COURT OF APPEAL OF VICTORIA

Nguyen v Director of Public Prosecutions and Another

[2019] VSCA 20

Maxwell P, Tate and Niall JJA

2 August 2018, 13 February 2019

Constitutional Law — State courts — Commonwealth judicial power — Grants of power incompatible with — Unexplained wealth restraining orders — Power to grant restraining order without guarantee of inter partes hearing — Whether invalidity flows as a result of — Whether statutory scheme impaired institutional integrity of State courts — Power of court to decide what procedural fairness requires — Ability of respondent to apply to set aside order — Safeguards to institutional integrity — Constitution of the Commonwealth , Ch III — Confiscation Act 1997 (Vic), ss 40F, 40H, 40I, 40J, 40R, 40W, 40ZA.

Pursuant to s 40I(1) of the *Confiscation Act 1997* (Vic) (the Act), a court had to make an unexplained wealth restraining order (restraining order) if certain enumerated criteria were satisfied. In accordance with s 40ZA, the property the subject of a restraining order was forfeited to the Minister within six months after the making of the order. While s 40F of the Act provided that the application for a restraining order could be made without notice, s 40H(1) gave the court the discretion to require notice of the application to be given to a respondent if it were satisfied that the circumstances of the case justified the giving of such a notice. If a restraining order had been made without notice, s 40J(1) of the Act required the applicant to serve the order on the respondent. If, after reasonable steps had been taken, the respondent could not be located, s 40J(2) required the applicant to give notice in any other manner directed by the court. Sections 40R and 40S of the Act relevantly allowed any person claiming an interest in property the subject of a restraining order to apply for an exclusion order, which the court could make if satisfied that the applicant had acquired the interest in the property lawfully. Section s 40W of the Act empowered the court to make such further orders in relation to restraining orders as it considered just.

Without notice to the appellant, an application for a restraining order was made and granted in respect of three properties of which the appellant was the registered proprietor. After being served with the restraining order, the appellant applied for an exclusion order pursuant to ss 40R and 40S of the Act. Upon that application being dismissed, she appealed the dismissal and the decision to grant the restraining order, arguing that s 40I of the Act was invalid as it impaired the institutional integrity of the courts empowered to make orders under the section, contrary to the limitations upon legislative power imposed by Ch III of the *Constitution of the Commonwealth* (the Constitution). She argued principally that the impairing feature arose from s 40I authorising the self-executing forfeiture of property without the guarantee of an *inter partes* hearing.

Held by Tate JA, Maxwell P and Niall JA agreeing: (1) There is no broad principle that the absence of an as of right inter partes hearing in State legislation renders that legislation void as contrary to the Constitution. [70]-[79], [150]

International Finance Trust Company Ltd v New South Wales Crime Commission (2009) 240 CLR 319, considered.

(2) The discretion pursuant to s 40H to determine what procedural fairness requires, the inclusion of the power in s 40W of the Act to make any orders it considers just, the court supervised requirement to provide notice of the restraining order pursuant to s 40J and the preservation of the court's inherent or implied power to set aside an order it has made ex parte all safeguard the institutional integrity of the courts empowered to make restraining orders under s 40I. [80]-[81], [100], [108], [139], [140]-[142], [150]

Director of Public Prosecutions v Vu (2006) 14 VR 249, applied.

International Finance Trust Company Ltd v New South Wales Crime Commission (2009) 240 CLR 319; *NSW Crime Commission v Ollis* (2006) 65 NSWLR 478, distinguished.

Appeal against the decision of Judge Jordan ([2017] VCC 1217), dismissed.

Cases Cited

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Glass v Chief Examiner (2015) 50 VR 577.

Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA) (2008) 234 CLR 532.

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K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd (1985) 157 CLR 309.

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Metropolitan Gas Co v Federated Gas Employees Industrial Union (1925) 35 CLR 449.

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Public Prosecutions (Vic), Director of v Nguyen (2009) 23 VR 66.

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Taylor v Taylor (1979) 143 CLR 1.

Thiess v Collector of Customs (2014) 250 CLR 664.

Thomas A Edison Ltd v Bullock (1912) 15 CLR 679.

Treasurer of Victoria v Tabcorp Holdings Ltd [2014] VSCA 143.

University of Wollongong v Metwally (No 2) (1985) 59 ALJR 481.

Walton v Gardiner (1993) 177 CLR 378.

Application for leave to appeal

M Hume, for the applicant.

L De Ferrari SC and *E Ruddle*, for the respondent.

K Walker QC and *K Foley*, for the intervener.

Cur adv vult

13 February 2019

Maxwell P.

1 I have had the considerable advantage of reading in draft form the respective reasons of Tate and Niall JJA. I too would grant leave to appeal but dismiss the appeal for the reasons which their Honours give.

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Tate JA.

Introduction and summary

2 A court[1] has power under s 40I[2] of the *Confiscation Act 1997* ("the Act") to make an unexplained wealth restraining order[3] the effect of which is that the property the subject of the order is forfeited to the Minister after the expiry of six months.[4] The Director of Public Prosecutions (the DPP), or an appropriate officer, may apply for a restraining order without notice to the person affected; that is, it can be made *ex parte*. Forfeiture may occur after six months despite no hearing between the parties (an *inter partes* hearing) having taken place.

3 This proceeding involves a constitutional challenge to the validity of s 40I of the Act as authorising self-executing forfeiture orders and thereby failing to preserve a right of the respondent to an *ex parte* restraining order to participate in an *inter partes* hearing. It is alleged that s 40I offends the principle in *Kable v Director of Public Prosecutions (NSW)* (*Kable*),[5] as expressed in *International Finance Trust Co Ltd v New South Wales Crime Commission* (*International Finance*).[6]

4 An unexplained wealth restraining order was made on 27 October 2015 in the County Court by Judge Carmody, pursuant to s 40I of the Act, *ex parte* ("the restraining order"), prohibiting any person from disposing of or otherwise

1 That is, the County Court or Supreme Court. The Act s 3.

2 See [39] below.

3 In what follows these are referred to as "restraining orders". The Act provides for other types of restraining orders to be made, for example under s 18, but these are not relevant here.

4 Pursuant to s 40ZA of the Act. See [47] below.

5 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

6 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

dealing with five properties.[7] Thi Thu Ha Nguyen ("Ha") is the registered owner of three of the properties[8] and her mother, Thi Dong Nguyen (Dong), is the registered owner of the other two. It is the three properties of which Ha is the registered owner that are the subject of the proceeding in this Court (collectively, "the property").[9] On 30 August 2017 Judge Jordan of the County Court made an order ("the final order")[10] denying applications by Ha and Dong for exclusion of their respective properties from the restraining order.[11] Ha now seeks leave to appeal against the restraining order and the final order.

5 The Attorney-General intervenes in the application for leave to appeal, pursuant to s 78A of the *Judiciary Act 1903* (Cth). The Attorney-General also issued a Notice under the *Charter of Human Rights and Responsibilities* ("the Charter") to the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) that a question arose in the proceeding with respect to the interpretation of a statutory provision in accordance with the Charter. The VEOHRC did not intervene.

6 For the reasons set out below, I would grant leave to appeal but dismiss the appeal.[12]

7 In my view, *International Finance* is readily distinguished. I consider that s 40I is valid because it does not confer a function upon a court that substantially impairs its institutional integrity so as to be incompatible with its role as a repository of federal jurisdiction. The institutional integrity of the court that makes an unexplained wealth restraining order is protected by numerous provisions under the Act intended to afford procedural fairness to a person whose property is restrained. In addition, the Act does not exclude inherent or implied powers of a court to observe elementary rules of justice. The *Kable* challenge is rejected.

The ex parte application for the restraining order

8 On 22 October 2015 the DPP made an application *ex parte* under s 40F(2)[13] for the restraining order. The DPP's application was supported by an affidavit of Sergeant Kylie Louise Baulch.[14] Sergeant Baulch deposed to her suspicion that the property had not been lawfully acquired. The purpose of the restraining order was to preserve the property so it would be available to satisfy the forfeiture of unexplained wealth that may occur under the Act.

9 Ha's brother, Nam Son Nguyen (Son), is currently serving a prison term, having been convicted of one charge of cultivating a quantity of cannabis that was not less than the commercial quantity, two charges of theft and one charge of trafficking in a drug of dependence. He was sentenced in the County Court on

7 The properties are: (1) 214 Forrest Street, Ardeer; (2) 137 Hilma Street, Sunshine West; (3) 147-151 Devonshire Road, Sunshine; (4) 665 Ballarat Road, Ardeer; and (5) 6 Glinden Avenue, Ardeer.

8 The Forrest Street, Hilma Street and Devonshire Road properties.

9 Unless the context indicates otherwise.

10 Pursuant to s 40S of the Act. See [43] below.

11 Nguyen v DPP [2017] VCC 1217 (Reasons).

12 For convenience, in what follows I refer simply to "the appeal".

13 See [36] below.

14 Then Detective Leading Senior Constable Baulch. The affidavit was sworn on 22 October 2015.

23 September 2015 by Judge Carmody to a total effective sentence of three and a half years' imprisonment with a non-parole period of two a half years.

10 The application for the restraining order was heard before Judge Carmody. He was satisfied that Sergeant Baulch did suspect that the property sought to be restrained was not lawfully acquired; that either the property is located in Victoria or the person who has acquired the property is ordinarily resident in Victoria; and that there were reasonable grounds for Sergeant Baulch's suspicion.[15] Relevantly, he was also satisfied that the application ought proceed without giving notice to any other person. He arrived at this state of satisfaction taking into account the factors set out in s 40H(2),[16] namely: (a) the need to preserve the subject property to ensure it is available for forfeiture; (b) any jeopardy to an investigation into criminal activity by a law enforcement agency that could result from the giving of notice; (c) any risk to the safety or security of a person, including a potential witness in any criminal proceeding, that could result from the giving of notice; (d) the provision made by the Act for exclusion applications; (e) the limited duration of the order; and (f) the submissions made by the applicant for the order. Judge Carmody made the restraining order on 27 October 2015. On 2 November 2015 the DPP served on Ha the restraining order and a notice requiring a declaration of property interests in relation to the restraining order.[17]

The exclusion applications

11 On 23 December 2015 Ha and Dong brought exclusion applications under s 40R[18] for orders excluding their respective properties from the restraining order. To succeed on the exclusion applications, it was necessary for Judge Jordan to be satisfied, pursuant to s 40S(1),[19] that, relevantly, the property was lawfully acquired by Ha and Dong. There is a presumption that an applicant's interest in the restrained property has not been lawfully acquired unless the applicant proves otherwise.[20] Ha and Dong were required to prove, on the balance of probabilities, that their respective properties were lawfully acquired.

12 At the hearing of the exclusion applications,[21] Ha and Dong were unrepresented, though they had previously had two firms of solicitors acting at various stages. The supporting affidavits and exhibits before the Court had been prepared by solicitors. Although no duty lawyer could be obtained before the hearing commenced, Ha and Dong indicated that they wished to proceed.[22] A duty lawyer was successfully obtained at a later stage to assist with subpoenaing witnesses.[23]

15 He also accepted an undertaking as to damages proffered on behalf of the DPP.

16 See [38] below.

17 Ha ultimately accepted at the hearing in this Court that she received notice of the restraining order, having maintained in her written submissions that she had never stated that she was notified "promptly" or on any particular date but rather that she had "constructive notice".

18 See [42] below.

19 See [43] below.

20 Section 40S(2). See [43] below.

21 The exclusion applications were heard before Judge Jordan on 7-18, and 28 August 2017.

22 Reasons [7].

23 Ibid [38].

13 The judge afforded Ha and Dong "a good deal of latitude" in terms of the evidence received to accommodate their being unrepresented.[24]

14 Ha and Dong attempted to demonstrate that their respective properties had been lawfully acquired using funds obtained by way of bank loans, personal loans, employment income, rental income, Son's gambling winnings and gifts from family and friends. The judge did not find their evidence credible and was particularly critical of them as witnesses.

15 In relation to Ha, the judge remarked:

> I found her a very evasive, inconsistent and generally unsatisfactory witness. Her credit in my view was seriously impugned. She could not be relied on.[25]

16 In relation to Dong, he remarked: "I found her a most unreliable, evasive and unsatisfactory witness …"[26]

17 He went on to say about Dong:

> her evidence both in affidavit and in oral form was extremely unreliable to such an extent that I found her credit very seriously impugned … it was apparent that this was a witness prone to inconsistent, evasive and indeed positively misleading answers.[27]
>
> …
>
> It seemed to me she would really say anything when pressed into a corner and faced with a plain contradiction.[28]

18 Son gave evidence from Loddon Prison via videolink. The judge found his evidence "completely unsatisfactory".[29] In particular, the judge dismissed as "very implausible" Son's account of his sudden wealth due to gambling.[30] He concluded:

> I reject the evidence of Son as to any lawful accumulation by him of his gambling funds and wealth generally. His evidence did not assist [Ha and Dong] to discharge the onus on them. It was so improbable that it carried no persuasion in regard to their unexplained wealth at issue in these two applications.[31]

19 He inferred that by gambling Son was attempting to launder unlawfully acquired money and to give it legitimacy.[32]

20 A number of family members and a family friend gave evidence from Vietnam via videolink.[33] The judge found their evidence to be unreliable, vague and improbable.[34]

21 Phan, Ha's boyfriend, also gave evidence. The judge found his evidence

24 Ibid [5]. Throughout the hearing, Dong was assisted by an interpreter. Ha's boyfriend, Tu Phan Nguyen (Phan), also assisted.

25 Reasons [79].

26 Ibid [14].

27 Ibid [21].

28 Ibid [22].

29 Ibid [49].

30 Ibid [51].

31 Ibid [56].

32 Ibid [100].

33 These were Nguyen Tang Thep (Dong's brother and Ha's uncle), Nguyen Viet Minh (a family friend) and Nguyen Thi Phuong (Dong's daughter and Ha's sister).

34 Reasons [107], [108] and [111].

improbable.[35] He found that he lived at a house where the police had raided the garage and found a great deal of hydroponic equipment and cannabis that led to Son's conviction. Phan said he had never been in the garage.[36]

22 In addition to the affidavits of Ha and Dong, a number of written documents were provided as evidence. His Honour was not assisted by these,[37] describing one exhibit as "meaningless"[38] and noting that two undated handwritten letters written by witnesses heard on video from Vietnam "seem to be written on identical note paper".[39]

23 Ha and Dong called one of their mortgage brokers to give evidence.[40] However, his evidence contradicted much of the evidence given by Ha and Dong and he "did considerable harm to their case".[41] The judge found the mortgage broker to be a "truthful and reliable witness".[42]

24 The judge accepted the evidence given by Sergeant Baulch whose two affidavits set out the information leading to police interest in Ha and Dong with respect to their wealth following the drug investigation that led to the conviction of Son. Sergeant Baulch relied on a report prepared by a forensic accountant, Mr Roden.[43] Mr Roden gave evidence and the judge accepted his detailed report.[44]

25 On 30 August 2017 Judge Jordan dismissed the exclusion applications.[45] He determined that he was not satisfied that the property was lawfully acquired. He found that both Ha and Dong had failed to provide documentary or other evidence that would support their claims that their respective properties were lawfully acquired.[46]

26 There was no constitutional challenge made below to the validity of the Act.

Forfeiture of the property

27 On 6 October 2017 the Office of Public Prosecutions made an application under s 40ZB[47] for a declaration that the respective properties of Ha and Dong had been forfeited. The six-month period from the date of the restraining order (made 27 October 2015), at the end of which forfeiture may have occurred, was suspended by reason of the exclusion applications.[48]

35 Ibid [113].

36 Ibid.

37 Ibid [120]

38 Ibid.

39 Ibid [121].

40 This was Huy Pham. He answered a subpoena issued by Ha and Dong with the assistance of a duty barrister.

41 Reasons [81].

42 Ibid [82].

43 Ibid [85].

44 Ibid [87].

45 Ibid [136]. As noted, Ha refers to this as "the final order".

46 Ibid.

47 See [48] below.

48 Section 40ZA(2). See [47] below.

28 On 9 October 2017 Judge Carmody made an order *ex parte* declaring that the respective properties of Ha and Dong, which were the subject of the restraining order, had been forfeited to the Minister.[49]

The grounds of appeal

29 In her application for leave to appeal, Ha raises three grounds of appeal:

> GROUND 1 — The Restraining Order and Final Order are void as a result of section 40I of the *Confiscation Act 1997* not preserving a right for the respondents to the restraining order to obtain an inter-partes rehearing of orders made ex-parte.
>
> GROUND 2 — The Restraining Order and Final Order are void as a result of section 40I of the *Confiscation Act 1997* self executing whether or not notice is given to a respondent, with no right of reinstatement to challenge the ex-parte restraining order.
>
> GROUND 3 — The Restraining Order and Final Order are void as a result of section 40I of the *Confiscation Act 1997* self executing upon the completion of 6 months, whether or not the court is able to comply with the hearing rule in relation to the ex-parte restraining order within that period of time.

30 In addition, particular issues arose during the course of oral argument at the hearing of the appeal and this Court gave leave to the parties and the intervener to file further submissions on those issues. Those issues are:

(a) whether the power of the court under s 40W[50] to make "any orders in relation to the property to which the unexplained wealth restraining order relates as it considers just" can be made *after* property has been forfeited;[51] that is, the temporal scope of s 40W;

(b) the extent of the court's powers under s 40J(2)[52] should a matter return to the court if notice cannot be served because the respondent cannot be located;[53]

(c) the relevance of *Director of Public Prosecutions v McEachran* ("McEachran")[54] and *Siddique v Director of Public Prosecutions* ("Siddique"),[55] relied upon by Ha, in the context of Ha's submission that pt 4A of the Act is a code.[56]

31 These issues are addressed below in the course of dealing with the grounds of appeal. Many of the issues raised by the grounds of appeal, and the submissions made in relation to them, are interrelated. In turn the analysis of the Act adopted in the context of ground 1 also has implications for the determination of grounds 2 and 3.

32 Before examining the grounds of appeal, it is convenient to examine the overall statutory scheme of the Act.

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49 On 23 November 2017 Ha and Dong made an application for relief under s 45B(1) of the Act, as they claimed they were dependents of Son. On 4 December 2017 Judge Murphy made an order on the papers that the application for relief be adjourned for mention on 23 January 2018. On 23 January 2018 Judge Dyer made an order that the application for relief be further adjourned to 6 February 2018. Before this could be heard the application for leave to appeal was brought in this Court on 22 January 2018.

50 See [45] below.

51 See [98] below.

52 See [40] below.

53 See [140]-[142] below.

54 *Director of Public Prosecutions (Vic) v McEachran* (2006) 15 VR 268.

55 *Siddique v Director of Public Prosecutions (Vic)* [2015] VSC 99.

56 See [127]-[130] below.

The statutory scheme

33 Part 4A of the Act deals with unexplained wealth. Division 1 deals with unexplained wealth restraining orders and div 2 deals with forfeiture of unexplained wealth.

34 In div 1, s 40C(1) explains what an unexplained wealth restraining order is:

> 40C Unexplained wealth restraining orders
>
> (1) An unexplained wealth restraining order is an order that no property or interest in property, that is property or an interest to which the order applies, is to be disposed of, or otherwise dealt with by any person except in the manner and circumstances (if any) specified in the order.

35 Section 40D explains the purpose for which an unexplained wealth restraining order may be made; namely, to preserve property or an interest in property in order that the property or interest will be available to satisfy any forfeiture that may occur:

> 40D Purpose for which an unexplained wealth restraining order may be made
>
> (1) An unexplained wealth restraining order may be made to preserve property or an interest in property in order that the property or interest will be available to satisfy forfeiture of property that may occur under Division 2.
>
> (2) If a court makes an unexplained wealth restraining order in respect of property or an interest in property, the unexplained wealth restraining order must state that the property or interest is restrained to preserve property or an interest in property so that the property or interest will be available for unexplained wealth forfeiture.

36 Section 40F sets out the process for the DPP, or appropriate officer, to apply for an unexplained wealth restraining order including, under sub-s (2), on the basis of a suspicion held by a police officer on reasonable grounds that the property was not lawfully acquired. As mentioned above, this may occur without notice:

> 40F Application for unexplained wealth restraining order
>
> (1) The DPP or an appropriate officer may apply without notice to a court for an unexplained wealth restraining order in respect of property if a police officer suspects on reasonable grounds that —
>
> (a) a person has engaged in serious criminal activity; and
>
> (b) that person has an interest in the property; and
>
> (c) in the case of property located outside Victoria — that serious criminal activity occurred within Victoria; and
>
> (d) the total value of the property that is the subject of the application is $50 000 or more.
>
> (2) The DPP or an appropriate officer may apply without notice to a court for an unexplained wealth restraining order in respect of property if a police officer suspects on reasonable grounds that —
>
> (a) the property was not lawfully acquired; and
>
> (b) either—
>
> (i) the property is located in Victoria; or
>
> (ii) the person who has acquired the property is ordinarily resident in Victoria.
>
> (3) An application under subsection (1) or (2) must be supported by an affidavit of a police officer —
>
> (a) setting out any relevant matters; and

(b) in the case of an application under subsection (1), stating that the police officer suspects that —

(i) a person has engaged in serious criminal activity; and

(ii) that person has an interest in the property; and

(iii) in the case of property located outside Victoria —that serious criminal activity occurred within Victoria; and

(iv) the total value of the property that is the subject of the application is $50 000 or more; and

(c) in the case of an application under subsection (2), stating that the police officer suspects that —

(i) the property was not lawfully acquired; and

(ii) either —

(A) the property is located in Victoria; or

(B) the person who has acquired the property is ordinarily resident in Victoria; and

(d) setting out the grounds on which the police officer has the suspicion referred to in paragraph (b) or (c) (as the case may be).

(4) In addition, an affidavit supporting an application under subsection (2) must identify the person who has or the persons who have an interest in the property suspected of not having been lawfully acquired if that information is known to the police officer at the time of the application.

(5) An application under subsection (1) for an unexplained wealth restraining order does not need to specify a particular offence constituting the serious criminal activity but may specify one or more offences that constitute the serious criminal activity.

(6) For the purposes of this section, property in which a person has an interest includes —

(a) property that is subject to the effective control of the person; and

(b) property that was the subject of a gift from the person to another person regardless of when the gift was made.

(7) An application for a restraining order or a civil forfeiture restraining order in relation to property or an interest in property does not preclude an application for an unexplained wealth restraining order being made in relation to the same property or interest in property.

(8) An application for an unexplained wealth restraining order may be made more than once in respect of the same property or interest in property.

Example

Separate applications under subsections (1) and (2) made be made in respect of the same property or the same interest in property.

(9) An application for an unexplained wealth restraining order in relation to property or an interest in property made on the basis of serious criminal activity does not preclude an application for a further unexplained wealth restraining order being made in relation to other property or another interest in property on the basis of the same serious criminal activity.

37 Section 40G sets out when property is to be taken to be lawfully acquired; it relevantly provides:

40G Property lawfully acquired

(1) For the purposes of this Part —

(a) property acquired by a person for sufficient consideration that has otherwise been lawfully acquired is taken to have been lawfully acquired only if the consideration given for the property by the person was lawfully acquired;

(b) property acquired by a person other than for sufficient consideration or on the distribution of the estate of a deceased person is taken to have been lawfully acquired only if the person from whom it was acquired or the deceased person (as the case may be) lawfully acquired the property;

Note

The effect of paragraph (b) is that if, for example, the donor of property given as a gift to the person received the property as a gift from someone else who acquired the property unlawfully, the property remains property that has not been lawfully acquired.

(c) property acquired by a person as a prize or as the proceeds of any form of gambling is taken to have been lawfully acquired only if any money or other item of value used by the person for the purposes of entering the prize draw or for the purposes of the gambling (as the case may be) was lawfully acquired;

…

(2) Subsection (1) does not limit the criteria for determining for the purposes of this Part whether or not property has been lawfully acquired.

(3) Despite subsection (1)(f), a person who acquires the property from the sale or disposal of the property under this Act lawfully acquires the property unless any consideration paid for the property has not been lawfully acquired.

38 Section 40H sets out the considerations which a court must take into account when deciding whether notice should be given to a person affected by an unexplained wealth restraining order. It also expressly confers power on the court, under sub-s (1), to direct that notice be given to a person affected before the application is heard. This differs from the scheme of the legislation considered in *International Finance*.[57] Section 40H(5) empowers the court to hear the application for an unexplained wealth restraining order without notice being given to the affected party if the court has determined that no notice is required:

40H Procedure on application for unexplained wealth restraining order

(1) On an application under section 40F, if the court, having regard to the matters referred to in subsection (2), is satisfied that the circumstances of the case justify the giving of notice to a person affected, the court may direct an applicant for an unexplained wealth restraining order to give notice of the application for that order to any person whom the court has reason to believe has an interest in the property that is the subject of the application.

(2) In determining whether the circumstances of the case justify the giving of notice, the court must have regard to —

(a) the aim of preserving the property that is the subject of the application so as to ensure its availability for the purpose of unexplained wealth forfeiture; and

(b) any jeopardy to an investigation by a law enforcement agency into criminal activity that could result from the giving of notice; and

(c) any risk to the safety or security of a person, including a potential witness in any criminal proceeding, that could result from the giving of notice; and

(d) the provision made by this Act to enable a person claiming an

57 This is discussed at [66]-[84] below.

interest in property the subject of an unexplained wealth restraining order to apply for a section 40S exclusion order to protect that interest from the operation of the unexplained wealth restraining order; and

(e) the limited duration of an unexplained wealth restraining order; and

(f) the submissions, if any, made by the applicant in relation to the giving of notice.

(3) In determining whether to direct an applicant to give notice of an application for an unexplained wealth restraining order, the court may have regard to any other matter that the court considers relevant.

(4) If the court requires notice of an application for an unexplained wealth restraining order to be given under subsection (1) and the application is withdrawn because of that requirement, the court must not award costs in relation to the application.

(5) If the court does not require notice of an application for an unexplained wealth restraining order to be given under subsection (1), it may hear and determine the application in the absence of any person who has an interest in the property that is the subject of the application.

(6) Any person notified under subsection (1) is entitled to appear and to give evidence at the hearing of the application but the absence of that person does not prevent the court from making an unexplained wealth restraining order.

(7) The court may —

(a) order that the whole or any part of the proceeding be heard in closed court; or

(b) order that only persons or classes of persons specified by it may be present during the whole or any part of the proceeding; or

(c) make an order prohibiting the publication of a report of the whole or any part of the proceeding or of any information derived from the proceeding.

(8) The court must cause a copy of any order made under subsection (7) to be posted on a door of the court house or in another conspicuous place where notices are usually posted at the court house.

(9) A person must not contravene an order posted under subsection (8).Penalty: Imprisonment for 12 months or 1000 penalty units.

39 Section 40I mandates the making of an unexplained wealth restraining order if the court is satisfied of various matters. This section is the target of the constitutional challenge which is the subject of the appeal:

40I Determination of application for unexplained wealth restraining order

(1) On an application under section 40F(1) for an unexplained wealth restraining order, the court must make an unexplained wealth restraining order if it is satisfied that —

(a) the deponent of the affidavit supporting the application does suspect that —

(i) a person has engaged in serious criminal activity; and

(ii) that person has an interest in the property sought to be restrained; and

(iii) in the case of property located outside Victoria—the serious criminal activity occurred in Victoria; and

(iv) the total value of the property is $50 000 or more; and

(b) there are reasonable grounds for the suspicion referred to in paragraph (a)(i), (ii) and (iii).

(2) The court must be satisfied that the deponent of the affidavit reasonably suspects that a person with an interest in the property has engaged in serious criminal activity —

(a) regardless of whether that person, or any other person, has been charged with, tried for, acquitted or convicted of, or has had a conviction quashed, pardoned or set aside for, an offence that is, or offences that are, suspected of constituting the serious criminal activity; and

(b) where more than one offence is specified as constituting the serious criminal activity — if the court is satisfied that the deponent reasonably suspects that the conduct of the person constitutes at least one of those offences.

(3) On an application under section 40F(2) for an unexplained wealth restraining order, the court must make an unexplained wealth restraining order if it is satisfied that —

(a) the deponent of the affidavit supporting the application does suspect that —

(i) the property sought to be restrained was not lawfully acquired; and

(ii) either —

(A) the property is located in Victoria; or

(B) the person who has acquired the property is ordinarily resident in Victoria; and

(b) there are reasonable grounds for that suspicion.

(4) For the purposes of subsection (3)(b), in determining whether there are reasonable grounds for suspecting that property was not lawfully acquired, the court may have regard to one or more of the following —

(a) the lawful income of a person with an interest in, or effective control of, the property;

(b) any suspected unlawful activity of a person with an interest in, or effective control of, the property;

(c) the prior ownership of the property and any suspected unlawful activity of a person, or persons, who previously owned the property;

(d) the circumstances under which the property has come to the attention of Victoria Police;

(e) any other relevant matter.

40 Section 40J requires that, if the unexplained wealth restraining order was made *ex parte*, notice of the order must be given to a person affected. Subsection (2) provides for the court to give directions if the person cannot be located:

40J Notice of unexplained wealth restraining order to be given to persons affected

(1) If —

(a) an unexplained wealth restraining order is made in respect of property of a person; and

(b) notice had not been given to that person of the application for the unexplained wealth restraining order —

the applicant must give written notice of the making of the unexplained wealth restraining order to that person.

(2) If a person to whom notice must be given under subsection (1) cannot be found after all reasonable steps have been taken to locate the person, the applicant must give notice to that person in any other manner that the court directs.

…

41 Section 40K(1) requires that further notice must be given to a person affected requiring him or her to give a written declaration of interests in the restrained property:

(1) Subject to subsection (2),[58] if an unexplained wealth restraining order is made in respect of property, a police officer must give a notice to each person who the applicant for the unexplained wealth restraining order believes has an interest in that property requiring the person to give to the police officer a written declaration of interests in restrained property.

42 Section 40R allows a person claiming an interest in property in respect of which an unexplained wealth restraining order has been made to apply for the exclusion of his or her interest in that property from the operation of the order. This is the section pursuant to which Ha and Dong made their exclusion applications:

40R Application for exclusion from unexplained wealth restraining order

(1) If a court makes an unexplained wealth restraining order against property, any person claiming an interest in the property may apply to the court that made that order for a section 40S exclusion order.

(2) An application under subsection (1) must be made —

(a) if notice is required to be given under section 40J — within 90 days after service of notice of the making of the unexplained wealth restraining order; or

(b) in any other case — within 90 days after the making of the unexplained wealth restraining order.

(3) Subject to subsection (4), the court may extend the period within which an application may be made, whether or not that period has expired, if it is in the interests of justice to do so.

(4) The court may not extend the period within which an application may be made in respect of property that has been forfeited by or under this Act.

(5) An applicant must give notice of the application, and, subject to subsection (10), of the grounds on which it is made —

(a) to the applicant for the unexplained wealth restraining order; and

(b) to any other person whom the applicant has reason to believe has an interest in the property.

(6) Any person referred to in subsection (5) is entitled to appear and to give evidence at the hearing of an application for a section 40S exclusion order but the absence of that person does not prevent the court from making a section 40S exclusion order.

(7) If the person referred to in subsection (5)(a) proposes to contest an application for a section 40S exclusion order, that person must give the applicant notice of the grounds on which the application is to be contested.

---

58 Subsection (2) deals with circumstances in which a notice under s 40M has been issued. This occurs when the restraining order is made on the basis that the respondent has engaged in serious criminal activity. The s 40M notice requires a written declaration of interests with particulars as prescribed under s 40N including, for example, any unit trusts, ledgers, shares or debentures in which the person holds an interest. If a s 40M notice has been issued, a police officer may, but is not required to, give a notice under s 40K(1).

(8) If a person claiming an interest in the property is charged with an offence, any statement made or evidence given by the person in support of an application under this section is admissible against that person in a proceeding for perjury or any proceeding under this Act but is not otherwise admissible in evidence against that person.

(9) If a person claiming an interest in the property is charged with an offence, any information, document or thing obtained as a direct or indirect consequence of any statement made or evidence given by the person in support of an application under this section is admissible against that person in a proceeding for perjury or any proceeding under this Act but is not otherwise admissible in evidence against that person.

(10) If —

(a) a person applies under this section for a section 40S exclusion order; and

(b) that person is charged with an offence relevant to the application for the section 40S exclusion order; and

(c) that person has made an application under subsection (11) —

the person need not give notice of the grounds on which the application for the section 40S exclusion order is made until the application under subsection (11) has been determined.

(11) Any person referred to in subsection (5) may apply to the court for an order that the hearing of the application for a section 40S exclusion order be stayed until the charge referred to in subsection (10)(b) —

(a) is finally determined; or

(b) is withdrawn.

(12) The court may only order that the hearing of the application for a section 40S exclusion order be stayed if the court considers that not ordering a stay of the hearing would prejudice the fairness of the hearing of the charge.

…

43 Section 40S describes the process for determining an exclusion application, including the imposition of a reverse onus:

40S Determination of application for exclusion from unexplained wealth restraining order

(1) On an application under section 40R, the court may make an order excluding the applicant's interest in property from the operation of the unexplained wealth restraining order if the court is satisfied that the property was lawfully acquired by the applicant.

(2) For the purposes of this section, the applicant's interest in property is presumed not to have been lawfully acquired unless the applicant proves otherwise.

(3) An order under subsection (1) made in respect of an interest in property excludes the interest in property from the unexplained wealth restraining order with effect from —

(a) 30 days after the date of the order; or

(b) such later date as the court sees fit.

(4) If the court makes an order under subsection (1) the court may also make an order declaring the nature, extent and value of the applicant's interest in the property.

44 Section 40T sets out the evidentiary requirements for an exclusion application:

40T Evidentiary requirements for exclusion order

(1) At a hearing of an application for a section 40S exclusion order, the applicant for the order must provide documentary evidence of any transactions alleged by the applicant to have occurred that would support the claim that the property that is the subject of the application was lawfully acquired by the applicant.

(2) The court hearing the application may accept evidence other than documentary evidence if —

(a) that other evidence is provided in addition to documentary evidence of the transaction; or

(b) the court is satisfied that it is not reasonable to expect documentary evidence to exist because of the nature of the transfer of property, the effluxion of time or any other reason.

45 Section 40W empowers the court to make such further orders in relation to restrained property as it considers just, including varying the property to which the order relates. It is a live constructional issue on the appeal as to whether s 40W would extend to directing that there be a rehearing of the application for an unexplained wealth restraining order:

40W Further orders

(1) The court may make any orders in relation to the property to which the unexplained wealth restraining order relates as it considers just.

(2) An order under subsection (1) may be made —

(a) when the court makes an unexplained wealth restraining order; or

(b) at any later time.

(3) An order under subsection (1) may be made on the application of —

(a) the applicant for the unexplained wealth restraining order; or

(b) a person to whose property the unexplained wealth restraining order relates or who has an interest in that property;

(c) a trustee, if the unexplained wealth restraining order directed the trustee to take control of property; or

(d) a prescribed person, or a person belonging to a prescribed class of persons; or

(e) any other person who obtains the leave of the court to apply.

(4) Any person referred to in subsection (3) is entitled to appear and to give evidence at the hearing of an application under this section but the absence of that person does not prevent the court from making an order.

(5) The applicant for an order under subsection (1) must give written notice of the application to each other person referred to in subsection (3)(a) to (3)(c) who could have applied for the order.

(6) Examples of the kind of order that the court may make under subsection (1) include the following —

(a) an order varying the property to which the unexplained wealth restraining order relates;

(b) an order varying any condition to which the unexplained wealth restraining order is subject;

(c) an order providing for the reasonable living expenses and reasonable business expenses of any person referred to in section 40C(4);

(d) an order relating to the carrying out of any undertaking given under section 40C(7) in relation to the unexplained wealth restraining order;

(e) an order for examination under Part 12;

(f) an order directing any person whose property the unexplained wealth restraining order relates to or any other person to furnish to such person as the court directs, within the period specified in the order, a statement, verified by the oath or affirmation of that person, setting out such particulars of the property to which the unexplained wealth restraining order relates as the court thinks proper;

(g) an order directing any relevant registration authority not to register any instrument affecting property to which the unexplained wealth restraining order relates while it is in force except in accordance with the order;

(h) if the unexplained wealth restraining order did not direct a trustee to take control of property in accordance with section 40C(3), an order directing a trustee to take control of property at any later time specified in the order under subsection (1);

(i) if the unexplained wealth restraining order directed a trustee to take control of property —

(i) an order regulating the manner in which the trustee may exercise powers or perform duties under the unexplained wealth restraining order;

(ii) an order determining any question relating to the property;

(j) an order directing a person to whose property the unexplained wealth restraining order relates or who has an interest in that property to use or manage specified property to which the unexplained wealth restraining order relates, subject to conditions specified in the order;

(k) an order directing a person prescribed for the purposes of subsection (3)(d), if that person so consents, to do any activity specified in the order that is reasonably necessary for the purpose of managing specified property to which the unexplained wealth restraining order relates.*Example*

The court may direct the carrying out of repairs on restrained premises.

Note

Property is defined as including any interest in property. See section 3(1).

46 Section 40X confers power on the court to make an order setting aside an unexplained wealth restraining order if satisfied that it is no longer required or appropriate. The application can only be made by the applicant for the unexplained wealth restraining order:

40X Setting aside of unexplained wealth restraining order

On the application of the applicant for an unexplained wealth restraining order, the court that made the unexplained wealth restraining order may make an order setting aside the unexplained wealth restraining order if satisfied that the unexplained wealth restraining order is no longer required or appropriate.

47 In div 2, s 40ZA(1) provides for the restrained property to be forfeited to the Minister on the expiry of six months from the making of the order. In general terms, s 40ZA(2) provides for the restrained property not to be forfeited even though six months has passed if an exclusion application is still pending. This facilitates in effect a suspension of the process towards forfeiture. If the

exclusion application is refused or dismissed, forfeiture occurs at the end of the period during which the person may appeal or when the appeal is determined unsuccessfully:

> 40ZA Forfeiture of unexplained wealth
>
> (1) Subject to subsection (2), property that is the subject of an unexplained wealth restraining order is forfeited to the Minister on the expiry of 6 months after the making of the unexplained wealth restraining order.
>
> (2) If, on the expiry of the 6 months referred to in subsection (1), an application under s 40R is still pending, the restrained property is forfeited to the Minister —
>
> (a) if the application is refused or dismissed —
>
> (i) at the end of the period during which the person may appeal against the refusal or dismissal; or
>
> (ii) if an appeal against the refusal or dismissal is lodged — when the appeal is abandoned or finally determined without the order having been made; or
>
> (b) if the application is withdrawn or struck out — on that withdrawal or striking out.
>
> (3) For the purposes of subsection (2), an application under section 40R is not pending unless an application under section 40R(1) has been made —
>
> (a) within the period referred to in section 40R(2); or
>
> (b) where, under section 40R(3), the court has extended the period in which the application may be made — within the period as so extended and before the expiry of the period of 6 months referred to in subsection (1).

48 Section 40ZB allows for applications to be made for declarations that restrained property has been forfeited:

> 40ZB Declaration that property has been forfeited
>
> (1) The applicant for an unexplained wealth restraining order may apply to the court that made that order for a declaration that property that was subject to the unexplained wealth restraining order has been forfeited to the Minister under section 40ZA.
>
> (2) An applicant under this section for a declaration that property has been forfeited is not required to give notice of the application to any person who has an interest in the property.*Note*
>
> Section 40C provides that an unexplained wealth restraining order may be made in respect of property or an interest in property.
>
> (3) On an application under subsection (1), the court, if satisfied that the property has been forfeited to the Minister under section 40ZA, must make a declaration accordingly.

49 Section 40ZC allows for further exclusion applications to be made. These are in addition to exclusion applications made under s 40R[59] for exclusion from the scope of a restraining order. Applications made under s 40ZC are for exclusion from forfeiture *after* the property has been forfeited to the Minister under s 40ZA. Leave is required. Exclusion from forfeiture applications cannot be made if the property has been disposed of in accordance with s 44 (which is not to occur until after any appeal period has expired, except with the leave of the court, and not before the final determination of any exclusion application,

59 See [42] above.

including an exclusion from forfeiture application made under s 40ZC). Pursuant to sub-s 2(b), there is a time-limit of 60 days after forfeiture for the application for exclusion to be made. Section 40ZD provides for an exclusion order to be made if the court is satisfied that the property was lawfully acquired by the applicant.

50 Section 45B permits orders to be made granting relief from forfeiture where necessary to prevent undue hardship caused by the unexplained wealth forfeiture.[60]

51 Ha's challenge to s 40I focuses upon what is alleged to be a fundamental unfairness in a State court making restraining orders *ex parte* which may result in forfeiture of property without a guarantee that the making of the restraining order can be revisited at a full *inter partes* hearing.

Preliminary point — Should Ha be granted leave to raise the constitutional challenge?

52 The DPP raises, as a preliminary point, the question of whether Ha should be granted leave to raise the constitutional challenge to the validity of s 40I for the first time in this Court. Ha does not allege any error by Judge Jordan in the conduct of the trial nor in the reasons supporting his decision to dismiss Ha and Dong's exclusion applications. Rather, Ha relies on a collateral challenge alleging the constitutional invalidity of s 40I as the sole basis of the appeal. The DPP notes that the constitutional challenge could have been raised during the course of the hearing of the exclusion applications but instead Ha (and Dong) opted to conduct a prolonged trial.

53 In my view, it is appropriate to permit Ha to raise her constitutional argument on the appeal for the first time. The validity of s 40I involves a pure question of law and the DPP does not contend that it was possible for there to have been evidence which could have been relied upon below which would have prevented the point succeeding.[61] Nevertheless, as the DPP submits, it remains a matter of discretion whether the Court will permit an argument to be run for the first time on appeal.[62] She submits that the principle of finality of litigation favours the refusal of leave to permit the constitutional challenge to be raised and that the interests of justice do not support a grant of leave.

54 I disagree. The constitutional challenge is fundamental to the operation of the Act in respect of the property. If s 40I is invalid, the court had no power to make the restraining order *ex parte*. As is apparent from the statutory scheme, the restraining order served as the basis from which the forfeiture of the property inevitably occurred (given the dismissal of the exclusion applications). The self-executing nature of the restraining order reinforces, in my view, that the circumstances here are exceptional and the interests of justice favour a grant of leave to raise in this Court the argument based on the principle identified in *Kable*.

55 The DPP also submits that Ha has acted inconsistently with her current challenge because her exclusion application was predicated on the restraining

60 See *Meskovski v Director of Public Prosecutions (Vic)* [2018] VSCA 293 in respect of the power to grant relief from forfeiture under the Act. As noted at n 49, Ha applied for relief against forfeiture under s 45B.

61 *Harplex Pty Ltd v Konstandellos* (2018) 54 VR 174, 190 [67]. See also *Coulton v Holcombe* (1986) 162 CLR 1, 7; *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481, 483.

62 *Glass v Chief Examiner* (2015) 50 VR 577, 597-8 [78].

order being valid and in effect.[63] However, Ha's conduct, in assuming the validity of the restraining order for certain purposes, cannot render the restraining order valid if it is invalid. Ha's challenge is to the constitutionality of the statutory scheme that has led to the forfeiture of the property and which, according to Ha, is invalid for failing to guarantee an *inter partes* hearing. In this context it is the statutory scheme, and not Ha's conduct, that demands scrutiny.

56 The DPP also submits that the chronological sequence is important. As mentioned, on 9 October 2017 Judge Carmody declared that the property had been forfeited to the Minister, being satisfied that it had been forfeited by operation of s 40ZA of the Act on 27 September 2017,[64] and had vested in equity in the Minister on that date.[65] Once the applicable registration requirements had been complied with, the property vested in law in the Minister between 11 December 2017 and 15 January 2018. The DPP submits that forfeiture having taking place, the restraining order, which has interlocutory force, is spent and there is no utility in Ha obtaining an order quashing it given that its effect has come to an end. The DPP relies on the observation of this Court in *DPP v Nguyen*[66] to the effect that "[o]nce property has been automatically forfeited under s 35(1), there is no longer any restraining order in operation in respect of the property".[67]

57 In my view, the question of the utility of quashing the restraining order, if Ha were to be successful on the appeal, is here of little moment. This is an issue that is relevant to the framing of the form of relief that might ultimately be made in the disposition of the appeal but it does not affect the question of whether leave should be granted for the constitutional argument to be raised nor does it affect where the interests of justice lie.

Is s 40I invalid because it fails to preserve a right to an inter partes hearing? — Ground 1

58 In accordance with what has become known as the *Kable* principle, a State Parliament cannot confer powers or functions upon the Supreme Court of a State that are incompatible with, or repugnant to, its exercise of federal judicial power.[68] Legislation that purports to confer jurisdiction on State courts that compromises their institutional integrity and affects their capacity to exercise federal jurisdiction as independent and impartial tribunals offends Ch III of the Commonwealth *Constitution* and is constitutionally invalid.[69]

59 The *Kable* principle was applied in *International Finance* to invalidate s 10 of the *Criminal Assets Recovery Act 1990* (NSW) ("the NSW Act") because s 10 engaged the State Supreme Court of New South Wales in an activity repugnant to the judicial process in a fundamental degree. Section 10 provided

63 The same allegation of inconsistent conduct is made in relation to Ha's application for relief against forfeiture: see n 49 above.

64 The property was forfeited at the end of the appeal period (28 days) from the making of the final order (30 August 2017).

65 Pursuant to s 41(3)(a) of the Act.

66 *Director of Public Prosecutions v Nguyen* (2009) 23 VR 66.

67 *Director of Public Prosecutions v Nguyen* (2009) 23 VR 66, [117] (Maxwell P, Weinberg JA and Kyrou AJA).

68 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 106 (Gaudron J), 137 (Gummow J).

69 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 560 [39].

that the New South Wales Crime Commission ("the Commission") could apply *ex parte* for a restraining order preventing dealings with specified property. The majority of the Court construed s 10 as requiring the court to conduct an *ex parte* hearing, if the Commission sought one. A subsequent forfeiture order could be made in respect of the restrained property. Section 10 was held to be void because it conscripted the State Supreme Court into a process which required the mandatory *ex parte* sequestration of property upon suspicion of wrongdoing, for an indeterminate period, with no effective curial enforcement of the duty of full disclosure that applies to *ex parte* applications.[70]

60 Ha supports ground 1 of the grounds of appeal by relying upon *International Finance* as authority for the proposition that a statute that does not provide for an "as of right" *inter partes* hearing is void as contrary to the Commonwealth *Constitution*. Ha submits that, similarly to s 10 of the NSW Act, s 40I of the Act does not provide for an "as of right" rehearing and therefore is "repugnant to the judicial process" and contrary to Ch III of the *Constitution*. Ha contends that in the context of the Act there will be no curial enforcement of the duty of full disclosure governing the *ex parte* application for an unexplained wealth restraining order. Ha submits that the general power of the Court to make any orders it considers just, under s 40W,[71] is of no assistance.

61 Ha contends that where Parliament intends to preserve rights and protect interests, it does so expressly. Ha submits that pt 4A of the Act effectively operates as a code and should be interpreted as such. She submits that there are features of the Act that indicate that, with respect to a restraining order obtained *ex parte*, the correct construction of the Act, and s 40I and s 40W in particular, is to prohibit a rehearing by necessary implication.[72]

62 Ha submits that a rehearing right would render the existing relief by way of an exclusion order, under s 40S, "practically redundant". This is so because a rehearing right under either s 40I or s 40W would afford greater protection to persons affected by an unexplained wealth restraining order than the hearing conducted for the purposes of the exclusion application. Under s 40S, a person claiming an interest in restrained property can only succeed in having that property excluded from the restraining order if they can demonstrate, on a reverse onus, that the property was lawfully acquired. However, a full rehearing of the *ex parte* application for a restraining order would not only consider whether the property was lawfully acquired but also whether there had been non-compliance with the duty of full disclosure. The scope of a rehearing would thus extend to all the issues canvassed at an exclusion application, and more. Ha submits that this Court should not readily adopt an interpretation of the Act that renders exclusion applications redundant and it should therefore conclude that there is no right to a rehearing under either s 40I or s 40W.

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70 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 367 [98] (Gummow and Bell JJ). See *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679, 681-2; *Director of Public Prosecutions and Another v Moloney* (2011) 33 VR 23, 35-6 [39]-[40].

71 See [45] above.

72 Ha thus appears to be in the position that Gageler J described in *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 604 [75] as a "party seeking to challenge validity advanc[ing] a literal and draconian construction, even though the construction would be detrimental to that party were the law to be held valid" in accordance with that construction.

63 Ha also relies upon s 40X[73] which provides for an application to be made for the discharge of a restraining order. As noted, this process is only available to the applicant for the restraining order. The court may then set aside the restraining order if satisfied that it is "no longer required or appropriate". Ha submits that s 40X is the only source of power in the court to set aside a restraining order following its initial grant and thus that there is no implied power to set aside a restraining order otherwise.

64 Ha submits that the failure of s 40I to provide a right to an *inter partes* rehearing of an *ex parte* application for an order that may result in forfeiture of property renders s 40I repugnant to Ch III and void. Ha submits that this Court ought not to adopt a strained meaning of s 40I in seeking to preserve its validity, by the principle of legality or otherwise.

65 In response, the DPP submits that there are three critical differences between the statutory scheme under the Act and that of the NSW Act which are sufficient to distinguish *International Finance*:

(a) the power of the court under s 40H(1) to direct that the DPP give notice of an application for a restraining order to the person affected;

(b) the inherent or implied power of a court[74] to set aside an order made *ex parte*;

(c) the absence of indicia that pt 4A is intended to be a code.

(1) Power of court to direct that notice be given

66 The DPP submits that s 40H(1) is one of the sections of the Act that render inapplicable the reasoning of the majority of the High Court in *International Finance* that invalidated s 10 of the NSW Act. She submits that it is significant that, under s 40H(1) of the Act, the court has the power to direct that the DPP give notice of an application for a restraining order to the person affected; that is, the court has power to

> direct an applicant for an unexplained wealth restraining order to give notice of the application for that order to any person whom the court has reason to believe has an interest in the property that is the subject of the application.[75]

67 Whether a court will exercise the power to direct that notice be given depends upon a number of factors, including, as mentioned above, the aim of preserving the property to ensure its availability for forfeiture; any potential jeopardy to a criminal investigation; any risk to the safety of a witness; the availability of a person with an interest in the property to protect that interest by an exclusion application; the limited duration of a restraining order and any submissions made to the court.[76] The DPP submits that s 40H assists in distinguishing the statutory scheme under the Act from s 10 of the NSW Act because s 10 mandated the making of a restraining order *ex parte* if the Commission chose to proceed *ex parte*. All that was necessary was for the application by the Commission to be supported by an affidavit stating various matters, including the holding of a suspicion that a relevant person had engaged in serious crime related activity. Relevantly, s 10 provided:

> (1) A restraining order is an order that no person is to dispose of … or to

73 See [46] above.

74 The Supreme Court having inherent power and the County Court having implied power.

75 See [38] above.

76 Ibid. See also [10] above.

> otherwise deal with … an interest in property to which the order applies except in such manner or in such circumstances (if any) as are specified in the order.
>
> (2) The Commission may apply to the Supreme Court, ex parte, for a restraining order …
>
> (3) The Supreme Court *must make the order applied for under subsection (2)* if the application is supported by an affidavit of an authorised officer stating that:
>
> (a) … the authorised officer suspects that the person has engaged in a serious crime related activity …
>
> (b) … the authorised officer suspects that the interest is serious crime derived property …
>
> and the Court considers that having regard to the matters contained in any such affidavit there are reasonable grounds for any such suspicion.[77]

68 By contrast, under s 40H it is for the court to decide whether the application can proceed *ex parte* or can only proceed after notice has been given to a person affected.

69 Whether this is a critical difference depends upon an analysis of the reasons of the majority in *International Finance*.

70 In *International Finance* the Court split four-three on whether s 10 of the NSW Act was invalid. The majority expressed itself in three separate sets of reasons, those of French CJ, the joint reasons of Gummow and Bell JJ, and those of Heydon J.

71 French CJ noted that senior counsel for International Finance Trust Co Ltd "accepted that the proposition that s 10(3) does not allow the Court hearing an ex parte application for a restraining order to do other than hear it ex parte was critical to his argument".[78] His Honour accepted that construction and held that if the Commission chose to apply *ex parte*, it mandated that the court hear and determine the application without notice to the person affected ("the mandatory requirement"). The question of notice (and the procedural fairness associated with notice) became a matter for the Commission's discretion and not that of the court:

> The Court *must* make the order applied for on the Commission's application when the conditions set out in s 10(3) … are satisfied. There is no textual space in the section within which the Court may interpose a further condition requiring that notice first be given to the affected party. Nor is this a case in which … the Court should read such a power into the section by some form of implication unsupported by its text. … As Gummow and Bell JJ point out in their joint judgment and Heydon J shows in detail, the [NSW] Act establishes a "distinct regime" excluding the general powers of the Supreme Court which might otherwise have applied.
>
> The question whether notice is to be given of an application for a restraining order is therefore at the Commission's discretion. It is left to the Commission to judge whether there is such a risk of concealment or dissipation of the assets the subject of the order that notice of the application should not be given to the person affected by it. The Court's discretion as to the conduct of its own proceedings in

77 Emphasis added.

78 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 347 [36].

the key area of procedural fairness is supplanted by the Commission's judgment.[79]

72 For French CJ, the mandatory requirement raised as a live issue the question of the constitutional validity of s 10:

> The issue of validity arises with respect to s 10 because it authorises ex parte applications to the Court, which must be heard and determined ex parte by the Court.[80]

73 French CJ took the view that s 10 was invalid because it purported to authorise the Executive to direct the court as to the manner of its exercise of federal judicial power, with the consequence of distorting the institutional integrity of the Court and impairing its capacity to be a repository of federal jurisdiction:

> To require a court, as s 10 does, not only to receive an ex parte application, but also to hear and determine it ex parte, if the Executive so desires, is to *direct the court as to the manner in which it exercises its jurisdiction* and in so doing to deprive the court of an important characteristic of judicial power. That is the power to ensure, so far as practicable, fairness between the parties. …
>
> *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*.[81]

74 Gummow and Bell JJ determined that invalidity flowed from four factors relating to the operation of the NSW Act: (1) the mandatory requirement; (2) the indeterminacy of the period of sequestration; (3) the lack of curial enforcement of the duty of full disclosure; and (4) the requirement for an affected person to disprove a complex legal and factual proposition:

> 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.[82]

75 Neither the first nor second factors are present here. Nor is the fourth. Section 25(2) of the NSW Act provided that the Supreme Court "must not make" an exclusion order

> unless it is proved that it is more probable than not that:

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79 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, [44]-[45] (emphasis added) (citations omitted).

80 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, [47].

81 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, [55]-[56] (emphasis added).

82 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, [97] (emphasis added).

(a) in the case of an order relating to fraudulently acquired property — the interest in property to which the application relates *is not fraudulently acquired property or is not illegally acquired property*, or

(b) in any other case — the interest in property to which the application relates is not illegally acquired property.[83]

76 By contrast, under the Act exclusion orders may be made by a court under s 40S or 40ZD of the Act without proof of a "negative proposition of considerable factual and legal complexity". The applicant for exclusion does not have to negate anything; instead, the applicant must positively prove that he or she lawfully acquired the property in which an interest is claimed.[84] While there is a reverse onus imposed, this does not have as a consequence constitutional invalidity.

77 Heydon J held that the mandatory requirement alone would not have led to repugnancy to the judicial process in a fundamental degree so as to lead to constitutional invalidity. However, it was relevant to that issue. He said:

> 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 to the judicial process in a fundamental degree, it is relevant to whether one other aspect of the legislation is.[85]

78 He went on to say that the granting of injunctive relief *ex parte* is an accepted and traditional power that courts enjoy:

> The element which is repugnant is not the grant of a power to make restraining orders ex parte. That is a very well-known aspect of Australian judicial process in relation to injunctions, although the power should only be exercised in exceptional or special cases, where there is some special hazard or cause of urgency. A risk of dissipation of assets in such a fashion as to frustrate the objects of the law can be in that category.[86]

79 For Heydon J the principal vice of s 10 was that the NSW Act did not provide a procedure by which the restraining order, obtained *ex parte*, could be challenged and set aside:

> 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.

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83 Emphasis added.

84 See *Commissioner of the Australian Federal Police v Hart* (2018) 262 CLR 76, 83-4 [7] with respect to the *Proceeds of Crime Act 2002* (Cth), s 102(3)(b) in relation to a similar requirement.

85 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 384 [152] (emphasis added) (citations omitted).

86 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, [156].

> *The central issue*. If there is no procedure by which the person subject to a s 10(2) restraining order made ex parte may approach the Court to have it set aside once that person has learnt of the order, the effect of s 10 is to compel the Supreme Court of New South Wales to engage in activity which is repugnant to the judicial process in a fundamental degree.[87]

80 In my view, the DPP is correct to submit that s 41H provides an essential point of difference between the statutory scheme under the Act and that under the NSW Act. All four judges in the majority placed some weight upon the presence of the mandatory requirement in determining that s 10 was invalid; for French CJ it was determinative, for Gummow and Bell JJ it was one of four factors, and for Heydon J it was relevant to invalidity.

81 Under the Act there is no mandatory requirement. The Act expressly invests the court with the discretion to determine if notice should be given to an affected person; there is no direction by the Executive to the court as to how to conduct its proceedings. The Act does not deprive the court of an essential incident of its judicial function of determining what procedural fairness requires.

82 This was explained by Nettle JA, in delivering the judgment of this court, in *Director of Public Prosecutions v Vu* (*"Vu"*).[88] A proper understanding of s 40H reveals that an application by the DPP for an *ex parte* restraining order involves a two-stage process; while the first stage, the power of the DPP to apply for a restraining order under s 40F(1) *ex parte*, appears to ignore any obligation to afford natural justice that might apply, the second stage, under s 40H, reasserts that obligation and renders its performance a matter within the discretion of the court. The comments expressed in *Vu* were made in the context of applications for restraining orders made under s 16 of the Act where a person has been charged[89] with a criminal offence[90] in respect of property in which that person has an interest, or is "tainted property".[91] Nettle JA said:

> Clearly, s 16(2) of the Act gives the Director of Public Prosecutions the right to apply without notice to the Supreme Court for a restraining order in circumstances mentioned in that section, thereby suggesting that the court is to hear the application ex parte. But this apparent disregard of the rules of natural justice is qualified by the very next section — s 17 — that empowers the court to direct the director to give notice of the application. In effect, as the court observed in *Navarolli, the Act gives the director the right to apply without notice and leaves to the court the determination of the question whether the application will be heard without notice*. Thus, the effect of the legislation is to leave to the judge the discretion to determine whether the matter is to be heard with or without notice. But it is not to be doubted that the discretion must be exercised judicially, according to what is necessary and proper in the circumstances of each case, and

87 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, [154]-[155].

88 *Director of Public Prosecutions v Vu* (2006) 14 VR 249. The other members of the Court were Chernov and Neave JJA.

89 Or will be charged within the next 48 hours.

90 That is, criminal offences under sch 1 to the Act.

91 "Tainted property" is defined in s 3 of the Act.

> in that sense the discretion is by no means unconstrained. Fundamentally, we think, it is a matter of balancing the right to be heard against the purposes of the legislation.[92]

83 While s 16(2) permits *ex parte* applications, s 17 confers on the court the power to determine if the application can proceed in that manner or requires notice to the person affected. The obligation to observe natural justice is met and the control by the court is not relinquished.

84 The same two-stage process is encapsulated in applications for restraining orders under s 40F(1) and the discretionary determination of the question whether the application will be heard without notice under s 40H(1). In my view, the power of the DPP to apply for a restraining order under s 40F(1) *ex parte* is unobjectionable because, as Heydon J observed, the power to entertain applications *ex parte* is an accepted power of courts. The two stage process does not impair the institutional integrity of a court because the court retains control over the fairness of its own processes and the Act does not permit an agent of the Executive to direct the court to disregard what natural justice might require in the circumstances of the case.

(2) Power of court to set aside ex parte order

85 The DPP submits that another essential point of difference between the statutory scheme under the Act and the NSW Act is that under the Act there is an inherent or implied power of the court to set aside a restraining order obtained *ex parte*.[93] As mentioned above, the absence of effective curial enforcement of the duty of full disclosure in *ex parte* applications played an important part in the reasons of Gummow and Bell JJ, as the third factor signalling invalidity.[94] Considered from the perspective of a person affected, it was the absence of a procedure by which a person subject to a restraining order obtained *ex parte* could approach the court to have it set aside that was the central issue for Heydon J in concluding that s 10 of the NSW Act was repugnant to the judicial process in a fundamental degree.

86 The DPP submits that the power of a court to set aside an *ex parte* order is the power that is necessarily implied as part of the power of a court to hear an application *ex parte*. This is supported by the observations of the High Court in *Electric Light & Power Supply Corporation Ltd v Electricity Commission of New South Wales*,[95] to the effect that when the legislature confers a function on a court, then "[i]n the absence of express words to the contrary or of reasonably plain intendment the inference may safely be made that it takes it as it finds it

92 *Director of Public Prosecutions v Vu* (2006) 14 VR 249, 257 [26] (emphasis added) (citation omitted).

93 It was common ground that the various rules of court that confer power to set aside an order made on an *ex parte* basis (r 46.08(b) of the *Supreme Court (General Civil Procedure) Rules 2015* and the *County Court Civil Procedure Rules 2008*) do not apply because s 133(2) of the Act excludes the operation of civil procedure rules. Section 133 relevantly provides: "(1) Proceedings on an application under this Act are civil in nature, except as otherwise provided by this Act. (2) Despite subsection (1), the rules regulating the practice and procedure of a court in civil proceedings (except in relation to costs) do not apply to a proceeding on an application under this Act".

94 See [74] above.

95 *Electric Light and Power Supply Corporation Ltd v Electricity Commission (NSW)* (1956) 94 CLR 554.

with all its incidents".[96] Legislation conferring powers on a court "takes the Court and its processes as it finds them, except to the extent the Act modifies or qualifies those processes".[97]

87 In particular, the power to set aside an order obtained *ex parte* is an inherent power of the Supreme Court as a superior court. At the time of the enactment of pt 4A,[98] which post-dated *International Finance Trust Co Ltd v New South Wales Crime Commission*, there was no statement made by the Victorian Parliament that it was the intention of pt 4A to alter or vary s 85 of the *Constitution Act 1975* (which recognises the unlimited jurisdiction of the Supreme Court), by contrast with the express provision in s 145 of the Act that other sections of the Act were intended to alter or vary s 85 of the *Constitution Act*.[99]

88 The inherent power of a court to set aside orders made *ex parte* was acknowledged by the minority in *International Finance* (Hayne, Crennan and Kiefel JJ):

> The general rule that a judgment or order that has been formally recorded cannot be reconsidered except by processes of appeal has long been recognised to be subject to some qualifications. In particular, it is a rule that does not apply to an order made ex parte. As Griffith CJ rightly said, in *Owners of SS Kalibia v Wilson*:
>
> > when a judicial order has been obtained ex parte the party affected by it may apply for its discharge. This is an elementary rule of justice, of the application of which familiar instances are afforded by writs of care and ex parte injunctions.
>
> … it is a power necessarily implied as a part of the power of the Court to proceed ex parte. That is, as Griffith CJ put the point, it is "an elementary rule of justice".[100]

89 The general principle applies to all courts.[101] As Gibbs J said in *Taylor v Taylor* (*"Taylor"*)[102] (with whom Stephen J agreed):

> It is clear that the majority of the Court in Cameron v Cole accepted that a court, whether superior or inferior, has inherent power to set aside an order made against a person who did not have a reasonable opportunity to appear and present his case.[103]

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96 *Electric Light and Power Supply Corporation Ltd v Electricity Commission (NSW)* (1956) 94 CLR 554.

97 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 378 [134].

98 Part 4A was introduced by the *Justice Legislation Amendment (Confiscation and Other Matters) Act 2014* which was assented to on 21 October 2014.

99 The sections intended to alter or vary the jurisdiction of the Supreme Court are identified as: ss 55(10); 56(6); 57(6); 106(3); 119(7) and 118L, none of which appear in pt 4A.

100 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 376 [130] (citations omitted).

101 As noted, the Act applies to both the Supreme and County Courts. There is no differentiation in the Act between those courts. Thus, an inference that can be drawn about the application of the Act to one of those courts must also apply to the other.

102 *Taylor v Taylor* (1979) 143 CLR 1.

103 *Taylor v Taylor* (1979) 143 CLR 1. See also 16 (Mason J, with Aickin J agreeing): "A jurisdiction to set aside its orders is inherent in every court unless displaced by statute". See also *Savcor Pty Ltd v Cathodic Protection International APS* (2005) 12 VR 639, 646 [20].

90 Maxwell P (with whom Eames JA agreed) endorsed the general principle in *Duck Boo International Co Ltd v Mizzan Pty Ltd*,[104] specifically with respect to the County Court:

> [T]he County Court, like every court, has inherent jurisdiction to set aside its own orders. Where an order is made *ex parte* without notice to a party affected, that party has the right, *ex debito justitiae*, to approach the court and have the application re-heard. As Gillard AJA noted in *Savcor*, where an application is made to set aside an order made without notice, whether the application is pursuant to the rule or the inherent power of the court, the court re-hears the original application.[105]

91 The DPP further relies on *Vu* to urge that pt 4A of Act should not be construed, by its silence, as having excluded the inherent or implied power of a court to set aside its own orders when obtained *ex parte*. In *Vu*, Nettle JA, for the court, said:

> [T]he common law right to be heard is not lightly displaced and hence … a court should approach the construction of a statute with a presumption that the legislature does not intend to deny natural justice. Thus, where legislation is silent on the matter, it may be presumed that the legislature has left it to the court to prescribe and enforce the appropriate procedure to ensure natural justice.[106]

92 The power may be removed by statute[107] but, as the minority said in *International Finance*, this would require "the clearest language".[108] The general principle was not doubted by the members of the majority in *International Finance* but they considered that, nevertheless, the scheme of the NSW Act revealed that any conferral of power to set aside an *ex parte* order would need to be express and there was an absence of any such express power.[109] In substance the NSW Act was to be treated as a code.[110]

93 The Attorney-General supports the approach adopted by the DPP and, in addition, makes an alternative submission. He submits that, alternatively to the inherent or implied power relied upon by the DPP, there is another source of power for the setting aside of a restraining order made *ex parte* and the directing of a full *inter partes* hearing. This power lies in s 40W of the Act. As noted, s 40W provides for the court to "make any orders in relation to the property to which the unexplained wealth restraining order relates as it considers just".[111] The Attorney-General submits that s 40W is a power of very considerable breadth, although not unlimited,[112] and is to be read consistently with other

104 *Duck Boo International Co. Ltd v Mizzan Pty Ltd* [2006] VSCA 241.

105 *Duck Boo International Co. Ltd v Mizzan Pty Ltd* [2006] VSCA 241, [13] (citations omitted).

106 *Director of Public Prosecutions v Vu* (2006) 14 VR 249, 256 [22] (citation omitted).

107 *Taylor v Taylor* (1979) 143 CLR 1, 16 (Mason J).

108 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 378 [134].

109 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, [93] (Gummow and Bell JJ).

110 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, [162] (Heydon J). This issue is discussed below from [110] ff.

111 See [45] above.

112 For example, the Attorney-General submits that the power under s 40W cannot be exercised *after* a forfeiture order has been made: see [99] below.

aspects of the statutory scheme. It encompasses, implicitly, a power of the court to make an order setting aside a restraining order made *ex parte* for breach of the obligation to make full disclosure.

94 The NSW Act also contained a power to make orders it considered appropriate. However, the power was confined to "ancillary" orders.[113] The New South Wales Court of Appeal in *New South Wales Crime Commission v Ollis* (*"Ollis"*)[114] held that this power did not extend to the holding of an *inter partes* hearing for the purpose of dissolving a restraining order. Basten JA took the view that the term "ancillary" envisaged orders in aid of a pending assets forfeiture order.[115] Giles JA, with whom Mason P agreed, held that it was not consistent with the scheme of the NSW Act that there be a further hearing, after the *ex parte* order has been obtained, where the defendant could put on material and invite a reconsideration of the basis upon which the restraining order was made.[116] The majority in *International Finance* agreed with the construction adopted in *Ollis*.[117]

95 The Attorney-General relies on the difference in statutory language between the provision for "ancillary" orders under the NSW Act and the power under s 40W for the court to "make any orders in relation to the property to which the unexplained wealth restraining order relates as it considers just".[118]

96 I agree that there is a striking difference in the language of the NSW Act and that of s 40W of the Act. An understanding of "ancillary" as facilitative only of a forfeiture order is clearly not applicable to the amplitude of the power conferred by s 40W. Rather, s 40W appears to be directed to the making of whatever orders the court, in its assessment of the individual circumstances of a case, considers appropriate to ensure justice between the parties. In my view, this is another significant feature of the Act which distinguishes it from the scheme of the NSW Act.

97 Furthermore, the narrow reading of the power to make further orders, adopted by Giles JA and Mason P in *Ollis* and approved by the majority in *International Finance*, related to legislation that required that a court conduct an *ex parte* hearing if that was the form of hearing for which the Commission applied. Given the power of the Executive to direct the court in this way, it may appear reasonable to conclude that it would be inconsistent with such a scheme for the affected person to have the capacity to return to the court for a full *inter partes* hearing. Putting the issue of validity to one side, the role of the Executive

113 The NSW Act, s 12(1), a power "at any later time" after the making of a restraining order, to "make any ancillary orders … that the Court considers appropriate": see *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 364 [90].

114 *NSW Crime Commission v Ollis* (2006) 65 NSWLR 478.

115 *NSW Crime Commission v Ollis* (2006) 65 NSWLR 478, [60].

116 *NSW Crime Commission v Ollis* (2006) 65 NSWLR 478, [34].

117 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 356 [60] (French CJ), 365 [90] (Gummow and Bell JJ). Heydon J said: "An order which is 'ancillary' to another is an order which is subservient, subordinate, auxiliary or accessory to it. An order which sets aside another order is not 'ancillary' to it": *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 386 [161].

118 See [45] above.

envisaged under the NSW Act as controlling the court processes would be undermined. But this says nothing about the scheme under the Act, where there is no comparable mandatory requirement.

98 The Act recognises that circumstances may suggest that a person affected by a restraining order should be heard *before* the order is made. However, it leaves that decision to be made by the court. For the Act to ensure that the decision lies within curial and not executive authority implicitly recognises the importance of the court continuing to observe procedural fairness in this context. As noted, s 40J[119] mandates that, if notice has not already been given of the application for a restraining order under s 40F, notice *must* be given to the person whose property has been restrained and the court maintains supervision of that process. The importance placed throughout the Act on procedural fairness is consistent with support for an interpretation of s 40W that permits an applicant to apply to have an *ex parte* order set aside on the basis that there has been a breach of the obligation of full disclosure.

99 The broad interpretation of s 40W,[120] including as a source of power by which a person subject to a restraining order obtained *ex parte* could seek to have it set aside, is further supported by other features of s 40W, namely:

(1) The time at which the court may make "any order … it considers just" is not expressly restricted; it may be made at the time the court is making a restraining order or "at any later time". In my view, this would encompass, for example, a s 40W order being made during an *ex parte* hearing, adjourning the hearing and directing, in the interests of justice, that notice be given to an affected person to attend a reconvened *inter partes* hearing to determine if a restraining order should be made. (Alternatively, a court may simply adjourn the court and rely on its power under s 40H to direct that notice be given to a person affected.) Section 40W also clearly incorporates an order being made *after* the restraining order has been served on a person affected. This is not to say that an order can be made under s 40W at any time. The DPP and the Attorney-General submitted that the power conferred by s 40W is not available *after* forfeiture has occurred. Its terms reflect the present tense in that it refers to property to which the restraining order "relates". Section 40W is included in div 1 of pt 4A, entitled "Unexplained wealth restraining orders" and the powers directed to the period after forfeiture, for example, ss 40ZB and 40ZD[121] are found in div 2 of pt 4A entitled "Forfeiture of unexplained wealth" and in s 45B[122] in pt 5 entitled "Effect of forfeiture". This statutory structural separation reflects the spent force of a restraining order upon forfeiture.[123] Construing s 40W as operating after forfeiture is inconsistent with the manner in which s 40ZC is intended to operate, especially the time-limit of 60 days imposed by s 40ZC(2)(b) to apply for exclusion from forfeiture.[124]

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119 See [40] above.

120 See [45] above.

121 See [48] and [49] above, respectively.

122 See [50] above.

123 See [56] above.

124 See [49] above.

(2) The persons who may apply for a s 40W order are unrestricted. In particular, there is no requirement that the application for the s 40W order be made by the applicant for the restraining order (by contrast with s 40X), although the applicant may apply.[125] Rather, the s 40W order may be sought by the person whose interest in the property is being restrained, or sought to be restrained; that is, by "a person to whose property the unexplained wealth restraining order relates or who has an interest in that property". An application can also be made by a trustee, a prescribed person or "any other person who obtains the leave of the court to apply". The latter broad category would encompass someone who is not eligible to make an exclusion application but, perhaps, has information relevant to the acquisition of the property the subject of the restraining order.

(3) There is no requirement for a person who applies for a s 40W order to attend court, although they may do so and give evidence.

(4) The orders that the Act identifies, under the s 40W power, are illustrative only. The examples given include variations to the property restrained; variations to the conditions imposed; the provision of reasonable living expenses; and an order regulating the manner in which a trustee may exercise powers over property in respect of which it has control. These do not exhaust the range of orders that a court may make under s 40W.

100 In my view, the language of s 40W, on its plain meaning, is sufficiently broad to extend to the making of orders setting aside an order obtained *ex parte*. An order setting aside a restraining order made *ex parte* is clearly an order "in relation to the property to which the unexplained wealth restraining order relates" under s 40W(1) because its effect would be to lift the restraint over the property and permit dealings with that property. This construction is consistent with the scheme of the Act given that, as I have described, its provisions recognise the importance of procedural fairness and the scheme of the Act is sufficiently different from the scheme of the NSW Act, there being no scope for a mandatory directive by the Executive.

101 This construction of s 40W is also supported by the principle of legality whereby statutory provisions "are not to be construed as abrogating fundamental rights or important common law rights, privileges and immunities in the absence of clear words or necessary implication to that effect".[126] Such clear words may come from a "specific, clear and unambiguous alteration in pursuit of clearly identified legislative objects".[127] There is a specific and unambiguous alteration of the common law right to a fair hearing in s 40I because it unequivocally permits orders restraining persons from dealing with property without affording them a hearing in which they can participate. By contrast there is no such specific and unambiguous alteration of the common law right to a fair hearing in s 40W. Instead, there is the use of language which,

125 Section 40X allows only for the applicant for the order to seek a discharge: see [46] above and [112]-[124] below.

126 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 249 [126] (Crennan J) ("Lee"); see also 217-18 [29] (French CJ), 264 [171] (Kiefel J), 308-10 [308]-[313] (Gageler and Keane JJ). See also *Coco v The Queen* (1994) 179 CLR 427, 437, 446; *Potter v Minahan* (1908) 7 CLR 277, 304.

127 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 249 [126] (Crennan J).

as described, is sufficiently wide to extend to the making of orders setting aside orders obtained *ex parte* by means of the curial enforcement of the obligation of full disclosure.

102 This broad interpretation of s 40W is reinforced by the consideration that the underlying interest at stake is an interest in property and, at common law, forfeiture regimes are construed strictly. To this effect Whelan JA (with whom Redlich and Santamaria JJA agreed) said in *Markovski v Director of Public Prosecutions*:[128]

> When construing the provisions of a statute which purports to effect confiscation, any statutory ambiguity should be interpreted so as to respect a person's property rights, and, if there are two reasonable interpretations, the more lenient of which will avoid the imposition of the confiscation, that more lenient construction must be adopted.[129]

103 Furthermore, I consider that the Charter supports this construction. Section 32(1) of the Charter provides that "[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights". As this Court said in *R v DA*:[130]

> Where more than one interpretation of a provision is available on a plain reading of the statute, then that which is compatible with rights protected under the Charter is to be preferred.[131]

104 An interpretation of s 40W that extends to the making of an order setting aside a restraining order made *ex parte* ensures that s 40W is compatible with the relevant right engaged by the section, namely, the right to a fair hearing under s 24(1) of the Charter, which relevantly reads:

> [A] party to a civil proceeding has the right to have the … proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

105 A right to a fair hearing quintessentially requires that both parties be heard. The interpretation I favour manifestly "better accommodates"[132] the right to a fair hearing than an interpretation that impliedly excludes the court's power to entertain an application for a discharge of an *ex parte* order. This construction affords a meaning that respects the right to a fair hearing and is consistent with a plain reading of s 40W and reflective of common law principles of construction. It is an interpretation that does not strain the language used but, rather, as countenanced by this Court in *Treasurer (Vic) v Tabcorp Holdings Ltd*,[133] is in accordance with the ordinary meaning of the words that Parliament has chosen.[134]

106 Moreover, this interpretation does not give rise to questions of whether restrictions on the right are justified. By contrast, the construction proffered by

128 *Markovski v Director of Public Prosecutions (Vic)* (2014) 41 VR 548.

129 *Markovski v Director of Public Prosecutions (Vic)* (2014) 41 VR 548, [64(3)]. See also *Murphy v Farmer* (1988) 165 CLR 19, 27-9.

130 *R v DA* (2016) 263 A Crim R 429.

131 *R v DA* (2016) 263 A Crim R 429, [44].

132 *Hogan v Hinch* (2011) 243 CLR 506, 550-1 [78].

133 *Treasurer of Victoria v Tabcorp Holdings Ltd* [2014] VSCA 143.

134 *Treasurer of Victoria v Tabcorp Holdings Ltd* [2014] VSCA 143, [1]-[2], [99]-[102].

Ha denies the operation of the right to a fair hearing in this context and any potential issues of the justification of that denial, or their relevance to constructional choice,[135] were not addressed.

107 The interpretive obligation under s 32(1) of the Charter applies only to Victorian legislation and statutory instruments. Its support for a broad construction of s 40W further distinguishes *International Finance* and the narrow construction adopted there of the court's power to make orders it considered appropriate. In any event, as noted,[136] the power in the NSW Act was expressed in much narrower language, being confined to "ancillary" orders.

108 I also consider that, in any event, the inherent or implied power of a court to set aside an order it has made *ex parte* has not been removed by the Act. The Act does not contain the "clearest language" necessary to exclude the right of a party affected by a judicial order obtained *ex parte* to apply for its discharge.[137] The need for the Act as a whole to be interpreted compatibly with the Charter, under s 32(1), also supports a construction of the Act that does not exclude the inherent or implied power of a court to discharge an *ex parte* order.

109 Furthermore, I reject Ha's contention that construing the Act as permitting an *inter partes* hearing to determine if a restraining order should be discharged would render the exclusion application regime redundant. Exclusion orders under s 40S can be applied for, under s 40R, by "any person" claiming an interest in the property. This typically extends to family members who have acquired their interest in the relevant property lawfully. Applications for exclusion orders are subject to a detailed set of rules. The order, as the name suggests, excludes or excises an interest from the restraint imposed and thereby from the other processes, including forfeiture, under the statutory scheme. The order removes an interest in property from the operation of the statute. It allows the statutory scheme to continue to operate on any interest that has not been excised. By contrast, an application to discharge a restraining order seeks to impugn the making of the order in the first place; it seeks to demonstrate that the order should never have been made. The focus of the hearings, and the force of the orders made, are quite different. In my view, the postulated redundancy is unsupported by the Act.

(3) Part 4A is not intended to be a code

110 In *International Finance* Heydon J construed pt 2 of the NSW Act as a "self-contained and exhaustive regime".[138] He relied upon the "strict, confined, specific and tight regulation of the powers granted"[139] that left no room for an avenue by which an affected person could seek to dissolve an order obtained *ex*

135 As might be considered under s 7(2) of the Charter.

136 See [94]-[96] above.

137 See [92] above.

138 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 387 [162].

139 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, [165].

parte. Gummow and Bell JJ accepted that the NSW Act displayed "a plain intendment to establish a distinct regime".[140] French CJ also noted in this context that the NSW Act "contains its own procedural provisions".[141]

111 In my view, the regime provided for under the Act is not analogous in this respect to the NSW Act. It is sufficient to observe from the matters described above that, although many of the provisions of the Act are detailed and prescriptive, there are broad discretionary powers conferred upon the court that are inconsistent with the operation of the Act as a code. These include the ability of the court to take into account "any other matter that the court considers relevant" in determining whether to direct, under s 40H(1), that notice be given *before* a restraining order is made and the power under s 40W to make "any orders … it considers just". These powers are neither tight nor confined and do not reflect the stringency of a self-contained regime.

112 As developed in oral submissions, Ha argues that if there was a right to a rehearing *inter partes* in the exercise of the court's inherent jurisdiction, it would be expected that s 40H(2)[142] would make express reference to that right as one of the factors to be taken into consideration by a court in determining whether the circumstances of the case justify the giving of notice, in advance of the hearing, to a person affected of an application for a restraining order. However, in my view there is no well-founded expectation that the Act should expressly refer to the role that might be played by the inherent or implied jurisdiction of the Court. Indeed, this submission suffers from the flaw of requiring express mention, or necessarily implied inclusion, of procedural protections rather than adopting the accepted approach of common law construction of reading legislation consistently with those protections unless expressly and unequivocally excluded. It would be fair to say that many of the submissions proffered on behalf of Ha were based upon an assumption that the Act is to be treated as a code, exhaustively providing in express terms for every detail of its operation, rather than identifying aspects of the Act, considered neutrally, which support its interpretation as a code. There was at times an assumption by Ha of the truth of a proposition she sought to establish, without independent support.

113 Ha did focus upon a specific section in this limb of her argument, namely s 40X. Ha submits that construing the Act as permitting a person affected to apply to set aside an *ex parte* restraining order would be inconsistent with s 40X which, as noted above,[143] provides only for the applicant for the restraining order to apply for a discharge of the order. Ha submits that s 40X exhaustively provides for the circumstances in which a restraining order can be discharged, namely, where the order is "no longer required or appropriate".

114 The Attorney-General alerted this Court to two relevant decisions construing the right to seek the setting aside of a restraining order under s 42 of the

140 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, [79].

141 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, [44].

142 See [38] above.

143 See [63] above.

Proceeds of Crime Act 2002 (Cth) ("the POC Act"): *Director of Public Prosecutions (Cth) v Kamal* (*"Kamal"*)[144] and *Ruzehaji v Commissioner of the Australian Federal Police* (*"Ruzehaji"*).[145]

115 In *Kamal* the Court of Appeal of Western Australia upheld the constitutional validity of s 26(4) of the POC Act. Section 26(4) imposed a requirement upon the court to "consider" an application for a restraining order without notice having been given if the DPP requests the court to do so. The Court rejected a constitutional challenge based on the *Kable* principle because the majority considered that the Court had power to direct that notice be given irrespective of whether the DPP had requested the application be heard *ex parte*.[146] In doing so, it distinguished *International Finance*. Relevantly, the Court relied upon s 42 and the capacity it confers upon a person affected by a restraining order to argue, albeit on a limited basis, that the order should not be continued, as one means by which to distinguish the legislation from the NSW Act. (*Kamal* is not directly applicable here because s 42 of the POC Act differs from s 40X of the Act in that s 42 permits applications for revocation to be made by "a person who was not notified of the application for a restraining order".)

116 At the time the relevant order in *Kamal* was made, sub-s (1) of s 42 relevantly provided that a "person who was not notified of the application for a restraining order may apply to the court to revoke the order" and sub-s (5) of s 42 empowered the court to revoke such an order "if satisfied that there are no grounds on which to make the order at the time of considering the application to revoke the order". The Court held that s 42 is the exclusive source of the power to review an *ex parte* order, thus excluding the Court's inherent power to set aside an order made *ex parte* on the ground of nondisclosure.[147] The Court regarded s 42 as an adequate means by which a party against whom a restraining order had been obtained *ex parte* could set it aside.[148] The Court was not drawn into activity repugnant to the judicial process in a fundamental degree.

117 I do not consider the overall statutory context of the POC Act, as considered in *Kamal*, to be sufficiently analogous to the Act for the reasoning in *Kamal*, with respect to s 42 as an exclusive source of power, to be applicable here. Martin CJ noted in *Kamal* that s 42 stood to be construed without reference to a later amendment to sub-s (5) of s 42 empowering the court to set aside a restraining order "if satisfied that it is … in the interests of justice". Martin CJ said that this amendment, which I note is analogous to the terms of s 40W of the Act albeit without s 40W being tied to restraining orders, was likely to have been intended to address the issue of the lack of a procedure for the curial enforcement of the obligation of full disclosure. He said:

> Given that these amendments were made following the decision in *International Finance*, it is reasonable to infer that the amendment to s 42 was made in response

144 *Director of Public Prosecutions (Cth) v Kamal* (2011) 206 A Crim R 397; 248 FLR 64.

145 *Ruzehaji and Another v Commissioner of the Australian Federal Police* (2015) 124 SASR 355; 303 FLR 414.

146 The majority was Martin CJ and Buss JA: see *Director of Public Prosecutions (Cth) v Kamal* (2011) 206 A Crim R 397; 248 FLR 64, [95], [220], [222]. On this principal issue McLure P was in dissent: 99 [135].

147 *Director of Public Prosecutions (Cth) v Kamal* (2011) 206 A Crim R 397; 248 FLR 64, [111] (Martin CJ); [131] (McLure P); [251]-[252] (Buss JA).

148 See especially *Director of Public Prosecutions (Cth) v Kamal* (2011) 206 A Crim R 397; 248 FLR 64, [111] (Martin CJ) and [251(b)], [251(d)].

> to that decision and, in particular, to address concerns expressed by some of the majority justices in that case relating to the lack of any facility to enforce the obligation to make full disclosure when proceeding ex parte in the [NSW] Act. *The breadth of the power of revocation provided by the amendment would be sufficient to empower a court to revoke a restraining order because of the DPP's failure to comply with the obligation of full disclosure*.[149]

118 He said later that the amendment to s 42(5) "would appear to provide a mechanism for the supervision of the obligation of full disclosure imposed upon an applicant for an order without notice".[150]

119 This is consistent with the interpretation of s 40W of the Act adopted above.

120 Moreover, while McLure P agreed that s 42 was the exclusive source of power to revoke a restraining order, she emphasised the provisional nature of an order made *ex parte* which can be set aside upon a review of the merits.[151] Her Honour also noted that while "material non-disclosure could not itself entitle the court to set aside an ex parte restraining order made under s 18 of the POC Act unless it had the effect of undermining a condition necessary to enliven the power", that would "usually be the case where the original decision does not involve the exercise of a discretion".[152] She went on to say:

> In any event, material non-disclosure would clearly be relevant to proof of the requirements in s 18(1)(d) [the existence of reasonable grounds to suspect commission of a serious offence] and (f) [court to be satisfied that authorised officer holds the suspicion on reasonable grounds] of the POC Act, both of which require the court to make value judgments. Further, deliberate non-disclosure of material information may be such as to prevent the court from being satisfied of the matters in s 18(1)(f).[153]

121 Buss JA took the view, primarily by reason of s 42, that the POC Act, unlike the NSW Act, "does not displace, without an adequate alternative judicial remedy, the court's power to discharge any restraining order covering property that was made without notice of the application having been given to the owner".[154]

122 By contrast with *Kamal*, in *Ruzehaji* the Full Court of the Supreme Court of South Australia held that the express revocation power in s 42 was not an exclusive source of power; it did not preclude an application being made under the *District Court Civil Rules 2006* (SA) to discharge a restraining order because the restraining orders were interlocutory.[155]

123 In my view, it is not possible to apply the reasoning of either *Kamal* or *Ruzehaji* here directly to determine whether s 40X is an exclusive source of power because, as noted, they concern different legislation with different terms. In particular, the terms of s 42 of the POC Act differ considerably from those of

149 *Director of Public Prosecutions (Cth) v Kamal* (2011) 206 A Crim R 397; 248 FLR 64, [44] (emphasis added).

150 *Director of Public Prosecutions (Cth) v Kamal* (2011) 206 A Crim R 397; 248 FLR 64, [104].

151 *Director of Public Prosecutions (Cth) v Kamal* (2011) 206 A Crim R 397; 248 FLR 64, [131].

152 *Director of Public Prosecutions (Cth) v Kamal* (2011) 206 A Crim R 397; 248 FLR 64, [144].

153 *Director of Public Prosecutions (Cth) v Kamal* (2011) 206 A Crim R 397; 248 FLR 64

154 *Director of Public Prosecutions (Cth) v Kamal* (2011) 206 A Crim R 397; 248 FLR 64, [252].

155 *Ruzehaji and Another v Commissioner of the Australian Federal Police* (2015) 124 SASR 355; 303 FLR 414, [65]-[68] (Gray J); see also [84] in respect of examination orders made *ex parte*. Peek J and Nicholson J agreed with Gray J. As noted at n 93 above in Victoria the civil procedure rules do not apply under the Act.

s 40X of the Act. Moreover, as noted, the later amendment to s 42 extended its scope to a power more closely resembling s 40W of the Act and this was interpreted, consistent with the construction I favour, as providing for the curial enforcement of the duty of full disclosure that applies to *ex parte* applications, thus preserving constitutional validity.

124 The focus of the analysis must always lie with the text and structure of the legislation being interpreted.[156] Here, the inclusion of the power under s 40W is significant. I do not accept that s 40X is intended to confine the power of the court to discharge a restraining order to those circumstances where the order is "no longer required or appropriate". Nor do I consider that s 40X impliedly excludes other circumstances (for example, a breach of the obligation of full disclosure) as warranting the discharge of a restraining order, or excludes persons other than the applicant from bringing to the attention of the court some deficiency in the initial application. It is necessary to read the Act as a whole and each provision must be read in the context of the other provisions of the Act.[157] In my view, s 40X must be read in light of the breadth of s 40W and the power of the court to make "any orders in relation to the property to which the unexplained wealth restraining order relates as it considers just". This suggests that s 40X is included as an express power targeted at those specific circumstances where the applicant for the order becomes aware that a restraining order is not necessary and, for purposes of administrative convenience, can apply to the court to have its operation formally brought to an end. I do not consider that it impliedly confines the power under s 40W to make discharge orders for other purposes.

125 The language of s 40X of the Act can be contrasted with the language used by a legislature when it intends to codify an aspect of the general law, as, for example, in s 473DA(1) and s 437FA(1) of the *Migration Act 1958* (Cth) which respectively provide:

> 473DA Exhaustive statement of natural justice hearing rule
>
> (1) This Division … is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the Immigration Assessment Authority.
>
> 473FA How Immigration Assessment Authority is to exercise its functions
>
> (1) The Immigration Assessment Authority, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of limited review that is efficient, quick, free of bias and consistent with Division 3 (conduct of review).

126 These provisions have been construed as effective to restrict the common law natural justice hearing rule, largely replacing it with more limited procedural obligations found in div 3 of the *Migration Act*, leaving the bias rule with full effect.[158] There is no analogous language of codification employed in the Act, in s 40X or elsewhere, and especially no adoption of an "exhaustive statement" of

156 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46-7 [47]; *Thiess v Collector of Customs* (2014) 250 CLR 664, 671 [22]; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78].

157 *Metropolitan Gas Co v Federated Gas Employees Industrial Union* (1925) 35 CLR 449, 455; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, 315.

158 *BMV16 v Minister for Home Affairs and Another* (2018) 261 FCR 476, [42]-[44] (Mortimer, Moshinsky and Thawley JJ).

powers and functions. While I accept that Ha's submission that the Act is a code does not depend upon explicit codification, but rather implicit codification,[159] it is my view that the scheme of the Act, as I have described, does not amount, explicitly or implicitly, to a code. In particular, the broad discretionary powers available to a court are inconsistent with the type of exhaustive prescriptive regime for which Ha contends.

127 Ha has an additional submission in support of the proposition that the Act is to be construed as a code. This submission is made with respect to what she argues is the confined scope of s 40W.

128 Ha relies on *McEachran* and *Siddique*. Both cases are concerned with the power of the court under s 143 of the Act to make orders for the provision of legal assistance by Victoria Legal Aid where the cost of such assistance can be secured over land or other property. In *McEachran* Ashley JA (with whom Nettle JAand Smith AJA agreed) held that an order under s 143 would not entitle Victoria Legal Aid to take and enforce a charge over restrained property until and unless the property ceased to be restrained.[160] In reaching this conclusion, Ashley JA observed that the Act set up an "elaborate scheme" to limit dealings with restrained property.[161] He set out a number of statutory indicia supporting his conclusion including the observation that the broad power under s 26(1) to make "further orders" in relation to restrained property ought not be construed to authorise orders that legal costs be met out of restrained property or that property could be rendered unrestrained in order that a defendant's legal costs could be met. Section 26 is the equivalent of s 40W.[162]

129 In *Siddique* Ginnane J relied on *McEachran* to conclude that s 26 did not permit a court to make a variation of a restraining order to provide for the use of restrained property to pay for legal expenses.[163] He confirmed that the list of examples of orders that could be made, identified in s 26(5), were illustrative only[164] but that s 26 did not extend to the making of the orders sought by Mr Siddique as this would run counter to the terms of s 14(5), which prevents a court from providing for the payment of legal expenses when a restraining order is made; if it had been intended that a court could provide for payment of legal expenses by varying a restraining order, express provision would have been made.

130 In my view Ha's reliance upon *McEachran* and *Siddique* is misplaced. Neither case addresses the question of restraining orders obtained *ex parte* or whether they can be set aside under a court's inherent or implied power. Nor does either case support the proposition that the examples of orders that can be made, identified in s 26(5) and s 40W(6) respectively, are exhaustive of the orders that can be made. Rather, the conclusions reached in *McEachran* and

159 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 360-1 [80] (Gummow and Bell JJ).

160 *Director of Public Prosecutions (Vic) v McEachran* (2006) 15 VR 268, 269 [2] (Nettle JA); 278-9 [42]-[43] (Ashley JA).

161 *Director of Public Prosecutions (Vic) v McEachran* (2006) 15 VR 268 [50].

162 Section 26(1) reads: "The court may, when it makes a restraining order or at any later time, make such orders in relation to the property to which the restraining order relates as it considers just".

163 *Siddique v Director of Public Prosecutions (Vic)* [2015] VSC 99, [23].

164 *Siddique v Director of Public Prosecutions (Vic)* [2015] VSC 99 [17]. See Ashley JA to the same effect: *Director of Public Prosecutions (Vic) v McEachran* (2006) 15 VR 268, 281 [50].

Siddique were based on a close reading of the text of sections of the Act not directly relevant here and implied incompatibility with other specific sections of the Act. The cases do not carry implications of general principle. They do not address the question of the process in accordance with which an order is obtained from a court or the measures available to a court to ensure the integrity of that process.

131 I do not consider that pt 4A is to be construed as a code. Insofar as the judgments in *International Finance* are based on construing the NSW Act as a code, *International Finance* is distinguishable.

132 I reject ground 1.

Is s 40I invalid because there is no right of reinstatement after self-execution? — Ground 2

133 Ha supports ground 2 of the grounds of appeal by submitting that, even if the Act is interpreted as providing for the rehearing of an *ex parte* restraining order, s 40I is invalid because it does not guarantee that an affected person will receive notice of the order prior to its execution. Thus, the Act does not allow a respondent who might be given late notice of a restraining order to compel a rehearing before that order is executed and the restrained property forfeited. An order made under s 40I "self-executes" after six months to effect forfeiture pursuant to s 40ZA.[165] Ha contends that the lack of a guarantee of notice and the self-executing nature of a restraining order compromise the Court's institutional integrity as involving a fundamental breach of natural justice.

134 The validity of the Act cannot be preserved, Ha submits, merely because, as here, the applicant elects to give notice of the restraining order promptly.[166]

135 Ha relies upon *Nicholas v The Queen* (*Nicholas*)[167] and *Leeth v Commonwealth* (*Leeth*)[168] as authority for the proposition that a statute that provides for a process that infringes the right of a party to meet the case against him or her should be declared void. In *Nicholas* Gaudron J observed:

> In my view, consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, *the right of a party to meet the case made against him or her*, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It means, moreover, that a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute.[169]

136 In *Leeth* Mason CJ, Dawson and McHugh JJ remarked:

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165 The limited period of time before which forfeiture occurs is discussed under ground 3 below.

166 See *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 356 [59] (French CJ), 388 [164] (Heydon J). As mentioned, Ha was served with notice of the restraining order on 2 November 2015, the order having been made on 27 October 2015: see [10] above.

167 *Nicholas v The Queen* (1998) 193 CLR 173.

168 *Leeth v Commonwealth* (1992) 174 CLR 455.

169 *Nicholas v The Queen* (1998) 193 CLR 173, 208-9 [74] (emphasis added).

> It may well be that *any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power*, but the rules of natural justice are essentially functional or procedural and, as the Privy Council observed in the Boilermakers' Case, a fundamental principle which lies behind the concept of natural justice is not remote from the principle which inspires the theory of separation of powers.[170]

137 Ha also relies on the remarks of Gageler J in *Assistant Commissioner Condon v Pompano Pty Ltd* (*Pompano*)[171] that the central vice in the NSW Act identified in *International Finance* was that the NSW Act involved a process which, in its entirety, failed to afford procedural fairness. His Honour emphasised the need to consider the process as a whole and not simply the question of whether or not a court may, or must, in certain circumstances, make an order *ex parte*:

> There are many instances in which a court may, or must, make ex parte orders; but invariably as a step in an overall process that, viewed in its entirety, entails procedural fairness. *International Finance* shows that a court cannot validly be required to make an ex parte restraining order within a statutory context which practically impedes the affected person from applying for discharge of that order.[172]

138 Ha submits that the Act is not "saved" by the inclusion of s 40J,[173] which compels the applicant for an unexplained wealth restraining order to notify any affected persons upon the making of such an order if no notice has previously been given. Ha maintains that as s 40J fails to specify a time limit for service of the notice of the restraining order, it cannot guarantee that notice will occur before forfeiture and it follows that it cannot act as a condition precedent to the forfeiture of restrained property. There is no sanction expressly provided for a breach of s 40J.

139 The DPP, supported by the Attorney-General, submits that the flaw in Ha's submission is that she fails to recognise the importance of sub-s (2) of s 40J, which implicitly imposes an obligation upon the applicant for a restraining order to take "all reasonable steps" to locate the person whose property is restrained and, in the event that there has been failure to locate the person, the matter falls within the supervision of the court. I agree that this implies that, if the person cannot be located after all reasonable steps have been carried out, there is a duty on the applicant to approach the court. For the steps to be "reasonable" they must be carried out promptly even if there is no express time limit. The obligation to return to the court in the event of a failure to serve notice of the order also reinforces the notion that notice ought be served promptly.

140 In my view, the extent of the court's powers should a matter return to it under s 40J(2) includes hearing and determining whether there has been a breach of the obligation to use all reasonable steps to locate the respondent to the restraining order and imposing a variety of sanctions. In particular, in the event

170 *Leeth v Commonwealth* (1992) 174 CLR 455, 470 (emphasis added) (citation omitted).

171 *Assistant Commissioner Condon v Pompano Pty Ltd and Another* (2013) 252 CLR 38.

172 *Assistant Commissioner Condon v Pompano Pty Ltd and Another* (2013) 252 CLR 38, [192] (citation omitted).

173 See [40] above.

of a breach, a court could exercise its discretion to discharge a restraining order, either under s 40W or under its inherent or implied powers, as discussed above.

141 Nothing in pt 4A excludes the inherent jurisdiction of the court to ensure that it is not "converted into [an] instrument of injustice or unfairness".[174] Thus, if it was not possible to locate the respondent to a restraining order and serve written notice upon him or her, and the court was not satisfied that any other form of notice would be adequate, the court could discharge the restraining order leaving the DPP or an appropriate officer to make a subsequent application for a restraining order when more information about the location of the respondent had become available. In this context it is relevant to note that s 40F(8) expressly envisages repeated applications for a restraining order in respect of the same property or interest in property.[175]

142 Furthermore, the Act is premised upon an exchange of communications between the applicant and respondent to a restraining order. In particular, it is premised upon the respondent to a restraining order having notice of that order and being required, upon further notice, under s 40K,[176] to give a written declaration of interests in the restrained property having been warned about the consequences that may follow if statements are made in the declaration that are false and misleading in a material way.[177] The written declaration of interests must also include a statement of the nature and extent of the interest, including such matters as, in respect of a mortgage, the current value of the debt secured by the mortgage.[178] There are strict time limits and a breach may result in the imposition of a fine[179] and a court-issued direction for the information to be provided.[180] Where the relevant exchange of communication has not occurred, it is open for a court to take the view that the statutory scheme is not operating as intended and to discharge the restraining order obtained *ex parte*.

143 I reject ground 2.

Is s 40I invalid because there may be no inter partes hearing within 6 months? — Ground 3

144 Ground 3 is closely linked to the other two grounds. In essence, the submission is that even if the Act could be construed as implicitly allowing for a rehearing, all aspects of the timing of that rehearing would be controlled arbitrarily by the six-month period prescribed under s 40ZA(1) for forfeiture. As noted above, the effect of s 40ZA(2) is to suspend the period of time after which restrained property is forfeited to the Minister where an exclusion application is on foot. Where a s 40R exclusion application is still pending at the time of the expiry of the six-month period prescribed under s 40ZA(1), forfeiture is deferred until the exclusion application has been refused, dismissed, withdrawn or struck out. Ha submits that there is no similar provision deferring forfeiture until a pending rehearing of the application for a restraining order has been

174 *Assistant Commissioner Condon v Pompano Pty Ltd and Another* (2013) 252 CLR 38, 108 [187] (Gageler J), quoting *Walton v Gardiner* (1993) 177 CLR 378, 393 (Mason CJ, Deane and Dawson JJ).

175 See [36] above.

176 See [41] above. See also s 40M and s 40N as described at n 58 above.

177 See s 40O.

178 Section 40L.

179 Section 40O.

180 Section 40P.

resolved. Ha submits that, in the absence of such a provision, there would be an arbitrary time limit of six months during which the rehearing would have to occur. This would compromise the granting of adjournments; the fixing of convenient later hearing dates; the time afforded for preparation; the duration of the hearing; and the period of time required for deliberation by the court and the giving of reasons. The resulting arbitrariness is relied on to submit that the Act cannot be coherently construed as implicitly providing for a rehearing. It is submitted that the failure of the Act to confer a power upon the Court to defer forfeiture until a rehearing takes place and is determined deprives the court of its institutional integrity.

145 In response, the DPP submits that the hypothesis upon which Ha's submissions depend ought not be accepted. That hypothesis suggests that the applicant for the restraining order, the DPP or an appropriate officer, might engineer matters so that nothing is done for months to locate the person whose property is restrained. The public officers would act so as to undermine the court's supervision of the mandatory requirement under the Act for notice to be given. The DPP submits, and I agree, that the Act is not to be construed on the basis that a person appointed to a statutory office will countenance, or engage in, the conscious maladministration of the Act.

146 Furthermore, given that the Act is premised upon information being supplied by the person whose property is restrained, as described above,[181] conduct such as that hypothesised by Ha flouts the entire manner in which the statutory scheme is intended to operate. One cannot approach the construction of the Act on the basis that it gives rise to a consequence of arbitrary forfeiture because of consequences that would occur if all the requirements and safeguards of the Act were disregarded.

147 Furthermore, as emphasised by the Attorney-General, there are protections afforded *after* forfeiture has taken place whereby a person with an interest in property that has been forfeited can apply to the court, under s 40ZC, for his or her interest to be excluded from the unexplained wealth forfeiture order.[182] The order is made under s 40ZD if the court is satisfied that the property was lawfully acquired. In my view, this provides yet another means by which the interests of a person whose property is restrained are procedurally protected; there is no arbitrary interference with property.

148 I reject ground 3.

Conclusion

149 I would grant leave to appeal. Given the complexity of the issues raised it cannot be said that the prospects of the appeal succeeding were no more than fanciful.[183]

150 However, I would dismiss the appeal and uphold the validity of s 40I of the Act. More generally, I do not accept that *International Finance* stands for the broad proposition that the absence of an "as of right" *inter partes* hearing in legislation renders the legislation void as contrary to the Commonwealth *Constitution*. The defects in the NSW Act which lead to the invalidity of s 10 of the NSW Act, which I have described in detail above, are not present under the Act. The Act contains numerous procedural and substantive safeguards which

181 See [142] above.

182 See [49] above.

183 *Kennedy v Shire of Campaspe* [2015] VSCA 47, [12].

safeguard the institutional integrity of the courts empowered to make unexplained wealth restraining orders under s 40I. The challenge based upon *Kable* fails.

Niall JA.

151 I have had the very considerable advantage of reading, in draft, the reasons for judgment of Tate JA. Like her Honour, I would grant leave to appeal but dismiss the appeal. Subject to what follows, I would do so for the reasons which her Honour gives.

The court's role as a repository of federal jurisdiction

152 The *Constitution*, in its text and structure, establishes an integrated court system populated by courts that are independent and impartial.[184] The structural imperative is that every court within that system must be a fit repository for the exercise of federal judicial power.[185] Fitness depends on institutional independence and impartiality.[186] At the federal level, independence and impartiality are, in part, secured by a strict separation of powers.[187] That is not so at state level.[188] The *Constitution* protects state courts by prohibiting state legislation that purports to confer a power or function which substantially impairs the court's institutional integrity and which is incompatible with that court's role as a repository of federal jurisdiction.[189]

153 Independence and institutional impartiality are hallmarks of a state court, setting it apart from other decision-making bodies.[190] Those features will be invalidly impaired where a legislature imposes a judicial function or an adjudicative process on a court which directs or requires the court to implement a political decision, or a government policy, without following ordinary judicial processes.[191]

154 In *International Finance Trust Company Ltd v New South Wales Crime Commission* (*International Finance*),[192] which exemplifies the general principle, the defining features were impaired because the *Criminal Assets Recovery Act 1990* (NSW) ("the NSW Act") conscripted the Supreme Court into a process incompatible with, and repugnant in a fundamental degree to, the judicial function of the Court and ordinary judicial processes.[193] This was because the NSW Act directed as to the manner and outcome of the jurisdiction

184 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (Boilermakers).

185 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (Kable).

186 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51

187 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

188 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

189 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 101-103 (Gaudron J), 114-116 (McHugh J), 138, 143 (Gummow J); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

190 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 426 [44].

191 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393

192 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

193 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 366 [97], 367 [98] (Hayne, Crennan and Kiefel JJ); *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 426 [45], 427 [46]; *Assistant Commissioner Condon v Pompano Pty Ltd and Another* (2013) 252 CLR 38, 90 [127] (Hayne, Crennan, Kiefel and Bell JJ) (Pompano).

and obliged the court to depart from ordinary judicial process.[194] *International Finance* shows that a court cannot validly be required to make an ex parte restraining order within a statutory context that, in practice, impedes the affected person from applying for discharge of that order.[195]

Applicant's submissions

155 In considering the submissions in this case, it is important not to lose sight of the overarching principle that the doctrine established in *Kable v Director of Public Prosecutions* (*Kable*)[196] serves, namely, the protection of the institutional integrity of the court. It is important to avoid the temptation, inherent in the applicant's submissions, to take what has been said in one decision of the High Court about the validity of other laws and assume, without examination, that what is said in that decision can be applied to the legislation under consideration.[197] The existence of an invalidating feature in one context may lack its sting in another. More fundamentally, it is a mistake to treat the construction given to provisions in one Act as if it controlled the construction of another.

156 The applicant submits that the *Confiscation Act 1997* ("the Act") impliedly removes the ability of the affected party to approach the court to have the ex parte order dissolved, either on the basis that it ought not to have been made or because there had been material nondisclosure by the applicant for the order.

157 The applicant points to the outcome in *International Finance* as supporting both her construction of the Act and her submissions on invalidity that are said to flow from that construction. In my view, *International Finance* provides no assistance on the anterior question of construction and there is no foundation for her constitutional argument, and reliance on it, as controlling the present case, tends to distract from ordinary process of construction. This is because the text and structure of the Act are relevantly different to the NSW Act examined in *International Finance*.

Consideration

158 The relevant constructional task is not to find a source of power for the court to entertain an application to set aside an ex parte order once it has been made. Such a power is a well understood corollary of the power to make an ex parte order and is an "elementary rule of justice".[198] Rather, the question is whether the power has been removed.

159 On the question of construction, the first point to note is that there are no provisions of the Act that expressly purport to remove the ability of an affected party to approach the court to set aside a restraining order that had been made ex parte. However, that is not the end of the matter because such a consequence may flow, from necessary implication, if the existence of the power would be

194 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 366 [97], 367 [98] (Hayne, Crennan and Kiefel JJ); *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 [45], 427 [46]; *Assistant Commissioner Condon v Pompano Pty Ltd and Another* (2013) 252 CLR 38, 90 [127] (Hayne, Crennan, Kiefel and Bell JJ).

195 *Assistant Commissioner Condon v Pompano Pty Ltd and Another* (2013) 252 CLR 38, 109 [192] (Gageler J).

196 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

197 *Assistant Commissioner Condon v Pompano Pty Ltd and Another* (2013) 252 CLR 38, 94 [137]; *Kuczborski v Queensland* (2014) 254 CLR 51, 90 [106] (Hayne J).

198 *SS Kalibia v Wilson* (1910) 11 CLR 689, 694 (Griffith CJ).

inconsistent with the statutory scheme as a whole. Such an implication might readily be drawn if the retention of the power would undermine the statutory purpose of the provision or render the scheme incoherent.

160 However, that implication is not lightly drawn. It is a significant step to conclude that the parliament has, by implication, removed a power that the court would otherwise possess, with the result that its judicial processes are fundamentally compromised. The power to revisit an ex parte order ensures that the court's processes are not traduced by preventing an order that, in substance, finally determines rights without the affected party being heard.[199] It is a power of a kind necessary "to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction" and is an inherent power in a superior court.[200] The power is a product of the obligation to accord procedural fairness that is a defining feature of a court.

161 To require that the implication be clear and unequivocal does not involve straining the language of the Act to avoid invalidity. Rather, this requirement reflects a common understanding on which legislation is drafted. For the purpose of construction, part of the context is supplied by the important legal principle that a law conferring jurisdiction on a court takes the court as it finds it.[201] Further, the inherent powers of the court are not to be abrogated in the absence of express words or necessary intendment.[202]

162 Notwithstanding the stringency required, it was an implication that three Justices drew in *International Finance*.[203] Justice Tate, in her Honour's reasons above, comprehensively analyses the reasoning of the High Court in that case to demonstrate why the implication was drawn and to examine the differences with the legislation in the present case.[204] I would emphasise that the constructional conclusion reached in *International Finance* does not represent the starting point for the construction of the Act.

163 Section 40I(3) of the Act provides the power, and if the stipulated criteria are satisfied the duty, to make an unexplained wealth restraining order. Importantly, s 40H(1) provides that if the court is satisfied the circumstances justify the giving of notice, it may require that notice be given. It follows that the Act does not demand an ex parte hearing and leaves it to the court, having regard to the matters in s 40H(2) and (3), to determine whether it should proceed on notice.

164 The purpose for which a restraining order may be made is that provided for in s 40D of the Act, namely, to preserve property or an interest in property in order that the property or property interest will be available to satisfy the forfeiture of property that may occur under the Act. This purpose shares an underpinning

199 *Assistant Commissioner Condon v Pompano Pty Ltd and Another* (2013) 252 CLR 38, 92 [131] (Hayne, Crennan, Kiefel and Bell JJ).

200 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1, 17-18 [38],18 [43] (PT Bayan Resources), quoting *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 623.

201 *Electric Light and Power Supply Corporation Ltd v Electricity Commission (NSW)* (1956) 94 CLR 554, 559-560.

202 *Assistant Commissioner Condon v Pompano Pty Ltd and Another* (2013) 252 CLR 38, 61 [42] (French CJ).

203 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 365 [93] (Gummow and Bell J), 386 [159]-[160] (Heydon J).

204 See [69]-[81] above.

with many ex parte orders which are made to secure the effective exercise of the jurisdiction invoked, namely, to not give a forensic or other advantage to the applicant.[205]

165 Although it may be necessary for the court to make orders in the absence of an affected party in order to preserve property, there is no reason why the affected party should not be heard once an order is made and the property secured. When an order is made, s 40J of the Act requires that written notice is given to the affected party. Further, the Act provides, amongst other things, an opportunity to make an exclusion order.[206]

166 There is nothing antithetical to the achievement of the purpose of preserving and securing property in allowing an affected party, once they become aware that an order has been made, to apply to the court to have the order vacated. The criteria and process for making a restraining order may result in such an application presenting forensic challenges, including the absence of a protection against self-incrimination.[207] However, the maintenance of such an avenue for the affected party is not inconsistent with the operation of the scheme as a whole. Unlike in *International Finance*, in this instance it is the court, not the applicant, that has the final say on whether notice is given. There is nothing incongruous in permitting the court to revisit or reconsider its own decision, at the initiative of the affected party, once notice has been given and the property secured.

167 Similarly, the making of an application to set aside a restraining order would not interfere, to an impermissible degree, with the statutory process of an application for exclusion under s 40R or forfeiture under s 40ZA of the Act. There may be challenges in having concurrent or sequential applications, however such challenges are not uncommon and can be addressed through appropriate case management.

168 There may also be the imperative that the application to set aside the restraining order be determined before the property is forfeited under s 40ZA. However time constraints are not unusual and can be managed. A party seeking to vacate an ex parte order would be expected to move quickly once apprised of the order and its terms. These considerations do not provide the basis for removing the power of reconsideration altogether.

169 Experience in ex parte orders generally shows that it would be unusual that an application to set aside an order would interfere with, or cause undue difficulties in, the preparation and determination of the substantive proceeding. There is no reason to consider that an application to set aside a restraining order would be any different.

170 The criteria to be applied in determining an application for a restraining order and applicable to an exclusion order under s 40S are different. Allowing an affected party to apply to the court to review or reconsider the restraining order provides an additional means for that party to have property released in order to avoid forfeiture. This would not require the moving party to satisfy the court that the property was lawfully acquired. However, the two types of applications

205 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1, 18 [43], 24 [65], 24-25 [66], 28 [77].

206 *Confiscation Act 1997* (the Act) s 40R.

207 Cf the Act s 40R(8)-(9).

(one to reconsider and the other for an exclusion order) serve different functions and it is not surprising that they have different criteria. The existence of one power does not render the other redundant.

171 It follows that there is no warrant to read down the inherent or implied powers of the court, so as to exclude the power to revisit an ex parte restraining order. For the reasons given by Tate JA, such a construction of the Act would be even more anomalous given the broad powers in s 40W, which itself provides an additional power to revisit the ex parte order.

172 Once the issue of construction is resolved against the applicant, the premise of her constitutional argument falls away. Even if the Act precluded an application to set aside a restraining order, that would not of itself dispose of the constitutional question. It would be necessary to ask whether the absence of a power to review and consider an order made ex parte, within this statutory scheme as a whole, meant that the court was required to adopt a judicial process that rendered the scheme incompatible with the judicial function of the court. Resolution of that question would proceed on the basis of a construction that this Court has not accepted. In my view, this Court should not determine that question given the conclusion that, properly construed, the Act does not have the operation and effect for which the applicant contends.

173 The orders proposed by Tate JA should be made.

Orders accordingly

Solicitors for the applicant: *J T Lawyers*.

Solicitors for the respondent: *Solicitor for Public Prosecutions*.

Solicitors for the intervener: *Victorian Government Solicitor*.

GAVIN WENDT