



## HIGH COURT OF AUSTRALIA

7 February 2018

COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE v STEVEN IRVINE HART &  
ORS; COMMONWEALTH OF AUSTRALIA v YAK 3 INVESTMENTS PTY LTD AS  
TRUSTEE FOR YAK 3 DISCRETIONARY TRUST & ORS; COMMONWEALTH OF  
AUSTRALIA & ANOR v FLYING FIGHTERS PTY LTD & ORS  
[2018] HCA 1

Today the High Court unanimously allowed two appeals from a decision of the Court of Appeal of the Supreme Court of Queensland concerning the *Proceeds of Crime Act 2002* (Cth) ("the POCA"). The appeals related to whether property that was forfeited to the Commonwealth under the POCA could be recovered by, or an amount equivalent to its value paid to, companies which held an interest in the property immediately prior to its forfeiture. The High Court unanimously dismissed a further appeal from the same decision regarding the date at which a court must be satisfied that particular property is subject to the effective control of a person, in order that the court may declare that the whole or part of that property is available to satisfy a pecuniary penalty order made against the person.

In May 2003, the Commonwealth Director of Public Prosecutions ("the CDPP") obtained restraining orders under the POCA prohibiting disposal of, or other dealing with, certain property suspected of being under the effective control of Mr Steven Hart, who was suspected of committing offences in operating tax minimisation schemes. The restrained property included aircraft, a car and real property. In May 2005, Mr Hart was convicted of nine offences of defrauding the Commonwealth. In April 2006, the restrained property was automatically forfeited to the Commonwealth under s 92 of the POCA.

Following the automatic forfeiture, a number of companies with which Mr Hart was affiliated applied to the District Court of Queensland under s 102 of the POCA to recover their respective interests, or an amount equal to the value of their interests, in some of the forfeited property. The companies contended that, for the purposes of s 102(3), the property was not "used in, or in connection with, any unlawful activity" ("the use condition"); was not "derived or realised, directly or indirectly" from any unlawful activity ("the derivation condition"); and had been "acquired ... lawfully" ("the acquisition condition"). The CDPP also applied to the District Court under s 141 of the POCA for a declaration that any property recovered by the companies was available to satisfy any pecuniary penalty order made against Mr Hart. Under s 141, a precondition to the District Court making that order was that the District Court be satisfied that the relevant property "is subject to the effective control" of Mr Hart. A pecuniary penalty order was subsequently made requiring Mr Hart to pay \$14,757,287.35 to the Commonwealth.

The District Court ordered the recovery, under s 102, of some of the real property and some of the aircraft, on condition that the companies pay to the Commonwealth \$1.6 million in respect of fixed and floating charges (over some of the forfeited property) which had also been automatically forfeited to the Commonwealth. The District Court dismissed the CDPP's application under s 141 on discretionary grounds. The companies, the Commonwealth, and the Commissioner of the Australian Federal Police (replacing the CDPP) each appealed.

On appeal, the Court of Appeal held, by majority, that the companies had proved that the use condition, the derivation condition, and the acquisition condition were each satisfied in respect of the relevant forfeited property and that the orders under s 102 sought by the companies should be made without the condition imposed by the District Court. A key element of the majority's reasoning was that property would only be "derived" from unlawful activity if it was *wholly* derived from the commission of a relevant offence. The majority also held that effective control of the property for the purposes of s 141 was to be assessed at the date of the determination of the CDPP's application under that provision, meaning that the application should be dismissed because it could not be established that Mr Hart had effective control of the property at that date.

By special leave, the Commonwealth and the Commissioner of the Australian Federal Police appealed to the High Court. The High Court held that property will be "derived" from unlawful activity for the purposes of the derivation condition if it is wholly or partly derived from an act or omission constituting a relevant offence. For property to be "partly derived" from unlawful activity, the degree of derivation must be more than trivial, but beyond that there is no requirement that the degree of derivation must be substantial. Regarding the use condition, the Court held that "use in, or in connection with, unlawful activity" is a broad conception that involves practical considerations that will vary from case to case. However, "use" does not require a causal link between the property and a relevant offence or that the property was necessary for or made a unique contribution to the offence, nor does the degree of use need to be proportionate to the forfeiture of the property. Regarding the acquisition condition, the Court held that the applicant must prove that each step in the process by which the applicant came to hold a relevant interest in the property was lawful, including that all of the consideration paid by the applicant for the interest was lawfully acquired.

In the result, the companies' application under s 102 failed in respect of all of the forfeited property except for one item of real property, the proceeds of which (if any) were to be paid by the Commonwealth to one of the companies following satisfaction of \$1.6 million secured by two security interests. Accordingly, the appeals in respect of the s 102 application were allowed.

The High Court also held that effective control of property for the purposes of s 141 is to be assessed at the date of the determination of an application under that provision. Accordingly, the appeal in respect of the s 141 application was dismissed.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*