MAGISTRATES COURTS OF QUEENSLAND

CITATION:	*Armour v FAC* [2012] QMC 22
PARTIES:	**CARLEEN JANET ARMOUR** (applicant) **v** **FAC** (respondent)
FILE NO/S:	MAG68052/12(2)
DIVISION:	Magistrates Courts
PROCEEDING:	Application for a Protection Order under the *Domestic and Family Violence Protection Act 2012*
ORIGINATING COURT:	Magistrates Court at Southport
DELIVERED ON:	21 November 2012
DELIVERED AT:	Southport
HEARING DATE:	25 September 2012
MAGISTRATE:	Costanzo JJ
ORDER:	**Application granted.**
CATCHWORDS:	FAMILY LAW – DOMESTIC VIOLENCE — Meaning of '*necessary or desirable*' — Paramount principles to be applied — Other relevant considerations — Holding perpetrators of domestic violence accountable — Subornation of aggrieved to give evidence against her own interest— Risk of further domestic violence — Need for protection *Domestic and Family Violence Protection Act 2012 (Qld),* s 3, s 4, s 37, s 57, s 197, s 198 considered *Corporations Act 2001 (Cth),* s 1323 compared *AB v Magistrates' Court at Heidelberg [2011] VSC 61* *ASIC v Mauer-Swisse Securities Ltd* (2002) 20 ACLC 1,530; [2002] NSWSC 684 *Australian Securities and Investments Commission v Arafura Equities Pty Ltd* (2005) 56 ACSR 429; [2005] QSC 376 *Australian Securities and Investments Commission (ASIC) v Carey (No 3)* (2006) 232 ALR 577; (2006) 57 ACSR 307; (2006) 24 ACLC 581; [2006] FCA 433 *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] ALR

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Brunsgard v Daire (1984) 36 SASR 391

Connell v National Companies & Securities Commission (1989) 2 WAR 121; (1989) 1 ACSR 193, (1990) 8 ACLC 70

Conway v Jerram, Magistrate and NSW State Coroner (2010) 78 NSWLR 371; [2010] NSWSC 371

Cornwell v Commissioner of Australian Federal Police (1990) 24 FCR 544; 94 ALR 495

Corporate Affairs Commission (NSW) v Walker (1987) 11 ACLR 884; (1987) 5 ACLC 991

Corporate Affairs Commission (NSW) v Prime Commodities Pty Ltd (1987) 11 ACLR 584 at 587; (1987) 5 ACLC 787

Corporate Affairs Commission (NSW) v Walker (1987) 11 ACLR 884; (1987) 5 ACLC 991

Corporate Affairs Commission v ASC Timber Pty Ltd (1992) 10 ACSR 525; (1992) 11 ACLC 141

Corporate Affairs Commission v Lone Star Exploration NL (No 2) (1988) 50 SASR 24; (1988) 14 ACLR 499; (1988) 6 ACLC 1108

Knight v FP Special Assets Ltd (1992) 174 CLR 178

MAN v MAM [2003] QDC 398

Nadler v Police (2008) 257 LSJS 315; (2008) 187 A Crim R 347; [2008] SASC 242

Rejfek v McElroy (1965) 112 CLR 517; [1966] ALR 270

COUNSEL: Chetty (constable) for applicant

respondent on own behalf

SOLICITORS: Police Prosecutions for the applicant

respondent on own behalf

The Application

[1] This is a police application under the *Domestic and Family Violence Protection Act 2012*, seeking a protection order against FAC (the respondent) for the protection of LKJ (the aggrieved) from domestic violence.

The Legislation

[2] The *Domestic and Family Violence Protection Act 2012* (the Act), ss 1–2, commenced on the date of assent. The remaining provisions commenced on 17 September 2012. The application was filed on 11 April 2012. The hearing before me was on 25 September 2012.

[3] The transitional provisions in Part 10 of the Act provide:

> **197 Application for protection order**
> (1) This section applies to an application for a protection order under the repealed Act if, on the commencement, the application had not been finally dealt with.
> (2) The application is taken to have been made under section 32 of this Act.
>
> **198 Domestic violence committed before commencement**
> A court may make an order under a provision of this Act in relation to domestic violence committed before the commencement of the provision.

[4] Under s 195 '***repealed Act'*** means the *Domestic and Family Violence Protection Act 1989*.

[5] Therefore, as the parties were aware, and agreed, this application, having been made before the commencement of the Act, while the repealed Act was still in force, must now be determined under the Act.

[6] The application is therefore deemed to be an application under sections 32(1)(c) and to be an application 'by a police officer under section 100(2)(a)' which empowers a police officer to apply to a court for a protection order under part 3, division 1 if, 'after an investigation, the police officer reasonably believes domestic violence has been committed'.

[7] In part 3, division 1, section 37 of the Act sets out precisely what the court must be satisfied of, and what it must and may consider, before the discretion to make a protection order is enlivened:

> **37 When court may make protection order**
> (1) A court may make a protection order against a person (the ***respondent***) for the benefit of another person (the ***aggrieved***) if the court is satisfied that—
> (a) a relevant relationship exists between the aggrieved and the respondent; and
> (b) the respondent has committed domestic violence against the aggrieved; and
> (c) the protection order is necessary or desirable to protect the aggrieved from domestic violence.
> (2) In deciding whether a protection order is necessary or desirable to protect the aggrieved from domestic violence, the court—
> (a) must consider the principles mentioned in section 4; and
> (b) may consider whether a voluntary intervention order has previously been made against the respondent and whether the respondent has complied with the order.

[8] There was no dispute in this case that a 'relevant relationship' existed. The aggrieved and the respondent had, as a couple, been in an intimate personal relationship[1].

[9] The respondent disputes that he has committed domestic violence against the aggrieved and that the protection order is necessary or desirable to protect the aggrieved from domestic violence.

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[1] See sections 13(a), 14(c) and 18(1) of the Act.

[10] In reaching my decision that it is both necessary and desirable, in this case, to protect the aggrieved from domestic violence I have had regard to and considered each of the principles mentioned in section 4 of the Act. I have more to say about this below. Section 4 states:

> **4 Principles for administering Act**
> (1) This Act is to be administered under the principle that the safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount.
> (2) Subject to subsection (1), this Act is also to be administered under the following principles—
> (a) people who fear or experience domestic violence, including children, should be treated with respect and disruption to their lives minimised;
> (b) perpetrators of domestic violence should be held accountable for their use of violence and its impact on other people and, if possible, provided with an opportunity to change;
> (c) if people have characteristics that may make them particularly vulnerable to domestic violence, any response to the domestic violence should take account of those characteristics;
> *Examples of people who may be particularly vulnerable to domestic violence—*
> • women
> • children
> • Aboriginal people and Torres Strait Islanders
> • people from a culturally or linguistically diverse background
> • people with a disability
> • people who are lesbian, gay, bisexual, transgender or intersex
> • elderly people
> (d) in circumstances in which there are conflicting allegations of domestic violence or indications that both persons in a relationship are committing acts of violence, including for their self-protection, the person who is most in need of protection should be identified;
> (e) a civil response under this Act should operate in conjunction with, not instead of, the criminal law.

[11] I have also had regard to and considered each of the main objects mentioned in section 3 of the Act. Section 3 states:

> **3 Main objects**
> (1) The main objects of this Act are—
> (a) to maximise the safety, protection and wellbeing of people who fear or experience domestic violence, and to minimise disruption to their lives; and
> (b) to prevent or reduce domestic violence and the exposure of children to domestic violence; and
> (c) to ensure that people who commit domestic violence are held accountable for their actions.
> (2) The objects are to be achieved mainly by—
> (a) allowing a court to make a domestic violence order to provide protection against further domestic violence; and
> (b) giving police particular powers to respond to domestic violence, including the power to issue a police protection notice; and
> (c) imposing consequences for contravening a domestic violence order or police protection notice, in particular, liability for the commission of an offence.

[12] Section 56 then sets out which standard (mandatory) conditions must be included in a domestic violence order.

[13] Under section 57 the court may also impose other conditions that the court considers both ***necessary*** in the circumstances; **and** ***desirable*** in the interests of the aggrieved, any named person or the respondent. Section 57 states:

> **57 Court may impose other conditions**
> (1) A court making or varying a domestic violence order may also impose any other condition that the court considers—
> (a) ***necessary*** in the circumstances; **and**
> (b) ***desirable*** in the interests of the aggrieved, any named person or the respondent.
> (2) The principle of paramount importance to the court must be the principle that the safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount.

Meaning of *'necessary or desirable to protect the aggrieved'*

[14] The first thing to observe is that the test is stated in the alternative.

[15] A court may find it desirable to make an order without finding it to be necessary. One example may be where a perpetrator of domestic violence needs to be held accountable.

[16] A court may find it necessary to make an order without finding it to be desirable. One example may be where a court finds it is necessary despite the wishes of an aggrieved who stands opposed to the making of an order.

[17] Secondly, giving these terms their plain English meaning, the following meanings are given to the words 'necessary' and 'desirable' in the Online Oxford English Dictionary:

Necessary:

"That is needed.";
"Needed to be done, achieved, or present; essential";
"Indispensable, vital, essential; requisite. Also with *to* or *for* (a person or thing)"
"Of an action: that needs to be done; that is done in order to achieve the desired result or effect. if necessary: if required by the circumstances"; and
"That which is indispensable; a necessary thing; an essential or requisite".

Desirable:

"Worthy to be desired; to be wished for"; and
"That which is desirable; a desirable property or thing".

[18] Thirdly, whether the court finds it necessary or finds it desirable, the finding must be made in the context that it is either necessary or desirable that the order be made in order to protect the aggrieved. Logically, this must mean that the necessity or desirability of an order being made must arise or derive from a need to protect the aggrieved with the terms of an order. The necessity or desirability must be predicated upon a finding that there exists a need to protect the aggrieved from domestic violence.

[19] Fourthly, in the absence of authority to the contrary, and on the basis of the authorities I refer to below, I would hold that the need for protection must be a

real one, not some mere speculation or fanciful conjecture. Need often arises from risk. The court needs to assess the risk to the aggrieved and assess whether management of the risk is called for.

[20] The risk of further domestic violence and the need for protection must actually exist. There is no stated necessity that the need or the risk be significant or substantial. The need for protection of an aggrieved must be sufficient, however, to make it necessary or desirable to make the order in all the circumstances.

Discussion: What facts and circumstances can be taken into account?

[21] Clearly, in deciding whether a protection order is necessary or desirable to protect the aggrieved from domestic violence, the court must, under s 37(2)(a), consider the principles mentioned in section 4. However, the Act does not say that the court can not consider other matters. If they are relevant the court may also have regard to other matters.

[22] Under the 'repealed Act', section 20, the court was required to be satisfied that the respondent had committed an act of domestic violence against the aggrieved (and that a domestic relationship existed between the 2 persons) and that respondent was likely to commit an act of domestic violence again or, when the act of domestic violence was a threat, that the respondent was likely to carry out the threat.

[23] In relation to section 20 of the repealed Act, in *MAN v MAM* [2003] QDC 398 at [20] McGill DCJ held that:

> "'Likely' in my view does not in the statute mean more probable than not, but it must at least involve a real, not remote likelihood, something more probable than a mere chance or risk".
> His honour went on to say:
> "The Magistrate ought to have been considering whether the evidence indicated that there was some real, significant likelihood that the respondent spouse would commit an act of domestic violence in the future".

[24] The 'likelihood' test is no longer mandated but it may still, logically, be a relevant consideration. If a respondent is likely to commit some act of domestic violence against an aggrieved again in future then a court may find that the need to protect the aggrieved is sufficient to make it necessary or desirable to make the order in all the circumstances.

[25] Of course, under the new Act there may now be circumstances where, even in the absence of the degree of likelihood previously required, the making of a protection order may be found to be necessary and/or desirable to protect an aggrieved from domestic violence.

[26] To understand what may be considered relevant under section 37 of the Act, to determining if it is necessary or desirable to protect the aggrieved from domestic violence by making a protection order, it may be useful to see what other jurisdictions do.

Comparison of State Laws

ACT: *Domestic Violence and Protection Orders Act 2008* (ACT)

[27] In the *Australian Capital Territory*, a protection order can be either a domestic violence order or a personal protection order. Under s 46 the court may make a final protection order if it is satisfied on the balance of probabilities that either:

> (1) the respondent has engaged in domestic violence; or
> (2) the respondent has engaged in personal violence towards the aggrieved person and may engage in personal violence towards the aggrieved person during the time the order is proposed to operate if the order is not made.

[28] Under s 48 a final order may contain the conditions or prohibitions the Magistrates Court considers ***necessary or desirable***.

[29] Therefore, to make an order, all that is required is that the court be satisfied of one of the two limbs. Then the court is to consider what conditions or prohibitions the Magistrates Court considers ***necessary or desirable***. Logically, it would follow that the conditions and prohibitions would be such as are ***necessary or desirable*** in order to manage or minimise the risk found to exist.

NT: *Domestic and Family Violence Act 2007* (NT)

[30] In the Northern Territory, before making a domestic violence order (DVO), the issuing authority (the 'authority') must be satisfied, under s 18(1), on the balance of probabilities that there are reasonable grounds for a protected person to fear the commission of domestic violence against the protected person by the defendant. Because of the objective nature of the test in subsection (1), the issuing authority may be satisfied on the balance of probabilities as to the reasonable grounds even if the protected person denies, or does not give evidence about, fearing the commission of domestic violence. Under subsection (2), in addition, if the protected person is a child, the authority may make a DVO if satisfied there are reasonable grounds to fear the child will be exposed to domestic violence committed by or against a person with whom the child is in a domestic relationship.

[31] Under s 19(1), in deciding whether to make a DVO, the issuing authority must consider the safety and protection of the protected person to be of paramount importance. Under subsection (2), in addition, the issuing authority must consider the following:

(a) any family law orders in force in relation to the defendant, or any pending applications for family law orders in relation to the defendant, of which the issuing authority has been informed;
(b) the accommodation needs of the protected person;
(c) the defendant's criminal record as defined in the *Criminal Records (Spent Convictions) Act* ;
(d) the defendant's previous conduct whether in relation to the protected person or someone else;
(e) other matters the authority considers relevant.

[32] Under s 21 a DVO may provide for any of the following:

> (a) an order imposing the restraints on the defendant stated in the DVO as the issuing authority considers are **necessary or desirable** to

prevent the commission of domestic violence against the protected person;

(b) an order imposing the obligations on the defendant stated in the DVO as the issuing authority considers are **necessary or desirable**:
    i. to ensure the defendant accepts responsibility for the violence committed against the protected person; and
    ii. to encourage the defendant to change his or her behaviour;
(c) other orders the issuing authority considers are **just or desirable** to make in the circumstances of the particular case.

NSW: *Crimes (Domestic and Personal Violence) Act 2007*

[33] In New South Wales, an apprehended violence order includes an apprehended domestic violence order and an apprehended personal violence order[2].

[34] Under section 16(1) the court may make an apprehended domestic violence order if it is satisfied on the balance of probabilities that a person who has or has had a domestic relationship with another person has reasonable grounds to fear, and in fact fears, any of the following, if it is conduct that, in the opinion of the court, is sufficient to warrant the making of the order:

(a) the commission by the other person of a personal violence offence against the person, or
(b) the engagement of the other person in conduct in which the other person either intimidates the person (or a person with whom the person has a domestic relationship), or stalks the person.
Under subsection (2) it is not necessary for the court to be satisfied that the person for whose protection the order would be made in fact fears that such an offence will be committed, or that such conduct will be engaged in, if:
(a) the person is a child, or
(b) the person is, in the opinion of the court, suffering from an appreciably below average general intelligence function, or
(c) in the opinion of the court:
(i) the person has been subjected at any time to conduct by the defendant amounting to a personal violence offence, and
(ii) there is a reasonable likelihood that the defendant may commit a personal violence offence against the person, and
(iii) the making of the order is ***necessary*** in the circumstances to protect the person from further violence.
Under subsection (3) conduct may amount to intimidation of a person even though it does not involve actual or threatened violence to the person, or it consists only of actual or threatened damage to property belonging to, in the possession of or used by the person.

South Australia: *Intervention Orders (Prevention of Abuse) Act 2009*

[35] In South Australia, the court may make an intervention order under s 6 if satisfied, on the balance of probabilities, that it is reasonable to suspect that the

[2] See ss 16(1) (apprehended domestic violence orders), 19(1) (apprehended personal violence orders).

defendant will, without intervention, commit a defined[3] act of abuse against a person, and that the issuing of the order is ***appropriate*** in the circumstances.

[36] Previously, under repealed s 99(3) of the *Summary Procedure Act* 1921 the courts in South Australia could make a restraining order imposing such restraints on a defendant as were ***necessary or desirable*** to prevent the defendant acting in the apprehended manner. In *Brunsgard v Daire* (1984) 36 SASR 391 Johnson J said at 395 that from a practical point of view the whole exercise of on an application for a restraining order under s 99 of the *Justices Act 1921 (SA)* was not to mete out punishment for some behaviour but to prevent breaches of the peace. The decision was followed by Legoe J in *Quicksilver v Liddy* Supreme Court of South Australia Justices Appeal 2747 of 1991, 24 January 1992; BC9200543.

Tasmania: *Justices Act 1959*

[37] In Tasmania under s 106B(1) the court may make an order imposing such restraints upon a person as are ***necessary or desirable*** to prevent the person from acting in a manner specified in s 106B(1) namely, if the court is satisfied on the balance of probabilities –

(a) that –
(i) a person has caused personal injury or damage to property; and
(ii) that person is, unless restrained, likely again to cause personal injury or damage to property; or
(b) that –
(i) a person has threatened to cause personal injury or damage to property; and
(ii) that person is, unless restrained, likely to carry out that threat; or
(c) that –
(i) a person has behaved in a provocative or offensive manner;
(ii) the behaviour is such as is likely to lead to a breach of the peace; and
(iii) that person is, unless restrained, likely again to behave in the same or a similar manner; or
(d) that a person has stalked the person for whose benefit the application is made or a third person the stalking of whom has caused the person for whose benefit the application is made to feel apprehension or fear.

Victoria: *Family Violence Protection Act 2008*

[38] Under s 74, the court may make a 'family violence intervention order' if satisfied, on the balance of probabilities, that the respondent has committed family violence against the affected family member and is likely to continue to do so or do so again.

[39] Also, the court in Victoria may make a final order whether or not-

(a) some or all of the family violence constituting grounds for making the order occurred outside Victoria, if the affected family member was in Victoria at the time at which the family violence occurred, and

[3] See s 8—"Meaning of abuse—domestic and non-domestic"

(b) the affected family member was outside Victoria at the time at which some or all of the family violence constituting grounds for making the order occurred, if that family violence occurred in Victoria.

[40] In *AB v Magistrates' Court at Heidelberg*[4] *[2011] VSC 61* Mukhtar AsJ relevantly held:

> **[61]** I think the statute is investing faith in the Magistrate to form a belief judicially, which is based not on caprice or convenience or personal value, but on some rational grounds. There is a natural inclination to say probative as well but there are bound to be cases where allegations may not be improbable but not manifestly so, and a Magistrate forms a belief conscientiously that "a risk may be posed" as s 78(5)[5] says. Perhaps it could be a real and sensible risk. However one poses the test, in my view, a belief can be formed about a risk on the basis of allegations that are yet to be proven, but have to be taken seriously (or not dismissed as frivolous) until they are eventually tested. An element of judgment has to be involved, especially as a child is involved, and so much will depend on the circumstances. To that end, regard must be had to the evidentiary requirements and the inquisitorial flavour of s 65 which states that:
>
> > "Subject to this Act, in a proceeding for a family violence intervention order the court may inform itself in any way it thinks fit, despite any rules of evidence to the contrary." …
>
> **[82]** … I think it is right to say that by and large, the legislation looks to the Magistrate to undertake or allow a form of inquisitorial justice. A demonstration of that is s 78(5) itself. Another example is s 81 which permits the Court to include in a family violence intervention order "any conditions that appear to the Court ***necessary or desirable*** in the circumstances".

[41] Likewise, s 51(6) of the 2012 Act provides that the court may refuse to make a 'consent order' if the court believes the making of the order may pose a risk to the safety of an aggrieved, any named person, or any child affected by the order. However, no such provision appears in relation to orders which are not 'consent orders', such as after a hearing is held to determine an application, as in the case before me.

[42] Nevertheless, the issue of possible risk to the safety of an aggrieved, a child of the relationship or the respondent is a problematical issue for a court to

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[4] In *AB v Magistrates' Court at Heidelberg* (above, at [86]) Mukhtar AsJ also addressed the Magistrate's role in reaching consent orders and discussed the context in which a Magistrate needs to decide what conditions he or she regards as ***necessary or desirable*** in the circumstances:

> **[86]** … the Magistrate did not commit jurisdictional error in suggesting or proposing a consent order that she would be prepared to make. I reject the submission that the Magistrate entered the fray to the point where she, having stepped into jurisdiction, then stepped back out of it. To tell the parties that she would make a consent order if there were different terms was within power. To suggest what terms would be acceptable is part of the discourse that is necessary to understand the refusal of consent, and how to then advance the matter. Further, s 81(1) permits the Court to include any conditions that it regards as ***necessary or desirable*** in the circumstances. That, together with the inquisitorial features of the Act, unquestionably permits the Court to not only decline the consent order but to suggest or encourage orders that would be acceptable before the Court would give its consent. To sit there Sphinx-like, and simply refuse consent without suggesting alternatives adds to problems. As Mr Holt said, are the parties to have their consent rejected and then leave the Court for further discussions to somehow magically discern why it was the Magistrate was concerned, and then to come back with some proposed additional order?

[5] Section 78(5) of the Victorian Act provides:

> "(5) A court may refuse to make a final order, or an order varying, revoking or extending a final order, to which the parties to the proceeding have consented if the court believes the order may pose a **risk** to the safety of one of the parties or a child of the affected family member or respondent."

consider under the Act of 2012. This is because section 4 of the 2012 Act specifically provides that "perpetrators of domestic violence should be held accountable for their use of violence and its impact on other people and, if possible, provided with an opportunity to change".

[43] If a court knows or has good reason to suspect that making an order will or may put the aggrieved at risk of retaliatory domestic violence, or worse, then if no order is made the perpetrator "wins" or, in the terms of the Act, the perpetrator is not held accountable. The aggrieved may still live in fear of the respondent whether an order is made or not made. Retaliation may still occur even if the order is not made. If risk of retaliation were the only major consideration there would be cases where the worse the behaviour by a perpetrator and the worse the impact on the victim the less likely it is a court will make an order. This could not have been the intention of the Parliament.

[44] These are real considerations in this case where, for reasons I will discuss later, the only reasonable inference I can draw from all the evidence and the manner of its delivery is that the Respondent has suborned the Aggrieved. The experience of the courts is that domestic violence can be committed boldly, subtlety or surreptitiously and it is often insidious.

Western Australia: *Restraining Orders Act 1997*

[45] In Western Australia a court may make a restraining order, which includes a 'violence restraining order' and a 'misconduct restraining order'.

The court may make a 'violence restraining order' if satisfied on the balance of probabilities that:
(1) unless restrained, the 'respondent' is <u>likely</u> to either
(a) commit a violent personal offence against the applicant, or
(b) behave in a manner that could reasonably be expected to cause the applicant to fear that the respondent will commit such an offence; and
(2) granting a violence restraining order is ***appropriate*** in the circumstances.

Further analysis of State Laws

[46] There are few published cases about the domestic violence laws of the other States.

[47] While the legislation in other States can not affect the jurisdiction of this court, the types of considerations referred to by the various Acts may provide some insight into the types of considerations which may, in appropriate cases, be relevant considerations in the determination of whether it is ***necessary or desirable*** for this court to make an order. They certainly do not provide anything approximating an exhaustive list of possible relevant circumstances. Whether they are relevant will depend on the law in Queensland and on the facts and live issues of each case. What weight ought to be given to any such relevant circumstance must also depend on the overall facts and circumstances of each hearing.

[48] The types of considerations referred to by the various Acts may simply provide this court with some inkling about the types of considerations legal minds, and judicial minds, may need to bring to bear on the determination of

issues raised under the Queensland Act. However, I have taken great care to look at the context in which each of the other state laws is drafted.

[49] In 'domestic violence' legislation, in some States of Australia the use of the words "***necessary or desirable***" appears in relation to the conditions or restraints or prohibitions which it is judged are ***necessary or desirable***.

[50] However, in Queensland the court must first assess whether it is ***necessary or desirable*** to make an order (at all) ***to protect the aggrieved***. Under s 56(1)(a) of the Act the order could possibly state only the standard (mandatory) condition "to be of good behaviour towards the aggrieved and not commit domestic violence against the aggrieved". It must therefore be necessary to identify what the aggrieved needs protection from and why it is necessary or desirable to protect the aggrieved.

[51] As a second step, the order may then include further or ancillary orders which it considers are ***necessary in the circumstances*** and ***desirable in the interests of*** an aggrieved, of any named person or of a respondent.

Commonwealth Legislation: *Corporations Act 2001*

[52] There is one statute which is analogous to section 37 of the Act. The *Corporations Act 2001,* at section 1323, has a comparable provision.

[53] Under s 1323, the Court may make or continue any of the orders listed in subsection (1)(d) thru (k) inclusive (such as orders prohibiting payment or transfer of money, financial products or other property), if—

> "(a) an investigation is being carried out in relation to an act or omission by a person, that constitutes or may constitute a contravention of the Corporations Act; or
> (b) a prosecution has begun against a person for a contravention of the Corporations Act; or
> (c) a civil proceeding has begun against a person under the Corporations Act; and the Court considers it ***necessary or desirable*** to do so for the purpose of protecting the interests of a person (in this section called an **aggrieved person**) to whom the relevant person referred to in paragraph (a), (b) or (c) is liable, or may be or become liable, to pay money, whether in respect of a debt, by way of damages or compensation or otherwise, or to account for financial products or other property."

[54] Orders prohibiting conduct under section 1323 may prohibit the conduct either absolutely or subject to conditions. The same can be said of s 37 of the *Domestic and Family Violence Protection Act 2012*.

[55] The main purpose for which powers are conferred under section 1323 is to protect the interests of so-called aggrieved persons by preserving the respondent's assets pending the outcome of an investigation, prosecution, or proceeding, with the intention that the respondent's assets will be available to meet the claims of the aggrieved persons. See *Corporate Affairs Commission (NSW) v Walker*[6] (1987) 11 ACLR 884 at 888, 896; (1987) 5 ACLC 991.

[6] The court in this case was considering the Securities Industry Code (NSW) s 147 and the Companies (NSW) Code s 573.

[56] The discretionary considerations employed by the courts which have considered section 1323 may be relevant when a magistrates court in Queensland is considering whether to make a protection order where the 'domestic violence' is, for example, coercive, deceptive or unreasonably controlling economic abuse.[7] However, the discretionary considerations may also be adapted to other aspects of domestic violence.

[57] It has been stated that a determination of whether it is "***necessary or desirable***", for the purpose of protecting creditors, shareholders and other claimants, that one or more orders under section 1323 be made or continued, may involve "a very difficult balancing exercise of private and public rights" and the public interest will in appropriate cases outweigh private rights: *Corporate Affairs Commission (NSW) v Prime Commodities Pty Ltd* [8] (1987) 11 ACLR 584 at 587; (1987) 5 ACLC 787 at 789.

[58] Exercise of that discretion has been held to depend upon the circumstances, including the stage of any investigation, or of civil or criminal litigation, the nature of the alleged liability of the defendant to any aggrieved person, the likelihood of liability being established and the gravity of the situation. For example, see In *Corporate Affairs Commission (NSW) v Walker* [9] (1987) 11 ACLR 884 at 888; (1987) 5 ACLC 991 in the Supreme Court of NSW, Waddell CJ in Equity held:

> "What evidence is necessary before an order should be made will depend on the circumstances. In the case of an application made shortly after an investigation has begun, the evidence may be regarded as sufficient if it establishes the general circumstances, the nature of the investigation and the reason why it is thought that there may be some liability on the part of a relevant person.
>
> On a later application, where the question is whether or not orders already made should continue, additional evidence may be thought to be necessary, such as evidence which describes the progress of and the future steps likely to be taken in the investigation. Evidence might be required which goes some distance towards establishing liability or which establishes a prima facie case. In deciding what evidence is required the court might well think it relevant to take into account the detriment which might be caused to potential claimants against a relevant person if an order is refused and to a relevant person if an order is made.
>
> The order made should, of course, go no further than is necessary for the purpose of protecting likely claimants against the relevant person, for instance, sufficient security may be provided for any liability by making an order in respect of part, as opposed to the whole, of the relevant person's property."

[59] The decision in *Corporate Affairs Commission (NSW) v Walker* was followed and applied in the following three cases.

[60] In *Corporate Affairs Commission v ASC Timber Pty Ltd* (1992) 10 ACSR 525; (1992) 11 ACLC 141, Cohen J held that the persons to be protected by an

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[7] See s 8(1)(c) (Meaning of *domestic violence*) and s 12 (Meaning of *economic abuse*).
[8] A decision under s 573(1)(c) of the Companies (NSW) Code.
[9] The court in this case was considering the Securities Industry Code (NSW) s 147 and the Companies (NSW) Code s 573.

order under s 1323 are those persons to whom the person over whom a receiver has been appointed is liable or may become liable to pay any moneys, whether in respect of a debt, by way of damages or compensation or otherwise, or to account for any securities or other property. That liability or potential liability may extend well beyond the time when one of the grounds for appointment of the receiver ceases to exist.

[61] In the context of domestic violence one could extrapolate that it may be ***necessary or desirable*** to make an order in order to protect an aggrieved person even if one of the grounds for finding that domestic violence has been committed by the respondent has ceased to exist. Also, if one reason why it is decided that a risk of future domestic violence is because of ongoing contact, such as in family court proceedings or because of other unresolved relationship issues, the order may need, in appropriate cases, to extend beyond the likely conclusion of those proceedings or resolution.

[62] In *Corporate Affairs Commission v Lone Star Exploration NL (No 2)* (1988) 50 SASR 24; (1988) 14 ACLR 499 at 506; (1988) 6 ACLC 1108, the Full Court held that when exercising the discretion to make an order under s 573(1) of the Companies (SA) Code, a court is not limited to those facts which are the subject of the activity under s 573(1)(a), (b) or (c), but it can have regard to all the facts and circumstances disclosed to the court. The discretionary powers of the court were able to be invoked without further pre-condition upon proof of one of the activities in para (a), (b) or (c). Then, the question for the court is whether it is ***necessary or desirable*** for the purpose of protecting the interests of any person to whom the relevant person is or may be or become liable to pay money or to account for any property. The Full Court added that in some cases it may be appropriate to consider whether the actual or potential liability is connected in some way with a possible contravention of the Code.

[63] In the context of domestic violence one could also extrapolate that it may be ***necessary or desirable*** to make an order in order to protect an aggrieved person having regard not only to evidence which establishes that domestic violence has been committed by a respondent, according to the definition of domestic violence, but also by having regard to all the other facts and circumstances disclosed to the court. This may include evidence which is properly before the court but which was not led by or relied upon by the applicant.

[64] I would add that the court can also take into the account reasonable inferences it can draw from the evidence disclosed to the court such as inferences that a respondent has suborned an aggrieved to withdraw her complaint or suborned an aggrieved to commit perjury.

[65] It is also clear that the Full Court was content to make an order not only if the relevant risk is 'likely' but also if it is 'possible'.

[66] A further factor may be the gravity of the situation: see *Corporate Affairs Commission v Lone Star Exploration NL (No 2)* [10](above), ACLR at 510–11.

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[10] See also *Corporate Affairs Commission (SA) v Lone Star Exploration NL* (1988) 50 SASR 12; (1988) 13 ACLR 769; (1988) 6 ACLC 792. This is the report of the decision by O'Loughlin J which was the subject of the appeal in *Lone Star Exploration NL (No 2)* (above). O'Loughlin J's decision was upheld.

The Full Court held that even if a judge considered he or she could not on the information before the court say that it was "necessary" to make the orders sought, but that on the other hand, the gravity of the situation strongly suggested that it was desirable that a measure of protection be afforded to the aggrieved, then an order could still be made.

[67] In *Connell v National Companies & Securities Commission* (1989) 2 WAR 121; (1989) 1 ACSR 193 at 204, (1990) 8 ACLC 70, Malcolm CJ followed *Walker's* case (above) and further held, at 206, that:

> " … the statutory jurisdiction conferred by s 573 is a protective jurisdiction to be exercised by the court on the application of the NCSC for the purpose of protecting the interests of the (aggrieved). Given that one or other of the pre-conditions in paras (a), (b) or (c) of s 573(1) are established and it is shown that an order is necessary or desirable for the relevant purpose, the fact that an interim order was obtained as a result of misconduct, non-disclosure of material facts or a person was prevented from leaving the country by misrepresentation, whether taken separately or in combination would not be likely to outweigh the need for protection, if established. Such facts may well have other implications for the persons concerned. Proceedings instituted without just cause in which no proper attempt is made to establish the grounds on which an order may be made by admissible evidence will be liable to be struck out as an abuse of process of the court."

[68] There is also an element of risk assessment and risk management in the judgment the court must make under section 1323. See *Australian Securities and Investments Commission (ASIC) v Carey (No 3)* (2006) 232 ALR 577; (2006) 57 ACSR 307; (2006) 24 ACLC 581; [2006] FCA 433; where French J at [26], [27], [30], [31], [33] to [35] held:

> [26] The circumstances in which the court may make orders under s 1323(1) are wide as indicated by the words "necessary or desirable … for the purpose of protecting the interests of a person …". There is an element of risk assessment and risk management in the judgment the court is called on to make. It follows, and has been accepted, that there is no requirement on the part of ASIC to demonstrate a prima facie case of liability on the part of the relevant person or that the person's assets have been or are about to be dissipated — *Corporate Affairs Commission v ASC Timber Pty Ltd* (1989) 7 ACLC 467 at 476 (Powell J); *Australian Securities and Investments Commission v Adler* (2001) 38 ACSR 266; [2001] NSWSC 451 at [7] (Santow J). (my underlining)
> [27] The nature and duration of orders made under s 1323(1) can be fashioned by the court to reflect its assessment of any risk of dissipation of the assets of a person under investigation. (my underlining)
> [30] … For the reasons already canvassed the court, in making orders under s 1323, engages in a risk assessment and management process. The logic of the section assumes that the court will not always have before it evidence of the kind that would be necessary and admissible in proceedings to establish definitively the nature and extent of the assets of the persons under investigation and their liability to aggrieved persons. Nor will it necessarily have before it evidence of the kind that would establish definitively that dissipation of assets has occurred or is likely to occur or that flight is imminent.
> [31] The logic of s 1323 requires the court to be able to act on evidence which might not be admissible in civil or criminal proceedings leading to a definitive determination of the rights and liabilities of the parties. Hearsay

> evidence may therefore be received and acted upon, not as proof of the truth of its content but as evidence of the existence of a risk or possibility that gives rise to the necessity for or desirability of a protective order. … .
> [33] Accepting that there is a possibility that penalty proceedings may be taken against one or more of the defendants in this case that does not, in my opinion, render the present application an application for the imposition of a penalty or an application incidental to such proceeding. As already noted, evidence may be relied upon of a hearsay or opinion character in these proceedings which might not be admissible in penalty proceedings. … .
> [34] It was submitted for the second defendant that because ASIC seeks an order that the reasonable costs of the receivers and managers whose appointment it seeks should be payable from the collective assets of the defendants, that fact itself gives the present application the character of a penalty proceeding. In my opinion however, the submission is misconceived. An order for the payment of costs out of the collective assets of the defendants would not of itself amount to the imposition of a penalty. Although it may effectively deprive defendants of some of their property that imposition is not by way of punishment for any contravention of the law.
> [35] Objection was also taken to the admissibility against the second defendant of transcripts of examinations of other parties conducted under s 19 of the ASIC Act. …, the transcripts of the examinations conducted under s 19 can be relied upon as tending to establish the possibility that circumstances exist which give rise to the necessity or desirability of a protective order. What is in evidence here is the fact that the statement was made in the course of a s 19 examination. The fact that the statement was made, rather like the hearsay evidence referred to earlier, may support an inference that circumstances exist that make a protective order necessary or desirable. It is not necessary to rely upon such evidence for the purpose of establishing the truth of the statement made." (my underlining)

[69] However, it has been held that a court will not find it ***necessary or desirable*** to make an order under section 1323 where investors' funds are not at risk: see *Australian Securities and Investments Commission v Arafura Equities Pty Ltd* (2005) 56 ACSR 429; [2005] QSC 376. The relevant risk must exist.

[70] I also note that in *ASIC v Mauer-Swisse Securities Ltd* (2002) 20 ACLC 1,530; [2002] NSWSC 684 it was held that it is within the purposes of protecting the interests of aggrieved persons under s 1323 that a person be prevented from departing Australia to assist ASIC in its investigations into a possibly fraudulent scheme involving Australian investors. If there was evidence of large scale fraud, the fact that only one small claim had been made so far did not detract from ASIC's case, because the victims may have had little or no information about the extent of the fraud and few resources to recover their losses. Similarly, in the case I have to determine, the fact that no Temporary order was made does not tie my hands. Further circumstances about the respondent's conduct have now come to light which I will discuss below.

Other legislation

[71] In *Conway v Jerram, Magistrate and NSW State Coroner* (2010) 78 NSWLR 371; [2010] NSWSC 371 an order was sought to hold a coroner's inquest under (NSW) *Coroners Act 2009*, s 84. Under that section the Supreme Court (NSW) may order an inquest if it appears ***necessary or desirable*** in the interests of justice to do so. I take into account the following principles extracted by Barr AJ:

"In my view, this court should not hesitate to order an inquest if, after considering the evidence, it concludes that the interests of justice make it ***necessary or desirable*** to do so. In *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 Gaudron J said At 205—

> "It is contrary to long-established principle and wholly inappropriate that the grant of power to a court (including the conferral of jurisdiction) should be construed as subject to a limitation not appearing in the words of that grant. Save for a qualification which I shall later mention, a grant of power should be construed in accordance with ordinary principles and, thus, the words used should be given their full meaning unless there is something to indicate to the contrary. Powers conferred on a court are powers which must be exercised judicially and in accordance with legal principle. This consideration leads to the qualification to which I earlier referred. The necessity for the power to be exercised judicially tends in favour of the most liberal construction, for it denies the validity of considerations which might limit a grant of power to some different body, including, for example, that the power might be exercised arbitrarily or capriciously or to work oppression or abuse.""

The evidence in this case

[72] The applicant's case arose from a complaint by the aggrieved LKJ made on 6 April 2012. The complaint was recorded contemporaneously in a police notebook and signed by LKJ. The complaint was as follows:

> "LKJ
> 06/05/85 states
> I have been in a relationship with FAC for the past 2 months. I live at [address]. FAC lives at [address]. He is employed as a senior web designer by the QLD government. He also works in the Army Reserves where he is training to be a Commissioned Officer.
>
> I see FAC around once a week, usually on weekends. FAC came down last night, Thurs the 05/04/12 at around 10pm
>
> On the 6th of April 2012 we both went to my work xmas party at the Surfers Paradise RSL. We got there at around 12pm to around 5pm. FAC had approximately 12 drinks including rum and beer. At 5pm the party concluded. We then walked separately to an after party on the Esplanade in Surfers Paradise. FAC then started a verbal argument with me over alcohol. FAC started walking back to my house to get his alcohol. He did not have a key for my unit. I did not give him permission to enter my property. I then walked back to my house around 10 minutes after FAC had left.
>
> I was concerned for my property. I got back to my house to find FAC inside the unit. I assume he climbed the balcony to get in. Inside the unit we continued arguing. I called the police earlier and told FAC they were on their way. FAC said he would wait for police down stairs. We sat down stairs together for 5 minutes. The under ground car park door then opened and FAC went in to get his Motorbike to leave. I followed him in the cark park. I grabbed his bag from the ground. FAC started his bike and once he realised I had his bag he turned the bike off. I was holding his bag and he grabbed me and threw me to the ground. Once I was laying on the ground on my back FAC grabbed me around the throat and squized (sic) my wind pipe. He then picked me up and threw me to the ground 2-3 times whilst he was still holding my throat. He then picked me up again and slammed me to the ground. At this time some neighbours within the complex ran over to see if I

> was alright. He then let me go. I said 'I just wanna go upstairs and wait for police' FAC said, he was going to wait with his bike. I went upstairs and FAC rode off without his back pack. I took his backpack up stairs. Police attended my address around 15 minutes later.
>
> I hand (sic) the backpack to police. I am fearful of FAC he's abusive and violent behaviour has increased over the last 2 months. I do not want anything to do with him. I did not give him permission or authority to assault me in anyway."
> (my underlining of the domestic violence I find to be proven on the balance of probabilities below)

[73] The police also observed, and noted, that the aggrieved had red marks and grazes on her left forearm, upper arm and left and right elbows. The police also noted that the aggrieved stated she had soreness to her lower back and tail bone.

[74] Constable Lukic stated under cross-examination that police were not aware of any evidence to suggest the aggrieved and respondent were still in a relationship, or that they had any need to see each other or that they needed to contact each other.

[75] The respondent relies on the evidence of LKJ whereby she now states in her evidence that she does not really recall the argument. LKJ states that she does not want the matter to go any further and that she has asked the police to stop on several occasions. This may explain why no Temporary Protection Order was ever made but I do not know and it is not relevant to my decision. Lofts stated the respondent and herself have been in contact once per month solely "to do with this" and to come to court on three or four occasions and to get court dates. LKJ stated in evidence that she does not believe she needs an order and that she is not in fear. However, her demeanour and cool and her disdainful manner in her responses to the questioning by the respondent said otherwise.

[76] Now LKJ states that they wrestled over the bag because she did not want the respondent to leave. On the other hand LKJ told police she did not want him there and that she wanted nothing to do with him. When challenged about saying the respondent had pressed her throat, LKJ responded that she has said the respondent may have done it accidentally yet no such thing is recorded in the notes she adopted of her conversation with police when she made a complaint. She states she was intoxicated at that time and may not have understood.

[77] The aggrieved also swore that she did not agree that she had told police, as written in the notebook she signed, that the respondent grabbed her by the throat, squeezed her windpipe and threw her to the ground. Now she says the police may have exaggerated what she told them. She states that the police have taken her comments out of context and that the redness to her throat was communicated to her by the police as having possibly come from wrestling the backpack from her shoulder.

[78] On all issues related to the making of the aggrieved's complaint I found the evidence by the police truthful and more reliable whereas I found the evidence by the aggrieved lacked the ring of truth.

[79] The respondent relies also on a memorandum written by Constable Armour. As a consequence of the position now taken by the aggrieved the actual applicant police officer, Constable Armour, wrote the following memorandum to her Officer in Charge on 13 June 2012 [11]:

> "I have perused the submissions at the request of the prosecutor and have noted that the information the aggrieved has provided in the submission differs from the information police received from her at the time of the DV incident. The Aggrieved indicated that domestic violence had occurred on the night, with the Respondent decamping prior to police arrival and she was fearful that the Respondent would return to her dwelling and further domestic violence would occur. This is why police made the DV Temp Order Application on the night.
>
> Notwithstanding this, I have no objection to not proceeding as requested by the Aggrieved, as in the circumstances the likelihood of successful prosecution is minimal.
>
> General Prosecution Policy and Public Interest Test
>
> Therefore, in accordance with OPM 3.4 "General Prosecution Policy" I submit that consideration be given to not proceeding with this matter in this instance for the following reasons:
>
> - The Aggrieved is the complainant, and there is no CCTV or independent witnesses to this matter.
> - Although the Aggrieved expressed a fear on the night and indicated that repeat of DV was likely, she has since recanted this and made several submissions to the court and prosecutions attempting to have the matter withdrawn. (Her submission indicates that she continues to hold this view)
> - Her submission indicates that she is of the belief that there will be no further domestic violence (among other reasons)
> - It is submitted that as she has no willingness to assisting in any prosecution, in fact acknowledges she will work actively against any prosecution, that any appearance by her at court would be counterproductive to any prosecution.
>
> In applying the public interest test, it is submitted therefore that the public interest will not be served in continuing the prosecution when the above and following are considered.
>
> - The aggrieved is the sole person named as an aggrieved person in the application and despite her initial information she now strongly indicates the initial incident is not a pattern of behaviour or part of a series of events.
> - She has decided of her own free will, without the holding out of any favour or incentive, to make submission requesting cessation to further proceedings.

[11] This memorandum was exhibit ACF 1to the first Affidavit by the respondent.

- The continuation of proceedings is in direct opposition to the desire of the aggrieved and apparently in opposition from advice from the Magistrate.

Request
I therefore forward this report for your consideration and comment as required and respectfully request that the file be forwarded as a matter of urgency to the OIC, Gold Coast Prosecutions."

[80] Despite this submission, the Queensland Police Service has proceeded with the application.

[81] Of great concern to this court are not just the striking similarities and non-coincidental juxtapositions in the affidavits provided by the aggrieved and the respondent, but also the sworn evidence each of them gave about how that came to be.

[82] The following schedule sets out those striking similarities and non-coincidental juxtapositions in the affidavits.

FAC	**LKJ**
1. I am listed as the respondent in this matter.	1. I am listed as the aggrieved in this matter.
2. On Friday 6th April 2012 I attended a work function with my, then girlfriend LKJ.	2. On Friday 6th April 2012 I attended a work function with my, then boyfriend, FAC.
3. After the work function we went to another residence in Surfers Paradise at approximately 5pm.	3. After the work function we went to another residence in Surfers Paradise at approximately 5pm.
4. I had a verbal argument LKJ and left the residence to return to [address] to retrieve personal items and my motorbike.	4. I had an argument FAC and he left the residence to go back to my residence where he had left a number his personal items and motorbike
7. While I was inside the premises, LKJ arrived at the premises. We had a verbal argument about certain things including LKJ accusing me of breaking into the property.	7. We had a verbal argument about certain things. He did not threaten me nor physically touch me.
14. I attempted to grab the backpack from LKJ and we got into a wrestle for the backpack.	14. FAC then attempted to grab the backpack and we go into a wrestle for the backpack.
15. Both myself and LKJ fell to the ground still wrestling over the backpack.	15. Both myself and FAC fell to the ground still wrestling over the backpack.
38. At no time did I assault LKJ.	27. At no time has FAC assaulted me.
39. At no time did I cause damage to the property of LKJ.	28. At no time has FAC damaged my property.
40. At no time did I intimidate or harass LKJ.	29. At no time has FAC intimidated or harassed me.
41. At no time did I show indecent sexual behaviour or attempted indecent sexual contact towards LKJ.	30. At no time has FAC shown indecent sexual behaviours or attempted indecent sexual contact towards me.
42. At no time did I threaten LKJ with any of the abovementioned 4 points.	31. At no time has FAC threatened me with any of the abovementioned 4 points.
46. I do not currently know the address of LKJ, nor have I attempted to seek it though	36. FAC does not know my current residence, nor has made any attempt to seek

her or any other party or electronic means.	it from me.

[83] The respondent gave evidence first, before the aggrieved who he called as part of his case. The aggrieved had refused to provide an affidavit to the police. She did provide one to the respondent. This is understandable if the aggrieved was waiting for the respondent to produce an affidavit and to tell her what to say.

[84] The respondent said he assisted LKJ to prepare her affidavit by asking her what she would be able to attest to. When asked how he knew what to state in the affidavit he said they spoke about the evening of the incident. He said he formatted the affidavit for her (which would explain the exact same type font and formatting) because she did not have much in the way of computer skills. He said he believed they had a discussion first and that he then typed it for her. He said he prepared the affidavits on his home laptop and that he got the form for the affidavit from the Justice and Attorney-General website.

[85] When the respondent was questioned about the striking similarities he said he assisted LKJ to prepare her affidavit and that he typed it for her because he was the one with computer skills and access to a printer. He stated he did not think the aggrieved would know where to obtain the forms on the internet. It is at least believable that he did type both affidavits because they are consistent with his presentation of his case.

[86] LKJ then gave evidence that her affidavit was all in her own words. She states that she refused to provide one for the police. LKJ was evasive when she said she prepared the affidavit with a bit of help from a friend. She said she looked up the form online. She said she prepared and typed it herself.

[87] When asked if she discussed it with the respondent she said "No." and stated she knew he wanted one if she was willing, and that she agreed to provide one. She says she did not discuss the content. Once typed, according to LKJ, she took it before the Justice of the Peace to sign, put it in an envelope and gave it to the respondent via a friend.

[88] They can not both be telling the truth.

Findings

[89] In *Nadler v Police* (2008) 257 LSJS 315; (2008) 187 A Crim R 347; [2008] SASC 242 at [76] Gray J held

> "A determination by a tribunal of fact in an adversary system is not a decision as to where the truth may lie, but whether the party with the onus of proof has discharged the onus to the requisite standard."

[90] In *Cornwell v Commissioner of Australian Federal Police* (1990) 24 FCR 544; 94 ALR 495 at FCR 556, Wilcox J held that the *Briginshaw* standard required a feeling of actual persuasion and that the court was not to resolve issues of credit by considering a witness' evidence in isolation and without forming an opinion about the credibility of other evidence.

[91] I am satisfied on the balance of probabilities and to a very high degree of satisfaction that the respondent and the aggrieved are both lying.

[92] I am also satisfied on the balance of probabilities and to a very high degree of satisfaction, by the evidence and by the demeanour of the aggrieved, that the respondent has suborned her false evidence. However, I am not satisfied she perjured herself of her own free will. I am satisfied the aggrieved lied not only about the manner in which the affidavit was produced but also about the initial complaint to police. I find that domestic violence did occur as described to the police and that a genuine complaint was indeed made by her to the police.

[93] I am satisfied that, on the balance of probabilities the respondent committed the acts of domestic violence of which the aggrieved complained to police. I am so satisfied to a very high degree of satisfaction.

[94] In the respondent's second affidavit he also states:

> "60. As per my previous affidavit, I stated that I voluntarily handed my firearms to Mt Ommaney Police Station. I have since retrieved my firearms due to the length that these proceedings have taken.
>
> 61. I believed that this process would be quick, efficient and soon resolved; however it has been a far longer process that started to impact on my life because I was unable to compete in sports shooting, which I do on a regular basis.
>
> 62. This is the reason I retrieved my firearms from the police and keep them safely, stored in accordance with Queensland Firearms legislation at my place of residence and have continued to shoot at SSAA Ripley in competition since.
>
> 63. I believed it was relevant to disclose this amendment to my previous affidavit so as not to mislead the court into believing that these firearms were still held by police.
>
> 64. Having an order against myself will have severe consequences for my life. These will include but are not limited to:
>
> 65. Being unable to continue with my military career through RMC, and possibly having my employment with the Australian Army terminated.
>
> 66. Negative consequences to my career and from my employer as an IT Professional, as I am a QLD public servant and will be required to disclose this outcome to my employer under the Public Service Act.
>
> 67. I will need to surrender my QLD firearms licence and my firearms, therefore losing an extremely valuable collection of assets as well as a sport that I have enjoyed participating in for approximately the last 7 years."

[95] In my deliberations I have taken into account that the imposition of a protection order may well have the deleterious effects outlined by the respondent. As in *Walker's* case (above) I have taken into account the detriment which might be caused to the aggrieved if an order is refused and to the respondent if an order is made.

[96] However, given my clear and unequivocal finding of subornation by the respondent I am not convinced that the disclosure was anything but feigned candour. In balancing the private rights of the parties and public rights in this case the public interest in impeding, minimising or preventing domestic violence outweighs the private rights of the parties.

[97] The evidence points to the aggrieved having told the police about the respondent's access to firearms and that he was in the Army Reserves when she freely complained about the domestic violence incident on 6 April 2012, and she expressed her fear of the respondent due to his abuse and said that the

respondent's abusive and violent behaviour had increased over the previous two months and that she wanted nothing further to do with him.

[98] The fact that the respondent has maintained regular contact with the aggrieved and managed to effectively compel the aggrieved to give false evidence, having already committed the serious act of domestic violence by squeezing her throat and causing the redness and other injuries, satisfies me that he should be held accountable for his domestic violence, and for his further abuse of the aggrieved by convincing her to falsely testify, against her own interests.

[99] I have also taken into account that the Act is protective legislation but that it is not intended to be punitive for the respondent unless, of course, he breaches a protection order after it is made. Indeed the Act, in aiming to hold the perpetrators of domestic violence accountable also aims to ensure the person is given an opportunity to change their behaviour. I will address this possibility below.

[100] The totality of the evidence satisfies me that the aggrieved needs to be protected from him and from further acts of domestic violence.

[101] I find the police applicant has discharged the onus of proof to the requisite standard.

[102] I am satisfied that, on the balance of probabilities, and to a very high degree of satisfaction[12], that—

(a) a relevant relationship exists between the aggrieved and the respondent; and
(b) the respondent has committed domestic violence against the aggrieved (in the manner described above in the police notebook and underlined by me); and
(c) a protection order is both necessary AND desirable to protect the aggrieved from domestic violence by the respondent.

[103] Even if the test under the repealed Act had continued to be relevant I would have found there is a real, and substantial or significant, likelihood the respondent would commit some act of domestic violence again in future if no order were made. The likelihood is that this respondent will again force this

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[12] I have considered and applied the standard of proof as expressed in *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] ALR 334 at CLR 362–3 , where Dixon J said that except in criminal matters, it is enough if an allegation is proved to the "reasonable satisfaction of the tribunal" and went on to say:

> But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal …
>
> This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained.

The degree of satisfaction required by the civil standard of proof may vary according to the gravity of the fact to be proved: see *Briginshaw v Briginshaw*, at CLR 368–9 , ALR 344–5, which was followed in *Rejfek v McElroy* (1965) 112 CLR 517; [1966] ALR 270; at CLR 521, where the High Court held:

> "But the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused. The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge."

aggrieved to do things against her will and for his benefit if the occasion suits his needs.

[104] Applying the principle of paramount importance[13] that the safety, protection and wellbeing of people who fear or experience domestic violence is paramount and having considered all of the evidence I find it is both ***necessary*** in the circumstances **and** ***desirable*** in the interests of the aggrieved to add conditions that the respondent will have no direct or indirect contact with the aggrieved by any means whatsoever and that the respondent will not go to within 100 metres of the aggrieved's residential or work places.

[105] In coming to this conclusion I have also followed and applied *Carey (No 3)* (above) in fashioning an order which is determined by an assessment of the risk of further domestic violence by the respondent against the aggrieved. I have also applied *Walker's* case (above) in determining that the order made should go no further than is necessary for the purpose of protecting the aggrieved from the respondent. Also, applying *Lone Star (No2)* (above) the gravity of the situation makes it necessary or desirable that protection be given to the aggrieved and that the respondent is held accountable for his actions.

[106] Applying *Carey (No 3)* (above), this also means that, on my assessment of the risk of domestic violence to the aggrieved in this case, the duration of the order under s 97 of the Act, should be for two years. The police did not submit that special reasons exist for making the order continue in force for any longer period under section 97(2).

Order

[107] Application granted.

[108] When the parties have read this decision after it is published today I will be available at 11 am to hear any submissions about any **further** conditions the parties may seek consistent with my findings, for example: whether the court should make a voluntary intervention order under part 3, division 6 of the Act. The proceedings are adjourned to 11 am. If the applicant does not attend I will not take the matter any further. If the respondent does not attend I may still entertain the applicant's further submissions, if any. Alternatively, I may grant an adjournment to consider any further issues that are raised at 11 am.

Costanzo JJ
Magistrate, Southport
21 November 2012

[13] See s 57(2) of the Act.