

**COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE v HART & ORS (B21/2017);**

**COMMONWEALTH OF AUSTRALIA v YAK 3 INVESTMENTS PTY LTD AS TRUSTEE FOR YAK 3 DISCRETIONARY TRUST & ORS (B22/2017);**

**COMMONWEALTH OF AUSTRALIA & ANOR v FLYING FIGHTERS PTY LTD & ORS (B23/2017)**

Court appealed from: Court of Appeal of the Supreme Court of Queensland [2016] QCA 215

Date of judgment: 29 August 2016

Special leave granted: 6 April 2017

Mr Steven Hart, an accountant, ran tax avoidance schemes that resulted in the acquisition of various assets by Mr Hart and four of his companies. In 2003 the Commonwealth obtained a restraining order over property owned or leased by Mr Hart or his companies, under s 17 of the *Proceeds of Crime Act 2002* (Cth) (“the Act”). The property included land, aircraft and subleases of hangars.

In 2005 Mr Hart was sentenced to seven years’ imprisonment, upon being convicted of nine offences of defrauding the Commonwealth in contravention of s 29D of the *Crimes Act 1914* (Cth). Due to Mr Hart’s convictions, in 2006 the restrained property was forfeited to the Commonwealth under s 92 of the Act. In 2010 the District Court of Queensland ordered Mr Hart to pay a pecuniary penalty of \$14,757,287.35 to the Commonwealth under s 116 of the Act.

The Commonwealth then applied to the District Court for an order under s 141 of the Act that the forfeited property be applied towards satisfaction of the pecuniary penalty, on the basis that Mr Hart had had effective control of such property. The companies applied for their interests in the forfeited property to be transferred to them under s 102 of the Act. Section 102(3)(a) provided that an order could be made if “the property was not ... derived or realised, directly or indirectly, by any person from any unlawful activity”. In response, the Commonwealth sought orders that any such transferred interests nevertheless be applied to reduce the pecuniary penalty.

On 6 May 2013 Judge Andrews, after largely refusing the companies’ application, ordered that certain assets be transferred to the companies if they paid the Commonwealth \$1.6 million (less certain sale proceeds). This was after construing the words in s 102(3)(a) of the Act, in relation to the derivation of the subject property, to mean “not substantially” derived from any unlawful activity. His Honour held that the relevant date for the assessment of effective control, for the purposes of s 141(1)(c) of the Act, was the date on which a restraining order was made. After finding that all elements of s 141 of the Act had been satisfied, his Honour nevertheless dismissed the Commonwealth’s application on discretionary grounds. That outcome turned on the fact that the assets under Mr Hart’s effective control were encumbered by charges in favour of another company (Merrell Associates Ltd).

Appeals were filed by Mr Hart's companies, on one hand, and by both the Commonwealth and the Commissioner of the Australian Federal Police (together, "the Commonwealth appeals") on the other.

The Court of Appeal by majority (Douglas J and Peter Lyons J; Morrison JA dissenting) allowed the companies' appeal and dismissed the Commonwealth appeals. The Court of Appeal then made various declarations and orders in relation to the transfer of forfeited property by the Commonwealth to the companies, after setting aside the condition (ordered by Judge Andrews) that the companies pay the Commonwealth.

In respect of the Commonwealth appeals, the majority held that declarations could not be made under s 141 of the Act in respect of property that was already the subject of a restraining order under s 17 (which would ordinarily mature into forfeiture to, and subsequent sale by, the Commonwealth). Their Honours held that the question of effective control was to be determined at the date of the determination of an application under s 141, not at the date of a restraining order. The Commonwealth could therefore not establish effective control by Mr Hart at the relevant time. In respect of the companies' appeal, the majority held that the words "derived or realised" in s 102(3)(a) of the Act meant "wholly derived or wholly realised". Derivation partly from unlawful activity was no barrier to the making of orders that the Commonwealth transfer property that had been forfeited to it under s 92.

Morrison JA however would have allowed the appeal of the Commonwealth and dismissed those of the companies and the Commissioner of the Australian Federal Police. His Honour held that the relevant time to assess "effective control" under s 141(1)(c) of the Act was when the restraining order was made. Morrison JA also held that s 102(3)(a) was not to be read as if "substantially" (or any other word) was included.

In appeal B21/2017, the grounds of appeal include:

- The majority of the Court of Appeal erred in construing s 141 of the Act as being inapplicable to property that had been subject to restraining orders under s 17 of the Act.
- The majority of the Court of Appeal erred in construing the date of effective control in s 141(1)(c) as the date on which an application under s 141 is determined, notwithstanding that the property was the subject of restraining orders under s 17 of the Act.

In appeals B22/2017 and B23/2017, the grounds of appeal include:

- The majority erred in construing the words "the property was not ... derived or realised ... by any person from any unlawful activity" in s 102(3)(a) of the Act as meaning "the property was ... not wholly derived or wholly realised ... by any person from any unlawful activity."

Notices of contention have been filed by the respondents in appeals B22/2017 and B23/2017.