

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : COMMISSIONER OF THE AUSTRALIAN
FEDERAL POLICE -v- KALIMUTHU [No 2] [2015]
WASC 376

CORAM : ALLANSON J

HEARD : 26 AUGUST 2015

DELIVERED : 8 OCTOBER 2015

FILE NO/S : CIV 2440 of 2014

MATTER : An Application pursuant to section 19 of the *Proceeds
of Crime Act 2002* (Cth)

AUD 1,492,416.26 held in Australian and New
Zealand Banking Group Limited account numbers
016318392765167 in the name of MICHAEL DASS
Macqueline Patricia and 016318289838452 in the
name of KALIMUTHU Ganesh and AUD 974,520.21
held in Commonwealth Bank of Australia account
number 06616510338576 in the name of
KALIMUTHU Ganesh

BETWEEN : COMMISSIONER OF THE AUSTRALIAN
FEDERAL POLICE
Applicant

AND

GANESH KALIMUTHU
First Respondent

MACQUELENE PATRICIA MICHAEL DASS
Second Respondent

Catchwords:

Practice and procedure - *Proceeds of Crime Act 2002* (Cth) - Application to set aside order made *ex parte* - Whether there was a material non-disclosure - Whether the application was an abuse of process - Turns on own facts

Legislation:

Proceeds of Crime Act 2002 (Cth), s 15, s 15B, s 15N, s 15N(3), s 15P, s 19, s 19(1), s 19(3), s 19(5), s 25, s 26(1), s 26(2), s 26(3), s 26(4), s 26(5), s 29, s 31, s 31(4), s 31(5), s 31(6), s 32, s 42, a 42(1A), s 42(2), s 42(5), s 49, s 49(1), s 180, s 317

Rules of the Supreme Court 1971 (WA), O 58 r 23, O 59 r 7

Result:

Respondents' application dismissed

Category: B

Representation:

Counsel:

Applicant	:	Mr P N Bevilacqua
First Respondent	:	Mr E W L Greaves
Second Respondent	:	Mr E W L Greaves

Solicitors:

Applicant	:	Australian Federal Police - Proceeds of Crime Litigation
First Respondent	:	Putt Legal
Second Respondent	:	Putt Legal

Case(s) referred to in judgment(s):

Allen v Director of Public Prosecutions (WA) [2014] WASC 67

Assistant Commissioner Michael James Condon v Pompano Pty Ltd [2013]
HCA 7; (2013) 252 CLR 38

Batistatos v Roads and Traffic Authority of New South Wales [2006] HCA 27; (2006) 226 CLR 256
Bell Group NV (In Liq) v Aspinall (1998) 19 WAR 561
Director of Public Prosecutions (Cth) v Kamal [2011] WASC 55; (2011) 206 A Crim R 397
Dupas v The Queen [2010] HCA 20; (2010) 241 CLR 237
Ex parte The Commissioner of the Australian Federal Police [2012] WASC 252
Hunter v Chief Constable of West Midlands Police [1981] UKHL 13; [1982] AC 529
Jago v District Court of NSW [1989] HCA 46; (1989) 168 CLR 23
Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd [2009] HCA 43; (2009) 239 CLR 75
Memory Corporation Plc v Sidhu (No 2) [2000] 1 WLR 1443
Moti v The Queen [2011] HCA 50; (2011) 86 ALJR 117
PNJ v The Queen [2009] HCA 6; (2009) 83 ALJR 384
Popovic v Panagoulas [2014] WASC 86
Re application pursuant to section 19 of the Proceeds of Crime Act 2002 (Cth);
Ex parte Commissioner of the Australian Federal Police [2014] WASC 390
Ridgeway v The Queen [1995] HCA 66; (1995) 184 CLR 19
Rogers v The Queen [1994] HCA 42; (1994) 181 CLR 251
Savcor Pty Ltd v Cathodic Protection International APS [2005] VSCA 213; (2005) 12 VR 639
Thomas A Edison Ltd v Bullock [1912] HCA 72; (1912) 15 CLR 679
Walton v Gardiner [1993] HCA 77; (1993) 177 CLR 378

1 **ALLANSON J:** On 20 October 2014, I heard an application by the
Commissioner of the Australian Federal Police for a restraining order
under the *Proceeds of Crime Act 2002* (Cth). I made orders immediately,
with reasons to be published. The reasons were published on 24 October
2015: *Re application pursuant to section 19 of the Proceeds of Crime
Act 2002 (Cth); Ex parte Commissioner of the Australian Federal
Police* [2014] WASC 390. The matter proceeded, and orders were made,
without notice to the respondents.

2 The effect of the orders was to restrain any dealing in funds standing
to the credit of three bank accounts in the names of the respondents. One
of the accounts was in the name of Macqueline Patricia Michael Dass, the
other two in the name of Ganesh Kalimuthu.

3 The sole issue for the present is whether the orders made should be
set aside as an abuse of process.

4 In the reasons which follow, all references to legislation are to the
Proceeds of Crime Act.

The Proceeds of Crime Act

5 The Act provides for both freezing orders, made by a magistrate, and
restraining orders, made by a court with 'proceeds jurisdiction' as defined
in the Act.

6 Under s 15B, a magistrate must make a freezing order if an
authorised officer makes an application in accordance with the Act, and
the requirements of the section are met. A freezing order is an order that
a financial institution not allow a withdrawal from an account with the
institution, except in the manner and circumstances specified in the order.

7 A freezing order comes into force when a copy is given to the
relevant financial institution: s 15N. It remains in force until the end of
the period specified in the order or if, before the end of that period, a court
makes a decision on an application for a restraining order. As originally
made, a freezing order must not specify a period of more than three
working days: s 15N(3).

8 Under s 25, a proceeds of crime authority may apply for a restraining
order. By s 26(1) and (2), the authority must give written notice of the
application to the owner of the property, and to any other person the
authority reasonably believes may have an interest in the property. The
court to which the application is made must not hear the application

unless it is satisfied that the owner of the property has received reasonable notice of the application: s 26(3). The court must, however, consider the application without notice having been given if the responsible authority requests the court to do so, and may, at any time before finally determining the application, direct the responsible authority to give or publish notice of the application to a specified person or class of persons: s 26(4) and (5).

- 9 The jurisdiction of the court in deciding an application is constrained by s 19. By s 19(1):

A court with proceeds jurisdiction must order that:

- (a) property must not be disposed of or otherwise dealt with by any person; or
- (b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order;

if:

- (c) a proceeds of crime authority applies for the order; and
- (d) there are reasonable grounds to suspect that the property is:
 - (i) the proceeds of a terrorism offence or any other indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concern (whether or not the identity of the person who committed the offence is known); or
 - (ii) an instrument of a serious offence; and
- (e) the application for the order is supported by an affidavit of an authorised officer stating that the authorised officer suspects that:
 - (i) in any case - the property is proceeds of the offence; or
 - (ii) if the offence to which the order relates is a serious offence - the property is an instrument of the offence;

and including the grounds on which the authorised officer holds the suspicion; and

- (f) the court is satisfied that the authorised officer who made the affidavit holds the suspicion stated in the affidavit on reasonable grounds.

10 There is an exception in s 19(3), under which the court may refuse to make a restraining order in relation to an indictable offence that is not a serious offence if the court is satisfied that it is not in the public interest to make the order. The alleged offences, in the present matter, are serious offences, so the exception does not apply.

11 The court must make a restraining order even if there is no risk of the property being disposed of or otherwise dealt with: s 19(5).

12 The court hearing an application for a restraining order cannot itself make a freezing order, or extend the freezing order made by a magistrate, until it has decided the application. But under s 15P, a magistrate may make an order extending the period specified in a freezing order if an authorised officer applies for the extension, and the magistrate is satisfied that an application has been made to a court (but not decided by the court) for a restraining order to cover the account. No other criteria are specified for the making of an extension.

13 The extension may be for a specified number of working days or the period ending when the court decides the application for the restraining order. The extension does not have effect unless a copy of the order for the extension is given to the financial institution before the time the freezing order would cease to be in force apart from the extension.

14 Once a restraining order has been made, a person who was not notified of the application for the order may apply at any time for an order under s 29 excluding a specified interest in property from the order: s 31. By s 31 (4), (5) and (6):

- (4) The person must give written notice to the responsible authority of both the application and the grounds on which the exclusion is sought.
- (5) The responsible authority may appear and adduce evidence at the hearing of the application.
- (6) The responsible authority must give the person notice of any grounds on which it proposes to contest the application. However, the authority need not do so until it has had a reasonable opportunity to conduct examinations in relation to the application.

15 By s 32:

The court must not hear an application to exclude specified property from the restraining order if:

- (a) the restraining order is in force; and
- (b) the responsible authority has not been given a reasonable opportunity to conduct examinations in relation to the application.

16 By s 42, a person who was not notified of the application for a restraining order may apply to the court to revoke the order. The application must be made within 28 days after the person is notified of the order. The court may extend the 28 day period if the person applies for an extension of time within the 28 days: s 42(1A). The person applying for an order under s 42 must give written notice of the application and the grounds on which revocation is sought: s 42(2). The court may revoke the restraining order under s 42(5) if satisfied that:

- (a) there are no grounds on which to make the order at the time of considering the application to revoke the order; or
- (b) it is otherwise in the interests of justice to do so.

17 The procedure for forfeiture of property that is suspected to be the proceeds of an indictable offence or the instrument of a serious offence is found in s 49:

- (1) A court with proceeds jurisdiction must make an order that property specified in the order is forfeited to the Commonwealth if:
 - (a) the responsible authority for a restraining order under section 19 that covers the property applies for an order under this subsection; and
 - (b) the restraining order has been in force for at least 6 months; and
 - (c) the court is satisfied that one or more of the following applies:
 - (i) the property is proceeds of one or more indictable offences;
 - (ii) the property is proceeds of one or more foreign indictable offences;
 - (iii) the property is proceeds of one or more indictable offences of Commonwealth concern;
 - (iv) the property is an instrument of one or more serious offences; and

- (e) the court is satisfied that the authority has taken reasonable steps to identify and notify persons with an interest in the property.

...

- (3) Paragraph (1)(c) does not apply if the court is satisfied that:
 - (a) no application has been made under Division 3 of Part 2-1 for the property to be excluded from the restraining order; or
 - (b) any such application that has been made has been withdrawn.

18 The respondents also referred to the onus and standard of proof in s 317; In particular, an applicant for an order bears the onus of proving the matters necessary to establish the grounds for making the order. In effect, once the restraining order has been made, the onus would be on the respondents to show that property should be excluded or the restraining order should be set aside.

Ex parte application

19 The Commissioner requested the court to consider the application for a restraining order without notice to any person: see s 26(4). On request, the court is required to consider the application without notice, but is not required to determine the application on an ex parte basis.

20 I considered and determined the application ex parte and set out my reasons for doing so in [31] to [33]:

In my opinion, the interests of justice required the court to consider the application and make the order restraining the property on an ex parte basis. I formed that opinion for these reasons. First, the application was made on an urgent basis as freezing orders were currently in place over the property under s 15B, and would lapse on 20 October 2014. Second, the nature of the property restrained - funds in bank accounts - would enable them to be moved quickly and dissipated if notice was given of the application. It is appropriate to ensure that the objects of the Act are not defeated by any withdrawal of the funds. Third, neither Ms Michael Dass nor Mr Kalimuthu lives in Australia; both appear to have made only fleeting visits to this country. Fourth, most of the deposits were made after the account holder had left Australia. Many of the deposits in the CBA account were made by cash deposits in New South Wales. These circumstances do not suggest that the funds are owned by the only two individuals who are currently identified.

Finally, s 42 allows the court to revoke a restraining order on the application of a person who was not notified of this application. Under s 42(5), the court may revoke the order if it is satisfied that:

- (a) there are no grounds on which to make the order at the time of considering the application to revoke the order; or
- (b) it is otherwise in the interests of justice to do so.

21 As Martin CJ said in *Ex parte The Commissioner of the Australian Federal Police* [2012] WASC 252:

The ambit of those rights, although different from the right to be heard before the order is made, is not so materially different as to lead me to conclude in this case that there would be irremediable prejudice to the party who is most affected by the order sought ... by proceeding to make the orders without notice and then leaving him to the exercise of the rights he has under s 42 of the Act. [35].

22 Counsel for the respondents challenges the statement that the circumstances do not suggest that the funds were owned by the respondents, as the account holders. The language used in the decision is inaccurate as a statement of rights between account holder and bank. The preceding matters regarding the respondents' connection with Australia, and when and how the deposits were made, are not challenged.

Setting aside an order under the Act

23 The respondents initially applied to set aside the restraining order on an alternative basis, under the general power in *Rules of the Supreme Court 1971* (WA) O 58 r 23 (as applied to any ex parte order made in chambers by O 59 r 7). They abandoned that ground at the hearing. In my opinion, that concession - if that accurately describes it - was properly made.

24 In civil proceedings, the court has a general power to set aside an order made ex parte on various grounds, including where there has been a material non-disclosure in the process of obtaining the order: see *Bell Group NV (In Liq) v Aspinall* (1998) 19 WAR 561; *Popovic v Panagoulis* [2014] WASC 86 [54] - [55]. But that power is not consistent with the intention apparent in s 42. With respect, I agree with McLure P in *Director of Public Prosecutions (Cth) v Kamal* [2011] WASC 55; (2011) 206 A Crim R 397 [131], that s 42 is intended to be the exclusive source of power to review an ex parte order. That conclusion is implicit also in the reasoning of Martin CJ (for example at [104] - [111]), and Buss JA ([246] - [252]).

25 The court in *Kamal* was not, however, called upon to consider whether the application in that case was an abuse of process. The respondents rely upon the inherent power of the court to prevent an abuse of its processes which, they submit, has not been excluded by s 42.

26 In deciding a matter under the Act, the court is determining a matter arising under a law made by the Parliament of the Commonwealth, and is exercising federal jurisdiction. The power to prevent its procedures being abused is part of the inherent or implied power of a court: *Hunter v Chief Constable of West Midlands Police* [1981] UKHL 13; [1982] AC 529, 536 (Lord Diplock); *Rogers v The Queen* [1994] HCA 42; (1994) 181 CLR 251, 286 (McHugh J). The inherent power of the court to prevent abuse of its processes may be an attribute of the judicial power of the Commonwealth provided in Ch III of the *Australian Constitution*: *Dupas v The Queen* [2010] HCA 20; (2010) 241 CLR 237 [15]. Even if the inherent power may be displaced by statute, its nature and purpose are such that they would not, as a rule, be displaced or abrogated by general words in a statute nor by statutory provisions or rules which overlap with them: *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7; (2013) 252 CLR 38 (*Pompano*), [41] - [43] (French CJ); and see [187] - [188] (Gageler J); *Allen v Director of Public Prosecutions (WA)* [2014] WASC 67 [36] (Jenkins J).

27 The Commissioner did not contend that the power of the court to prevent an abuse of process had been displaced by s 42 or other provisions of the Act. Both parties identified the issue in this application as whether the application by the Commissioner was an abuse of process.

Abuse of process

28 The authorities support the following general propositions:

1. It is not possible to exhaustively describe what will constitute an abuse of process: *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27; (2006) 226 CLR 256 [9] - [15]; *PNJ v The Queen* [2009] HCA 6; (2009) 83 ALJR 384 [3] (French CJ, Gummow, Hayne, Crennan & Kiefel JJ). The categories of abuse of process are not closed, and a court may exercise its power in relation to an abuse of process 'as and when the administration of justice demands' (*Jago v District Court of NSW* [1989] HCA 46; (1989) 168 CLR 23, 74 (Gaudron J); *Walton v Gardiner* [1993] HCA 77; (1993) 177 CLR 378, 394 (Mason CJ, Deane & Dawson JJ)).

2. Something may be an abuse of process, although it is not inconsistent with the literal application of the court's procedural rules, if it would nevertheless be 'manifestly unfair to a party to litigation ... or would otherwise bring the administration of justice into disrepute among right-thinking people' (*Hunter* (536) (Lord Diplock); *Walton v Gardiner* (393) (Mason CJ, Deane & Dawson JJ). See also *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43; (2009) 239 CLR 75 [28]).
3. Abuse of process is not, however, a term at large or without meaning, nor is any conduct of a party or non-party in relation to judicial proceedings an abuse of process if it can be characterised as, in some sense, unfair to a party. But abuse of process extends to proceedings that are 'seriously and unfairly burdensome, prejudicial or damaging' or 'productive of serious and unjustified trouble and harassment' (*Ridgeway v The Queen* [1995] HCA 66; (1995) 184 CLR 19, 74 - 75 (Gaudron J); *Batistatos* [14] (Gleeson CJ, Gummow, Hayne & Crennan JJ) [47]). While the categories of abuse are not closed, at least one of three characteristics will generally be present, namely:
 - (a) a court's processes being invoked for an illegitimate or collateral purpose;
 - (b) the use of a court's procedures being unjustifiably oppressive to a party; or
 - (c) the use of a court's procedures bringing the administration of justice into disrepute.

See *Rogers* (286) (McHugh J); *Batistatos* [15]; *PNJ* [3]; *Moti v The Queen* [2011] HCA 50; (2011) 86 ALJR 117 [10] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ).

The duty of disclosure

- 29 It is not controversial that the Commissioner, in applying for an order ex parte, was under a duty to make full disclosure of all relevant information in his possession, whether or not it assisted the application: *Thomas A Edison Ltd v Bullock* [1912] HCA 72; (1912) 15 CLR 679, 681 - 682; *Savcor Pty Ltd v Cathodic Protection International APS* [2005] VSCA 213; (2005) 12 VR 639 [24] - [36] (*Savcor*). Whether information is relevant must be considered having regard to the nature of the application and the factors relevant to the exercise of the discretion. A

fact is material where it is a 'matter of substance in the decision making process': *Savcor* [35] - [36].

30 The authorities generally speak of non-disclosure of matters of fact. The respondents submit that the duty of full disclosure includes a duty to bring to the courts attention a matter of law, notwithstanding that the court should generally be presumed to know the statute law: see *Memory Corporation Plc v Sidhu (No 2)* [2000] 1 WLR 1443, where Mummery LJ described the duty on an urgent hearing without notice as 'a high duty to make full, fair and accurate disclosure of material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case' (1459 - 1460). Where the question is whether there has been an abuse of process, I see no basis for maintaining a distinction between matters of fact, and the legal and procedural aspects of the case.

31 The Commissioner submitted that any non-disclosure was not material, as it was relevant only to the exercise of the power under s 26, and not to the criteria for making an order under s 19. I do not accept that submission. The importance of the right to be heard before an order is made contrary to a person's interests is fundamental to the exercise of the judicial function. The non-disclosure was material to that matter, and the exercise of the court's discretion to proceed without notice.

32 Second, the Commissioner submitted that the respondents had not adduced evidence of any facts that they would have put before the court had they been given notice of the hearing. It may be, having regard to the criteria in s 19, that the respondents would have been restricted in what they could say or do. If it were simply a matter of the discretion to set aside an order obtained irregularly, the court would act on a range of factors and the practical utility of setting aside the order may be important. But if the respondents establish that there has been an abuse of process, the need to preserve the proper processes of the court should prevail.

33 Third, the Commissioner submitted that there had been no application made to extend under s 15P, and that the court had no power to direct that such an application be made. Both of these statements are correct, but neither bears on whether the court was aware that the matter could proceed on notice without the risk of dissipation of the funds in the accounts, and whether the proceedings could have been adjourned, even if only for a short time to enable an extension application to be made.

34 The application to extend the freezing order could have been made immediately after the Commissioner had made his application in this court and before it was heard. The criteria for an order under s 15P are extremely limited, and the risk of refusal of an extension order must be slight. In practical terms, the Commissioner could have approached the hearing with an existing order under s 15P to prevent the respondents from dealing with the accounts until the decision of the court. The Commissioner submits that way of proceeding is not intended by the Act. In my opinion, however, it is what the legislation intends; it is consistent with the scheme of the Act, practically efficient, and consistent with the text of s 15P, which requires only that an application has been made to a court but not decided. The alternative of having to urgently seek an extension only if a judge determines that the application must proceed on notice is impractical, particularly where the judge hearing the application does not have power to extend the operation of the freezing order.

35 In my opinion, the Commissioner should have disclosed the possibility of extending the freezing order under s 15P, to enable the court to decide whether, in those circumstances, the hearing should proceed on notice to those who might be affected.

36 That does not, however, resolve this application. The question is whether the failure to bring s 15P to the attention of the court when seeking the urgent restraining order was an abuse of process.

Non-disclosure and abuse of process

37 In *Pompano* [43], French CJ referred to the inherent power of the Supreme Court 'to prevent abuse of its processes by revoking an ex parte order against a party when the party seeking the order has failed to discharge its obligation of full disclosure'. I am not aware of other authority which equates non-disclosure and abuse of process. In *Bell Group NV (In Liq) v Aspinall*, 571 - 572, the court referred to the two concepts as quite distinct, although there may be an overlap in relevant factual material.

38 The respondents did not suggest that the non-disclosure was made in bad faith, or for an ulterior purpose, but submitted that those matters are not determinative because the manner in which the Commissioner proceeded was, in the circumstances, unjustifiably oppressive to the respondents. They relied, essentially, on these factors.

39 First, the restraining order application did not have to be determined urgently. The Commissioner could have applied for an extension of the

freezing order until the application was decided. If there was a risk of dissipation of the funds, an extension of the freezing order would have met that risk. I agree with this submission.

40 Second, in making the application, the Commissioner did not bring to the court's attention that the freezing order could be extended pursuant to s 15P, and this was a material non-disclosure in an ex parte application. It is not in contention that no reference was made to s 15P in the application, at the hearing, or in the reasons of the court. I have found it was material.

41 Third, the Commissioner had submitted that there was a risk of dissipation of the funds in the accounts if they were not 'restrained or frozen'. This was apt to mislead without the disclosure of s 15P.

42 The respondents pointed to the consequences of the restraining order being made:

1. On an application to exclude property under s 29, or an application to set aside the order under s 42, they must disclose their grounds. They should not be put in the position where they are required to disclose their defence to forfeiture prematurely.
2. On an application under s 29 or s 42, the onus is on them and not the Commissioner.
3. On an application to exclude property, they may be subject to the requirement of an examination under s 180.
4. Although s 42 permits an order to be set aside in the interests of justice, the Act imposes a 28 day time limit for bringing that application (and the respondents did not apply within that time).
5. Once an order has been made under s 19, unless a respondent takes positive steps, the Commissioner can move for forfeiture. Where no application has been made for property to be excluded from the restraining order, the Commissioner need only prove that he is the applicant for forfeiture, that the order has been in force for at least six months, and that he has taken reasonable steps to identify and notify persons with an interest in the property: s 49(1).

43 But, despite my view that s 15P should have been referred to in the hearing, I am not satisfied that the application for the orders can be

properly characterised as an abuse of process. The principal reasons for that conclusion are, first, that it is not alleged to have been a deliberate non-disclosure; and second, the power in s 42(5) enables the court to revoke an order if satisfied it is in the interests of justice to do so. Section 42(5) is sufficient to empower a court to revoke a restraining order because of an applicant's failure to comply with the obligation of full disclosure. The submission that the application is 'seriously and unfairly burdensome, prejudicial or damaging' or 'productive of serious and unjustified trouble and harassment' must be viewed in the context of that power. It would have been sufficient in this case had the respondents brought an application in accordance with that section. I do not accept that is unjustifiably oppressive.

44 Neither party referred me to any authority where similar circumstances were held to be an abuse of process. So far as I am aware, apart from the comment of French CJ in *Pompano*, referred to above, non-disclosure has generally been regarded as an irregularity, unless it is deliberate or a fraud.

45 Counsel for the respondents also submitted that the respondents would have the onus on any application to revoke. The criteria for an order under s 42(5) include the interests of justice. Proof of a material non-disclosure should be sufficient to satisfy the section. The need to satisfy the court of that criterion cannot properly be described as an undue burden.

46 If the statutory consequences that now affect the respondents can be considered harsh or oppressive, those consequences result from the terms of the Act as they apply to any restraining order, and the failure of the respondents to apply to revoke the order within the time limited by s 42(1A). Counsel for the respondents argued that the time of 28 days is unduly restrictive, particularly for respondents who are not resident in Australia. I am not, however, satisfied that such a time limit on making an application, or applying for an extension of time to do so, can be considered so harsh as to make the original proceedings an abuse.

Remedy

47 The Commissioner did not dispute that the court has power to set aside the restraining order if it is found to be an abuse of process. I invited the parties to make further submissions if they wished to be heard on whether the inherent powers of the court would include the power to set aside an order which has force and duration by reason of the statute.

Neither directly responded. Because of my view on the question of abuse of process, it is not necessary to pursue that question further.

Conclusion

48 The respondents' application will be dismissed.