ASSET CONFISCATION UPDATE – 18 November 2009

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***International Finance Trust Co Ltd v New South Wales Crime Commission* [2009] HCA 49**

On 12 November 2009, a divided High Court handed down a landmark decision concerning the validity of the *Criminal Assets Recovery Act* 1990 (the "CAR Act") (which is the NSW equivalent of the *Confiscation Act*).

The High Court delivered four separate judgments, one by French CJ, a joint judgment by Gummow and Bell JJ, one by Heydon J (who collectively comprise the majority) and a joint dissenting judgment by Hayne, Crennan and Kiefel JJ.

The issue

The Appellants challenged the constitutional validity of section 10(3) of the CAR Act, which compelled the Supreme Court of New South Wales to make a restraining order in circumstances where the New South Wales Crime Commission (**Commission**) made application for such restraining order ex parte and satisfied the relevant affidavit requirements.

In short, the issue was whether legislation which compelled the making of such a restraining order offended against the constitutional principle that there be a separation of powers between the executive and judicial functions. The question was posed by Hayne, Crennan and Kiefel JJ, at [103], as follows:

> "*Do the statute's requirements that the Supreme Court freeze dealings in any property of a person on ex parte application by the executive, and proof of mere suspicion that the person has committed a crime (based on articulated grounds and found by the Court to be reasonable), require the Supreme Court to engage in activity repugnant to the judicial process to such a degree that the statute is beyond the legislative power of the State?*"

The decision of French CJ

French CJ found that section 10(3) of the CAR Act was invalid. French CJ reached that conclusion on the basis that the Commission was entitled to make its application for the restraining order ex parte and could not be compelled by the Court to give notice of such application to the parties to be affected by the restraining order [at 44].

At [45], French CJ stated that "*the question whether notice is to be given of an application for a restraining order is*

therefore at the Commission's discretion".

His Honour went on to say at [45]:

> "*The Court's discretion as to the conduct of its own proceedings in the key area of procedural fairness is supplanted by the Commission's judgment. It is a consequence of the preceding construction that if the Commissioner elects to apply ex parte there is no opportunity for the affected party upon the hearing of the application to test the authorised person's affidavit or to put before the Court evidence to rebut it. Upon an ex parte application, the Court is confined to a consideration of the sufficiency of the affidavit of the authorised officer.*"

At [47], his Honour found that:

> "*The issue of validity arises with respect to section 10 because it authorises ex parte applications to the Court, which must be heard and determined ex parte by the Court.*"

At [54], his Honour stated:

> "*When an ex parte application for interlocutory relief is made the Court, in the ordinary course, has a discretion whether or not to hear the application without notice to the party to be affected. In exercising that discretion it will have regard to the legitimate interests of the moving party which have to be protected, whether there is likely to be irrevocable damage to the interests of the affected party if the order is made, and what provision can be made for the affected party to be heard to have the order discharged or varied after it has been made.*"

At [56], French CJ concluded as follows:

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

The decision of Gummow and Bell JJ

Gummow and Bell JJ found that section 10(3) of the CAR Act was invalid.

In construing section 10 of the CAR Act, Gummow and Bell JJ stated, at [79], that:

> "*The first principle is that the legislature, in selecting the Supreme Court as the forum, may be taken,*

in the absence of contrary express words or of reasonably plain intendment, to take the Supreme Court as the legislature finds it, with all of its incidents."

Critical to their Honours' finding that section 10 was invalid was a finding that a person affected by a restraining order does not have the right to have the application for the restraining order reheard inter partes. In that regard, Gummow and Bell JJ relied upon the decision of the New South Wales Court of Appeal in *New South Wales Crime Commission v Ollis* (2006) 65 NSWLR 478. At [90], their Honours reproduced the following quote from Ollis:

> "*It is not consistent with the scheme of the Act that, when a restraining order is made, there can be a further hearing at which the same Judge or another Judge can be asked to determine on the same material whether there are reasonable grounds for the suspicion; nor that there can be a further hearing at which further material is put before the same Judge or another Judge by the defendant and the Judge is asked to determine on the enhanced material whether there are reasonable grounds for the suspicion. The making of the restraining order can be challenged on appeal, on the contention that the Judge was in error in determining that there were reasonable grounds for the suspicion; or an application can be made for an exclusion order.*"

Having found that an affected person has no right to challenge the making of the restraining order other than by appeal or prosecuting an exclusion application, their Honours stated at [97] and [98] that:

> "*The Supreme Court is conscripted for a process which requires in substance the mandatory ex parte sequestration of property upon suspicion of wrong doing, for an indeterminate period, with no effective curial enforcement of the duty of full disclosure on ex parte applications. In addition the possibility of release from that sequestration is conditioned upon proof of a negative proposition of considerable legal and factual complexity.*
>
> *Section 10 engages the Supreme Court in activity which is repugnant in a fundamental degree to the judicial process as understood and conducted throughout Australia.*"

The decision of Heydon J

Heydon J concluded that section 10(3) of the CAR Act was invalid. Heydon J engaged in a detailed analysis of the adversarial system which is premised upon each party to a dispute having the ability to put before the Court their respective positions.

At [143], his Honour stated that:

> "*The experience teaches that commonly one story is good only until another is told. Where a judge hears one side but not the other before deciding, even if the side heard acts in the utmost good faith and makes full disclosure of all that that side sees is relevant, there may be considerations which that side*

had not entertained and facts which that side did not know which, if brought to the attention of the judge, would cause a difference in the outcome.

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

Having analysed the need for both parties to have an opportunity to put before the Court all matters relevant to the dispute, at [152] his Honour stated that:

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

Heydon J based his finding that section 10(3) was invalid upon the fact that the Commission was entitled to obtain a restraining order ex parte whilst there was no mechanism within the CAR Act to apply for a speedy dissolution of that restraining order.

At [154], his Honour stated that:

> "*A duty in the Supreme Court to grant an ex parte restraining order for a short period pending an application by the defendant to oppose its continuation, or dissolve it, is not repugnant to the judicial process in a fundamental degree. But the practical desirability of ensuring that assets not be disposed of before an application for a restraining order comes to Court is one thing. Creating a capacity in the Commission to retain a restraining order it has obtained ex parte without there being any procedure by which the defendant may apply to have it speedily dissolved is another.*"

His Honour concluded at [155] that:

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

In making such finding, his Honour determined, at [160], that there was no provision within the CAR Act for a

rehearing of the application for the restraining order inter partes.

The dissenting decision of Hayne, Crennan and Kiefel JJ

Hayne, Crennan and Kiefel JJ dissented and found that section 10 of the CAR Act was valid. Their Honours' conclusion was based upon the premise that a person affected by an ex parte restraining order always has the right to have the application reheard inter partes even if there are no express mechanisms within the Act to do so. That being so, the judicial function of the Court is preserved.

At [119], their Honours stated that:

> "*… if the application for a restraining order is made without notice of the application being given to the person affected, any person who is affected by the order may apply for reconsideration of the restraining order by the judge who made the order or by another judge. On that application for reconsideration of the order made ex parte, the person seeking to argue against maintenance of the order may agitate any aspect of the issues that determine whether the Supreme Court must make a restraining order.*"

Hayne, Crennan and Kiefel JJ expressly stated, at [124], that the decision of Ollis "*should be overruled*".

At [128], their Honours stated that:

> "*Neither section 10(2), providing for a restraining order to be sought ex parte, nor the provisions of section 12, enabling the making of various forms of orders ancillary to the making of a restraining order, shows that the Act should be read as inferentially excluding applications by the party affected by a restraining order, after the order has been made, to contest whether it should have been made or it should continue and to adduce evidence in support of that party's case. Indeed, absent express and clear indication of that intention ("reasonably plain intendment"), the CAR Act should not be construed as working such a fundamental alteration to civil procedure as would be required to conclude that an order made ex parte should not be open to subsequent review and reconsideration on the application of a party adversely affected by it.*"

What does it all mean for Victorian practitioners?

Like the CAR Act, section 18 of the *Confiscation Act* also provides that a Court "must" make a restraining order if it is satisfied in respect of the affidavit material. Therefore, the *Confiscation Act* also limits the Court's discretion and, prima facie, offends against the principle of separation of powers as found by the majority of the High Court in respect of the CAR Act.

However, one point of distinction between the *Confiscation Act* and the CAR Act is that the Confiscation Act, at section 17, contains a provision by which the Court may direct an applicant for a restraining order to give notice of the application to any person whom the Court has reason to believe has an

interest in the property that is the subject of the application. In other words, the Court, as opposed to the applicant for the restraining order, determines whether or not a third party ought to be given notice of the application for the restraining order. In practice, this only rarely happens.

In making a determination as to whether such notice should be given, the Court is to have regard to the matters set out in section 17(1A) of the *Confiscation Act*, being factors which primarily are aimed at ensuring that the property sought to be restrained and the related criminal investigation are not put in jeopardy by the giving of notice.

It might appear that section 17 is sufficient to distinguish the *Confiscation Act* from the CAR Act so as to preserve the constitutional validity of section 18 of the *Confiscation Act*. However, if the Court determines that no notice of an application ought to be given, section 17 does not overcome some of the difficulties identified by the High Court, namely that a Court will then be compelled to act on affidavit material which may well be deficient and does not tell the whole story (whether deliberately or inadvertently).

It would seem that that deficiency could be remedied by reverting to the practice of making only interim restraining orders and then permitting (if sought) a rehearing inter partes or simply pointing out to affected persons that they have a right to seek such rehearing (being the right that Hayne, Crennan and Kiefel JJ found existed under the CAR Act).

Such construction would explain the reference in section 17(1A)(e) to the "*limited duration of a restraining order*". In other words, s.17 of the *Confiscation Act* suggests that restraining orders ought to be made either on an interim basis or on the basis that they can be challenged inter partes.

What does all this mean for practitioners? Firstly, there is at present a state of uncertainty about whether or not restraining orders made under the *Confiscation Act* were in fact validly made. Secondly, there is a state of uncertainty about whether or not a person affected by a restraining order has a right to have the restraining order reheard inter partes.

In time, these matters wi9ll also be tested in Victoria.

In the interim, if a client presents with a restraining order and there are reasons to believe that, had the client been given notice of the restraining order an argument or evidence could have been presented to the Court so as to persuade it not to make the restraining order, application should be made to have the application for the restraining order reheard inter partes.

There is at least one Victorian Supreme Court case (*DPP v Loo* [2007] VSC 343) in which such inter partes rehearing occurred, although the rehearing in that case was not opposed by the DPP.

About the author

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Before coming to the Bar, Christian was a partner with Deacons. Through his commercial experience, he has a detailed knowledge of property, equity and trust issues, all of which are relevant to and impact on proceedings under the Confiscation Act.

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