interpretation assigned to the earlier enactment, unless an intention to exclude that interpretation is evident[15]. That

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9 [2010] 1 WLR 1434 at 1437 [9]; [2010] 4 All ER 537 at 540.

10 *Serious Crime Act 2007* (UK), s 19(2). See also s 1(1).

11 *R v Hall* [2015] 1 Cr App R (S) 16 at 131 [16]; *R v McGrath* [2017] EWCA Crim 1945 at [10]; *R v Strong* [2017] EWCA Crim 999 at [11].

12 *R v Hancox* [2010] 1 WLR 1434 at 1437 [10]; [2010] 4 All ER 537 at 540.

13 *Serious Crime Act 2007* (UK), s 19(5). See also s 1(3).

14 *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402 at 411; Bennion, *Bennion on Statutory Interpretation*, 5th ed (2008) at 599-601; Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at [3.43].

15 *Townsville Harbour Board v Scottish Shire Line Ltd* (1914) 18 CLR 306 at 315; *Re Carl Zeiss Pty Ltd's Application* (1969) 122 CLR 1 at 6.

presumption may be strengthened by the legislative history of the statute. In *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees*[16], certain references in a report by a Committee which preceded the enactment and in the Second Reading Speech provided that context. In the present case, it is evident that the decision in *R v Hancox* was known to the Parliament and that it was understood that a court must conclude that there is a real or significant risk that the person will commit serious offences before an order of the kind in question is made. So much is evident from the debate on the relevant provisions in the Bill[17].

20 It must therefore be accepted, having regard to the context for s 5(1), that it is to be read as its analogue was in *R v Hancox*. That interpretation has been adopted in the joint reasons. I agree with those reasons and the conclusions which follow. I would answer the questions stated for the opinion of the Full Court as their Honours propose.

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16 (1994) 181 CLR 96 at 106-107.

17 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 May 2016 at 60; New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 4 May 2016 at 70-71.

BELL, KEANE, NETTLE AND EDELMAN JJ.

Introduction

21 This special case concerns the validity of s 5 of the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) ("the SCPO Act"). That section, read with s 6, empowers the District Court of New South Wales or the Supreme Court of New South Wales to make "preventive orders" that can restrain the liberty of an individual including without proof of the commission of a crime by that person. The plaintiffs challenge the validity of that legislation on the ground that the legislation is incompatible with the institutional integrity of those State courts, relying upon the doctrine developed from the decision of this Court in *Kable v Director of Public Prosecutions (NSW)*[18].

22 This Court has previously dismissed *Kable* challenges in decisions concerning preventive order legislation involving terrorism[19], organised criminal activity[20], and sexual offenders[21]. None of those decisions was challenged by the plaintiffs. The SCPO Act, and the challenge in this case, involve preventive orders concerning "serious crime related activity". The terms and operation of the SCPO Act are similar in important respects to each of the other regimes. Much of the reasoning of principle underlying the decisions that concluded that those legislative regimes were not incompatible with the institutional integrity of State courts applies also to the SCPO Act.

23 Even if the unchallenged precedent of this Court could be put to one side, the core submission of the plaintiffs should not be accepted. The SCPO Act does not involve the exercise of non-judicial power, nor is it incompatible with the institutional integrity of the District Court or the Supreme Court, because it deploys open-textured phrases which, properly interpreted, give rise to rules requiring the court to conduct an assessment of future risk and to balance criteria within a wide degree of judicial evaluation before making a preventive order. In an area necessarily involving considerable uncertainty it is not antithetical to

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18 (1996) 189 CLR 51.

19 *Thomas v Mowbray* (2007) 233 CLR 307.

20 *Wainohu v New South Wales* (2011) 243 CLR 181; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38.

21 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

the judicial process for Parliament to require the courts to interpret and to apply open-textured norms rather than "striving for a greater degree of definition than the subject is capable of yielding"[22].

24 Ultimately, the plaintiffs' objections to the SCPO Act reduce to an objection to the legislative policy involving a regime of preventive orders that can deprive individuals of liberty even in circumstances where they have not committed any offence in the past and might not be expected to do so in the future. Yet, as Gleeson CJ observed in *Fardon v Attorney-General (Qld)*, "nothing would be more likely to damage public confidence in the integrity and impartiality of courts than judicial refusal to implement the provisions of a statute upon the ground of an objection to legislative policy"[23].

Background

25 On 5 October 2018, the Commissioner of Police commenced proceedings by summons in the Supreme Court against the plaintiffs in this proceeding, respectively Damien Charles Vella, Johnny Lee Vella, and Michael Fetui. The Commissioner alleged that the first plaintiff is the National President (or, if not, a National Office Bearer), and the other plaintiffs are members, of an organisation known as the Rebels. That organisation was described in the summons, in misleading vernacular[24], as an "Outlaw Motor Cycle Gang".

26 By a further amended summons the Commissioner sought orders under the SCPO Act to restrain and prohibit the plaintiffs, for two years, from various activities. The activities described in the summons include, in broad summary and with limited exceptions, the following: (i) approaching, contacting or associating directly or indirectly with persons associated with any Outlaw Motorcycle Gang (a phrase left undefined in the further amended summons) and producing to the police on demand any electronic device and password to ensure compliance with that prohibition; (ii) travelling in any vehicle between the hours of 9 pm and 6 am except in the case of a genuine medical emergency; (iii) attending or approaching specified types of premises associated with the Rebels Outlaw Motorcycle Gang or any other Outlaw Motorcycle Gang;

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22 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 593 [22], quoting *M v M* (1988) 166 CLR 69 at 78.

23 (2004) 223 CLR 575 at 593 [23]. See also at 601 [42].

24 *South Australia v Totani* (2010) 242 CLR 1 at 149 [397].

(iv) possessing or having access to an encrypted communications device or possessing an encrypted application/media application; (v) possessing more than one mobile telephone; (vi) possessing any weapon; and (vii) wearing, possessing or displaying any Rebels insignia or any other Outlaw Motorcycle Gang insignia.

27 In the summons, the Commissioner asserted that each of the plaintiffs had been convicted of serious criminal offences. In relation to the first two plaintiffs the alleged convictions included offences of robbery in company, firing a firearm in a manner likely to injure persons or property, and obtaining money by deception. The alleged convictions of the third plaintiff included offences of assault occasioning actual bodily harm, resisting an officer in the execution of duty, and affray. The Commissioner also relied upon allegations that each of the plaintiffs had been involved in serious crime related activity for which he had not been convicted, or was acquitted. Few particulars of each matter of alleged involvement in serious crime related activity were provided. Further, by an assertion unsupported by any particulars, the Commissioner alleged that there were reasonable grounds to believe that the making of an order in relation to each plaintiff would protect the public by preventing, restricting or disrupting involvement by each of the plaintiffs in serious crime related activities.

28 In the special case, the plaintiffs admitted the facts of the convictions and sentences alleged by the Commissioner, and the facts of the charges, withdrawal of charges, acquittals, and charges not proceeded with as alleged by the Commissioner. Despite the breadth of the summons and the lack of clarity in many respects relating to the six steps discussed below, the plaintiffs did not submit that the summons was defective. Rather, the central issue in this proceeding is whether s 5(1) of the SCPO Act is invalid because it is inconsistent with and prohibited by Ch III of the *Constitution*.

Background to the SCPO Act

29 The SCPO Act is concerned with a type of order that has been described as a civil "preventive order"[25]. Such orders have long antecedents including, as early as the fourteenth century, in binding-over orders, by which justices of the peace and judges could bind over a person without proof of any offence, requiring payment of a sum of money as a pledge, if there were sufficient

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25 See, eg, Ashworth and Zedner, *Preventive Justice* (2014) at 74-94.

apprehension that the person's activities could breach the peace[26]. The Court of Chancery granted writs of supplicavit to restrain anticipated breaches of peace involving bodily harm by taking a person into custody, subject to release only upon security for good behaviour[27]. The severity of the apprehended harm that might attract Chancery's intervention increased over time[28]. The Court of Chancery also ordered injunctions to restrain the anticipated commission of criminal acts or public wrongs, particularly in cases of "public health or comfort or safety"[29], by "balancing the magnitude of the evil against the chances of its occurrence"[30]; in modern times that power has been substantially confined to situations dealing with statutory duties[31], on the general principle that it is not for a court to remedy "what it regards as the defective machinery of a statute"[32].

30 With further antecedents in preventive order regimes consequent upon the curial sentencing process[33], from the late 1990s the United Kingdom Parliament legislated for civil preventive orders in a wide variety of different contexts including sexual harm, molestation, anti-social behaviour, and disruptive and

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26 *Thomas v Mowbray* (2007) 233 CLR 307 at 329 [16], 356 [116]. See also *Sheldon v Bromfield Justices* [1964] 2 QB 573 at 577; *R v Wright; Ex parte Klar* (1971) 1 SASR 103.

27 Blackstone, *Commentaries on the Laws of England* (1769), bk 4 at 249-250; Story, *Commentaries on Equity Jurisprudence as administered in England and America*, 14th ed (1918), vol 3 at 513-514. See also *Thomas v Mowbray* (2007) 233 CLR 307 at 356-357 [118].

28 Jenks, "Writs *De Minis* and *Supplicavit*: The History of Surety of the Peace", in Jenks, Rose and Whittick (eds), *Laws, Lawyers and Texts* (2012) 253 at 262-263.

29 *Ramsay v Aberfoyle Manufacturing Co (Australia) Pty Ltd* (1935) 54 CLR 230 at 249.

30 *Earl of Ripon v Hobart* (1834) 3 My & K 169 at 176 [40 ER 65 at 68].

31 *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 49-50.

32 *Ramsay v Aberfoyle Manufacturing Co (Australia) Pty Ltd* (1935) 54 CLR 230 at 243. See also at 249-250, 255-256.

33 *Prevention of Crime Act 1908* (UK), s 10.

unlawful behaviour at football matches[34]. As Lord Steyn explained in relation to anti-social behaviour orders, "[t]here is no doubt that Parliament intended to adopt the model of a civil remedy of an injunction, backed up by criminal penalties"[35].

31 With similar early twentieth century antecedents[36], legislative regimes involving the making of preventive orders by courts have also been enacted in Australia in areas including domestic and personal violence[37], problem gambling that is ancillary to domestic violence[38], public safety and breaches of the peace[39], sexual and other dangerous offenders[40], groups associated with criminal activity[41], and terrorism[42]. In 2016, the New South Wales Parliament enacted the SCPO Act, relying heavily upon the model of the *Serious Crime Act 2007* (UK).

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34 Ashworth and Zedner, *Preventive Justice* (2014) at 75.

35 *R (McCann) v Manchester Crown Court* [2003] 1 AC 787 at 806 [18].

36 *Habitual Criminals Act 1905* (NSW).

37 *Restraining Orders Act 1997* (WA), Pts 1B, 2; *Family Violence Act 2004* (Tas); *Crimes (Domestic and Personal Violence) Act 2007* (NSW); *Domestic and Family Violence Act 2007* (NT); *Family Violence Protection Act 2008* (Vic); *Intervention Orders (Prevention of Abuse) Act 2009* (SA); *Domestic and Family Violence Protection Act 2012* (Qld); *Family Violence Act 2016* (ACT).

38 *Intervention Orders (Prevention of Abuse) Act 2009* (SA).

39 *Peace and Good Behaviour Act 1982* (Qld); *Restraining Orders Act 1997* (WA), Pt 3.

40 *Criminal Procedure Act 1921* (SA), Pt 4, Div 7; *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW); *Crimes (High Risk Offenders) Act 2006* (NSW); *Dangerous Sexual Offenders Act 2006* (WA); *Serious Sex Offenders Act 2013* (NT); *Serious Offenders Act 2018* (Vic).

41 *Serious and Organised Crime (Control) Act 2008* (SA); *Serious Crime Control Act 2009* (NT); *Crimes (Criminal Organisations Control) Act 2012* (NSW); *Criminal Organisations Control Act 2012* (WA); *Criminal Organisations Control Act 2012* (Vic).

The operation of the SCPO Act

32 The SCPO Act creates a regime for the making of serious crime prevention orders by the Supreme Court or the District Court of New South Wales[43]. A serious crime prevention order must not exceed a duration of five years[44]. This special case is concerned only with natural persons, as to whom a breach of the order has a maximum penalty of $33,000 and imprisonment for five years[45].

33 Proceedings for serious crime prevention orders are not criminal proceedings[46]. Other than in relation to an offence against the SCPO Act, the civil burden of proof and rules of evidence apply and any rules of interpretation or evidence that are unique to criminal law do not apply[47]. At the hearing of the application, a person against whom a serious crime prevention order is sought can appear and make submissions[48]. The applicant and the person against whom the order is sought have a right of appeal on any question of law and, with leave, on a question of fact[49]. The applicant and the person against whom the order is sought can also apply to the same court to vary or revoke the order if there has been a substantial change in the relevant circumstances[50].

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42 *Criminal Code* (Cth), Div 104; *Terrorism (Police Powers) Act 2002* (NSW); *Terrorism (Community Protection) Act 2003* (Vic); *Terrorism (Preventative Detention) Act 2005* (Tas); *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT); *Terrorism (High Risk Offenders) Act 2017* (NSW).

43 SCPO Act, s 3(1), definition of "appropriate court".

44 SCPO Act, s 7(2).

45 SCPO Act, s 8(b) and *Crimes (Sentencing Procedure) Act 1999* (NSW), s 17.

46 SCPO Act, s 13(1).

47 SCPO Act, s 13(2).

48 SCPO Act, s 5(4).

49 SCPO Act, ss 11(1), 11(2).

50 SCPO Act, s 12.

The terms of ss 5 and 6 of the SCPO Act

34 Section 5(1) of the SCPO Act provides:

> "An appropriate court may, on the application of an eligible applicant, make an order (a ***serious crime prevention order***) against a specified person if:
>
> (a) in the case of a natural person – the person is 18 years old or older, and
>
> (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."

35 Section 6(1) of the SCPO Act provides:

> "A serious crime prevention order may contain such prohibitions, restrictions, requirements and other provisions as the court considers appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person in serious crime related activities."

36 Serious crime related activity is, in short, anything done by a person, whether or not the person was charged or convicted, that is, or was at the time, a serious criminal offence[51]. What is a serious criminal offence is defined in wide

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51 SCPO Act, s 3(1), definition of "serious crime related activity".

terms[52]. It includes: drug trafficking offences; offences involving imprisonment for five years or more involving a wide variety of offences such as theft, fraud, money laundering, extortion, violence, blackmail, perverting the course of justice, tax or revenue evasion, illegal gambling, forgery, or homicide; and offences involving the destruction of or damage to property having a value of more than $500. It also extends to offences outside New South Wales, or outside Australia, if the offence there would have been a serious criminal offence if committed within New South Wales.

37 The phrase "involved in serious crime related activity" is defined in s 4(1) of the SCPO Act essentially to require the person to engage in serious crime related activity or to engage in conduct that facilitates, or is likely to facilitate, serious crime related activity. Like the United Kingdom legislation upon which it was modelled[53], s 4(1) of the SCPO Act draws from the ordinary meaning of "facilitates", which is "to make easier".

38 However, the ordinary meaning of "facilitates" is restricted by s 4(2) of the SCPO Act, which provides that when determining whether the conduct of a person has facilitated another to engage in serious crime related activity a court may take into account whether the conduct was reasonable in all the circumstances. The concept of facilitating serious crime related activity in s 4(1) is thus narrower than merely conduct that makes the commission of a crime easier. Conduct will be very likely to be reasonable, and not facilitating conduct, if it was done without the intention of assisting the commission of serious crime related activity and without recklessness or reasonable means of knowing that the conduct would assist the commission of serious crime related activity.

The balancing process required by ss 5 and 6 of the SCPO Act

39 Sections 5 and 6 of the SCPO Act, when read together, create a power for the court to make a serious crime prevention order. There are six required steps before the court can exercise the power in relation to natural persons.

40 The **first step**, in s 5(1)(a), requires the natural person to be at least 18 years old.

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52 SCPO Act, s 3(1), definition of "serious criminal offence" and *Criminal Assets Recovery Act 1990* (NSW), s 6(2).

53 *Serious Crime Act* 2007 (UK), s 2(3); United Kingdom, *Serious Crime Act 2007*, Explanatory Notes at [16].

41 The **second step**, in s 5(1)(b), requires proof that the person against whom the order is sought has been convicted of or been involved in serious criminal offending. This step is backward looking, focusing upon the person's past conviction for a serious criminal offence or past involvement in "serious crime related activity", the definition of which can be described broadly as the commission of a serious criminal offence[54].

42 The proof of past conviction for a serious criminal offence might require only the tender of a criminal record certificate[55]. Either the District Court or the Supreme Court can make a serious crime prevention order based upon such past conviction for a serious criminal offence[56]. In contrast, an order based upon the proof of past involvement in the commission of a serious criminal offence can only be made in the Supreme Court[57]. A hearing for an order based on such past involvement might give rise to disputed questions of fact. In resolving those disputes the Supreme Court can admit and consider hearsay evidence if "(a) the court is satisfied that the evidence is from a reliable source and is otherwise relevant and of probative value, and (b) the person against whom the order is sought to be made has been notified of, and served with a copy of, the evidence before its admission"[58]. However, and conformably with the requirement in s 13(2) that only "civil" rules of evidence apply, the Supreme Court will also take into account the usual principle, in deciding whether a fact has been proved, that without more, the more serious the alleged involvement in unlawful conduct, and the greater the magnitude of the alleged illegality, the more unlikely it will be that a person has acted or will act in the way alleged[59].

43 The **third step**, in s 5(1)(c), requires the court to assess whether there is a real likelihood, in other words a real or significant risk, that the person against whom the order is sought will be involved in serious crime related activity. This step might also involve disputed facts. It is a forward-looking requirement.

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54 SCPO Act, s 3(1), definition of "serious crime related activity".

55 *Evidence Act 1995* (NSW), s 178.

56 SCPO Act, s 5(1) read with s 3(1), definition of "appropriate court".

57 SCPO Act, s 3(1), definition of "appropriate court", para (b).

58 SCPO Act, s 5(5).

59 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 343-344, 350, 361-362.

44 The requirement in s 5(1)(c) as to the matters that the court must be satisfied that there are "reasonable grounds to believe" is essentially a requirement of "the existence of facts which are sufficient to induce that state of mind in a reasonable person"[60]. The court must have reasonable grounds to believe that the making of the order "would" prevent, restrict or disrupt involvement by the person in serious crime related activities and thus "protect the public" from these public wrongs. The conditional verb, "would", is the language of probability or likelihood[61] in assessing the effect of the order. Without a real likelihood that the person against whom the order is sought will be involved in serious crime related activities, there is no basis for the order because there could not be any likelihood that the order would prevent, restrict or disrupt such involvement in serious crime related activities. The Court of Appeal of England and Wales has thus correctly, and repeatedly, concluded that the making of a serious crime prevention order under the *Serious Crime Act* regime, upon which ss 5 and 6 of the SCPO Act were based, requires a real or significant risk that the person will be involved in serious offences[62].

45 The need for the court to conclude that there is a real or significant risk that the person will commit serious offences is thus supported by the text of s 5(1)(c) of the SCPO Act and the preceding judicial interpretation of the United Kingdom legislation upon which ss 5 and 6 were based.

46 The third step provides a simple answer to the submission by the plaintiffs that a preventive order could be made against a person who had an historical conviction for an offence of stealing clothing from a department store. Without more, a single historical conviction for such a theft would not be sufficient to give rise to a real or significant risk that the person would commit the same offence, or any other serious offence, in the future. In any event, the fourth and fifth steps below are clear reasons to reject the plaintiffs' submission that a

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60 *George v Rockett* (1990) 170 CLR 104 at 112. See also *R v Tillett; Ex parte Newton* (1969) 14 FLR 101 at 106.

61 *Taylor v New South Wales* (1999) 46 NSWLR 322 at 338 [64].

62 *R v Hancox* [2010] 1 WLR 1434 at 1437 [9]; [2010] 4 All ER 537 at 540. See also *R v Barnes* [2012] EWCA Crim 2549 at [9]; *R v Hall* [2015] 1 Cr App R (S) 16 at 131 [16]; *R v McGrath* [2017] EWCA Crim 1945 at [10]; *R v Strong* [2017] EWCA Crim 999 at [11].

preventive order could be made against such a person in terms that require the person to reside at, and not to leave, their home or not to enter department stores.

47 The **fourth step** is also required by s 5(1)(c). It may again involve disputed questions of fact. The court must consider whether the facts establish reasonable grounds to believe that the potential order would have the effect of preventing, restricting, or disrupting the person's involvement in serious crime related activities. This step requires the court to survey the range of possible orders and to consider whether there is a real likelihood that the order will prevent, restrict, or disrupt the person's likely involvement in the serious crime related activities. The verbs – prevent, restrict, or disrupt – are not defined and bear their ordinary meaning including a result that is short of entire prevention but which limits the extent of the person's likely involvement in the serious crime related activities.

48 An example where the fourth step was not satisfied is one of the orders sought in *Commissioner of Police v Cole*[63], which was to restrict the defendants' internet access to the use of a single nominated computer with additional requirements including providing information to a nominated police officer concerning each defendant's internet service provider, username, and passwords. That order was not made, with Davies J observing that there was "no evidence to suggest that computers have been or are likely to be used in any manner that contributes to serious crime related activities"[64].

49 The **fifth step**, from s 6(1) of the SCPO Act, further constrains the orders that can be made. The "prohibitions, restrictions, requirements and other provisions" ordered are required to be such "as the court considers appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person in serious crime related activities". Although s 6(1) provides that the court "may" impose the restrictions that it considers appropriate,

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63 [2018] NSWSC 517 at [52].

64 [2018] NSWSC 517 at [57]. See also *Commissioner of Police v Bowtell [No 2]* [2018] NSWSC 520 at [100], [102].

this is an enabling word with "compulsory force" when what is sought is "in advancement of public justice"[65].

50 The constraint that the court must consider the order to be appropriate for its purpose is a familiar one. "Appropriate", in the sense of "suitable or fitting for a particular purpose"[66], embodies the requirements that the order be reasonable and adapted to its purpose. It is particularly a common constraint expressed upon orders, such as civil preventive orders[67], that require an assessment of future possibilities. In *Mitchell v The Queen*[68], in the context of a provision that empowered a court to impose a sentence of "strict security life imprisonment" without, if the court considered it appropriate, a non-parole period, this Court said that "[t]he phrase 'considers ... appropriate' indicates the striking of a balance between relevant considerations so as to provide the outcome which is fit and proper". And speaking of the power to make "such order or orders as [the court] thinks appropriate" in s 87 of the *Trade Practices Act 1974* (Cth), Mason P said that it allowed "the defendant's as well as the plaintiff's interests to be taken into account in moulding a just response"[69].

51 The balancing process operates as follows. On the one hand, the court will consider the likelihood that an order will prevent, restrict, or disrupt serious

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65 *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 at 225. See also *Victorian Building Authority v Andriotis* (2019) 93 ALJR 869 at 887 [108] and the authorities cited there.

66 *Macquarie Dictionary*, 7th ed (2017), vol 1 at 68, "appropriate", definition 1. See also *Oxford English Dictionary*, 2nd ed (1989), vol 1 at 586, "appropriate", definition 5.

67 *Criminal Procedure Act 1921* (SA), s 99AA(1)(c); *Peace and Good Behaviour Act 1982* (Qld), s 27(1)(b); *Restraining Orders Act 1997* (WA), s 34(b); *Crimes (High Risk Offenders) Act 2006* (NSW), s 11(1); *Serious and Organised Crime (Control) Act 2008* (SA), s 22(2); *Intervention Orders (Prevention of Abuse) Act 2009* (SA), ss 6(b), 24 read with *Problem Gambling Family Protection Orders Act 2004* (SA), s 4(1)(b); *Serious Crime Control Act 2009* (NT), s 25(1)(b); *Criminal Organisations Control Act 2012* (Vic), ss 45(1), 47(1); *Criminal Organisations Control Act 2012* (WA), s 57(1)(b).

68 (1996) 184 CLR 333 at 346.

69 *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353 at 368.

criminal activities, and the magnitude of the activity that will be so affected. On the other hand, the court will consider the extent to which an order will intrude upon the defendant's liberty, including the scope of the order and the length of its term. In balancing these matters, if there is a less intrusive order that will achieve broadly the same effect as a significantly more intrusive order then the latter will not be appropriate. For instance, in *Commissioner of Police v Bowtell [No 2]*[70] a condition that prohibited the defendants from attending any licensed hotels, pubs, clubs, and bars was not appropriate as it would add little, if anything, to the disruptive effect of other conditions which prohibited the defendants associating with, or contacting, members of any Outlaw Motorcycle Gang.

52 As earlier explained, ss 5 and 6 of the SCPO Act are modelled on the United Kingdom legislation. The drafter may be taken to have been aware of the interpretation placed by the English courts on the requirement that an order be "appropriate"[71]. Indeed, at the date of its enactment it is evident that members of the New South Wales Parliament were aware of the leading decision of the Court of Appeal of England and Wales in *R v Hancox*[72]. In that case, the Court of Appeal held that the requirement that the court consider the serious crime prevention order to be "appropriate" involved the same approach as that which applies to anti-social behaviour orders and travel restriction orders under the *Criminal Justice and Police Act 2001* (UK): "[s]uch orders can be made only for the purpose for which the power was given by statute. And they must be proportionate." This conclusion was said *also* to follow from the European Convention for the Protection of Human Rights and Fundamental Freedoms[73]. But the principal reason for the conclusion, independently of any Convention concerns, involved the adoption of the Court of Appeal's earlier reasoning from *R v Mee*[74] in relation to which travel restriction orders would be appropriate

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70 [2018] NSWSC 520 at [98]-[99].

71 *Re Carl Zeiss Pty Ltd's Application* (1969) 122 CLR 1 at 6.

72 [2010] 1 WLR 1434; [2010] 4 All ER 537. See New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 May 2016 at 42, 60; New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 4 May 2016 at 70-71, 82-83, 84.

73 *R v Hancox* [2010] 1 WLR 1434 at 1437 [10]; [2010] 4 All ER 537 at 540.

74 [2004] 2 Cr App R (S) 81.

under the *Criminal Justice and Police Act*[75]. In that case, the Court said of the length of such an order[76]:

> "The length should be that which is required to protect the public in the light of the assessment of the degree of risk which is presented by the facts. But, as we have said, it should be tailored to the defendant to such a degree as the court feels able when balanced against the risk."

53 During oral argument there was dispute about whether an order could ever be appropriate within the terms of ss 5 and 6 of the SCPO Act if the order permitted "detention" of a person. It might be doubted whether the regime contemplates either custodial detention or non-custodial "home detention" rather than, for example, a curfew. But if, as a matter of construction of the sections, an order for custodial detention or "home detention" were possible, and if that construction would make s 5 invalid, then the court could construe s 5 so that it extended only to those orders for which the section might "lawfully be applied"[77]. Since no such order is sought against any of the plaintiffs, it is unnecessary to decide this issue[78].

54 The **sixth step** is that the court should consider whether any appropriate order should be made. Despite the risk of the person offending, and even with the prohibitions, restrictions and requirements as are appropriate, s 5(1) empowers, but does not require, the court to make the order. The fulfilment of the statutory conditions described in the five steps above confers a discretion upon the court to make the appropriate order[79]. To adapt an example given in oral submissions by the Solicitor-General of the Commonwealth, the court's discretion might be exercised not to make an order preventing spouses who share a family home with children from having any contact with each other even if the court were to

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75 *R v Hancox* [2010] 1 WLR 1434 at 1437 [10]; [2010] 4 All ER 537 at 540.

76 *R v Mee* [2004] 2 Cr App R (S) 81 at 438-439 [14].

77 *Interpretation Act 1987* (NSW), s 31(2). See also *Newcastle and Hunter River Steamship Co Ltd v Attorney-General for the Commonwealth* (1921) 29 CLR 357 at 370.

78 *Knight v Victoria* (2017) 261 CLR 306 at 324-325 [33].

79 See *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 544, 551.

consider the order to be appropriate for the purpose of protecting the public by disrupting a criminal enterprise between the spouses.

No impairment of a court's institutional integrity by other civil preventive order regimes

55 The plaintiffs submitted that s 5(1) of the SCPO Act is inconsistent with Ch III of the *Constitution*. They relied upon the principle deriving from the decision of this Court in *Kable*[80]. The reasons of the Justices in the majority in that case have been synthesised as follows[81]:

> "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." (footnotes omitted)

56 Although it is only extreme legislation that will substantially impair the institutional integrity of a State court, the boundaries of the *Kable* principle are not sharp. The contours of the categories where State legislation will substantially impair a court's institutional integrity will necessarily emerge slowly. But the categories must develop in a principled, coherent, and systematic way rather than as evaluations of specific instances.

57 Before turning to the particular grounds upon which the plaintiffs submitted that the SCPO Act substantially impairs the institutional integrity of the District Court and the Supreme Court, it is necessary to explain the striking similarities that the SCPO Act has with other preventive order regimes that this Court has previously held not to infringe the *Kable* principle. Each regime involves criteria that are necessarily imprecise, since the future is not certain, particularly in relation to the assessment of risk (the third step) and the balancing process (the fifth step). As to the question of risk, some legislation requires a

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80 (1996) 189 CLR 51.

81 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 424 [40]. See also *Kuczborski v Queensland* (2014) 254 CLR 51 at 98 [139].

court to be satisfied that there is "an unacceptable risk"[82] or "reasonable cause to believe" in the risk[83]. Other legislation uses criteria that the person threatened has "reasonable grounds to fear"[84] the conduct, or that it is "reasonable to suspect"[85] that the conduct will occur, or "likely" that the conduct will occur[86], or that the person against whom the order is sought has engaged in conduct and is "likely to do so again"[87], or "may again"[88] do so. As to the balancing process in the range of conditions in an order, apart from the common use of "appropriate", other

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82 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), ss 13(1), 13(2); *Crimes (High Risk Offenders) Act 2006* (NSW), ss 5B(d), 5C(d); *Dangerous Sexual Offenders Act 2006* (WA), s 7(1); *Serious Sex Offenders Act 2013* (NT), ss 6(1), 31(1); *Terrorism (High Risk Offenders) Act 2017* (NSW), ss 34(1)(d), 34(2)(b); *Serious Offenders Act 2018* (Vic), ss 14, 62(2).

83 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW), s 5(1)(a).

84 *Domestic and Family Violence Act 2007* (NT), s 18. See also *Restraining Orders Act 1997* (WA), s 10D(1); *Crimes (Domestic and Personal Violence) Act 2007* (NSW), ss 16(1), 19(1); *Family Violence Act 2016* (ACT), s 34(1)(a).

85 *Intervention Orders (Prevention of Abuse) Act* 2009 (SA), s 6(a). See also *Terrorism (Police Powers) Act 2002* (NSW), s 26D; *Terrorism (Community Protection) Act 2003* (Vic), s 13E(1); *Terrorism (Preventative Detention) Act 2005* (Tas), s 7(1); *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT), s 18(4).

86 *Restraining Orders Act 1997* (WA), s 34(a).

87 *Family Violence Protection Act 2008* (Vic), s 74(1). See also *Restraining Orders Act 1997* (WA), s 10D(1).

88 *Family Violence Act 2004* (Tas), s 16(1).

legislation uses a criterion of "necessity"[89], "necessary or desirable"[90], "not inappropriate"[91], or "sufficient grounds"[92].

(1) Preventive orders concerning terrorism

58 Division 104 of the *Criminal Code* (Cth), as considered in *Thomas v Mowbray*[93], establishes a preventive order regime "for the purpose of protecting the public from a terrorist act"[94]. Section 104.4 gives an issuing court – the Federal Court of Australia, the Family Court of Australia, or the then Federal Magistrates Court[95] – the power to issue an interim control order which, when confirmed by the issuing court, can last up to 12 months[96]. Various conditions are required. Two central conditions concern the risk assessment (the third step) and the balancing process (the fifth step).

59 The risk condition, in s 104.4, is satisfied either by past commission of a criminal offence relating to training with or from a listed terrorist organisation[97], or by likely future involvement in a terrorist act. It requires the court to be satisfied on the balance of probabilities either "(i) that making the order would substantially assist in preventing a terrorist act; or (ii) that the person has

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89 *Crimes (Domestic and Personal Violence) Act 2007* (NSW), ss 17(3), 20(3), 35(1).

90 *Family Violence Act 2004* (Tas), s 16(2); *Domestic and Family Violence Act 2007* (NT), ss 21(1)(a), 21(1)(b); *Family Violence Protection Act 2008* (Vic), s 81(1); *Domestic and Family Violence Protection Act 2012* (Qld), ss 37(1)(c), 37(2), 47(2), 48(2), 49(3), 57(1).

91 *Restraining Orders Act 1997* (WA), s 10D(2).

92 *Crimes (Criminal Organisations Control) Act 2009* (NSW), s 19(1)(b).

93 (2007) 233 CLR 307.

94 *Criminal Code* (Cth), s 104.1.

95 *Criminal Code* (Cth), s 100.1(1), definition of "issuing court".

96 *Criminal Code* (Cth), s 104.16(1)(d).

97 *Criminal Code* (Cth), s 101.2.

provided training to, or received training from, a listed terrorist organisation"[98]. These criteria give considerable latitude to the court. The notion of "substantial assistance" is inherently imprecise. Further, a "terrorist act" is defined in s 100.1 in terms "which may give an area of choice and discretion"[99] and in broadly expressed criteria including action that "creates a serious risk to the health or safety of the public or a section of the public" and action that "seriously interferes with, seriously disrupts, or destroys, an electronic system"[100].

60 The balancing condition in s 104.4 requires the court to be satisfied on the balance of probabilities that "each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act"[101]. In conducting that balancing exercise the court is required to take into account the impact of the order upon the circumstances of the person subject to it (including their financial and personal circumstances)[102]. The control order that was considered by the issuing Magistrate to meet the balancing criteria subjected Mr Thomas to significant constraints including the following: to remain at his home (or an address notified to the Australian Federal Police) between midnight and 5 am; to report to police three times a week; not to leave Australia without police permission; not to associate with various individuals; and not to use a variety of communications technology either at all, or without approval[103].

61 A majority of this Court upheld the validity of this terrorism preventive order regime. Mr Thomas submitted that one basis on which the terrorism preventive order regime was invalid was that it was incompatible with the judicial integrity required by Ch III of the *Constitution*[104]: it involved the

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98 *Criminal Code* (Cth), s 104.4(1)(c).

99 *Thomas v Mowbray* (2007) 233 CLR 307 at 352 [98].

100 *Criminal Code* (Cth), s 100.1(2)(e)-(f) read with s 100.1(1), definition of "terrorist act".

101 *Criminal Code* (Cth), s 104.4(1)(d).

102 *Criminal Code* (Cth), s 104.4(2).

103 *Thomas v Mowbray* (2007) 233 CLR 307 at 493-495 [554].

104 *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [63].

conferral of non-judicial power, or in so far as it did confer judicial power, it authorised the exercise of that power in a manner contrary to Ch III. These submissions were rejected by a majority of this Court in reasoning that applies *a fortiori* to State legislation[105].

62 The reasoning of Gummow and Crennan JJ, in the following respects, was the subject of agreement by Callinan J and Heydon J[106]. Gleeson CJ also wrote to similar effect[107]. Their Honours observed that[108]: (i) the regime involved a judicial procedure[109]; (ii) the orders which could be made were "a familiar part of judicial power to make orders restraining the liberty of the subject"; and (iii) the evaluation of broadly expressed criteria, including "oppressive", "unreasonable", "unjust", or "just and equitable", had long been recognised as consistent with judicial power[110].

63 The various judgments in the majority in *Thomas v Mowbray* also recognised[111] that balancing exercises in many areas of the law involve broadly expressed criteria which constrain the liberty of the subject in circumstances other than in consequence of the commission of a criminal act. Whether those exercises concern bail applications, binding a person over to keep the peace, applications for apprehended violence orders, preventive orders for the continued detention of sex offenders, or even injunctions to constrain the likely commission

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105 *Thomas v Mowbray* (2007) 233 CLR 307 at 343-355 [65]-[110]. See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 655-656 [219].

106 *Thomas v Mowbray* (2007) 233 CLR 307 at 509 [600], 526 [651].

107 *Thomas v Mowbray* (2007) 233 CLR 307 at 330-335 [19]-[30].

108 *Thomas v Mowbray* (2007) 233 CLR 307 at 344-348 [71]-[79], 351-352 [94]-[97].

109 See also *Thomas v Mowbray* (2007) 233 CLR 307 at 508 [599]. See *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 305. See also *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 628.

110 See *Insurance Commissioner v Associated Dominions Assurance Society Pty Ltd* (1953) 89 CLR 78 at 90; *R v Commonwealth Industrial Court; Ex parte The Amalgamated Engineering Union, Australian Section* (1960) 103 CLR 368 at 373; *Cominos v Cominos* (1972) 127 CLR 588 at 593, 599-600, 603-604, 608.

111 *Thomas v Mowbray* (2007) 233 CLR 307 at 328 [15], 347-348 [79], 507 [595].

of an offence, the judicial process and method of applying that balancing exercise is one that develops and refines rules and principles whose clarity increases over time.

64 Like the SCPO Act, the terrorism preventive order regime permits orders to be made against a person who has not committed a crime and is not expected to commit any crime. Nor does s 104.4(1)(c)(i) of the *Criminal Code* require that any particular act be committed by the person before an order is contemplated. It is enough that the making of the order would "substantially assist" in preventing a terrorist act[112]. In *Thomas v Mowbray* itself, the orders were based upon allegations that Mr Thomas, whose convictions had been quashed[113], had admitted training with a listed terrorist organisation, had links to extremists who might exploit his vulnerabilities, and was an available resource for the commission of, or assistance to commit, terrorist acts[114].

(2) Preventive orders concerning sexual offenders

65 In *Fardon*[115], this Court considered whether the terms of Queensland legislation that provides for preventive orders for sexual offenders were incompatible with the institutional integrity of the Supreme Court of Queensland. The *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ("DPSO Act") empowers the Supreme Court of Queensland to make an order against a person serving a period of imprisonment for a sexual offence of a violent nature or against children. The Court can order that the person be detained in custody for an indefinite term for control, care or treatment or that the person be released from custody subject to conditions[116].

66 The regime contains risk and balancing criteria. The risk criterion is if the person is "a serious danger to the community", defined as involving an unacceptable risk that the prisoner would commit a serious sexual offence if

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112 *Criminal Code* (Cth), s 104.4(1)(c)(i).

113 *Thomas v Mowbray* (2007) 233 CLR 307 at 488 [537].

114 *Thomas v Mowbray* (2007) 233 CLR 307 at 322-323 [1].

115 (2004) 223 CLR 575.

116 DPSO Act, s 13(5).

released from custody or released from custody without a supervision order[117]. The Court might decide that it is "satisfied" only if satisfied to a high degree of probability by acceptable, cogent evidence of sufficient weight to justify the decision[118]. The balancing criterion applies in relation to the Court's choice of three orders (detention in custody, conditional release, or no order) and, in relation to conditional release, the conditions that it "considers appropriate"[119].

67 The *Kable* challenge to the validity of the sexual offender preventive order regime in *Fardon* focused upon a variety of aspects of the legislation including civil detention in prison on the basis of a risk of re-offending in the future in the absence of a crime, a trial, and a conviction, what was alleged to be punishment in a manner inconsistent with the essential character of a court and the nature of judicial power, that the prediction of re-offending was unreliable, and that an "unacceptable" risk was an unclear phrase[120]. However, as the Solicitor-General of the State of Queensland observed, the same phrase had been used in the *Bail Act 1980* (Qld) and in the context of denying a parent access to a child[121].

68 Six members of this Court dismissed the challenge to the validity of the sexual offender preventive order regime. As Gleeson CJ observed, whilst the legislation conferred "a substantial discretion as to whether an order should be made, and if so, the type of order", the "Queensland Parliament was attempting to ensure that the powers would be exercised independently, impartially, and judicially"[122]. Similarly, McHugh J saw the three discretionary choices as to the order that the Supreme Court might make as a strength, tending to validity, rather than a weakness of the regime[123]. Callinan and Heydon JJ observed that the

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117 DPSO Act, s 13(2).

118 DPSO Act, s 13(3).

119 DPSO Act, s 13(5)(b).

120 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 577.

121 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 579. See also at 593 [22].

122 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 592 [19]-[20].

123 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 597 [34].

"process of reaching a predictive conclusion about risk is not a novel one"[124]. The same reasoning must apply to the risk concept in the third step of the analysis under the SCPO Act, which effectively amounts to a requirement that there is a real and significant risk.

(3) Preventive orders concerning criminal organisations

69 The *Crimes (Criminal Organisations Control) Act 2009* (NSW) ("the CCOC Act") empowered the Supreme Court to make interim and final control orders. There were two criteria. Neither required any unlawful conduct by the person subject to the order, either in the past or the future. The first was the risk criterion. The second criterion was the balancing criterion.

70 The risk criterion required only that the Supreme Court conclude that the person "is a member of a particular declared organisation", or "is or purports to be a former member of a particular declared organisation but has an on-going involvement with the organisation and its activities"[125]. The assessment of the risk presented by the declared organisation was an anterior issue left to the determination of an "eligible judge", in a persona designata capacity[126], as to whether "members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity" and the "organisation represents a risk to public safety and order" in New South Wales[127]. The risk criterion of a "risk to public safety and order" was highly elastic. It was concerned only with the organisation with which the individual who was subject to the order might have ongoing involvement and not with any specific threat of harm from the individual. As for the balancing criterion, this required only that the Supreme Court conclude that "sufficient grounds exist for making the control order"[128]. There was no explanation or definition of the grounds that would be sufficient.

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124 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 657 [225].

125 CCOC Act, s 19(1).

126 CCOC Act, s 5.

127 CCOC Act, s 9(1).

128 CCOC Act, s 19(1)(b).

71 In *Wainohu v New South Wales*[129], the plaintiff challenged the validity of this preventive order regime for criminal organisations on a number of grounds, including that it impermissibly undermined or impaired the institutional integrity of the Supreme Court. Six members of this Court rejected that submission. In a joint judgment, Gummow, Hayne, Crennan and Bell JJ held that although the risk criterion was required to be considered by an eligible judge, Commonwealth legislation would have been valid if the power had been conferred upon a Ch III court[130]. It followed that a State court could have exercised the same judicial power. As for the balancing criterion, despite the elasticity of "sufficient grounds", their Honours, with whom French CJ and Kiefel J agreed on this point[131], held that it was sufficient for validity that the limits to the curial power could be ascertained "by regard to the subject, scope and purpose of the Act including the consequences of the making of an interim control order or control order"[132].

72 It is notable that although the preventive order regime for criminal organisations in the CCOC Act contained generally broader and more elastic provisions than the preventive order regime for terrorist acts in the *Criminal Code*, the joint judgment of Gummow, Hayne, Crennan and Bell JJ in *Wainohu v New South Wales*[133] supported the validity of the scheme by reference to the judgments of Gleeson CJ, Gummow and Crennan JJ, and Callinan J in *Thomas v Mowbray*[134], discussed above. Despite the different formulations, the principles underlying the two preventive order regimes were relevantly alike and it would be incoherent to conclude that one preventive order regime did not undermine the institutional integrity of the court but that the other did.

73 Less than two years later, a challenge was brought against the Queensland preventive order legislation, namely the *Criminal Organisation Act 2009* (Qld).

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129 (2011) 243 CLR 181.

130 *Wainohu v New South Wales* (2011) 243 CLR 181 at 225 [91].

131 *Wainohu v New South Wales* (2011) 243 CLR 181 at 220 [72].

132 *Wainohu v New South Wales* (2011) 243 CLR 181 at 230 [111].

133 (2011) 243 CLR 181 at 230 [111] fn 222.

134 (2007) 233 CLR 307 at 331-334 [20]-[28] per Gleeson CJ, 344-348 [71]-[82], 350-351 [88]-[92] per Gummow and Crennan JJ, 507-508 [596] per Callinan J.

One purpose of the legislation was to "disrupt" and "restrict" the activities of members and associates of organisations involved in serious criminal activity[135]. Section 18 of the *Criminal Organisation Act* authorised the Supreme Court of Queensland to make a control order against a person, which remained in force until revoked[136]. The risk conditions that enabled an order to be made included if the Court was "satisfied" that (i) the person had engaged in serious criminal activity, and (ii) the person "associates with any member of a criminal organisation for the purpose of engaging in, or conspiring to engage in, serious criminal activity"[137]. Serious criminal activity was defined in terms of similar breadth to the SCPO Act, including an indictable offence punishable by at least seven years' imprisonment[138]. And the criteria for a criminal organisation included that it was "an unacceptable risk to the safety, welfare or order of the community"[139]. As for the balancing criterion, s 19 of the *Criminal Organisation Act* provided, in broader terms than s 6 of the SCPO Act, that the Court could impose conditions that it considered "appropriate".

74 In *Condon v Pompano Pty Ltd*[140] this Court considered, and unanimously rejected, a *Kable* challenge to this Queensland preventive order regime. The respondents submitted that the regime departed "to a significant degree from the methods and standards which have historically characterised the exercise of judicial power"[141]. The respondents further submitted that the question of whether an organisation presented "an unacceptable risk to the safety, welfare or order of the community" was not suitable for judicial determination and asserted that "the risk assessment which the Court is required to undertake is an executive, rather than judicial, function"[142]. Hayne, Crennan, Kiefel and Bell JJ rejected

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135 *Criminal Organisation Act 2009* (Qld), s 3(1).

136 *Criminal Organisation Act 2009* (Qld), s 20(3).

137 *Criminal Organisation Act 2009* (Qld), s 18(2).

138 *Criminal Organisation Act 2009* (Qld), ss 6(a), 7(1)(a).

139 *Criminal Organisation Act 2009* (Qld), s 10(1)(c).

140 (2013) 252 CLR 38.

141 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 40.

142 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 41.

these submissions, concluding that the legislation was "not different in any relevant way from the tasks held to be validly assigned to courts" by the legislation in issue in *Thomas v Mowbray* and *Fardon*. Their Honours emphasised that "[c]ourts are often called on to make predictions about dangers to the public"[143].

75 An underlying premise of the decisions of this Court upholding the criminal organisation preventive order regimes in New South Wales and Queensland was that fine distinctions could not be drawn to distinguish the terrorism and sexual offender preventive order regimes that were upheld in *Thomas v Mowbray* and *Fardon* from these criminal organisation preventive order regimes. The material features were the risk assessment and the balancing exercise. The validity turned upon the risk and balancing criteria, with a focus upon the conduct of an organisation in the criminal organisation context, as well as a focus on the conduct of an individual in the terrorism preventive order legislation and the sexual offender preventive order legislation upheld in *Thomas v Mowbray* and *Fardon*.

The validity of s 5(1) of the SCPO Act

76 Faced with the decisions discussed above, all of which dismissed *Kable* challenges to preventive order regimes from different perspectives, the plaintiffs framed their challenge as a scattergun approach occasionally involving submissions in direct opposition to each other. For instance, in written submissions in chief, in written submissions in reply, and in oral submissions, the plaintiffs submitted that the SCPO Act "enlisted" the court to do the bidding of the executive. On this view, as the majority of this Court held in *South Australia v Totani*, the legislation would be invalid because the court would be deprived of any real opportunity for evaluation[144]. In contrast, the plaintiffs also submitted that s 6 of the SCPO Act imposed an "evaluative criterion of the broadest kind". It suffices to divide the plaintiffs' submissions into three strands.

77 The first strand of the plaintiffs' submissions was that the SCPO Act undermines the criminal justice system of State courts. The reasons given for this reduce to two. First, it was said that the SCPO Act undermines the finality of the

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143 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 96 [143].

144 (2010) 242 CLR 1 at 52 [82], 67 [149], 88 [226], 92-93 [236], 160 [436], 173 [481].

criminal justice system. It was submitted that this occurs where an order is made imposing further restrictions on the liberty of a person who has previously been convicted and punished for a serious offence or where an order is made imposing restrictions on a person's liberty despite the person's acquittal of a serious offence, including after a trial by jury where guaranteed by s 80 of the *Constitution*. Secondly, it was said that the SCPO Act establishes a regime that would conflict with the criminal justice system. One example of this conflict was said to be the need for a defendant to elect whether to give evidence in the civil preventive order proceedings, with the risk of adverse inferences if evidence is not given and the risk of assisting a later prosecution if evidence is given. Another example was said to be the ability of prosecuting authorities to elect to use the "easier" route of the SCPO Act rather than a criminal prosecution where there are no reasonable prospects of conviction or a criminal prosecution is not in the public interest.

78 The error in these submissions is that they seek to equate the civil preventive order regime with the regime for prosecution and punishment for past criminal offences. It is not to the point to ask whether the traditional use of the label "punishment"[145] might be extended to describe orders other than for past offences and where the purpose of the order does not include two of the traditional purposes of punishment: retribution and rehabilitation[146]. Nor is it to the point whether a civil preventive order regime might be brought within an extended conception of a "criminal justice system". The relevant point is that the regime is separate and distinct from traditional criminal justice and its outcomes can therefore be different without inconsistency. Prosecutions for criminal offences involve trials for offences based upon past conduct. The civil preventive order regime for serious crime is not a trial of any offence. It anticipates future risk, albeit with the past commission of an offence as "a step in the decision" about future risk[147]. The regimes thus involve different responses to a different

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145 See *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 596 [34], 610 [74], 655 [219].

146 See *The Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at 506 [55], quoting *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076 at 52,152.

147 *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at 371 [33]. See also *Duncan v New South Wales* (2015) 255 CLR 388 at 407-408 [41].

subject matter; no conflict and no double jeopardy is involved[148]. Issues of forensic prejudice to a defendant facing future criminal proceedings can be addressed where necessary by an adjournment or temporary stay of the civil proceedings until the conclusion of the criminal proceedings[149]. These are familiar considerations for courts.

79 The second strand of the plaintiffs' submissions was that the SCPO Act "enlists" the courts to administer a different, and lesser, form of criminal justice. After pointing to the variety of differences between the system of criminal justice concerned with prosecution of persons for past offences and the preventive order regime established by the SCPO Act, the plaintiffs submitted that the effect of the SCPO Act is that the Act empowers applicants for preventive orders – the Commissioner of Police, the Director of Public Prosecutions, and the New South Wales Crime Commission – with a discretion as to which grade of criminal justice would apply to a person. This strand of submissions again incorrectly assumes an identity between the function and purpose of civil preventive orders and the function and purpose of punishment for past offences. The lack of this identity makes the various differences in the regimes readily explicable. Nor is there any enlistment of the court by the executive. The orders are made by the court with substantial judicial discretion as to whether any order should be made as well as the content of the order. In *South Australia v Totani*[150], Hayne J identified the vice of the legislation there under challenge. His Honour said:

> "It is the Executive which chooses whether to apply for an order, and the Executive which chooses the members of a declared organisation that are to be made subject to a control order. So long as the person named as a defendant falls within the definition of 'member', the Court cannot refuse the Executive's application; the Court must make a control order ... [T]he Court is acting at the behest of the Executive."

The SCPO Act is not affected by this vice.

80 The third strand of the plaintiffs' submissions relied upon the remarks of Gaudron J in *Kable* that the legislature had attempted to "dress up" the

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148 Compare *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 14 [42]-[43].

149 See *Commissioner of Australian Federal Police v Zhao* (2015) 255 CLR 46 at 58-59 [35]-[37].

150 (2010) 242 CLR 1 at 89-90 [229].

proceedings as "proceedings involving the judicial process. In so doing, the Act makes a mockery of that process and, inevitably, weakens public confidence in it."[151] Contrary to the plaintiffs' written and oral submissions, the reference by Gaudron J to "public confidence" was not suggesting a licence for the Court to declare legislation invalid based upon its perception of the reaction of the public to the application of that legislation. Rather, public confidence represents "the trust reposed constitutionally in the courts"[152]. That construct of trust depends upon integrity. As Brennan CJ said in *Nicholas v The Queen*[153]:

> "Integrity is the fidelity to legal duty, not a refusal to accept as binding a law which the court takes to be contrary to its opinion as to the proper balance to be struck between competing interests. To hold that a court's opinion as to the effect of a law on the public perception of the court is a criterion of the constitutional validity of the law, would be to assert an uncontrolled and uncontrollable power of judicial veto over the exercise of legislative power. It would elevate the court's opinion about its own repute to the level of a constitutional imperative. It is the faithful adherence of the courts to the laws enacted by the Parliament, however undesirable the courts may think them to be, which is the guarantee of public confidence in the integrity of the judicial process and the protection of the courts' repute as the administrator of criminal justice."

81 In written submissions, the features of the SCPO Act that the plaintiffs submitted are a departure from established judicial methods and procedures included: (i) the civil standard of proof and rules of evidence; (ii) the admission of hearsay evidence where the evidence is from a "reliable source"; and (iii) the hearing being before a judge alone, without a jury. However, all of these matters are, or are consistent with, long-established judicial methods and procedures albeit usually in civil rather than criminal trials.

82 In oral submissions, the plaintiffs relied upon remarks of McHugh J in *Kable*, in what senior counsel for the plaintiffs accepted to be the "core summary" of the plaintiffs' case, that the SCPO Act is "'not directed to any determination or order which resolves an actual or potential controversy as to existing rights or obligations' which is the benchmark of an exercise of judicial

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151 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 108.

152 *Moti v The Queen* (2011) 245 CLR 456 at 478 [57].

153 (1998) 193 CLR 173 at 197 [37].

power"[154]. The plaintiffs focused upon the open-textured nature of the criteria by which the court is to evaluate whether to make an order and the terms of the order. This submission is contrary to history, authority and principle.

83 As to history, it is a factor in favour of the judicial character of an exercise of power that it is one which has been treated for centuries as an exercise of judicial power[155]. As has been explained above, preventive order regimes have antecedents as judicial power dating from the fourteenth century including binding-over orders, writs of supplicavit, injunctions to restrain the anticipated commission of criminal acts or public wrongs, and preventive order regimes consequent upon the curial sentencing process. The historical consideration is reinforced by the usual judicial methods that have accompanied the conferral of these powers on courts. It is true that the SCPO Act lacks express procedural guarantees of the kind identified by this Court as significant to the validity of the legislation in *Fardon*[156]. But the absence of express provision of that kind does not mean that such procedures as are necessary to ensure procedural fairness may be avoided. In the absence of a clearly expressed contrary legislative intent, the legislature is taken to intend that express procedures will be supplemented by such requirements for procedural fairness as are necessary to achieve it[157]. For present purposes, it is unnecessary for this Court to pass upon the likely content of the hearing rule on an application for an order under the SCPO Act: suffice it to say that given the seriousness of the consequences for the subject of

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154 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 122 (footnote omitted).

155 *Palmer v Ayres* (2017) 259 CLR 478 at 494 [37]. See also *R v Davison* (1954) 90 CLR 353 at 368-370, 382; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 387, 394; *Thomas v Mowbray* (2007) 233 CLR 307 at 329 [16]-[17], 357 [120]-[121]; *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 574 [105].

156 (2004) 223 CLR 575 at 596-597 [34], 621 [115]. It is also true that the SCPO Act does not expressly require the giving of reasons and that the exemption of eligible judges from the duty to give reasons was the basis of this Court's conclusion that the CCOC Act was invalid in *Wainohu v New South Wales* (2011) 243 CLR 181.

157 See, eg, *Annetts v McCann* (1990) 170 CLR 596 at 598; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 85 [95], 95 [131]-[132], 96-98 [139]-[143], 111-115 [178]-[188].

such an order, it is likely to be considerable[158]. To accept that it were otherwise would be to adopt the kind of "literal and draconian construction" which, as Gageler J cautioned in *North Australian Aboriginal Justice Agency Ltd v Northern Territory*[159], is so often advanced by challengers in constitutional litigation who desire "to maximise the prospect of constitutional invalidity".

84 As to authority, one point that emerges clearly from the decisions in *Thomas v Mowbray*[160], *Fardon*[161], *Wainohu v New South Wales*[162], and *Condon v Pompano Pty Ltd*[163], as we have set out above, is that sharp distinctions should not, and cannot, be drawn between the different open-textured criteria used to shape the judicial evaluative exercise for assessment of risk or the balancing exercise concerning the preventive order to be made. It could hardly be said that this Court could, on the one hand, uphold, as valid exercises of judicial power, criteria such as "an unacceptable risk to the safety, welfare or order of the community", "reasonably necessary", "reasonably appropriate and adapted", "sufficient grounds", and "considers appropriate", but, on the other hand, find invalid the use of criteria in the SCPO Act such as "appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement" or criteria amounting to an assessment of "real likelihood".

85 In our view, no relevant distinction can be drawn between the regime upheld in *Thomas v Mowbray*[164] and the SCPO Act. Like the terrorism control order regime, the preventive order regime in the SCPO Act involves a judicial procedure for orders that affect the liberty of the subject. In both regimes the person subject to the order need not be the person who it is suspected might

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158 *Eaton v Overland* (2001) 67 ALD 671 at 716 [165]; *Gribbles Pathology (Vic) Pty Ltd v Cassidy* (2002) 122 FCR 78 at 100 [117].

159 (2015) 256 CLR 569 at 604 [75].

160 (2007) 233 CLR 307.

161 (2004) 223 CLR 575.

162 (2011) 243 CLR 181.

163 (2013) 252 CLR 38.

164 (2007) 233 CLR 307.

commit an offence in the future[165]. The broadly expressed criteria in Div 104 of the *Criminal Code* are echoed in the provisions of the SCPO Act. The former uses concepts of whether making the order would "substantially assist" in preventing a "terrorist act"[166], which includes broad criteria such as "serious risk"[167] and "disrupts"[168], and whether the conditions in the order are "reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act"[169]. The concepts in the latter involve real risk, as well as notions of appropriateness related to "preventing, restricting or disrupting involvement"[170].

86 As to principle, the submission that the SCPO Act preventive order regime is not an exercise of judicial power, or is incompatible with the exercise of judicial power, due to its open-textured nature ultimately misconceives the process of judicial development of rules by reference to general conceptions. There is, at best, a fine distinction between the judicial development of a statutory standard and the development of a judicial standard[171]. Both proceed by the development and refinement of rules, often by the creation of categories of case, within the general conception. A statute can pick "up as a criterion for its operation a body of the general law" and "in the absence of a contrary indication in the statute, the statute speaks continuously to the present, and picks up the case law as it stands from time to time"[172]. Generally, broadly expressed criteria can be expected to be given content as "the technique of judicial interpretation [gives] content and more detailed meaning on a case to case basis. Rules and

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165 See *Thomas v Mowbray* (2007) 233 CLR 307 at 352 [97].

166 *Criminal Code* (Cth), s 104.4(1)(c)(i).

167 *Criminal Code* (Cth), s 100.1(2)(e).

168 *Criminal Code* (Cth), s 100.1(2)(f).

169 *Criminal Code* (Cth), s 104.4(1)(d).

170 SCPO Act, s 5(1)(c).

171 *Australian Securities and Investments Commission v Kobelt* (2019) 93 ALJR 743 at 762 [85]; 368 ALR 1 at 23.

172 *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 549 [23].

principles emerge which guide or direct courts in the application of the standard."[173]

87 When Lord Atkin created a "general conception" of a duty of care in *Donoghue v Stevenson*[174], what he did was to "open up a category of cases giving rise to a special duty. ... The general conception can be used to produce other categories in the same way. An existing category grows as instances of its application multiply until the time comes when the cell divides."[175] General conceptions, whether express or implied, requiring consideration of concepts such as "likelihood", "appropriateness", "disruption", or "interference", might not have the clarity of clear, rigid rules but, as Lord Nicholls of Birkenhead observed in *In re Spectrum Plus Ltd (In liq)*[176]:

> "Rigidity in the operation of a legal system is a sign of weakness, not strength. It deprives a legal system of necessary elasticity. Far from achieving a constitutionally exemplary result, it can produce a legal system unable to function effectively in changing times."

88 It may be accepted that there remains considerable room for judicial evaluation despite the general conceptions of ss 5 and 6, as properly interpreted, being deconstructed into the six steps discussed above. For instance, an important issue in crafting the appropriate precautionary response, particularly in relation to the fifth step, will be the "dual axes" of "assessment of the gravity of the harm in prospect ... [and] the degree of probability that it will actually occur"[177]. But the process of balancing the magnitude of a risk and its likelihood when determining the burden of alleviating precautions that is reasonable or appropriate is not alien

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173 Zines, *The High Court and the Constitution*, 4th ed (1997) at 195, quoted in *Thomas v Mowbray* (2007) 233 CLR 307 at 351 [91].

174 [1932] AC 562 at 580.

175 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 524-525. See also *Cook v Cook* (1986) 162 CLR 376 at 387.

176 [2005] 2 AC 680 at 699 [41].

177 Ashworth and Zedner, *Preventive Justice* (2014) at 122.

to judicial power. It is the very exercise upon which courts engage every day when assessing whether a duty of care has been breached[178].

89 For these reasons, there is nothing antithetical to the judicial process, and nothing that could impair the institutional integrity of a State Supreme Court, in open-textured legislation that establishes broad principles to be developed and applied by courts. The application of these rules to persons by courts is the very nature of the judicial process. It may be that, even after the rules become refined and developed, there will remain considerable latitude for courts to craft orders that relate to the particular person. That is how courts of equity operated for hundreds of years. It remains the case, including by the grant of orders restricting liberty by reference to predictive considerations in numerous areas including bail applications, sentencing hearings, custody and access disputes, and almost every day in applications for interim or interlocutory injunctions.

90 It is, therefore, unsurprising that it was not suggested in submissions that the power to make a preventive order is more naturally an executive power than a judicial power. There are good reasons why such powers, if they are to exist, should be exercised by the judiciary. A person subject to an exercise of judicial power should have the power to obtain legal representation, the benefit of a hearing with fair process and generally held in public, an entitlement to written reasons for the decision as to the orders made which demonstrate the application of general rules to the facts of the case, and a power of appeal or to seek leave to appeal. "This is not the way that any arm of the Executive conventionally operates."[179] In *Thomas v Mowbray*, Gleeson CJ observed that the decision by Parliament to confer this power on the judiciary reflected a "parliamentary intention that the power should be exercised judicially, and with the independence and impartiality which should characterise the judicial branch of government"[180]. The Chief Justice continued, saying that[181]:

> "the exercise of powers, independently, impartially and judicially, especially when such powers affect the liberty of the individual, would

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178 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48; *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 433 [27], 455-456 [105], 480-481 [213].

179 *Thomas v Mowbray* (2007) 233 CLR 307 at 508 [599].

180 *Thomas v Mowbray* (2007) 233 CLR 307 at 327 [12].

181 *Thomas v Mowbray* (2007) 233 CLR 307 at 329 [17].

ordinarily be regarded as a good thing, not something to be avoided. … To decide that such powers are exclusively within the province of the executive branch of government would be contrary to our legal history, and would not constitute an advance in the protection of human rights."

91 Section 5(1) of the SCPO Act is valid.

Conclusion

92 The questions of law referred to this Court in the special case should be answered as follows:

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

Answer: No.

Question 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?

Answer: Unnecessary to answer.

Question 3: Who should pay the costs of the special case?

Answer: The plaintiffs.

93 GAGELER J. On application to the Supreme Court of New South Wales or to the District Court of New South Wales by the Commissioner of Police ("the Commissioner"), the Director of Public Prosecutions or the New South Wales Crime Commission, s 5(1) of the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) ("the SCPO Act") empowers the court, where stated preconditions are met, to make a "serious crime prevention order" ("SCPO") against a person who has been convicted of a "serious criminal offence" or who is found by the court on the civil standard of proof to have been "involved in serious crime related activity". Section 6(1) of the SCPO Act provides that an SCPO "may contain such prohibitions, restrictions, requirements and other provisions as the court considers appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person in serious crime related activities". An SCPO can be made for a period of up to five years, during which period any contravention of it by the person against whom it is made is a criminal offence.

94 The substantive question in this special case in a proceeding for declaratory relief in the original jurisdiction of the High Court is whether s 5(1) of the SCPO Act is in whole or in part invalid because it is inconsistent with Ch III of the *Constitution*. My answer is that the provision is wholly invalid for that reason.

Supreme Court proceeding

95 The proceeding for declaratory relief arises out of a proceeding on an application under s 5(1) of the SCPO Act that is pending in the Supreme Court of New South Wales in which the Commissioner (the first defendant in the proceeding for declaratory relief) is the plaintiff and Damien Vella, Johnny Vella and Michael Fetui (the plaintiffs in the proceeding for declaratory relief) are defendants. The Commissioner alleges in the Supreme Court proceeding that each defendant in that proceeding is a member of an organisation known as the "Rebels", which the Commissioner refers to as an "Outlaw Motorcycle Gang".

96 By further amended summons in the Supreme Court proceeding, the Commissioner seeks SCPOs prohibiting each defendant in that proceeding for a period of two years from:

- approaching, contacting or associating directly or indirectly with any person known by the defendant to be a member (or former member), associate (or former associate), hangaround (or former hangaround), nominee (or former nominee) or prospect (or former prospect) of any outlaw motorcycle gang, with the exception for Damien and Johnny Vella of pre-arranged, approved family events;

- travelling in any vehicle between the hours of 9 pm and 6 am except in the case of a genuine medical emergency;

- attending or approaching any premises known or suspected by the defendant to be a residence of, a place of employment of, or a place occupied or frequented by, any member (or former member), associate (or former associate), hangaround (or former hangaround), nominee (or former nominee) or prospect (or former prospect) of any outlaw motorcycle gang, with the exception again for Damien and Johnny Vella of pre-arranged, approved family events;

- possessing or having access to an encrypted communications device or encrypted media application (including but not limited to WhatsApp, Wickr, Snapchat, Hushmail and Confide);

- possessing more than one mobile telephone;

- possessing any weapon; and

- wearing, possessing or displaying any Rebels insignia, patches or accoutrement and other merchandise.

97 With the exception (depending on the circumstances) of possessing a weapon, each of the prohibitions sought by the summons to be contained in each SCPO would constrain conduct that is otherwise lawful.

98 Reflecting the structure of s 5(1) of the SCPO Act, to the detail of which it will be necessary in due course to turn, the summons indicates that the Commissioner seeks those orders against each defendant in the Supreme Court proceeding on three cumulative grounds. The first is that each defendant is over 18 years of age. The second is that each defendant has been convicted of a "serious criminal offence" or has been involved in other "serious crime related activity". The third is that there are reasonable grounds to believe that making the SCPO against each defendant would protect the public by preventing, restricting or disrupting involvement by him in serious crime related activities.

99 There is no dispute that each defendant in the Supreme Court proceeding has been convicted of serious criminal offences. The convictions were, in respect of each defendant, of offences against provisions of the *Crimes Act 1900* (NSW). In relation to Damien Vella, the convictions on which the Commissioner relies are convictions in 2008 of one offence of robbery in company[182] and of three offences of obtaining a valuable thing by deception[183], each committed in 2006. In relation to Johnny Vella, the Commissioner similarly relies on convictions in

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182 Section 97(1) of the *Crimes Act*.

183 Section 178BA(1) of the *Crimes Act*.

2008 of one offence of robbery in company and of three offences of obtaining a valuable thing by deception, again, each committed in 2006, as well as on a conviction in 2001 of an offence of larceny[184] committed in 2001. In relation to Michael Fetui, the Commissioner relies on a series of more recent convictions. They are a conviction in 2010 of an offence of resisting an officer in the execution of his or her duty[185] committed in 2009, a conviction in 2011 of an offence of affray[186] committed in 2011, a conviction in 2015 of an offence of assault occasioning actual bodily harm[187] committed in 2014, and convictions in 2018 of offences of affray and resisting an officer in the execution of his or her duty committed in 2018.

100 Disputed in the Supreme Court proceeding, and required in that proceeding to be determined by the Supreme Court on the civil standard of proof, is whether each defendant has been involved in serious crime related activity within the meaning of the SCPO Act for which he has not been convicted. The Commissioner alleges in the Supreme Court proceeding that each is a participant in a criminal group contrary to s 93T of the *Crimes Act*. The Commissioner additionally alleges in relation to Damien Vella and Johnny Vella that each was involved in an offence of assault occasioning actual bodily harm (for which each was charged and acquitted before the District Court of New South Wales in 2007) and offences of shooting with intent to murder[188] and discharging loaded arms with intent to inflict grievous bodily harm[189] (for which each was charged in 2006 but the charges were not proceeded with before the District Court in 2007). The Commissioner additionally alleges in relation to Michael Fetui that he was involved in an offence of affray (for which he was charged in the Local Court but the charge was withdrawn in 2014) as well as offences of engaging in acts intended to cause grievous bodily harm, participating in a criminal organisation, serious organised crime and affray for which he was charged in Queensland in 2019 in criminal proceedings which remain pending in Queensland.

101 To avoid confusion in nomenclature, I will refer to Damien Vella, Johnny Vella and Michael Fetui (in their capacity as plaintiffs in the proceeding for

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184 Section 117 of the *Crimes Act*.

185 Section 58 of the *Crimes Act*.

186 Section 93C(1) of the *Crimes Act*.

187 Section 59(1) of the *Crimes Act*.

188 Section 29 of the *Crimes Act*.

189 Section 33A(1) of the *Crimes Act*.

declaratory relief) as "the individuals" and to refer to the Commissioner and the State of New South Wales (in their capacity as defendants in the proceeding for declaratory relief) as "the State".

SCPO Act

102 The SCPO Act is relevantly described in its long title as "[a]n Act to provide for the making of serious crime prevention orders". The Explanatory Note to the Bill for the SCPO Act explained its object as being "to enable the Supreme Court and the District Court to make serious crime prevention orders, on the application of the Commissioner of Police, the Director of Public Prosecutions or the New South Wales Crime Commission, so as to prevent, restrict or disrupt involvement by certain persons in serious crime related activities"[190].

103 In the Second Reading Speech for the Bill for the SCPO Act in the Legislative Assembly the purpose of the SCPO Act and cognate legislation was said to be "to deliver on the Government's election commitment to introduce tough new powers to give police the upper hand in the fight against serious crime". Those powers were said to "include United Kingdom-style serious crime prevention orders to disrupt the activities of serious criminals"[191]. The reference was to powers conferred by the *Serious Crime Act 2007* (UK) ("the UK SCPO Act"), on which the SCPO Act appears in part to have been modelled.

104 The operation of the SCPO Act is reliant on five key defined terms. The first is "appropriate court", which means the Supreme Court and in some circumstances the District Court[192]. The second is "eligible applicant", which means any of the Commissioner, the Director of Public Prosecutions and the New South Wales Crime Commission[193]. The third is "serious criminal offence", which has the same meaning as in the *Criminal Assets Recovery Act 1990* (NSW)[194]. The fourth is "serious crime related activity", which means anything done by a person that is or was at the time a serious criminal offence, whether or

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190 New South Wales, *Crimes (Serious Crime Prevention Orders) Bill 2016*, Explanatory Note at 1.

191 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 March 2016 at 60.

192 Section 3(1) of the SCPO Act, definition of "appropriate court".

193 Section 3(1) of the SCPO Act, definition of "eligible applicant".

194 Section 3(1) of the SCPO Act, definition of "serious criminal offence".

not the person has been charged with the offence, or, if charged, has been tried, or, if tried, has been convicted or acquitted or had a conviction quashed or set aside on appeal[195].

105 The meaning given to "serious criminal offence" in the *Criminal Assets Recovery Act*[196] as imported into the SCPO Act is extremely broad. The definition in the *Criminal Assets Recovery Act* is expressed to encompass offences against specified provisions of the *Crimes Act*, of the *Firearms Act 1996* (NSW), of the *Drug Misuse and Trafficking Act 1985* (NSW) and of the *Poisons Act 1966* (NSW)[197]. It is also expressed to encompass any "offence that is punishable by imprisonment for 5 years or more and involves theft, fraud, obtaining financial benefit from the crime of another, money laundering, extortion, violence, bribery, corruption, harbouring criminals, blackmail, obtaining or offering a secret commission, perverting the course of justice, tax or revenue evasion, illegal gambling, forgery or homicide"[198]. The individuals pointed out that the effect of that added omnibus provision is to sweep up most of the remaining offences in the *Crimes Act*. Not confining itself to conduct within New South Wales, the definition is also expressed to encompass offences against a law of the Commonwealth or of another State or a Territory or of a place outside of Australia which would amount to serious criminal offences if committed in New South Wales[199]. Its operation in that respect is illustrated by the most recent serious crime related activities which the Commissioner alleges in relation to Michael Fetui in the Supreme Court proceeding. Finally, the definition is expressed to encompass an "offence of attempting to commit, or of conspiracy or incitement to commit, or of aiding or abetting", any of the other offences to which it refers[200].

106 The remaining defined term on which the operation of the SCPO Act is reliant is "involved in serious crime related activity". The definition of the term is as follows[201]:

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195 Section 3(1) of the SCPO Act, definition of "serious crime related activity".

196 Section 6(2), (3) and (4) of the *Criminal Assets Recovery Act*.

197 Section 6(2)(a)-(b), (e)-(h) of the *Criminal Assets Recovery Act*.

198 Section 6(2)(d) of the *Criminal Assets Recovery Act*.

199 Section 6(2)(i) of the *Criminal Assets Recovery Act*.

200 Section 6(2)(j) of the *Criminal Assets Recovery Act*.

201 Section 4(1) of the SCPO Act.

> "For the purposes of this Act, a person is ***involved in serious crime related activity*** if:
>
> (a) the person has engaged in serious crime related activity, or
>
> (b) the person has engaged in conduct that has facilitated another person engaging in serious crime related activity, or
>
> (c) the person has engaged in conduct that is likely to facilitate serious crime related activity (whether by the person or another person)."

For the purpose of determining whether the conduct of a person has facilitated another person to engage in serious crime related activity, yet oddly not for the purpose of determining whether the conduct of a person is likely to facilitate serious crime related activity by that person or another person, "a court may take into account whether the conduct was reasonable in all the circumstances"[202].

107 The definition of "involved in serious crime related activity" is cast in terms which make the question of whether a person "is involved" in serious crime related activity dependent on whether the person "has engaged" in any of the categories of activity identified in paras (a), (b) or (c). Whilst no party or intervener sought to make anything of that change of tense, the effect of the provision is to make past engagement correspond to present and ongoing involvement.

108 Turning to the detail of the definition, para (a) refers to conduct that constitutes a serious criminal offence. The paragraph for that reason imports a requirement for the existence of the mental element as well as the physical element of such an offence. Paragraphs (b) and (c), in contrast, refer to conduct which need not constitute a criminal offence. Neither para (b) nor para (c) imports any requirement for knowledge of or intention to facilitate serious crime related activity. The concept of facilitation invoked in each of them derives from the ordinary understanding of that terminology. Applying that ordinary understanding, facilitation of serious crime related activity involves nothing more than making conduct that constitutes serious crime related activity easier[203]. The word "likely" in para (c) has its ordinary meaning, "namely, to convey the notion of a substantial – a 'real and not remote' – chance regardless of whether it is less or more than 50 per cent"[204].

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202 Section 4(2) of the SCPO Act.

203 *Milne v The Queen* (2014) 252 CLR 149 at 163 [33].

204 *Boughey v The Queen* (1986) 161 CLR 10 at 21.

109 Brought within the concept of involvement in serious crime related activity by para (b) of the definition is accordingly lawful conduct that makes it easier for another person to engage in conduct that constitutes a serious criminal offence or that constitutes other serious crime related activity. Then added by para (c) of the definition is lawful conduct that does no more than to give rise to a real chance of making it easier for someone to engage in conduct that constitutes a serious criminal offence or that constitutes other serious crime related activity.

110 The statutory concept of involvement in serious crime related activity in that way takes the already broad statutory concept of a serious criminal offence and builds around it a personalised penumbra of lawful activities which in some way increase the risk of someone committing a serious criminal offence, including a serious criminal offence that is itself inchoate or accessorial. That penumbral operation is illustrated by an example given in argument by the individuals and not disputed by the State. For a person at risk of committing the serious criminal offence of stealing from a department store (an offence involving theft punishable by five years' imprisonment[205]), entering a department store becomes involvement in a serious crime related activity.

111 Section 5(1) of the SCPO Act, which must be read in light of each of those definitions, provides:

> "An appropriate court may, on the application of an eligible applicant, make an order (a ***serious crime prevention order***) against a specified person if:
>
> (a) in the case of a natural person – the person is 18 years old or older, and
>
> (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,

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205 Section 117 of the *Crimes Act*.

> restricting or disrupting involvement by the person in serious crime related activities."

A serious criminal offence or serious crime related activity is within s 5(1)(b)(i) or (ii) whether it occurred before or after the commencement of the SCPO Act[206].

112 Section 6(1) of the SCPO Act, which is headed "Content of serious crime prevention order", provides:

> "A serious crime prevention order may contain such prohibitions, restrictions, requirements and other provisions as the court considers appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person in serious crime related activities."

Section 6(2) cuts back on the amplitude of s 6(1) to the extent of providing that an SCPO cannot require a person to answer questions or provide information orally or to provide specified categories of documents or other information. The precise scope of that qualification is not presently material.

113 The procedure for making an SCPO requires that an application for an SCPO normally be served on the person against whom it is sought[207]. That person is given a right to appear and participate in the hearing of the application[208]. The proceeding on the application is designated to be a civil proceeding[209] in which the rules of evidence applicable in civil proceedings (including as to the burden of proof) apply[210]. The one exception is that the court is permitted to take into account hearsay evidence, despite any rule relating to the admission of hearsay evidence to the contrary, if the court is satisfied that the evidence is from a reliable source and is otherwise relevant and of probative value and that the person against whom the order is sought to be made has been notified of, and served with a copy of, the evidence before its admission[211].

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206 Clause 2 of Sch 1 to the SCPO Act.

207 Section 5(3) of the SCPO Act.

208 Section 5(4) of the SCPO Act.

209 Section 13(1) of the SCPO Act.

210 Section 13(2)(b) of the SCPO Act.

211 Section 5(5) of the SCPO Act.

114 Where made, an SCPO must be served on the person against whom it is made[212], takes effect from the time of service (or from such later time as might be specified in the order)[213] and continues in effect for the period specified in the order[214], which can be a period of up to five years[215]. Although the SCPO can be varied or revoked at any time on application by the applicant for the order or the person against whom it is made[216], an application for variation or revocation can only be made by the person against whom the order is made with leave of the court, which can only be granted if the court is satisfied that there has been a substantial change in the relevant circumstances since the order was made or last varied[217].

115 For so long as the SCPO remains in effect, the person against whom it is made commits a criminal offence if he or she contravenes the order[218]. Noting that it would be open to the person to raise by way of exculpation an honest and reasonable mistake as to the existence of facts which, if true, would have taken his or her conduct outside the relevant prohibition in the SCPO[219], the offence would be one of strict liability punishable by imprisonment for up to five years.

Construction of ss 5(1)(c) and 6(1) of the SCPO Act

116 Preliminary to consideration of the consistency of s 5(1) of the SCPO Act with Ch III of the *Constitution* is examination of its legal and practical operation. Examination of that legal operation requires attention to the construction of s 5(1) as well as to the construction of s 6(1).

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212 Section 5(6) of the SCPO Act.

213 Section 7(1)(a) of the SCPO Act.

214 Section 7(1)(b) of the SCPO Act.

215 Section 7(2) of the SCPO Act.

216 Section 12(1) of the SCPO Act.

217 Section 12(2) of the SCPO Act.

218 Section 8 of the SCPO Act.

219 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 533; *CTM v The Queen* (2008) 236 CLR 440 at 447 [8].

117 Before the enactment of the SCPO Act, the operation of a somewhat similarly worded provision in the UK SCPO Act[220] had been explained in *R v Hancox*[221], a decision of the Court of Appeal of England and Wales to which specific reference was made in the course of debate on the Bill for the SCPO Act in the Legislative Assembly[222]. The provision was explained to require, for the making of such an order: that there must be a "real, or significant, risk" that the person convicted of having committed a serious offence, against whom the order is sought, will commit further serious offences; and that the order must be "proportionate" in the sense that "it is not enough that the order *may* have some public benefit in preventing, restricting or disrupting involvement by the [person] in serious crime" but rather that "the interference which it will create with the [person's] freedom of action must be justified by the benefit" and that "the provisions of the order must be commensurate with the risk"[223].

118 The explanation in *R v Hancox* of the need to be satisfied of a "real, or significant, risk" and that the order will be "proportionate" can be accepted as broadly descriptive of the legislatively contemplated nature of the inquiry to be undertaken by the Supreme Court or the District Court in the application of ss 5(1) and 6(1) of the SCPO Act. However, closer analysis is required. Issues of construction bearing on the constitutional validity of s 5(1) arise in relation to both s 5(1)(c) and s 6(1).

119 The word "may" in s 5(1) of the SCPO Act connotes the conferral on the appropriate court of a discretion[224]. The discretion to make an SCPO is enlivened, on application, if each precondition in paras (a), (b) and (c) of s 5(1) is met. Section 6(1) governs the content of such SCPO as might be made in the exercise of that discretion.

120 Yet it is apparent from the terms of ss 5(1)(c) and 6(1) that those two provisions cannot be applied independently, for the reason that "the order" to which s 5(1)(c) refers can only be an order the content of which complies with

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220 Section 19 of the UK SCPO Act.

221 [2010] 1 WLR 1434; [2010] 4 All ER 537.

222 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 May 2016 at 42.

223 [2010] 1 WLR 1434 at 1437 [9]-[10]; [2010] 4 All ER 537 at 540-541 (original emphasis).

224 Section 9(1) of the *Interpretation Act 1987* (NSW).

s 6(1). For an SCPO to be made, it must be determined by the court to meet the requirements of both provisions.

121 To appreciate the judgment calls required of a court in the application of both s 5(1)(c) and s 6(1), it is necessary to begin by unpacking the common language which those provisions employ. Using different parts of speech, each uses the language of protecting "the public by preventing, restricting or disrupting" involvement of the person against whom an SCPO is made in serious crime related activities.

122 The State submitted that protection of the public constitutes a separate and distinct consideration within the analysis required in the application of that language. The word "by" makes plain that it is not. Protection of the public is equated to "preventing, restricting or disrupting" involvement in serious crime related activities. The legislative contemplation is that the public is protected if and to the extent that a person is so prevented, restricted or disrupted. There is no added requirement for a finding of public protection.

123 Importantly, the words "preventing, restricting or disrupting" in both s 5(1)(c) and s 6(1) constitute a composite expression. The expression is of variable content. The expression is indicative of a spectrum of potential impediment to the person against whom an SCPO is made becoming involved in serious crime related activities. At the highest end of the spectrum – prevention – is the effect of stopping the person from becoming involved in serious crime related activities, perhaps involving conduct that constitutes the commission by the person of a serious criminal offence. At the lowest end of the spectrum – disruption – is the erection of some sort of obstacle which makes it more difficult for the person to become involved in serious crime related activities, perhaps involving no more than conduct that gives rise to a real chance of making it easier for some other person to commit a serious criminal offence that is itself inchoate or accessorial. Between those two extremes is a range of potential degrees of impediment to involvement in some or all serious crime related activities.

124 Correspondingly, the words "prohibitions, restrictions, requirements and other provisions" in s 6(1) connote a range of constraints on freedom by which some impediment to involvement in some or all serious crime related activities might be imposed. To return to the example used in argument of a person who would be involved in serious crime related activity by entering a department store, measures which might reduce the risk of the person engaging in that activity and which might therefore be available under s 5(1)(c) to be included in an SCPO would potentially include: a prohibition on approaching within a specified distance of a department store during opening hours, a restriction on travel to the locality of a department store, or a requirement to wear a tracking device.

125 The constraints on freedom which might be imposed within the range are infinitely malleable in their scope and intensity. They might restrict conduct. They might compel conduct. The parties and some interveners disagreed about whether they might extend to some form of detention. There is no need to resolve that disagreement in order to determine the constitutional validity of s 5(1).

126 What s 5(1)(c) in terms requires as a precondition to the making of an SCPO is that the court be "satisfied that there are reasonable grounds to believe that the making of" a particular SCPO "would" prevent, restrict or disrupt involvement in serious crime related activities by the person against whom it is made. The mandated inquiry is inherently forward-looking. The required judgment is inherently predictive.

127 The level of satisfaction signified by the requirement for satisfaction "that there are reasonable grounds to believe" is settled in Australian law. Belief on reasonable grounds requires "an inclination of the mind towards assenting to, rather than rejecting, a proposition" based on objective circumstances sufficient to induce that state of mind in a reasonable person which "may, depending on the circumstances, leave something to surmise or conjecture"[225]. The requisite belief here can only be that of the appropriate court to which the application for the SCPO is made. The content of "would" in the context of s 5(1)(c) is informed by that understanding. The word in context requires no more than belief on reasonable grounds on the part of the court as to the existence of a real likelihood[226] corresponding to a real and not remote chance.

128 Section 5(1)(c) accordingly requires, as a precondition to the making of an SCPO, that the court be persuaded, having regard to the objective circumstances proved by the evidence before it, to incline to the belief that: (1) there is a real and not remote chance, or a real risk, that the person against whom the SCPO is made would be involved in serious crime related activities in the absence of the SCPO; and (2) there is a real and not remote chance that subjection of the person to the particular prohibitions, restrictions, requirements or other provisions to be imposed by the SCPO would in some degree impede that involvement. The requisite satisfaction, in short, is as to the likelihood of the constraints on freedom to be imposed by the SCPO to some extent reducing the risk of the person being involved in serious crime related activities in the future.

129 What s 6(1) adds to s 5(1)(c) is a requirement that the particular prohibitions, restrictions, requirements or other provisions to be imposed by the

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

226 cf *New South Wales v Taylor* (2001) 204 CLR 461 at 481 [63], 491 [100].

SCPO be considered by the court to be "appropriate" for the purpose of reducing the identified risk of the person being involved in serious crime related activities in the future. The word "appropriate", of course, connotes an evaluative judgment, involving "the striking of a balance between relevant considerations so as to provide the outcome which is fit and proper"[227]. No doubt, in forming the requisite evaluative judgment as to appropriateness, the court is obliged to weigh its assessment of the degree of risk of the person being involved in serious crime related activities, seemingly in terms of both the likelihood and seriousness of those serious crime related activities, absent the constraints to be imposed by the SCPO against the impact of those constraints on the person's liberty. And no doubt, the court will not consider the constraints to be imposed by the SCPO "appropriate" unless it considers them to be justified by the reduction in risk which they would produce. The word "proportionate" might well be used to describe a constraint which the court considers so justified. The SCPO Act, however, provides neither express nor implicit guidance as to the relative weights to be given to liberty and risk or as to how the ultimate balance is to be struck.

Practical operation of s 5(1) of the SCPO Act

130 The practical operation of s 5(1) of the SCPO Act is best illustrated by looking to how it would fall to be applied in the pending Supreme Court proceeding.

131 Each individual being an adult who has been convicted in the past of serious criminal offences, ss 5(1)(a) and 5(1)(b)(i) would be satisfied. The outcome of the contest between the parties as to whether each individual has been involved in serious crime related activity for which he has not been convicted of a serious criminal offence so as also to satisfy s 5(1)(b)(ii) would make no difference to satisfaction of the precondition in s 5(1)(b).

132 The critical contest would be as to the threshold requirement posed by s 5(1)(c): whether the Supreme Court should be persuaded to assent to the proposition that there is a real risk that each individual would be involved in serious crime related activities in the absence of an SCPO. For that purpose, the individual's past convictions of serious criminal offences and any other serious crime related activities which might be proved in the proceeding to the civil standard would be relevant but not determinative. Other evidence bearing on propensity for involvement in serious crime related activities would be relevant.

133 If the Supreme Court were to be persuaded on the evidence before it of a real risk that an individual would be involved in serious crime related activities in

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227 *Mitchell v The Queen* (1996) 184 CLR 333 at 346.

the absence of an SCPO, it would be incumbent on the Supreme Court to go on to examine each prohibition contained in the SCPO sought against the individual by the Commissioner to determine: for the purpose of s 5(1)(c), whether the prohibition would in some degree impede the individual's involvement in serious crime related activities; and for the purpose of s 6(1), whether the prohibition is appropriate for that purpose having regard to the extent of its impact on the freedom of the individual.

134 If the Supreme Court determined that a prohibition sought by the Commissioner would impede the individual's involvement in serious crime related activities to a degree which justified its impact on the individual's freedom, the Supreme Court's discretion to make an SCPO containing the prohibition would be enlivened. Absent some reason for the discretion not to be exercised, the SCPO would be made.

135 The result would be the promulgation of a personalised code of conduct to which the individual would thereafter be bound for the two-year period of the SCPO under pain of criminal punishment for contravention. Alone for the individual against whom the SCPO was made, conduct otherwise lawful would become by force of the SCPO criminal conduct.

136 In the United Kingdom, "civil preventive orders" under the UK SCPO Act, and similarly structured legislation which originated in the 1990s and increased gradually in scope in the 2000s[228], have been described as amounting to a form of "personal criminal law". They have been identified as giving rise to the "constitutional objection" that, in conferring broad and flexible powers on courts to make them on application by the executive, the United Kingdom Parliament "has effectively breached the separation of powers by giving 'a wholly discretionary judgment of character and disposition' to the courts, which effectively 'collapses legislative and adjudicative functions into the executive function'"[229].

137 In Australia, where we have a constitution custodianship of which is the inalienable duty of this Court, considerations of that nature engage directly with Ch III of the *Constitution* through the principle associated with *Kable v Director of Public Prosecutions (NSW)* ("*Kable*")[230].

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228 Ashworth and Zedner, *Preventive Justice* (2014) at 75-76.

229 Ashworth and Zedner, *Preventive Justice* (2014) at 87.

230 (1996) 189 CLR 51.

The *Kable* principle

138 The principle for which *Kable* is taken to stand as authority was stated sufficiently (not exhaustively[231]) by Gleeson CJ in *Fardon v Attorney-General (Qld)* ("*Fardon*")[232]. The principle so stated is "that, since the *Constitution* established an integrated Australian court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts [and other State courts], State legislation which purports to confer upon such a court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid".

139 That statement of the principle captures the constitutionally implied limitation on State legislative power that is presently applicable together with the structural reason for that implication. The limitation is that State legislative conferral on a State court of a function which substantially impairs the institutional integrity of the court is inconsistent with Ch III of the *Constitution*. Implication of that limitation is necessitated by the constitutional structure because impairment of the court's institutional integrity undermines the capacity of the Commonwealth Parliament to invest the judicial power of the Commonwealth in that court.

140 The constitutional justification for the limitation on State legislative power is accordingly founded on the constitutional justification for Ch III's requirement that the judicial power of the Commonwealth be invested only in institutions sufficiently distinct from other arms of government to answer the description of "courts". Underlying that separation of Commonwealth judicial power is "the recognition that we have inherited and were intended by our Constitution to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive", "the rights referred to in such an enunciation [being] the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom"[233]. Most basic amongst those rights, and characteristically the most jealously safeguarded by courts within our inherited common law tradition, is the right to liberty. Indeed, the underlying constitutional doctrine has been traced to

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231 See *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 162-164 [26]-[32]; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63]-[64].

232 (2004) 223 CLR 575 at 591 [15]. See also *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 424 [40].

233 *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11.

Montesquieu's proposition that "there is no liberty, if the judiciary power be not separated from the legislative and executive"[234].

141 Chapter III's separation of the judicial power of the Commonwealth to be exercisable only by courts "was not a product of abstract reasoning alone, and was not based upon precise definitions of the terms employed". Rather, it was "based upon observation of the experience of democratic states"[235]:

> "It may accordingly be said that when the Constitution of the Commonwealth prescribes as a safeguard of individual liberty a distribution of the functions of government amongst separate bodies, and does so by requiring a distinction to be maintained between powers described as legislative, executive and judicial, it is using terms which refer, not to fundamental functional differences between powers, but to distinctions generally accepted at the time when the Constitution was framed between classes of powers requiring different 'skills and professional habits' in the authorities entrusted with their exercise."

The point is not that the characteristics of judicial power and of institutions qualified to exercise it are frozen in time. They are not. The point is that those characteristics are deeply rooted in a tradition within which judicial protection of individual liberty against legislative or executive incursion has been a core value.

142 Continued reference to an independent judiciary as "a safeguard of individual liberty", or in language traceable to Blackstone[236] as a "bulwark of freedom", can too easily be dismissed in contemporary Australia as antiquated hyperbole. That is so if regard is not had to the contemporary experience of once-democratic states, also inheritors of the common law tradition, where judicial independence has fallen into neglect and where the characteristics of institutions entrusted with the exercise of judicial power have been permitted to become less distinctive.

143 In *Hilton v Wells*[237], Mason and Deane JJ quoted as applicable to Ch III's separation of Commonwealth judicial power an observation made by Cardozo CJ

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234 Montesquieu, *The Spirit of Laws* (Nugent trans, 1873), bk XI, ch VI at 174 (*L'Esprit des Lois*, first published 1748). See also *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 390-393.

235 *R v Davison* (1954) 90 CLR 353 at 380-382.

236 Blackstone, *Commentaries on the Laws of England* (1765), bk I at 133.

237 (1985) 157 CLR 57 at 82.

in the context of addressing the separation of powers under the Constitution of the State of New York[238]. The observation, as quoted, was as follows:

> "From the beginnings of our history, the principle has been enforced that there is no inherent power in Executive or Legislature to charge the judiciary with administrative functions except when reasonably incidental to the fulfilment of judicial duties. ... The exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers. Elasticity has not meant that what is of the essence of the judicial function may be destroyed".

144 Subsequently, in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[239], Ch III's separation of the "judicial function" from the "political functions of government" was referred to as a "constitutional imperative" buttressing judicial independence "not only by avoiding the occasions when political influence might affect judicial independence but by proscribing occasions that might sap public confidence in the independence of the Judiciary". That recognition of the foundational significance of the separation of the judicial function from the political functions of government to ensuring the actuality and the perception of the independent exercise of judicial power underlay the appropriation and application both in *Wilson*[240] and in *Kable*[241] of the statement of the Supreme Court of the United States in *Mistretta v United States*[242] that "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship" from which it follows that the reputation of the Judicial Branch "may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action".

145 The independence of the judiciary is more likely to be destroyed by the creeping normalisation of piecemeal borrowing of judicial services to do the work of the legislature or the executive than by any single act of outright

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238 *In re Richardson* (1928) 160 NE 655 at 657.

239 (1996) 189 CLR 1 at 12.

240 (1996) 189 CLR 1 at 9.

241 (1996) 189 CLR 51 at 133.

242 (1989) 488 US 361 at 407.

conscription. Writing soon after *Mistretta*, Professor Martin Redish made essentially that point. He wrote[243]:

> "Generally, the danger is an incremental one: eventually the judicial branch will either have acquired an excess of authority or will have lost much of its requisite integrity, but no single breach could be attributed responsibility for the overall harm. It is presumably for that very reason that separation of powers protections are largely prophylactic in nature: they are designed to prevent damage to the political framework before the truly serious harm intended to be avoided can occur."

146 Judicial determination of whether a particular function conferred on a State court by State legislation infringes *Kable*'s implied limitation on State legislative power must be cognisant of the ongoing importance of the reasons which underlie Ch III's exclusive allocation of the judicial power of the Commonwealth to institutions having sufficient independence from other arms of government to qualify as "courts". It must be cognisant of the risk of the destruction of the institutional integrity of courts by attrition – the "death by a thousand cuts"[244] – and such use as it might make of analogical reasoning must be sensitive to that risk.

147 Nowadays, it goes without saying that the institutional integrity of a State court cannot be impaired by State legislative conferral of a function which the Commonwealth Parliament could itself confer on a State court as an incident of the judicial power of the Commonwealth[245]. It ought also to be recognised that if the Commonwealth Parliament could not itself confer a function on a State court as an incident of the judicial power of the Commonwealth, the reason why the function lies beyond the power of the Commonwealth Parliament to confer on that court can inform determination of whether the function is properly

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243 Redish, "Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of *Morrison* and *Mistretta*" (1989) 39 *DePaul Law Review* 299 at 303.

244 Welsh, "A Path to Purposive Formalism: Interpreting Chapter III for Judicial Independence and Impartiality" (2013) 39 *Monash University Law Review* 66 at 71, quoting Gerangelos, "Interpretational Methodology in Separation of Powers Jurisprudence: The Formalist/Functionalist Debate" (2005) 8 *Constitutional Law and Policy Review* 1 at 3.

245 *Bachrach (HA) Pty Ltd v Queensland* (1998) 195 CLR 547 at 561-562 [14]; *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181 at 186 [10]; *Baker v The Queen* (2004) 223 CLR 513 at 526-527 [22]-[24]; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 90 [126].

characterised as incompatible with the institutional integrity of the court so as to be also beyond the power of a State Parliament to confer on the State court. Consistently with *Kable*'s "essential notion"[246] that Ch III of the *Constitution* does not "permit[] of different grades or qualities of justice" as between Commonwealth and State courts[247], a power that is not judicial because it is corrosive of the independence of the institution on which it is conferred must lie beyond legislative power to confer on a State court, irrespective of the source of that legislative power.

Non-judicial power

148 Relying principally on *Thomas v Mowbray*[248], the Solicitor-General of the Commonwealth went so far as to submit that the power conferred by s 5(1) of the SCPO Act is of a kind which could be conferred on a court by Commonwealth legislation as part of the judicial power of the Commonwealth. The submission overstated the effect of that decision. I reject it for the following reasons.

149 "The power to restrict or interfere with a person's liberty on the basis of what that person might do in the future", as Gleeson CJ observed in *Thomas v Mowbray*, "is not intrinsically a power that may be exercised only legislatively, or only administratively"[249]. Dispensation of "preventive justice", another description traceable to Blackstone[250], is not inherently incompatible with judicial power.

150 Like any other power conferred on a court by Commonwealth legislation, however, a particular power to restrict or interfere with a person's liberty on the basis of what that person might do in the future can only be conferred if the power is, or is incidental to, a power that is properly characterised as "judicial power".

151 Consistently with the reasons for the separation of judicial power being rooted in constitutional history, the content of judicial power has been said to "defy, perhaps it were better to say transcend, purely abstract conceptual

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246 *Fardon* (2004) 223 CLR 575 at 617 [101].

247 *Kable* (1996) 189 CLR 51 at 103.

248 (2007) 233 CLR 307.

249 (2007) 233 CLR 307 at 328 [15].

250 Blackstone, *Commentaries on the Laws of England* (1769), bk IV at 248.

analysis"[251]. But consistently again with the historical preoccupation of the separation of powers doctrine with the protection of liberty, judicial power has been recognised to have at its core the power of a polity "to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property"[252]. The "unique and essential function of the judicial power is the quelling of such controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion"[253]. Thus, as it was put in the classic statement of Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*[254], "a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons".

152 Paradigmatically within the "general rule", and incontestably "at the heart of exclusive judicial power", is "the power to determine whether a person has engaged in conduct which is forbidden by law and, if so, to make a binding and enforceable declaration as to the consequences which the law imposes by reason of that conduct"[255]. Never doubted has been that the function of "adjudging and punishing criminal guilt" is "exclusively judicial"[256], and repeatedly recognised has been that "involuntary detention of a citizen in custody by the State" other than in "exceptional cases" is consistent with Ch III "only as a consequential step in the adjudication of criminal guilt of that citizen for past acts"[257].

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251 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394.

252 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357.

253 *Fencott v Muller* (1983) 152 CLR 570 at 608.

254 (1970) 123 CLR 361 at 374.

255 *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 497.

256 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27. See also *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 175; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 258.

257 *Fardon* (2004) 223 CLR 575 at 612 [80].

153 Traditionally, circumstances in which courts have exercised powers to constrain liberty by reference to what a person might do in the future have been confined to instances of the "general rule".

154 Plainest amongst those circumstances has been deprivation of liberty consequent upon an adjudication of criminal guilt, through imposition of a custodial sentence the setting of which is the outcome of a discretionary judgment which takes into account the protection of the community from the risk of reoffending indicated by, amongst other things, the past criminal acts of which an offender has been found guilty[258], or in the application of an additional regime of preventive detention that is "attached by legislation to the curial sentencing process upon conviction"[259]. Examples of early legislation within that category are the *Inebriates Act 1912* (NSW) and the *Habitual Criminals Act 1905* (NSW).

155 Powers now conferred on a sentencing court by the *Crimes (Sentencing Procedure) Act 1999* (NSW) to make a "community correction order"[260], a "non-association order"[261], or a "place restriction order"[262] are within that traditional paradigm. Notwithstanding that they are orders made with a view to the protection of the community, each is within a suite of orders the making of which consequent upon conviction is designed to bring to an end a controversy as to the penal consequences of a past criminal act. Despite contemporary statutory developments in the United Kingdom being of peripheral constitutional relevance in Australia, the importance which *R v Hancox* has assumed in the interpretation of the SCPO Act makes it not irrelevant to the present analysis to note that the provision in the UK SCPO Act explained in that decision was of much the same character. The provision was expressed to confer an additional power of a court when "dealing with a person" convicted of an offence "in relation to the offence": the order it authorised could not be made except "in addition to a sentence imposed in respect of the offence concerned" or "in addition to an order discharging the person conditionally"[263].

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258 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 476.

259 *Fardon* (2004) 223 CLR 575 at 613 [83]. See also *R v Moffatt* [1998] 2 VR 229 at 251-252, referred to in *Lowndes v The Queen* (1999) 195 CLR 665 at 670-671 [11].

260 Section 8 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

261 Section 17A(2)(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

262 Section 17A(2)(b) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

263 See s 19(2), (4) and (7) of the UK SCPO Act.

156 Less well appreciated as conforming to the "general rule" was the ancient power of a magistrate to make a "binding over order", the effect of which was to require a person to enter into a "recognisance" (that is, to give an undertaking secured by a sum of money) to "keep the peace" or "be of good behaviour", breach of which would result in forfeiture of the sum of the recognisance. The order enforced, in light of a finding by the magistrate of conduct indicative of a likelihood of its breach[264], an existing inchoate obligation to refrain from conduct contrary to morality (*contra bonos mores*) if not contrary to law (*contra pacem*)[265]. An order made in the exercise of the exceptional jurisdiction of a court of equity to enjoin a criminal act[266] fits the same pattern in so far as it enforces in the face of an imminent threat of breach an antecedent legal obligation. "[T]he general interest of the public in the observance of the law is not in itself sufficient to justify the Court in granting an injunction"[267].

157 The power to detain an accused person in custody or to impose conditions of bail constraining the liberty of the accused person pending trial for a criminal offence is different in so far as it "is not seen by the law as punitive or as appertaining exclusively to judicial power"[268]. As a power ancillary to the process of adjudging and punishing criminal guilt, it lies within the category of powers not independently judicial in nature which can be committed to courts as "incidents in the exercise of strictly judicial powers"[269].

158 Outside the scope of exercise of the judicial power of quelling a controversy about an actual or threatened breach of an antecedent legal obligation, legislative conferral of a power to constrain liberty by reference to what a person might do in the future involves a departure from the "general rule". The constitutionally guaranteed institutional independence of a court provides a

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264 *Wise v Dunning* [1902] 1 KB 167 at 176.

265 *Chu Shao Hung v The Queen* (1953) 87 CLR 575 at 589-590; *South Australia v Totani* (2010) 242 CLR 1 at 170-171 [473]-[474].

266 *Ramsay v Aberfoyle Manufacturing Co (Australia) Pty Ltd* (1935) 54 CLR 230; *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 49-50. See also *Attorney-General (ex rel Lumley) v T S Gill & Son Pty Ltd* [1927] VLR 22.

267 *Ramsay v Aberfoyle Manufacturing Co (Australia) Pty Ltd* (1935) 54 CLR 230 at 243.

268 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 28.

269 *R v Davison* (1954) 90 CLR 353 at 368, quoting *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151.

strong policy reason to consider that any such power to constrain liberty, if it is to be conferred at all, is best conferred on a court[270]. Preservation of the constitutionally guaranteed institutional independence upon which the efficacy of such a conferral depends demands, however, that the conferral occur through the legislative formulation of "a judicial process of some refinement"[271].

159 That a power to constrain liberty on the basis of what a person might do in the future is not inherently incompatible with judicial power, that a particular power to do so is conferred on a court, and that the particular power so conferred is to be exercised in the context of procedural rules appropriate to civil litigation, are all factors which tend in favour of the characterisation of the particular power as judicial[272]. Of themselves, however, they are insufficient to impart that character.

160 As Kitto J explained in *R v Spicer; Ex parte Australian Builders' Labourers' Federation*[273], "[t]he reason for concluding in some ... cases that the judicial character of the repository imparts a judicial character to the power is simply that the former provides a ground for an inference, which in those cases there is nothing or not enough in other considerations to preclude, that the power is intended and required to be exercised in accordance with the methods and with a strict adherence to the standards which characterise judicial activities". His Honour went on to explain:

> "That is not a necessary inference, however, in every case of this kind. The authorised act itself, though not inherently incapable of judicial performance, may be by nature more appropriate for administrative performance. The possible effects of the act when done upon persons, situations and events may be such as to suggest the probability that decisions to exercise or to refrain from exercising the power were intended to be made upon considerations of general policy and expediency alien to the judicial method. The circumstances in which the power is to be exercisable may be prescribed in terms lending themselves more to administrative than to judicial application. The context in which the provision creating the power is found may tend against a conclusion that a strictly judicial approach is intended. And there may be other

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270 cf *Grollo v Palmer* (1995) 184 CLR 348 at 367. See also *Thomas v Mowbray* (2007) 233 CLR 307 at 329 [17].

271 *Fardon* (2004) 223 CLR 575 at 614 [85].

272 *Pasini v United Mexican States* (2002) 209 CLR 246 at 253-254 [12].

273 (1957) 100 CLR 277 at 305.

> considerations of a similar tendency. The problem in such a case ought therefore to be recognised as one of statutory construction, the task being to decide whether or not the provision should be understood as intending that in discharging the responsibility which possession of the power entails the person or body entrusted with it is to act strictly as a judge. The fact that the person occupies a judicial office, or that the body is or is not a judicial tribunal is only one matter to be considered. There may be many others."

The holding in that case was that a provision of a Commonwealth law which purported to empower a court to disallow a rule of an industrial organisation on grounds which included the opinion of the court that the rule prevented or hindered members of the organisation from observing the law or imposed unreasonable conditions upon the membership of any member or upon any applicant for membership was invalid. The explanation, in the words of Kitto J, was that "though it empower[ed] a court to do an act ... which is not insusceptible of a judicial performance", the provision was nevertheless "found to mean, on a clear preponderance of considerations, that the function for which it provides is to be performed as an administrative function, with a more elastic technique, and more of an eye to consequences and industrial policy generally, than could properly be expected of a court"[274].

161 "Many examples are to be found in the exercise of judicial power of orders which alter the rights of the parties or are the source of new rights" and "there are countless instances of judicial discretions with no specification of the criteria by reference to which they are to be exercised – nevertheless they have been accepted as involving the exercise of judicial power"[275]. Still, an irreducible requirement for any power conferred on a court to have the character of judicial power remains that its exercise must proceed "upon grounds that are defined or definable, ascertained or ascertainable, and governed accordingly"[276]. That is to say, the exercise of the power must "be governed or bounded by some ascertainable tests or standards"[277]. The nature of the criteria to be applied by the

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274 (1957) 100 CLR 277 at 305-306. See also at 289-290.

275 *R v Joske; Ex parte Shop Distributive and Allied Employees' Association* (1976) 135 CLR 194 at 215-216. See also *Baker v The Queen* (2004) 223 CLR 513 at 523 [13], 532 [42].

276 *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 291.

277 *R v Spicer; Ex parte Waterside Workers' Federation of Australia* (1957) 100 CLR 312 at 317.

court must "be not so indefinite as to be insusceptible of strictly judicial application"[278]. The decision that the court is authorised to make must not be authorised to be made "upon considerations of general policy and expediency alien to the judicial method"[279].

162 As a constituent element of judicial power, that requirement for decision-making criteria to be susceptible of strictly judicial application itself defies abstract conceptual analysis and should not be mistaken for a requirement for linguistic precision in the statutory language by which a particular power is conferred on a court. The focus of the requirement is on ensuring that such criteria as are expressed to govern the exercise of a power conferred on a court are appropriate to the exercise of a power of that nature by an independent judiciary – that their elasticity is not such that, in the already quoted language of Cardozo CJ, "the essence of the judicial function may be destroyed". The latitude of choice traditionally exercisable by a court in making an order constraining liberty in consequence of an adjudication of criminal guilt, or in the context of determining an application for bail, can for that reason be no guide to the latitude of choice that can be committed to a court to constrain liberty in circumstances divorced from the administration of the criminal law.

163 Relevantly at issue in *Thomas v Mowbray* was whether the authority to make an interim control order ("ICO") conferred on an "issuing court" by s 104.4 of the *Criminal Code* (Cth) met that minimum requirement of susceptibility of strictly judicial application. Holding that it did, a majority pointed to the "critical" presence in s 104.4 of "what may be said to be adequate legal standards or criteria"[280].

164 The differences between the criteria for the making of an ICO set out in s 104.4 of the *Criminal Code* held in *Thomas v Mowbray* to be adequate to confer judicial power and the criteria for the making of an SCPO set out in ss 5(1)(c) and 6(1) of the SCPO Act are stark. The court under s 104.4(1)(c) of the *Criminal Code* was required to be satisfied on the balance of probabilities either that the making of the ICO "would substantially assist in preventing a terrorist act" or that the person against whom it was to be made had provided

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278 *R v Commonwealth Industrial Court; Ex parte The Amalgamated Engineering Union, Australian Section* (1960) 103 CLR 368 at 383. See also *Steele v Defence Forces Retirement Benefits Board* (1955) 92 CLR 177 at 188.

279 *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 305; *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 550-551 [4]-[5].

280 (2007) 233 CLR 307 at 345 [72]. See also at 509 [600], 526 [651].

training to, or received training from, a listed terrorist organisation. The court under s 104.4(1)(d) was then required to be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed by the ICO was "reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act". In forming that state of satisfaction, the court was obliged by s 104.4(2) to "take into account the impact of the obligation, prohibition or restriction on the person's circumstances" as a mandatory consideration.

165 The court under s 5(1)(c) of the SCPO Act, in contrast, needs to be satisfied at the threshold only that there are reasonable grounds to believe that there is a real chance, or real risk, that the person against whom the SCPO is made would engage in, facilitate or increase the likelihood of facilitation of serious crime related activities in the absence of the SCPO. That standard of a real risk or real chance is not of itself insusceptible of strictly judicial application[281]. The problem is that once the threshold of a real risk is met, s 5(1)(c) requires nothing more for the making of an SCPO than satisfaction on the part of the court that subjection of the person to the prohibitions, restrictions, requirements or other provisions to be imposed by the SCPO would in some unspecified degree decrease that risk of involvement. It requires nothing more than satisfaction that the constraints on behaviour to be imposed on the person against whom the SCPO is made would in some unspecified degree reduce the risk of that person or another person engaging in conduct that constitutes a serious criminal offence. The extent of impediment able to be effected by the prohibitions, restrictions, requirements or other provisions is open-ended. The nature and extent of the risks against which they may be directed are sweeping. The range of potential orders is almost limitless.

166 The latitude of that unguided choice required of the court in the application of s 5(1)(c) of the SCPO Act is undiminished by the added requirement of s 6(1) that the court needs to consider that the prohibitions, restrictions, requirements or other provisions imposed by the SCPO are "appropriate". The statutory question begged by s 6(1) is: appropriate to what end? The statutory answer is supplied nowhere other than by the criterion set out in s 5(1)(c) of the SCPO Act.

167 The differences between the elasticity of the criterion set out in s 5(1)(c) of the SCPO Act for the making of an SCPO and the specificity of the criteria set out in s 104.4 of the *Criminal Code* for the making of an ICO correspond to a critical difference in the purposes of making the two kinds of order. The purpose

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281 cf *M v M* (1988) 166 CLR 69 at 78; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 54 [23]-[24], 96 [143].

of making an ICO, as spelt out in s 104.1 of the *Criminal Code*, was to "protect[] the public" from a "terrorist act", an expression defined in s 100.1 to refer to an action or a threat of action causing or creating a serious risk of causing serious harm to persons or to infrastructure with the intention of advancing an ideological cause and of influencing or intimidating the government or the public. The specific criteria for the making of an ICO set out in s 104.4 were closely tailored to achieve that specific protective purpose.

168 In that respect, as was recognised in *Thomas v Mowbray*[282], there was a close analogy between an ICO and an apprehended violence order ("AVO"), for which broadly equivalent provision is made in legislation in every State and Territory. The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) is an example[283]. For a court to make an AVO (an "apprehended domestic violence order" or an "apprehended personal violence order") under that Act, the court must ordinarily be satisfied on the balance of probabilities that a person has reasonable grounds to fear intimidation or stalking or the commission of an offence against them by another[284]. The prohibitions or restrictions on the behaviour of the other person that can then be imposed by the AVO are such as appear to the court to be "necessary or desirable ... to ensure the safety and protection of the person in need of protection and any children from domestic or personal violence"[285].

169 In contrast to both an ICO and an AVO, an SCPO is made not to provide specific protection against a specific threat of harm from the person against whom it is made. Rather, an SCPO is made in order to make it in some unspecified degree less likely that the person against whom the SCPO is made will engage in conduct that falls within the extremely broad statutory conception of involvement in serious criminal activities. The elasticity of the criteria for its making corresponds to the elasticity of the purpose for which it is made.

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282 (2007) 233 CLR 307 at 328-330 [16]-[18], 334 [28], 347-348 [79].

283 See also *Domestic and Family Violence Act 2007* (NT); *Domestic and Family Violence Protection Act 2012* (Qld); *Family Violence Act 2004* (Tas); *Family Violence Act 2016* (ACT); *Family Violence Protection Act 2008* (Vic); *Intervention Orders (Prevention of Abuse) Act 2009* (SA); *Personal Safety Intervention Orders Act 2010* (Vic); *Personal Violence Act 2016* (ACT); *Personal Violence Restraining Orders Act 2016* (NT); *Restraining Orders Act 1997* (WA).

284 Sections 16 and 19 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

285 Section 35(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

170 Finally, much more than an ICO, an SCPO is distinctly rule-like in its operation. An ICO (even where confirmed) could be for a period of no more than one year[286] and could be varied or revoked at any time on application by the person against whom it was made if the court was not satisfied that the criteria for its making continued to exist[287]. In contrast, as has already been noted, an SCPO can be made for a period of up to five years and can be varied or revoked on application by the person against whom it is made only if the court is satisfied that there has been a substantial change in circumstances. For so long as it remains in force, its operation from the perspective of the person against whom it is made is indistinguishable from a legislated code.

171 Where an exercise of a power conferred on a court settles no question as to the existence of any antecedent right or obligation yet results in an order imposing a new and enduring restriction on liberty, some special and compelling feature ought to be found to exist for its inclusion in the category of judicial power to be justified. Characterisation of the power as judicial ought to require at least that the criteria to be applied by the court in making the order are legislatively tailored to the achievement of a legislatively specified protective outcome. That was the case in *Thomas v Mowbray*. It is not the case here.

172 Whether the power conferred by s 5(1) of the SCPO Act is best characterised as executive or legislative is perhaps an open question. The "general distinction between legislation and the execution of legislation", being "that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases"[288], is insufficient to yield an answer. What matters for present purposes is that the power is not judicial for the reason just stated.

Incompatibility

173 The reasons given for the conclusion that the criteria set out in s 5(1) of the SCPO Act for the making of an SCPO are inadequately adapted to exercise by an independent judiciary to warrant characterisation of the power to constrain liberty conferred by that provision as a judicial power are also sufficient to justify the conclusion that the conferral of that power to constrain liberty on the Supreme Court and the District Court substantially impairs their institutional integrity.

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286 Sections 104.5(1)(f) and 104.16(1)(d) of the *Criminal Code* (Cth).

287 Sections 104.18 and 104.20 of the *Criminal Code* (Cth).

288 *The Commonwealth v Grunseit* (1943) 67 CLR 58 at 82.

174 The attempt by the State and interveners to support s 5(1) of the SCPO Act by analogy to the provision upheld in *Fardon* and to the legislation considered in *Wainohu v New South Wales*[289] is misplaced. Like the Commonwealth legislation in *Thomas v Mowbray*, the State legislation in both of those cases was closely tailored to the achievement of a specified protective end.

175 The provision upheld in *Fardon*[290] enabled the Supreme Court of Queensland, on application, to make in respect of a person serving a sentence of imprisonment either a "continuing detention order" ("that the prisoner be detained in custody for an indefinite term for control, care or treatment") or a "supervision order" ("that the prisoner be released from custody subject to the conditions it considers appropriate that are stated in the order") only if satisfied by "acceptable, cogent evidence" and "to a high degree of probability" that the prisoner constituted "a serious danger to the community" by reason of the existence of an "unacceptable risk that the prisoner will commit a serious sexual offence" in the absence of such an order. The Court was required to have regard to, amongst other things, psychiatric reports indicating an assessment of risk of future serious sexual offending and any participation by the prisoner in rehabilitation programs. A continuing detention order, which was the focus of the analysis in *Fardon*, was required to be reviewed by reference to the same criterion, and either affirmed or revoked, annually[291]. The majority specifically found in the "yardstick" of an "unacceptable risk that the prisoner will commit a serious sexual offence" a standard sufficiently precise to admit of judicial application[292]. No equivalent yardstick is to be found in s 5(1) of the SCPO Act.

176 Before leaving *Fardon*, it is relevant to note the importance placed by Gummow J, with whom Hayne J relevantly agreed, on a continuing detention order or a supervision order being able to be made only against a "prisoner", being someone "presently detained in custody upon conviction for an offence of the character of those offences of which there is said to be an unacceptable risk of commission if the appellant be released from custody". His Honour remarked that "[t]o this degree there remains a connection between the operation of the [State legislation] and anterior conviction by the usual judicial processes", adding that "[a] legislative choice of a factum of some other character may well have imperilled the validity of [the provision in issue]"[293]. Although present in the

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289 (2011) 243 CLR 181.

290 Section 13 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).

291 Sections 27 and 30 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).

292 (2004) 223 CLR 575 at 593 [22], 597 [34], 616-617 [97]-[98], 657 [225].

293 (2004) 223 CLR 575 at 619 [108]. See also at 647 [196].

provision of the UK SCPO Act considered in *R v Hancox*, such a connection to an anterior conviction is wholly absent from s 5(1) of the SCPO Act.

177 The legislation considered in *Wainohu*[294], having been found by the majority to be wholly invalid as a result of the infringement of the *Kable* principle by reference to another aspect of its operation, was said by the majority not independently to infringe the *Kable* principle by reference to the criteria for the exercise of the power it conferred on the Supreme Court to make a "control order" being cast in terms of satisfaction that the person against whom the order was to be made was a member of a particular declared organisation and that "sufficient grounds" existed for making the order[295]. The majority commented that, although the legislation did not attempt to prescribe what might be "sufficient grounds" for the making of such a control order, those grounds were to be "ascertained by regard to the subject, scope and purpose of the [legislation] including the consequences of the making of an interim control order or control order", and observed that "the conferral of curial powers by reference to such criteria nevertheless may be susceptible to the exercise of judicial power"[296]. A control order under that legislation, however, did not involve the Supreme Court in fashioning any code of behaviour for the person against whom it was made. Its only effect was to bring the person within the definition of "controlled member" so as to become subject to specific and limited prohibitions which the legislation itself imposed on a controlled member[297]. The legislation in that case therefore lacked the feature of elasticity which I consider to be fatal to s 5(1) of the SCPO Act.

178 Mention should finally be made of *South Australia v Totani*[298]. A feature of the provision there found to infringe the *Kable* principle[299] was that it left the Magistrates Court of South Australia with no option but to make a "control order", triggering prohibitions for which the legislation itself provided[300], once

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294 *Crimes (Criminal Organisations Control) Act 2009* (NSW).

295 Section 19 of the *Crimes (Criminal Organisations Control) Act 2009* (NSW).

296 (2011) 243 CLR 181 at 230 [111]. See also at 220 [72].

297 Sections 26 and 27 of the *Crimes (Criminal Organisations Control) Act 2009* (NSW).

298 (2010) 242 CLR 1.

299 Section 14(1) of the *Serious and Organised Crime (Control) Act 2008* (SA).

300 Section 14(5) of the *Serious and Organised Crime (Control) Act 2008* (SA).

the Magistrates Court was satisfied, on application by the Commissioner of Police, that the person against whom the order was sought was a member of an organisation which had been declared by the Attorney-General. The vice of the provision, in the language of French CJ, was that it "impair[ed] the decisional independence of the Magistrates Court from the executive in substance and in appearance in areas going to personal liberty and the liability to criminal sanctions which lie at the heart of the judicial function"[301]. In the language of Gummow J, in the implementation of a legislative policy "to disrupt and restrict the activities of ... organisations involved in serious crime" and "to protect members of the public from violence associated with such criminal organisations", the Magistrates Court was "called upon effectively to act at the behest of the Attorney-General to an impermissible degree"[302].

179 The provision held to infringe the *Kable* principle in *Totani* might be said to have given too little latitude for judgment in constraining personal liberty. The provision here might be said conversely to give too much latitude for judgment in constraining personal liberty. The effect, however, is much the same. Without a lodestar to guide the choice of how much to constrain the otherwise lawful behaviour of a person assessed as having a real chance of involvement in serious crime related activities, the role of the Supreme Court or the District Court must in practice be confined to assessing the appropriateness of the ongoing constraints proposed in the terms of the SCPO that is sought in the application made to it by the Commissioner or the Director of Public Prosecutions or the New South Wales Crime Commission. The judiciary is effectively enlisted by s 5(1) of the SCPO Act to perform a personalised legislative function at the behest of the executive.

180 The judiciary can, of course, be expected to perform any function that might be legislatively imposed on it, as best it can, in a judicial manner. The judiciary can therefore be expected to fashion for itself workable and consistent decision-making criteria to guide the individualised assessment that it is obliged to make in each case in which it is asked by the executive to make an SCPO. Appellate processes can be expected to be invoked and, over time, a body of principle can be expected to develop. So the process of making an SCPO will be judicialised; and so with the judicialisation of the process the distinctive character of the judiciary as the constitutional arbiter of disputes about rights between the citizen and the State will become increasingly less distinct. Incrementally but inexorably the judiciary will be drawn ever more deeply into a

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301 (2010) 242 CLR 1 at 52 [82].

302 (2010) 242 CLR 1 at 67 [149], read with s 4(1) of the *Serious and Organised Crime (Control) Act 2008* (SA).

process in which institutional boundaries are blurred and by which its institutional independence is diminished.

Conclusion

181 The questions raised by the special case should be answered as follows: (1) Yes; (2) The sub-section is wholly invalid; (3) The defendants.

182 GORDON J. *Kable v Director of Public Prosecutions (NSW)*[303] held that a State legislature could not give to a State court the task of deciding that a named individual should be subject to restraints on liberty to reduce the risk of that person committing future crime.

183 As Gaudron J said in *Kable*, "[p]ublic confidence cannot be maintained in the courts and their criminal processes if, as postulated by [the impugned provision], the courts are required to deprive persons of their liberty, not on the basis that they have breached any law, but on the basis that an opinion is formed, by reference to material which may or may not be admissible in legal proceedings, that on the balance of probabilities, they may do so"[304].

184 The *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) ("the SCPO Act"), in issue in these proceedings, goes further. It has the Supreme Court and the District Court of New South Wales[305] deciding who, of a wide class of persons, should be subject to special restraints on their individual liberty not on the basis that they breached any law[306] (though they may have), or they belong to any particular criminal organisation[307], or espouse or pursue views antithetical to maintaining a democratic society[308], but on the basis that the court is satisfied that there are reasonable grounds to believe that restraining that individual's liberty would protect the public by preventing, restricting or disrupting involvement by that individual in serious crime related activities[309]. And that involvement may be no more than conduct that is likely to facilitate serious crime related activity by that person or another person[310].

185 The class of persons to which the SCPO Act potentially applies is wide. The bar for restraining the liberty of a person within that class is low. In its legal

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303 (1996) 189 CLR 51.

304 (1996) 189 CLR 51 at 107.

305 SCPO Act, s 3(1) definition of "appropriate court".

306 cf *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

307 *Wainohu v New South Wales* (2011) 243 CLR 181; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38.

308 *Thomas v Mowbray* (2007) 233 CLR 307.

309 SCPO Act, s 5(1)(c).

310 SCPO Act, s 4(1)(c).

and practical operation, the SCPO Act requires a State court to draft ad hominem rules restraining the personal liberty of a named individual.

186 Restraining any person's liberty will always lessen that person's opportunity to commit some form of crime. The fact that an individual has been charged but not subsequently convicted, or for that matter convicted or, indeed, acquitted, of a crime[311] cannot, as postulated by the SCPO Act, require "the courts ... to deprive persons of their liberty, not on the basis that they have breached any law, but on the basis that an opinion is formed, by reference to material which may or may not be admissible in legal proceedings, that on the balance of probabilities"[312] there are reasonable grounds to believe that the restraint would prevent, restrict or disrupt criminal activity by them or another person.

187 The questions raised in the special case should be answered in the manner proposed by Gageler J. I agree generally with his Honour's reasons. The circumstances giving rise to the special case, as well as the provisions of the SCPO Act, are set out in the reasons of the other members of the Court. It is unnecessary to repeat them except to the extent necessary to explain these reasons.

188 It is necessary to be wary of what might be called the "domino" effect of cases that have distinguished *Kable*[313]. It is a mistake to take what was said in other cases about other legislation and apply those statements without close attention to the principle at stake.

189 The principle at stake here concerns the kinds of *issues* that may be resolved by the application of judicial power, and the kinds of *criteria* that may be applied in the exercise of judicial power, in a way that is compatible with the institutional integrity of a State court. The two are intertwined.

190 It is, however, both necessary and useful to say something separately about each, bearing in mind what Kitto J said in *R v Davison*[314]: that a distribution of the functions of government amongst separate bodies is a "safeguard of individual liberty", and that that is achieved "by requiring a distinction to be maintained between powers described as legislative, executive

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311 SCPO Act, s 5(1)(b).

312 *Kable* (1996) 189 CLR 51 at 107.

313 See *Condon* (2013) 252 CLR 38 at 94 [137].

314 (1954) 90 CLR 353 at 381-382.

and judicial" – by reference not to fundamental functional differences between powers, "but to distinctions ... between classes of powers requiring different 'skills and professional habits' in the authorities entrusted with their exercise".

191 It is the legislature that has the power, skills and resources to identify what conduct should be unlawful, to legislate to make that conduct unlawful and then to take any other steps the legislature considers necessary to reinforce the fact that, and to explain why, that conduct is now unlawful. It is the legislature that prescribes norms of conduct which govern the manner in which individuals are required to behave. It is the legislature that determines how best to protect the public against criminal behaviour by determining what conduct should be prohibited, how it should be punished, and what powers and resources the police force should have to detect and prevent crime[315]. By contrast, it is for the courts, in that context, to adjudge and punish criminal guilt[316].

192 The *issue* which the SCPO Act would have the courts in New South Wales decide is whether and how to impose future special restraint on the liberty of a named individual. The central *criteria* require no more than that that person has been involved in any of a wide range of criminal offences, regardless of whether that person has been charged, convicted, or even acquitted of the alleged offence or offences; that there are reasonable grounds to believe that making the order would protect the public by preventing, restricting or disrupting the person's involvement in serious crime related activities; and that the order is "appropriate" to that end[317].

193 That is, the SCPO Act requires courts to restrain the future liberty of a named individual:

- not in relation to a "prisoner" presently detained in custody for a serious sexual offence, as in *Fardon v Attorney-General (Qld)*[318];
- not to prevent harm to an identified individual, as is the issue in an apprehended violence order[319]; and

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315 See, eg, *Fardon* (2004) 223 CLR 575 at 647-648 [196]-[197].

316 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27.

317 SCPO Act, ss 3(1) definition of "serious crime related activity", 4(1), 5(1), 6(1).

318 (2004) 223 CLR 575 at 603 [51], 619 [108].

319 See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

- not to prevent existential threats to society, such as terrorism, as in *Thomas v Mowbray*[320];

but on the ground that there are "reasonable grounds to believe" that the restraint on the liberty of a named individual would prevent, restrict or disrupt crime, or someone else's involvement in crime.

194 The additional criterion is that the restraint on the liberty of the named individual is "appropriate"[321]. As Gageler J asks: "appropriate to what end?"[322] Treating the word "appropriate" as rescuing the legislation from invalidity would appear to overlook the fact that "appropriate" was the condition for the order in *Kable*[323]. When approaching legislation whose constitutional validity is challenged, it is important to avoid the temptation to redraft it. As French CJ said in *International Finance Trust Co Ltd v New South Wales Crime Commission*, "[t]he court should not strain to give a meaning to statutes which is artificial or departs markedly from their ordinary meaning simply in order to preserve their constitutional validity"[324].

195 However, the question, "appropriate to what end?", is more fundamental than a mere drafting or construction issue about the word "appropriate". That question is more fundamental because of the interconnected and intertwined aspects of the SCPO Act.

196 First, the class of persons who are intended to be caught by the SCPO Act is defined very widely. The Act applies to any person aged 18 years or older who has been convicted of a *serious criminal offence* but also applies to a person who "has been *involved* in *serious crime related activity*" for which the person has not been convicted (including by reason of being acquitted of, or not being charged with, such an offence)[325].

197 That immediately raises the second aspect – the breadth of conduct caught by the SCPO Act. The reference to "serious criminal offence" and "serious crime

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320 (2007) 233 CLR 307.

321 SCPO Act, s 6(1).

322 Reasons of Gageler J at [166].

323 (1996) 189 CLR 51 at 62.

324 (2009) 240 CLR 319 at 349 [42].

325 SCPO Act, s 5(1)(a) and (b) (emphasis added).

related activity" is important but should not distract from the fact that because of the way in which the SCPO Act defines "serious criminal offence", it extends to, among other offences, "an offence that is punishable by imprisonment for 5 years or more and involves theft, fraud, obtaining financial benefit from the crime of another, money laundering, extortion, violence, bribery, corruption, harbouring criminals, blackmail, obtaining or offering a secret commission, perverting the course of justice, tax or revenue evasion, illegal gambling, forgery or homicide"[326]. Furthermore, the conduct is not limited to conduct within New South Wales and includes an "offence of attempting to commit, or of conspiracy or incitement to commit, or of aiding or abetting" that broad group of offences[327].

198 Next, as just seen, the class of persons caught includes those "*involved* in *serious crime related activity*". That last phrase – *serious crime related activity* – is defined to mean anything done by a person that is or was at the time a serious criminal offence, whether or not the person has been charged with the offence, or, if charged, has been tried, or, if tried, has been convicted or acquitted or had a conviction quashed or set aside on appeal[328]. The class of persons is broadened further by the fact that a person is *involved* in *serious crime related activity* if the person has engaged in serious crime related activity; has engaged in conduct that has *facilitated* another person engaging in serious crime related activity; or has engaged in conduct that is *likely to facilitate serious crime related activity* whether by that person or another person[329].

199 Then, there is the low bar to restraining personal liberty. A court need only be satisfied that there are *reasonable grounds to believe* that restraining an individual's liberty would protect the public by *preventing*, *restricting or disrupting* involvement by that person in serious crime related activities where their involvement may be no more than conduct that is *likely* to facilitate serious crime related activity by that person or another person[330]. It is not necessary to prove that restraining a person's individual liberty would prevent, restrict or disrupt a person's involvement in such serious crime related activities. It is

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326 SCPO Act, s 3(1) definition of "serious criminal offence", incorporating *Criminal Assets Recovery Act 1990* (NSW), s 6(2)-(4).

327 SCPO Act, s 3(1) definition of "serious criminal offence", incorporating *Criminal Assets Recovery Act 1990* (NSW), s 6(2)(i) and (j).

328 SCPO Act, s 3(1) definition of "serious crime related activity".

329 SCPO Act, s 4(1).

330 SCPO Act, ss 5(1)(c), 4(1)(c).

enough that there be "reasonable grounds to believe" it. In determining these questions, the rules of evidence may not apply – specifically, those in relation to hearsay evidence[331].

200 It is in that context that the requirement in s 6(1) that the restraint on a person's individual liberty is "appropriate" is to be considered and assessed. And it is that question, in that context, which identifies the principle at stake. Is that the kind of *issue* that may be resolved by the application of judicial power, applying those kinds of *criteria* in the exercise of judicial power, in a way that is compatible with the institutional integrity of a State court?

201 If the SCPO Act is valid, it would require the Supreme Court and the District Court of New South Wales to apply judicial procedures and, it may be expected, to develop a body of decisions about how the provisions operate and apply. But that is beside the point. The question is whether the task set by the SCPO Act is appropriate for the courts. Should a court draft and impose on an identified person, of a very widely defined class of persons who have potentially done no more than engage in conduct likely to facilitate serious crime related activity (whether or not they have been convicted of any offence), "appropriate" special restraints on that person's individual liberty, not to protect a particular person, or to prevent some particular anticipated danger to the safety of others, but because there are reasonable grounds to believe that those restraints on that person's individual liberty would prevent, restrict or disrupt that person from committing a crime or facilitating another to commit a crime? The answer is "no".

202 As States "strain to protect their people"[332], there must still be adherence to the rule of law. Thus, even where a State seeks "to fight fire with fire" to repress and prevent, for example, serious terrorist violence, the State "may not use indiscriminate measures which would only undermine the fundamental values they seek to protect"[333]. Here, the SCPO Act does not seek to fight fire with fire. It seeks to fight a *potential* fire with fire by requiring a State court to draft ad hominem rules restraining the personal liberty of a named individual. That is not compatible with the institutional integrity of a State court.

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331 SCPO Act, s 5(5).

332 Bingham, *The Rule of Law* (2010) at 158.

333 Bingham, *The Rule of Law* (2010) at 158-159, quoting Schwimmer, "Preface", in Council of Europe, *Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies* (2002) 5 at 5.

203 Legislation of this kind has been described as enabling the imposition of "personalised penal codes, where non-criminal behaviour becomes criminal for individuals who have incurred the wrath of the community"[334]. It has "been interpreted as permitting courts to impose wide prohibitions that have the effect of closing off many otherwise lawful and harmless activities"[335]. Preventive orders are, in essence, "a form of *criminalisation*: an *ex ante* criminal prohibition, not an *ex post* criminal verdict", a function that would conventionally be that of the legislature, not the judiciary[336].

204 That is not to say that a control orders regime will necessarily be impermissible in all circumstances. It is clear from *Thomas*[337] that that is not so. The fundamental difference between the SCPO Act, which applies to a broad class with exceedingly low thresholds, "not on the basis that they have breached any law, but on the basis that an opinion is formed, by reference to material which may or may not be admissible in legal proceedings, that on the balance of probabilities, they may do so"[338], and the scheme in *Thomas*, directed at a narrow class in exceptional circumstances with stringent standards to be met, is plain.

205 The problems identified in *Kable* are not avoided by widening the class to which the law applies or by having the court decide how the liberty of the individual should be restrained. And unlike the legislation in *Kable*, which required proof that it was more likely than not that Mr Kable would commit a serious act of violence[339], the SCPO Act permits restraints on an individual's liberty if there are reasonable grounds to believe that the restraints would prevent, restrict or disrupt involvement by the person in serious crime related activities.

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334 Council of Europe, *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to the United Kingdom, 4th-12th November 2004* (2005) at 37 [110].

335 Ashworth and Zedner, *Preventive Justice* (2014) at 85.

336 Simester and von Hirsch, "Regulating Offensive Conduct through Two-Step Prohibitions", in von Hirsch and Simester (eds), *Incivilities: Regulating Offensive Behaviour* (2006) 173 at 173, 178 (emphasis in original).

337 (2007) 233 CLR 307.

338 *Kable* (1996) 189 CLR 51 at 107.

339 (1996) 189 CLR 51 at 62.

206 As the reasons of other members of the Court point out, the SCPO Act is modelled on a law enacted by the Parliament of the United Kingdom[340]. The United Kingdom law was enacted, and operates, in a radically different context in which there is no constitutional limit upon the tasks that the United Kingdom Parliament may give the courts. As Gummow J said in *Momcilovic v The Queen*[341]:

> "The system of federal government in Australia is constructed upon the recognition that there rests upon the judicature 'the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised'[342]. Judicial review of both the validity of legislation and the lawfulness of administrative action is thus an accepted part of the Australian legal landscape.
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> By contrast, in the United Kingdom, ... Diceyan notions of parliamentary sovereignty remain influential. Those notions appear to be treated as compatible with the existence of European structures of law-making and adjudication and with the application of the [*Human Rights Act 1998* (UK)] as some superior form of law alongside the application of the European Convention by the European Court of Human Rights. In *Jackson v Attorney-General*[343], Baroness Hale of Richmond, whilst acknowledging that 'Scotland may have taken a different view', observed that '[t]he concept of parliamentary sovereignty', which since the seventeenth century 'has been fundamental to the constitution of England and Wales', means that 'Parliament can do anything'."

Neither the enactment of the United Kingdom law, nor the way in which the courts of England and Wales have construed and applied it (within the United Kingdom constitutional context), bears upon the questions this Court must consider.

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340 *Serious Crime Act 2007* (UK).

341 (2011) 245 CLR 1 at 89-90 [156]-[157] (footnote omitted).

342 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 276.

343 [2006] 1 AC 262 at 318 [159].