IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B21 of 2017

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

AND **STEVEN IRVINE HART & ORS**
Respondents

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 & ORS**
Respondents

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B23 of 2017

BETWEEN: **COMMONWEALTH OF AUSTRALIA & ANOR**
Appellants

AND: **FLYING FIGHTERS PTY LTD ACN 067 895 005 & ORS**
Respondents

APPELLANTS' CONSOLIDATED REPLY

CONSOLIDATED SUBMISSIONS OF THE COMMONWEALTH APPELLANTS

Commissioner of the Australian Federal Police
Criminal Assets Litigation
45 Commercial Road
Newstead QLD 4006
Telephone: (07) 3222-1555
Facsimile: (02) 6132-6137
Email: BRIS-CAL@afp.gov.au
Ref: Harley Pope

PART I. PUBLICATION

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

PART II. ARGUMENT

(A) CONSTRUCTION OF SECTION 102

'Derived or realised'

2. The respondents assert that the appellants' construction of 'derived or realised' in s 102(3)(a) of the *Proceeds of Crime Act 2002* (Cth) (the **Act**) is that, if *any part* of an asset (however small) is derived from unlawful sources, the condition in s 102(3)(a) is not satisfied: RS [3]. They claim that the majority's construction of 'derived or realised' is supported by the drafting of s 102(2) (RS [33], [36]-[37]), the ordinary meaning of 'derived' (RS, [35]), and the beneficial nature of the provision and the discretion in s 102 (RS [16]-[24]). These submissions should be rejected.

3. ***First***, the respondents' argument attacks a straw man. The appellants do not contend that if any part of an asset is derived from unlawful activity then the condition in s 102(3)(a) cannot be satisfied. On the contrary, they submit that the words 'derived or realised' should be given their ordinary meaning: AS [47]. Without being exhaustive, that meaning encompasses situations in which most of the funds used to obtain or retain an interest have come from unlawful activity,[1] or where property would not have been obtained or retained but for the use of unlawful funds.[2] It is the majority's approach that reflects an all or nothing interpretation of s 102(3)(a), because the majority (erroneously) held that only property that is *wholly* derived or realised from unlawful activity falls outside the subsection: CA [832], [921]-[923].

4. ***Secondly***, the ordinary meaning of 'derived or realised' is not 'wholly derived or realised': cf RS [35]. If, for example, 80 per cent of an asset were derived from unlawful sources, it would be an ordinary use of language to describe that asset as being derived from unlawful activity. By reading s 102(3)(a) as referring only to property that is *wholly* derived or realised from unlawful activity, the majority added a requirement not warranted by the ordinary meaning of the language. The fact that the Victorian Parliament chose to use the term 'substantially derived' in the *Confiscation Act 1997* (Vic) has no bearing on the meaning of 'derived or realised' in s 102(3): cf RS [35]. That is particularly so given that, when the *Confiscation Act 1997* was enacted, the authorities did not establish that derived meant 'wholly derived'.[3]

5. ***Thirdly***, the invocation of principles about penal or beneficial provisions is misplaced: cf RS [21]-[24].[4] The principal objects of the Act include depriving persons of the proceeds of offences and benefits derived from offences. These objects are largely directed to preventing unjust enrichment, rather than effecting punishment.[5] Moreover, s 102 only applies to an interest in property that has been forfeited because it was subject to a restraining order, the suspect was convicted of a serious offence, and the interest was not successfully excluded under ss 29 or

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1 Eg the Sea Fury.

2 Eg the North American T-28 VH-SHT and the proceeds of 27 Samara Street, Sunnybank Hills.

3 See, eg, *Jeffery v Director of Public Prosecutions* (1995) 79 A Crim R 514 (***Jeffrey (No 2)***) at 526 (Giles AJA).

4 In any case, the majority considered that classifying s 102 as a beneficial or penal provision would be unlikely to lead to different results: CA at [886].

5 *R v McLeod* (2007) 16 VR 682 at [16], [21], citing *R v Brough* [1995] 1 NSWLR 419 at 423; Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987* (Report 87, 30 June 1999) at [2.60]-[2.61], [2.78].

94. Given those matters, an interest in property cannot be presumed to have been lawfully acquired or lawfully derived.[6] Yet absent such a presumption, there is no basis to presume that Parliament intended s 102 to confer a benefit on anyone who cannot prove that the conditions in s 102 are satisfied according to their ordinary meaning.

6. Any broadening of the meaning of s 102 comes at the expense of the capacity of the Act to achieve its primary purpose.[7] To acknowledge this is not to say that every provision pursues the general purposes of the Act at all costs.[8] It is, however, to recognise that a construction of the words 'derived or realised' that gives rise to the possibility that an applicant may recover his or her *entire* interest in property, even if that property was almost entirely derived from unlawful activity, cannot be reconciled with the principal object of the Act: see AS [46], [48].

Acquired the property lawfully

7. The respondents contend that, on the appellants' construction, property cannot be acquired lawfully if *any* funds used to purchase the property (even "one tainted dollar") came from unlawful sources: RS [49]. They submit that the correct position is that lawful acquisition is to be assessed in a similar manner as derivation, having regard to the contributions to the acquisition made by lawful and unlawful sources: RS [58]. These submissions should not be accepted.

8. ***First***, the respondents again misinterpret the appellants' submissions. The appellants do not contend that a single tainted dollar paid to acquire an asset would be enough to prevent the condition in s 102(3)(b) from being satisfied: cf RS [50].

9. ***Secondly***, the appellant's construction again accords with the ordinary and natural meaning of s 102(3)(b). The verb 'acquire' can mean 'the act or process of getting something into one's ownership or possession'.[9] Property is not acquired lawfully if the *process of acquisition* involves the commission of one or more offences (that being of particular importance in light of the money laundering offences: AS [58]). Likewise, as a matter of ordinary language, property is not acquired lawfully if any significant part of the *funds used* to acquire that property were unlawfully acquired.

10. That construction is supported by *Markovski*: cf RS [51]. There, the Victorian Court of Appeal considered the meaning of 'lawfully acquired' in s 22 of the *Confiscation Act 1997* (Vic).[10] Mr Markovski argued that he was only required to show that the transaction by which he obtained his interests in property was lawful, and that whether the funds used to obtain that property were lawfully acquired was irrelevant.[11] That argument was rejected by the whole Court. After highlighting the money laundering offences in the *Crimes Act 1958* (Vic), Redlich JA stated:[12]

> [I]f the property is acquired by the use of funds that are the proceeds of criminal activity, the transaction by which the property was acquired will not be lawful. It would be inconsistent

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6 See, in respect of analogous legislation, *Markovski v Director of Public Prosecutions* (2014) 41 VR 548 (***Markovski***) at [113] (Santamaria JA, referring to a 'presumption of unlawful acquisition'); *Henderson v Queensland* (2014) 255 CLR 1 at [15] (French CJ), [31]-[32] (Bell J), [171] (Keane J).

7 See *Director of Public Prosecutions v Brauer* [1991] 2 Qd R 261 at 271 (Derrington J).

8 Cf CA [885], referring to *Carr v Western Australia* (2007) 232 CLR 138 at [5]-[7] (Gleeson CJ).

9 *Markovski* (2014) VR 548 at [74]-[75] (Whelan JA) (quoting from *The Macquarie Dictionary* (5th ed), sv 'acquire').

10 That section enabled a person to apply to exclude property from a restraining order.

11 (2014) VR 548 at [15].

12 (2014) VR 548 at [8]-[9].

with those provisions were the term "lawfully acquired" to be construed as excluding from consideration the source of the funds and their effect upon the lawfulness of the transaction.

11. To similar effect, Santamaria J observed:[13]

> It seems to me that one would not say of a person who had acquired some asset with the proceeds of a crime that he or she had 'lawfully acquired' that asset, notwithstanding that the asset had been acquired pursuant to a formal contract.
>
> One would not say that an interest in an asset had been lawfully acquired if the funds used to acquire that asset had not themselves been lawfully acquired. One would not say that the asset had been lawfully acquired whether the funds to acquire it had been unlawfully acquired by the owner or had been made available to the owner by a third party who had acquired them unlawfully.

12. Whelan JA (with whom the other members of the Court generally agreed) likewise observed that if the acquisition of property involved the commission of a money laundering offence, the acquisition could not be lawful.[14] His Honour did refer to earlier authorities[15] suggesting that there was *some* overlap between the test for unlawful *derivation* and for lawful *acquisition* in particular circumstances. However, those tests were not said to be coextensive.[16]

13. ***Thirdly***, on the respondents' approach, there is virtually a complete overlap between the test of derivation in s 102(3)(a) and the test of lawful acquisition in s 102(3)(b). By treating those tests as being substantially coextensive (RS [53], [58]), the respondents' construction fails to give work to each word that Parliament has enacted.[17] It is particularly unlikely that Parliament intended that adjacent paragraphs in s 102(3), which structurally create cumulative requirements, would have substantially identical content.

14. ***Fourthly***, if the lawfulness of an acquisition is not determined by whether offences were committed in the process of acquisition, but instead by the relative contributions of tainted and untainted sources (RS [58]), a person could commit multiple offences in acquiring an asset, but provided that the asset was not *wholly* acquired with tainted funds, s 102(3)(a) (and therefore, on the respondents' approach, s 102(3)(b)) would be satisfied. That result is irreconcilable with the ordinary meaning of the words 'acquired the property lawfully'.

15. ***Finally***, the respondents gain little or no assistance from the other cases on which they rely: RS [55]-[58]. Reliance on *R v McLeod*[18] is entirely misplaced given it dealt with a very different context. That case concerned s 5(2A) of the *Sentencing Act 1991* (Vic), which allowed a court to take into account the automatic forfeiture of lawfully acquired property under the *Confiscation Act 1997* (Vic) for the purpose of sentencing. The Victorian Court of Appeal accepted that evidence about the *extent* of lawful acquisition of the property might be relevant to the sentencing process.[19] This was because forfeiture of lawfully acquired property was a

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13 (2014) VR 548 at [95]-[96].
14 (2014) VR 548 at [85].
15 In particular, *Director of Public Prosecutions v Jeffrey* (1992) 58 A Crim R 310 (***Jeffrey (No 1)***); *Jeffrey (No 2)* (1995) 79 A Crim R 514; *Director of Public Prosecutions v Diez* [2003] NSWSC 238 (***Diez***).
16 (2014) VR 548 at [49].
17 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71] (McHugh, Gummow, Kirby and Hayne JJ).
18 (2007) 16 VR 682.
19 (2007) 16 VR 682 at [29]-[30].

punishment, rather than a deprivation of the profits of crime, and that punishment needed to be taken into account in setting the appropriate sentence.[20]

16. *Director of Public Prosecutions v Diez*[21] concerned s 48(4) of the *Proceeds of Crime Act 1987* (Cth) (the **1987 Act**), which relevantly provided that the Court had to be satisfied that the 'defendant's interest in the property was lawfully acquired' before declaring that a restraining order was to be disregarded for the purpose of automatic forfeiture under s 30 of that Act. Mr Diez had received funds from the sale and rent of properties in Columbia, and had used these funds for renovations and mortgage repayments on his family home. He did not disclose these funds on his tax returns. Justice Greg James found that the family home had not been derived from unlawful activity and had been lawfully acquired under s 48(4). However, his Honour's reasons tended to run together the separate questions of whether property was unlawfully acquired, and whether it was derived from unlawful activity. Further, his Honour applied a 'substantial contribution' test for derivation based on an authority on the 'use' test which goes against the weight of more recent authority.[22] For these reasons, *Diez* does not assist.

Onus of Proof

17. The respondents claim that the primary judge and the Court of Appeal did not depart from principles concerning the onus of proof. They contend that they were not required to adduce evidence to rule out any and all possible derivation from unlawful activity, and instead were required only to address the allegations that had been pleaded and fairly raised on the evidence: RS [67]-[68]. These submissions overlook several matters.

18. ***First***, the Commonwealth pleaded that the Hart companies had not shown that the relevant property was not derived from or used in unlawful activity: AS [65].

19. ***Secondly***, the trial was only partly on the pleadings. The respondents made no amendment to their points of claim filed on 29 April 2009; instead, they relied on affidavits filed at various times (some only days before the trial) that qualified or contradicted their pleaded case.[23] The appellant sought to amend its Points of Defence where possible in order to respond to the shifting positions of the respondents. Any suggestion that the pleadings completely defined the matters in dispute is not accurate: cf RS [67]-[68].[24]

20. ***Thirdly***, the primary judge's finding referred to at AS [59] is evident from the nature of evidence he considered necessary to raise a suspicion as to lawfulness.[25]

21. ***Fourthly***, as the respondents recognise, s 317 of the Act placed the burden on them to prove that each of the limbs of s 102(3) was satisfied. However, they assert that this does not 'relieve' the appellant of an evidential burden to identify unlawful conduct: RS [63]. They also assert that 'slender evidence may suffice' to discharge the onus (RS [64]), relying on Thomas J's judgment in *Director of Public Prosecutions v Brauer*.[26] In fact, in *Brauer* the Full Court of the Queensland Supreme Court held that there was *no evidential burden* on the Commonwealth as to whether

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20 (2007) 16 VR 682 at [21]-[23].
21 [2003] NSWSC 238.
22 [2003] NSWSC 238 at [42]-[43], citing *Jeffrey (No 1)* (1992) 58 A Crim R 310 at 316-317, which is not supported by more recent authority: see AS [40]-[41], RS [26].
23 Eg affidavits of Laura Hart of 21 September 2010 [AB 1144] and 17 November 2010 [AB 1196].
24 See, eg, Updated Further Further Amended Points of Defence 26 November 2010, [37], [38] (T-28 Reg VH-SHT), [41] (Sea Fury), [72] (Akrotech Cap 232).
25 See PJ [15], [308], [712]-[714], [735]-[736], [743]-[747], [818], [822].
26 [1991] 2 Qd R 261 at 268.

property was 'used in, or in connection with, unlawful activity'.[27] Further, the statement that 'slender evidence may suffice' was made by Thomas J in the course of discussing how an *evidential* burden – had it existed – may be discharged. It was not a statement as to how the burden *on the respondents* may be discharged. In any case, Thomas J went on to hold that 'there is no evidentiary principle which can convert the initial evidential burden which lies on the defendant into one which lies on the Commonwealth'.[28] The other members of the Court were even clearer. Connolly J (with whose conclusions Derrington J agreed) described the burden of proof on the property owner as 'extremely onerous',[29] before rejecting the proposition that 'absence of evidence of illegal activity is the same as positive proof of legal activity'.[30] He recognised that the burden on the property owner may in some cases be impossible to discharge, even if property was not in fact connected to unlawful activity.

22. Given the above, the respondents' reliance on *Briginshaw v Briginshaw*[31] is misplaced: cf RS [63]. The application under s 102 was brought by the respondents. The appellants bore no burden to prove anything. In any case, even if the appellants did bear an evidential burden on any point, *Briginshaw* is not relevant to the discharge of an evidential burden.

23. ***Fifthly***, the passage quoted from *Jeffrey (No 1)* is of no assistance: cf RS [65]. It is inconsistent with *Brauer*. Further, in its terms that passage relates to whether property was *used* in or in connection with unlawful activity, rather than whether property was *derived or realised* from such activity. The contexts are critically different. While it may be very difficult to negate every kind of unlawful activity which could be imagined in connection with the 'use' of property (which would require a person to account for every use of property over a potentially long period), no such difficulty arises in proving that property was not *derived* from unlawful activity, or that it was not unlawfully *acquired*, because that inquiry is more limited both as to point of time and subject matter. The owner of property should generally be well placed to prove the manner in which that property was acquired and the source of the funds used for that acquisition.[32]

24. Consistently with the above, the primary judge found that the Commonwealth was *not* better placed to prove the essential facts relating to the sources of the respondents' income, or to trace the ultimate source of funds used to acquire the assets: PJ [36]. His Honour accepted the Commonwealth's forensic accountant's opinion that 'the operations that Mr Hart conducted through the Hart group and the [respondents] 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': PJ [39].

25. Accordingly, the trial judge and the Court of Appeal should not have accepted that the payment by Tinkadale in March 1994 was not derived from unlawful activity: cf RS [70], citing PJ [347], [349]; CA [1062], [1072]. The respondents bore the onus of proving that the payment was not derived from unlawful activity, yet they provided no explanation for the payment by Harts to Tinkadale of $100,000, and then Tinkadale's payment to Nemesis of $50,000. In the absence of

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27 That being a context where, as discussed at [23] below, there is a stronger argument for imposing an evidential burden on the Commonwealth than in relation to unlawful derivation, or unlawful acquisition, where it is quite clear that no such burden exists: see *Henderson v Queensland* (2014) 255 CLR 1 at [15] (French CJ), [33] (Bell J), [171] (Keane J); *Markovski* (2014) 41 VR 548 at [104] (Santamaria JA).

28 [1991] 2 Qd R 261 at 269.

29 [1991] 2 Qd R 261 at 264.

30 [1991] 2 Qd R 261 at 265.

31 (1983) 60 CLR 336.

32 Eg *Henderson v Queensland* (2014) 255 CLR 1 at [15] (French CJ), [33] (Bell J), [171] (Keane J).

such an explanation, it was not open to find that these funds were lawfully derived, merely because the Court found that they were not sourced from the Hendon arrangement.

Construction of s 141

26. The respondents contend that the date for effective control in s 141(1)(c) is the date of the hearing of the application. They claim this is supported by ss 142 and 282: RS [80]-[81]; that it avoids absurd consequences: RS [90]-[94]; and that it is consistent with references to effective control in ss 29, 102 and 116: RS [98], [104]. Those submissions should be rejected.

27. ***First***, the respondents suggest that s 142 makes specific provision for charging property that is subject to restraining orders for the purpose of discharging PPOs made under the Act, and that this 'specific regime' makes it unnecessary to 'alter the ordinary meaning' of s 141 to allow property that has been subject to a restraining order to be applied to satisfy a PPO: RS [80]. Critically, however, s 142 only applies to another person's property (i.e. a person *other than* the subject of the PPO) where an order under s 141(1) 'is, or has been, made': s 142(1)(b)(ii). That is, its application to another person's property is preconditioned on the making of an order under s 141(1). If, as the respondents contend, such an order cannot be made in respect of property that had been previously restrained under s 17 (because the restraining order takes the property out of the effective control of the person the subject of the PPO), s 142 also has no application to that property. Similarly, on the respondents' construction, s 282(4) would not operate in respect of another person's property that had been previously restrained as it only applies where a s 141(1) order 'is in force': s 282(4)(b)(ii).[33]

28. ***Secondly***, the respondents assume that forfeited property will vest absolutely under s 96: RS [87]. That overlooks the exception in s 97, which provides that 'registrable property'[34] vests in the Commonwealth in equity but not in law until the registration requirements have been complied with. Until that occurs, s 45(4) will not apply and the restraining order continues. Here, the forfeited aircraft, leases, real property and the Mercedes Benz were registrable property.[35]

29. ***Thirdly***, the asserted absurdities are imaginary. The respondents claim that if the date for effective control in s 141(1)(c) is the date of the restraining order, the status of property would be permanently affected: RS [113]. Thus, assets sold to the general public or bought under s 103 could nonetheless be subject to a declaration under s 141: RS [90], [91], [96]. In fact, the effect of the appellants' construction is not that a restraining order permanently freezes the status of the property. Rather, as Morrison JA observed, the restraining order and forfeiture regime under the Act operates to 'suspend' effective control for the purpose of preserving property so that it can be made available for recovery under the Act, including by way of satisfying a PPO: CA [274]-[275]. It would be contrary to the purpose of the Act if that suspension made the property unavailable to satisfy a PPO.[36] In contrast, the respondents'

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33 The result would be that s 282(4) would have no wider operation in respect of another person's property than s 282(3), which only applies where a restraining order is made 'subsequently' to the PPO. This is contrary to the principle of construction that each section of an Act should be given separate work to do: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71] (McHugh, Gummow, Kirby and Hayne JJ).

34 The term is defined in s 338 as 'property title to which is passed by registration on a register kept pursuant to a provision of any law of the Commonwealth or of a State or Territory'.

35 The Commonwealth gave an undertaking not to sell the property subject of the respondents' s 102 application without their consent: see affidavit of Ty Maher, 24 November 2010, [12] [AB 1960].

36 If property were transferred under s 102 and there had been a real change in control, that could be taken into account in the exercise of discretion under s 141: see [30] below. In this case, however, there was no delay between the hearing of the s 102 application and the application under s 141.

examples concern subsequent dealings with property outside the statutory regime, where effective control has not been suspended by statutory processes, but has been extinguished.

30. Further, the respondents' 'parade of horribles'[37] discounts the fact that a declaration under s 141 is discretionary: see AS [81]. It is fanciful to suppose that a court would ever make a declaration under s 141 in respect of property that had already been sold by the Official Trustee, or which had been already transferred under s 103.[38] The construction of s 141 should not be determined on the basis of such unlikely examples.

31. ***Fourthly***, the respondents' claim that it would 'subvert the beneficial intention' of s 102 to allow property recovered under that provision to be subject to s 141 is baseless: cf RS [95]. The Act creates a number of processes for confiscation. Section 141 is in Part 2-4, which deals with PPOs, whereas s 102 is in Part 2-3, dealing with forfeiture. The fact that property has been successfully recovered under s 102 simply shows that it has satisfied the statutory criteria for recovery from forfeiture. It says nothing about whether that property should be available to satisfy a PPO, which is a *separate* stream which furthers *different* statutory objects based on *different* statutory criteria. Critically, in contrast to the statutory criteria in s 102(3), the Act does not require property to be somehow tainted by unlawfulness for it to be used to satisfy a PPO.[39]

32. Moreover, it should be recalled that s 102 permits the recovery of property that has been forfeited, even where a proportion of that property was derived from unlawful activity. Indeed, on the majority's construction, almost the entire value of the property that is recovered under s 102 may have been unlawfully derived. It would be inconsistent with the objects of the Act if a PPO went unsatisfied because there was no mechanism for the Commonwealth to recover *at least* the proportion of property that was derived from unlawful activity. An order under s 141, which may apply to 'the whole, or a specified part' of particular property, provides such a mechanism by allowing a court to order that part of the property be made available to satisfy a PPO. Such a deprivation could hardly be described as arbitrary expropriation: cf RS [116].

33. ***Fifthly***, the respondents' claims that their submissions promote the "harmonious operation" of the Act are wrong. In particular, they are wrong to claim that effective control in s 102(2) refers to the date of deciding the application: cf [94], [98]. If s 102(2)(b) referred to that date, the condition would *always* be satisfied, because s 102 only applies to property that is vested in the Commonwealth and such property obviously cannot be under the convicted person's effective control. For this reason, the Court of Appeal was correct to hold that the word 'is' in s 102(2)(b) means 'was at the date of the restraining order': CA [1217]-[1218].[40] Accordingly, the comparison between s 141 and s 102(2) in fact demonstrates that the phrase '*is* not subject to the effective control' does not necessarily refer to the date the relevant application is decided.

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37 *Dalton v New South Wales Crime Commission* (2006) 227 CLR 490 at [124] (referring to R Posner, 'Foreword: A Political Court' (2005) 119 *Harvard Law Review* 31 at 96).

38 Section 103(b) provides that buy-back under that provision is only available where a court is satisfied, among other things, that there is no reason why property should not be transferred.

39 See, eg, Act s 29(4) (which provides that property which has been lawfully obtained and is not an instrument of unlawful activity nevertheless cannot be excluded from the restraining order unless the court is also satisfied that a PPO cannot be made against the suspect), ss 141, 142 and 282 (which provide a mechanism for property under a person's effective control to be applied to satisfy a PPO regardless of whether the property itself was derived or realised from, or used in connection with, unlawful activity or had not been lawfully acquired).

40 To the same effect, see *Logan Park Investments Pty Ltd v DPP (Cth)* (1994) 122 FLR 1 at 3; *Gray v Official Trustee in Bankruptcy* (1991) 29 FCR 166; *Director of Public Prosecutions (Cth) v Hart (No 2)* [2005] 2 Qd R 246 at [2] (McPherson JA, Williams JA and Chesterman J agreeing).

34. This construction does not make s 102(2)(b) impossible to satisfy: cf RS [94]. Not every ground for making a restraining order depends on a suspect having effective control.[41] Further, even if a restraining order is made based on a suspect's effective control, such an order is made on the basis of reasonable suspicion, ordinarily in an ex parte hearing.[42] An *inter partes* hearing under s 102 provides an applicant with an opportunity to prove, on the balance of probabilities, that at the date of the restraining order the property was not subject to the suspect's effective control.

35. The respondents' reliance on s 29(4)(b) is likewise misplaced, as they mistakenly contend that 'the scheme of the Act ... contemplates that an application to exclude property from restraining orders will be heard at the same time as an application to make the restraining order': RS [105]. That submission cannot be reconciled with: s 29(1), which provides that such an application may be made 'when the [restraining] order is made *or at a later time*'; with s 31, which enables a person to apply to exclude property from a restraining order *after* being notified of the order; or with s 32, which require such an exclusion application not to be heard until after the DPP has had a reasonable opportunity to conduct an examination. All these aspects of the statutory scheme support the conclusion that 'effective control' in s 29(4) means effective control at the date of the restraining order (not at the time of the application for exclusion).

36. That submission is supported by *Logan Park Investments Pty v Public Prosecutions (Cth)*.[43] The respondents' claim that that case should be distinguished or overruled depends largely on the view that applications for exclusion and restraining orders would be heard at the same time: RS [107]. Yet the 1987 Act (like the present Act) provided for a court to consider hearing an application for a restraining order *ex parte* at the request of the DPP.[44] It also contemplated that exclusion orders could be made after a restraining order.[45] The respondents are therefore wrong to suggest that the construction in *Logan Park* addressed a non-existent problem.

37. Accordingly, the harmonious operation of ss 29(4), 102(2) and 141 does not support, but instead undercuts, the respondents' construction: cf RS [98], [104]. The references to 'effective control' in ss 29(4) and 102(2) cannot be interpreted literally; they both refer to effective control at the date of the restraining order. Consistency suggests that, where a restraining order has been made, the same date should be used for the purposes of s 141(1)(c).

(B) DISPUTED ASSETS

38. The appellants make the following specific points to address the respondents' submissions on individual assets, and further rely on their submissions on the Notices of Contention (Part D).

39. ***North American T-28 VH-SHT:*** The respondents claim that no money laundering offence was committed because the $83,100 was indirectly sourced and came directly from the Geoff Klooger Trust Account: RS [133]-[134]. This should not be accepted. The respondents' evidence was that on 27 October 1998 Merrell lent Flying Fighters[46] $100,000. This was done by telegraphic transfer to the trust account of Geoff Klooger & Associates.[47] On 2 November 1998, Flying Fighters used that $100,000 to pay the vendor for the T-28 and another aircraft,

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41 See, eg, s 17(2)(d) (allowing for the making of a restraining order over property that is proceeds or an instrument of an indictable offence).

42 Act, s 26(4).

43 (1994) 122 FLR 1.

44 1987 Act, s 45(2).

45 1987 Act, s 48(1).

46 The first respondent in B23 of 2017.

47 See affidavit of Laura Elizabeth Hart sworn 23 July 2010, p 22 [Vol 2 AB 736].

with $83,000 of the amount being spent on the T-28.[48] Given the primary judge's findings about Mr Hart's control of Merrell and his knowledge about the source of its funds, Merrell's possession, bringing into Australia and disposing of the $100,000 would have contravened s 82(1) of the 1987 Act. In addition, Flying Fighters would have contravened s 82(1) at least in disposing of the amount. That contravention would follow from two unchallenged findings of the primary judge: Mr Hart was in effective control of Flying Fighters and the other respondents during the period of the UOCL offences: PJ [292]-[293], and when a respondent possessed, received or disposed of funds from Merrell, it had his state of mind: PJ [296].[49]

40. ***Mercedes Benz***: The respondents contend that the approach of the primary judge was wrong in principle because it regarded an asset as derived from unlawful activity because a general security was granted over that asset, together with another asset which 'happens to be tainted': RS [144]. However, this was not a case where a general security placed over an asset coincidentally covered a tainted asset: CA [642] (Morrison JA). The primary judge found that Dr Fleming would not have made the loan that enabled the purchase of the Mercedes Benz from the receiver of Nemesis without the charge over the Sea Fury: AS [105]. There was ample justification for this finding. Dr Fleming described the charge over the Sea Fury as the 'primary security' and referred to being satisfied that that charge was sufficient to cover the proposed loan: CA [641(c)] (Morrison JA). He entered into a Deed of Priority so that the charge over the Sea Fury had first priority over the Merrell charge: CA [641(d)] (Morrison JA). The Deed of Loan, moreover, made the charge over the Sea Fury the only collateral security and limited the lender's recourse by reference to that security: CA [641(e)] (Morrison JA). Morrison JA therefore correctly described the inference drawn by the primary judge as 'irresistible': CA [642].

41. ***North American Trojan VH-AVC:*** The respondents contend that expenditure on restoration and repairs did not affect the derivation of this aircraft, based on the majority's view that derivation is concerned with how an entity acquired its interest in property: RS [148], citing CA [883], [1108]. That view of 'derived' in s 102(3)(a) overlooks the fact that under s 102 the relevant interest is the interest immediately prior to forfeiture.[50] That interest is not necessarily the same as the interest at the time of acquisition (which may have been years before). The focus therefore should not simply be on money spent in acquiring the property; money in improving and preserving the property may also be relevant: CA [668]-[669] (Morrison JA).

42. Further, the respondents describe the $50,000 spent on repairs and restoration as a 'small amount' relative to the purchase price: RS [149], citing CA [1109]. This discounts both the size of the sum and the fact that it represents approximately 22 per cent of the purchase price.[51] Those matters should have led the Court of Appeal to hold that the respondents had not satisfied them that the aircraft was not derived from unlawful activity.

43. As for the money laundering offences, the primary judge did not need positively to find that particular offences had been committed; the fact that he was 'suspicious' was sufficient: cf RS [150]. Under s 102(3)(a), the onus was on the respondents to satisfy him that no money

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48 Affidavit of Laura Elizabeth Hart sworn 23 July 2010, p 25 [Vol 2 AB 739].

49 Further, the 'use' test in s 102(3)(a) does not require the property to be used 'as a physical entity': cf RS [124]. See Act, s 338 (defining property to include intangible property); *Director of Public Prosecutions v George* (2008) 102 SASR 246 at [64].

50 This is in addition to the other difficulties with the majority's construction outlined at AS [54]-[56].

51 The aircraft was purchased for $228,500 in 2001. $50,000 represents approximately 22 percent of that prince. The primary judge found that the $50,000 represented approximately 18 percent of the total derivation funds of $278,500: PJ [726]. That was still a substantial proportion.

laundering offence had been committed; that the property had not been used in connection with any such offence; and that the property was not derived from such an offence.

44. ***Hangar 400 and Doonan's Road, Grandchester:*** The respondents contend that the findings on the connection between the Perpetual offences and these two assets should not be disturbed because the finding was a 'matter of fact and degree based on the exercise of judgment by the primary judge': RS [155], [158]. This should not be accepted. This Court should not defer to the primary judge's finding about the application of the words 'used in, or in connection with, any unlawful activity' in s 102(3)(a) to these assets, as the primary judge proceeded on a wrong interpretation of those words.[52] In any case, this Court can readily determine for itself whether these assets were 'used in, or in connection with, unlawful activity', relying on the primary judge's undisturbed findings about the Perpetual offences.[53]

45. With respect to Doonan's Road, the respondents cite the Court of Appeal's finding that only small amounts of tainted funds were used to repay the loans in respect of the property: RS [159], referring to CA [1188], [1190]-[1191]. However, these findings do not take the Perpetual funds into account. They therefore fail to address the appellants' submission that Perpetual funds were unlawfully derived, and that Doonan's Road was derived from the repayment of NAB with Perpetual and Equititrust Ltd's money: AS [123].

46. ***Proceeds of 6 Merriwa Street:*** The respondents claim that the majority correctly found that Nemesis' interest in 6 Merriwa Street was not derived or realised from unlawful activity, and base their claim on the primary judge's findings that funds from UOCL amounted to less than 5 per cent of the cash flows used to repay the loan to Equititrust: RS [162]-[163]. These submissions again fail to address the role of the Perpetual offences. The appellants' argument is not that the funds sourced from UOCL by themselves necessarily rendered the interest in 6 Merriwa Street unlawfully derived; it is that funds from the Perpetual offence (which the Court of Appeal was *not* satisfied had *not* been committed), together with funds from Equititrust, were used to repay the mortgage from the NAB. The Perpetual funds, in short, played an important role in retaining the interest.[54] They therefore affected the lawfulness of its derivation.

(C) DISCRETION

(i) *Exercise of discretion under s 102(1)*

47. The respondents submit that the appellants should be precluded from raising new matters in respect of the exercise of the s 102(1) discretion in appeal B23 of 2017: RS [174]. However, these matters arise out of the majority's judgment in the Court of Appeal, particularly the construction of 'derived or realised' in s 102(3)(a) as 'wholly derived or realised'. That construction was not the subject of argument before the primary judge and was not adopted by him; nor was it the subject of detailed submissions before the Court of Appeal.[55] The key issue which that construction poses for the exercise of discretion — whether the Act makes the extent

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52 That is, that these words required a 'substantial connection' between the activity in question and use of the property: PJ [119], [282]. The point was recognised by Morrison JA: CA [695].

53 Compare *Warren v Coombes* (1979) 142 CLR 531 at 551; *Fox v Percy* (2004) 214 CLR 118 at [25].

54 It is respectfully submitted that Peter Lyons J's suggestion that the Perpetual funds likely had no role in release of the mortgage (CA [1154]) was merely speculation. No evidence was called from anyone at the NAB about whether the property would have been released from the mortgage absent the use of funds from both Perpetual and Equititrust.

55 The submissions focused on whether the primary judge was correct in construing the words 'derived or realised' in s 102(3)(a) as meaning 'substantially derived or realised'.

to which an interest in property is derived from unlawful activity a mandatory consideration — is one of law. Accordingly, the issue of discretion is properly raised at this stage.

(ii) *Valuation of interests – s 102(1)(c)*

48. The respondents emphasise that the majority's valuation of the interests was an appropriate exercise of the Court of Appeal's discretion: RS [169]. However, s 102 gives a court no discretion to choose to declare the value of an interest either before or after forfeiture, as the respondents claim: RS [181]. The date for valuation is that immediately before forfeiture.

49. Further, the declared value was not properly established on the evidence. The appellants had raised the respondents' failure to establish the extent and value of their interests in the property in pleadings.[56] The respondents were aware of this and should have obtained evidence from a valuer of their interest in the property, including the effect of the Merrell charges, at the time immediately before forfeiture. They did not do so.

(iii) *Exercise of discretion — s 141*

50. The respondents claim that the premise on which the primary judge exercised his discretion under s 141 was correct 'at the broad generality and abstraction with which it was expressed': RS [186]. That cannot be correct. The primary judge's construction of 'derived or realised' in s 102(3)(a) was different from that of the majority of the Court of Appeal. It led his Honour to hold that the respondents could not recover various assets, including the Sea Fury, the North American T-28 and the proceeds from 27 Samara Street, Sunnybank Hills. The majority's construction of s 102(3)(a) led to the opposite conclusion.

(D) ARGUMENTS ON THE NOTICES OF CONTENTION

(i) Perpetual offences

51. The respondents first submit that the knowledge of Dr Ambler and Dr Fleming was 'irrelevant' because they were not the relevant actors for Yak and Bubbling. They claim the 'real issue' was whether Mrs Hart and Ms Petersen had a fraudulent intention on behalf of Yak and Bubbling when executing the loan agreement with clause 16: RS [199]-[200]. These claims are baseless.

52. The appellants' points of defence[57] make it plain that the 'real issue' was not whether Mrs Hart and Ms Petersen were fraudulent. It was whether Yak and Bubbling could discharge the onus of proving that they had not, contrary to s 408C(1)(f) of the *Criminal Code* (Qld), induced Perpetual Nominees to approve a loan facility to those entities by causing the true nature of the arrangements entered into between Mr Hart and Dr Ambler and Dr Fleming and the true nature of the relationship between Mr Hart and Yak and Bubbling to be misrepresented.[58] The particulars identified the representation as that contained in clause 16 of the documents entitled 'Loan facility—terms and conditions'. They also identified the circumstances from which it could be inferred that Bubbling and Yak *and* Drs Ambler and Fleming knew that the representation was false.[59] For example, in the case of hangar 400, the circumstances were that:

(i) Yak and Bubbling were under Mr Hart's effective control;

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56 Commonwealth's Updated Further Further Amended Points of Defence at 87: [Vol 1 AB 149].

57 See paras 9(d)3 (relating to hangar 400) [Vol 1 AB 71-73] and 104(b)(3) of the Updated Further Further Amended Points of Defence (relating to Doonan's Road, Grandchester) [Vol 1 AB 142-144].

58 The allegations in relation to the assets are similar but not identical.

59 Paras 9(d)3(a)c [Vol 1 AB 73].

(ii) part of the consideration offered by Mr Hart to Dr Ambler for entering into the guarantees was an option agreement dated 10 December 2001 over the hangar 400 sublease; and

(iii) part of the consideration offered by Mr Hart to Dr Fleming for entering into the guarantees was an option agreement dated 23 July 2002 over the property at Doonan's Road.

53. The knowledge of Dr Fleming and Dr Ambler was part of the case put by the Commonwealth and it was necessary for the respondents to address it.[60]

54. The respondents next submit that the evidence of Mrs Hart and Ms Petersen was 'more than sufficient' to discharge their onus that no fraud had occurred: RS [209]. They claim that the primary judge failed to consider *any* of the evidence from Mrs Hart and Ms Petersen regarding their beliefs about the meaning of the loan documents, and that this led his Honour into error: RS [210]-[211]. He ought to have found instead that the onus had been discharged, as should the Court of Appeal: RS [217]-[218]. These submissions should be rejected, for two reasons.

55. ***First***, they assume that if the primary judge did not expressly refer to evidence, he did not have regard to it. That assumption is erroneous.[61] Take the issue of effective control. The primary judge considered that whether Yak and Bubbling honestly made the representations depended partly on whether the directors were aware that Mr Hart was in effective control of those companies at the relevant time: PJ [261]. Mrs Hart stated in her affidavit of 23 July 2010 that at no time did she believe that Mr Hart was in effective control of the assets.[62] Mrs Petersen gave oral evidence suggesting that was also the case.[63] The primary judge found, however, that Ms Petersen was not fully frank on the issue (PJ [180]-[181]), and he was positively satisfied that Mr Hart was in effective control of Yak and Bubbling in December 2001 and January 2002: PJ [266]. In so finding, his Honour must have implicitly rejected Mrs Hart's evidence.[64]

56. The primary judge's reasons reveal an implicit rejection of Mrs Hart and Ms Petersen's evidence in other telling respects. For example, his Honour accepted the appellants' submission that if the only concern of MFS and Perpetual Nominees was that Yak and Bubbling were not parties to proceedings commenced by ASIC against Harts Australasia entities, the condition would have been unnecessary: PJ [270]. His acceptance of that submission is irreconcilable with Mrs Hart's professed understanding of clause 16.[65] The primary judge also accepted Dr Fleming's and Dr Ambler's evidence which indicated they believed that they were given an indemnity — in the sense of protection or security — by Yak and Bubbling respectively: PJ [215], [217] (describing the affidavit evidence). His acceptance of that evidence suggested that the representation was both objectively false and was known to be so, which was not consistent with Mrs Hart's affidavit evidence.[66] Further, as mentioned above, the primary judge found that Mr Hart was in effective control of Yak and Bubbling at all relevant times. That finding was not

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60 It should be recalled that Dr Fleming was a director of Yak 3 and Dr Ambler was a director of Bubbling. They each signed the respective the loan documents. On that basis alone, their states of mind were relevant.

61 See QCA [461] (Morrison JA). His Honour also pointed out that many parts of the primary judge's reasons suggested that their source was evidence from Mrs Hart's affidavit or amounted to a rejection of parts of it: fn 419.

62 Affidavit of Laura Hart of 23 July 2010, para 69(k)(ii) [Vol 2 AB 805].

63 See PJ [180]; T3-69, ll 26-40.

64 That accorded with his reservations about accepting her evidence absent corroboration: PJ [170].

65 Affidavit of Laura Hart of 23 July 2010, para 69(d)-(h) and (k)(aa)-(dd) [Vol 2 AB 8801, 803-804].

66 Affidavit of Laura Hart of 23 July 2010, para 69(k)(qq) [Vol 2 AB 807].

challenged on appeal. It undermines Ms Petersen's denials of dishonesty in cross-examination[67] and contradicts Mrs Harts' affidavit evidence.[68]

57. As these examples demonstrate, the Court of Appeal was right to find that '[to] the extent that Mrs Hart and Ms Petersen gave evidence as to their honesty...his Honour's findings carry a finding that he did not accept their evidence': CA [996].

58. ***Secondly***, the primary judge's findings were open. They were based on assessments of the witnesses' credit. As such, they should not be set aside unless the primary judge is found to have palpably misused his advantage, or acted on evidence that is glaringly improbable or contrary to compelling inferences.[69] None of those situations apply here. As the primary judge observed, there was much circumstantial evidence to suggest that the respondents were dishonest by the standards of ordinary honest people: PJ [252]. Besides the matters referred to in [55] to [56] above, the terms of the clause 16 contained no hint that MFS was only concerned with the effect of the ASIC liquidation on the Harts Australasia companies.[70]

59. It is also significant that the evidence the respondents called was limited and did not discharge their onus. They failed to call any evidence from Dr Ambler and Dr Fleming about their understanding of the arrangements. They also failed to call evidence from Mr Hart; the lawyers whom Mrs Hart alleged had prepared the option agreements;[71] and anyone in MFS or Perpetual Nominees who had been involved in approving the loan.[72] The sole evidence they led was from Ms Petersen and Mrs Hart. But the primary judge, who had seen them cross-examined, was under no obligation to accept that their evidence was credible, and he did not. His conclusion that he was not satisfied that the directors and Yak and Bubbling had not committed the Perpetual Offences discloses no error.

(ii) Blackshort payment

60. The primary judge was not satisfied that $300,000 of $382,141.93 made on 16 October 2000 was not derived indirectly from offences involving UOCL. The Court of Appeal rejected a challenge to that finding. The respondents' now attack the finding on two bases: first, the appellants should not have been permitted to rely on the allegations because they were raised late: RS [224]; and second, the evidence was inconsistent with the transfer of UOCL funds to Nemesis through Blackshort: RS [225]-[227]. These submissions should not be accepted.

61. ***First***, the respondents had sufficient notice of the need to identify the ultimate source for the payment. Mr Vincent, the Commonwealth's forensic accountant, referred to the payment of $1.3m from Blackshort in his report of 2 September 2009: AB 2046, [11.7.4(iv)]. He stated that the documentation was 'insufficient to ascertain how [Flying] Fighters and the companies

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67 See T3-78, ll 19-31 [Vol 1 AB 196].

68 Affidavit of Laura Hart of 23 July 2010, para 69(k)(ii) [Vol 2 AB 805].

69 *Fox v Percy* (2003) 214 CLR 118 at 128 [29] (Gleeson CJ, Gummow and Kirby JJ).

70 Cf RS [214]-[215]. The respondents' claim that it 'was objectively apparent that the real concern of MFS/Perpetual was the risk from the ASIC liquidation' (RS [214]) ignores that the documents predated the loan to Yak and Bubbling by months and the respondents could have called, but did not call, evidence from those at MFS and Perpetual.

71 Affidavit of 23 July 2010, paras 69 (tt)(c), (uu) and (vv) [Vol 2 AB 808-809].

72 The respondents' claim (RS [212]) that a particular interpretation of clause 16 is untenable in light of the fact that MFS knew that Mr Hart had provided a 'thank you' to MFS for the loan facility should not be accepted. But the primary judge pointed out that the letter postdated the drawdown of the loan facility by three days. His Honour also correctly accepted a submission from the appellants that, without evidence from Mr Adams of MFS, it would be impossible to conclude that Mr Adams had not been induced by the representation made in clause 16 to believe that the relevant persons and companies were not entering into an agreement on behalf of Mr Hart: PJ [270].

allegedly making payments on their behalf, derived funds in order to make the payments used to acquire the asset': AB 2046, [11.7.4(iv)]. There was also insufficient evidence to draw a conclusion about the *original* source of the funds used to acquire the asset: AB 2049, [11.19.1]. Mrs Hart responded to this report in her affidavit of 21 September 2010. Her explanation for the $1.3m was that Nemesis had invested $1m with Watson Benefit Services (**WBS**) and the investment had returned $300,000 in one month. The investment was allegedly the subject of a written agreement, but Mrs Hart exhibited no copy of it. Subsequently, Mr Vincent reiterated his earlier views about the $1.3m payment in a supplementary report dated 21 October 2010: AB 2213, [19.8]. Plainly, the ultimate derivation of the $1.3m was in issue and the respondents ought to have been aware, and indeed were aware, of that fact: CA [1025]; see also [626].

62. ***Secondly***, and relatedly, the appellants cannot be criticised for failing to ask Ms Lalor to trace the funds in respect of the Blackshort payments: RS [224]. The onus of demonstrating that the funds were not from unlawful activity lay at all times with the respondents.[73]

63. ***Thirdly***, there is no substance in the claim that the evidence was inconsistent with the transfer of UOCL funds to Nemesis through Blackshort. The primary judge's findings were open. The respondents' only explanation for the $1.3m was supplied by Mrs Hart.[74] Yet she provided no primary evidence of the alleged written agreement with WBS: PJ [615]. Indeed, she gave no evidence of whether she had read the written agreement or how she knew its terms: PJ [615]. The respondents also failed to adduce any evidence from anyone who might have been able to shed light on the transactions involved. They did not call Mr Hart or Mr Hamish Watson. In the case of the latter, there was no apparent reason why he could not have been called or subpoenaed to give evidence or produce the alleged written agreement: CA [622].

64. Further, WBS's bank statement (AB 1193-1194) demonstrated that UOCL had deposited funds into WBS's account in October 2000 but did not demonstrate that only a small amount subsequently went to Blackshort: CA [617] (Morrison JA), [1024] (Peter Lyons J). In addition, the bank statement from Blackshort (AB 1574) did not demonstrate the source of the funds[75] used to restore a credit balance to Blackshort's account after a payment to Nemesis on 3 November 2000: CA [1024] (Peter Lyons J).

(iii) Hendon arrangement

65. The respondents claim that the primary judge erred in failing to be satisfied that $45,000 applied towards the purchase of 27 Samara Street was not from unlawful activity. They submit that the primary judge wrongly relied on *BRK (Bris) Pty Ltd v Commissioner of Taxation* (***BRK***),[76] and there was 'no admissible evidence' giving rise to a suspicion of a contravention of s 8N of the *Taxation Administration Act 1953* (Cth) (the **TAA**): RS [235]-[237]. They also submit that the primary judge wrongly disregarded the inherent likelihood of negligence rather than recklessness: RS [239]-[242]. These submissions should be rejected for three reasons.

66. ***First***, the general submission that there was 'no admissible evidence' for the judge's suspicion assumes that such evidence was necessary. It was not. The appellants' pleadings raised the lawfulness of funds derived from the Hendon arrangement as an issue. The respondents had the onus of demonstrating that those funds had been lawfully derived. They therefore had to

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73 Act, s 317. In any event, the respondents had had access to the bank statements, including those of UOCL, Blackshort and WBS, for a considerable time: see CA [629].

74 T6-12, ll 37-54 [Vol 1 AB 367].

75 Being deposits of $1.3m and $500,000. The respondents therefore did not rule out indirect derivation from UOCL.

76 [2001] FCA 164.

adduce evidence to demonstrate that contraventions of s 8N had not occurred, because there was no recklessness on the part of Mr Hart and others in relation to the preparation and lodgement of the income tax returns.

67. ***Secondly***, in any event, the complaint about the primary judge's reliance on *BRK* is misplaced. The appellants did in fact adduce evidence, being the affidavit evidence from Mr Stevens, who had worked in Harts Australia Limited Group, and Mr Young of the Australian Taxation Office. They each outlined the nature of the Hendon arrangement. Mr Young gave evidence that the Commissioner of Taxation had assessed primary tax as payable by the participants and had imposed penalty tax on them based on the recklessness of their tax agent, Harts Australia Ltd. He referred to two Federal Court cases dismissing appeals against the Commissioner's assessments.[77] One was *BRK*. The respondents did not object to the affidavits of Mr Stevens and Mr Young being read: CA [958]. Further, they did not contend that the reasons in *BRK* misstated the operation of the scheme: PJ [318]. In other words, they implicitly agreed that the description of the scheme in *BRK* was correct. In these circumstances, the primary judge was entitled to rely upon *BRK* at least for its description of the Hendon arrangement: CA [958]. Further, the primary judge did not treat *BRK* as the sole evidence of a contravention under s 8N of the TAA: cf RS [235]. His Honour's reasons refer to the onus of proof and evidence from Mr Young and Mr Stevens: see CA [506], [964].

68. ***Thirdly***, the primary judge did not disregard the inherent likelihood of negligence rather than recklessness.[78] As stated above, the onus of demonstrating that there was no recklessness lay on the respondents. Yet in seeking to discharge that onus, the respondents failed to call anyone who might have enabled them to discharge it. They did not call Mr Hart, Mr Adcock or anyone else who had worked under them to give evidence. They did not call anyone from Cleary and Hoare Solicitors, which prepared the pro-forma documents used by the participants and who gave the Harts Group legal advice on how to implement the arrangement — advice that was ignored.[79] Nor did the respondents call any of the participant trustees (of which there were many[80]). It was therefore not an 'obvious inference' (RS [240]) that persons involved with the Hendon arrangement had simply been negligent. The primary judge's findings were correct.

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Stephen Donaghue
Solicitor-General of the Commonwealth
T: 02 6141 4139 **F:** 02 6141 4149
E: stephen.donaghue@ag.gov.au

Gim Del Villar
T: 07 3175 4650 **F:** 07 3175 4666
E: gdelvillar@qldbar.asn.au

Julia Freidgeim
T: 02 6141 4118 **F:** 02 6141 4149
E: julia.freidgeim@ag.gov.au

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77 Affidavit of Iain Young, paras 22 to 23 [Vol 4 AB 1832].

78 The suggestion that the onus can be reduced on the basis that people are more likely to be negligent than reckless is indistinguishable from applying a presumption that persons do not ordinarily engage in criminal activity: cf *Henderson v Queensland* (2014) 255 CLR 1 at [15] (French CJ), [31]-[32] (Bell J), [171] (Keane J).

79 Affidavit of Ian Stevens, para 24 [Vol 4 AB 1842].

80 As Mr Young's affidavit indicates, 52 trustees participated in the Hendon arrangement: see para 20 [Vol 4 AB 1832].