IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

ON APPEAL FROM THE COURT OF APPEAL
OF THE SUPREME COURT OF QUEENSLAND

No B21 of 2017

Between: **COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE**
Appellant

and:

STEVEN IRVINE HART AND OTHERS
Respondents

No B22 of 2017

Between: **COMMONWEALTH OF AUSTRALIA**
Appellant

and:

YAK 3 INVESTMENTS PTY LTD AND OTHERS
Respondents

No B23 of 2017

Between: **COMMONWEALTH OF AUSTRALIA AND ANOTHER**
Appellants

and:

FLYING FIGHTERS PTY LTD AND OTHERS
Respondents

RESPONDENTS' CONSOLIDATED SUBMISSIONS

Filed on behalf of the Respondents

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PART I: CERTIFICATION

1 These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2 Throughout these submissions references to sections and the Act are, unless otherwise stated, sections of the *Proceeds of Crime Act 2002* (Cth) (**Act**) as it stood in 2006.

3 While the appellants' question 3(a) is correct, a simple "No" will not produce a complete answer. The appellants' contention is that the condition in s 102(3)(a) will fail if ***any part*** of the asset (however small) is derived from unlawful sources. On the appellants' case, one tainted dollar paid to acquire or to repair or to charge an asset, or the incidental commission of a single offence should result in refusal of the application. The construction advanced by the appellants does not necessarily follow from a simple "No" to question 3(a), noting that other tests are discussed in the authorities, including the "substantially derived" test adopted by the primary judge.

4 The respondents agree that the answer is "Yes" to question 3(b), but say that the question does not arise in this case, because the majority of the Court of Appeal did not purport to state a general principle to the contrary (paragraphs 45 to 48).

5 The respondents say that, to the final part of the answer to question 3(c), after the word "substantial", should be added the following (paragraphs 25 to 28):

> ... the connection must be more than tenuous or remote; whether the connection is sufficient will be a matter of fact and degree depending on the circumstances of the case, and having regard to the role that the property plays in the commission of the unlawful activity.

6 Question 3(d) is in issue, but the answer is disputed. The respondents contend that the test for "lawfully acquired" should not comprehend the absence of any single offence or any amount of tainted proceeds being used for the acquisition of the assets (paragraphs 49 to 59).

7 The real issue in respect of s 141 is question 3(f), not question 3(e). The respondents contend that, in all cases, the date of effective control is that time at which the declaration pursuant to s 141 is to be made (paragraphs 72 to 117).

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903*

8 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

PART IV: FACTS

9 The respondents accept the appellants' statement of facts as correct, save for the contention at {AS[21]} that the assets ordered to be transferred to the respondents were derived from unlawful activity. The majority of the Court of Appeal found that these assets were not so derived. Several assets had been acquired wholly with lawful funds.

PART V: LEGISLATION

10 The appellants' list of applicable legislative material is accepted, with the following additions, which are annexed:

- *Proceeds of Crime Act 2002* (Cth) ss 140, 142, 330
- *Confiscation Bill 1997 Explanatory Memorandum* p 10
- *Proceeds of Crime Bill 2002 Explanatory Memorandum* p 2

The principal decisions below have been reported as follows:

- *Director of Public Prosecutions (Cth) v Hart* (2010) 81 ATR 471
- *Commissioner of Australian Federal Police v Hart* (2016) 336 ALR 492; 314 FLR 1

PART VI: ARGUMENT

(A) STATUTORY CONSTRUCTION

Overview of the Act

11 Part 2-1 of the Act provides for the making of restraining orders, the exclusion of property from restraining orders, and ancillary provisions. Property is made subject to a restraining order if an authorised officer reasonably suspects that the property is subject to the effective control of the suspect. The Act requires notice to be given to the owners and persons believed to have an interest in the property and contemplates that any applications to exclude property will be heard together with the application for the making of the restraining order.

12 Proceedings in Part 2-1 for the making of restraining orders, or the exclusion of property from retraining orders, are interlocutory: *DPP (Cth) v Hart* [2004] 2 Qd R 1 at 3 [3] per McMurdo P. Such proceedings do not determine any questions of ownership or interests in the property to be restrained. These questions would be determined at a later time in applications to recovery forfeited property {CA[321]}.

13 Part 2-2 permits the making of forfeiture orders. Part 2-3 automatically forfeits property subject to a restraining order upon the conviction of the suspect. Upon forfeiture, the

restraining order ceases to be in force: s 45(4) and the restrained property vests absolutely in the Commonwealth: s 96.

14 Division 3 of Part 2-3 of the Act is titled "Recovery of forfeited property". In particular, this Division provides for:

(a) orders to recover forfeited property: s 102; and

(b) orders to buy back forfeited property: s 103.

15 Part 2-4 provides for the imposition of pecuniary penalty orders. Division 4 of Part 2-4 provides for the enforcement of PPOs. A PPO is a judgment debt: s 140(4). In respect of property subject to a restraining order, s 142 imposes a charge upon restrained property for payment of the PPO. The DPP may also apply to declare other property as available to satisfy the PPO pursuant to s 141, with the effect that the PPO may be executed against the property as if it were property owned by the person subject to the PPO.

Construction of s 102 – general considerations

16 The majority were correct to approach the exercise of construction of the conditions in s 102(3), specifically the words "derived or realised", on the basis that:

(a) the exercise of power in s 102 is discretionary {CA[881]}; and

(b) the section is remedial or beneficial legislation {CA[882]}.

17 The appellants do not challenge the finding that s 102 is discretionary. The existence of this discretion answers the appellants' arguments that a person who may have been involved in criminal activity could "demand" the return of property {AS[46]}, or that the Commonwealth would be "obliged" to transfer property, even if most of the source money had been derived from criminal activity {AS[48]}.

18 The appellants emphasise the primary objects of the Act. The majority accepted that the primary purpose of the legislation was forfeiture, but found that s 102 had a competing remedial purpose to the otherwise "draconian" effects of the Act {CA[883]–[884], quoting *Markovski v DPP* (2014) 41 VR 538 (***Markovski***) at [113]}.

19 As to the operation of s 15AA of the *Acts Interpretation Act 1901* (Cth), the majority had particular regard to the observations of Gleeson CJ in *Carr v Western Australia* (2007) 219 CLR 196 at 208 [8] {CA[885]}:

> That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs.

20 Section 102, with the other recovery provisions in Division 3 of Part 2-3, were enacted by the Parliament as "safeguards for innocent third parties, dependents and people with an interest in property", to ensure that the Act is "balanced and fair": *Proceeds of Crime Bill 2002 Explanatory Memorandum* p 2.

21 The majority's characterisation of the recovery provisions as remedial or beneficial was correct and consistent with authority. In *DPP v Logan Park Investments* (1995) 125 FLR 359 the NSW Court of Appeal held that s 48 of the *Proceeds of Crime Act 1987* (Cth) (*1987 Act*) [analogous to s 102 of the present Act] was "beneficial and protective against the rights of individuals", and was not to be construed narrowly: at 368 per Kirby A-CJ.

22 Alternatively, as P Lyons J noted, a similar approach to construction would be warranted on the basis that the legislation is penal {CA[886]}. In *Jeffrey v DPP (Cth)* (1995) 79 A Crim R 514 (*Jeffrey No 2*) the court approached the construction of the *1987 Act* on the basis that the enjoyment of property is "a fundamental right under our legal system", and by reason that the *1987 Act* expropriated private property rights, any statutory ambiguity should be interpreted to respect those rights, stating at 517-518:

> Unless no other interpretation is possible, justice requires that statutes should not be construed so as to enable the confiscation of an individual's property without payment of just compensation. A fortiori where the statute does not provide for any compensation.

23 The court specifically held that this canon of construction should apply to s 48 of the *1987 Act*: 79 A Crim R 514 at 518. As to the present Act see *DPP (Cth) v Hart* [2004] 2 Qd R 1 at 5 [12] per McMurdo P. Also *Re Drugs Misuse Act 1986* [1988] 2 Qd R 506 at 511-512 per Carter J in respect of the connection required for the "use test".

24 Accordingly, the majority were right to construe s 102 "so as to give the fullest relief which the fair meaning of its language will allow" {CA[882], quoting *Bull v Attorney-General (NSW)* (1913) 17 CLR 370 at 384} and where there is doubt about the meaning of s 102, to resolve that doubt in a manner that makes relief available, particularly where the grant of relief is discretionary {CA[918]}.

Construction of s 102(3)(a) – "used in, or in connection with"

25 There was no material difference in the reasoning of the Court of Appeal on this issue.

26 All members of the Court of Appeal found the word "substantial" to be unsatisfactory and did not gloss the condition in s 102(3)(a) with this qualification {CA[102], [901]}.

27 Morrison JA agreed with the majority in finding that the question of whether the use test was satisfied was a question of fact and degree {CA[96]}. Both Morrison JA and

P Lyons J endorsed statements to this effect by the Victoria Court of Appeal in *Chalmers v R* (2011) 37 VR 464 at [77], [89] {CA[106]-[107], [894]}. See also *Cini v The Commissioner of the Australian Federal Police* (2016) 312 FLR 432 at 445 [53].

28 It is important to note is that the condition requires that the property is ***used,*** in or in connection with, unlawful activity. The focus of the inquiry must be as to the use of the property {CA[887]}. In *DPP v George* (2008) 102 SASR 246 (***George***) Doyle CJ observed at 262 [65] {quoted by P Lyons J at CA[889]} that the use test :

> ... invites attention to the role that the property plays in the commission of the offence, to the extent to which the property is so used, and to how much of the property, or what part of it, is used.

Construction of s 102(3)(a) – "derived or realised"

29 At the heart of this issue is the meaning of the expression "derived or realised" where property has been derived from both lawful and unlawful sources. Must an application for the recovery of property pursuant to s 102(3) be refused if the source of ***any part*** of the funds to acquire the property was unlawful activity?

30 The primary judge resolved this issue by concluding that an applicant must show that the property was not ***substantially*** derived or realised, directly or indirectly, from unlawful activity {RJ[96]-[143]}, relying particularly on the reasoning in *DPP v Diez* [2003] NSWSC 238 (***Diez***).

31 The majority of the Court of Appeal found the word "substantial" to be unsatisfactory, being capable of expressing a wide range of meanings from "not imaginary" through "considerable" to "for the most part" {CA[901]}.

32 The majority construed the meaning of "derived or realised" without any qualifying words, finding two features of the statute to be of particular importance.

33 **Firstly**, s 329 defines property as "proceeds of an offence" if it is "wholly derived or realised, whether directly or indirectly, from the commission of the offence", or if it is "partly derived or realised, whether directly or indirectly, from the commission of the offence". The language of "wholly or partly derived" is repeated in s 330.

34 The majority found that these definitions reflected a recognition by those responsible for the drafting of the legislation that the terms "derived" and "realised" would ordinarily mean "wholly derived" and "wholly realised" {CA[920]}.

35 This ordinary meaning of "derived" and "realised" is reflected in another criminal forfeiture statute: in s 3(1) of the *Confiscation Act 1997* (Vic) "derived property" is defined as property "derived or realised or substantially derived or realised, directly or

indirectly, from any unlawful activity". The inclusion of the words "*substantially derived*" was intended by the Victorian Parliament to permit confiscation where the property was not wholly derived from unlawful activity: *Confiscation Bill 1997 Explanatory Memorandum* p 10.

36 **Secondly**, different drafting was deployed in subsections 102(2) and 102(3), which are alternative pathways to recovery of property {CA[919]}. The condition in s 102(2)(c) adopts the defined term "proceeds", as defined in s 329. The corresponding condition in s 102(3)(a) did not use the defined term "proceeds", and did not deploy the language of "wholly derived ... or partly derived" found in s 329 and s 330. The majority held {CA[921]}:

> The fact that 102(3) does not use the defined term "proceeds", nor the drafting approach adopted in s 329 and s 330, seems to me to be of some significance. It points rather strongly to the conclusion that the condition was not intended to specify that an application under s 102(3) must demonstrate that the property was not partly derived, nor partly realised, from unlawful activity.

37 Had Parliament intended s 102(3)(a) to require an applicant to satisfy the court that the property was not ***partly derived*** or realised from unlawful activity, then the defined term "proceeds" or the expression "wholly or partly" would have been used. As Douglas J noted, the absence of this language in s 102(3) supports the more confined interpretation of "derived" or "realised" {CA[832]}.

38 The appellants contend that the majority's interpretation leads to a lack of coherence, because an applicant for relief under s 102(2) must not have been involved in the commission of the offence to which the forfeiture relates, so it makes no sense for such an applicant to meet a more stringent test {AS[49]}.

39 The condition in s 102(2)(c) is limited, however, to the applicant's interest in the property not being the proceeds of "***the offence***", meaning the specific offence to which the forfeiture related. By contrast, the condition in s 102(3)(a) is that the property was not derived or realised from "***any unlawful activity***". The latter is a more stringent condition because an applicant must address any unlawful activity, and not merely the specific offence to which the forfeiture relates. The provisions are coherent.

40 The majority further held that whether property was derived or realised was to be determined as a question of fact, finding that the "best guidance" for the application of the source test was to be found in *DPP v Allen* [1988] VSC 661 (***Allen***) and *DPP v Lynch* (WA CCA, unreported, 2 February 1990, BC9001509) (***Lynch***) {CA[923]}.

41 P Lyons J quoted McGarvie J in *Allen* {CA[908]} who stated at p 10:

> The source of the property is to be determined not as a legal concept but by the concepts of ordinary people. One is guided by what, as a practical matter of fact, a practical person would regard as a real source of the property.

42 This factual approach in *Allen* was adopted in *Lynch* where Commissioner Templeman was considering an application made pursuant to s 31 of the *1987 Act*, which is analogous to s 102 of the present Act. The Commissioner found (BC9001509 at 14):

> The principle enunciated by McGarvie J is applicable in the present case because Mr Lynch set out to prove that the purchase price of the House was derived from lawful activities. I consider that if he is to succeed, I must be satisfied that as a practical matter, money earned by lawful activities was the real source of the property.

43 The majority did not base their construction of s 102(3)(a) on *Allen* and *Lynch*, but identified these decisions as appropriate illustrations of the practical application of their preferred interpretation {CA[923]}. Accordingly, the appellants' complaint that *Allen* did not purport to stipulate a general test {AS[50]-[52]} is misplaced.

44 *DPP (Cth) v Corby* [2007] 2 Qd R 318 does not assist the construction of s 102 {AS[53]}, because that case examined a provision of a very different character and purpose {CA[912]-[917]}. It can also be noted that the application in *Corby* was an *ex parte* application for a restraining order, which Keane J observed did not determine any substantive rights of the parties.

Construction of s 102(3)(a) – payments after acquisition

45 The majority did not make the findings asserted by the appellants at {AS[54]}.

46 In the case of the North American Trojan T-28 VH-AVC, this aircraft had been purchased in 2001 entirely from lawful funds. From 2003 to 2005, funds were spent on restoration and repairs that were found to be from unlawful sources {CA[1096]}.

47 The majority observed that, monies subsequently incurred on restoration and repair would "at least ordinarily" not be taken into consideration {CA[1108]}. The majority did not, however, purport to state any general principle and treated the matter as one turning on the particular facts of this case. The majority did not find that such expenditure must in all cases be excluded from consideration. Accordingly, the consequence asserted in the appellants' submission at {AS[56]} does not follow.

48 In respect of 6 Merriwa Street, Nemesis had acquired an unencumbered interest in the property from lawful sources {CA[1153]}. The property was subsequently mortgaged but in circumstances that made no material difference to the interest of Nemesis {CA[1155]}. Contrary to the appellant's submission, the majority found that the source

of funds used to repay the loan ***was*** relevant to the question of lawful derivation, but this fact did not affect their ultimate conclusion {CA[1156]}.

Construction of s 102(3)(b) – "acquired the property lawfully"

49 The appellants submit that property can only be acquired "lawfully" within the meaning of s 102(3)(b) if ***no part*** of the funds used to purchase the property involved monies from unlawful sources {AS[57]}. On the appellants' case, one tainted dollar paid to acquire or to repair or to maintain an asset would defeat the condition {AS[54]-[56]}.

50 The appellants' proposed construction does not reflect the ordinary and natural meaning of the words, and represents an extreme position, contrary to the principled approach to construction adopted by the majority {CA[918]}.

51 *Markovski* does not support appellants' submission. *Markovski* did not find that property would not be lawfully acquired if there was any contribution from unlawful sources. The court only held that the determination of whether property was "lawfully acquired" in s 22 of the *Confiscation Act 1997* (Vic) "***may properly involve***" consideration of the source of funds: 41 VR 548 at 563 [76]. Further, as Whelan JA observed in that case at 564 [53]:

> That is not to say that evidence as to the source of funds used is essential in every case, or to address how far such an inquiry might property extend.

52 In *Markovski* at 556 [40] Whelan JA referred to *DPP (Cth) v Jeffrey* (1992) 58 A Crim R 310 (***Jeffrey No 1***) where Hunt CJ at CL observed at 313:

> As a matter of practical reality, what such an applicant must do in most cases in order to establish the negative facts stated in [s 102(3)(a)] is not only to deny on oath in general terms that the property was so used in or derived from any such unlawful activities but also to establish what activities it was in fact used in and derived from. To a large extent, the derivation of the property would ordinarily be proved by the same facts as an applicant must establish in relation to [s 102(3)(b)].

53 At 557 [42]-[45] Whelan JA noted that the concept of lawful acquisition substantially overlapped with derivation, such as in *Jeffrey No 1* where the court assessed lawful acquisition by reference to the contributions from legitimate and illegitimate sources.

54 *Markovski* also relied on other decisions in which the question of lawful acquisition was assessed by considering the relative contributions of lawful and unlawful funds to the acquisition of the asset, in particular *Diez* (at 558 [49]) and *R v McLeod* (2007) 16 VR 682 (***McLeod***) (at 559-560 [52]-[55]).

55 In *Diez*, Greg James J determined an application pursuant to s 48(4) of the *1987 Act* in respect of a house that had been acquired using lawful funds and funds transferred to Australia from overseas, which the DPP impugned as involving offences with respect to

income tax and the *Financial Transactions Reporting Act 1988* (Cth). These overseas funds were found not to have been lawfully derived, but Greg James J found at [55]:

> I do consider, however, when I have regard to the whole of the property and what went into it, that the contribution made by those sums is not such that I should hold the property was directly or indirectly so derived.

56 In *McLeod*, the court had to determine whether a family home that had been forfeited had been "acquired lawfully", concluding that the property was lawfully acquired, even though proceeds of unlawful activity were used to make mortgage payments.

57 In *Markovski* Whelan JA noted that *McLeod* proceeded on the basis that an asset may be lawfully acquired to the extent that funds not derived from unlawful activities were utilised in its acquisition: 41 VR 548 at 560 [55].

58 As the above authorities demonstrate, a payment of tainted funds towards a purchase, or the commission of an offence (whether money laundering, financial transaction reporting, or taxation) in respect of those funds does not of itself prevent property from being acquired "lawfully". Whether property is acquired lawfully for the purposes of s 102(3)(b) is to be assessed in a similar manner as derivation, having regard to the contributions to the acquisition made by lawful and unlawful sources.

59 This construction of s 102(3)(b) is also consistent with the principled approach to construction adopted by the majority, to interpret the provision in a manner that makes relief available, particularly where the grant of relief is discretionary {CA[918]}.

Construction of s 102(3) – onus of proof

60 The primary judge did not make the finding alleged at {AS[59]}. The appellants do not identify a statement by the primary judge to this effect.

61 The primary judge did not err in respect of the burden of proof. This argument was rejected by all members of the Court of Appeal. The majority noted that the reasons of the primary judge "are replete with statements recognising that the onus lay on the Hart companies to establish the matters raised by s 102(3)" {CA[935]}. That proposition was also accepted by Morrison JA {CA[390]}.

62 Before the Court of Appeal, the appellants contended that particular statements by the primary judge demonstrated that he had erroneously reversed the onus of proof. For the reasons set out in the judgment of P Lyons J, these statements, properly understood, did not make out the appellants' contention {CA[936]-[941]. In particular:

(a) the primary judge was correct to approach the case on the basis that, for each activity "whose lawfulness was suspect", the issue was whether the respondents

"could prove that an asset was not derived directly or indirectly from money derived from the unlawful activity" {RJ[15]};

(b) it was reasonably open to find that funds were not derived from unlawful activities where no suspicion had been raised on the evidence {RJ[735]};

(c) the finding of the primary judge at {RJ[818]} in respect of funds between Harts Australia Ltd and Nemesis must be read in light of earlier findings about the role of Nemesis in providing financial assistance to the companies {RJ[391]-[408]};

(d) by his general statement at {RJ[55]} the primary judge was not adopting any presumption to the effect that the respondents had been acting lawfully, and was mindful of the fact that the onus of proof lay on the Hart companies {CA[941]}.

63 The legal burden of proof lies on an applicant to satisfy the court of the matters necessary to establish the grounds for making the order applied for: s 317. This does not relieve a respondent, however, from having any evidential burden, particularly where a respondent raises allegations of criminal activity or serious misconduct: *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362.

64 Depending on the circumstances of the case, "slender evidence may suffice" to discharge the onus, particularly in relation to unlawful activity: *Brauer v DPP* [1991] 2 Qd 261 at 268 (***Brauer***), *Jeffrey No 2* at 518. The court will take into account any difficulty in the applicant's capacity to adduce suitable evidence. The extent to which past transactions need to be explained will "be determined from case to case on the basis of reasonableness": *Brauer* at 267 per Thomas J, also *Diez* at [46]-[49].

65 Hunt CJ at CL in *Jeffrey No 1* at 313-314 stated the following principles as to the burden of proof in a s 102 application, dealing with its analogue in the *1987 Act*:

> [I]n my view it is not necessary for an applicant – in addition to his sworn denial in general terms that the property had been so used in any such unlawful activities – to deal specifically with every kind of unlawful activity which could be imagined in relation to the use of such property. His is like the onus which the Crown bears in a criminal trial (although the extent of the burden is obviously not the same) to meet any "defence" of accident, provocation or self-defence etc; the Crown does not have to meet every such "defence" which could possibly arise in relation to the offence charged. There is an evidentiary onus or obligation upon the accused to point to or introduce evidence from which it could be inferred that there is at least a reasonable possibility that, for example, his act was accidental, or that it was provoked, or done in self-defence. So also is an evidential obligation placed upon the Commissioner in a taxation appeal to raise a particular matter in evidence so as to require the taxpayer to deal with that issue in the discharge of his overall onus of proof.

> In an application pursuant to s 48(4), therefore, the applicant ... need deal specifically only with inferences available from the evidence that his property had been used in particular unlawful activities and which tend to contradict his sworn denial ...
>
> The Director, moreover, has the obligation to put an application for relief pursuant to s 48(4) on notice (usually by cross-examination) of his intention to rely upon such inferences from the evidence which contradict his denial on oath the property had been used in any unlawful activities ...
>
> It must, of course, be kept firmly in mind that the legal onus in relation to s 48(4) remains at all times upon the applicant, and that what I have said refers only to a subsidiary issue as to what is involved in the discharge of that onus from an evidentiary point of view... There is an obligation upon the Director to point to or to introduce evidence from which such inferences may become available.
>
> [case references omitted]

66 These principles were adopted in *Diez* and *Markovski*.

67 The primary judge and the Court of Appeal did not depart from these principles, or reverse the onus of proof, as asserted by the appellants {AS[64]}. The primary judge directed that the case be conducted on pleadings, to define the issues in dispute. This was consistent with the principles stated in *Jeffrey No 1*: namely, the appellants had an obligation to give notice of the unlawful activities relied upon, and that adversarial proceedings are to be conducted fairly.

68 In order to discharge their onus of proof, the respondents were not required to adduce evidence to rule out any and all possible forms of unlawful conduct, including conduct of third parties not within their knowledge. The respondents were only required to address allegations that had been pleaded, and had been fairly raised on the evidence before the primary judge. The Court of Appeal were correct to find {CA[935]}:

> In my view the learned primary Judge was right not to consider the possibility that property, the subject of the application under s 102, was relevantly associated with some form of illegal activity other than that raised by the Commonwealth parties, in their points of defence, or otherwise properly in issue in the proceedings before him.

69 The decision in *Henderson v Queensland* (2014) 255 CLR 1 does not assist the appellants. As this Court noted, the result in that case followed from the manner in which the application had been advanced before the primary judge and the Court of Appeal: at 11-14 [26]-[30] per Bell J, and at 44 [172] per Keane J.

70 The appellants make a specific complaint in respect of payment made by Tinkadale in March 1994 {AS[66] fn 77}. The relevant issue at trial, defined by the pleadings, was whether payments from Astion to Tinkadale came from funds sourced from the Hendon arrangement. The primary judge found that they had not {RJ[349]}. This finding of fact was not the subject of appeal either to the Court of Appeal or to this Court. The primary

judge was not required to engage in speculation as to possible unlawful activity involving Tinkadale that had not been pleaded or the subject of evidence.

71 Given the primary judge's close examination of a vast amount of evidence, including detailed tracing and reconciliation of the sources and application of funds, it was a matter for the primary judge as to whether this evidence was sufficient.

Construction of s 141 – "is subject to the effective control"

72 The reasoning of the majority is correct in principle and ought to be accepted.

73 This construction reflects the natural reading of s 141 and its apparent purpose, which is to enlarge the pool of property available for execution under a PPO to property that is not subject to the legal ownership of the person subject to the PPO but is nonetheless subject to their effective control. The majority concluded {CA [1268]}:

> In my view, the natural reading of s 141 is that it permits a declaration to be made in respect of property which, at the time when the application is determined, is under the effective control of the person who is subject to the PPO. When the declaration is made, a restraining order may then be made in respect of the property; with the result that the property becomes subject to a charge. Section 141 is not directed to property which has been the subject of a restraining order under earlier provisions of the POCA, such as s 17, which would ordinarily mature into forfeiture, resulting in sale and the payment of the net proceeds to the CAA. Moreover, it seems to me to be well beyond the objects of the Act to make property of another person available to satisfy a PPO where the property once was, but no longer is, subject to the effective control of the person subject to the PPO. [footnotes omitted]

74 Having regard to this purpose, and the use of the present tense – "*is*" – the time for assessing the effective control is at the time of the making of the s 141 declaration.

75 Morrison JA, in dissent, accepted that this interpretation was appropriate, at least for property that had not been subject to a restraining order {CA[273]}.

76 In *DPP v Walsh* [1990] WAR 25 (***Walsh***), a decision not considered by the Court of Appeal, Seaman J held that effective control for the purposes of s 28(3), the analogue of s 141 in the *1987 Act*, means the date at which an order under s 28(3) might be made.

77 As to the public policy underpinning this section, Seaman J stated in *Walsh* at 34:

> Apart from what seem to me to be the plain words of the subsection it is, in my opinion, entirely consistent with the principal objects of the Act that where the benefit cannot be traced, as in this case, that a fortune under the person's effective control, however derived, should be reduced by the amount of the benefit.

78 The appellants contend, however, that s 141(1)(c) has a very different meaning in cases where the relevant property had at an earlier time been the subject of a restraining order, namely that "*is subject to the effective control*" must instead be read as "*was subject to*

the effective control, at the time a restraining order was made". This was the conclusion reached by Morrison JA, dissenting {CA[282]}.

79 The rationale for this interpolation into the text of the Act is that the Parliament intended that any property that has been subject to a restraining order should continue be available in the future to satisfy a PPO, by means of a s 141 declaration {AS[74]}.

80 Express provision was made, however, for the charging of property subject to restraining orders for the discharge of PPO orders made under the Act. Section 142 creates a charge where a PPO is made against a person and property is subject to a restraining order in respect of the PPO offence. Since Parliament has enacted a specific regime in s 142 for the use of restrained property to meet a PPO, it is unnecessary to alter the ordinary meaning of s 141. Provisions such as s 29(4) and s 282 are accordingly explicable without resort to eisegesis in respect of s 141.

81 It is apparent from s 142 that Parliament has given consideration to the reasonable use of property subject to a restraining order to satisfy a PPO. Had Parliament intended that a PPO should be satisfied by property that had been subject to a restraining order, then this could have been clearly stated in s 142.

82 It is apparent that sections 29(4), 45(3), 142 and 282 form a coherent regime for the application of property restrained by the Act to satisfy PPO orders. It is not necessary to alter the meaning of s 141(1)(c) for these provisions to operate. The primary judge made the following observation in respect of s 29(4) {RJ[164]}:

> If [the submission is] that the intention of s 29(4) is that the property restrained should be permanently available to satisfy a pecuniary penalty order in spite of s 102 then I reject it. That interpretation would allow the Commonwealth to appropriate a blameless person's property without fair compensation notwithstanding that the property was lawfully acquired, derived and used and merely because the property was, at the time of the restraining order, under the effective control of a convicted person. If the legislature had such an intention, it would be more clearly expressed.

83 The majority of the Court of Appeal was correct to have regard to the ordinary course of events contemplated by the Act in respect of restraining orders, exclusion and forfeiture, in order to construe the meaning of s 141.

84 Property becomes subject to a restraining order by reason of a suspect being charged with an offence, and the ***suspicion*** of an authorised officer that the property is subject to the effective control of the suspect. The court making the restraining order is not required to determine the question of effective control, but only be satisfied that the officer holds the suspicion on reasonable grounds: s 17(1)(f).

85 Prior to forfeiture the restrained property may be released:

(a) by the court making an exclusion order: s 29;

(b) by revocation of the restraining order: s 42;

(c) by the withdraw of the charges: s 45(a);

(d) by the acquittal of the suspect: s 45(b); or

(e) by the quashing of the relevant conviction: s 45(c);

86 In none of the above instances would it be reasonable to believe that Parliament intended that property released from a restraining order in this manner should be nonetheless remain subject to forfeiture by way of a later application pursuant to s 141.

87 Restrained property may be forfeited by application made pursuant to Part 2-2 or automatically upon conviction for the relevant offences pursuant to Part 2-3. Upon forfeiture, the restraining order ceases to be in force: s 45(4) and the restrained property vests absolutely in the Commonwealth: s 96.

88 Nothing in the Act suggests that the forfeited property vested in the Commonwealth is intended to be the subject of an application made pursuant to s 141.

89 Following the expiration of relevant time limits (s 99) the Official Trustee, on behalf of the Commonwealth must, as soon as practicable, dispose of the forfeited property and credit the proceeds, after its expenses, to the Confiscated Assets Account: s 100. This is subject to a direction issued by or on behalf of the Minister: s 100(2).

90 In the ordinary course, therefore, the assets subject to the restraining order would be forfeited and then sold by the Official Trustee to the general public. The effect of the appellants' construction would be that the assets sold to the general public nonetheless remain at risk of forfeiture to satisfy a PPO in the future, if the person subject to a PPO was in effective control when the restraining order was made.

91 As another illustration, consider property that has been bought back from the Commonwealth by application made pursuant to s 103, in exchange for payment to the Commonwealth for its value: s 105. On the appellants' construction, this property would remain be at risk of forfeiture to satisfy a PPO in the future.

92 The absurdity of these practical consequences demonstrates why the appellants' construction is wrong in principle, and must be rejected.

93 A further absurdity emerges when s 102(2) is considered. Under this subsection, property may be recovered from the Commonwealth if the conditions in paragraphs (a), (b) and (c) are satisfied. The condition in s 102(2)(b) is that:

... the applicant's *interest in the property is not subject to the *effective control of the person whose conviction caused the forfeiture

94 If effective control must be determined at the time of the restraining order, and not at the time of the s 102 application, then this condition in s 102(2)(b) for the recovery of property would be impossible to satisfy, assuming effective control existed when the restraining order was made.

95 As for s 102(3), the person making the application cannot be the person convicted of the offences: s 102(3)(c). If such an applicant has satisfied the court of the conditions, and obtained the favourable exercise of discretion, it would subvert the beneficial intention of s 102 for those assets to be subject to re-forfeiture.

96 Assume in this case that the respondents, after recovering the assets from the Commonwealth, sold some or all of those assets to third parties. On the construction pressed by the appellants', these assets would continue to be subject to forfeiture by an application made pursuant to s 141, to satisfy Mr Hart's PPO. This cannot be right.

97 To address the specific submissions of the appellants {AS[73]-[81]}:

98 **Firstly**, s 29(4) is explained by the specific provision in s 142 for the charging of property subject to restraining orders, and the power in s 282 for the court to make directions to the Official Trustee to pay monies to the Commonwealth to discharge a PPO. The Act works harmoniously, and in particular the meaning of "is ... subject to" in s 102(2)(b) is consistent with the same expression used in s 141(1)(c), on the majority's construction.

99 **Secondly**, the majority's conclusion that s 141 was not directed to property that had been restrained and, in the ordinary course, disposed of by the Official Trustee, was logical and reasonable. It would be absurd for the Commonwealth to sell forfeited assets to the general public, only to forfeit those same assets again by means of an application made pursuant to s 141. Sections 29(4), 45(3), 45(5), 142 and 282 of the Act form a complete regime for applying property the subject of a restraining order to satisfy an outstanding PPO. Having regard to the penal nature of the Act, it would be contrary to public policy to use s 141 to extend the scope of forfeiture beyond these specific provisions.

100 **Thirdly**, the appellants are wrong to say that their s 141 application would otherwise fail since at the time of the hearing of the application, the property was vested in the Commonwealth and for that reason not under Mr Hart's control {AS[76]}. The difficulty in the interpretation of s 141 arose in this case because of the unusual

circumstances in which the application was made {CA[1267]}. The assets had been made subject to a restraining order on 8 May 2003 and were forfeited to the Commonwealth on 18 April 2006, so that the restraining order was then discharged. On 17 July 2006 the CDPP applied for a PPO against Mr Hart. On 17 October 2006 the companies applied for orders for the recovery of the forfeited assets pursuant to s 102(3). On 7 September 2007 the CDPP filed its application pursuant to s 141, notwithstanding that the PPO proceeding against Mr Hart was still unresolved.

101 Unusually, the recovery proceeding under s 102 was heard at the same time as the application pursuant to s 141. The orders sought pursuant to s 141 were contingent upon the transfer of assets to the respondents. Accordingly the effective control was control by the respondent companies, not by the Commonwealth.

102 Further, it would be wrong in principle to treat s 141 as a mechanism intended to claw back property recovered pursuant to s 102, on the assumption that the s 102 applicants "may have had some involvement in the offending that led to the PPO" {AS[76]}.

103 Parliament has expressly decided the classes of applicant not eligible to apply for recovery orders in s 102(2)(a) and s 102(3)(c). Otherwise, the involvement of an applicant in criminal activity would be a matter for discretion of the court. It would be wrong to interpret s 141 in a manner likely to result in re-forfeiture of those assets.

104 **Fourthly**, each of s 102(2), s 141 and s 116(3) can be read consistently and harmoniously as referring to the present. For s 102(2), the apparent public policy objective is that property should not to be returned in effect to the wrongdoer, and accordingly the relevant time for effective control is the time that the assets are to be returned. This is harmonious with s 141, on the majority's construction. The effect of s 116(3), is that the present assets under the effective control of a party may be relied upon as evidence of the benefits derived from the commission of a past offence.

105 Section 29(4), on its ordinary meaning, refers to the present, namely the time at which the restraining order is made. This follows from the scheme of the Act, which contemplates that an application to exclude property from restraining orders will be heard at the same time as an application to make the restraining order: s 29(1).

106 **Fifthly**, *Logan Park Investments Pty Ltd v DPP (Cth)* (1994) 122 FLR 1 (***Logan Park***) resolved a drafting difficulty affecting a specific provision of the *1987 Act*, namely s 48(3)(fa), which provided for the exclusion of property from a restraining order. The primary judge was confronted with an argument that since the suspect had been arrested and imprisoned, and the assets were subject to restraining orders, so there was no longer

effective control. The court held that s 48(3)(fa) "can only be given practical effect" if the word "is" was read as "was at the date of the restraining order": 122 FLR 1 at 3.

107 This difficulty was more imagined than real. Like s 29(4) of the present Act, the *1987 Act* contemplated that applications for exclusion orders would be made at the same time as the exclusion order was made: s 48(1), (3)(b) and (c). Accordingly, the use of the present tense was appropriate, and plainly referable to the time of the restraining order.

108 The decision in *Logan Park* also turned on the finding that the provision could ***only*** be given practical effect if read in the past tense. By contrast, s 141 does not require any existing restraining order to operate, and is able to operate upon its ordinary meaning, as the majority found {CA[1257]}.

109 *Logan Park* was followed in *DPP (Cth) v Hart (No 2)* [2005] 2 Qd R 246 (***Hart No 2***), but in *Hart No 2* there was no contest as the relevant date {CA[1258]}. *Hart No 2* dealt with an exclusion application, rather than an application made pursuant to s 141.

110 In *Commonwealth v MacArthur* (unreported, NSWDC, 15 July 2004) an application was made pursuant to s 28(3) of the *1987 Act*. Judge Dodd in that case held that he was bound by the Court of Appeal decision in *Logan Park* and accordingly should not follow *Walsh*.

111 The Court of Appeal was not so bound and was correct not to follow *Logan Park*, since that provision is very different from s 141. It should also be noted that s 48(3)(fa) of the *1987 Act* was not carried over into the current Act, so this issue no longer arises.

112 As to {ASC[79]}, even if there are only convictions for indictable offences, the property is still subject to forfeiture upon application pursuant to Part 2-2. There is no difference in result in the date of effective control for the purposes of s 141.

113 **Sixthly**, the Court of Appeal was correct to find that the interpretation contended by the applicant might well go "beyond the objects of the Act" {CA[1268]}. On the appellants' proposed interpretation, the making of a restraining order would permanently affect the status of any property the subject of that order, without regard to whether the property had been excluded, forfeited, or sold by the Official Trustee.

114 The primary judge, referring to the objects of the Act found {RJ[158]}:

> Those principal objects do not include any reference to "effective control". No object is consistent with retention of one person's property because it was under the effective control of a convicted person when it was restrained. Such an object would jeopardise the interest of any person innocent of crime who proposed to settle property on trust or who was the beneficiary of a trust, or who granted a power of attorney to another which enabled the attorney to have effective control of property, or who bailed a chattel, or who appointed a real estate agent to collect rent, hold a deposit or manage property.

115 **Finally**, it is not an answer to say that the absurd consequences of the appellants' proposed interpretation might be avoided by the court having regard to the effective control of the property at the time of the hearing in exercising its discretion {AS[81]}.

116 If the person subject to the PPO does not own and is not in effective control of the property at the time the s 141 declaration is made, then the effect of that declaration would result in the expropriation of private property rights on the arbitrary ground that it was once the subject to a restraining order made pursuant to the Act.

117 The majority's construction s 141 should be upheld as correct in principle.

(B) THE DISPUTED ASSETS

Alleged Money Laundering Offences

118 In respect of the various assets, the appellants complain that the Court of Appeal failed to consider whether those assets were "acquired lawfully" in light of alleged money laundering offences and whether the assets were thereby "used" in connection with unlawful activity {AS[83](c), [91], [92], [94], [97], [112]}.

119 The absence of specific consideration of these matters is explicable since the appellants failed to raise these matters in their grounds of appeal {Notice of Appeal filed 3 June 2010}. The appellants' submissions regarding the use of the legal interest in the assets {AS[94], [97]} were not put to the Court of Appeal. Whether the court failed to consider these issues is not, however, the real question in this appeal. The appellants do not seek to remit the matter for reconsideration by the Court of Appeal. The real question is whether, on the merits, these arguments would produce a different outcome.

120 The majority did not assume that, because an asset was not derived from unlawful activity, that the other conditions in s 102(3)(a) and (b) were automatically satisfied {AS[91]}. No such reasoning appears in their judgments.

121 The primary judge's approach to this question was as follows {RJ[306]}:

> In respect of each asset where an issue is whether the Companies have proved that it was not derived or realised from unlawful activity because of the use of funds from UOCL or from Merrell, if the Companies have so satisfied me, they have also satisfied me the asset was not used in connection with unlawful activity, in spite of the suspicion that a money laundering offence occurred by that use of the funds.

122 For the reasons at paragraphs 49 to 59, the primary judge's approach was correct in principle and should be adopted. This approach is consistent with the findings of the majority in respect of the source test, and the approach adopted in the authorities including *Jeffrey No 1*, *Diez* and *Markovski*.

123 In order to contravene s 82 of the *1987 Act* or s 400.9 of the *Criminal Code* (Cth), the relevant element requires a person to "receive, possess, dispose of or bring into Australia" the relevant money or property. By reason of the primary judge's finding at {RJ[81]}, the effect of the money laundering offences are limited to those that involved the direct application of funds from UOCL or Merrell for the acquisition. For this reason the appellants press the money laundering submission only in respect of three assets {AS[92], [94], [96], [110]} which are:

(a) the Hawker Sea Fury VH-SHF;

(b) the North American T-28 VH-SHT; and

(c) the North American Trojan VH-AVC (only in respect of the restoration cost).

124 These three aircraft were not "*used*" in connection with unlawful activity. It is not sufficient that there be a connection between the aircraft and the unlawful activity. The condition in s 102(3)(a) requires the aircraft to have been "used", as a physical entity: {CA[887]} and *George* at 262 [65].

125 Here the aircraft were no more than passive repositories or manifestations, so to speak,of the funds applied to their purchase (or restoration, for the Trojan). While the application of tainted funds towards the purchase price (or restoration) of an aircraft would be relevant to the source test, it would not be sufficient to satisfy the use test.

Hawker Sea Fury – VH-SHF

126 The issues in respect of the Sea Fury arise in the following way:

(a) the Sea Fury was acquired with cash flows of in total $664,335.82, of which cash flows $185,566 were sourced from Merrell lending money to Fighters, which the primary judge found to be from unlawful activities;

(b) the bulk of the cash for the purchase of the Sea Fury was from a loan from Unlimited Aero Maintenance (also known as Flying Fighters Maintenance and Restoration) of $382,141.93 which the primary judge found to be sourced from Nemesis on 6 November 2000;

(c) the primary judge found that: Nemesis possessed funds to make this payment from monies received from Blackshort Pty Ltd (**Blackshort**); Hamish Watson was a former director of Blackshort and was also a director of Watson Benefit Services (**WBS**); and on 4 October 2000 UOCL had transferred $1.5 m to the bank account of WBS {RJ[615]};

(d) the primary judge found that the "possibility exists" that UOCL had transferred funds via WBS to Nemesis, and on this basis he concluded that the respondents had not established that $300,000 was not derived from unlawful activity {RJ[616]};

(e) this finding was upheld by the Court of Appeal {CA[630], [1026]}, but is challenged by the respondents' Notice of Contention;

(f) accordingly, treating the Blackshort monies as tainted, the primary judge concluded that $178,769.82 of funds to acquire the Sea Fury were untainted and $485,566 were funds "not shown to be untained" {RJ[617]}.

127 If the challenge to the finding regarding the Blackshort monies is upheld, then only $185,566 (28%) of the Sea Fury was derived from unlawful activity.

128 The submissions in respect of the Notice of Contention are addressed in Part VII.

129 The respondents rely on their submissions at paragraphs 118 to 125.

North American T-28 VH-SHT

130 The cash flows to acquire the T-28 were in total $282,100 of which $83,100 was sourced indirectly from Merrell and $64,000 obtained from a NAB loan. The primary judge found $64,000 to be money obtained from unlawful activity {RJ[488]}.

131 The respondents successfully challenged the primary judge's finding in respect of the $64,000, the majority finding that the primary judge fell into error {CA[1016]}. This finding made by the Court of Appeal is not challenged by the respondents.

132 Accordingly, no more than 29% of the purchase price was derived, indirectly, from unlawful activity. The majority's finding that this aircraft was not derived or realised from unlawful activity was correct {RJ[801], CA[1017]}.

133 The respondents rely on their submissions at paragraphs 118 to 125. Further, in respect of the alleged money laundering offences, the $83,100 while ultimately sourced from UOCL, only indirectly contributed to the purchase of the T-28 since the monies were not applied directly but were sourced from the Geoff Klooger Trust Account {RJ[487]}.

134 While the respondents do not dispute that the ultimate source of the funds was UOCL, the indirect contribution to the acquisition of the T-28 means that there was no money laundering offence involved in the acquisition of the T-28.

Proceeds of 27 Samara Street

135 This property was purchased for a total cost of $150,571.12. The sum of $45,000 that contributed to the purchase price came from Astion. Because of its involvement in the Hendon arrangement, the primary judge was not satisfied that the $45,000 was not derived from unlawful activity {CA[1159]}.

136 This finding was upheld on appeal {CA[1169]} but is challenged by the respondents by their Notice of Contention, the submissions as to which are addressed in Part VII.

137 If the Notice of Contention is upheld, the result is that 27 Samara Street was acquired 100% from lawful sources. Even if the Notice of Contention is dismissed, the contribution of unlawful funds was no more than 30% of the purchase price.

138 On either basis, the majority's conclusion that 27 Samara Street was not derived directly or indirectly from unlawful activity was correct {CA[1172]}.

Mercedes Benz 380 SL

139 The Mercedes had been acquired entirely by Nemesis in 1995 through the refinancing of a lease residual through Esanda. Subsequently a receiver and manager was appointed to Nemesis to administer assets including the Mercedes. Fighters purchased the Mercedes from the receiver and manager in 2001. The funds to acquire the Mercedes were provided by a loan from Dr Fleming The loan from Dr Fleming was later discharged from the proceeds of sale of a property on Brandon Road, which was not a property derived from unlawful activity. {RJ[843]-[835]}.

140 All of the funds used to acquire the Mercedes were from lawful sources.

141 The loan from Dr Fleming was secured by a registered fixed and floating charge over the assets of Fighters in favour of Dr Fleming. One of the assets secured by this charge was the Sea Fury VH-SHF, which was partly derived from UOCL funds. Because Dr Fleming's charge included the Sea Fury, the primary judge was not satisfied that the Mercedes was not derived from unlawful activity {RJ[844]-[845]}.

142 The respondents challenged this finding on appeal. The majority found that the Sea Fury was not derived from unlawful activity {CA[1027]}. Accordingly, the use of the Sea Fury as security for the loan from Dr Fleming became moot. The respondents' specific challenges to the primary judge's reasons fell away {CA[1199]}.

143 The appellants now seek to reinstate the decision of the primary judge.

144 The reasoning of the primary judge was wrong in principle. An asset that was not "derived ... from any unlawful activity" does not lose that status because a general security (such as a fixed and floating charge, or "all monies" mortgage) is temporarily granted over that asset, together with another asset or fund which happens to be tainted.

145 This is particularly so where, as happened in this case, the loan to refinance the vehicle had been discharged entirely from lawful sources.

North American Trojan VH-AVC

146 This aircraft was purchased entirely with lawful funds.

147 In 2003 a total $50,000 was spent on restoration and repairs that was found to have been sourced from unlawful activities {CA[1096]}.

148 The majority observed that monies incurred on restoration and repair would "at least ordinarily" not be taken into consideration. The majority found that the expenditure on restoration and repairs did not affect their conclusion that the aircraft was not derived from unlawful activities {CA[1108]}. Douglas J stated {CA[833]}:

> The factual example of the difference that I have found most useful in this case is that of the North American Trojan aircraft where the purchase money for the aircraft was untainted but tainted money was spent in partly restoring it. It seems wrong to me to conclude that, simply because of the source of the money spent on its repair, the property was derived by its owner from unlawful activity.

149 Alternatively, the small amount spent on repairs and restoration, relative to the purchase price, did not affect the conclusion that the aircraft was not derived from unlawful activity {CA[1109]}. Also relevant is that the primary judge found that the repairs had not increased the value of the Trojan {RJ[722]}.

150 While the primary judge was "suspicious" that money laundering offences may have occurred, he made no findings that any particular offences had occurred, The primary judge addressed the issue at {RJ[306]}, as quoted at paragraph 121 (above). In respect of the alleged money laundering offences, it can be noted that the monies spent on the Trojan were not sourced directly from UOCL or from the Nigel Arnott loan. The $50,000 was a book entry involving no cash transaction {RJ[722], [724]}. Mr Vincent admitted that, from the $144,000 loan from Arnott, only two payments were sourced for repairs on the Yak 3 and for the CAP {T 11-10}. The funds for the Trojan were not sourced directly from the Arnott loan. Accordingly, there was no breach of the money laundering provisions in respect of the Trojan.

Hangar 400

151 The primary judge found that Hangar 400 was fully acquired with cash flows that were sourced from lawful activities {RJ[775]}. The issue was whether the use of Hangar 400 as security for a loan from Perpetual altered the status of this asset.

152 The primary judge was not satisfied that the Perpetual loan had not been obtained by the fraudulent conduct by the respondents, by Mrs Hart and Ms Petersen, in contravention of s 408C(1)(f) of the *Criminal Code* (Qld) – the "**Perpetual offences**". The respondents challenge the Perpetual offences findings by their Notice of Contention, for the reasons set out in Part VII.

153 The appellants contended that, because Hangar 400 was security for the Perpetual loan, then Hangar 400 was property used in connection with unlawful activity, namely the Perpetual offences. The primary judge rejected that argument, finding that the asserted connection was "too tenuous on the present facts" {RJ[781]}, concluding that Hangar 400 was not derived from, or used in connection with unlawful activity{RJ[782]}.

154 The majority upheld these findings, making the additional observations that:

(a) Yak did not derive its title in Hangar 400 from the NAB loan, and NAB never held any mortgage over the Hangar 400 sublease {CA[1141]};

(b) the use of Hangar 400 was not "used in connection with" the fraudulent inducement, noting that the provision of security, and the representations were distinct conditions to be satisfied by Perpetual for the loan {CA[1143]}.

155 These findings of fact should not be disturbed. The connection between Hangar 400 was "tenuous and remote", and this finding was a matter of fact and degree based on the exercise of judgement by the primary judge: *George* 102 SASR 246 at [62]-[65], *Chalmers* 37 VR 464 at [77], [89] {CA[894]}. No error has been shown.

156 Alternatively, the findings must be upheld if the Perpetual offences findings are overturned, by the Notices of Contention.

Proceeds of Doonan's Road, Grandchester

157 The appellants make two submissions in respect of Doonan's Road, Grandchester.

158 The first is the same submission as for Hangar 400, namely that by the use of these properties as securities for the Perpetual loan, the properties were "used in connection with" the Perpetual offences {AS[120]}. The respondents rely on the matters above in answer to that submission.

159 The second submission is that Bubbling in part derived its interest in the Doonan's Road properties from the repayment of the Perpetual loan {AS[123]}. As the majority found, however, the loans in respect of Doonan's Road were repaid from untainted sources, save as to an amount of $4,566.80 {CA[1188]}. Overall, less than $30,000 of tainted funds were involved in a total acquisition cost in excess of $850,000 {CA[1190]-[1191]}.

160 Accordingly, the majority was correct to conclude that the Doonan's Road properties were not derived or realised or used in connection with unlawful activity {CA[1194]}.

Proceeds of 6 Merriwa Street

161 As noted above at paragraph 48, Nemesis had acquired an unencumbered interest in 6 Merriwa Street entirely from lawful sources {CA[1153]}. The property was later

mortgaged to Equititrust (not Perpetual {CA[1157]}) in circumstances that the majority found made no material difference to the interest of Nemesis {CA[1155]}.

162 The primary judge found that, while some of the funds used the repay the Equititrust loan may have come indirectly from UOCL, this source was substantially less than 5% of the cash flows used to repay the loan {RJ[791]}.

163 The majority found that, given the small role that the UOCL funds played in the repayment of the Equititrust loan, the interest of Nemesis in 6 Merriwa Street was not derived or realised from unlawful activity {CA[1156]}.

164 No error has been shown in respect of these findings. The majority did not find that the source of funds were irrelevant, as the appellants contend {AS[121]}. The Equititrust mortgage and the monies indirectly sourced from UOCL were considered by the majority in reaching their conclusions regarding 6 Merriwa Street.

(C) DISCRETION

Exercise of discretion – s 102(1)

165 In respect of the exercise of discretion, the appellants' pleaded case was that:

> The discretion given to the Court pursuant to s 102(1) should not be exercised because ... at all material times the [respondents] were under the effective control of Mr Hart and but for the forfeiture the property would have been available to satisfy any pecuniary penalty order made in respect of Mr Hart.
>
> {Updated Further Further Amended Points of Defence filed 23rd November 2010 (**POD**)}

166 The appellants argued that Mr Hart's effective control at the time of the restraining order, and the unfulfilled PPO, were matters that were relevant and decisive against the favourable exercise of the court's discretion. The manner in which this argument was advanced by the appellants is found at {RJ[153]-[165]} and {CA[1200]-[1211]}.

167 These were the only matters advanced by the appellants against the exercise of the court's discretion pursuant to s 102(1) before the primary judge, and the only grounds for appeal against the primary judge's favourable exercise of discretion {Notice of Contention filed 31st May 2013 CA3908/13 Ground 6, Notice of Appeal filed 3rd June 2013 CA/4987/13 Ground 6}.

168 The appellants advanced no other factors against a favourable exercise of discretion, and in particular did not litigate whether Mr Hart would have effective control of the assets were they ordered to be transferred to the respondents, or otherwise obtain some personal benefit if the respondents succeeded {RJ[168]}.

169 For these reasons, the appellants {AS[127]} and Morrison JA {CA[309]} mischaracterise the effect of the primary judge's reasons at {RJ[155]}. There the primary judge was grappling with the appellants' submission that effective control was a mandatory consideration for the exercise of the discretion.

170 The discretion pursuant to s 102(1) is a choice whether to transfer the properties to the applicant, or to leave them vested in the Commonwealth as forfeited property. Having satisfied the preconditions, then *prima facie* the discretion should be favourably exercised, subject to any discretionary matters that might be relevant to refuse relief.

171 The primary judge and the majority of the Court of Appeal were correct to find that Mr Hart's effective control at the time of the restraining order was an irrelevant consideration for the exercise of the discretion. As P Lyons J points out, the persons who would be entitled to apply to recover forfeited property pursuant to s 102(3) are persons who have interests in restrained property that was subject to the effective control of a person who was later convicted {CA[1220]}:

> In my view, it is inconsistent with the fact that the legislation makes the relief available to persons of that class to say that membership of that class is a factor weighing against the grant of relief.

172 As for the existence of an unfulfilled PPO, the majority found that, since the Act does not provide for forfeited property to be applied to discharge a PPO, the existence of an unfulfilled PPO is also irrelevant to the exercise of the discretion {CA[1226]}.

173 Since the appellants failed on their only discretionary grounds for withholding relief, the primary judge was correct to exercise the discretion in favour of the respondents.

174 In respect of the assets the subject of appeal in B23 of 2017, the appellants press new matters in respect of the exercise of the s 102(1) discretion {AS[142]-[145]}. These are new matters not previously pleaded or the subject of a ground of appeal. These contentions should not be permitted to be raised now.

175 Alternatively, if this Court were minded to grant leave to the appellants to reopen the exercise of discretion in respect of the assets in B23 of 2017, that matter should be remitted to the primary judge for further argument on that question. If reopened, the discretion may turn in part upon the resolution of the Notices of Contention, which would affect the findings in respect of tainted and untained funds.

Valuation of interests – s 102(1)(c)

176 The appellants contend that the Court of Appeal erred in declaring the value of the three real properties that had been sold and whose proceeds were held by the Official Trustee.

177 It should be noted that the Merrell charge extended to other assets including assets still forfeited to the Commonwealth and other assets not the subject of appeal. The charge was not limited to the three real properties.

178 Paragraphs 7, 8 and 9 of the final orders {Further Amended Order 8th November 2016} declared that Bubbling and Nemesis had ownership of these properties immediately prior to forfeiture, expressly subject to the Merrell charge in each case. Paragraphs 12, 14 and 16 declared the values of each of these properties immediately prior to forfeiture.

179 It was appropriate, exercising the discretion of the Court as to relief, to order the Commonwealth to pay monies to the respondents equal to the net proceeds of sale held by the Trustee {*Commissioner of the Australian Federal Police v Hart & Ors* [2016] QCA 284 (**CA2**) [6], [15]}. It was reasonable to declare that interest as equal to these values, since the sales occurred not long after forfeiture {CA2[13]}.

180 As the majority noted, a charge as a security does not transfer title {CA[1242]}, so it was appropriate to treat the value of the interest held by the respondent, without having to engage in speculation on the value of the charge.

181 The court was also entitled, within its discretion as to relief, to declare the value of the interest at a date after forfeiture, rather than the date immediately prior to forfeiture. At this time, the assets would be no longer subject to the Merrell charge, having become empty upon forfeiture. The words "immediately prior to forfeiture" could be set aside from paragraphs 7, 8, 9, 12, 14 and 16 of the final orders without altering their effect.

182 Whether or not Mr Hobson's affidavit was put in evidence on the date it was sworn on 6th May 2013, it was accepted by the Court of Appeal as part of its further hearing regarding the final orders to be made. The appellants did not seek to adduce any evidence regarding the asset values.

183 Even if Mr Hobson's affidavit could not be relied upon, the primary judge made findings regarding the proceeds of sale, which P Lyons J noted were higher than the figures provided by Mr Hobson's affidavit {CA2[15]}. These figures could be substituted if it were necessary to do so.

Exercise of discretion – s 141

184 If the majority's interpretation of effective control is upheld, this issue does not arise.

185 As to the appellants' specific submissions on the s 141 discretion:

186 Firstly, the premise was correct at the broad generality and abstraction with which it was expressed. The majority noted differing expressions in the authorities, such as "substantially" are likely to lead to similar results in practice {CA[901]}.

187 Secondly, the primary judge's reasons were not to the effect of the principle asserted. The primary judge took into account a range of matters both in favour and against the exercise of discretion. He did not bind his discretion with a rule of the kind asserted.

188 Thirdly, it is proper to take into consideration the fact that properties owned by the applicant might remain forfeited and unable to be recovered, with the effect that lawful inputs might be lost to innocent parties. Similarly, the court may take into account in the discretion that the applicant may be receiving a windfall or a partly tainted asset.

189 Fourthly, the bare size of the PPO, even if relevant, is not a mandatory consideration. The size of the PPO would at most be relevant if the PPO might be satisfied by some of the assets, but not all {CA[810]}. No issue arises on this point in this case.

190 Fifthly, the primary judge expressly considered the submissions that the unlawful activity had provided benefits to the respondents, and took those benefits into account, finding that these benefits were modest {RJ[872]-[876]}. The findings on that question were not challenged on appeal.

191 Sixthly, the appellants did not advance these matters before the primary judge, and such matters, if relevant to the s 141 application, were matters for which the onus fell on the appellants. In order to rely on these offences as matters to take into consideration for the s 141 application, the appellants would be required to prove them positively, and at the *Briginshaw* standard, given the serious nature of the allegations.

192 Finally, there is no basis for the complaint of *Wednesbury* unreasonableness.

193 For the above reasons, no error is shown in the exercise of the discretion, within the principles of *House v R* (1936) 55 CLR 499. If any error is demonstrated, then the matter should be remitted to the primary judge for reconsideration.

PART VII: ARGUMENT ON NOTICES OF CONTENTION

194 The respondents' submissions on the contentions in respect of the Mercedes 380 SL and the Doonan's Road properties are contained within the submissions in respect of the disputed assets in Section (B) above.

(D) PERPETUAL OFFENCES

195 If the majority's findings in respect of Hangar 400, 6 Merriwa Street and Doonan's Road are upheld, then this point of contention does not need to be determined.

196 The appellants pleaded that Yak and Bubbling made fraudulent representations to Perpetual Nominees to induce Perpetual to approve a loan facility, constituting an offence in contravention of s 408C(1)(f) of the *Criminal Code* (Qld). {POD[9](d)(3)}

197 The alleged fraud was by Yak and Bubbling executing documents with Perpetual titled *Loan Facility – Terms & Conditions* (**Loan Agreements**) where clause 16 stated:

> The borrower and guarantor represent and acknowledge that they are entering into this agreement of their own volition and are not doing so on behalf of Steven Irvine Hart nor any associated company with which he is associated. Neither Steven Irvine Hart nor any associated company is indemnifying us as to the repayment of the loan.

198 The appellants contended that the clause 16 representation was false because:

(a) option agreements granted to Dr Ambler and Dr Fleming were in truth indemnities given on behalf of Mr Hart; and

(b) Yak and Bubbling were companies secretly associated with Mr Hart.

199 The knowledge and intention of Dr Ambler and Dr Fleming was irrelevant. They were not the relevant actors for Yak or Bubbling. Mrs Hart and Ms Petersen were the directors of Yak and Bubbling who signed the Loan Agreements {Q00064158}.

200 In any event the appellants did not contend that either Dr Ambler or Dr Fleming were dishonest. The real issue was whether Mrs Hart and Ms Petersen had a fraudulent intention when they executed the Loan Agreements containing clause 16.

201 On this question the respondents adduced direct evidence from Mrs Hart in her affidavit sworn on 23rd July 2010. Starting at paragraph (69)(k) at page 89, Mrs Hart gave evidence responding to the specific allegation of fraud. In her evidence Mrs Hart:

(a) set out what she believed to be the particular concerns of McLaughlin Financial Services (**MFS**), which was acting on behalf of Perpetual in respect of the proposed borrowing, as set out in paragraphs (69)(d)-(h) – in particular the effect of ASIC liquidation of the Harts Australasia companies {(69)(k)(aa) p 89};

(b) stated her honest belief that the clause 16 warranty was representing that neither Yak nor Bubbling were subject to action by ASIC or liquidation {(69)(k)(cc)-(dd) p 90}, which was true;

(c) stated her honest belief that the clause 16 warranty was representing that Yak and Bubbling were entering into the Loan Agreements on their own behalf and for the benefit of the beneficiaries of their respective trusts, rather than Mr Hart or the Hart companies subject to the ASIC liquidation {(69)(k)(ee)-(hh) pp 90-91}, which was true; and

(d) stated her honest belief that so far as she was aware there were no indemnity agreements {(69)(k)(oo) p 92}, and that it was her honestly held belief that the option agreements did not constitute indemnities {(69)(k)(qq) p 93}.

202 In Mrs Hart's oral evidence at trial, she described her interactions with MFS by which she reached her belief as to the concerns of MFS were as to the warranty, assuring a representative of MFS that, "*None of us are involved in this action. It's Hart's, not the family group*" {T 5-13.36} referring to the ASIC proceedings. That was true.

203 Mrs Hart in her oral evidence stated {T 6-25.10-15}:

> And you're aware that McLaughlins Financial Services would no longer provide credit to companies that were associated with your husband, Mr Steven Hart — No, they did not want to provide credit to anyone who was going to be a party – who was a defendant in proceedings commenced by ASIC.

204 Mrs Hart stated her belief that Dr Ambler and Dr Fleming were not indemnified {T5-18.36-42}. She also repeated her affidavit evidence that so far as she was aware, she had never executed any indemnity for Yak or Bubbling {T5-22.15-20}.

205 The appellants did not challenge Mrs Hart's evidence as to the fraud allegations at all during cross-examination. The only question asked by Counsel for the appellants was whether she knew that the Commonwealth was alleging fraud contrary to s 408C, to which she replied {T6-24.27} "*I understand that's what the Crown is alleging, yes.*"

206 The appellants did not challenge Mrs Hart as to any aspect of her evidence contained in her affidavit or in her oral evidence as set out above.

207 As for Ms Petersen, during cross-examination she gave evidence of her understanding of the reason for the withdrawal of funding, again this being the action taken by ASIC against Harts Australasia {T 3-68.10-17}. Ms Petersen was referred to a letter from MFS {Q00060901} {T 3-68.21-50}

208 Ms Petersen was referred to clause 16 of the Loan Agreement, and it was put to her that the representation that the companies were "*not seeking this loan at the behest of Mr Hart*" was false. She denied that allegation {T 3-78.14-23}. She also denied that she understood that the option agreements to be indemnities {T 3-78.25-30, T 3-80.4-34}.

209 This evidence, particularly the unchallenged evidence of Mrs Hart, was more than sufficient for the respondents to discharge their onus to show that no fraud had occurred. They had established a *prima facie* case for the denial of unlawful activity as discussed by Hunt CJ at CL in *Jeffrey No 1*.

210 The primary judge failed to have regard to ***any*** of the above evidence, instead erroneously assuming that {RJ[250]}:

> ...not one signatory to the representations explained in evidence what he or she believed was the meaning of the clause 16 representations and whether the representation was true or honestly made.

211 The failure to consider this evidence materially led the primary judge into error, both in respect of his ultimate findings but also his wrongful rejection of the interpretation of clause 16 pressed by the respondents on the basis of that evidence {RJ[253]}.

212 Further, an interpretation of clause 16 to the effect that Mr Hart was not "at all" associated with Yak or Bubbling is untenable given that MFS knew:

(a) Mr Hart had until recently been a director of these companies {Appendix 61 Q0006707};

(b) Mr Hart remained married to Mrs Hart;

(c) Mr Hart was a beneficiary of the trusts for which Yak and Bubbling were trustees, MFS having been provided with copies of the trust deeds {T 6-48.51 to T 6-49.18};

(d) Mr Hart had provided a personal "thank you" letter to MFS for arranging the loan {Exhibit 3}; and

(e) after Mr Hart's involvement was apparent, the loan while initially for 12 months, {Appendix 61} was subsequently rolled by Perpetual in 2003 and 2003.

213 The evidence of Mrs Hart and Ms Petersen was credible. The primary judge accepted that, in addition to Mr Hart, others had worked to contribute to the growth of the respondent companies, including other members of the Hart family {RJ[870]}. It was uncontroversial at trial that the borrowings were used for the companies and not passed onto Mr Hart, Harts Australasia or other entities the subject of the ASIC liquidation. The representation by Yak and Bubbling that the borrowing was not on behalf of Mr Hart was honestly and reasonably held.

214 It was objectively apparent that the real concern of MFS/Perpetual was the risk from the ASIC liquidation. Indeed, this was the case put by the appellants to the primary judge {T 1-62}. The loan had been originally approved on 27th August 2001 {Appendix 59}. ASIC commenced its liquidation proceedings against the Harts Australasia entities on 24th September 2001. The following day on 25th September 2001 MFS sent a letter withdrawing the loan.

215 MFS sent a further letter on the following day, in which Michael King, a director of MFS, stated the concern of MFS/Perpetual {Affidavit of Laura Hart dated 23rd July 2010 Appendix 59 p 5 Q00060901}:

> Shortly put, is any person who is going to be a party to the proposed loan transactions by us a defendant in the proceedings commenced by ASIC?

216 This concern, and the knowledge of Mr Hart's involvement, in Yak and Bubbling, is apparent from the risk assessment {Affidavit of Laura Hart dated 23rd July 2010 Appendix 61 p 5 [Q00060707]} and credit analysis {Appendix 61 Q60060763}.

217 The failure of the primary judge to consider the evidence of Mrs Hart and Ms Petersen means that the finding of fraud cannot be sustained. The primary judge ought to have found that the respondents' onus of proof had been discharged.

218 The Court of Appeal also failed have regard to the affidavit evidence or the oral evidence of Mrs Hart and Ms Petersen. The majority erroneously found {CA[996]}:

> To the extent that Mrs Hart and Ms Petersen gave evidence as to their honesty on this question, his Honour's findings carry a finding that he did not accept this evidence.

219 The primary judge did not make such a finding about the evidence of Mrs Hart and Ms Petersen. He mistakenly believed that ***no evidence*** had been given {RJ[250}.

220 For the above reasons the Court of Appeal ought to have found that the respondents had discharged their burden of proof – on the balance of probabilities – to show that no unlawful activity was involved in relation to the Perpetual loan.

(E) BLACKSHORT PAYMENT

221 This issue is relevant to the Hawker Sea Fury. If the majority's findings are upheld in respect of the Sea Fury then this point of contention does not need to be determined.

222 This point of contention challenges the findings that the "possibility exists" that UOCL had transferred funds via WBC to Nemesis and the conclusion of the primary judge that the respondents had not established that $300,000 sourced from Blackshort was not sourced from unlawful activities {RJ[615]-[616]}.

223 The appellants did not plead that monies were transferred from UOCL to Nemesis through WBC. In respect of payments from Blackshort, the appellants had withdrawn allegations regarding Cardinal offences, which involved that account {POD 9(d)(2), withdrawn on 9th December 2009}. The further affidavit of Mr Vincent dated 21st October 2010 did not assert this connection.

224 The appellants did not ask the bank officer Ms Lalor to trace these funds {T 7-67.1-30} when they investigated the matter in 2005, nor had Mr Vincent investigated these funds for his report {T 9-34.53}. By the time the matter was raised, for the first time, in cross-examination on day six of the hearing {T 6-8}, it was too late for the respondents to obtain any evidence from the bank's records {Affidavit of Laura Hart sworn

21st September 2010 paragraph 7(b)(v) Appendix 13}. The primary judge should not have permitted the appellants to rely upon these allegations raised late in the hearing.

225 In any event, evidence is inconsistent with the transfer of UOCL monies to Nemesis through Blackshort. The primary evidence of the Blackshort bank account does not show any monies were paid by UOCL. {Exhibit ASL-02 B00030103}, and that the deposit to return the account to credit was a cash/cheque deposit {T 9-32.1}, not a payment from UOCL, which would have been by way of overseas transfer .

226 The primary evidence of the WBS bank account statement shows a deposit of $1,499,995, which is recorded as "Proceeds of Overseas Inwards Transfer" {Q00064356 pp 7-8}. The subsequent transactions show that these funds were dissipated before Nemesis made a payment of $1 million (from untainted funds).

227 Mr Vincent accepted that the funds did not come from UOCL {T 10-2.38 to 10-3.6}, by reference to his analysis of withdrawals from UOCL accounts {Affidavit of Paul Vincent sworn 3rd June 2009 Schedule B to Exhibit A}.

228 For these reasons, the monies from Blackshort were not unlawful funds. The Sea Fury was therefore derived with no more than 28% of funds from unlawful sources.

(F) HENDON ARRANGEMENT

229 This issue is relevant to 27 Samara Street. If the majority's findings are upheld in respect of this asset then this point of contention does not need to be determined.

230 The respondents challenge the primary judge's findings that $45,000 applied towards the purchase of 27 Samara Street was from unlawful activity. The source of the $45,000 was from Astion Unit Trust, which was an entity involved in the Hendon Arrangement, which was a tax scheme which operated in 1993 and 1994.

231 The appellants contended that this $45,000 was derived from offences in contravention of s 8N of the *Taxation Administration Act 1953* (Cth) (*TAA*).

232 The Hendon Arrangement was designed to take advantage of accumulated tax losses held by Westside Commerce Centre. This involved the appointment of the trustee for the development as a beneficiary of trusts for various clients.

233 The appointment of Westside Commerce Centre and the Astion Unit trust (after it took over) was found to be invalid under some of the trust deeds. The Commissioner assessed primary tax and also imposed penalty tax on some clients.

234 The primary judge found that there were reasonable grounds to suspect that accountants working for Mr Hart had committed offences in breach of s 8N *TAA*.

235 This suspicion was said to be raised by the evidence and findings made by Cooper J in *BRK (Bris) Pty Ltd v Commissioner of Taxation* [2001] FCA 164 (***BRK***). The primary judge should not have admitted this decision into evidence or relied upon the decision in respect of any issue of fact. The respondents were not parties to that decision so no question of issue estoppel arises. The evidence and more importantly the conclusions as to "reckless conduct" were inadmissible hearsay.

236 The BRK case was not a decision on an offence under s 8N *TAA*, but an appeal from the Commissioner imposing penalty tax under s 226H of the *Income Tax Assessment Act 1936* (Cth), which permits the Commissioner to impose a penalty where a tax shortfall "was caused by the recklessness of the taxpayer or of a registered tax agent with regard to the correct operation of this Act". The recklessness in s 226H is negligence, not dishonesty, which is required by s 8N *TAA*.

237 This is a very different situation in contrast to s 8N, which refers to a person who recklessly "makes a statement to a taxation officer that is false or misleading", essentially dishonesty. The primary judge held that recklessness for s 8N requires "indifference as to whether a representation is true or false, knowing that, more probably than not, it is false" {RJ[312]}.

238 There was no admissible evidence giving rise to a suspicion of a contravention of s 8N.

239 The primary judge was wrong to disregard the inherent likelihood of negligence rather than recklessness. As the primary judge observed {RJ[335]}:

> Harts had legal advice that the effectiveness of the clients' resolutions appointing WCC would depend on the terms of the clients' trust deeds and whether the terms authorised the appointments. Harts knew that if the terms did not authorise such an appointment, Harts could advise the client how to take steps provided for in proforma documents and execute them so as to make subsequent appointments of income to WCC valid. If the accountants had ensured that the process had been followed, the distributions of income would have been valid.

240 The obvious inference was negligence in failing properly to check all of the client trust deeds. Harts had the means to ensure the proper appointments of trust income by using the pro-forma documents prepared by Cleary & Hoare. Harts also had every interest in ensuring that its clients made effective appointments.

241 Nothing in the evidence of Ian Stevens, a director of the Hart accounting companies called by the appellants, suggests an intention other than to proceed with a compliance scheme, or any intention by the Hart accountants to make false representations to ATO {Affidavit of Ian Stevens sworn 25th October 2010, T7-68 to T 7-76}.

242 The primary judge suspected that there was a failure by the Hart accountants to act to ensure that the proper process was followed. Such a failure to act is negligent, not dishonest. For the above reasons, the primary judge was wrong to have a reasonable suspicion that the Hart accountants had committed s 8N offences.

243 Alternatively to the above submissions, the $45,000 was borrowed in 1997, which was at a time well after the alleged offences, and from the Astion rent account, which lawfully derived funds from rental from a property at Whyalla {RJ[346]}. The primary judge ought to have found that the $45,000 was not derived from the Hendon arrangement, and accordingly was not tainted.

10 244 But for the $45,000 the purchase of 27 Samara Street was from untainted funds.

PART VIII: TIME ESTIMATE

245 The respondents would seek no more than three hours for the presentation of the respondents' oral argument.

23rd June 2017

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