HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

INTERNATIONAL FINANCE TRUST COMPANY LIMITED & ANOR — APPELLANTS

AND

NEW SOUTH WALES CRIME COMMISSION & ORS — RESPONDENTS

International Finance Trust Company Limited v New South Wales Crime Commission [2009] HCA 49
12 November 2009
S72/2009

ORDER

1. *Appeal allowed.*

2. *Vary the orders of the Court of Appeal of the Supreme Court of New South Wales entered 6 November 2008:*

   (a) *By adding at the end of order 2, "and proceedings 12212 of 2008 be dismissed and the first respondent pay the costs of those proceedings of the appellants".*

   (b) *By adding an order declaring that s 10 of the* Criminal Assets Recovery Act *1990 (NSW) is invalid.*

3. *First respondent to pay the costs of the appellants.*

On appeal from the Supreme Court of New South Wales

Representation

T E F Hughes QC with G J Jones and G A F Connolly for the appellants (instructed by Atanaskovic Hartnell)

I D Temby QC with P F Singleton for the first respondent (instructed by New South Wales Crime Commission)

No appearance for the second and third respondents

Interveners

S J Gageler SC, Solicitor-General of the Commonwealth with K M Richardson intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with C L Conley intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor for Western Australia)

M G Sexton SC, Solicitor-General for the State of New South Wales with J G Renwick intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW))

P M Tate SC, Solicitor-General for the State of Victoria with K L Walker intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

W Sofronoff QC, Solicitor-General of the State of Queensland with G J D del Villar intervening on behalf of the Attorney-General for the State of Queensland (instructed by Crown Law Queensland)

M G Hinton QC, Solicitor-General for the State of South Australia with S T O'Flaherty intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for the State of South Australia)

CATCHWORDS

International Finance Trust Company Limited v New South Wales Crime Commission

Constitutional law (Cth) – Judicial power of Commonwealth – Jurisdiction vested in State courts – *Criminal Assets Recovery Act* 1990 (NSW) ("Act") – Section 10(2) of Act allows New South Wales Crime Commission ("Commission") to apply to Supreme Court of New South Wales ("Supreme Court") ex parte for restraining order in respect of interests in property – Section 10(3) of Act requires Supreme Court to make restraining order in respect of interest of person suspected of engaging in serious crime related activity and in respect of interests in property suspected of being derived from serious crime related activity where affidavit of authorised officer contains reasonable grounds for suspicion – Restraining order prevents persons disposing of or dealing with the interest, or attempting to do so – Section 25 of Act allows for application to exclude interest in property from restraining order – Where restraining orders granted, upon ex parte application by Commission, in respect of various bank accounts, suspected of being derived from serious crime related activity – Whether basis for granting restraining order only positively displaced by exclusion application under s 25 of Act, where applicant bears burden of proving, on balance of probabilities, that interest in property not fraudulently or illegally acquired – Whether s 10 engages Supreme Court in activity repugnant in a fundamental degree to judicial process.

Constitutional law (Cth) – Judicial power of Commonwealth – Jurisdiction vested in State courts – Section 22(2)(b) of Act requires Supreme Court, upon application by Commission, to make assets forfeiture order in respect of interests in property if more probable than not that the person whose suspected serious crime related activity formed the basis of restraining order has engaged in the last six years in serious crime related activity involving an offence punishable by imprisonment for five years or more – Whether s 22(2)(b) bill of pains and penalties – Whether s 22(2)(b) engages Supreme Court in activity repugnant in a fundamental degree to judicial process.

Statutes – Interpretation – Whether plain intendment of Act the establishment of regime distinct from usual incidents of Supreme Court.

Words and phrases – "ancillary orders", "confiscation", "ex parte", "fraudulently acquired property", "illegally acquired property", "reasonably plain intendment", "serious crime related activity".

Criminal Assets Recovery Act 1990 (NSW), ss 10, 12(1), 22, 25.

FRENCH CJ.

Introduction

1 The *Criminal Assets Recovery Act* 1990 (NSW) ("the CAR Act") empowers the New South Wales Crime Commission[1] ("the Commission") to apply to the Supreme Court of New South Wales for a restraining order in respect of some or all of the property of a person suspected of having committed a serious offence[2]. The provisions relating to restraining orders are in aid of the Commission's power to apply to the Court for forfeiture of the relevant property[3].

2 The Commission may apply to the Court for a restraining order without notice to the person affected. If the application is supported by an affidavit stating that the person affected is suspected of having engaged in "serious crime related activities", and setting out the grounds for that suspicion, and if the Court considers, having regard to the affidavit, that there are reasonable grounds for the suspicion, then the Court must make the order sought.

3 The validity of the provisions of the CAR Act providing for restraining orders and assets forfeiture orders is challenged in this appeal from the Court of Appeal of the Supreme Court of New South Wales[4]. The basis of the challenge is that the CAR Act imposes upon the Supreme Court functions which so distort its institutional integrity as to be inconsistent with its status as a repository of federal jurisdiction, conferred pursuant to Ch III of the Commonwealth Constitution. The challenge relies upon the decision of this Court in *Kable v Director of Public Prosecutions (NSW)*[5].

4 On its proper construction, s 10 of the CAR Act requires the Supreme Court to hear and determine, without notice to the persons affected, applications for restraining orders made ex parte by the Commission. For that reason the section impermissibly directs the Court as to the manner of the exercise of its jurisdiction and restricts the application of procedural fairness in the judicial process and conditions its full application upon a discretion exercised by the Executive branch of the government of New South Wales. It is not to the point

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1 Constituted under the *New South Wales Crime Commission Act* 1985 (NSW), s 5.

2 CAR Act, s 10.

3 CAR Act, s 22.

4 *International FinanceTrust Company Ltd v New South Wales Crime Commission* (2008) 251 ALR 479.

5 (1996) 189 CLR 51; [1996] HCA 24.

that the restriction is temporary, nor that the scope of the order may subsequently be varied by an exclusion order, which can only be made if the party affected shows, on the balance of probabilities, that the affected property was not illegally acquired. In my opinion the section is invalid.

Statutory framework

5 The CAR Act sets out a statement of its principal objects, which include providing for the confiscation, without requiring a conviction, of a person's property if the Supreme Court finds it to be more probable than not that the person has engaged in serious crime related activities[6]. They also include the objective of enabling law enforcement authorities "effectively to identify and recover property."[7] It is that object which is served, inter alia, by the provisions of the CAR Act which confer power on the Supreme Court to make restraining orders and ancillary orders requiring examination on oath of persons concerning the affairs of the owner of an interest in property subject to a restraining order[8].

6 Proceedings on an application for a restraining order or a confiscation order are not criminal proceedings[9]. The rules of construction applicable only in relation to the criminal law do not apply to the interpretation of the CAR Act[10] (except in relation to an offence against the CAR Act). The rules of evidence applicable in civil proceedings apply, and those applicable only in criminal proceedings do not apply, to proceedings under the CAR Act[11].

7 Applications for restraining orders may be made under Pt 2 of the CAR Act. Section 10 provides, inter alia:

> "(1) A restraining order is an order that no person is to dispose of or attempt to dispose of, or to otherwise deal with or attempt to otherwise deal with, an interest in property to which the order applies except in such manner or in such circumstances (if any) as are specified in the order.

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6 CAR Act, s 3(a).

7 CAR Act, s 3(c).

8 CAR Act, s 12(1)(b).

9 CAR Act, s 5(1).

10 CAR Act, s 5(2)(a).

11 CAR Act, s 5(2)(b).

(2) The Commission may apply to the Supreme Court, ex parte, for a restraining order in respect of:

(a) specified interests, a specified class of interests or all the interests, in property of a person suspected of having engaged in a serious crime related activity or serious crime related activities, including interests acquired after the making of the order and before the making of an assets forfeiture order affecting the interests that are subject to the restraining order, or

(b) specified interests, or a specified class of interests, in property that are interests of any other person, or

(c) interests referred to in both paragraph (a) and paragraph (b).

…

(3) The Supreme Court must make the order applied for under subsection (2) if the application is supported by an affidavit of an authorised officer stating that:

(a) in the case of an application in respect of an interest referred to in subsection (2)(a) – the authorised officer suspects that the person has engaged in a serious crime related activity or serious crime related activities and stating the grounds on which that suspicion is based, and

(b) in the case of an application in respect of any other interest – the authorised officer suspects that the interest is serious crime derived property because of a serious crime related activity or serious crime related activities of a person and stating the grounds on which that suspicion is based,

and the Court considers that having regard to the matters contained in any such affidavit there are reasonable grounds for any such suspicion."

8 The term "serious crime related activity" is defined as "anything done by the person that was at the time a serious criminal offence, whether or not the person has been charged with the offence" or, if charged, had been tried, tried and acquitted, or convicted (even if the conviction had been quashed or set aside)[12]. The term "serious criminal offence" is defined by reference to a range

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12 CAR Act, s 6(1).

of specified offences[13] including any offence under a law of the Commonwealth or of a place outside Australia which, if committed in New South Wales, would have been a "serious criminal offence"[14].

9 The Court may refuse to make a restraining order if the State fails to provide such undertakings as the Court considers appropriate with respect to the payment of damages or costs in relation to the making and operation of the order[15].

10 A restraining order made under s 10 is subject to a conditional time limit. After the first two working days of its operation, the order remains in force only while an application for an assets forfeiture order or an unsatisfied proceeds assessment order is pending before the Supreme Court, or if there is an unsatisfied proceeds assessment order in force against the person whose suspected serious crime related activities formed the basis of the restraining order[16]. If the Court does not make an assets forfeiture order in respect of the relevant property under s 22, then it may make an order in relation to the period for which the restraining order is to remain in force[17].

11 If the restraining order is made in respect of an interest in the property of a person, and the person was not notified of the application for the making of the order, notice of its making or variation is to be given by the Commission to the person[18].

12 The Supreme Court is empowered when it makes a restraining order or at any later time to make ancillary orders[19]. If the Commission or any other person

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13 CAR Act, s 6(2). The specified offences include drug offences; offences involving money laundering, perverting the course of justice, and tax and revenue evasion, if punishable by more than five years imprisonment; and offences against s 197 of the *Crimes Act* 1900 (NSW) involving the destruction of or damage to property in excess of $500. Accessorial offences, and conspiracy, attempt or incitement to commit a serious offence are also covered by the definition.

14 CAR Act, s 6(2)(i).

15 CAR Act, s 10(6).

16 CAR Act, s 10(9).

17 CAR Act, s 20(1).

18 CAR Act, s 11(2).

19 CAR Act, s 12.

applies for ancillary orders it must give notice of the orders to the person whose property interest is to be affected[20].

13 Section 22 provides for assets forfeiture orders to be made on application by the Commission. An application for such an order must be made on notice to a person to whom the application relates and that person may appear and adduce evidence at the hearing of the application[21]. The application may be made before or after or at the same time as an application for a restraining order but may not be determined prior to the grant of the restraining order[22]. The Supreme Court is required to make the assets forfeiture order if the condition set out in s 22(2) is satisfied. That condition is that the Court finds it to be more probable than not that the person on whose activities the restraining order was based was, at any time within six years before the application for the assets forfeiture order, engaged in serious crime related activity involving an indictable quantity, or punishable by imprisonment for five years or more. On an assets forfeiture order taking effect in relation to an interest in property, the interest is forfeited to the Crown and vests in the Public Trustee on behalf of the Crown[23].

14 A person whose interest in property is or may be the subject of an assets forfeiture order may apply to the Supreme Court for an "exclusion order", excluding the interest from the operation of the assets forfeiture order or any relevant restraining order[24]. Broadly speaking an exclusion order may only be made if the property interest to be excluded is not fraudulently or illegally acquired property[25]. The onus of proof is on the party applying for the order. The applicant must give the Commission notice of the application and notice of the grounds on which the exclusion order is sought[26]. If the Commission proposes to contest the application it must give the applicant notice of the grounds on which the application is to be contested[27].

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20 CAR Act, s 12(2) read with s 12(3).

21 CAR Act, s 22(9).

22 CAR Act, s 22(1A).

23 CAR Act, s 23(1)(a).

24 CAR Act, s 25(1).

25 CAR Act, s 25(2). The term "illegally acquired property" is defined in s 9, inter alia, as including the proceeds of "illegal activity", a term which is defined in s 4(1).

26 CAR Act, ss 25(5) and 25(6).

27 CAR Act, s 25(7).

Factual and procedural history

15 On 13 May 2008, the Commission commenced proceedings by summons filed in the Common Law Division of the Supreme Court of New South Wales against a defendant designated as the "beneficial owners of various bank and share trading accounts".

16 By the summons, the Commission sought final relief in the form of an assets forfeiture order pursuant to s 22 of the CAR Act. The Commission also applied by the summons for a restraining order under s 10, and ancillary orders under s 12 of the CAR Act. The ancillary orders sought would require the Public Trustee to hold money and shares from the accounts specified in three schedules to the summons.

17 The application for a restraining order was supported by the affidavit of an authorised person. It was heard ex parte by Hoeben J on 13 May 2008 and a restraining order was made on that day in the terms sought by the Commission along with the ancillary orders sought under s 12. There was no transcript of the proceedings before Hoeben J and no reasons delivered for making the orders.

18 An amended summons adding a further account was filed on 16 May 2008. A restraining order and ancillary orders were made ex parte on the same day in respect of the interests of the beneficial owners of that account. The owners were joined as second defendant. Further ancillary orders were made on 16 May 2008 requiring the Public Trustee to open domestic and international share trading accounts with Commonwealth Securities Ltd and for shares in the specified accounts with Commonwealth Securities Ltd to be transferred to those accounts. On 13 June 2008, International Finance Trust Company Limited ("IFTC") was joined as third defendant in the proceedings and IFTC Broking Services Limited as fourth defendant.

19 On 6 June 2008, IFTC and IFTC Broking Services filed a notice of intention to appeal against the orders made by Hoeben J on 13 May 2008. Three sets of restraining orders and extensive ancillary orders were made ex parte by Hislop J on 25 October 2008. A fourth amended summons was then filed on behalf of the Commission on 27 October 2008 seeking, inter alia, orders under s 22 in respect of funds and shares held in accounts set out in some seven schedules.

20 On 6 November 2008, the Court of Appeal made orders allowing the appeal and setting aside the orders made on 13 and (with certain immaterial exceptions) 16 May 2008[28] save for joinder orders. Orders made on 20 and

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28 (2008) 251 ALR 479 at 513.

27 May 2008 were also set aside. The appeal was allowed by majority (Allsop P, with Beazley JA agreeing, McClellan CJ at CL dissenting) on the basis that there was no admissible evidence before the primary judge that could provide the requisite reasonable grounds for the suspicion asserted by the authorised officer in the affidavit in support of the application[29]. However, the Court unanimously rejected a constitutional challenge to the validity of s 10[30]. This had the effect of leaving the proceedings in the Supreme Court on foot.

21 Special leave to appeal against the decision of the Court of Appeal was granted on 13 March 2009[31].

The appeal to this Court

22 By their notice of appeal, the appellants contended that the Court of Appeal of New South Wales erred:

> "(a) in holding that section 10(3) of the *Criminal Assets Recovery Act* 1990 (NSW) was valid and not repugnant to the exercise by the Supreme Court of New South Wales of the judicial power of the Commonwealth under Chapter III of the Constitution of the Commonwealth of Australia; and
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> (b) in not dismissing the amended summons filed by the First Respondent in proceeding S12212 of 2008 of the Supreme Court of New South Wales on the ground of the constitutional invalidity of section 10(3) of the *Criminal Assets Recovery Act* 1990 (NSW)."

The decision of the Court of Appeal

23 It is sufficient for present purposes to refer to the reasons of the Court of Appeal on the challenge to the validity of s 10. Those reasons were given by McClellan CJ at CL. Allsop P agreed, as did Beazley JA. In upholding the validity of s 10, McClellan CJ at CL made the following points:

- It is common for a court to entertain an ex parte application when a matter is urgent, in particular when there is a need to protect assets in

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29 (2008) 251 ALR 479 at 487 [39] per Allsop P, Beazley JA agreeing at 490 [56].

30 (2008) 251 ALR 479 at 503 [101] per McClellan CJ at CL, Allsop P agreeing at 481 [2], Beazley JA agreeing with Allsop P at 490 [56].

31 [2009] HCATrans 047.

circumstances where alerting the defendant may cause the assets to be dissipated[32].

- It is essential, given the nature of the Commission's functions, that it be permitted to make such an application[33].

- Section 10 is the point at which the court process which may lead to the ultimate confiscation of property is initiated[34].

- Restraining orders under s 10 are an incident of a comprehensive scheme, the principal object of which is to confer jurisdiction on the Supreme Court to make assets forfeiture orders[35].

- Under s 10 the Court is required to ensure that the relevant officer holds the necessary suspicion and that there are reasonable grounds for that suspicion. Whether there is admissible evidence to support confiscation of restrained property is a matter determined after an inter partes hearing[36].

- The Court is not bound to "rubber stamp" the affidavit supporting an application under s 10. Section 10(3) raises a justiciable issue and the Court thus has a "determinative role in the process of evaluating the application for the making of the order"[37].

- When the nature and purpose of the legislation are considered, the provision in s 10 allowing the Commission to elect an ex parte hearing does not so compromise the institutional integrity of the Supreme Court that s 10 is offensive to the Commonwealth Constitution[38].

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32 (2008) 251 ALR 479 at 502 [98].

33 (2008) 251 ALR 479 at 502 [98].

34 (2008) 251 ALR 479 at 502-503 [99].

35 (2008) 251 ALR 479 at 503 [100].

36 (2008) 251 ALR 479 at 503 [101].

37 (2008) 251 ALR 479 at 503 [100].

38 (2008) 251 ALR 479 at 503 [101].

His Honour held that under s 10(3) the Supreme Court was not free to proceed to hear and determine the application for a restraining order other than ex parte if the Commission had elected to bring the application ex parte[39].

24 Allsop P observed additionally that, although it had not been argued in the Court of Appeal, if it were to be concluded that the character of the task conferred upon the Supreme Court by s 10 was administrative and not judicial, the applicability of the *Kable* doctrine might arise. If it were to be considered that the judge hearing such an application should not, or must not, give reasons, again the applicability of *Kable* might arise[40].

Civil forfeiture of assets – a global phenomenon

25 Forfeiture of assets by reason of criminal conduct has a long history in English law[41]. That history encompasses deodand, common law forfeiture of the property of felons and traitors and statutory forfeiture. Statutory forfeiture has been described by the Supreme Court of the United States as "likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer."[42]

26 There are broadly two classes of statutory forfeiture. One depends upon conviction and is generally referred to as "criminal assets forfeiture". The other depends upon unlawful conduct and is designated "civil assets forfeiture"[43]. The

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39 (2008) 251 ALR 479 at 504 [104].

40 (2008) 251 ALR 479 at 489 [52].

41 See generally *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 279 per Brennan J, 289 per Dawson J; [1994] HCA 10; Blackstone, *Commentaries on the Laws of England*, (1766), bk 2 at 267-268 and (1769), bk 4 at 374-381; Freiberg and Fox, "Fighting Crime with Forfeiture: Lessons from History", (2000) 6 *Australian Journal of Legal History* 1; and the celebrated article by J J Finkelstein, "The Goring Ox", (1973) 46 *Temple Law Quarterly* 169.

42 *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 at 682 (1974); *Austin v United States* 509 US 602 at 612-613 (1993). These judgments were concerned with the application to in rem civil forfeiture of the Eighth Amendment prohibition on imposition of excessive fines.

43 Early English customs statutes were precursors of criminal assets forfeiture laws, for example the *Act of Frauds* (1 Eliz c 11). See Harper, *The English Navigation Laws: a Seventeenth-Century Experiment in Social Engineering*, (1939) at 87; Freiberg and Fox, "Forfeiture, Confiscation and Sentencing", in Fisse, Fraser and Coss (eds), *The Money Trail: Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting*, (1992) 106 at 114. The distinction

(Footnote continues on next page)

first civil assets forfeiture law in Australia was enacted in 1977 when s 229A was introduced into the *Customs Act* 1901 (Cth).

27 Civil assets forfeiture laws were first enacted in the United States in 1789[44]. They provided for the forfeiture of ships and cargoes used in customs offences, piracy and slave trafficking. A general conviction-based forfeiture scheme was established in 1970 by the *Racketeer Influenced and Corrupt Organizations Act* ("the RICO Act")[45]. The *Money Laundering Control Act* 1986[46] became the primary civil assets forfeiture statute[47]. Civil assets forfeiture laws have been enacted in the past few decades in a significant number of countries, including Australia, Canada, the United Kingdom, Ireland and South Africa[48].

28 Royal Commissions of Inquiry into organised crime and corruption in Australia in the 1970s and 1980s recommended the development of effective mechanisms for depriving criminals of their profits[49]. The Standing Committee of Attorneys-General in 1983 initiated the development of model forfeiture legislation. In the event, the States and Territories enacted criminal assets forfeiture laws[50]. In the late 20th and early 21st centuries civil assets forfeiture

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between forfeitures and penalties was considered in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 172-173 [29]-[31] per Gummow J, 177-178 [52] per Kirby J, 195-198 [108]-[112] per Hayne J; [2003] HCA 49.

44 See discussion in *United States v Bajakajian* 524 US 321 at 340-341 (1998) per Thomas J for the Court, 345-346 per Kennedy J (dissenting).

45 Which amended title 18 of the United States Code by inserting, inter alia, Ch 96, entitled "Racketeer Influenced and Corrupt Organizations" (18 USC §§1961-1968).

46 Which amended title 18 of the United States Code by inserting, inter alia, a new Ch 46, entitled "Forfeiture" (18 USC §§981- 982).

47 See generally Cassella, "An Overview of Asset Forfeiture in the United States", in Young (ed), *Civil Forfeiture of Criminal Property*, (2009) 23 at 27-30.

48 See generally Young (ed), *Civil Forfeiture of Criminal Property*, (2009), Chs 3 to 7.

49 Lusty, "Civil Forfeiture of Proceeds of Crime in Australia", (2002) 5 *Journal of Money Laundering Control* 345.

50 *Crimes (Confiscation of Profits) Act* 1986 (Vic); *Crimes (Confiscation of Profits) Act* 1986 (SA); *Proceeds of Crime Act* 1987 (Cth); *Crimes (Confiscation of Profits) Act* 1988 (WA); *Crimes (Forfeiture of Proceeds) Act* 1988 (NT); *Crimes*

(Footnote continues on next page)

statutes of general application were enacted by the Commonwealth and all States and Territories save for Tasmania[51].

29 The preceding history is mentioned by way of acknowledgment of the widespread acceptance by governments around the world and within Australia of the utility of civil assets forfeiture laws as a means of deterring serious criminal activity which may result in the derivation of large profits and the accumulation of significant assets. The law under consideration in this case is, in many respects, typical of the kind of civil assets forfeiture statutes enacted in other States and Territories of Australia and in other countries.

The CAR Act – legislative history

30 The CAR Act began its life as the *Drug Trafficking (Civil Proceedings) Act* 1990 (NSW) ("the 1990 Act"). It was directed to property of persons who had engaged in a "drug-related activity". This was defined in s 6 of the 1990 Act by reference to the commission of a "serious drug offence", itself a defined term. Section 10 of the 1990 Act provided for a restraining order which differed in content from the current form of order. The original definition of "restraining order" in s 10(1) was:

> "an order that no interest in property that is an interest to which it applies is to be disposed of, or otherwise dealt with, by the person whose interest it is or by any other person, except in such manner and in such circumstances (if any) as are specified in the order."

The terms of sub-ss (2) and (3) have remained relevantly unchanged save for expansion of their application from drug related activities to serious crime related activities.

31 The Premier of New South Wales, delivering the Second Reading Speech for the Bill for the 1990 Act, made it clear that it was influenced by the conclusions of the Moffitt Royal Commission and inspired by the American

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(Confiscation of Profits) Act 1989 (Q); *Confiscation of Proceeds of Crime Act* 1989 (NSW); *Proceeds of Crime Act* 1991 (ACT); *Crime (Confiscation of Profits) Act* 1993 (Tas). See discussion in Grono, "Civil Forfeiture – The Australian Experience", in Young (ed), *Civil Forfeiture of Criminal Property*, (2009) 125.

51 *Proceeds of Crime Act* 2002 (Cth); *Criminal Assets Recovery Act* 1990 (NSW); *Confiscation Act* 1997 (Vic); *Criminal Property Confiscation Act* 2000 (WA); *Criminal Proceeds Confiscation Act* 2002 (Q); *Criminal Property Forfeiture Act* 2002 (NT); *Confiscation of Criminal Assets Act* 2003 (ACT); *Criminal Assets Confiscation Act* 2005 (SA).

RICO Act[52]. Little was said of the process for obtaining restraining orders save for an erroneous reference to the Commission as the body effecting the restraint and a reference to the requirement for an undertaking as to damages[53].

32 The 1990 Act was amended by the *Drug Trafficking (Civil Proceedings) Amendment Act* 1997 (NSW), which widened its application to serious crime related activity and changed its name to the *Criminal Assets Recovery Act* 1990 (NSW). Its coverage was extended to include property situated outside the State of New South Wales. The prohibition on dealing with property the subject of a restraining order was extended to include attempts to deal with such property. None of the extrinsic materials made any specific reference to the power of the Commission to make an ex parte application for a restraining order.

Restraining orders and assets forfeiture

33 Interim or interlocutory restraining or asset freezing processes go hand-in-hand with assets forfeiture. They have their origins deep in the history of this branch of the law. Processes akin to pre-conviction restraint mechanisms were available at common law against indicted persons, although they appear to have involved nominal seizure by a sheriff rather than by court order[54]. Today all civil assets forfeiture statutes in Australia make reference to restraining orders or freezing orders.

34 Ex parte applications can be made in every jurisdiction. The forfeiture statutes of the Commonwealth, Victoria, Queensland and South Australia each make express provision for the application for a restraining order to be made ex parte. They also empower the court to which the application is made to direct that notice of the application be given to the person affected before the application is fully determined[55]. Western Australia's *Criminal Property Confiscation Act* 2000 provides for "freezing orders" to be made affecting "confiscable property". Applications may be made to the relevant court by the Director of Public Prosecutions and may be made ex parte. There is no express

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52 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 May 1990 at 2527-2528.

53 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 May 1990 at 2530.

54 Dalton, *Countrey Justice*, (1619) at 267; Hale, *The History of the Pleas of the Crown*, new ed (1800), vol 1 at 363-364.

55 *Proceeds of Crime Act* 2002 (Cth), s 26(5); *Confiscation Act* 1997 (Vic), s 17(1); *Criminal Proceeds Confiscation Act* 2002 (Q), s 30A(3); *Criminal Assets Confiscation Act* 2005 (SA), s 25(5).

provision for the court to require that notice of such applications be given to any party[56].

35 Fulfilment of the purposes of civil assets forfeiture laws almost inevitably requires provision to be made for ex parte applications for orders for the protection of targeted assets pending a substantive forfeiture hearing. There will be in some, and perhaps many cases, a real risk that the owner of the assets, if alerted to the making of an application for a protective order, will take steps to conceal or dispose of the subject assets. Such considerations are not novel in the exercise of the wider civil jurisdiction of courts particularly in relation to the grant of Mareva orders and Anton Piller orders. But the relevance of prudential considerations in favour of ex parte applications for a particular class of case does not mean that an ex parte application will be required in every case within the class.

The construction of s 10

36 The construction of s 10 raises the following questions:

1. Is the Supreme Court required to hear, without notice to the affected party, an ex parte application made by the Commission under s 10?

2. Is the Supreme Court, in any event, required to decide the application only upon the material contained in the affidavit of an authorised officer supporting the application?

Senior counsel for the appellants accepted that the proposition that s 10(3) does not allow the Court hearing an ex parte application for a restraining order to do other than hear it ex parte was critical to his argument.

37 On any view of the section it cannot require the Court to hear ex parte an application for a restraining order in circumstances in which the CAR Act requires the Commission to give notice to the affected party. Such a requirement arises where a final assets forfeiture order is sought at the same time as the restraining order[57]. Assuming that requirement does not arise, the first

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56 *Criminal Property Confiscation Act* 2000 (WA), ss 41-46. Similarly, the *Proceeds of Crime Act* 2002 (UK) provides that applications for restraint orders may be made ex parte (s 42(1)) and does not expressly empower the court to require that notice be given to any party. Under Ontario's *Civil Remedies Act* 2001, an application for a restraining order may be made on motion without notice for up to 30 days (s 4(3)).

57 CAR Act, s 22(9).

constructional question invites a consideration of the words "ex parte" and the text and context of ss 10(2) and 10(3), as well as of the objects of the legislation.

38 In its primary meaning, "ex parte" designates an application in a judicial proceeding made by a person who is not a party to the proceeding but has an interest sufficient to support the application. However, in the usage relevant to this appeal, "ex parte" refers to something done in judicial proceedings without notice to the party affected. That may be an application, or a hearing, or the making of an order. A party may file an application or motion against another party without giving notice that it has done so. The court may hear the application ex parte and may make an order without prior notice to the affected party. In New South Wales, r 25.11 of the Uniform Civil Procedure Rules 2005 (NSW) provides that the Supreme Court "may make [a freezing] order … upon or without notice to a respondent …".

39 Ex parte procedures of the kind contemplated by r 25.11 of the UCPR are not unusual but should always be regarded as exceptional. They involve a departure, albeit temporary, from the general requirement of procedural fairness that no order adverse to a party's property, liberty, or any other interest should be made without that party first having an opportunity to be heard. That opportunity includes the right to test and/or rebut evidence relied upon by the moving party and to make submissions on matters of fact and law. Ex parte interlocutory injunctive relief may be sought where the urgency of the matter is such that there is no time to notify the respondent. Anton Piller orders and Mareva or assets preservation orders are often sought ex parte on the basis that notice to the affected party is likely to result in the destruction of evidence or the concealment or dissipation of assets which it is intended the proposed order will protect[58]. Nevertheless, courts have long had the power to require that notice of an application made ex parte be given to the party affected. The court may not accept that the matter is as urgent as claimed or that the subject matter of the application would be compromised if the affected party were to be alerted to it. Or it may be that the court does not find the affidavit in support of the motion "sufficiently positive"[59].

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58 The doctrinal basis of Mareva or assets preservation orders was discussed in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 399-401 [41]-[44] per Gaudron, McHugh, Gummow and Callinan JJ; [1999] HCA 18.

59 Joyce, *The Law and Practice of Injunctions in Equity and at Common Law*, (1872), vol 2 at 1306, referring to *Byron (Lord) v Johnston* (1816) 2 Mer 29 [35 ER 851]; for general discussion on ex parte applications, see Joyce at 1306-1307; and Paterson (ed), *Kerr on the Law and Practice of Injunctions*, 6th ed (1927) at 635.

40 The appellants and the Commission were on common ground in submitting that if the Commission chooses to bring an ex parte application under s 10, the Court is required to hear and determine it ex parte. The Commission submitted that the contrary construction should be rejected unless such a construction is needed to render the provision constitutional, a need which it contended does not arise. The Solicitor-General of the Commonwealth supported the construction of s 10 advanced by the appellants and the Commission. The State of New South Wales, on the other hand, contended that on its proper construction s 10 would allow the Court to require the party affected to be given notice before hearing an application made ex parte.

41 The process of statutory construction, including the identification of constructional choices, is informed by text, context and legislative purpose and, when applicable, the conservative principle that, absent clear words, Parliament does not intend to encroach upon fundamental common law principles, including the requirement that courts accord procedural fairness to those who are to be affected by their orders. Further, where there is a constructional choice that would place the statute within the limits of constitutional power and another that would place it outside those limits, the former is to be preferred[60].

42 There is a caveat which should be entered in relation to these principles. The court should not strain to give a meaning to statutes which is artificial or departs markedly from their ordinary meaning simply in order to preserve their constitutional validity. There are two reasons for this. The first is that if Parliament has used clear words to encroach upon the liberty or rights of the subject or to impose procedural or other constraints upon the courts its choice should be respected even if the consequence is constitutional invalidity. The second reason is that those who are required to apply or administer the law, those who are to be bound by it and those who advise upon it are generally entitled to rely upon the ordinary sense of the words that Parliament has chosen[61]. To the extent that a statutory provision has to be read subject to a counterintuitive judicial gloss, the accessibility of the law to the public and the accountability of Parliament to the electorate are diminished. Moreover, there is a real risk that,

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60 See *Interpretation Act* 1987 (NSW), s 31(1); *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 267 per Dixon J; [1945] HCA 30; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 14 per Mason CJ; [1992] HCA 64; *New South Wales v The Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 161 [355]; [2006] HCA 52; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11]; [2008] HCA 4. See also *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 519 [46]; [2009] HCA 4.

61 See *Interpretation Act* 1987 (NSW), s 34(3).

notwithstanding a judicial gloss which renders less draconian or saves from invalidity a provision of a statute, the provision will be administered according to its ordinary, apparent and draconian meaning. In the context of the present case, that risk is enhanced where the provision, on the face of it, appears to require the Supreme Court to hear only from the moving party where that party chooses to make an ex parte application.

43 Section 10 does not make any express provision for the Commission to apply to the Court on notice. Yet it and other provisions of the CAR Act are drafted on the premise that an application may be made on notice. Section 10 provides that a restraining order may make provision, out of the property to which the order applies, for reasonable legal expenses "incurred in connection with the application for the restraining order"[62]. Notice of the restraining order itself is to be given to the person affected if "the person was not notified of the application for the making of the restraining order"[63]. Moreover, an ancillary order may be made when the Court makes a restraining order and can be made on the application of the owner of the affected property[64]. Consideration of these provisions leads to the conclusion that the Commission may elect not to exercise its right to make its application ex parte. There is some limited textual support for that conclusion in the sense that the express authority conferred by the statute on the Commission to apply ex parte can be said to subsume the lesser authority to apply on notice.

44 It does not follow from the preceding discussion that s 10 authorises the Court to require that the Commission give notice of the application to the affected party. The Court *must* make the order applied for on the Commission's application when the conditions set out in s 10(3) of the CAR Act are satisfied. There is no textual space in the section within which the Court may interpose a further condition requiring that notice first be given to the affected party. Nor is this a case in which, on the interpretative principles to which I have referred earlier, the Court should read such a power into the section by some form of implication unsupported by its text. Moreover, the general provisions of the UCPR relating to freezing orders are not apt to be grafted on to the legislative scheme of the CAR Act so far as it relates to restraining orders. The CAR Act contains its own procedural provisions. As Gummow and Bell JJ point out in their joint judgment[65] and Heydon J shows in detail[66], the CAR Act establishes a

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62 CAR Act, s 10(5).

63 CAR Act, s 11(2)(b).

64 CAR Act, ss 12(1) and 12(2)(b).

65 See below at [79]-[80].

66 See below at [162]-[165].

"distinct regime" excluding the general powers of the Supreme Court which might otherwise have applied.

45 The question whether notice is to be given of an application for a restraining order is therefore at the Commission's discretion. It is left to the Commission to judge whether there is such a risk of concealment or dissipation of the assets the subject of the order that notice of the application should not be given to the person affected by it. The Court's discretion as to the conduct of its own proceedings in the key area of procedural fairness is supplanted by the Commission's judgment. It is a consequence of the preceding construction that if the Commission elects to apply ex parte there is no opportunity for the affected party upon the hearing of the application to test the authorised person's affidavit or to put before the Court evidence to rebut it. Upon an ex parte application, the Court is confined to a consideration of the sufficiency of the affidavit of the authorised officer.

46 Section 10(3) conditions the Court's obligation to make the order sought upon the Court considering that, having regard to the matters contained in the affidavit, there are reasonable grounds for the suspicion which is asserted by the authorised officer. Although the Court can refuse the order on the basis that it considers that the authorised officer does not have the requisite suspicion, if the application is heard ex parte there will be no-one before the Court to question the existence of that suspicion. In most cases it will be sufficient, as a practical matter, that the suspicion is asserted and that there are reasonable grounds for it disclosed on the affidavit.

47 If the application were made on notice, the affected party would be able to cross-examine the authorised officer on his or her affidavit with a view to demonstrating that he or she does not hold the requisite suspicion, or that there are parts of the affidavit which are so inherently unreliable as not to form reasonable grounds for that suspicion. Evidence in rebuttal could be directed to the same propositions. The party, if given notice, could also make submissions to the Court about the existence of the conditions upon the Court's powers under s 10. Such a process would be an unobjectionable exercise of the judicial function. It would not involve any intrusion by the legislature upon that function nor any usurpation of it by the Executive. The issue of validity arises with respect to s 10 because it authorises ex parte applications to the Court, which must be heard and determined ex parte by the Court.

48 It was submitted that the person affected by a restraining order can apply to set it aside. The statute itself makes no such provision. Assuming, however, that such an application can be made, it is difficult to see any ground upon which the order could be set aside save for the following:

(i) want of the relevant suspicion on the part of the authorised officer;

(ii) want of reasonable grounds for the asserted suspicion.

In the absence of any discretion in the Court to refuse a restraining order when the conditions for making the order are satisfied, non-disclosure of a material fact by the authorised officer will be significant only if the fact is material to the criteria for the making of the order. The availability of a mechanism by which a party affected by a restraining order can apply to discharge it is not germane to the issue of validity. The question whether there has been an impermissible invasion of the judicial function of the Court is not to be resolved simply by engaging in a calculus of fairness and assessing whether prejudice to a party, flowing from denial to it of a hearing prior to a restraining order being made, can be remedied at some later time. In any event, in this case, as explained in the joint judgment of Gummow and Bell JJ[67], a restraining order can only be displaced, pending the determination of an assets forfeiture order, by an application under s 25, which places upon the party affected by the restraining order the onus of demonstrating that the property the subject of the application is not illegally acquired property as defined in the CAR Act.

The validity of s 10

49 The separation of legislative, executive and judicial powers reflected in the structure of Chs I, II and III of the Constitution does not prevent the Commonwealth Parliament from passing a law which has the effect of requiring a court exercising federal jurisdiction to make specified orders if certain conditions are met. If the satisfaction of a condition enlivening the court's statutory duty depends upon a decision made by a member of the Executive branch of government, it does not necessarily follow that the Parliament has thereby authorised the Executive to infringe impermissibly upon the judicial power[68].

50 On the other hand, Parliament cannot direct courts exercising federal jurisdiction as to the manner and outcome of the exercise of that jurisdiction. As was pointed out in *Chu Kheng Lim v Minister for Immigration*[69], that would constitute an impermissible intrusion into the judicial power which Ch III vests

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67 See below at [90].

68 *Palling v Corfield* (1970) 123 CLR 52 at 58-59 per Barwick CJ, 62 per McTiernan J, 64-65 per Menzies J, 65 per Windeyer J agreeing with other members of the Court, 67 per Owen J, 69-70 per Walsh J, 70 per Gibbs J; [1970] HCA 53.

69 (1992) 176 CLR 1.

exclusively in the courts which it designates[70]. In *Nicholas v The Queen*[71], Brennan CJ observed that the acceptance of instructions from the legislature to exercise judicial power in a particular way was inconsistent with the duty to act impartially. Gaudron J said that the essential character of a court and the nature of judicial power necessitate that a court not be required or authorised to proceed in a manner that does not ensure, inter alia, the right of a party to meet the case made against him or her[72]. Gummow J put it thus[73]:

> "The legislative powers of the Commonwealth do not extend to the making of a law which authorises or requires a court exercising the judicial power to do so in a manner which is inconsistent with its nature."

As his Honour said, quoting from a judgment of Windeyer J[74], the concept of judicial power and that of impermissible intrusions upon the manner and outcome of its exercise "transcends 'purely abstract conceptual analysis' and 'inevitably attracts consideration of predominant characteristics', together with 'comparison with the historic functions and processes of courts of law'."[75] His Honour again touched upon the question in *APLA Ltd v Legal Services Commissioner (NSW)*[76] when he accepted that:

> "a law may not validly require or authorise the courts in which the judicial power of the Commonwealth is vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power."

Whether that proposition could be subsumed in a concept of "due process" was left open.

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70 (1992) 176 CLR 1 at 36 per Brennan, Deane and Dawson JJ.

71 (1998) 193 CLR 173 at 188 [20]; [1998] HCA 9.

72 (1998) 193 CLR 173 at 208 [74].

73 (1998) 193 CLR 173 at 232 [146].

74 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394; [1970] HCA 8.

75 (1998) 193 CLR 173 at 233 [148].

76 (2005) 224 CLR 322 at 411 [247]; [2005] HCA 44.

51 In *Bodruddaza v Minister for Immigration and Multicultural Affairs*[77], this Court noted that the Minister did not dispute that if s 486A of the *Migration Act* 1958 (Cth), which was then under challenge, "had the character of a law which purported to direct the manner in which the judicial power of the Commonwealth should be exercised, it would be invalid."[78] The Court referred to the judgment in *Chu Kheng Lim* as demonstrating the point[79].

52 In their joint judgment in *Thomas v Mowbray*[80], Gummow and Crennan JJ observed that the decisions of this Court had not gone so far as to imply something like a "due process" requirement from the text and structure of Ch III. I would add that the term "due process", imported from another constitutional setting, should be treated with some caution in relation to Ch III. Whether a more general implication may emerge from Ch III than has hitherto been made, and how it should be designated, is a matter for another day. It is sufficient, for the present, to accept as a proposition that which Gummow and Crennan JJ accepted, albeit as a working hypothesis, when they said in *Thomas*[81]:

> "it may be accepted for present purposes that legislation which requires a court exercising federal jurisdiction to depart to a significant degree from the methods and standards which have characterised judicial activities in the past may be repugnant to Ch III."

The plaintiff in that case argued that provisions of Div 104 of the *Criminal Code* (Cth) providing for the issue of interim control orders were invalid. One of the grounds of the asserted invalidity was that "Div 104 provides for the routine making of interim control orders depriving a person of liberty on an ex parte basis and without notice."[82] Gummow and Crennan JJ rejected that contention on the basis that[83]:

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77 (2007) 228 CLR 651; [2007] HCA 14.

78 (2007) 228 CLR 651 at 669 [47].

79 (2007) 228 CLR 651 at 669-670 [48].

80 (2007) 233 CLR 307 at 355 [111]; [2007] HCA 33.

81 (2007) 233 CLR 307 at 355 [111].

82 (2007) 233 CLR 307 at 312 (R Merkel QC in argument).

83 (2007) 233 CLR 307 at 355 [112].

> "ex parte applications are no novelty, and the scheme of the legislation … is to provide in the very short term for a contested confirmation hearing if the person in question wishes to proceed in that way."

The question whether Div 104 required a court to proceed ex parte upon receipt of a request for the issue of an interim control order was not agitated.

53 *Chu Kheng Lim*, *Nicholas* and *Thomas* were concerned with courts exercising federal jurisdiction and the question whether duties or functions were imposed upon them which were inconsistent with their independence from the legislative and executive branches of government. Although it is right to say, as was recognised in *Kable*, that the Constitution provides for an integrated national court system, that does not mean that State courts or their judges and officers are to be assimilated with federal courts and their judges and officers[84]. On the other hand, as McHugh J explained in *Kable*[85]:

> "in some situations the effect of Ch III of the Constitution may lead to the same result as if the State had an enforceable doctrine of separation of powers. This is because it is a necessary implication of the Constitution's plan of an Australian judicial system with State courts invested with federal jurisdiction that no government can act in a way that might undermine public confidence in the impartial administration of the judicial functions of State courts."

54 Procedural fairness or natural justice lies at the heart of the judicial function. In the federal constitutional context, it is an incident of the judicial power exercised pursuant to Ch III of the Constitution. It requires that a court be and appear to be impartial, and provide each party to proceedings before it with an opportunity to be heard, to advance its own case and to answer, by evidence and argument, the case put against it. According to the circumstances, the content of the requirements of procedural fairness may vary. When an ex parte application for interlocutory relief is made the court, in the ordinary course, has a discretion whether or not to hear the application without notice to the party to be affected. In exercising that discretion it will have regard to the legitimate interests of the moving party which have to be protected, whether there is likely to be irrevocable damage to the interests of the affected party if the order is made, and what provision can be made for the affected party to be heard to have the order discharged or varied after it has been made. In so saying, it is not intended to suggest that an official cannot validly be authorised by statute to

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84 See *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 598 [36] per McHugh J; [2004] HCA 46.

85 (1996) 189 CLR 51 at 118.

bring an application ex parte to a federal court or to a State or Territory court capable of exercising federal jurisdiction. The CAR Act takes the further step of requiring the Supreme Court to hear and determine such an application ex parte.

55 To require a court, as s 10 does, not only to receive an ex parte application, but also to hear and determine it ex parte, if the Executive so desires, is to direct the court as to the manner in which it exercises its jurisdiction and in so doing to deprive the court of an important characteristic of judicial power. That is the power to ensure, so far as practicable, fairness between the parties. The possibility that a statutorily mandated departure from procedural fairness in the exercise of judicial power may be incompatible with its exercise was considered in *Leeth v The Commonwealth*[86]. Mason CJ, Dawson and McHugh JJ said[87]:

> "It may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power, but the rules of natural justice are essentially functional or procedural and, as the Privy Council observed in the *Boilermakers' Case*, a fundamental principle which lies behind the concept of natural justice is not remote from the principle which inspires the theory of separation of powers." (footnote omitted)

56 In my opinion the power conferred on the Commission to choose, in effect, whether to require the Supreme Court of New South Wales to hear and determine an application for a restraining order without notice to the party affected is incompatible with the judicial function of that Court. It deprives the Court of the power to determine whether procedural fairness, judged by reference to practical considerations of the kind usually relevant to applications for interlocutory freezing orders, requires that notice be given to the party affected before an order is made. It deprives the Court of an essential incident of the judicial function. In that way, directing the Court as to the manner of the exercise of its jurisdiction, it distorts the institutional integrity of the Court and affects its capacity as a repository of federal jurisdiction.

57 The preceding conclusion involves a judgment about the quality of the Executive's intrusion, sanctioned by the legislature, into the judicial function. It is not to the point to say that in many, if not most cases of such applications, the Supreme Court would be likely, if it had the discretion, to hear and determine them ex parte. It is likely that, before deciding to proceed ex parte, the Court

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86 (1992) 174 CLR 455; [1992] HCA 29.

87 (1992) 174 CLR 455 at 470.

would first determine that procedural fairness could be accorded by provision for discharge on application. Alternatively, it might make the order limited in time so that the applicant would have to justify its continuation. Nor is it to the point to say that the particular intrusion upon the judicial function authorised by s 10 is confined in scope and limited in effect both in time and by the facility to seek ancillary or exclusion orders. Such a calculus will not accord sufficient significance to the quality of the intrusion upon the judicial function. An accumulation of such intrusions, each "minor" in practical terms, could amount over time to death of the judicial function by a thousand cuts.

58 Even if, contrary to my primary conclusion, a facility for the party affected to seek discharge or variation of the restraining order within a short time would have been sufficient to save s 10 from invalidity, s 25, for the reasons explained by Gummow and Bell JJ, is not such a facility.

59 In my opinion, s 10 is invalid. Although the authority it confers on the Commission to make ex parte applications subsumes the authority to make applications on notice, assumed in other provisions of the CAR Act, it cannot sensibly be read down to limit its operation to applications on notice. That operation is inextricably linked to the express authority which it confers and which, for the reasons outlined, thus spells invalidity. Such a reading down would impose a judicial gloss on the section at odds with its text.

60 I agree with and respectfully adopt the observations in the joint judgment of Gummow and Bell JJ concerning the effect of the provisions of s 25 relating to exclusion orders and of the provisions of s 12 relating to ancillary orders[88]. I agree also with their Honours' rejection of the proposition that s 22 is a bill of pains and penalties and their observation that it does not operate independently of a judicial determination of liability[89]. I agree with their conclusion that the significance of s 22 lies in its interaction with s 10 and not otherwise[90].

Conclusion

61 In my opinion the appeal should be allowed, the appellants' costs to be paid by the first respondent. There should be an order declaring that s 10 of the CAR Act is invalid. The proceedings in the Supreme Court of New South Wales should be dismissed, with costs as proposed by Gummow and Bell JJ.

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88 See below at [90]-[97].

89 See below at [99].

90 See below at [99].

62 GUMMOW AND BELL JJ. The appellants are companies incorporated in Vanuatu. The first appellant ("IFTC") is a Vanuatu government licensed trust company. The second appellant ("IFTCB") conducts share trading accounts. The appellants are entitled to exercise effective control over various accounts with ANZ National Bank Limited, Bank of New Zealand, Commonwealth Bank of Australia and Commonwealth Securities Limited which are the subject of the orders of the Supreme Court of New South Wales giving rise to this appeal.

63 The untested case presented to the Supreme Court by the first respondent ("the Commission") was that IFTC is owned and managed by a firm of accountants, PKF Vanuatu, the senior partner of which is Mr Robert Francis Agius. He is an Australian citizen, who stays regularly in Sydney, but resides in Vanuatu. The Commission suspects that Mr Agius has engaged in offences punishable by imprisonment for five years or more and involving fraud, contrary to ss 176, 176A and 178BA of the *Crimes Act* 1900 (NSW) ("the Crimes Act").

64 The appellants appeal from so much of the judgment of the New South Wales Court of Appeal (Allsop P, Beazley JA and McClellan CJ at CL) given on 6 November 2008[91] as upheld the validity of the "restraining order" provision in s 10 of the statute enacted as the *Drug Trafficking (Civil Proceedings) Act* 1990 (NSW) but since 1997[92] titled the *Criminal Assets Recovery Act* 1990 (NSW) ("the Act"). In this Court, the Attorneys-General of the Commonwealth, New South Wales, Victoria, South Australia, Queensland and Western Australia intervened to support the validity of s 10. There has been no appearance for the second and third respondents.

65 Part 2 of the Act (ss 10-21) is headed "Restraining orders", and Pt 3 (ss 22-32) is headed "Confiscation". Detailed definitions are found in Pt 1 (ss 1-9A).

66 The orders with respect to the accounts of IFTC and IFTCB were made in reliance upon s 10. The Court of Appeal, by majority (Allsop P and Beazley JA; McClellan CJ at CL dissenting), set aside the orders on two grounds. These were that there had been no admissible evidence before the primary judge on which he could conclude that the suspicions held by the Commission were based on reasonable grounds, and that there had been a failure by the primary judge to discharge the obligation to provide reasons.

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91 (2008) 251 ALR 479.

92 By amendment made by the *Drug Trafficking (Civil Proceedings) Amendment Act* 1997 (NSW).

67 However, the appellants remained exposed to the prospect of further proceedings under s 10 because the Court of Appeal unanimously upheld the validity of that section. Further, s 10 must be read with s 22, which provides for the making by the Supreme Court of an assets forfeiture order on the application of the Commission. The subject matter of such an order would be "all or any of the interests in property that are, or are proposed to be, subject to a restraining order when the assets forfeiture order takes effect" (s 22(1)).

The scheme of the Act

68 A restraining order continues in force for at least the first two working days after it is made; it continues thereafter, relevantly, so long as there is pending in the Supreme Court an application for an assets forfeiture order (s 10(9)). If the Supreme Court refuses to make the assets forfeiture order in respect of the interests bound by the restraining order, the Court may make such orders "as it considers appropriate in relation to the operation of the restraining order" (s 20(1)). This would include the making of an order to discharge the restraining order. However, the Act contains no provision limiting the period within which the assets forfeiture order application must be brought on for determination and no sanctions against delay in doing so.

69 Section 25, which it will be necessary to consider in detail later in these reasons, does provide for the making, on application to the Supreme Court, of orders excluding interests in property from the operation of a current restraining order. But the applicant must prove that it is more probable than not that the property was not acquired by serious crime related activity (s 25(2)).

70 The relationship between the restraining order and an application for an assets forfeiture order thus is not analogous to that between an interim injunction granted on an *ex parte* application, a contested application shortly thereafter for an interlocutory injunction and a suit for final relief. The scheme of the Act is more rigid and places the importance to the Commission in obtaining and retaining a restraining order above remedial flexibility.

The construction of s 10

71 Section 10 has been amended since its enactment in 1990, and there have been expansions in some of the defined terms upon which it depends, but the essential structure of the provision has been retained. Section 10(1) identifies a "restraining order" as:

> "an order that no person is to dispose of or attempt to dispose of, or to otherwise deal with or attempt to otherwise deal with, an interest in

property to which the order applies except in such manner or in such circumstances (if any) as are specified in the order."

72 Section 10(2) states:

"The Commission[93] may apply to the Supreme Court, ex parte, for a restraining order in respect of:

(a) specified interests, a specified class of interests or all the interests, in property of a person suspected of having engaged in a serious crime related activity or serious crime related activities, including interests acquired after the making of the order and before the making of an assets forfeiture order affecting the interests that are subject to the restraining order, or

(b) *specified interests, or a specified class of interests, in property that are interests of any other person*, or

(c) interests referred to in both paragraph (a) and paragraph (b)." (emphasis added)

The orders against the appellants were based upon par (b) of s 10(2).

73 The expression "serious crime related activity" in s 10(2) has a very wide reach. It extends to anything done by a person which at the time was "a serious criminal offence", whether or not the person has been charged or, if charged, has been tried, or tried and acquitted, or convicted, even if the conviction has been quashed or set aside (s 6(1)). The expression "a serious criminal offence" itself is given a comprehensive definition in pars (a)-(j) of s 6(2). It includes, for example, an offence under s 197 of the Crimes Act involving the destruction of or damage to property with a value of more than $500 (par (h)). Sections 176, 176A and 178BA of the Crimes Act, to which reference has been made, appear to fall within par (d) of s 6(2) of the Act[94].

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93 Provision also is made by s 19 of the *Police Integrity Commission Act* 1996 (NSW) for the exercise by that body of the functions of the Commission under provisions such as s 10 of the Act.

94 Paragraph (d) reads:

"an offence that is punishable by imprisonment for 5 years or more and involves theft, fraud, obtaining financial benefit from the crime of another, money laundering, extortion, violence, bribery, corruption, harbouring criminals, blackmail, obtaining or offering a secret commission, perverting

(Footnote continues on next page)

74 In the course of argument in this Court questions were raised as to whether the expression in s 10(2) "may apply to the Supreme Court, ex parte, ..." necessitated an *ex parte* application or whether a particular application might be made on notice to those whose property interests would be bound by the order sought by the Commission. Other provisions, in particular s 11(2)(b) and s 25(4)(a), indicate that the Commission may decide to give notice of an application for the making of a restraining order. In this sense, the phrase "may apply" is permissive as to the procedure adopted in making an application.

75 Section 10(2) also serves a distinct purpose of creating a new species of subject matter for adjudication by the Supreme Court, namely applications by the Commission for a "restraining order". Section 10(2) is to be read with s 10(3). Together they have the dual operation of creating that new subject matter for adjudication and of conferring on the Supreme Court the authority to exercise jurisdiction with respect to that subject matter.

76 Section 10(3) states:

> "The Supreme Court must make the order applied for under subsection (2) if the application is supported by an affidavit of an authorised officer stating that:
>
> (a) in the case of an application in respect of an interest referred to in subsection (2)(a) – the authorised officer suspects that the person has engaged in a serious crime related activity or serious crime related activities and stating the grounds on which that suspicion is based, and
>
> (b) in the case of an application in respect of any other interest – the authorised officer suspects that the interest is serious crime derived property because of a serious crime related activity or serious crime related activities of a person and stating the grounds on which that suspicion is based,
>
> and the Court considers that having regard to the matters contained in any such affidavit there are reasonable grounds for any such suspicion."

77 Section 10(3) is a provision of a familiar kind. It confers upon the Supreme Court a power with a duty to exercise it if the Supreme Court decides

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> the course of justice, tax or revenue evasion, illegal gambling, forgery or homicide".

that the conditions attached to the power are satisfied[95]. A law of that description is not to be stigmatised on that ground alone as an attempt to direct the Supreme Court as to the outcome of the exercise of its jurisdiction[96]. However, the outcome is determined by the adequacy of the evidence in the affidavit of the authorised officer of the Commission. It is upon this material that the Supreme Court considers whether there are reasonable grounds for the suspicion expressed by the authorised officer. The result is that even where notice of an application is given there will be limited scope to contest the making of the order sought by the Commission.

78 Relevantly for the construction of s 10, the Act stipulates that proceedings on a restraining order application are not criminal proceedings (s 5(1)) and that the rules of construction applicable only in relation to the criminal law do not operate (s 5(2)). However, two relevant principles of statutory construction are engaged.

79 The first principle is that the legislature, in selecting the Supreme Court as the forum, may be taken, in the absence of contrary express words or of reasonably plain intendment, to take the Supreme Court as the legislature finds it, with all its incidents[97]. Three of those incidents which the Court of Appeal accepted as applicable to the jurisdiction to make restraining orders, and which the Commission did not seek to challenge in this Court, are the application of the rules of evidence respecting the use of affidavit evidence on interlocutory applications, the requirement that the primary judge provide adequate reasons, and the exercise of the appellate jurisdiction of the Court of Appeal with respect to challenges to interlocutory orders. However, as is explained later in these reasons and, in particular, in those of Heydon J, in other significant respects the Act displays a plain intendment to establish a distinct regime.

80 That distinct regime invites application of the second principle of construction. This is that a particular provision which explicitly prescribes the mode of exercise of a power may exclude the operation of general provisions

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95 *Leach v The Queen* (2007) 230 CLR 1 at 17-18 [38]; [2007] HCA 3; *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 302 [28]; [2007] HCA 28.

96 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 560 [39]; [2008] HCA 4.

97 *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486 at 491 [7]; [2006] HCA 38; *Thomas v Mowbray* (2007) 233 CLR 307 at 340 [55]; [2007] HCA 33.

which might otherwise have been relied upon for the exercise of the power[98]. Several such particular provisions may be noted. The power to make a restraining order is conferred in broad terms, but nevertheless an order does not apply to an interest acquired after the order is made, in the absence of express provision that it does so apply (s 10(2A)). Further, the Supreme Court may refuse to make a restraining order in the absence of such undertakings by the State as the Court considers appropriate, with respect to payment of damages or costs in relation to the making and operation of the order (s 10(6)); these undertakings may be given by the Commission on behalf of the State (s 10(7)).

The principal objects of the Act

81 In the Second Reading Speech on the Bill for the Act, given on 8 May 1990, the Premier observed that there was "no doubt the proposed legislation is tough"[99]. He added[100]:

> "The most innovative and controversial aspect of this legislation is that it will create a scheme of asset confiscation that will operate outside and completely independent of the criminal law process. All existing confiscation schemes in Australia, with the notable exception of the Commonwealth Customs Act, are conviction-based – that is to say, before a person's assets can be confiscated the person must have been convicted in the criminal courts. This legislation, like the Commonwealth Customs Act, treats the question of confiscation as a separate issue from the imposition of a criminal penalty. It essentially provides that a person can be made to account for and explain assets and profits whether or not the person has been convicted, and even if the person has been acquitted in the criminal courts. The critical thing that must be proved is that it is more probable than not that the person engaged in serious drug crime. Proof on the balance of probabilities is the same standard of proof as that used in ordinary civil litigation. The more stringent standard of proof beyond a reasonable doubt is a creature of the criminal law."

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98 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 583-589 [44]-[59], 612 [149], 615-616 [162]-[165]; [2006] HCA 50; *Director of Public Prosecutions v Vu* (2006) 14 VR 249 at 267.

99 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 May 1990 at 2528.

100 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 May 1990 at 2528-2529.

82 The use of the term "confiscation" in legislation of this type is imprecise, if not inaccurate. Speaking of the United Kingdom legislation beginning with the *Drug Trafficking Offences Act* 1986 (UK) and including the *Proceeds of Crime Act* 2002 (UK), Lord Bingham of Cornhill observed in *R v May*[101] that what is involved is "not confiscation in the sense in which schoolchildren and others understand it". He continued:

> "A criminal caught in possession of criminally-acquired assets will, it is true, suffer their seizure by the state. Where, however, a criminal has benefited financially from crime but no longer possesses the specific fruits of his crime, he will be deprived of assets of equivalent value, if he has them. The object is to deprive him, directly or indirectly, of what he has gained. 'Confiscation' is, as Lord Hobhouse of Woodborough observed in *In re Norris*[102], a misnomer."

These remarks apply with added force to application of the Act to the situation, of which the facts of the present case are an example, where there has been no conviction, and to the application of the Act in cases where there has been an acquittal. Again, in *NSW Crime Commission v D'Agostino*[103], the Act operated upon a motor vehicle and a half share in a residential property owned by a person convicted of a single instance of shop-lifting.

83 The issues which are before this Court do not call into question the legislative policy of which the Premier spoke. This policy is now, after the expansion of the statute beyond concern with drug trafficking, expressed in the statement in s 3 of the principal objects of the Act as being:

> "(a) to provide for the confiscation, without requiring a conviction, of property of a person if the Supreme Court finds it to be more probable than not that the person has engaged in serious crime related activities, and
>
> (b) to enable the proceeds of serious crime related activities to be recovered as a debt due to the Crown, and
>
> (b1) to provide for the confiscation, without requiring a conviction, of property of a person that is illegally acquired property held in a false name or is not declared in confiscation proceedings, and

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101 [2008] 1 AC 1028 at 1034.

102 [2001] 1 WLR 1388 at 1392; [2001] 3 All ER 961 at 966.

103 (1998) 103 A Crim R 113.

(c) to enable law enforcement authorities effectively to identify and recover property."

The issue in this Court

84 What is in issue is the validity of the conscription of the Supreme Court as an essential actor in the provisions for the making of restraining orders. In the present case Allsop P, after referring to the above remarks of the Premier in 1990, continued[104]:

> "Balanced against that important public policy is the clear recognition in our legal and political system of the importance of the protection of individual rights, including the right to own and enjoy private property. Thus, the common law requires a degree of clarity in the wording of any statute which abrogates or confiscates property rights. This is rooted in the importance of such rights and their legitimate protection in civil society free from the exercise of arbitrary power, in particular prerogative or Executive power."

His Honour went on to identify the use of the judicial branch of government as the mechanism chosen by the legislature "to mediate the relationship between the competing, and to a degree conflicting, policies to which I have referred"[105].

85 The Supreme Court, for over a century, has been invested with extensive federal jurisdiction. In the instant case, the Court of Appeal had before it a controversy respecting the validity of s 10 of the Act and so was exercising the judicial power of the Commonwealth in a matter arising under or involving the interpretation of the Constitution. In other cases, even where there is no issue of constitutional validity, an application under s 10 nevertheless may attract the exercise of federal jurisdiction[106]. For example, certain offences under the laws of the Commonwealth are classified by par (i) of s 6(2) of the Act as serious criminal offences and may found the suspicion spoken of in s 10(2)(a) of engagement in serious crime related activity.

86 However, the case for invalidity has been conducted on a broader basis, looking to the operation of the legislation where the Supreme Court acts as the

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104 (2008) 251 ALR 479 at 482.

105 (2008) 251 ALR 479 at 483.

106 See *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581-582; [1983] HCA 31.

highest judicial organ of the State and no exercise of federal jurisdiction is involved.

87 The appellants accordingly contend in accordance with authority in this Court[107] that s 10 is designed to engage the Supreme Court in activity which is repugnant to the judicial process in a fundamental degree and thereby impermissibly trenches upon its appearance as a tribunal which stands apart from the Executive Branch of the government of the State and its instrumentalities such as the Commission, and which is equipped to administer in disputes justice *inter partes*, with results openly arrived at by the Court.

Consideration

88 A starting point for consideration of the particular case presented by the appellants is provided by the following passage in the reasons of Crennan J in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*[108]:

> "In *Kable* [*v Director of Public Prosecutions (NSW)*], Gaudron J spoke of the power of indefinite detention, based on an opinion that a person is more likely than not to commit a serious act of violence in the future, as 'the antithesis of the judicial process'[109]. Six members of this Court described what is involved in judicial process in *Bass v Permanent Trustee Co Ltd*[110]:
>
> > 'Judicial power involves the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process. And that requires that the parties be given an opportunity to present their evidence and to challenge the evidence led against them.'"

89 Applications entertained *ex parte* for orders with immediate effect upon the person or property of another are a well-established qualification to that

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107 The most recent general statements of principle are found in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 551-552 [6]-[7], 552-553 [10], 594 [175] and *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 530 [89]-[90], 535 [111]; [2009] HCA 4.

108 (2008) 234 CLR 532 at 594 [175].

109 (1996) 189 CLR 51 at 106; [1996] HCA 24.

110 (1999) 198 CLR 334 at 359 [56] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [1999] HCA 9.

general principle[111]. One of the complaints respecting the processes for the making of the interim control orders under the legislation upheld in *Thomas v Mowbray*[112] concerned the *ex parte* nature of those applications. But Gummow and Crennan JJ emphasised that the legislation provided in the very short term for a contested confirmation hearing[113]. That is not so with regard to the restraining orders, which have a life which follows the pendency of an assets forfeiture application.

90 It is true that "at any later time" after the making of a restraining order, the Supreme Court may "make any ancillary orders ... that the Court considers appropriate". Section 12(1) so provides. However, Basten JA indicated in *New South Wales Crime Commission v Ollis*[114] that the term "ancillary" in s 12(1) envisages orders in aid of a pending assets forfeiture application under s 22. Giles JA, with whom Mason P agreed, held in *Ollis* that the suspicion upon which a restraining order was founded may only be positively displaced by exclusion application made under s 25[115]. His Honour said[116]:

> "It is not consistent with this scheme of the Act that, when a restraining order is made, there can be a further hearing at which the same judge or another judge can be asked to determine on the same material whether there are reasonable grounds for the suspicion; nor that there can be a further hearing at which further material is put before the same judge or another judge by the defendant and the judge is asked to determine on the enhanced material whether there are reasonable grounds for the suspicion. The making of the restraining order can be challenged on appeal, on the contention that the judge was in error in determining that there were reasonable grounds for the suspicion; or application can be made for an exclusion order. Whatever the scope of s 12(1)(a) of the Act, however, it does not extend to reconsideration of the basis of the restraining order, and the variation sought in order 1 of the defendants'

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111 cf *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40 at 55.

112 (2007) 233 CLR 307.

113 (2007) 233 CLR 307 at 355 [112]. See also at 509 [600] per Callinan J, 526 [651] per Heydon J.

114 (2006) 65 NSWLR 478 at 493.

115 (2006) 65 NSWLR 478 at 486-487.

116 (2006) 65 NSWLR 478 at 487.

> amended notice of motion can not be made by a single judge (or, for that matter, on appeal)."

The reference to the limited nature of the appellate process is significant. No submission was made to this Court that *Ollis* be overruled. In any event, we agree with the construction given to the Act in that case.

91 Before turning further to consider the exclusion application provision, it is convenient to refer in more detail to the United Kingdom "confiscation" legislation. This provides an instructive example of the use of *ex parte* procedures.

92 In *Jennings v Crown Prosecution Service*[117] Laws LJ said:

> "[P]recisely because the applicant is the Crown, the court must be alert to see that its jurisdiction is not being conscripted to the service of any arbitrary or unfair action by the state, and so should particularly insist on strict compliance with its rules and standards, not least the duty of disclosure."

In England, RSC Order 115 is headed "Confiscation and Forfeiture in Connection with Criminal Proceedings". Rule 4(2) and (3) states:

> "(2) Unless the court otherwise directs, a restraint order made where notice of it has not been served on any person shall have effect until a day which shall be fixed for the hearing where all parties may attend on the application ...
>
> (3) Where a restraint order is made the prosecutor shall serve copies of the order and of the witness statement or affidavit in support on the defendant and on all other named persons restrained by the order and shall notify all other persons or bodies affected by the order of its terms."

Rule 5(1) provides for applications to discharge or vary a restraint order, by any person or body on whom the order is served. These provisions were described by Lord Hobhouse of Woodborough in *In re Norris*[118] as making explicit the availability of an *inter partes* hearing to determine applications to discharge or vary an *ex parte* order.

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117 [2006] 1 WLR 182 at 198; [2005] 4 All ER 391 at 410; affd [2008] 1 AC 1046.

118 [2001] 1 WLR 1388 at 1394; [2001] 3 All ER 961 at 967-968.

93 The scheme of the restraining order provisions of the Act is quite different, not the least with respect to the absence of a clear means of curial supervision of the duty to disclose material facts on *ex parte* applications. The importance of that duty in the administration of justice is to be seen from the reasons given by Lingdren J in *Hayden v Teplitzky*[119] for discharging certain assets preservation orders which had been made on an *ex parte* application. The English system described above clearly allows for the prompt enforcement of that duty. It may be that upon application for an exclusion order under s 25 it would be open to an applicant to agitate the question of the absence of full disclosure by the Commission. However, even if that be so, and it is unnecessary to form a concluded view on the matter, the disposition of the exclusion application will be controlled by the imperative terms of s 25(2). The application must fail unless the applicant discharges the burden imposed by that sub-section.

94 Section 25(2) states:

> "The Supreme Court must not make the exclusion order applied for unless it is proved that it is more probable than not that:
>
> (a) in the case of an order relating to fraudulently acquired property – the interest in property to which the application relates is not fraudulently acquired property or is not illegally acquired property, or
>
> (b) in any other case – the interest in property to which the application relates is not illegally acquired property."

The phrase "fraudulently acquired property" is defined in s 9A so as to include interests held in a false name where a false instrument, identity document or signature was used knowingly for the purpose of its acquisition or for dealing with it. An interest in property is "illegally acquired property" if it is all or part of the proceeds of "illegal activity" or is in all or part the proceeds of a dealing with such property, or has been wholly or partly acquired using such property (s 9). The proceeds of a dealing do not lose their identity "merely as a result of being credited to an account" (s 9(7)). The expression "illegal activity" has a meaning which extends well beyond "serious crime related activity". It catches any act or omission which constitutes an offence at common law or against the laws of New South Wales or the Commonwealth (s 4(1)).

95 The result is that the effect of the suspicion by an authorised officer of the Commission, evidence supporting which has been provided to the Supreme Court on the application under s 10, which founds a restraining order possibly may be

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119 (1997) 74 FCR 7 at 11-13.

of considerable scope and may be displaced only when an application for an assets forfeiture order is no longer pending in the Supreme Court, or upon application under s 25. But that application cannot succeed unless the applicant proves to the Supreme Court that it is more probable than not that the interest in property for which exclusion is sought is not "illegally acquired property".

96 The making of that proof by the applicant for an exclusion order requires the negating of an extremely widely drawn range of possibilities of contravention of the criminal law found in the common law, and State and federal statute law. Indeed, where a relevant act or omission occurred outside the State and is an offence in the place where it occurred, the applicant must show that had the act or omission occurred within the State it would not have been an offence against the common law or State or federal statute law (s 4(1)).

97 The Supreme Court is conscripted for a process which requires in substance the mandatory *ex parte* sequestration of property upon suspicion of wrong doing, for an indeterminate period, with no effective curial enforcement of the duty of full disclosure on *ex parte* applications. In addition the possibility of release from that sequestration is conditioned upon proof of a negative proposition of considerable legal and factual complexity.

98 Section 10 engages the Supreme Court in activity which is repugnant in a fundamental degree to the judicial process as understood and conducted throughout Australia.

Conclusions

99 The appellants have succeeded in establishing the invalidity of s 10. They also challenged the validity of s 22 on a distinct ground. This is that the assets forfeiture provision is a bill of pains and penalties. Section 22 is not a bill of pains and penalties; it does not operate independently of a judicial determination of liability[120]. As the Commonwealth Solicitor-General correctly submitted, the significance of s 22 lies in its interaction with s 10 and not otherwise.

Orders

100 The appeal should be allowed. The appellants' costs should be paid by the first respondent. The orders of the Court of Appeal of the Supreme Court of New South Wales entered 6 November 2008 should be varied (a) by adding at the end of Order 2 "and proceedings 12212 of 2008 be dismissed and the first

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120 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 654-656 [218]-[219]; [2004] HCA 46.

respondent pay the costs of those proceedings of the appellants", and (b) by adding an order declaring that s 10 of the *Criminal Assets Recovery Act* 1990 (NSW) is invalid.

HAYNE, CRENNAN AND KIEFEL JJ.

The issue

101 A State statute permits a law enforcement authority to seek from the State's Supreme Court, without notice to anyone, an order preventing any dealing with specified property. The Supreme Court must make that restraining order if a law enforcement officer suspects that the person who owns the property has committed one of a broad range of crimes, or the officer suspects that the property is derived from criminal activity, and the Court considers that there are reasonable grounds for the suspicion. The statute makes no express provision for any subsequent contested hearing about whether a restraining order should be made.

102 On application by a law enforcement authority, the Supreme Court must order forfeiture of property subject to a restraining order if it is more probable than not that, at any time within the previous six years, the person whose conduct formed the basis of the restraining order had committed any offence punishable by five or more years' imprisonment. Subject to some exceptional cases where hardship would be caused to innocent others, property can only be excluded from the operation of a restraining order, or a forfeiture order, if it is shown to be more probable than not that the relevant interest in the property was not acquired as a result of *any* illegal activity.

103 Do the statute's requirements that the Supreme Court freeze dealings in any property of a person on ex parte application by the executive, and proof of mere suspicion that the person has committed a crime (based on articulated grounds and found by the Court to be reasonable), require the Supreme Court to engage in activity repugnant to the judicial process to such a degree that the statute is beyond the legislative power of the State? These reasons will demonstrate that this question should be answered "no".

104 The facts underlying this matter, and the history of proceedings in the courts below, are sufficiently described in the reasons of other members of the Court.

The *Criminal Assets Recovery Act* 1990 (NSW)

105 The principal objects of the *Criminal Assets Recovery Act* 1990 ("the CAR Act") include[121]:

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121 s 3(a).

> "to provide for the confiscation, without requiring a conviction, of property of a person if the Supreme Court finds it to be more probable than not that the person has engaged in serious crime related activities".

The CAR Act defines[122] "serious crime related activity" very widely. It refers to "anything done by the person that was at the time a serious criminal offence" whether or not the person has been charged with the offence or, if charged, has been tried, tried and acquitted, or convicted (even if the conviction has been quashed or set aside). "[S]erious criminal offence" includes various drug and firearms offences[123]. It also includes any offence that is punishable by imprisonment for five years or more and that involves any of a wide variety of conduct including violence, theft, fraud, money laundering and tax or revenue evasion[124].

106 The CAR Act provides for the Supreme Court to make various forms of order including a "restraining order"[125] and an "assets forfeiture order"[126]. As the name suggests, a restraining order:

> "is an order that no person is to dispose of or attempt to dispose of, or to otherwise deal with or attempt to otherwise deal with, an interest in property to which the order applies except in such manner or in such circumstances (if any) as are specified in the order"[127].

And as the name again suggests, an assets forfeiture order is:

> "an order forfeiting to, and vesting in, the Crown all or any of the interests in property that are, or are proposed to be, subject to a restraining order when the assets forfeiture order takes effect"[128].

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122 s 6.

123 s 6(2)(a), (b), (c) and (e).

124 s 6(2)(d).

125 s 10.

126 s 22.

127 s 10(1).

128 s 22(1).

107 If an assets forfeiture order has been applied for, a person whose interest in property is or might be subject to the order may apply to the Supreme Court for an order (an "exclusion order") excluding the interest from the operation of the assets forfeiture order or any relevant restraining order[129]. The Court must not make the exclusion order unless it is proved[130] that it is more probable than not that the relevant interest was not "illegally acquired property" or, if the order relates to what the CAR Act identifies as "fraudulently acquired property", was not of that character and was not illegally acquired property. "[F]raudulently acquired property" is defined[131], in effect, as property held in a false name, where a false instrument or signature, or an identity document of another person, was used for the purpose of acquiring or dealing with the property.

108 The meaning of "illegally acquired property" is elaborated in s 9 of the CAR Act. At the risk of undue abbreviation, the expression encompasses the proceeds of any illegal activity, the proceeds of the disposal of or other dealing in illegally acquired property, and property wholly or partly acquired using illegally acquired property. "[I]llegal activity" is defined in s 4 in the broadest possible terms. It includes any act or omission that constitutes an offence (including a common law offence) against the laws of New South Wales or the Commonwealth. It also includes any act or omission that occurs *outside* New South Wales, is an offence against the law of the place where it occurs, and is of a kind that, if it had occurred in New South Wales, would have been an offence against the laws of New South Wales or the Commonwealth. It follows that, to obtain an exclusion order, a person must prove, on the balance of probabilities, innocence of *any* wrongdoing in connection with the acquisition of the property which it is sought to exclude from restraint or forfeiture.

109 The CAR Act provides (s 10(2)) that the New South Wales Crime Commission ("the Commission") (a body constituted under the *New South Wales Crime Commission Act* 1985 (NSW)) "may apply to the Supreme Court, ex parte, for a restraining order" in respect of some or all of the interests in property "of a person suspected of having engaged in a serious crime related activity or serious crime related activities". The CAR Act further provides (s 10(3)) that the Supreme Court "must make the order applied for under subsection (2)" if, first, "the application is supported by an affidavit of an authorised officer stating that ... the authorised officer suspects that the person has engaged in a serious crime

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129 s 25(1).

130 s 25(2).

131 s 9A.

related activity or serious crime related activities and stating the grounds on which that suspicion is based", and secondly, "the Court considers that having regard to the matters contained in any such affidavit there are reasonable grounds for any such suspicion". The CAR Act provides (s 10(6)) that the Supreme Court may refuse to make a restraining order if an appropriate undertaking with respect to the payment of damages or costs or both in relation to the making and operation of the order is not given. The CAR Act does not state any other basis for the Court to refuse to make the order sought.

110 After the first two working days of its operation, a restraining order remains in force in respect of an interest in property only for so long as certain conditions are met[132]. The most relevant of those conditions is that an application for an assets forfeiture order is pending in respect of that interest[133]. The CAR Act provides (s 11(1)) for the giving of notice of the making of a restraining order to the Director of Public Prosecutions and to the Commissioner of Police. As to the person or persons whose interest is subject to the restraining order, s 11(2) provides that:

> "If:
>
> (a) a restraining order is made in respect of an interest in property of a person, and
>
> (b) the person was not notified of the application for the making of the restraining order,
>
> notice of the making or variation of the order is to be given by the Commission to the person."

The CAR Act further provides (s 12) for the Supreme Court to make any ancillary order the Court considers appropriate, either when it makes a restraining order or at any later time. Section 12(1) expressly provides that the power to make ancillary orders extends to an order varying the interests in property to which the restraining order relates and an order for examination on oath of the owner of an interest in property that is subject to the restraining order. Ancillary orders may be made[134] on application by the Commission, the owner of the property, the Public Trustee (if the restraining order has directed the Public

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132 s 10(9).

133 s 10(9)(a).

134 s 12(2).

Trustee to take control of an interest in property), or (with the leave of the Supreme Court) any other person.

111 The making of a restraining order provides the gateway to the making of an assets forfeiture order in respect of some or all of the property restrained. Section 22(2) provides that the Supreme Court must make an assets forfeiture order:

> "if the Court finds it to be more probable than not that the person whose suspected serious crime related activity, or serious crime related activities, formed the basis of the restraining order was, at any time not more than 6 years before the making of the application for the assets forfeiture order, engaged in:
>
> (a) a serious crime related activity involving an indictable quantity, or
>
> (b) a serious crime related activity involving an offence punishable by imprisonment for 5 years or more".

The arguments against validity

112 The central thrust of the appellants' argument against the validity of some or all of the provisions of the CAR Act that had been engaged in the present matter was that the Act required the Supreme Court to make orders sequestrating the assets of a person on the mere suspicion of the executive of commission of crime (and on no other evidence), and without the person having any sufficient opportunity to contest the basis upon which the order would be made. These features of the operation of the CAR Act, and in particular the provisions of s 10(2) regulating the making of a restraining order, were said to deprive the Supreme Court "of the reality or appearance of independence or impartiality that is essential to its position"[135] as a court that exercises federal jurisdiction and for that reason to be so antithetical to the judicial process as to take the relevant provisions of the CAR Act beyond the legislative power of the State Parliament. If, as the appellants alleged, s 10 of the CAR Act was invalid, the whole structure

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135 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 535 [111]; [2009] HCA 4. See also *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; [1996] HCA 24; *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547; [1998] HCA 54; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; [2004] HCA 31; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; [2004] HCA 46; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; [2008] HCA 4.

of the Act collapsed because the making of both exclusion orders and assets forfeiture orders presupposed the valid making of a restraining order.

113 It can be seen that the argument against the validity of s 10 had two distinct but related elements: one concerning the grounds for making a restraining order, and the other concerning the procedures to be followed by the Supreme Court in making an order of that kind. While it will be necessary, of course, to consider both elements of the argument in combination, it is convenient to begin examination of the argument by treating the two elements separately.

The grounds for making a restraining order

114 The three relevant forms of order for which the CAR Act provides (restraining order, assets forfeiture order and exclusion order) are to be made on different footings. A restraining order is founded on proof that a law enforcement officer suspects (on reasonable grounds) the commission of a serious crime; an assets forfeiture order is founded on the existence of a restraining order coupled with proof, on the balance of probabilities, of commission of *any* serious crime in the previous six years; an exclusion order is made only on proof, on the balance of probabilities, that the relevant property or interest in property was acquired without *any* illegality. A restraining order denies the owner of property the capacity to dispose of or deal with that person's property. It is to be made on no more evidence than evidence of the executive's suspicion of commission of crime and the Supreme Court's determination that there are reasonable grounds for the suspicion. But final disposition of interests in the property, whether by forfeiture or by exclusion from restraint and forfeiture, is to be made on proof of more than suspicion of commission of crime.

115 Because a restraining order is a necessary but not sufficient precursor to making an assets forfeiture order, it is unsurprising that the facts to be established in order to obtain a restraining order differ from the facts that are to be established when an assets forfeiture order is made. Although the CAR Act provides[136] for the exclusion of property from the reach of an assets forfeiture order after that order has been made, an assets forfeiture order is properly seen as intended (subject to that exception) to be the final disposition of rights in property. And the evident legislative intention of the CAR Act is that, without the necessity for conviction, and even in the face of an acquittal, a person who is found to have *probably* engaged in serious crime related activity is to have all of his or her property confiscated and forfeited to the Crown except to the extent

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136 s 25(1)(b).

that that person can show that the property was acquired without *any* form of wrongdoing.

116 The chief weight of the appellants' argument fell upon the validity of s 10 of the CAR Act and its provisions regulating the making of a restraining order. The burden of the argument was that because the only issues for determination by the Supreme Court in an application for a restraining order are first, whether a law enforcement officer suspects that the owner of the property has committed a relevant crime or that the property is derived from criminal activity, and secondly, whether the stated grounds for that suspicion are reasonable[137], the Supreme Court is, in effect, placed in the position of acting at the behest of the executive.

117 The first of the issues identified (the holding of a relevant suspicion) may not often be capable of contradiction, yet it is possible to imagine cases where it could be said that the application was made in bad faith, no suspicion being genuinely entertained.

118 The second issue, about whether the stated grounds give a reasonable basis for the asserted suspicion, may be arguable more often than the first. Certainly a judge called on to make a restraining order would be expected, even if the person interested in opposing the making of a restraining order was not, or could not be, heard, to pay close attention to this second aspect of the matter. But each element of the requirements that must be satisfied before a restraining order is made tenders an issue for decision. That is, a judge asked to make a restraining order must exercise judgment according to identified standards in deciding whether the grounds for making an order are established.

119 If the application for a restraining order were to be made on notice (as s 11(2)(b) of the CAR Act inferentially acknowledges it may be[138]) both of the issues which must be decided by the judge asked to make the order would be open to controversy and argument. And as these reasons will later demonstrate, if the application for a restraining order is made without notice of the application being given to persons affected, any person who is affected by the order may apply for reconsideration of the restraining order by the judge who made the

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137 cf *George v Rockett* (1990) 170 CLR 104; [1990] HCA 26.

138 So far as relevant, s 11(2)(b) obliges the Commission to give notice of the making or variation of a restraining order to a person in respect of an interest in whose property the order was made "[i]f ... the person was not notified of the application for the making of the restraining order".

order or by another judge. On that application for reconsideration of the order made ex parte, the person seeking to argue against maintenance of the order may agitate any aspect of the issues that determine whether the Supreme Court must make a restraining order.

120 It is true that, if the material advanced by the Commission in support of an application for a restraining order meets the requirements of s 10(3), the Court will have no choice but to make the order that is sought. But this is a commonplace in the judicial system.

121 The principle applied in *Finance Facilities Pty Ltd v Federal Commissioner of Taxation*[139] recognises that there are many cases where a statute confers a power on a court (and to that end uses the word "may") but does so in terms that make plain that the authority thus given *must* be exercised upon proof of the particular case out of which the power arises. In the present case, the CAR Act avoids the constructional difficulty that sometimes attends cases resolved by applying the *Finance Facilities* principle by saying that the Court *must* make a restraining order if the conditions for its making are established. But that does not deny that in every case where application is made for a restraining order the issue tendered for decision will be whether the relevant conditions are met. And the decision of an issue of that kind is an ordinary and unremarkable performance of the judicial function. Apart, then, from setting the relevant factual hurdle at the level of the existence of a reasonably grounded suspicion of criminal conduct, as distinct from proof of its commission, the provisions of s 10(3) of the CAR Act do not differ from any of a number of different statutory conferrals of jurisdiction upon courts which require the court to exercise a power if conditions prescribed for its exercise are met. And as pointed out earlier, a restraining order, though working a considerable effect on property rights, does not finally dispose of those rights. The final disposition of property by assets forfeiture order or exclusion order is not to be made on mere suspicion.

The procedures for making a restraining order

122 Do the procedures for exercise of the Supreme Court's powers to make a restraining order under the CAR Act differ in any relevant respect from the procedures usually followed in the judicial process?

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139 (1971) 127 CLR 106; [1971] HCA 12. See also, for example, *Leach v The Queen* (2007) 230 CLR 1 at 17-18 [38]; [2007] HCA 3.

123 The Court of Appeal of New South Wales has held[140] that, if a restraining order is made on the ex parte application of the Commission, that order cannot thereafter be reconsidered by the judge who made the order, or by another single judge of the Supreme Court, whether by reference to the material advanced by the Commission or by reference to that material as supplemented by further evidence. The Court of Appeal held, in effect, that the only way in which a restraining order can be challenged is by appeal.

124 It was on this understanding of the operation of the CAR Act that the appellants submitted that their property rights could be, and in this case had been, substantially curtailed in proceedings in which they had not been and could not be heard. The construction of the CAR Act which was the premise for this submission should not be adopted. The decision of the Court of Appeal in *New South Wales Crime Commission v Ollis* should be overruled.

125 If the CAR Act did not expressly provide, as it does in s 10(2), that the Commission may apply ex parte for a restraining order, it may have been arguable that a person affected by such an order was entitled, *as of right*, to the setting aside of any such order made without notice to that party[141]. Section 10(2) puts beyond doubt that the argument just described is not available. But s 10(2) does not provide that the Supreme Court may make a restraining order *only* upon hearing the Commission in support of the application and without permitting any party affected to oppose the making of the order. Although the Commission may seek a restraining order without notice to any other person, s 11(2)(b) recognises, as already noted, that the Commission may give notice of its application to others, including a person or persons who may be thought to have an interest in the property that is to be restrained.

126 It by no means follows that, because an application for a restraining order may be made ex parte, an order so obtained, unlike any other order made ex parte by the Supreme Court, cannot be reconsidered inter partes on the application of a person affected. That reconsideration can be undertaken by the judge who made the order, or by another judge. The grounds for reconsideration include, but are not limited to, an allegation that the Commission did not make full and frank disclosure of all matters bearing upon whether the order sought should be made. The material that may be examined on application for reconsideration of the order is not confined to the material that the Commission placed before the Court

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140 *New South Wales Crime Commission v Ollis* (2006) 65 NSWLR 478.

141 *Cameron v Cole* (1944) 68 CLR 571 at 589 per Rich J; [1944] HCA 5; *Taylor v Taylor* (1979) 143 CLR 1 at 7-8 per Gibbs J, 16 per Mason J; [1979] HCA 38.

in support of its ex parte application. Nothing in the CAR Act expressly excludes the applicability of these propositions. The CAR Act should not be read as impliedly denying their applicability.

127 It is necessary to make good the propositions just stated. Each is founded on the general proposition that the relevant provisions of the CAR Act take the Supreme Court as they find it. More particularly, because statutory construction is more than an exercise in literal comprehension, the relevant provisions of the CAR Act must be read in the setting provided by the common law system of adversarial trial administered in Australian courts[142] and the processes ordinarily followed by the Supreme Court. As the whole Court said, more than 50 years ago, in *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW*[143], it is well established that when legislation refers a particular matter for hearing and determination to an existing court established as part of the judicial system of the State,

> "unless and except in so far as the contrary intention appears ... it is to the court as such that the matter is referred exercising its known authority according to the rules of procedure by which it is governed and subject to the incidents by which it is affected".

As the Court went on to say[144]:

> "It may be remarked that the rule or principle invoked is but an expression of the natural understanding of a provision entrusting the decision of a specific matter or matters to an existing court. It is no artificial presumption. When the legislature finds that a specific question of a judicial nature arises but that there is at hand an established court to the determination of which the question may be appropriately submitted, it may be supposed that if the legislature does not mean to take the court as it finds it with all its incidents including the liability to appeal, it will say so. In the absence of express words to the contrary or of reasonably plain intendment the inference may safely be made that it takes it as it finds it with all its incidents and the inference will accord with reality."

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142 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 343 [3]; [2000] HCA 63; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [64]; [2006] HCA 44.

143 (1956) 94 CLR 554 at 559; [1956] HCA 22.

144 (1956) 94 CLR 554 at 560.

128 Neither s 10(2), providing for a restraining order to be sought ex parte, nor the provisions of s 12, enabling the making of various forms of orders ancillary to the making of a restraining order, shows that the Act should be read as inferentially excluding application by the party affected by a restraining order, after the order has been made, to contest whether it should have been made or should continue and to adduce evidence in support of that party's case. Indeed, absent express and clear indication of that intention[145] ("reasonably plain intendment"[146]), the CAR Act should not be construed as working such a fundamental alteration to civil procedure as would be required to conclude that an order made ex parte should not be open to subsequent review and reconsideration on the application of a party adversely affected by it[147]. An intention to effect such a change is not "to be assumed nor is it to be spelled out from indirect references, uncertain inferences or equivocal considerations"[148]. And neither the provision for making application ex parte nor any other feature of the Act engaged principles of the kind discussed in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia*[149] and, more recently, *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom*[150].

129 As a general rule, since the late 19th century, a court or judge has had no power to review, rehear, vary or set aside any judgment after it has been passed and entered, or any order after it has been drawn up[151]. That is, as a general rule, a judgment or order, once formally recorded, can be discharged or varied only on

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145 *Cameron v Cole* (1944) 68 CLR 571 at 589; *Wentworth v NSW Bar Association* (1992) 176 CLR 239 at 252; [1992] HCA 24.

146 *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW* (1956) 94 CLR 554 at 560.

147 *The Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395-396 per Dixon CJ and Webb J; [1958] HCA 6.

148 *Tanos* (1958) 98 CLR 383 at 396 per Dixon CJ and Webb J.

149 (1932) 47 CLR 1; [1932] HCA 9.

150 (2006) 228 CLR 566; [2006] HCA 50.

151 See, for example, *Burrell v The Queen* (2008) 82 ALJR 1221; 248 ALR 428; [2008] HCA 34; *Grierson v The King* (1938) 60 CLR 431; [1938] HCA 45; *In re St Nazaire Co* (1879) 12 Ch D 88.

appeal. It is not necessary to stay to consider the recalling of an order that has been pronounced but not formally recorded, or the particular position of the orders of this Court as the court of final resort[152].

130 The general rule that a judgment or order that has been formally recorded cannot be reconsidered except by processes of appeal has long been recognised to be subject to some qualifications. In particular, it is a rule that does not apply to an order made ex parte[153]. As Griffith CJ rightly said, in *Owners of SS Kalibia v Wilson*[154]:

> "when a judicial order has been obtained *ex parte* the party affected by it may apply for its discharge. This is an elementary rule of justice, of the application of which familiar instances are afforded by writs of *ca re* and *ex parte* injunctions."

And it is, therefore, unsurprising that rules of court, including the Uniform Civil Procedure Rules 2005 (NSW) ("the UCPR"), provide expressly[155] for applications of that kind in cases where a judgment or order given or made in the absence of a party has been entered. But as the UCPR also recognise[156], the power of the Supreme Court of New South Wales to set aside judgments or orders made ex parte is not derived only from the Rules; it is a power necessarily implied as a part of the power of the Court to proceed ex parte. That is, as Griffith CJ put the point, it is "an elementary rule of justice".

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152 See, for example, *State Rail Authority of NSW v Codelfa Construction Pty Ltd* (1982) 150 CLR 29; [1982] HCA 51; *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481; 60 ALR 68; [1985] HCA 28; *Autodesk Inc v Dyason [No 2]* (1993) 176 CLR 300; [1993] HCA 6; *Elliott v The Queen* (2007) 234 CLR 38; [2007] HCA 51.

153 See, for example, *Owners of SS Kalibia v Wilson* (1910) 11 CLR 689 at 694 per Griffith CJ; [1910] HCA 77; *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679; [1912] HCA 72; *Hardie Rubber Co Pty Ltd v General Tire & Rubber Co* (1972) 129 CLR 521 at 527 per Gibbs J; [1973] HCA 66; *Bidder v Bridges* (1884) 26 Ch D 1 at 9 per Lord Selborne LC, 12 per Cotton LJ.

154 (1910) 11 CLR 689 at 694.

155 r 36.16(2)(b).

156 r 36.16(4).

131 One particular basis for seeking to set aside an order obtained ex parte is exemplified by the decision of Isaacs J in *Thomas A Edison Ltd v Bullock*[157]. In that matter, Barton J had granted an interlocutory injunction on ex parte application by the Edison company. The defendant moved before Isaacs J to dissolve the injunction on grounds including that the Edison company had not disclosed material facts. Isaacs J held[158] that a party asking for an injunction ex parte is duty bound "to bring under the notice of the Court all facts material to the determination of his right to that injunction, and it is no excuse for him to say he was not aware of their importance". As Isaacs J went on to say[159]:

> "the party inducing the Court to act in the absence of the other party ... fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all the material facts which that party would presumably have brought forward in his defence to that application. Unless that is done, the implied condition upon which the Court acts in forming its judgment is unfulfilled and the order so obtained must almost invariably fall."

132 The decision in *Edison* can be understood as a particular application of the equitable maxim that a party who seeks equity must do equity. But the obligation to make proper disclosure when seeking relief from a court without notice to the opposite party should not be understood as confined to cases where equitable relief is sought.

133 In the Supreme Court of New South Wales, the obligation might be seen as rooted in the requirement of s 56 of the *Civil Procedure Act* 2005 (NSW) that the overriding purpose of that Act and the UCPR is "to facilitate the just, quick and cheap resolution of the real issues" in proceedings. That statement of overriding purpose is certainly not inconsistent with the existence of an obligation to make proper disclosure when moving the Court ex parte, but the source of the obligation is better understood as lying in the very nature of the adversarial system administered in Australian courts, coupled with the emphasis given[160] to the desirability of finality in litigation. Unless a party moving a court to make orders in the absence of parties having an interest to oppose their making is obliged to make proper disclosure of all relevant materials, hearings will be

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157 (1912) 15 CLR 679.

158 (1912) 15 CLR 679 at 681-682.

159 (1912) 15 CLR 679 at 682.

160 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; [2005] HCA 12.

needlessly multiplied and prolonged. Courts should not be asked to make orders in the absence of opposing interests on material that is or should be known to be deficient. If an order is made in those circumstances, the consequences identified by Isaacs J in *Edison*[161] should follow: "the order so obtained must almost invariably fall".

134 But the power to set aside an order obtained ex parte for want of proper disclosure is not the only power to set aside an order obtained ex parte. A person affected by an order, but as to the making of which the person has not been heard, may move[162] for reconsideration of the order either on the material before the judge at the time of making the order or on that material supplemented by further material. Whether or when it would be forensically possible to achieve a different result on reconsideration of an order, if the material on which the order was made was not supplemented, need not be considered. And whether a person who recognises that he or she may later be charged with an offence would think it wise to take a step which may expose the person to cross-examination about suspicions said to be held by authorities is likewise not to the point. What is presently important is that, because the CAR Act gives the Supreme Court the jurisdiction to make a restraining order, the Act takes the Court and its processes as it finds them, except to the extent the Act modifies or qualifies those processes. Any modification of, or qualification to, that rule would require the clearest language. There is no provision of the CAR Act that expressly modifies that "elementary rule of justice" that a party affected by a judicial order obtained ex parte may apply for its discharge. No implied modification or qualification of the rule can be spelled out from the terms of the CAR Act, whether by reference to the Act's provisions about ancillary orders or otherwise.

135 The Commission expressly accepted, in argument in this Court, that the CAR Act does not inferentially exclude the ordinary power of the Supreme Court to reconsider an order made ex parte if it is alleged that the order was obtained without the applicant making full disclosure of relevant matters. As earlier observed, the CAR Act provides that the Commission *may* apply ex parte for a restraining order and that the Supreme Court *must* make that order if the conditions described earlier in these reasons are met. To that extent, the CAR Act provides its own distinct procedural regime for the exercise of the power to

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161 (1912) 15 CLR 679 at 682.

162 cf *Cretanor Maritime Co Ltd v Irish Marine Management Ltd* [1978] 1 WLR 966 at 978; [1978] 3 All ER 164 at 174; *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health* (1989) 89 ALR 366 at 368.

make a restraining order. But the question which then arises is whether, by permitting but not requiring the Commission to apply ex parte, the Act impliedly excludes the engagement of an important consequence that attaches to and ordinarily follows from a court's exercise of power ex parte. That question is presented, but not answered, by the observation that a restraining order may be made ex parte.

Repugnance to judicial process?

136 Neither the grounds for making a restraining order nor the procedures of the Supreme Court that are or may be engaged in the making or reconsideration of such an order, whether considered separately or in combination, are repugnant to the judicial process as understood and conducted in Australia. Section 10 of the CAR Act does not deny either the reality or the appearance of the impartiality of the Supreme Court of New South Wales. It is not invalid.

137 As for the separate challenge to s 22 of the Act, which provides for the making of an assets forfeiture order, it is enough to make two points. First, we agree with Gummow and Bell JJ that, for the reasons their Honours give, s 22 is not a bill of pains and penalties. Second, whether, in particular operations of s 22, the section may be engaged in ways that do present issues about the intersection of that operation with principles of the kind usually grouped under the rubrics of double jeopardy or incontrovertibility of acquittals is a question that does not arise in this case. No factual footing for its consideration yet exists and no order has yet been made in this matter under s 22. It is neither necessary nor appropriate to consider further the validity of s 22. The challenge to the validity of s 10 failing, any broader issue about the validity of s 22 should await another day.

Orders

138 The appeal to this Court should be dismissed. The Commission sought no order as to costs.

139 HEYDON J. The background circumstances are set out in the judgment of Gummow and Bell JJ. The abbreviations there employed are employed below.

The *Kable* doctrine and s 10

140 *General.* At least at the time when it was decided, *Kable v Director of Public Prosecutions (NSW)*[163] had its critics. Whatever the force of their criticisms, there is no doubt that the decision has had extremely beneficial effects. In particular, it has influenced governments to ensure the inclusion within otherwise draconian legislation of certain objective and reasonable safeguards for the liberty and the property of persons affected by that legislation. It is true that apart from the *Kable* case itself there has been no successful invocation of the doctrine associated with that case in this Court, and no challenge to the correctness of that doctrine. In these very proceedings the parties did not challenge the correctness either of the *Kable* case or of anything said in it. It is accordingly not necessary to evaluate the criticisms. The case stands. It must thus be applied if circumstances which attract its operation arise. One central proposition in the *Kable* case which has never been challenged is Gummow J's statement that a provision in a State statute conferring an authority on a State court capable of exercising federal jurisdiction which is "repugnant to the judicial process in a fundamental degree" is not constitutionally valid[164].

141 *The centrality of "hearings".* One of the primary principles on which the judicial process in this country operates is the principle that before any judicial decision is made which has substantive consequences[165] there generally should be a "hearing". A hearing takes place before a judge at a time and place of which the moving party has given notice to the defending party. At it both parties have an opportunity to tender evidence relating to, and advance arguments in favour of, the particular orders they ask for. This aspect of the rules of natural justice pervades Australian procedural law. It has several justifications, and their force is so great that exceptions to the hearing rule in judicial proceedings are very narrow.

142 One justification is that the forensic system employed in the courts of this country in civil proceedings for remedies having substantive consequences is adversarial. Ex hypothesi, it is not possible for a court to operate an adversarial

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163 (1996) 189 CLR 51; [1996] HCA 24.

164 (1996) 189 CLR 51 at 132.

165 This expression excludes ex parte procedural orders like those made shortening the time for service of initiating process and directing speedy timetables with a view to the matter being readied quickly for an early inter partes interlocutory hearing.

system without the court having the evidence and arguments which each adversary wants to have considered. If the hearing rule were different, the system would be internally contradictory.

143 Another justification is that to act only on the version advanced by one adversary is to risk reaching unsound conclusions, and thus to risk both injustice and inefficiency. Experience teaches that commonly one story is good only until another is told. Where a judge hears one side but not the other before deciding, even if the side heard acts in the utmost good faith and makes full disclosure of all that that side sees as relevant, there may be considerations which that side had not entertained and facts which that side did not know which, if brought to the attention of the judge, would cause a difference in the outcome.

> "The person most likely to have thought of cogent considerations, and to know the relevant facts, is the person whose interests are in jeopardy, that is the party opposing the decision. Therefore we shall avoid bad decisions best if we ensure that each potential decision, before it is finally decided, is exposed to what is likely to be the strongest possible criticism of it."[166]

Thus, hearing both sides before deciding tends to quell controversies and discontents. As Megarry J said in *John v Rees*[167]:

> "It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious', they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."

Of the last sentence Lord Hoffmann has observed[168]: "Most lawyers will have heard or read of or even experienced such cases but most will also know how rare they are. Usually, if evidence appears to an experienced tribunal to be

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166 Lucas, *The Principles of Politics*, (1966) at 132.

167 [1970] Ch 345 at 402 (a case concerning the suspension by a national political party of one of its branches).

168 *Secretary of State for the Home Department v AF (No 3)* [2009] 3 WLR 74 at 102 [73]; [2009] 3 All ER 643 at 670.

irrefutable, it is not refuted." Perhaps both Megarry J and Lord Hoffmann are guilty of a little exaggeration. But even if Lord Hoffmann's reasoning is completely correct, it does not destroy Megarry J's point.

144 A further justification for the practice of hearing both sides is that it respects human dignity and individuality. "[S]ince men can talk, they should be allowed to, and not just bundled about like chessmen."[169] "[W]e think we owe it to a man as a human being to engage in argument with him, and allow him to engage in argument with us, rather than take decisions about him behind his back, completely disregarding, as it were, his status as a rational agent, able to appreciate the rationale of our decisions about him, possibly willing to co-operate in carrying them out."[170]

145 Finally, there is what has been called an "argument from Political Liberty"[171]:

> "[E]ach man ought himself to have some say of his own in his own future, and … each man ought to count, to count as being himself, and not merely as one instance among many of the human species. We therefore think each man ought to be able to instruct his own counsel (or appear in person) to represent his own views, not merely those views which a benevolent authority might deem him to hold. … [O]n a matter on which he is likely to have very strong wishes, namely where a decision (judicial or administrative) is in danger of being taken adversely to his interests, he should have a chartered right of having a say, that is, the authority has a duty to hear him."

Thus Megarry J also said in *John v Rees*[172]:

> "[T]hose with any knowledge of human nature who pause to think for a moment [are not] likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

146 *Illustrations.* The courts are extremely solicitous about the interests of persons who have not been given an opportunity to be heard either at all or in respect of particular questions before judicial orders of a substantive kind are

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169 Lucas, *The Principles of Politics*, (1966) at 269.

170 Lucas, *The Principles of Politics*, (1966) at 132.

171 Lucas, *The Principles of Politics*, (1966) at 270.

172 [1970] Ch 345 at 402.

made against them. Many illustrations of the duty only to make substantive judicial orders after giving a hearing – that is, not to act ex parte or sua sponte – can be found. A court may not decide a case on a point not raised by one of the parties or by the court for the consideration of the parties[173]. Non-compliance by a court of trial with the duty to give a hearing on a question of law which "must clearly be answered unfavourably to the aggrieved party" will not lead to a new trial, but where no hearing is given on the question whether a finding of fact turning on witness credibility should be made, it is not easy to conclude that a new trial should be refused on the ground that even if a hearing had taken place, "it could have made no possible difference to the result."[174] The court is not entitled to take into account factual material not in evidence without notice to the parties[175]. The court is not entitled to take judicial notice of particular matters of fact after inquiry without notifying the parties of the inquiry and giving them the opportunity to controvert or comment on the source in which the inquiry is made[176]. When local justices propose to use their local knowledge, it is "always wise" to make that fact known to the parties so as to give them an opportunity to comment on the knowledge claimed[177]. If, in determining whether the law should be developed in a particular direction, the court has recourse to learned works, it ought to give the parties an opportunity to deal with all matters which

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173 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22; *Friend v Brooker* (2009) 83 ALJR 724; 255 ALR 601; [2009] HCA 21.

174 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145-146 per Mason, Wilson, Brennan, Deane and Dawson JJ; [1986] HCA 54.

175 *Thomas v Thomas* [1961] 1 WLR 1 at 6, 8 and 9; [1961] 1 All ER 19 at 22 and 24 (behaviour of a party in earlier proceedings); *In re K (Infants)* [1963] Ch 381 at 405-406 (report of guardian ad litem filed but not tendered: see also *In re K (Infants)* [1965] AC 201 at 237-238); *Brinkley v Brinkley* [1965] P 75 at 78-79 (evidence in earlier proceeding not tendered in later); *In the Marriage of Dean* (1988) 94 FLR 32 at 36-38 (textbooks on valuation of businesses not in evidence); *Australian and Overseas Telecommunications Corporation Ltd v McAuslan* (1993) 47 FCR 492 at 495-496, 506-512 and 517 (part of psychiatric reference work neither tendered nor the subject of cross-examination or re-examination); and the cases cited by Lord Bingham of Cornhill in *R (Roberts) v Parole Board* [2005] 2 AC 738 at 752-754 [16]-[17].

176 *Cavanett v Chambers* [1968] SASR 97 at 101; *Stokes v Samuels* (1973) 5 SASR 18 at 26; *Fairbank v Jones* (1975) 10 SASR 367 at 370-371; *Gordon M Jenkins & Associates Pty Ltd v Coleman* (1989) 23 FCR 38 at 46-48.

177 *Bowman v Director of Public Prosecutions* [1990] Crim LR 600.

the court regards as material[178]. The same is true where the court is concerned with matters of fact going to the constitutional validity of legislation, the construction of statutes, and the construction of the Constitution[179]. Juries[180] and judges[181] may take into account their observations of the behaviour of witnesses in the well of the court which could not have been made by counsel, but only if they reveal what they have seen to the parties. A court which acts on its understanding of a document in a foreign language without informing the parties commits a breach of the rules of natural justice[182].

147 *Abuse of process following a proper hearing.* Conversely, the significance of the hearing rule is revealed by the fact that a hearing at which all parties were present may present an obstacle to future litigation. Thus it is an abuse of process to institute proceedings "for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."[183]

148 *Interlocutory injunctions in equity.* The sensitivity of the law towards the interests of parties who may be affected by ex parte substantive orders is illustrated by various aspects of equitable practice in relation to interlocutory injunctions.

149 There is a general rule of practice that no injunction will be granted ex parte unless it takes one of two forms. One form of injunction is that granted for

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178 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 511-512 [164]-[165]; [2002] HCA 9.

179 *Thomas v Mowbray* (2007) 233 CLR 307 at 513 [618]; [2007] HCA 33.

180 *R v White* (1987) 49 SASR 154 at 161-162.

181 *Minagall v Ayres* [1966] SASR 151 at 156; *Jobst v Inglis* (1986) 41 SASR 399 at 407-408; *Angaston and District Hospital v Thamm* (1987) 47 SASR 177; *Government Insurance Office of New South Wales v Bailey* (1992) 27 NSWLR 304; *In the Marriage of J and K A Zantiotis* (1993) 113 ALR 441; *In Marriage of Chehab* (1993) 113 FLR 94; *Marelic v Comcare* (1993) 47 FCR 437 at 448-450; *Kappos v State Transit Authority* (1995) 11 NSWCCR 386 at 390-392; *R v Martin (No 4)* (2000) 78 SASR 140; *Arian v Nguyen* (2001) 33 MVR 37 at 44 [27].

182 *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282 at 290-292.

183 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 541 per Lord Diplock.

a very short period within which notice is given to the defendant of its existence, so that the defendant may oppose any extension of it beyond that very short period. The second form of injunction is that granted until further order, but with liberty for the defendant to make a speedy application for it to be set aside. The former type of order is usually regarded as the more desirable. But our equitable practice knows nothing of an ex parte injunction granted until trial without liberty to apply for speedy dissolution.

150 Another instructive aspect of equitable practice is afforded in relation to the question of whether an ex parte injunction should be granted at all. It was summarised thus by Lord Hoffmann, delivering the opinion of the Privy Council in *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd*[184]:

> "Although the matter is in the end one for the discretion of the judge, audi [alteram] partem is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless *either* giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a *Mareva* or *Anton Piller* order) *or* there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. … Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none." (emphasis in original)

151 *Commissioner of Police v Tanos.* Illustrations of the aversion of Australian judicial process to ex parte relief of a substantive kind could be multiplied extensively, but a final illustration is *Commissioner of Police v Tanos*. In that case Dixon CJ and Webb J said[185]: "[I]t is a deep-rooted principle of the law that before any one can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding he must be afforded an adequate opportunity of being heard." Their Honours then said of this "general principle" that it was "hardly necessary to add that its application to proceedings in the established courts is a matter of course."[186] That case concerned s 3(1)(b) of the *Disorderly Houses Act* 1943 (NSW), which provided that the Supreme Court of New South Wales "may declare" premises to be a disorderly house on the

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184 [2009] 1 WLR 1405 at 1408 [13]. The other members of the Board were Lords Rodger of Earlsferry, Carswell, Brown of Eaton-under-Heywood and Mance.

185 (1958) 98 CLR 383 at 395; [1958] HCA 6.

186 *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396.

affidavit of a police officer claiming reasonable grounds for suspecting one or more of various conditions. The Disorderly Houses Regulations, reg 1, gave the Court power to make the declaration "immediately and ex parte" if this seemed "necessary or desirable" or on notice and inter partes if the Court thought an opportunity should be given to the owner or occupier to oppose the making of the declaration. Their Honours thought that on its true construction the regulation meant that prima facie the second course should be followed, and that the former course should be followed "only in exceptional or special cases" – where there was "some special hazard or cause of urgency"[187]. The case affords an instructive contrast with the present, for no such judicial discretion is available here.

152 Section 10(2)[188] of the Act provides that the Commission "may" apply for a restraining order ex parte. Section 10(3)[189] provides that if the Commission makes an application for a restraining order ex parte, the Supreme Court "must" make that order if the affidavit relied on by the Commission satisfies stipulated conditions. That is, the Supreme Court has no discretion to adjourn the hearing briefly while notice is given to the person affected. Although this is not by itself repugnant to the judicial process in a fundamental degree, it is relevant to whether one other aspect of the legislation is.

153 *The duration of restraining orders.* Section 10(9)[190] makes it plain that

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187 *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396.

188 See [72].

189 See [76].

190 It provides:

> "After the first 2 working days of its operation, a restraining order remains in force in respect of an interest in property only while:
>
> (a) there is an application for an assets forfeiture order pending before the Supreme Court in respect of the interest, or
>
> (b) there is an unsatisfied proceeds assessment order in force against the person whose suspected serious crime related activities formed the basis of the restraining order, or
>
> (c) there is an application for such a proceeds assessment order pending before the Supreme Court, or
>
> (d) it is the subject of an order of the Supreme Court under section 20 (Effect on restraining order of refusal to make confiscation order)."

once a restraining order has been made, unless it is set aside on appeal, it remains in force for two working days and continues to remain in force thereafter indefinitely until such time as all the states of affairs described in paragraphs (a)-(d) cease to exist. That period could be quite lengthy, since, for example, there is no statutory obligation on the Commission to prosecute the application for an assets forfeiture order described in s 10(9)(a) with any expedition. The extreme significance in the legislative scheme of the grant of a restraining order is highlighted by s 22(1A). It provides that an application for an assets forfeiture order under s 22(1) may be made "before or after or at the same time as an application for the relevant restraining order but may not be determined before the restraining order is granted." The scheme is that assets are to be frozen first and argued about afterwards – possibly a long time afterwards.

154 *Practical utility.* It is understandable that the Act places a high significance on the importance of obtaining a restraining order without notice to defendants. No doubt many potential defendants are able to dispose of their assets very speedily, and would do so, if given notice of the application before the restraining order is made. A duty in the Supreme Court to grant an ex parte restraining order for a short period pending an application by the defendant to oppose its continuation, or dissolve it, is not repugnant to the judicial process in a fundamental degree. But the practical desirability of ensuring that assets not be disposed of before an application for a restraining order comes to court is one thing. Creating a capacity in the Commission to retain a restraining order it has obtained ex parte without there being any procedure by which the defendant may apply to have it speedily dissolved is another.

155 *The central issue.* If there is no procedure by which the person subject to a s 10(2) restraining order made ex parte may approach the Court to have it set aside once that person has learnt of the order, the effect of s 10 is to compel the Supreme Court of New South Wales to engage in activity which is repugnant to the judicial process in a fundamental degree.

156 The element which is repugnant is not the grant of a power to make restraining orders ex parte. That is a very well-known aspect of Australian judicial process in relation to injunctions, although the power should only be exercised in exceptional or special cases, where there is some special hazard or cause of urgency. A risk of dissipation of assets in such a fashion as to frustrate the objects of the law can be in that category.

157 Nor is the element which is repugnant the creation of a duty on the Court to make the order, if the conditions in s 10(3) are satisfied. That too is a well-known aspect of Australian judicial process.

158 Nor is the element which is repugnant to be found in the failure of the legislation to give the Court power to consider whether the circumstances are sufficiently extreme to justify a grant of ex parte relief or whether the order, if

made, should be limited so as to last only for a short time. That is because that failure will cause little injustice if a wrongly made order is only made for a short time or can be dissolved speedily.

159 The repugnance arises if the legislation ensures that there is no facility for the Court to entertain an application to dissolve an ex parte restraining order once the defendant has received notice of its grant pursuant to s 11(2). If that facility existed, the potential injustice flowing from the preceding three characteristics of s 10 would be nullified or mitigated. But if it does not exist, there is the potentiality for extreme injustice in a fashion repugnant to the judicial process in a fundamental degree.

160 The crucial question is thus whether it is possible for a defendant to apply for speedy dissolution of the ex parte restraining order. The answer is "No". The Act does not expressly or implicitly grant defendants that facility. And its structure excludes it.

161 *No statutory grant of the facility.* There is no provision in s 10 or any other part of the Act pursuant to which a person against whom an ex parte restraining order has been made can apply to the Supreme Court to have the order set aside, at least without much difficulty and delay. The extensive list of orders set out in s 12(1) and described as "ancillary orders" does not contain any order of that kind. Section 12(1)(a) refers to "an order varying the interests in property to which the restraining order relates", but that language does not include an order setting aside the restraining order in its totality. An order which is "ancillary" to another is an order which is subservient, subordinate, auxiliary or accessory to it. An order which sets aside another order is not "ancillary" to it. Further, s 12(1) contemplates that an "ancillary" order can be made either later than or at the same time as the restraining order: a set of orders comprising a restraining order and an "ancillary" order made at the same time as the restraining order and setting it aside would be internally contradictory, which suggests that an order setting aside a restraining order is not an ancillary order. Nor does s 25 assist[191]. For the reasons given by Gummow and Bell JJ the narrow potentiality s 25 affords for bringing the restraining order to an end – through a complex negative inquiry which is likely often to be very time-consuming – does not prevent s 10 from operating so as to compel the Supreme Court to engage in an activity which is repugnant to the judicial process in a fundamental degree[192]. The same is true of s 20, because the power it affords to terminate the restraining order is only triggered once the Court decides not to make an assets forfeiture order, and that decision may not be made for a long time.

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191 See [93]-[94].

192 See [93]-[97].

162 *Statutory preclusion of the facility.* In addition to the fact that there is no express provision in the Act permitting a speedy application to dissolve restraining orders granted ex parte, the relevant sections in Pt 2 of the Act read as a whole indicate that they constitute a self-contained and exhaustive regime. It is a regime which excludes any recourse to, or to an analogy with, the general law powers in the Supreme Court to permit an application by an affected person to dissolve ex parte interlocutory injunctions. The Commission made a contrary concession, but incorrectly. It is not open to it to advocate or accept particular constructions of the legislation in any fashion binding on this Court and thereby, as it were, to "concede" the legislation under which it operates into constitutional validity by converting it into a statute which is different from the one actually enacted by the legislature.

163 The self-contained and exhaustive nature of the regime is demonstrated by the quite close detail to which Pt 2 of the Act descends in dealing with restraining orders. It would be wearisome to engage in unduly minute analysis, but the following matters may be noted. Section 10(1) and (2) provides for how the orders are to be applied for. Section 10(2), (2AA) and (2A) provides for the property in relation to which the orders may be applied for. Section 10(3) and (3A) provides for when the orders must be made. Section 10(4) provides for the Court to order the Public Trustee to take control of property to which the restraining order relates: see also ss 12, 18, 19 and 21. Section 10(5)(a) gives the Court power to ensure that a restraining order may make provision for meeting out of the property to which the order applies the reasonable living expenses of any person whose interests in property are subject to the restraining order (including the reasonable living expenses of any dependants). Section 10(5)(b) gives the Court power to ensure that a restraining order makes provision for the payment out of the property to which the order applies of the reasonable legal expenses of any person whose interests in the property are subject to the restraining order, being expenses incurred in connection with the application for the restraining order or an application for a confiscation order, or incurred in defending a criminal charge: see also ss 16A, 16B and 17. Section 10(6) and (7) provides for undertakings as to damages or costs. Section 10(8) provides that if a restraining order is in force in respect of an interest of a person in property, the order does not prevent the levying of execution against the property in satisfaction or partial satisfaction of the debt arising under a proceeds assessment order in force against the person, or, with the consent of the Supreme Court, the sale or other disposition of the interest to enable the proceeds to be applied in satisfaction or partial satisfaction of that debt, or, with the consent of the Supreme Court, the application of the interest in satisfaction or partial satisfaction of that debt. Section 10(9) provides for the duration of the orders. Section 10B provides for applications for restraining orders to be made by telephone and for notice of those orders to be given by telephone. Section 11 provides for notice of the restraining orders. Section 12 provides for the making of numerous ancillary orders. Sections 13 and 13A provide for the abolition of

certain privileges. Section 14 provides for orders for sale of certain types of property. Section 15 provides for recording restraining orders on title registers. Section 16 provides for punishments for contravention of restraining orders. Section 20 provides that if while a restraining order is in force the Supreme Court does not make an assets forfeiture order in respect of interests in property to which the restraining order relates or a proceeds assessment order in respect of any person whose interests in property are affected by the restraining order, the Court may make an order in relation to the period for which the restraining order is to remain in force, and make such other order or orders as it considers appropriate in relation to the operation of the restraining order.

164 In 1864 the Supreme Court of the United States said: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."[193] Under Pt 2 of the Act, there is notification only after the defendant's rights are affected, and no provision for any opportunity for defendants to argue that orders affecting them should be dissolved. In 1965 the Supreme Court of the United States said that the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."[194] The meaningfulness of notice depends on its timeliness. If the Commission chooses to proceed ex parte, the statutory scheme under consideration grants no right to notice before the ex parte order is made, and the grant by s 11(2)[195] of a right to notice of the ex parte order after it has been made is not a grant at a meaningful time because it can lead to no avenue by which the order can be dissolved before it causes more harm.

165 In short, the strict, confined, specific and tight regulation of the powers granted excludes recourse by analogy or otherwise to the general powers and traditional procedures of the Supreme Court in its administration of equitable relief. The "reasonably plain intendment" of the legislation is that Pt 2 does not, in this respect at least, take the Supreme Court of New South Wales as it finds it[196].

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193 *Baldwin v Hale* 68 US 223 at 233 (1864).

194 *Armstrong v Manzo* 380 US 545 at 552 (1965).

195 See [110].

196 *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW* (1956) 94 CLR 554 at 560 per Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ; [1956] HCA 22.

Bill of pains and penalties

166 To some extent the appellants employed s 22(2)(b) as an aid to their arguments in support of the conclusion that s 10 was invalid by reason of the *Kable* doctrine. That conclusion has been accepted for reasons other than the existence of s 22(2)(b). But the appellants also advanced a distinct argument based on s 22(2)(b). They submitted that s 22(2)(b)[197] exposes a person to punishment, in the form of forfeiture of property, for an offence for which that person has not been prosecuted, tried or convicted; that s 22(2) was void as being in substance a bill of pains and penalties antithetical to the exercise of judicial power under Ch III of the Constitution; and that s 10(3) fell with s 22(2)(b) because the making of a s 10(3) restraining order was a condition precedent to the making of an assets forfeiture order under s 22(2)(b).

167 The submission must be rejected. Like a bill of attainder, a bill of pains and penalties "is a legislative enactment which inflicts punishment without a judicial trial"[198]. The key question is thus whether s 22(2)(b) provides for a judicial trial. The finding referred to in s 22(2)(b) can only be made after notice of the application for an assets forfeiture order has been given to the person described in s 22(2)(b): see s 22(9)[199]. That person has a right to appear and adduce evidence: s 22(9). And the rules of evidence apply to that process of adducing evidence: s 5(2)(b)[200]. Thus s 22(2)(b) provides for a judicial trial. The standard of proof to be satisfied by the Commission ("more probable than not") is lower than the conventional criminal standard. This may be an

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197 See [111].

198 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 535 per Mason CJ; [1991] HCA 32.

199 It provides:

> "Notice of an application under this section is to be given to a person to whom the application relates and the person may appear, and adduce evidence, at the hearing of the application."

200 It provides:

> "Except in relation to an offence under this Act:
>
> …
>
> (b) the rules of evidence applicable in civil proceedings apply, and those applicable only in criminal proceedings do not apply, to proceedings under this Act."

unamiable provision, but it does not entail constitutional invalidity[201]. The more extreme step of reversing the burden of proof itself has been held not to invalidate a federal statute[202]. Section 22(2)(b) does not adjudge any specific person or specific persons guilty of an offence: it leaves it to the Supreme Court to do so on that standard of proof, but otherwise in conformity with the rules of evidence. If any s 22(2)(b) order is made, it is made in exercise of judicial power, not legislative power.

Section 22 does not undermine the protection of a criminal trial

168 A final submission advanced for the appellants by reference to s 3(a) of the Act[203] was that a s 22(2)(b) order amounted to confiscation of property without a conviction; that the proceedings for the s 22(2)(b) order were thus civil proceedings; that the forfeiture effected by the order was punishment; that the person against whom the order was sought was in peril of punishment without the procedural safeguards of a criminal trial; that this violated the essential requirements of the exercise of judicial power and usurped it; and that to punish a person only after a civil hearing was impliedly prohibited by the doctrine of the separation of powers.

169 In substance, as emerged in oral argument, these submissions did no more than complain that it is not constitutionally possible for a State court to obtain an order for forfeiture of property unless the matters of fact constituting the conditions for forfeiture are proved beyond a reasonable doubt. For the reasons given above[204], the stipulation of a lower standard of proof does not lead to that conclusion.

Orders

170 I agree with the orders proposed by Gummow and Bell JJ.

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201 *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181 at 186 [11]; [2004] HCA 9.

202 *Nicholas v The Queen* (1998) 193 CLR 173; [1998] HCA 9. See also *Thomas v Mowbray* (2007) 233 CLR 307 at 355-356 [113].

203 See above at [83].

204 See [167] above.