IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B21 of 2017

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

AND

STEVEN IRVINE HART
First Respondent

FLYING FIGHTERS PTY LTD as trustee for FLYING FIGHTERS DISCRETIONARY TRUST
Second Respondent

NEMESIS AUSTRALIA PTY LTD
Third Respondent

YAK 3 INVESTMENTS PTY LTD as trustee for YAK 3 DISCRETIONARY TRUST
Fourth Respondent

BUBBLING SPRINGS OLIVE GROVE PTY LTD as trustee for BUBBLING SPRINGS DISCRETIONARY TRUST
Fifth Respondent

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B22 of 2017

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Appellant

AND: **YAK 3 INVESTMENTS PTY LTD as trustee for YAK 3 DISCRETIONARY TRUST**
First Respondent

CONSOLIDATED SUBMISSIONS OF THE COMMONWEALTH APPELLANTS

Commissioner of the Australian Federal Police
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BUBBLING SPRINGS OLIVE GROVE PTY LTD as trustee for BUBBLING SPRINGS DISCRETIONARY TRUST
Second Respondent

NEMESIS AUSTRALIA PTY LTD
Third Respondent

FLYING FIGHTERS PTY LTD as trustee for FLYING FIGHTERS DISCRETIONARY TRUST
Fourth Respondent

ALFREDTON PTY LTD as trustee for NEMESIS GROUP SUPERANNUATION FUND
Fifth Respondent

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B23 of 2017

BETWEEN:

COMMONWEALTH OF AUSTRALIA
First Appellant

COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE
Second Appellant

AND:

FLYING FIGHTERS PTY LTD
ACN 067 895 005
First Respondent

YAK 3 INVESTMENTS PTY LTD
ACN 010 623 560
Second Respondent

BUBBLING SPRINGS OLIVE GROVE PTY
ACN 010 281 866
Third Respondent

NEMESIS AUSTRALIA PTY LTD
ACN 010 225 537
Fourth Respondent

CONSOLIDATED SUBMISSIONS OF THE APPELLANTS

PART I. PUBLICATION

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

PART II. ISSUES

2. These appeals raise issues at three levels, which are addressed as follows:

   (a) First, they raise several discrete, but important, issues as to the construction of ss 102 and 141 of the *Proceeds of Crime Act 2002* (Cth) (the **Act** or the **POCA**).

   (b) Second, they raise issues as to the application of those sections, properly construed, to eight discrete items of property.

   (c) Third, they raise issues as to the exercise of discretion to make orders under ss 102 and 141 of the Act.

3. The primary questions of construction raised by the appeals, and the answers to those questions that are proposed by the Commonwealth and the Commissioner for the Australian Federal Police (together, the **Commonwealth parties**) are: [1]

   (a) In s 102(3)(a) of the Act, do the words 'derived or realised…by any person from any unlawful activity' mean *wholly* derived or realised from any unlawful activity?

   Answer: No.

   (b) Are payments made after the initial acquisition relevant to determining whether property is 'derived' from unlawful activity for the purposes of s 102(3)(a) of the Act, such as payments for restoration and repairs or repayments of subsequent mortgages?

   Answer: Yes. The meaning of the word 'derived' is wider than the word 'acquired' and may encompass such payments.

   (c) What meaning should be given to the words used 'in, or in connection with...unlawful activity' in s 102(3)(a) of the Act?

   Answer: The words require a connection, or relationship or link, between the use of the property and unlawful activity. That connection, however, need not be substantial; a connection that is not tenuous or remote would suffice.

   (d) What meaning should be given to the words 'acquired the property lawfully' in s 102(3)(b) of the Act?

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[1] Questions (a)-(d) arise in B22 and B23 of 2017. Questions (e)-(f) arise in B21 of 2017.

Answer: Property is lawfully acquired if no offence has been committed in the process of acquiring the property, and if the funds used to acquire the property are not the result of proceeds of crime or some other criminality.

(e) Does s 141 of the Act apply to property that has been subject to a restraining order under s 17 of the Act?

Answer: Yes.

(f) If so, is the date of effective control under s 141(1)(c) the date on which an application under s 141 is determined, even in cases in which the property has been subject to restraining orders under s 17 of the Act?

Answer: No. In such cases, the relevant date of effective control is the date immediately prior to the restraining order being made.

PART III. SECTION 78B NOTICES

4. No notices are required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV. AUTHORISED REPORTS

4. The judgment of the Court of Appeal delivered on 29 August 2016 is not reported. Its medium neutral citation is [2016] QCA 215.

5. The short judgment of the Court of Appeal concerning the form of orders is also not reported. Its medium neutral citation is [2016] QCA 284.

PART V. FACTS

6. The first respondent, Mr Hart, was an accountant. He engaged in tax fraud by running a number of tax avoidance schemes in which he involved his clients.

7. On 8 May 2003, the Commonwealth sought and obtained a restraining order under s 17 of the Act over various aircraft,[2] sub-leases of land,[3] real property,[4] a vehicle[5] and fixed and floating charges granted by four of the respondents over their assets to Merrell Associates Limited (**Merrell**).[6] Each of these items of property was

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2 L-39C Albatross registration number VH-SIC; North American T-6; North American T-28 VH-SHT; De Havilland DH82 tiger moth VH-WEM; Yak 3 VH-YZK; Yak 50 VH-YAX; American Champion Decathlon VH-DEC; Sea Fury VH-SHF; North American T-28 VH-AVC; and Akrotech CAP 232 VH-SHI.

3 These were referred to as hanger 400; hanger 101 and hanger 607 in the proceedings below.

4 6 Merriwa Street, Sunnybank; 27 Samara Street, Sunnybank Hills and properties at Doonan's Road, Grandchester.

5 1983 Mercedes Benz 380SL.

6 Fixed and floating charges described as mortgage debentures between Nemesis Australia Pty Ltd, Yak 3 Investments Pty Ltd, Bubbling Springs Olive Grove Pty Ltd (now Bubbling Springs Pty Ltd) and Flying Fighters Pty Ltd and Merrell Associates Limited.

restrained on the basis that it was suspected of being under Mr Hart's effective control.[7]

8. The second to fifth respondents[8] applied to have their property excluded from the restraining order, on the basis that the property was not under the control of Mr Hart. That application was dismissed by the District Court of Queensland, and an appeal to the Court of Appeal was unsuccessful.[9]

9. On 26 May 2005, a jury found Mr Hart guilty of nine offences of defrauding the Commonwealth in contravention of s 29D of the *Crimes Act 1914* (Cth). He was sentenced to seven years' imprisonment for each offence, with the sentences to be served concurrently. Mr Hart appealed unsuccessfully to the Court of Appeal[10] and his application for special leave to appeal was refused.[11]

10. On 18 April 2006, by operation of s 92 of the Act, the property that had been found to have been under Mr Hart's effective control and that had been restrained was forfeited to the Commonwealth.

11. On 17 July 2006, the Commonwealth Director of Public Prosecutions (**CDPP**) applied for a pecuniary penalty order (**PPO**) under s 116 of the Act against Mr Hart.

12. On 17 October 2006, the second to fifth respondents applied for orders under s 102 of the Act directing the Commonwealth to transfer to them their interests in the forfeited property or to pay them an amount equal to the value of their interests (the **s 102 application**).

13. The CDPP subsequently applied for a declaration under s 141 of the Act that any property recovered from forfeiture by the respondents be available to satisfy any PPO made against Mr Hart (the **s 141 application**).

14. On 19 November 2010, the District Court of Queensland granted a PPO against Mr Hart under s 116 of the Act. It ordered him to pay the Commonwealth $14,757,287.35. That sum reflected the net value of benefits derived by Mr Hart from the offences of which he was convicted on 26 May 2005, and from additional

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7 Act, s 17(2)(c).

8 Flying Fighters Pty Ltd, Nemesis Australia Pty Ltd, Yak 3 Investments Pty Ltd and Bubbling Springs Olive Grove Pty Ltd.

9 *Cth DPP v Hart* [2004] QDC 121; *Director of Public Prosecutions (Cth) v Hart (No.2)* [2005] 2 Qd R 246. In the latter case, McPherson JA said at [31]: '[T]he evidence leaves no doubt that [Mr Hart] was in effective control of the property as well as the affairs of the corporate appellants. His attitude and his behaviour towards them is reminiscent of many others who persist in treating the business and assets of companies as if they were their own, with scant regard for the legal boundaries dividing personal and corporate powers and ownership.'

10 *R v Hart; ex parte Cth DPP* [2006] QCA 39.

11 *Hart v The Queen* [2006] HCATrans 345 (21 June 2006).

offences involving a company called United Overseas Credit Ltd (**UOCL**), which he controlled.[12] Mr Hart's challenge to the PPO was unsuccessful.[13]

15. On 2 April 2013, the primary judge determined the respondents' s 102 application and the CDPP's 141 application. In general terms, his Honour:

(a) refused the orders sought by the respondents in their s 102 application because they had failed to prove the value of their interest at the time of forfeiture in respect of eight assets;[14]

(b) indicated that if the respondents paid the Commonwealth $1.6m, he would grant them relief in respect of those assets;

(c) gave the respondents liberty to apply for orders in accordance with his reasons;[15] and

(d) despite finding that all elements under s 141 had been established, and that the assets were under the effective control of Mr Hart at the date of the restraining order, dismissed the CDPP's application under s 141 of the Act on discretionary grounds.

16. The orders referred to in subparagraph 15(c) above were made on 6 May 2013.

17. The Commonwealth parties appealed the dismissal of the s 141 application and the orders made on 6 May 2013. The respondents also appealed against the primary judge's decision in respect of certain assets that his Honour had determined could not be transferred under s 102, and disputing the necessity to pay $1.6m to obtain other assets.

18. On 29 August 2016, the Queensland Court of Appeal, by majority,[16] dismissed the appeals by the Commonwealth parties but allowed the respondents' appeal.

19. In relation to the s 102 appeals, the majority of the Court of Appeal held that none of the assets in the proceedings was used in, or in connection with, any unlawful activity or was derived or realised, directly or indirectly, by any person from any unlawful activity. In so holding, the majority construed 'derived or realised' in

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12 The unlawful activity ('the UOCL offences') consisted of contraventions of s 29D of the *Crimes Act 1914* (Cth) and s 135.1(5) of the *Criminal Code* (Cth). The UOCL offences were committed between 1998 and 2003.

13 An appeal to the Court of Appeal was dismissed: *Hart v Commonwealth Director of Public Prosecutions* [2012] 2 Qd R 203. Mr Hart's special leave application was subsequently refused: *Hart v Commonwealth Director of Public Prosecutions; Hart v Commonwealth of Australia* [2012] HCATrans 140.

14 [2013] QDC 60 at [847]-[849]. The eight assets were the L-39 VH-SIC; the Akrotech CAP 232; hangar 101; hangar 607; hangar 400; the proceeds of 6 Merriwa Street, Sunnybank; and the properties at Doonan's Road, Grandchester.

15 [2013] QDC 60 at [854]-[855].

16 Douglas J and Peter Lyons J; Morrison JA dissenting.

s 102(3)(a) of the Act as meaning 'wholly derived or realised'.[17] For that reason, the appeals succeeded, notwithstanding the fact that the majority rejected the respondents' challenges to the findings of the primary judge about the Perpetual offences,[18] the Hendon arrangement,[19] and the derivation of certain payments made to acquire the Hawker Sidley Sea Fury VH-SHF (**Sea Fury**)[20] and 27 Samara Street, Sunnybank Hills.[21]

20. In the s 141 proceeding, the majority rejected the Commonwealth parties' appeal because it held that one of the elements of s 141(1) (that the property was subject to the effective control of the person who is subject to a PPO) had not been established, as effective control had to exist at the date of the application under s 141.[22] The majority held that that requirement could not be satisfied if a restraining order had been made over the property the subject of the s 141 application.

21. On 8 November 2016, the Court of Appeal made orders, among other things, declaring the value of the respondents' interest in certain assets immediately before forfeiture and requiring the Commonwealth to pay the respondents those amounts, with interest. It also ordered the transfer of certain assets to the respondents.[23] The consequence, if those orders stand, is that the relevant assets will not be available to be applied towards the PPO, notwithstanding the fact that all of those assets were under the effective control of Mr Hart at the time the restraining orders were made, and many of them derived at least in part from unlawful activity.

PART VI. ARGUMENT

(A) STATUTORY CONSTRUCTION

Overview of the Act

22. Section 5 of the Act provides:[24]

> The principal objects of this Act are:
>
> (a) to deprive persons of the *proceeds of offences, the *instruments of offences, and *benefits derived from offences, against the laws of the Commonwealth or the *non-governing Territories…

23. The Act achieves these objects through a variety of provisions concerning restraining orders, forfeiture orders, automatic forfeiture, and pecuniary penalty orders.[25]

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17 [2016] QCA 215 at [832] (Douglas J), [921], [923] (Peter Lyons J).
18 [2016] QCA 215 at [993]-[999] (Peter Lyons J, with whom Douglas J agreed).
19 [2016] QCA 215 at [966]-[967] (Peter Lyons J, with whom Douglas J agreed).
20 [2016] QCA 215 at [1018]-[1027] (Peter Lyons J, with whom Douglas J agreed).
21 [2016] QCA 215 at [1159]-[1172] (Peter Lyons J, with whom Douglas J agreed)
22 [2016] QCA 215 at [1268].
23 [2016] QCA 284.
24 References to the legislation are to the version in force from 13 July 2006: see [2016] QCA 215 at [28] (Morrison JA), [848] (Peter Lyons J).

24. Under s 17(1), the court must make a restraining order if: the CDPP applies for the order; the person has been charged with, or is proposed to be charged with, an indictable offence; certain affidavit requirements specified in s 17(3) are met; and the court is satisfied that the authorised officer who made the affidavit held the suspicions stated in the affidavit on reasonable grounds. The restraining order can apply to property that is not owned by the person but is suspected of being under the person's effective control.[26]

25. Section 29 enables a person whose property would be covered by a restraining order or whose property has been covered by such an order to apply to have the property excluded from the order. However, property cannot be excluded from a restraining order unless the court is relevantly satisfied that a PPO cannot be made against the person who has effective control of the property.[27]

26. Section 38 enables a court to order the Official Trustee to take custody and control of property covered by a restraining order.

27. Section 45 provides for the circumstances in which a restraining order ceases to operate. Such an order relevantly ceases if the property subject to the order is excluded from a forfeiture order or from automatic forfeiture under s 94 of the Act, provided there is no other 'confiscation order'[28] or undetermined application for a confiscation order in relation to the offence to which the restraining order relates or a related offence.[29] A restraining order also ceases if the property has been vested absolutely in the Commonwealth pursuant to forfeiture under the Act.[30]

28. Section 92 relevantly provides that property is automatically forfeited to the Commonwealth at the end of a specified period if the person is convicted of a serious offence and the property is covered by a restraining order against the person that related to the offence. By s 96, such property vests absolutely in the Commonwealth at the time of the forfeiture.

29. At a time *prior to* forfeiture, s 94(1) provides that a person who has been convicted of a serious offence can apply to exclude property covered by a restraining order from being automatically forfeited under s 92. To obtain such an order, the person must demonstrate that the person owns the property; that it is neither 'proceeds' of unlawful activity nor an 'instrument' of unlawful activity; and that the defendant's interest in the property was lawfully acquired. [31]

30. At a time *after* property has been forfeit to the Commonwealth under s 92, s 102 allows any person who claims an interest in the property (not just a person who has

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25 Such provisions are part of the confiscation scheme in Chapter 2 of the Act: see s 7.

26 Act, s 17(3)(b)(i).

27 Act, s 29(4)(b). See also *Director of Public Prosecutions (Cth) v Hart (No.2)* [2005] 2 Qd R 246 at 253-254 [9] (McPherson JA).

28 A 'confiscation order' is defined in the Dictionary in s 338 of the Act to mean a forfeiture order, a PPO or a literary proceeds order.

29 Act, s 45(3).

30 Act, s 45(4).

31 Act, s 329(4).

been convicted) to obtain the return of an interest in property that has been forfeited, or to be paid the value of the interest, if certain conditions are satisfied.

Construction of s 102

31. Section 102(1) provides that, if property is forfeit to the Commonwealth under s 92, the court that made the restraining order referred to in s 92(1)(b) may, on application from a person who claims an interest in the property, make an order declaring the nature, extent and value of the applicant's interest in the property, and then either direct the Commonwealth to transfer the interest to the applicant or pay to the applicant an amount equal to the value declared.

32. Given the context (the return of property that has already vested in the Commonwealth), s 102 is concerned with declaring the nature, extent and value of the applicant's interest in property immediately before it was forfeited.[32]

33. Section 102(1) uses the word 'may'.[33] It was not in issue below that the court has a discretion whether to make an order under s 102.[34] In other words, satisfaction of the conditions in ss 102(2) or (3) does not mean that an applicant is entitled to an order.

34. An order under s 102(1) can be made only if the court is satisfied that the grounds set out in subsection (2) or (3) exist. Those conditions are stringent.

35. Subsection 102(2) sets out three separate conditions, all of which must be satisfied before that subsection is engaged. They are that:

(a) the applicant was not, in any way, involved in the commission of the offence to which the forfeiture relates;

(b) the applicant's interest in the property is not subject to the effective control of the person whose conviction caused the forfeiture; and

(c) the applicant's interest in the property is not 'proceeds of the offence' or an 'instrument of the offence'.

36. Section 329(1) of the Act defines property as 'proceeds of an offence' if the property is *wholly or partly* 'derived or realised, whether directly or indirectly, from the commission of the offence'.[35] It relevantly defines property as an

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32 The contrast in language with s 103 (c), which permits the court to make an order declaring the nature, extent and value of the interest (as at the time when the order is made) also reinforces the point.

33 Section 33(2A) of the *Acts Interpretation Act 1901* (Cth) provides that 'Where an Act assented to after the commencement of this subsection provides that a person, court or body may do a particular act or thing, and the word ***may*** is used, the act or thing may be done at the discretion of the person, court or body.'

34 The Court of Appeal held that the existence of the discretion was supported by the contrast of the use of the word 'may' in s 102(1) with the use of the word 'must' in other sections of the Act dealing with court orders: [2016] QCA 215 at [881] (Peter Lyons J) and [294], [309] (Morrison JA).

35 The terms 'proceeds' and 'instrument' are defined in s 338 (the Dictionary) in terms that direct attention to s 329. The term 'unlawful activity' is defined in s 338 to mean, relevantly, 'an offence

'instrument of an offence' if the property is 'used in, or in connection with, the commission of an offence'.[36] It further provides that proceeds or an instrument of unlawful activity means the proceeds or an instrument of the offence constituted by the act or omission that constitutes the unlawful activity.

37. The effect of s 102(2)(a) is that an applicant who was in any way involved in the offence that triggered forfeiture is excluded from being able to recover the forfeited property under s 102(2). However, even an innocent applicant cannot satisfy s 102(2), and thereby recover an interest in property that has been forfeit to the Commonwealth, if:

10 (a) the interest is under the effective control of the convicted person; or

(b) any *part* of the interest was derived, whether directly or indirectly, from the commission of the offence; or

(c) the property the subject of the interest was used 'in, or in connection with', the commission of the offence.

38. In contrast to s 102(2), an applicant who was involved in the commission of the offence that triggered forfeiture *can* recover the forfeited property under s 102(3), but only if all four conditions are satisfied. Those conditions (two of which are contained in s 102(3)(a)) are:

(a) the property was not used in, or in connection with, any unlawful activity;

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(b) the property was not derived or realised, directly or indirectly, by any person from any unlawful activity;

(c) the applicant for the order acquired the property lawfully; and

(d) the applicant is not the person convicted of the offence to which the forfeiture relates.

'in, or in connection with'

39. The phrase 'in, or in connection with' in s 102(3)(a) (which also comes into
30 s 102(2)(c), by reason of the use of that phrase in s 329(2) in the definition of 'instrument of the offence') is of wide scope. The words 'in connection with', following the word 'in', plainly show that the phrase extends beyond property that was actually used 'in' the commission of an offence. Further, the phrase is not qualified by an adjective such as 'substantial'. In those circumstances, it should not

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against a law of the Commonwealth'. Those definitions have the effect that the phrase 'proceeds of unlawful activity' has the same meaning as 'proceeds of an offence'.

36 Act, s 329(2)(a).

be construed as requiring a substantial relationship or link between the property and the commission of an offence.[37]

40. That conclusion is supported by authority.[38] In *Director Public Prosecutions (SA) v George* (***George***), for example, the Full Court of the Supreme Court of South Australia considered whether land was used 'in, or in connection with, the commission of an offence', and was therefore an 'instrument' of an offence under s 7 of the *Criminal Assets Confiscation Act 2005* (SA). Chief Justice Doyle observed that whether the statutory definition applied involved 'practical considerations and matters of degree'.[39] But he added:[40]

> There is one thing which I consider to be clear. It is that there is no basis for qualifying the statutory definition by requiring that any connection be a 'substantial connection'. To take that approach is to introduce an expression which the draftsman has not used....
>
> I also approach the issue of interpretation on the basis that the statutory definition should not be read as referring to or requiring a causal link between the property and the offence. Something less than that may suffice. Nor is it necessary that the property be something that is essential or necessary for the commission of the offence, or something that makes a unique contribution to the commission of the offence.

41. Similarly, in *Chalmers v The Queen*,[41] the Victorian Court of Appeal considered whether an apartment in which a murder had been committed was 'tainted property' within the meaning of the *Confiscation Act 1997* (Vic). The definition of 'tainted property' included property that was used 'in, or in connection with, the commission of the offence'. Consistently with *George* and other authorities, the Court of Appeal held that it was unnecessary to establish a 'substantial' connection, or that the crime could not have been committed without using the property. The Court added that whether there was a connection between the use of the property and the commission of the crime was a question of fact and degree.[42]

'derived from unlawful activity'

42. The primary judge held that the words 'the property...was not derived or realised, directly or indirectly, by any person from any unlawful activity' in s 102(3)(a) of

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37 [2016] QCA 215 at [106] (Morrison JA), [901] (Peter Lyons J).

38 See, for example, *Director Public Prosecutions (SA) v George* (2008) 102 SASR 246 at 262 [62]-[63], [65] (Doyle CJ); *Director of Public Prosecutions (WA) v White* (2010) 41 WAR 249 at [32]-[33] (McClure P, with whom Owen and Buss JJA agreed); *Dickfoss v Director of Public Prosecutions* (2012) 165 NTR 12 at [17], [20] (Riley CJ, with whom Southwood and Kelly JJ agreed); *Chalmers v The Queen* (2011) 37 VR 464 at [77] (Maxwell P, Redlich JA and Kyrou AJA); *Cini v Commissioner of the Australia Federal Police* [2016] VSCA 227 at [53] (Priest, Santamaria and Kaye JJA).

39 (2008) 102 SASR 246 at [57].

40 (2008) 102 SASR 246 at [62]-[63].

41 (2011) 37 VR 464.

42 (2011) 37 VR 464 at [77] (Maxwell P, Redlich JA and Kyrou AJA).

the Act should be construed to mean that the property was not *substantially* derived or realised from unlawful activity.[43]

43. The majority in the Court of Appeal (Douglas and Peter Lyons JJ) took a different view. Their Honours held that the words 'derived or realised' meant 'wholly derived or realised'.[44] The reasoning of Peter Lyons J (with which Douglas J agreed) depended on three main elements:

(a) s 102 was beneficial or remedial in character, and this meant that the principal objects of the Act had, at best, limited relevance to the construction of the section;[45]

(b) s 102(3)(a) did not use the term 'proceeds of the offence' (which, as noted above, is expressly defined in s 329(1) of the Act to include both property that is 'wholly' and 'partly' derived or realised from the commission of an offence) or an equivalent, thereby suggesting that Parliament had intended 'derived or realised' to mean 'wholly derived or realised';[46] and

(c) relief under s 102 was discretionary.[47]

44. Justice Peter Lyons also treated *Director of Public Prosecutions v Allen* (***Allen***)[48] as offering 'the best guidance' for the application of the derivation test in s 102(3)(a).[49]

45. The majority's construction should be rejected for the following five reasons.

46. **First**, the main objects of the Act, and the scheme of the Act, are critical to the construction of s 102. The interpretation of the Act that would best achieve its purpose or object must be preferred to each other interpretations.[50] Further, it is well established that a statute must be construed as a whole and on the basis that its provisions give effect to harmonious goals.[51] While s 102 offers a means by which persons who claim an interest in forfeited property can seek to have it returned, or to have the Commonwealth pay them for the value of their interest, it operates as a qualification on the general position that property that is the subject of a restraining order under the Act is automatically forfeit to the Commonwealth on conviction. The qualification on that general position applies only if various conditions are satisfied. The question is how those conditions should be construed. The fact that those conditions, if satisfied, operate beneficially to the applicant does not change

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43 [2013] QDC 60 at [135]-[136].
44 [2016] QCA 215 at [832] (Douglas J) and [921] and [923] (Lyons J).
45 [2016] QCA 215 at [885] (Peter Lyons J).
46 [2016] QCA 215 at [832] (Douglas J), [920]-[921] (Peter Lyons J).
47 [2016] QCA 215 at [918] (Peter Lyons J).
48 [1988] VicSC 661.
49 [2016] QCA 215 at [923].
50 *Acts Interpretation Act 1901* (Cth), s 15AA.
51 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]–[70] (McHugh, Gummow, Kirby and Hayne JJ); *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 at [31] (French CJ, Hayne, Kiefel and Nettle JJ).

the fact that s 102(3) must be interpreted in the context of the wider scheme of which it forms part. As Morrison JA pointed out, on the majority's construction of the condition in s 102(3)(a) an entity that had been intimately involved in crimes (although not actually convicted – see s 102(3)(c)) could demand the return of property that was not used in or in connection with unlawful activity if even a small proportion of the funds used to acquire the property were lawful.[52] Such a construction would undercut the principal objects of the Act and the scheme for confiscation that it establishes. The majority's appeal to a beneficial construction ignores this point.

47. **Secondly**, the only implication that should be drawn from the absence of the phrase 'proceeds of an offence' in s 102(3)(a) is that 'derived' should bear its ordinary meaning. That meaning directs attention to the origin or source of the property.[53] It does not, however, imply that property sourced from a combination of lawful and unlawful sources can never be derived from unlawful activity.[54] The same point can be made in this way: s 102(3)(a) requires a court to ask whether, on the facts as found, the applicant's interest in property is 'derived from unlawful activity'; it does not support judicial insertion of an additional word, such as 'wholly', into the language of the provision.[55]

48. **Thirdly**, the majority's construction of s 102(3)(a) generates anomalous results.[56] It would mean, for instance, that even an interest in property acquired in circumstances in which more than 70 or 80 percent of the source money had come from criminal activities would not be 'property derived from…any unlawful activity'.[57] Consequently, the Commonwealth could be obliged to transfer the interest or to pay the entire value of that interest (not merely the proportion lawfully derived) to an applicant under s 102. Given the objects of the Act, it is most unlikely that this result was intended.

49. Further, it is plain that this result could not follow under s 102(2), because the effect of s 102(2)(c) is that that condition cannot be satisfied if the applicant's interest was either wholly *or partly* derived from an offence. The most obvious

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52 [2016] QCA 215 at [125].

53 See, for example, *Macquarie Dictionary* (3rd ed, 1997), sv 'derive': 'To receive or obtain from a source or origin; to trace as from a source or origin.' See also *Director of Public Prosecutions (Cth) v Corby* [2007] 2 Qd R 318 at 321 (Keane JA).

54 See *Jeffery v Director of Public Prosecutions* (1995) 79 A Crim R 514 at 526 (Giles AJA): 'While the concept of derivation has regard to the origin or source of the thing said to have been derived, I see no point in substituting for the legislature's word a collection of other words: in particular, I consider that reference to *the* origin or *the* source may unduly restrict the fact-finding exercise.'

55 Compare *Spencer v Commonwealth* (2010) 241 CLR 118 at [58] (Hayne, Crennan, Kiefel and Bell JJ) (pointing to the dangers of judicial glossing of statutory expressions). See also the authorities cited in paragraph 40 above (rejecting a construction of 'used in connection with' that would insert the word 'substantial').

56 For the relevance of results to construction, see *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1980) 147 CLR 297 at 320-321 (Mason and Wilson JJ); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

57 Compare [2016] QCA 215 at [157] (Morrison JA) (discussing the Sea Fury aircraft, where only 28% of the source funds were untainted).

difference between ss 102(2) and (3) is that s 102(2) only applies to persons who can show that they were not 'in any way' involved in the offence to which the forfeiture relates. Given Parliament provided in s 102(2) that a wholly innocent person is unable to recover property if *any part* of that property was derived from unlawful activity, it is very difficult to see how it could rationally have intended that a person *who was involved* in the commission of an offence should be subject to the *less stringent* condition under s 102(3) that property is recoverable unless it is *wholly derived* from unlawful activity. Reading the two provisions together, the Court of Appeal's interpretation does not produce a coherent scheme.

50. **Fourthly**, *Allen* offers no support for the majority's construction of s 102(3)(a). In that case, McGarvie J of the Victorian Supreme Court considered whether to order forfeiture of certain property under the *Crimes (Confiscation of Profits) Act 1986* (Vic). Section 7(1)(b) of that Act provided that forfeiture could only be ordered if the property was 'derived or realised, directly or indirectly, by that person or another person, as a result of the commission of the offence'. Justice McGarvie, who found that virtually all the respondent's income had come from drug trafficking,[58] applied by analogy the principle in taxation cases on the source of income.[59] His Honour stated:[60]

> In the circumstances of this case, I apply the test of deciding whether a practical person, as a practical matter of fact, would regard the item of property as acquired by money, all of which, or all but an insignificant part of which, should be treated as originating from or traceable to moneys received in the commission of the offences of trafficking heroin or cannabis.

51. While that passage on its face supports the majority's approach, the statement is explicable because on the facts even the high bar that McGarvie J identified was met. Moreover, his Honour expressly recognised the possibility that property acquired with money from a number of sources, some of which may be lawful, might also be derived from unlawful activity. As he put it:[61]

> It may be that an item could fall within s.7(1)(b) even though a significant element or factor is a source which is not a result of the commission of the offence, but I did not need to decide that in [this] case.

52. Accordingly, *Allen* does not purport to lay down a general test for when property would be derived or realised from the commission of an offence.

53. In any event, as Morrison JA pointed out, the taxation cases referred to in *Allen*[62] are of doubtful utility: they involve differently framed legislation, with different

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58 [1988] VicSC 661 at p 12-16.

59 [1988] VicSC 661 at p 10 (referring to *Commissioner of Taxation v Cam and Sons* (1936) 36 SR (NSW) 544 at 547; *Nathan v Federal Commissioner of Taxation* (1918) 25 CLR 183 at 189-190; *Liquidator, Rhodesia Metals Ltd v Commissioner of Taxes* [1940] AC 774 at 789-790).

60 [1988] VicSC 661 at p 12 (emphasis added).

61 [1988] VicSC 661 at p 11.

62 *Commissioner of Taxation v Cam and Sons* (1936) 36 SR (NSW) 544 ('*Cam*'); *Nathan v Federal Commissioner of Taxation* (1918) 25 CLR 183 ('*Nathan*'); *Liquidator, Rhodesia Metals Ltd v Commissioner of Taxes* [1940] AC 774 ('*Rhodesia Metals*').

objects.[63] They were concerned not with derivation for the purposes of proceeds of crime, but with identifying whether income was from a source within a particular territory and thus was taxable.[64] To adopt the words of Keane JA (as his Honour then was) in *Director of Public Prosecutions (Cth) v Corby*, there is no indication that derivation in s 102(3) was:[65]

> to be trammelled with the complexities which have attached to the concept of derivation as a result of judicial exegesis of provisions of the *Income Tax Assessment Act* 1936 (Cth) [and other taxation statutes], which are concerned to identify the locale of the rights or activities which cause the production of the taxable income, or assessable income.

Relevance of payments after acquisition

54. The majority held that the question of whether property is derived from unlawful activity is concerned with how a relevant entity *acquired* its interest in the property.[66] On that basis, the majority found that the source of funds used to meet the costs of restoration and repairs of assets would ordinarily be irrelevant to whether those assets were derived from unlawful activity.[67] Similarly, the majority found that where a property was mortgaged after the initial acquisition, the source of funds used to repay that mortgage was not relevant to whether the property was unlawfully derived.[68]

55. That approach should be rejected. The concept of derivation extends beyond the specific circumstances involved in an acquisition.[69] Given the objects of the Act, and the fact that s 102(3) itself distinguishes between derivation and acquisition, Parliament should not be taken to have used the word 'derived' in such a narrow sense.

56. Acceptance of the majority's position would mean that funds used to render an asset functional must be ignored in deciding whether that asset is derived from unlawful activity. By that logic, even if renovation or restoration costs (which came from tainted funds) dwarfed the costs of acquisition (which came from untainted funds), the asset could not be said to have been derived from unlawful activity. That construction would create a substantial gap in the operation of the Act, and therefore is not the construction that best promotes the object and purposes of the Act.

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63 See [2016] QCA 215 at [154]-[156]. See also *Rhodesia Metals* [1940] AC 774 at 778; *Federal Commissioner of Taxation v French* (1957) 98 CLR 398 at 412 (Williams J), 415 (Kitto J).

64 *Nathan* concerned the application of s 10 of the *Income Tax Assessment Act 1915* (Cth) to dividends from companies that had carried on business in Australia and had derived profits from that business. *Rhodesia Metals* was concerned with the application of *War Taxation and Excess Profits Duty Ordinance* of Southern Rhodesia, No.20 of 1918, to profits from the sale of mining claims in Southern Rhodesia.

65 [2007] 2 Qd R 318 at 321.

66 [2016] QCA 215 at [1108].

67 [2016] QCA 215 at [1108].

68 [2016] QCA 215 at [1153], [1192]-[1193].

69 *Jeffery* (1995) 79 A Crim R 514 at 523 (Cole JA).

'acquired the property lawfully'

57. As to the condition in s 102(3)(b) that the applicant 'acquired the property lawfully', that condition is not satisfied if the process of acquisition involves a breach of the criminal law,[70] or if the funds used for the acquisition have not been lawfully acquired.[71] For example, if property has been purchased with three payments, one of which involved funds that were not lawfully acquired, the property has not been lawfully acquired. That follows from the ordinary and natural meaning of s 102(3)(b), construed in light of the objects of the Act.[72]

58. For the reasons developed below in relation to particular items of property, the requirement that property be 'acquired...lawfully' is of particular importance having regard to the operation of proceeds of crime legislation. In particular, s 82 of the *Proceeds of Crimes Act 1987* (Cth) (**the 1987 Act**) made it an offence to receive, possess, dispose of or bring into Australia any money, or other property, that may reasonably be suspected of being 'proceeds of crime'. That term was defined, among other things, as money or other property derived or realised, directly or indirectly, by any person from the commission of an indictable offence. Section 400.9 of the *Criminal Code* (Cth) had substantially similar effect. The existence of these offences emphasises that, if property is acquired using funds that are reasonably suspected of being proceeds of crime, then that conduct is itself an offence, which demonstrates that the property in question cannot be 'acquired lawfully'.

Onus of proof

59. The primary judge held that if particular assets were not derived or realised from the unlawful activity that had been identified by the Commonwealth in its Updated Further Further Amended Points of Defence, then that was itself sufficient for the respondents to have discharged their onus of proving that the assets were not derived or realised from unlawful activity.

60. The Court of Appeal upheld that approach. The majority held that, by leaving the task to a court, the legislature must be taken to expect that the application under s 102 would be conducted adversarially; and that the court will use its ordinary procedures to go about determining the relevant questions.[73]

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70 See, for example, *Studman v Commonwealth Director of Public Prosecutions* (2007) 177 A Crim R 34 at [49]; *Markovski v Director of Public Prosecutions* (2014) 41 VR 548 at [85] (Whelan JA).

71 *Markovski v Director of Public Prosecutions* (2014) 41 VR 548 at [8] (Redlich JA), [76]-[83] (Whelan JA), [95]-[97], [104] (Santamaria JA) (on the meaning of the term 'lawfully acquired' in the *Confiscation Act 1997* (Vic)).

72 The primary judge's view ([2013] QDC 60 at [304]) that s 102(3)(b) would be satisfied if property was 'substantially acquired lawfully' involved impermissibly reading the word 'substantially' into s 102(3)(b), and introduces a concept that is contrary to the objects and purpose set out in s 5 of the Act. It was correctly rejected by the Court of Appeal: see [2016] QCA 215 at [103] (Morrison JA) and [901] (Peter Lyons J).

73 [2016] QCA 215 at [935] (Peter Lyons J).

61. It is no doubt true that the Court should use its ordinary procedures to go about determining whether particular interests in property were derived from unlawful activity. However, those ordinary procedures include the normal principles pertaining to the onus of proof.

62. The onus of satisfying the court of the conditions in ss 102(2) or (3) remains at all times on the applicant. Section 317 of the Act expressly so provides, stating that the applicant in any proceedings bears the onus of proving the matters necessary to establish the grounds for making the order applied for.

63. It follows that the onus is on an applicant under s 102 to prove that any interest in property that is the subject of an application under s 102 was not used 'in, or in connection with', any unlawful activity and was not 'derived or realised by any person from any unlawful activity'. The authorities on analogous provisions, including *Henderson v Queensland*, support that submission.[74]

64. The majority of the Court of Appeal reversed that onus, by reasoning that, in an application under s 102, the Commonwealth is responsible for pleading all of the unlawful activity in connection with which property is used, or from which the property is derived,[75] with the result that, except to the extent that the Commonwealth proves otherwise, particular interests in property should not be treated as derived from or connected with unlawful activity.

65. Nothing about the pleadings in this case supports that position. The Commonwealth pleaded that the Hart companies had not shown that the relevant property was not derived from or used in unlawful activity. While the Commonwealth also went further, and pleaded where money had been traced from unlawful activity into particular assets, it did not thereby admit that all other sources of funds were lawful, or that property had not been used in connection with unlawful activity.[76]

66. Consistent with s 317 and the terms of s 102(3), the Court should have decided whether, on the evidence presented to the Court, the applicant had satisfied it that the property was *not* derived from or used in connection with 'any unlawful activity'.[77] The primary judge and the Court of Appeal erred in finding otherwise.

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74 *Henderson v Queensland* (2014) 255 CLR 1 at [13]-[15] (French CJ), [32]-[33] (Bell J), [171] (Keane J); *Director of Public Prosecutions v Brauer* [1991] 2 Qd R 261 at 264 (Connolly J), 271 (Derrington J).

75 The Commonwealth would seldom be better placed to know and prove essential facts about sources of funds than applicants to a s 102 application. In this matter, the primary judge expressly found that the Commonwealth was not better placed and that 'the operations that Mr Hart conducted through the Hart group and the Companies together with the assistance of UOCL and Merrell were interwoven in such a way as to make it extremely difficult to follow thoroughly even the simplest of transactions': see [2016] QCA 215 at [404].

76 See, for example, Updated Further Further Amended Points of Defence 26 November 2010, paras 37, 38 (on T-28 Reg. VH-SHT), 41 (on the Sea Fury), 72 (on the Akrotech Cap 232).

77 The Court's error is illustrated by the manner in which it approached a payment by Tinkadale in March 1994. The primary judge found that the Tinkadale payment of $50,000 did not consist of fees from the Hendon arrangement. Yet there was no explanation given for why Harts paid Tinkadale $100,000 and Tinkadale then paid Nemesis $50,000: see [2013] QDC 60 at [347], [349]; [2016] QCA

Construction of s 141

67. Section 116 of the Act provides for PPOs. A court *must* make an order requiring a person to pay an amount to the Commonwealth if the CDPP applies for the order and the court is satisfied of one or both of these matters:

(a) the person had been convicted of an indictable offence and had derived benefits from the commission of that offence; or

(b) the person had committed a 'serious offence'.[78]

In determining whether a person has derived a benefit, the court may treat as property of the person property that, in the court's opinion, was subject to the person's effective control.[79]

68. Section 141 complements s 116 by ensuring that property that is subject to a person's effective control is available to satisfy a PPO made against that person. Section 141(1) relevantly provides:

> If:
>
> (a) a person is subject to a *pecuniary penalty order; and
>
> (b) the *DPP applies to the court for an order under this section; and
>
> (c) the court is satisfied that particular property is subject to the *effective control of the person;
>
> the court may make an order declaring that the whole, or a specified part, of that property is available to satisfy the pecuniary penalty order.

69. The primary judge held that the conditions in s 141(1)(a), (b) and (c) had been satisfied, but nevertheless refused to make the order sought by the DPP. His main reason for doing so was that the companies had already failed to recover assets that were used in connection with unlawful activity, or derived from unlawful activity, and the Commonwealth's 'remedies' under s 102 of the Act were sufficient.[80]

70. By contrast, on appeal the majority held that s 141(1)(c) was not satisfied. Their Honours held that the 'natural reading' of the requirement that the court must be

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215 at [1062] [1072] (Peter Lyons J). The approach taken by the judges below was to determine whether the Hendon arrangement was the source of the payment; having decided that it was not, they held that the payment was lawfully derived. Absent any explanation for the payment, however, their Honours should not have assumed that the payment from Tinkadale was not derived from unlawful activity.

78 Act, s 116(1). The term 'serious offence' was defined in s 338 of the Act. It included indictable offences punishable by imprisonment for 3 years or more involving unlawful conduct by a person that caused, or was intended to cause, a benefit to the value of at least $10,000 for that person or another person.

79 Act, s 116(3). Further, in assessing the value of benefits that a person has derived, the court may treat as property of the person any property that, in the court's opinion, is subject to the person's effective control: see s 128.

80 [2013] QDC 60 at [873].

satisfied that particular property 'is subject to the effective control of the person' was that the property had to be under the effective control of the person subject to the PPO *at the time the s 141 application was determined.*[81]

71. The majority rejected the DPP's reliance on ss 29, 38 and 116 of the Act,[82] and held that s 141 'was not directed to property which has been the subject of a restraining order under earlier provisions of the Act, such as s 17, which would ordinarily mature into forfeiture, resulting in sale and the payment of the net proceeds to the [Confiscated Assets Account]'.[83] Justice Peter Lyons added:[84]

> [I]t seems to me to be well beyond the objects of the Act to make property of another person available to satisfy a PPO where the property once was, but no longer is, subject to the effective control of the person subject to the PPO…

72. The majority's reasoning concerning s 141 of the Act is erroneous, for the following reasons.

73. **First**, it does not give effect to the principle that a statute must be construed as a whole and on the basis that its provisions give effect to harmonious goals.[85] In particular, the majority did not address how its construction of s 141 was to be reconciled with s 29(4) of the Act. That subsection prohibits a court from excluding property from a restraining order unless the court is satisfied that a PPO or a literary proceeds order *cannot* be made against property under the effective control of the suspect. Justice Peter Lyons held that s 141 was not directed to preserving property so that it might be available to satisfy a PPO.[86] If that were correct, the prohibition in s 29(4) would be inexplicable.

74. **Secondly**, the majority's conclusion that s 141 is not directed to property that has been subject to a restraining order (because such property would 'ordinarily' be sold and proceeds would reach the Commonwealth) ignores several aspects of the statutory scheme. Several provisions of the Act contemplate that property that is subject to restraining orders may be applied to satisfy a PPO. Thus:

(a) Section 282 empowers a court that makes a PPO or a restraining order to direct the Official Trustee to satisfy the PPO out of property covered by the restraining order.

(b) Sections 73 and 94 respectively enable a person to apply for the exclusion of property from a forfeiture order or from automatic forfeiture under s 92. If a court makes an order under either provision, s 45(3) ensures that, subject to one relevant exception, a restraining order would cease to apply

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81 [2016] QCA 215 at [1268].
82 [2016] QCA 215 at [1261]-[1266].
83 [2016] QCA 215 at [1268].
84 [2016] QCA 215 at [1268].
85 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]-[70] (McHugh, Gummow, Kirby and Hayne JJ); *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 at [31] (French CJ, Hayne, Kiefel and Nettle JJ).
86 [2016] QCA 215 at [1262].

to the excluded property. The exception is where there is another 'confiscation order' (which includes a PPO)[87] in force, or an undetermined application for another 'confiscation order'. In such a case, the restraining order remains in force.

(c) Section 45(5) provides that a restraining order ceases to be in force if a PPO relating to the same offence or offences is satisfied, discharged or ceases to have effect, or if the property covered by the restraining order is sold or disposed of to satisfy the PPO.

10 These provisions, none of which Peter Lyons J addressed, demonstrate that property that is subject to a restraining order need not be forfeited, and that one purpose of restraining orders is to facilitate the satisfaction of a PPO.

75. **Thirdly**, the Act creates a new regime for the making of orders that, if made, necessarily deprive a person of 'effective control' of property that they previous controlled, whether through restraining orders, orders under s 38 providing for the Official Trustee to take custody and control of property, and forfeiture orders subsequent to conviction.[88] It would be anomalous to treat the loss of 'effective control' caused by the operation of other parts of the Act as preventing the making of an order under s 141.

20 76. By way of illustration, if property is forfeit following conviction, and that property then becomes the subject of an application under s 102,[89] the majority's interpretation would have the consequence that the relevant property could not be subject to an order under s 141 to ensure that it is available to satisfy the PPO. It would not matter that the property had been restrained because it was under X's effective control; that it had been treated by the court making the PPO as forming part of the benefits derived from the commission of serious offences by X; and that the PPO had not been satisfied. All that would matter is that, because the property had been forfeit to the Commonwealth, it was not under X's effective control *at the time* of the s 141 proceeding. The consequence would be that the assets that would
30 have been available to satisfy a PPO had they not been restrained or forfeit may no longer be available to satisfy such an order, because such assets may have to be returned under s 102 (including to people who may have had some involvement in the offending that led to the PPO). That is particularly likely given the majority's construction that property is derived from unlawful activity only if it is *wholly* derived from unlawful activity. Such considerations demonstrate that the majority's literal interpretation of s 141(1)(c) is at odds with the statutory scheme as a whole.

77. **Fourthly**, in addition to s 141, ss 29(4), 102(2) and s 116(3) of the Act all refer to property that 'is' subject to a person's effective control notwithstanding the fact that a restraining order applies to that property. The majority in the Court of Appeal

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87 Act, s 338.

88 [2016] QCA 215 at [268]-[278].

89 It is worth recalling that, on the majority's construction, property would not be precluded from being transferred under s 102 of the Act unless it was *wholly* derived from unlawful activity.

recognised that the terms of at least ss 102(2) and 116(3) should not be interpreted literally.[90] But despite that recognition, and the closely analogous context, the majority gave the word 'is' in s 141(1)(c) a different, and literal, interpretation.[91]

78. **Fifthly**, authorities decided in the context of the 1987 Act establish that the phrase 'is…subject to the effective control' were not to be construed in a strict temporal sense. In *Logan Park Investments Pty Ltd v Director of Public Prosecutions (Cth)* (***Logan Park***),[92] the appellants sought to exclude certain property from restraining orders after the conviction of a Mr McCauley for drug offences. Section 48(3)(fa)(iii) required the court to grant the application if satisfied that 'the applicant's interest in the property is not subject to the effective control of the defendant'. The New South Wales Court of Appeal rejected the appellants' submissions that Mr McCauley had no effective control because he was in prison and because restraining orders had been made.[93] The Court held, instead, that s 48(3)(fa)(iii) had to be construed as if it referred to effective control at the date of the restraining order.[94]

79. The reasoning in *Logan Park* highlights another incongruity of the majority's construction. Where property has been covered by a restraining order on the basis it is under a person's effective control, and that person is then convicted of an indictable but not serious offence, there would be no automatic forfeiture under s 92. In such a case, the reasoning in *Logan Park* suggests that, in order to give s 141(1)(c) operation, the date of effective control would have to be the date of the restraining order, not the date when the application is determined.[95] Yet on the majority's construction, a conviction for a serious offence would lead to a different date of effective control. It is difficult to see why the legislature would have intended to bring about that result, particularly since it would make s 141 much harder to satisfy in the case of a conviction for a serious offence.

80. **Sixthly**, to construe s 141(1)(c) as referring to effective control at the date of the restraining order would not be to 'go well beyond the objects of the Act'.[96] The objects of the Act are not limited to depriving persons of the proceeds and instruments of offences; they extend to depriving persons of the benefits of offences.[97] In this case, the properties that would be covered by the order under s 141 are the benefits of Mr Hart's offences.

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90 [2016] QCA 215 at [1217]-[1218] (on s 102(2)), [1264] (on s 116) (Peter Lyons J, with whom Douglas J agreed). On s 29(4) of the Act, see also *Director of Public Prosecutions (Cth) v Hart (No.2)* [2005] 2 Qd R 246 at [9] (McPherson JA), cited by Peter Lyons J at [1258].

91 It is well established that the use of 'is' or other verbs in the present tense in a statute need not lead to a literal construction: see, for example, the observations in *Gaffey v Chief Commissioner of State Revenue* [2000] NSWSC 403 at [12] (Young J) and *Hunt v The Queen* [2010] NZCA 528 at [23].

92 (1994) 122 FLR 1 at 2.

93 (1994) 122 FLR 1 at 3.

94 (1994) 122 FLR 1 at 3. That judgment was followed, in the context of s 28(3) of the 1987 Act, in *Commonwealth v Ross William Macarthur*, Unreported, District Court of New South Wales, 15 July 2004 at 23 (Judge Dodd).

95 (1994) 122 FLR 1 at 3.

96 [2016] QCA 215 at [1268] (Peter Lyons J).

97 Act, s 5(a).

81. **Finally**, the above interpretation would not oblige a court to disregard any later changes in ownership or *de facto* control of property. Nothing in the terms of s 141, or in the scope and subject matter of the Act,[98] would prevent a court from taking those matters into account in exercising the discretion whether to make an order under s 141 of the Act.

82. Accordingly, s 141(1)(c) ought to have been regarded as satisfied. The majority erred in holding otherwise.

(B) THE DISPUTED ASSETS

83. The legal points addressed above were directly relevant to the manner in which the Court of Appeal dealt with the eight disputed assets. In particular:

(a) The majority's construction of the words 'not derived or realised' in s 102(3)(a) was central to its findings about the Sea Fury, the North American T-28 VH-SHT and the proceeds of 27 Samara Street, Sunnybank Hills, as well as its finding about the Mercedes Benz (which was contingent on its finding about the Sea Fury).

(b) The majority's conclusion that the question whether property is 'derived' from unlawful activity is concerned with how a relevant entity acquired its interest in the property[99] was directly relevant to its findings about the North American Trojan VH-AVC, as well as to its findings about 6 Merriwa Street, Sunnybank Hills and Doonan's Road, Grandchester.

(c) The majority's failure to consider, and errors in its construction of, the money laundering offences created by s 82 of the 1987 Act and s 400.9 of the Criminal Code were relevant to whether the Sea Fury, the North American T-28 VH-SHT and the North American Trojan VH-AVC were 'lawfully acquired' for the purposes of s 102(3)(b) and/or 'used in, or in connection with' unlawful activity for the purposes of s 102(3)(a).

(d) The majority's narrow approach to applying the words 'used in, or in connection with...any unlawful activity' in s 102(3)(a) was central to its findings that neither Hangar 400 nor Doonan's Road, Grandchester had been used in connection with the Perpetual offences.

84. We address each of the eight assets in turn.

(i) Sea Fury

85. The Sea Fury aircraft was purchased with six payments totalling $644,335.82 in the period between 17 December 1999 and 19 October 2000.[100] Two payments by Merrell, representing $185,566, were made on 14 February 2000 and 16 October

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98 *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 39-40 (Mason J).

99 [2016] QCA 215 at [1108].

100 [2016] QCA 215 at [1018] (Peter Lyons J). See also at [609] (Morrison JA).

2000. Another payment, representing $382,141.93, was made by Unlimited Aero Maintenance (**UAM payment**) on 16 October 2000.[101]

86. The respondents did not challenge the primary judge's finding that he was not satisfied that the Merrell payments were not sourced from indictable offences involving UOCL.[102] Further, the majority of the Court of Appeal was not satisfied that $300,000 of the UAM payment had not been derived indirectly from offences involving UOCL.[103] Thus, the respondent companies failed to satisfy the majority that $485,566 out of $644,335.82 (or 72% of the sum used to purchase the aircraft) was not derived from unlawful activity.[104]

87. The majority of the Court of Appeal nonetheless held that the Sea Fury was not derived from unlawful activity because they construed s 102(3)(a) as requiring an applicant to demonstrate that their interest in property was not wholly derived or realised from unlawful activity.[105] That construction was mistaken for the reasons outlined above.

88. Further, the UOCL offences that Mr Hart was found to have committed were indictable offences.[106] The primary judge found that practically all of Merrell's funds were derived or realised, directly or indirectly, from UOCL.[107] His Honour found that Mr Hart exercised a high degree of control over the day to day operations of UOCL and Merrell; indeed, he suspected that Mr Hart's influence was such that he could determine whether Merrell made loans to the respondents or demanded repayment and could determine the conditions of the loans.[108] The primary judge stated:[109]

> I am not satisfied that any funds Merrell has provided in relation to the assets the subject of these proceedings were not derived from unlawful activity. Further, on a related issue, I am satisfied that any funds Merrell or UOCL has provided in relation to the assets the subject of these proceedings "may reasonably be suspected of being proceeds of crime" within the meaning of those words in section 82(1) of POCA 1987 (repealed).

89. His Honour also found that Mr Hart was in effective control of the respondents during the period that the UOCL offences were committed.[110] In addition, Mr Hart

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101 [2016] QCA 215 at [1020]. See also at [609].
102 [2016] QCA 215 at [1019].
103 [2016] QCA 215 at [1020]-[1026] (Peter Lyons J). See also [612]-[631] (Morrison JA).
104 [2016] QCA 215 at [1027].
105 [2016] QCA 215 at [1027].
106 See *Commonwealth Director of Public Prosecutions v Hart* [2010] QDC 457 at [57], [532] (Andrews DCJ) (explaining that the offences that Mr Hart was found to have committed were 'serious offences', which the Act defines as certain indictable offences). See also the primary judge's reasons: [2013] QDC 60 at [287].
107 [2013] QDC 60 at [76].
108 [2013] QDC 60 at [77].
109 [2013] QDC 60 at [81].
110 [2013] QDC 60 at [292].

was aware of whatever funds were paid by either UOCL or Merrell to the respondents or other companies in the Hart group of companies.[111]

90. None of these findings was challenged. It follows that Merrell's disposing of the $185,566 in the purchase of the Sea Fury would have contravened s 82 of the 1987 Act. So would the bringing into Australia, receiving, possessing and disposing of the $300,000.

91. Despite the above matters, the majority in the Court of Appeal appeared to assume that because the Sea Fury was not wholly derived from unlawful activity, the other conditions in s 102(3)(a) and (b) were automatically satisfied.[112] That approach is irreconcilable with the terms of s 102. The section plainly requires a court to be satisfied of all the conditions in s 102(3), not just one of them.

92. Further, the contraventions of s 82 of the 1987 Act were relevant to whether the Sea Fury was 'acquired lawfully' within the meaning of s 102(3)(b). The Sea Fury could not have been acquired lawfully if contraventions of s 82 of the 1987 Act had been committed in the process of acquiring it. Since the respondent companies bore the onus of establishing lawful acquisition,[113] and the appellants had denied that the Sea Fury was lawfully acquired,[114] the failure of the majority to consider that issue disclosed error.

93. Similarly, the contraventions of s 82 of the 1987 Act were relevant to whether the Sea Fury was 'used in, or in connection with', any unlawful activity within the meaning of s 102(3)(a). As explained in paragraphs 39 to 41 above, there is clear authority that the phrase 'in connection with' in s 102(3)(a) does not require a substantial connection or link between the use of the property and the unlawful activity. Nor does it require that the property be essential or necessary for the commission of that activity.

94. In this case, the interest of the respondent companies in the Sea Fury immediately before forfeiture was not limited to the physical aircraft; it included the legal interest in the aircraft.[115] That interest was transferred to the respondent companies in return for payments which included $185,566 by Merrell and $300,000 by UAO. If (as submitted above) the Merrell and UAO payments involved contraventions of s 82 of the 1987 Act, then the legal interest in the aircraft was used in connection with those contraventions. There would be a clear connection between the unlawful activity and the use of the legal interests.[116] The failure of the majority to consider the issue therefore involved error.

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111 [2013] QDC 60 at [295].

112 Their Honours did not discuss these conditions.

113 Act, s 317.

114 Updated Further Further Amended Points of Defence, para 42.

115 *Commonwealth Director of Public Prosecutions v Hart* [2005] 2 Qd R 246 at 257 [20] (McPherson JA) (holding that 'property' under the Act was capable of referring to either or both the object owned and the interest in it).

116 See [2016] QCA 215 at [110] (Morrison JA) (summarising statements in earlier authorities).

(ii) North American T-28 VH-SHT

95. There was no dispute in the Court of Appeal as to the primary judge's finding that $83,100 out of $282,100, or approximately 29% of the purchase price of the North American T-28 VH-SHT, was derived from unlawful activity.[117] However, the majority concluded that the aircraft was not derived from unlawful activity because of their construction of s 102(3)(a).[118] On that basis alone, their conclusion is flawed.

96. Further, the $83,100 of the purchase price was paid by Merrell and was found to be derived from offences involving UOCL. Those were all indictable offences.[119] In addition, Mr Hart controlled Merrell and was aware of the transfer of funds from Merrell. The bringing into Australia, receiving, possessing and disposing of the $83,100 therefore contravened s 82 of the 1987 Act. Given that contravention, the aircraft was not 'lawfully acquired' within s 102(3)(b). The failure of the majority to consider the issue, which the respondents had the onus of proving, involved additional error.

97. The majority also erred in failing to consider whether the aircraft was used in, or in connection with, any unlawful activity in s 102(3)(a). Since a legal interest in the aircraft was exchanged in return for the payment of the $83,100 and other payments, the interest in the aircraft was used in connection with the offence under s 82. The majority should have found accordingly.

(iii) Proceeds of 27 Samara Street

98. The errors regarding the proceeds of 27 Samara Street, Sunnybank Hills require some understanding of the Hendon arrangement.

99. The Hendon arrangement was a tax minimisation scheme promoted by Harts Accountants and Auditors. It was developed by Mr Hart and Mr Robert Adcock. The participants in the scheme, the clients of Harts Accountants and Auditors, were trustees of discretionary family trusts.[120] They entered into a joint venture arrangement with Westside Commerce Centre Pty Ltd as trustee for the Hendon Unit Trust (**WCC**). It had accrued substantial losses in 1993 and could not borrow to complete development of a shopping centre in South Australia. Under the original version of the scheme, the participants would appoint WCC as a beneficiary of their trusts and appoint income to it.[121] That income would be isolated from the creditors of WCC by providing that it was only to be paid over to the project manager when called for and then only to be used for development purposes. The project manager was Astion Pty Ltd (**Astion**), a company associated with Harts Accountants and Auditors.

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117 [2016] QCA 215 at [1001], [1017] (Peter Lyons J). See also [646]-[647] (Morrison JA).

118 [2016] QCA 215 at [1017].

119 See *Commonwealth Director of Public Prosecutions v Hart* [2010] QDC 457 at [57], [532] (Andrews DCJ) and the primary judge's reasons [2013] QDC 60 at [287].

120 There were 52 participants.

121 On 30 June 1995, the trustee of the Hendon Unit Trust was changed to Astion Pty Ltd.

100. The participants did not declare appointed income in the 1993, 1994 and 1995 financial years. They were later assessed as being liable to primary tax and penalty tax on the basis of recklessness of their tax agent, Harts Australasia Ltd.[122] In some cases, WCC had not been properly nominated as beneficiary of the relevant participant's trust; in other cases, the joint venture agreement was a reimbursement agreement.[123]

101. Of the income appointed to WCC under the scheme, 10 per cent was paid to Astion and two percent paid to Tinkadale Pty Ltd, another company associated with Harts Accountants and Auditors. A total of $12,031,072 in income was purportedly appointed to WCC, of which Astion received approximately $1.2 million.[124] Astion in turn provided amounts to entities associated with Mr Hart, including the respondents.

102. 27 Samara Street was purchased with a sum of $45,000 that came from Astion and a sum of $100,000 that was borrowed from the ANZ.[125]

103. The primary judge was not satisfied that the $45,000 provided by Astion for the acquisition of 27 Samara Street did not come from the Hendon arrangement,[126] and, in turn, was not satisfied that fees derived from the Hendon arrangement were not derived or realised from unlawful activity, these being contraventions of s 8N of *Taxation Administration Act 1953* (Cth).[127] He also found that it was unlikely that the ANZ would have lent 100 per cent of the purchase price and therefore that the property would have been purchased without the contribution lent by Astion.[128] None of these findings were disturbed on appeal.[129]

104. Unlike the primary judge, the majority held that the proceeds of 27 Samara Street were not derived from any unlawful activity. Their conclusion depended on the construction of 'not derived or realised' in s 102(3)(a) as meaning 'not wholly derived or realised'.[130] As that construction is erroneous, the conclusion cannot stand. Indeed, the circumstances attending the purchase of 27 Samara Street—where the property would not have been acquired absent the unlawfully derived funds—illustrate the anomalous results of their construction.

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122 [2016] QCA 215 at [483(n)].

123 [2016] QCA 215 at [949]-[950].

124 [2013] QDC 60 at [327].

125 [2016] QCA 215 at [1159]-[1160] (Peter Lyons J).

126 [2013] QDC 60 at [346], [801].

127 [2013] QDC 60 at [336]. The primary judge noted that Harts Australasia Ltd had received legal advice that the effectiveness of the clients' resolutions appointing WCC depended on the terms of the clients' trust deeds and whether the terms authorised the appointments. However, the advice was not followed.

128 [2013] QDC 60 at [807].

129 [2016] QCA 215 at [968], [1165], [1168] (Peter Lyons J, with whom Douglas J agreed). See also at [509], [721] (Morrison JA).

130 It is, however, difficult to identify from the reasons of Peter Lyons J what 'other funds' related to the purchase of the property were lawfully derived. Insofar as Peter Lyons J suggested that there were other lawful sources of funds, those sources are obscure. It is submitted that the only sources for the sums used to acquire 27 Samara Street were $45,000 from Astion and $100,000 from the ANZ.

(iv) Mercedes Benz

105. The primary judge was not satisfied that the Mercedes Benz was not derived or realised from unlawful activity. His Honour reached that conclusion after finding that the vehicle had been purchased from the receiver and manager of Nemesis using money lent by Dr Fleming; that the loan had been secured by a charge over the Sea Fury; and that Dr Fleming would not have made the loan without that security.[131]

106. The majority in the Court of Appeal found that the Mercedes Benz was not derived from unlawful activity because the Sea Fury was not derived from unlawful activity.[132] Since the majority's finding about the Sea Fury's derivation is mistaken, its finding about the Mercedes Benz is also mistaken.

(v) North American Trojan VH-AVC

107. The majority accepted that some 18% of the total funds expended on the North American Trojan VH-AVC were from tainted sources, because it was ultimately sourced from UOCL.[133] However, the majority held that, because these funds were used for restoration and repairs, the North American Trojan VH-AVC was not derived from unlawful activity.[134]

108. The majority further held that even if restoration and repair costs could be taken into account, the proportion of the total funds so spent was not sufficient to show that the interest was derived from unlawful activity.[135]

109. Both these conclusions are mistaken, being based on errors in the construction of 'derived' in s 102(3)(a) of the Act.

110. Further, both s 82 of the 1987 Act and s 400.9 of the *Criminal Code* (Cth) were in force at the time of the repairs of this aircraft.[136] The majority found that it was not reasonable to suspect that the aircraft was derived from the commission of an offence because the expenses involved in repairing and restoring the aircraft were not relevant to derivation.[137] For that reason, they held that it was unnecessary to determine whether the aircraft was used in or in connection with unlawful activity.

111. The majority's reasoning ignores the likelihood that each time the respondents (or another person) received and disposed of money or other property sourced from UOCL, they committed an offence. As outlined above, the primary judge had found that any funds Merrell or UOCL provided in relation to the assets in the proceedings 'may reasonably be suspected of being proceeds of crime' within

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131 See [2016] QCA 215 at [1196]-[1197] (Peter Lyons J) (summarising the findings).
132 [2016] QCA 215 at [1199] (Peter Lyons J).
133 [2016] QCA 215 at [1096] (Peter Lyons J).
134 [2016] QCA 215 at [1108].
135 [2016] QCA 215 at [1109].
136 The repairs took place between 2003 and 2005: see [2016] QCA 215 at [1095]. The provisions were in effect during that time.
137 [2016] QCA 215 at [1115].

s 82(1) of the 1987 Act.[138] Section 400.9 would have applied in essentially the same way. The primary judge had found, moreover, that Mr Hart was in effective control of the respondents[139] and was aware of whatever funds were paid by UOCL to Merrell, and by either UOCL or Merrell to the respondents or other companies in the Hart group of companies.[140] His Honour had concluded:[141]

> Where UOCL funds or Merrell funds were received by the Companies, Harts Consulting, HAL or other companies of which Mr Hart was in effective control or an agent I am suspicious that an offence against s 82(1) of POCA 1987 or Criminal Code 1995 (Cth) Section 400.9 was committed by the recipient.

112. These findings were not challenged. On the basis of those findings, each time the respondents expended funds that were reasonably suspected of being proceeds of crime[142] in repaying the loan for restoring or repairing the North American Trojan VH-AVC, they committed offences under s 82 of the 1987 Act or s 400.9 of the *Criminal Code* (Cth). The aircraft was therefore used in, or in connection with, that unlawful activity. The majority erred in holding otherwise.

(vi)-(viii) Doonan's Road, Hangar 400 and 6 Merriwa Street

113. Doonan's Road and 6 Merriwa Street were mortgaged to the National Australia Bank (**NAB**) to secure an overdraft facility provided to Nemesis Australia Pty Ltd (**Nemesis**).[143] The NAB had issued a notice of termination of the bill facility; demanded immediate payment of $2.3m and $1.05m; and issued a notice of default and demand to Nemesis and a notice of exercise of power of sale over all the assets of the third respondent.[144]

114. Yak 3 Investments Pty Ltd (**Yak 3**)[145] and Bubbling Springs Pty Ltd (**Bubbling Springs**)[146] borrowed $650,000 each from Perpetual for the purpose of lending the money to Nemesis, to enable Nemesis partially to repay its debt to the NAB.[147]

115. The Commonwealth alleged that offences under s 408C(l)(f) of the *Criminal Code* (Qld) were committed in obtaining these loans. That section relevantly provides:

> (1) A person who dishonestly—
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> ...
>
> (f) induces any person to do any act which the person is lawfully entitled to abstain from doing;
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> ...
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> commits the crime of fraud.

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138 [2013] QDC 60 at [81].
139 [2013] QDC 60 at [293].
140 [2013] QDC 60 at [295].
141 [2013] QDC 60 at [296].
142 Because they came from UOCL.
143 Being the third respondent to B22 of 2017.
144 [2016] QCA 215 at [682]-[684].
145 Being the first respondent to B22 of 2017.
146 Being the second respondent to B22 of 2017.
147 $1.75m borrowed from Equititrust Ltd was also used to pay out the loans to the NAB.

...

(3) For the purposes of this section—

(a) property, without limiting the definition of property in section 1, includes credit, service, any benefit or advantage, anything evidencing a right to incur a debt or to recover or receive a benefit, and releases of obligations…

116. The Commonwealth had alleged that Yak 3 and Bubbling Springs, in contravention of s 408C(l)(f), made fraudulent representations to Perpetual to induce Perpetual to lend them funds. To be more specific, Yak 3 and Bubbling Springs and the guarantors had signed loan documents with a clause (clause 16) in this form:[148]

> The Borrower and Guarantor represent and acknowledge that they are entering into this agreement of their own volition and are not doing so on behalf of Steven Irvine Hart nor any associated company with which he is associated. Neither Steven Irvine Hart nor any associated company is indemnifying us as to the repayment of the loan. We make this representation acknowledging that the lender is relying upon this representation in approving the loan facility.

117. The Commonwealth alleged that, in reality, two of the directors (Dr Ambler and Dr Fleming) who had provided guarantees and signed the documents had been indemnified by Mr Hart by being given options over hangar 400 and Doonan's Road, respectively; Yak 3 and Bubbling Springs were under Mr Hart's effective control; and those who signed the documents knew that the representations they were making were false.

118. The primary Judge was not satisfied that no offences had been committed in obtaining the two loans from Perpetual, and the Court of Appeal found that that finding was not erroneous.[149]

Hangar 400 and Doonan's Road

119. Despite rejecting the Hart companies' attack on the primary judge's findings, the majority found that Hangar 400 and Doonan's Road, had not been used 'in connection with' any unlawful activity within s 102(3)(a), the relevant unlawful activity being the fraudulent inducement contrary to s 408C(l)(f) of the *Criminal Code* (Qld). The majority found that while those properties were used in connection with the loans, they were not used in connection with the inducement.[150]

120. That approach to s 102(3)(a) was erroneous. As explained above, the words 'used…in connection with…any unlawful activity' are of wide scope. Even accepting that those words do not include uses of the property that have only a tenuous or remote connection with unlawful activity,[151] the connection here was

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148 See [2016] QCA 215 at [984] (quoting the relevant clause).

149 [2016] QCA 215 at [431]-[479] (Morrison JA), [978]-[999] (Peter Lyons J).

150 [2016] QCA 215 at [1143] (Peter Lyons J) (on hangar 400), [1193] (on Doonan's Road).

151 See [2016] QCA 215 at 113 (Morrison JA); *Director of Public Prosecutions (SA) v George* (2008) 102 SASR 246 at [62]-[65] (Doyle CJ); *Chalmers v R* [2011] VSCA 436 at [77]; *Dickfoss v Director of Public Prosecutions* (2012) 165 NTR 12 at [14], [18] (Riley CJ).

neither remote nor tenuous. It was direct. The properties were used as security in the process of applying for the loans, and there was nothing to suggest that Perpetual would have made the loans to Yak 3 and Bubbling Springs without them. The loan process, moreover, was fraudulent. In those circumstances, the majority's finding that there was no connection between the use of the properties and the unlawful activity cannot be sustained.[152]

6 Merriwa St and Doonan's Road

121. The majority also erred in finding that 6 Merriwa Street and Doonan's Road were not derived from unlawful activity. Justice Peter Lyons treated the part-payment of NAB's mortgage by use of the Perpetual funds as irrelevant. His Honour did so because he took the view that the interest in the properties was the same before and after the loan by Perpetual; before the loan it was mortgaged to one entity and after the loan to another.[153] In relation to Doonan's Road, he also found that, in any event, at the time of forfeiture, the loan had been paid off with money borrowed from Equititrust Ltd.[154]

122. The majority's approach to derivation was erroneous. It has the result that the payment of a mortgage over property, using funds obtained from unlawful activity, would never be relevant to derivation. There is no authority that supports that proposition. Nor do the words of s 102(3)(a) permit it.

123. In addition, the fact that Equititrust Ltd supplied funds for part-payment of the loan to the NAB does not deny that funds from the Perpetual offence were used to pay off a mortgage.

124. Further, in relation to Doonan's Road, the majority only considered the interest of Bubbling Springs after payment of the loan to the NAB, not the interest of Nemesis. Nemesis' interest after payment of the loan was not the same as it was before; after payment, its interest was no longer subject to the mortgage to the NAB.

125. For those reasons, the majority's findings about 6 Merriwa Street and the Doonan's Road involved error.

(C) DISCRETION

Exercise of discretion under s 102 in appeal B22 of 2017

126. In the alternative, with respect to the assets in appeal B22 of 2017, the Court of Appeal should have held that the primary judge's discretion to grant relief under s 102 miscarried.

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152 See [2016] QCA 215 at [694] (Morrison JA).
153 [2016] QCA 215 at [1155] (Peter Lyons J) (on 6 Merriwa St), [1193] (on Doonan's Road).
154 [2016] QCA 215 at [1193] (Peter Lyons J).

Relevant considerations

127. The primary judge held that there was no need to ascertain the factors relevant to the exercise of the discretion under s 102(1) from the subject-matter, scope and purpose of the Act because the relevant factors were 'expressly stipulated' in s 102(3).[155] Morrison JA was correct in holding that that approach erroneously conflated the factors that could be taken into account in exercising the court's discretion with the preconditions to the exercise of that discretion.[156] It had the result that the primary judge mistakenly proceeded on the footing that, once the preconditions necessary to enliven the discretion were established, nothing more remained to be considered. As Morrison JA put it, the primary judge 'construed s 102(3) as exhaustively stating the factors to be taken into account when exercising the discretion under s 102(1)'.[157] That was plainly erroneous because, as Morrison JA recognised, it 'would mean that there was no discretion under s 102(1) once the factors in s 102(3) were established', thereby turning the 'may' into a 'must'.[158] The result of his erroneous construction of s 102 was that the primary judge held that the question of Mr Hart's effective control of the property was *irrelevant* to the exercise of discretion under s 102(1), in the sense that 'the court's discretion under POCA s 102(3) would miscarry' if it found against an applicant on that basis.[159] On that approach, s 29(4) was treated as irrelevant to the matters to be considered under s 102(1), despite the strong nexus it suggested between the restraint of property and the availability of that property to meet a PPO (the point being that, but for the forfeiture under s 92 that enlivened the possibility of an order being made under s 102, the restrained property would have been available to meet the PPO).

128. The majority in the Court of Appeal did not grapple with the above error. Indeed, aspects of the reasoning of the majority suggest the same error in conflating preconditions with relevant considerations.[160] The majority declined to set aside the primary judge's exercise of discretion, holding that he was correct in holding that the effective control of the property at the date of the restraining orders was an *irrelevant* consideration,[161] as was the fact that an undischarged PPO had been made against Mr Hart.[162] The majority so held partly in reliance on the terms of s 102(2), and partly in reliance on s 141.

129. Contrary to the majority's reasoning, the fact that s 102(2), in contrast to s 102(3), refers to proof of the *absence* of effective control as one of the preconditions to the discretion under s 102(1) being enlivened does not render the *presence* of effective control *irrelevant* to the court's discretion where that discretion is enlivened

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155 [2013] QDC 60 at [154]-[155].
156 A point recognised by Morrison JA: [2016] QCA 215 at [304], [309]-[310].
157 [2016] QCA 215 at [309].
158 [2016] QCA 215 at [309].
159 [2013] QDC 60 at [169].
160 [2016] QCA 215 at [1219] (Peter Lyons J).
161 [2016] QCA 215 at [1220] (Peter Lyons J).
162 [2016] QCA 215 at [1223]-[1226] (Peter Lyons J).

because the conditions in s 102(3) are satisfied.[163] Indeed, the structure of s 102 suggests that the same discretion under s 102(1) – to be exercised by reference to the same discretionary considerations – arises irrespective of whether the court is satisfied of the matters in s 102(2) or 102(3).

130. Further, the majority's reliance on s 141 as providing the mechanism to determine whether property that is *not* the property of a person the subject of a PPO will be available to satisfy the PPO is inconsistent with the majority's construction of s 141, which is that s 141 *does not apply at all* to property that had been subject to restraining orders and had then been forfeited to the Commonwealth. It is internally inconsistent to reason that Parliament intended to preclude a court from considering the issue of effective control as a discretionary matter under s 102(1), because the relevant issue could be addressed under s 141, and then to hold that s 141 has no application to property that is subject to s 102. The majority have interpreted the scheme so as to introduce a situation where there is no mechanism by which a court can consider whether property forfeit under s 92 should be kept available to satisfy a PPO.

131. For the above reasons, the majority erred in failing to set aside the primary judge's exercise of discretion under s 102 of the Act.

Valuation of interests

132. There is a further discrete issue as to the manner in which the majority declared the value of the applicant's interests under s 102(1)(c). That section requires the Court to determine the value of the applicant's interest in property immediately before forfeiture.[164] At that time, 6 Merriwa Street, 27 Samara Street, and Doonan's Road (the **three properties**) were subject to fixed charges in favour of Merrell. The amounts that the charges secured were considerable; the primary judge estimated that it totalled $1.6m.[165]

133. The majority declared the monetary value of the respondents' interests in the three properties. Yet they treated the charges as if they could have no effect on the value of the respondents' interests,[166] and relied on the subsequent forfeiture of charges to the Commonwealth and on the net proceeds of sale after forfeiture.[167] That approach was flawed, for three reasons.

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163 So much was correctly accepted by Morrison JA: see [2016] QCA 215 at [302]-[303], noting that 'it can hardly be thought that the legislature viewed it [effective control] as a disqualifying feature for innocent applicants, but irrelevant to the discretion to grant relief to applicants who were actually involved in the offence'.

164 As recognised by the form of orders made by the Court of Appeal: see, for example, orders 4, 5 and 6 of the orders made on 8 November 2016: [2016] QCA 284.

165 [2013] QDC 60 at [23], [472], [793].

166 [2016] QCA 215 at [1242]-[1243] (Peter Lyons J).

167 See [2016] QCA 284 at [13] (Peter Lyons J).

134. **First**, even if a charge does not transfer title or possession to a beneficiary,[168] the charge may affect the value of an interest in property subject to it.[169]

135. **Secondly**, the fact that the charges were later forfeited to the Commonwealth cannot logically affect the value of the respondents' interest before forfeiture. The majority's approach means, in effect, that the applicants for orders under s 102 obtained a windfall as a result of what occurred after forfeiture. That cannot have been Parliament's intention.

136. **Thirdly**, there was no evidence of the value of the respondents' interests in the three properties (as opposed to the value of the properties) before the Court of Appeal.[170] The reasons of the Court of Appeal that accompanied the orders of 8 November 2016 disclose that the majority purported to rely on the affidavit of Gary Hobson.[171] However, that affidavit was not in evidence before the primary judge or the Court of Appeal, as the Commonwealth parties pointed out in their submissions below.[172]

137. The reasons of Peter Lyons J also refer in passing to the affidavit of Vanessa Goodey.[173] But even assuming that affidavit to have been properly adduced in evidence,[174] it could not have supplied evidence of the value of the three properties.[175] The affidavit was prepared for the purpose of the pecuniary penalty proceedings and the deduction that was required under s 130 of the Act.[176] That section provides:

> The *penalty amount under a *pecuniary penalty order against a person is reduced by an amount equal to the value, as at the time of the making of the order, of any property that is *proceeds of the offence to which the order relates if:
>
> (a) the property has been forfeited, under this Act or another law of the Commonwealth or under a law of a *non-governing Territory, in relation to the offence to which the order relates; or
>
> (b) an application has been made for a *forfeiture order that would cover the property.

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168 *In re bank of Credit and Commerce International SA (No 8)* [1998] AC 214 at 226 (Lord Hoffman).

169 See *United Travel Agencies Pty Ltd v Cain* (1990) 20 NSWLR 566 at 572 (Young J).

170 The Commonwealth parties filed written submissions about these matters on 26 March 2015 and 27 August 2016. The majority was therefore mistaken to claim that the Commonwealth parties did not submit that some allowance should be made by reason of the Merrell charge: [2016] QCA 284 at [13].

171 [2016] QCA 284 at [15].

172 The affidavit of Gary Hobson sworn 6 May 2013 was never read into evidence. On 27 August 2016, the respondents simply appended a copy of the affidavit of Mr Hobson (minus the exhibits) to their submissions about the form of orders.

173 [2016] QCA 215 at [924].

174 It is at least doubtful whether the affidavit was in evidence: see [2016] QCA 215 at [350]-[361] (Morrison JA).

175 [2016] QCA 215 at [370].

176 The affidavit, however, was not relied upon because the parties to the pecuniary penalty proceedings reached agreement that the value of the deduction was $4.8 million: see [2016] QCA 215 at [349].

138. In terms, s 130 is concerned with the value, at the time of making the PPO,[177] of any property which is proceeds of the unlawful activity to which the PPO relates and which has been forfeited to the Commonwealth. It does not matter how many persons may have an interest in that forfeited property; the size of the reduction is the same. By contrast, s 102(1)(c) refers to the value of an applicant's interest at the time immediately before forfeiture, and it is not limited to offences to which the PPO relates.[178] The values mentioned in ss 130 and 102(1)(c) are plainly different.

139. Even if those difficulties could be overlooked, Ms Goodey's affidavit did not take account of registered mortgages over each of the three properties at the time of forfeiture. Nor did it mention the Merrell charges. It was therefore incapable of supplying evidence of the value of the respondents' interest in each asset.[179]

140. Accordingly, the majority erred in declaring the value of the three properties.

Exercise of discretion under s 102 in appeal B23 of 2017

141. With respect to the assets that are in issue in appeal B23 of 2017, being assets where the majority set aside the decision of the primary judge to refuse to make orders under s 102, the Court of Appeal erred in exercising its discretion under s 102(1) to make the orders sought.

142. On the majority's construction of s 102(3)(a), a person could acquire property with funds almost entirely derived from unlawful activity, and yet would still satisfy s 102(3)(a), because the property would not have been *wholly* derived from unlawful activity. If s 102(3)(a) is construed in that way, then it should follow that the critical matter that informs the exercise of the discretion under s 102(1) is the *extent* to which the interest in property that is the subject of the application was derived from unlawful activity. Unless that is required to be considered as a discretionary matter, the result would be that the court could order the Commonwealth under s 102(1)(d) to pay an applicant an amount that substantially comprised the benefits of unlawful activity, without even been required to consider whether that was appropriate.[180] The subject matter, scope and purpose of the Act point so strongly against that construction that it is necessarily implicit that the

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177 That was 19 November 2010.

178 For that reason, s 130 would not have allowed a deduction for anything that might have been proceeds of the Perpetual offences or the offence arising from the Hendon arrangement.

179 A fact recognised by Morrison JA: see [2016] QCA 215 at [370].

180 UOCL received $19,168,097.77 from the UOCL offences: [2013] QDC 60 at [57]. Between July 1998 and 15 May 2001, Nemesis received $230,000; Harts Australia Ltd $1,170,000; Harts Consulting $2,674,567.97; and Merrell $5,264,170.18 directly from UOCL: [2013] QDC 60 at [395]. The applicants received money directly or indirectly from Merrell and received funds from Harts Consulting, Harts Australia, Unlimited Business Consultants or Nemesis: [2013] QDC 60 at [393]. UOCL continued to receive proceeds from the offences and to transfer money to Merrell, which in turn transferred money to other companies including Nemesis, Flying Fighters Maintenance and Restorations, Harts Consulting, Harts Financial Services, Sea Fury Investments and Federal Financial Group Inc.: Appendix 5 to Mr Vincent's Report 21 October 2010.

extent to which the relevant interest in property derived from unlawful activity is a mandatory consideration.[181]

143. The majority found that applicants for the orders under s 102:

(a) had failed to demonstrate that more than 28 percent of the funds used to purchase the Sea Fury came from lawful sources; and

(b) had failed to demonstrate that lawful funds from the ANZ would have been provided for the purchase of 27 Samara Street without the $45,000 supplied by Astion from the Hendon arrangement.

144. Further, the majority's findings with regard to the North American T-28 VH-SHT suggested that offences under s 82 of the 1987 Act had been committed in spending money repairing and restoring that aircraft.

145. In light of the above matters, and also having regard to the majority's construction of s 141, if orders were made under s 102 in relation to the above property, the Commonwealth would have no means under the Act of applying any part of the value of the above property to satisfy a PPO of over $14.75 million, notwithstanding the fact that a substantial part of the value of each of the above assets was derived from unlawful activity.

146. In these circumstances, the majority erred in exercising the discretion conferred by s 102(1), and should have refused relief with respect to each of the assets the subject of the appeal in B23 of 2017.

Primary judge's exercise of discretion under s 141 miscarried

147. If the majority's construction of s 141 is found to be erroneous, the primary judge's exercise of discretion should be found to have miscarried.[182]

148. **First**, the primary judge's exercise of discretion under s 141 was founded on a legally false premise; namely, that if an asset was derived substantially from funds from unlawful activity then it would not be ordered to be transferred under s 102.[183] Contrary to that premise, the majority in the Court of Appeal held that property may attract relief under s 102(3) even if it was substantially derived from funds from unlawful activity, such property falling outside s 102(3) only if wholly derived or realised from unlawful activity. In those circumstances, if the Court of Appeal's construction of s 102(3) is upheld, it follows that the primary judge's exercise of discretion under s 141 was based upon a fundamentally flawed understanding of the circumstances in which property that had been forfeit to the Commonwealth might be subject to an order under s 102, and therefore might need

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181 *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 39-40 (Mason J).

182 By reason of their construction of s 141, the majority did not consider the Commonwealth parties' attack on the primary judge's exercise of the discretion under s 141. This Court is as well placed as the Court of Appeal to consider that issue.

183 [2013] QDC 60 at [873], [875].

to be made the subject of an order under s 141 to ensure that that property is available to meet a PPO.

149. **Secondly**, and relatedly, the primary judge acted upon a wrong principle: his Honour proceeded on the basis that if property had not been found by him to have been substantially used in connection with unlawful activity or derived from unlawful activity under s 102 of the Act, there would (at least absent some special circumstance) be no justification for making an order under s 141 in respect of *other* property.[184] If the majority's construction of 'derived or realised' in s 102(3)(a) as meaning 'wholly derived or realised' is correct, then that approach makes no sense, for on that construction s 141 becomes a critical tool to ensure that assets that were *partly* derived from unlawful activity are available to meet a PPO. Indeed, even on a wider view of 'derived', the primary judge's approach cannot be reconciled with the purpose of s 141, which is intended to allow for property which may have been lawfully derived but which is under the effective control of a person ordered to pay a PPO to be available to be applied to satisfy that PPO.

150. **Thirdly**, the primary judge took into account an irrelevant consideration; namely, that the Commonwealth did not have to account for 'lawfully derived inputs' for property that could not be recovered under s 102 of the Act.[185] The subject matter, scope and purpose of the Act indicate that this is not a matter to which the court can have regard when exercising the discretion under s 141.[186] One of the principal objects of the Act is, relevantly, to deprive persons of the proceeds of offences and the benefits derived from offences against the laws of the Commonwealth.[187] Consistent with that purpose, s 116 of the Act authorises the making of PPOs representing the value of benefits derived from the commission of unlawful activity. That section contemplates that property which, at the time the benefits were derived, was under the effective control of the person subject to the PPO may be used to satisfy the order. Such property includes any property that is recovered under s 102 after being first restrained, and then forfeited under s 92. Moreover, on the majority's construction of s 102(3)(a), an applicant can recover property unless the inputs were wholly unlawfully derived. In this statutory context, it would undercut the purpose of s 141, as well as the purpose in s 5(a) of the Act, if the fact that the Commonwealth did not have to account for 'lawfully derived inputs' for some property under s 102 could be used as a factor against making an order under s 141 in respect of other property.[188]

151. **Fourthly**, the primary judge failed to take into account a mandatory relevant consideration; being the amount of the PPO, and whether that amount could be satisfied without making the order.[189] Reading ss 116 and 141 together, it is

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184 [2013] QDC 60 at [873], [884].

185 [2013] QDC 60 at [873].

186 [2016] QCA 215 at [805] (Morrison JA).

187 Act, s 5(a).

188 Furthermore, as Morrison JA pointed out, if an application under s 102 fails, there is no further occasion under the Act for consideration of the nature, extent or value of the interest that the claimant asserted: [2016] QCA 215 at [802]-[803].

189 As Morrison JA found: [2016] QCA 215 at [810]-[815].

implicit that this is a mandatory consideration. The nexus between a PPO and an order under s 141 appears on the face of s 141, which permits a court to make an order that property be applied to satisfy a PPO. It implicitly requires the court, in exercising its discretion under s 141, to consider the size of the PPO and to determine whether or how the order can be satisfied without recourse to the property that is the subject of the application. Although the primary judge mentioned the PPO at various times in his judgment, his Honour concluded that any sums that the second to fifth respondents derived from unlawful activity 'were more than adequately taken into account by the Commonwealth's remedies in the s 102(1) application'.[190] In reaching that conclusion, his Honour ignored the fact that the PPO was for $14,757,287.35, and that any assets returned to the second to fifth respondents would have only represented a fraction of that amount.

152. **Fifthly**, the primary judge ignored the fact that Mr Hart's unlawful activity had benefited the companies, notwithstanding that particular assets were not substantially used in connection with unlawful activity or derived from unlawful activity for the purposes of s 102(3) of the Act. The refusal to make the order under s 141 meant that the companies obtained a benefit, including a benefit with respect to tainted funds being used on particular assets, which they were allowed to retain in preference to the benefit being available to satisfy the PPO.

153. **Sixthly**, although the primary judge was not satisfied that the fourth and fifth respondents:

(a) had not committed the Perpetual offences;[191] and

(b) had not committed money laundering offences in receiving, possessing or disposing of funds from UOCL or Merrell;

his Honour failed to consider their involvement in the offences when it came to exercising his discretion, contrary to the objects and purpose of the Act.

154. **Finally**, the primary judge's decision to refuse to make an order under s 141 was unreasonable in all the circumstances. In the PPO proceedings, his Honour found that UOCL had made payments of $24,292,523.31. A PPO of $14,757,287.35 was made which represented the value of benefits that the first respondent had derived from certain unlawful activity minus an agreed amount of $4,800,000 for the forfeited assets.

155. In the s 102 application, the primary judge inferred that *all* income from UOCL and from Merrell was derived or realised from unlawful activity.[192] He found that Mr Hart had conducted operations through the Hart Group and the second to fifth respondents which were 'interwoven in such a way as to make it extremely difficult to follow through even the simplest of transactions'.[193] He found that Mr Hart was

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190 [2013] QDC 60 at [873].
191 [2013] QDC 60 at [275]-[276]
192 [2013] QDC 60 at [62]-[63], [76].
193 [2013] QDC 60 at [39].

in effective control of the respondents at the times during which the UOCL offences were committed; that the respondents, and other companies associated with Mr Hart, had benefited from the unlawful activity involving UOCL and were therefore better able to meet required repayments;[194] that the directors had benefited from the unlawful activity; and that Mr Hart had negotiated a reduction in the amount of the PPO.[195] The primary judge also accepted that the first respondent was a beneficiary of discretionary trusts for which two of the applicant companies are trustees. When all these circumstances are taken together, even in the absence of identifiable error, the primary judge's refusal to make an order under s 141 that would have facilitated the availability of property to meet the PPO of $14,757,287.35 was unreasonable and cannot stand.

156. Accordingly, on the basis of the facts summarised in the previous paragraph, this Court should set aside the primary judge's exercise of discretion, and should make orders under s 141 in the terms set out in paragraph 160 below.

PART VII. APPLICABLE LEGISLATION

157. A copy of the legislation as in force at the relevant times is contained in the annexure.

PART VIII. ORDERS

158. In appeal B22 of 2017, the appellant seeks orders that:

(1) The appeal be allowed with costs.

(2) The order of the Court of Appeal made on 29 August 2016 be set aside and, in its place, order that:

(a) the orders of the District Court made on 6 May 2013 be set aside;

(b) the respondents' application pursuant to s 102 of the Act be dismissed; and

(c) the respondents pay the costs of the proceeding in the Court of Appeal.

159. In appeal B23 of 2017, the appellant seeks orders that:

(1) The appeal be allowed with costs.

(2) Orders 1 and 4 to 18 of the Court of Appeal made on 8 November 2016 be set aside and, in their place, order that:

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194 See the discussion in [2013] QDC 60 at [392]-[394]. Although his Honour rejected the CDPP's submissions about benefits at [872]-[874] of his judgment, he concentrated on whether assets were derived from unlawful activity, not on whether the companies benefited from having access to funds produced from the unlawful activity.

195 His Honour also observed that it was possible that the first respondent remained in effective control of the second to fifth respondent, although, having regard to the onus, he was not satisfied of that: [2013] QDC 60 at [880]; but contrast [292].

(a) the appeal be dismissed; and

(b) the respondents pay the costs of the proceeding in the Court of Appeal.

160. Subject to the qualification below, the appellant in appeal B21 of 2017 seeks orders that:

(1) The appeal be allowed with costs.

(2) The order of the Court of Appeal made on 29 August 2016 be set aside and, in its place, order that:

(a) the whole of the following properties be available to satisfy the pecuniary penalty order made by the District Court of Queensland against Mr Steven Irvine Hart on 19 November 2010 ('the pecuniary penalty order'):

(i) North American Aviation T-28 Trojan with registration VH-SHT;

(ii) Hawker Sidley Aviation Sea Fury FB11 with registration VH-SHF;

(iii) Aerovod L-39C with registration VH-SIC;

(iv) Akrotech CAP232 with registration VH-SHI;

(v) North American Aviation T-28 Trojan with registration VH-AVC;

(vi) Mercedes Benz 380SL with registration AEROS1; and

(vii) Registered lease 704471517 known as Hangar 400 Archerfield Airport;

(b) the net proceeds from the sale of the following properties be available to satisfy the pecuniary penalty order:

(i) Lot 56 on RP 188161 (6 Merriwa Street);

(ii) Lot 222 on RP 122682 (27 Samara Street); and

(iii) Lots 235 to 238 on Crown Plan CH312074, Lots 146 and 147 on Crown Plan CH31665, Lot 154 on Crown Plan CH3182, Lot 126 on Crown Plan CC539, Lot 249 on Crown Plan CH312095, Lot 24 on Crown Plan CH312095, Lot 196 on Crown Plan CH311815, and Lot 269 on Crown Plan CH312095, located at Doonans Road Grandchester;

(c) the whole of the net rent received by the Official Trustee from registered lease 700515084 (Hangar 101) be available to satisfy the pecuniary penalty order;

(d) the Official Trustee be directed to:

(i) sell the property in paragraph (2)(a) of this order;

(ii) apply:

(A) the proceeds of the sale of the properties in paragraph (2)(a);

(B) the proceeds from the sale of the properties in paragraph (2)(b); and

(C) the rent referred to in paragraph (2)(c) of this order

in payment of the costs, charges, expenses and remuneration, of the kind referred to in s 288(1) of the Act and payable to the Official Trustee under the *Proceeds of Crime Regulations 2002* (Cth); and

(iii) credit the remainder of the money and amounts received to the Confiscated Assets Account as required by s 296 of the Act in part satisfaction of the pecuniary penalty order; and

(e) the respondents pay the costs of the proceeding before the Court of Appeal.

161. The qualification referred to in paragraph 160 above is that the orders in appeal B21 of 2017 are sought only in relation to the assets (if any) with respect to which the appeals in B22 of 2017 and B23 of 2017 are unsuccessful.

IX. ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT

162. The appellants estimate that 4 hours should be sufficient to present their oral argument.

Dated: 11 May 2017

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