Rocco Fazzari

Vella v Commissioner of Police (NSW) [2019] HCA 38

By Christine Melis

In 2016 the New South Wales Parliament enacted the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) *(SCPO Act)* which gives the Supreme Court and the District Court the power to make 'serious crime prevention orders' (SCPO) 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. It is modelled upon the *Serious Crime Act 2007* (UK). A majority of the High Court (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ; Gageler and Gordon JJ dissenting) held that s 5(1) of the *SCPO Act* was validly enacted as it is not inconsistent with, or prohibited by, Chapter III of the Constitution.

In a nutshell, s 5(1) of the *SCPO Act*, read with s 6, empowers the court to make an order in civil proceedings restraining the liberty of a person who has been convicted of a serious criminal offence (as defined) or who has been involved in serious crime related activity (as defined), if the court is satisfied that there are reasonable grounds to believe that the making of the

preventative order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime related activities.

In his Second Reading Speech on 22 March 2016, the Deputy Premier and Minister for Justice and Police, Mr Grant, said:

> The measures contained in these bills provide law enforcement agencies with a more effective means of reducing serious and organised crime by targeting their business dealings and restricting their behaviour. The bills deliver on the New South Wales Government's election commitment to introduce tough new powers to give police the upper hand in the fight against organised crime.

Prior to its enactment, the NSW Bar Association made a submission on the proposed Bill calling it *'an extraordinary and unprecedented piece of legislation with grave implications for the rule of law and individual freedoms in New South Wales.'* The submission doubted the constitutional validity of the Bill.

The powers under the Act were used for the first time in 2018 when the Commissioner of Police brought separate applications against two Outlaw Motorcycle Gangs (OMCG), the Nomads and the Finks (*Commissioner of Police v Bowtell [No 2]* [2018] NSWSC 520; *Commissioner of Police v Cole* [2018] NSWSC 517). The Commissioner's applications were based on an ongoing conflict between the two OMCGs which had escalated and culminated in a number of violent acts and public place shootings in the Hunter Region, endangering the safety of the public.

Both applications were upheld by Davies J. SCPOs were made against certain named members of both OMCGs. The orders had the effect of restraining and prohibiting those persons, for 12 months, from various activities, including associating with persons associated with any OMCG; attending premises associated with any OMCG; travelling in a vehicle between 9 pm and 6 am except in the case of genuine emergency; possessing more than one mobile phone; and wearing or displaying any OMCG insignia, patches or accoutrement.

The proceedings before the High Court arose after the Commissioner of Police commenced proceedings under the *SCPO Act* in the Supreme Court against Damien Charles Vella and other named members of the Rebels on 5 October 2018. The application sought similar SCPOs as those previously granted against members of the Finks and Nomads. By a special case, Mr Vella and two members of the Rebels brought proceedings in the High Court challenging the validity of s 5 of the *SCPO Act* on the basis that it was incompatible with the institutional integrity of the District Court and Supreme Court, relying upon the principles developed from the decision in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

In the standalone judgment of Kiefel CJ, her Honour distinguished *South Australia v Totani* (2010) 242 CLR 1. That case concerned s 10(1) of the *Serious and Organised Crime (Control) Act 2008* (SA) which 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 that 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 persons with whom the person could associate, and other restrictions.

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.

Her Honour identified that the question whether, properly construed, s 5(1) of the SCPO Act permits the court to assess the risk to the public is therefore essential to its validity (at [15]).

Her Honour and the balance of the majority court reached the conclusion that s 5(1) of the *SCPO Act* so permits. Kiefel CJ said that having regard to the context for s 5(1), it is to be read as its analogue was in *R v Hancox* [2010] 1 WLR 1434. There, the Court of Appeal of England and Wales construed an equivalent provision of the *Serious Crime Act* 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. Her Honour said:

> The operation which that Court saw as intended must, inferentially, have focussed 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*' (at [18]).

That interpretation was also adopted in the joint reasons of the court (Bell, Keane, Nettle, and Edelman JJ), concluding that 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,

> [b]ecause 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 preventative order. In an area necessarily involving considerable uncertainty it is not antithetical to 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' (at [23]).

The joint reasons held that there are six required steps before a court can exercise the power to grant a prevention order under ss 5 and 6 of the *SCPO Act* (at [40]-[54]).

In the joint reasons, their Honours noted that legislative regimes involving the making of preventative orders by courts have also been enacted in Australia in areas including domestic and personal violence, problem gambling that is ancillary to domestic violence, public safety and breaches of the peace, sexual and other dangerous offenders, groups associated with criminal activity, and terrorism (at [31], [58]-[75]).

Their Honours went on to say that there are good reasons why such powers, if they are to exist, should be made by the judiciary, rather than the executive:

> 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 order 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 (at [90]).

The joint judgment divided the plaintiffs' submissions into three strands and, in turn, rejected all three.

The first strand was that the *SCPO Act* undermines the criminal justice system of State courts by undermining the finality of that and by establishing a regime that would conflict with that system. Their Honours said that the regime under the *SCPO Act* is separate and distinct from traditional criminal justice and its outcomes can therefore be different without inconsistency (at [78]).

The second strand was that the *SCPO Act* 'enlists' the courts to administer a different, and lesser, form of criminal justice. Their Honours said that this submission again incorrectly assumed an identity between the function and purpose of civil preventative orders and the function and purpose of punishment for past offences. The orders are made by the court with substantial judicial discretion as to whether any order should be made and as to the content of the order (at [79]).

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 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.' Their Honours said that, contrary to the plaintiffs' 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', citing *Moti v The Queen* (2011) 245 CLR 456 at 478 [57]. That construct of trust depends on integrity (at [80]).

In dissent, Gordon J held that the task set by the *SCPO Act* is not appropriate for the courts (at [201]). Her Honour said the *SCPO Act* 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 (at [202]).

Gageler J similarly warned that 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 conscription (at [145]). BN