
# Obligation of Court to give reasons for making restraining orders

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## Reasons in ex parte applications

by Christian Juebner

Although proceeds of crime legislation around Australia, including the *Confiscation Act* 1997 (Vic) and the *Proceeds of Crime Act* 2002 (Cth), permits Courts to direct applicants for *ex parte* restraining orders to give notice of the applications to persons likely to be affected by them (i.e. to have the application is heard *inter partes*), such directions are made only in rare instances and restraining orders continue as a matter of course to be made *ex parte*.

Despite the making of restraining orders on an *ex parte* basis, in practice Courts only vary rarely provide reasons for the making of restraining orders, particularly in Victoria.

There are now a number of judicial decisions, particularly in New South Wales, which stand for the proposition that a Court should give reasons for the making of *ex parte* restraining orders. In that regard, see:

- *International Finance Trust Company Ltd v New South Wales Crime Commission* [2008] NSWCA 291;
- *New South Wales Crime Commission v Meads* [2010] NSWSC 1145;
- *New South Wales Crime Commission v Richards* [2010] NSWSC 1399;
- *New South Wales Crime Commission v Younan* [2012] NSWSC 13.

The issue of providing reasons was the subject of consideration by Hammill J last week in *New South Wales Crime Commission v Pham* [2014] NSWSC 998, where the Court again

confirmed that reasons should be given, albeit that the reasons need not be extensive.

Reasons for making restraining orders are potentially very important in advising persons who have had their property restrained because, inter alia, they could evidence an error in the approach taken by the Court in the analysis or could highlight that the Court may have been misled (even innocently) by the applicant for the restraining order in respect of a particular state of affairs, thereby providing grounds for having the restraining order set aside.

As a practical matter, practitioners should consider, when being engaged to advise in respect of a proceeds of crime proceeding, whether to approach the Court and request the provision of written reasons for the making of restraining orders where such reasons are absent.

The significance of written reasons is likely to be much greater in the context of civil forfeiture, which operates upon the suspicion of a relevant law enforcement officer as to the character of certain restrained property (i.e. that it has either been derived or used in connection with certain offences), than circumstances in which an accused has been charged and it is alleged that the accused has an interest in certain property.

***About the author***

Christian Juebner is a barrister at the Victorian Bar and practices extensively in proceeds of crime litigation in various Australian jurisdictions. He was admitted to practice in 1996 and, prior to coming to the Bar 10 years ago, was a partner with Deacons (now Norton Rose Fulbright).

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