

Decision of the Full Bench in the NT in the Lloyd Green case may have impact on:

- rights of substitution of property
- rights of a co-owner not party to the criminal offence
- just acquisition of property, which may be caught under s51 (xxxii) of the Constitution

s51, (xxxii)

The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

There is also the question of whether a judicial officer is exercising judicial power when he is under a mandatory requirement to act in a certain way. This has possible application in the Green case, but also in the draft Bill:

5 After section 20

Insert:

20A Restraining orders—unexplained wealth

When a restraining order must be made

- (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) the *DPP applies for the order; and
 - (d) there are reasonable grounds to suspect that a person's *total wealth exceeds the value of the person's *wealth that was *lawfully acquired; and
 - (e) any affidavit requirements in subsection (3) for the application have been met; and
 - (f) the court is satisfied that the *authorised officer who made the affidavit holds the suspicion or suspicions stated in the affidavit on reasonable grounds; and
 - (g) there are reasonable grounds to suspect either or both of the following:
 - (i) that the person has committed an offence against a law of the Commonwealth, a *foreign indictable offence or a *State offence that has a federal aspect;
 - (ii) that the whole or **any part of the person's wealth** was derived from **an offence against a law of the Commonwealth**, a foreign indictable offence or a State offence that has a federal aspect.

Division 1—Making freezing orders

15B Making freezing orders

- (1) A **magistrate must 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, if:

- (a) an *authorised officer described in paragraph (a), (aa), (b) or (c) of the definition of **authorised officer** in section 338 applies for the order in accordance with Division 2; and
- (b) there are reasonable grounds to suspect that the balance of the account:
 - (i) is *proceeds of an *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) is wholly or partly an *instrument of a *serious offence; and
- (c) the magistrate is satisfied that, unless an order is made under this section, there is a risk that the balance of the account will be reduced so that a person will not be deprived of all or some of such proceeds or such an instrument.

Note 1: Paragraphs (a), (aa), (b) and (c) of the definition of **authorised officer** in section 338 cover certain AFP members, certain members of the Australian Commission for Law Enforcement Integrity, certain members of the Australian Crime Commission and certain officers of Customs.

Note 2: The balance of the account may be proceeds of an offence even though the balance is only partly derived from the offence: see section 329.

- (2) An order made under subsection (1) covers the balance of the *account from time to time.

Order need not be based on commission of particular offence

- (3) The **reasonable grounds** referred to in paragraph (1)(b), and the **satisfaction** referred to in paragraph (1)(c), **need not be based on a finding as to the commission of a particular offence.**

Other Constitutional issues which may be relevant in the Green case:

Inconsistency of laws.

109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Rights of residents in States.

117. A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

Government of territories.

122. The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

ENDS