



## Précis Paper

A discussion about the recent decision of *Deputy Commissioner of Taxation v Changran Huang* (2021) HCA 43.

### **Discussion Includes**

- What was the High Court decision about?
- The Federal Court decision
- The Appeal
- The High Court's decision
- Justice Edelman's dissenting judgement

## Précis Paper

# Worldwide freezing orders

In this edition of BenchTV, Harry Melkonian (Honorary Associate, Macquarie Law School, Sydney) and Axel Melkonian (Law Student, University of Sydney, Sydney) discuss the recent decision of *Deputy Commissioner of Taxation v Changran Huang* (2021) HCA 43.

### What was the High Court decision about?

1. The case involved an action by the Commissioner to recover nearly \$141 million of tax allegedly owed by Mr Huang.
2. The case dealt with the international complexity of the Australian Court issuing a freezing order over Mr Huang's assets that was a worldwide freezing order.
3. Mr Huang and his wife had resided in Australia and were tax residents since 2013 but in 2018, Mr Huang returned to the People's Republic of China. It was after that that the ATO assessed the tax liability and promptly commenced litigation in 2019, requesting a freezing order.

### The Federal Court decision

4. In the Federal Court, the Government sought a freezing order which had the effect of preventing Mr Huang and his wife, who had also left Australia, from transferring or disposing of any assets, worldwide up to the value of \$141 million.
5. Judge Katzmann, under Federal Rule 7.32 and 7.35, granted the ex parte freezing order.
6. It then went to the Full Court and then to the High Court.
7. In the Federal Court, Her Honour referring to Rule 7.35 recited that a court can protect its process by making a freezing order against a prospective judgement debtor, if there is a danger that a judgement or prospective judgement will be unsatisfied because the judgement debtor absconds or the assets of the debtor are removed or disposed of.
8. Judge Katzmann made a finding that the tax audit indicated an intention to avoid paying tax by 'grossly understating income.' She also found that Mr Huang was a Chinese National who had been in the process of severing ties to Australia and was likely to have substantial assets in China. She further noted that since he became aware of the ATO's investigation and enquiry, 'the amount of money transferred increased dramatically after the audit began.'
9. Mr Huang's counsel argued that the freezing order did not serve the purpose of the statute because it did not protect or prevent frustration of a Federal Court's process. This was because there was no process available for enforcement of any judgement in the ATO's favour in either China or Hong Kong.

10. Judge Katzmann rejected this and said that under certain circumstances, maybe enforcement could be possible, however she did not find that enforcement in China or Hong Kong was possible. She noted that there were certain things in the future whereby the money could fall into someplace where there is an enforcement possibility.
11. Mr Huang then appealed to the Full Court.

### The Appeal

12. Mr Huang prevailed at the Full Court and the decision of the Federal Court was reversed.
13. His Counsel focused in on the issue that any judgement based on a tax debt would be unenforceable directly or indirectly.
14. The trial court had said that enforcement was 'not impossible'. However, Mr Huang maintained that it was and that there was no lawful reason for a freezing order where there was no possibility of enforcing the judgement.
15. The Full Court agreed with him that there has to be something more than a theoretical possibility or a maybe, noting "in our opinion, there must be a realistic possibility that any judgement obtained by the plaintiff can be enforced against assets of the defendant in the place to which the proposed order relates. A test of 'not impossible' 'is somewhat indefinite in meaning and in our view, sets the bar too low " and on that basis they reversed the decision of the Federal Court.
16. The ATO then sought review in the High Court of Australia.

### The High Court's decision

17. The decision was a 4-1 decision in the High Court with Justice Edelman in dissent.
18. The High Court reversed the Full Court and reinstated the decision of Judge Katzmann in the Federal Court.
19. The High Court started out with the recognition that a tax debt is not going to be enforceable in the People's Republic of China.
20. This is fundamental private international law. Public obligations; judgements of government debts, will not be enforced in the courts of another country.
21. The High Court did agree that freezing orders under Rule 7.32 have limitations and noted that there are two things that must be satisfied;
  - a. Firstly, the freezing order must be for the purpose of preventing any frustration of the court's process;
  - b. And secondly, the freezing order must address that purpose by seeking to meet a danger that a judgement, or prospective judgement, will be unsatisfied
22. The four justices agreed that Rule 7.32 contemplated that freezing orders would apply to assets outside of Australia.

23. In response, Huang's argument was that a freezing order can't be upheld unless there was a realistic possibility of the freezing order's efficacy. This was rejected by the majority because the law on its face does not have any discussion of efficacy.
24. The High Court said that a freezing order could be rejected on a discretionary basis where the defendant was outside the court's jurisdiction. Otherwise, they said, that worldwide freezing orders were not unusual anymore and were an exercise of the court's in personum jurisdiction over the defendant

#### Justice Edelman's dissenting judgement

25. Justice Edelman noted that a freezing order, on its face, can be a draconian thing. For example, it can deprive someone of the use of their assets even though there has been no adjudication of their actual liability.
26. He felt that the Full Court was correct; a freezing order was impermissible where there was questioned no prospect that it could be enforced.
27. He noted, as did the majority, that Rule 7.32 requires the Court's freezing orders to be for a particular purpose.
28. He said that the purpose of the rule, is to promote the integrity of the process of the court and it is not for the purpose of creating security for the plaintiff or by creating a leverage for the plaintiff.
29. The purpose of that freezing order was to protect the process of the court. It may have an unintended effect of harming the defendant, but the purpose is to protect the process of the court.
30. The justice then asked what process was being protected here; "If there is no realistic possibility that any process of the court would be frustrated or inhibited without the freezing order, then the court cannot be acting for the purpose of preventing the frustration or inhibition of the court's process. Courts cannot be taken to act in vain.
31. Justice Edelman in his dissent went on to say "In many other cases, it might be a very simple exercise for an applicant to point to evidence of the ability to obtain enforcement or reciprocal enforcement of judgements to justify a concern that the enforcement process of the court, including that reciprocity, could be frustrated or inhibited.' Which would justify a freezing order
32. In this case, since there was no realistic possibility of any enforcement of the prospective judgement against Mr Huang, in either the PRC or Hong Kong, a freezing order over his assets, in those jurisdictions, could not have the purpose of preventing or frustrating the enforcement processes of the Federal Court
33. He is saying that since the orders of the court are unenforceable in those countries anyway, the justification to protect process is not there and as such the statutory requirement is not fulfilled.

34. He noted that in the Government's submissions, they made a point that in personum nature of a freezing order, meant that it could be capable of application anywhere in the world and in his words 'this submission is based on erroneous conflation of all the different dimensions of jurisdiction.' He was saying that a freezing order can only be issued for a statutory purpose, namely, protection of the court's process and since that statutory process did not exist, there was therefore no lawful reason for a freezing order
35. This did not gain any traction with the majority who took a much more literal meaning of the statute
36. One of the principles of equity is that a court can deny relief if the court order is impossible to execute, the maxim is formally 'Equity does not act in vain'.
37. In the Huang case, the majority in dictum acknowledged that the court had discretion to deny the freezing order.
38. However, that was never really an issue on Appeal.
39. In his dissent, Justice Edelman said that a freezing order can only be imposed to protect the court process and where protection of process is impossible, then the statute's requirements have not been met and there can be no freezing order

## Biography

### Dr Harry Melkonian

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Dr Melkonian is admitted to practice in England, New York, California and New South Wales. He is a scholar on the Constitution of the United States. He has conducted over 1000 jury trials in the USA and is now resident in Sydney, where he practices law specialising in media and defamation, constitutional issues and private international law. He teaches at Macquarie University Law School and is the author of *Freedom of Speech and Society: A Social Approach to Freedom of Expression and Defamation*, *Libel Tourism* and *the Speech Act of 2010: The First Amendment Colliding with the Common Law*. He was the lead trial lawyer in the landmark *Meinhold v US* case in which the right of gays to serve in the US military was first established. He represented the Chief of Police during the aftermath of the riots in Los Angeles following the Rodney King trial.

### Axel Melkonian

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Axel Melkonian is currently the National Publications Officer of the Australian China Youth Association. He is also a Publications Committee member at the Sydney University Law Society.

## References

### Cases

*Deputy Commissioner of Taxation v Changran Huang* (2021) HCA 43