

**IN THE HIGH COURT OF NEW ZEALAND  
ROTORUA REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE**

**CRI-2025-463-122  
[2026] NZHC 1628**

BETWEEN SOLICITOR-GENERAL  
Appellant

AND ANDREW ANDY LEEF  
Respondent

Hearing: 3 November 2025

Appearances: I Auld and W Harvey for Appellant  
P Morgan KC and M Bradley as Amicus Curiae

Judgment: 11 June 2026

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**JUDGMENT OF BECROFT J**

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*This judgment was delivered by me on 11 June 2026 at 10am  
pursuant to s 341 of the Criminal Procedure Act 2011.*

*Registrar/Deputy Registrar*

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Solicitors/Counsel:  
Crown Law, Wellington  
Thackeray Chambers, Hamilton

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## **What this appeal is about**

[1] On a Sunday just after Christmas 2024, Mr Andrew Andy Leef walked down the main street of Taumarunui. Mr Leef is a patched member of the Mongrel Mob. He was wearing gang insignia, including his patch.

[2] Mr Leef was arrested and charged under the Gangs Act 2024 (the Act) with knowingly displaying his patch in a public place.<sup>1</sup> He pleaded guilty and was convicted.

[3] Mr Leef's patch was forfeited to the Crown under the Act. He requested that his patch be returned to him. He undertook not to wear the patch again in public. The issue then arose as to whether, despite that forfeiture, he could nevertheless have his patch returned?

[4] The District Court's decision as to that request (and this appeal) turns on the interpretation of s 7(3) of the Act which provides:

### **7 Prohibition on display of gang insignia in public place**

...

(3) If a person pleads guilty to, or is convicted of, an offence against subsection (1), the gang insignia concerned—

- (a) is forfeited to the Crown; and
- (b) may be destroyed or otherwise disposed of as the court, either at the time of the conviction for the offence or on a subsequent application, directs.

[5] In Mr Leef's case, Judge Rowe ruled that in the circumstances which I will outline, he could have his patch returned.<sup>2</sup> In particular, Judge Rowe held that the words "otherwise disposed of" in s 7(3)(b) of the Act could include disposal by way of returning the patch to the defendant.

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<sup>1</sup> Gangs Act 2004, s 7(1). Mr Leef was charged with "knowingly and without reasonable excuse displayed gang insignia namely a Mongrel Mob patched vest in a public place namely Hakiha Street, Taumarunui.

<sup>2</sup> *New Zealand Police v Leef* [2025] NZDC 14940.

[6] The Solicitor-General appeals that decision and in particular asks this Court to quash the direction returning the insignia to Mr Leef. The Solicitor-General argues that forfeiture under s 7(a) of the Act is absolute and that on a straightforward application of statutory interpretation principles, upon forfeiture, the gang patch is then to be destroyed or otherwise disposed of. The Solicitor-General submits that the words “otherwise disposed of” simply do not, and cannot, mean that the patch can be returned to the very defendant from whom it has been forfeited in the first place.<sup>3</sup>

[7] This appears to be a live matter before the District Court. I am told at least two other decisions have followed the same reasoning as Judge Rowe in this case. A High Court decision is therefore awaited.

[8] Mr Leef is unrepresented. He did not appear and took no part in the appeal.

[9] Mr Morgan KC was appointed as *amicus curiae*<sup>4</sup> to ensure that this Court was given as much assistance as possible. As he put it, his role was “to provide the Court with additional argument to the argument presented by counsel for [Mr Leef] ... particularly that articulated by Judge Rowe.” Mr Morgan emphasised that he did not advocate for any particular outcome.

[10] I state the result of this judgment from the outset. I conclude that the return of the gang patch to Mr Leef, as directed by Judge Rowe, is not permitted by s 7(3) of the Act. I therefore respectfully reach a different conclusion from the experienced District Court Judge. What follows are my reasons. While the conclusion may be easily stated, the reasoning is challenging and not without complexity.

### **What Mr Leef did**

[11] The summary of Mr Leef’s offending, as contained in Judge Rowe’s decision, is as follows:<sup>5</sup>

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<sup>3</sup> For the remainder of this judgment, for ease of reference I will describe the appellant as “the Crown”.

<sup>4</sup> Mr Morgan was appointed by the Court in this case, and in a parallel but slightly different case involving Mr Gray-Gill, which is the subject of a short, separate decision adopting the conclusion in this appeal.

<sup>5</sup> *New Zealand Police v Leef*, above n 2.

[4] On Wednesday 18 December 2024, Mr Leef drove his car to an ATM on Hakiaha Street, Taumarunui (the main street), got out of his car and used the ATM before driving to the BP Service Station at 4 Hakiaha Street.

[5] Mr Leef went into the BP store wearing a black and red leather vest, a white hoodie and a black cap, all displaying Mongrel Mob gang insignia.

[6] On Monday 23 December 2024, Mr Leef was at an ATM on Hakiaha Street, Taumarunui, wearing the same leather vest and white hoodie displaying Mongrel Mob gang insignia.

[7] On Sunday 29 December 2024, Mr Leef walked down Hakiaha Street wearing a leather vest with a large bulldog head encircled by the words “Mongrel Mob King Country” on the back with three small emblems on the front denoting affiliation with Mongrel Mob Hamilton, Petone and Notorious chapters.

[8] Underneath the vest, Mr Leef wore a white hoodie that displayed gang insignia on both sleeves. The hoodie had a large bulldog head encircled by the words “Mongrel Mob King Country”, as well as several smaller patches covering the hoodie.

[9] Mr Leef also wore a red baseball cap that had the word “MOB” on the front and where the letter O has a bulldog’s face in its place.

[10] These symbols are commonly displayed to denote membership of, or affiliation with, the Mongrel Mob gang.

[11] The Mongrel Mob is a specified gang under schedule 2 of the Gangs Act.

[12] Mr Leef was arrested and the gang insignia seized.

[12] As will be seen, Mr Leef displayed gang insignia in public on three separate occasions — though he was only charged in respect of the last instance.

[13] The summary of facts also records that when arrested Mr Leef said that what he was wearing was not a patch, it was “his family crest.” He said that he had been warned by the Mob leaders not to wear his vest in public.

[14] Mr Leef was aged 47 at the time. It is accepted that he is a patched member of the Mongrel Mob King Country chapter. And that what he was wearing on each occasion fell within the definition of “gang insignia” set out in the Act.

[15] The question Judge Rowe was then asked to decide was what should happen to the gang insignia, being the vest and the other items of clothing. Accordingly, Judge Rowe was called to interpret and apply s 7(3) of the Act. In particular, as he put it, he had to consider the meaning of “otherwise disposed of”.

### **The District Court decision**

[16] Judge Rowe’s decision was, with respect, comprehensive, detailed and careful. It is worth summarising it with similar care.

[17] In embarking upon the interpretative exercise which he identified as focussing on the meaning and effect of s 7(3)(b), the Judge observed that the explanatory note of the Bill stated that the then cl 7(3) re-enacted the comparable provision from the Prohibition of Gang Insignia in Government Premises Act 2013 (which the Act repealed). Both provisions were themselves carried over from the Wanganui District Council (Prohibition and Gang Insignia) Act 2009, ss 13(2) and (3).<sup>6</sup> He concluded that neither of those two provisions provided any interpretative assistance.

[18] He then turned to several interpretative tools to help in his interpretation. The first was the Interpretation Act 1999.

[19] Judge Rowe noted that the meaning of an enactment must be ascertained from its text and in light of its purpose.

[20] Judge Rowe said that, unambiguously, the first step was forfeiture to the Crown under s (7)(3)(a). However, the Judge noted that forfeiture was not defined in the Act, and he held that the structure of s 7(3) does not confer full rights of ownership or disposal on the Crown. He contrasted this provision with the language of forfeiture provisions in other Acts which made clear that ownership was to be removed absolutely.

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<sup>6</sup> The spelling of “Wanganui District” was officially changed to “Whanganui District” in 2015. The official spelling is adopted everywhere in this judgment except where referring to the Wanganui Act.

[21] His Honour concluded that the “material point is that mandatory forfeiture of an item under s 7(3)(a) does not, of itself, determine what is then to happen to the item when the legislature has refrained from giving explicit statutory guidance.”

[22] Judge Rowe then identified the purpose of the Act as:

- (a) to reduce the ability for gangs to operate, and
- (b) to minimise or address harm due to fear, intimidation and disruption by gangs.

[23] His Honour noted that not all the purposes stated in the explanatory note to the Bill or in Parliamentary debate have been included in Act’s two-fold specified purposes.

[24] The Judge then turned to the principle of legality. In short, this principle requires Parliament to be explicit when overriding fundamental common law rights. Otherwise, it is presumed that Parliament is legislating consistently with those rights. The common law right engaged on these facts is the right to own and possess personal property.

[25] His Honour noted that:

The Courts will not interpret legislation that takes away existing property rights more than a statute or its purposes require.

[26] He then concluded that s 7(3)(b) does not:

unambiguously extinguish the fundamental right of New Zealanders to their personal property following a breach of s 7(1) of the Gangs Act. Parliament has chosen to leave disposal of an item as an open-ended assessment having regard to the purposes of the Gangs Act.

[27] The Judge then turned to consider the New Zealand Bill of Rights Act 1990 (NZBORA). He discussed the relationship between ss 4-6 of NZBORA and noted that s 6 requires the Courts to interpret legislation in a rights-consistent manner where that is available on the words of the statute. His Honour then considered whether the rights contained in ss 9, 14, 21 and 27 might be engaged in this case.

[28] Judge Rowe considered s 9 (disproportionately severe treatment or punishment) may be engaged in certain circumstances where, for example, the insignia is worn in a way that has no connection to gang operations.

[29] Judge Rowe noted that the Attorney-General had already concluded that the Act was an unjustified limitation of s 14 of NZBORA (freedom of expression). However, Parliament had intentionally overridden that right and therefore it would undermine Parliament's intent if there was a reasonable basis to believe that an insignia not permanently destroyed or forfeited would be displayed in public again.

[30] Judge Rowe noted s 21 of NZBORA was not directly engaged but said it generally recognised that an individual's right to property is protected. Finally, s 27 may be engaged if the insignia is attached to property (e.g. a car) where a third party has a property right (perhaps a hire purchase arrangement), and that third person has no opportunity to be heard.

[31] The Judge then considered whether tikanga might be applicable. However, he received no evidence or detailed submissions on the point. He noted that tikanga might inform the value ascribed to a particular item but beyond that he did not venture.

[32] In light of his findings, Judge Rowe then turned to summarise the general principles to be applied as follows:

[79] Firstly, forfeiture is not for a Court to order; forfeiture follows from entry of a guilty plea or a conviction.

[80] Forfeiture under s 7(3)(a), however, does not confer a right of ownership on the Crown. It confers only a right to possess the forfeited item pending a decision by the Court as to what is to happen to the item under s 7(3)(b).

[81] This means the Crown does not have the power to destroy or dispose of insignia which has been seized without a Court order under s 7(3)(b).

[82] An offender's property rights are not wholly excluded by forfeiture. Such rights have not been clearly excluded by the legislation, whether on a common law analysis or on application of relevant principles under the NZBORA.

[83] That is not to say that a defendant's property rights prevail over all other considerations. A person's right to property is subject to the law and a person is not entitled to use their property to break the law.

[84] In the case of the Gangs Act, a gang member's right to possess gang insignia is subject to their obligation that it is not displayed in public. The consequence for that, however, is most obviously prosecution and potential conviction for committing such an offence. That does not necessarily determine what is to then happen to the item in question.

[85] This means that the police ought to seek directions about disposal of the item, whether it is by destruction or otherwise; a defendant or interested parties are entitled to be heard about this and then the Court is required to make an order.

[86] A Court may need to leave some time for an application to be made, either by the defendant or a third party as to the appropriate disposal order. While s 7(3)(b) suggests no timeframe for when any application should be made; in the interests of finality, the Court would be justified in recognising an inherent power to limit the period for such an application to the extent reasonable.

[87] The police submit that the only purpose of allowing disposal other than destruction of the gang regalia is to protect third party interests.

[88] While I agree third party interests are catered for under s 7(3)(b), I disagree that the subsection should be construed so narrowly. Subsection 7(3)(b) is fundamentally a relief against forfeiture provision where Parliament has given no explicit guidance. The Court must therefore establish the parameters of relief against forfeiture using the statutory interpretation tools and principles discussed.

[89] I consider that the nature of a disposal order, including who might receive the item on "disposal" is informed by an evaluation of the extent to which the purposes of the legislation have been breached, or are engaged, and the values and interests that are affected, including the defendant's values and interests.

[90] Gang insignia displayed during events where they are plainly part of gang activity to intimidate or disrupt the public, or public order, will seriously breach the Act and its purposes, as will gang insignia worn to incite a response from a rival gang. In such a situation destruction of the insignia may inevitably follow.

[91] At the other end of the spectrum are offences where the purposes of the Act are barely engaged, if at all.

[92] Values and interests of a defendant and third parties may entail a wider enquiry than simply financial interests. It is conceivable that an item seized by police may carry significant sentimental, cultural or personal value for a defendant, their whānau or family or others.

[93] Whatever order a Court may make about disposal of an item, other than destruction, the Court may need to assess whether there is a reasonable possibility that an item returned to an offender, or a third party will be displayed again in public. If there was such a possibility, it would clearly thwart the legislation to return the item to the offender or another identified party.

[33] Judge Rowe then applied these principles to Mr Leef and the insignia that had been seized from him. The Judge considered Mr Leef's offending did not significantly engage the purposes of the Act. He also noted that the Act was new, and Mr Leef seemed to be unaware of the reality of the risk of permanently losing his patch.

[34] Judge Rowe then noted that Mr Leef placed significant value in the patch and that it signified a sense of belonging to him. The Judge considered that destruction of the patch would be disproportionate in the circumstances, although not grossly disproportionate.

[35] Judge Rowe noted that Mr Leef in pleading guilty had made a clear commitment not to wear the patch outside again.

[36] Therefore, his Honour concluded:

[113] By a narrow margin, I find that Mr Leef's right to his property, being his vest displaying his patch and regalia, are not overcome by this breach of the Gangs Act.

[114] I therefore direct that the vest, having been forfeited to the Crown, is to be disposed of by being returned to Mr Leef on his clear understanding that it will not be displayed in public, in breach of the Gangs Act, again.

### **Jurisdiction to appeal?**

[37] In his very helpful submissions, Mr Morgan KC properly questioned whether the Solicitor-General could appeal a decision such as that of Judge Rowe. That involves questions of statutory interpretation of relevant sections of the Criminal Procedure Act 2011 (CPA). I cannot help but highlight the irony that a statutory interpretation exercise is required to determine whether the gate can be opened to an appeal where the central issue itself is statutory interpretation.

[38] The question raised by Mr Morgan is more complex for an associated, parallel appeal, heard at the same time, where the appellant was convicted and discharged, and the Judge made a direction that the gang patch not be forfeited.<sup>7</sup> Reference should be had to that decision on this point also.

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<sup>7</sup> *Solicitor General v Gray-Gill* [2026] NZHC 1629.

[39] Mr Morgan draws attention to both s 212 and s 246 of CPA. They provide:<sup>8</sup>

**212 Interpretation**

In this Part, unless the context otherwise requires,—

**appeal court** means a first appeal court, second appeal court, or other appeal court specified by this Part

**prosecution** has the meaning given to it in section 364

**sentence**—

- (a) includes any method of disposing of a case following conviction; but
- (b) does not include—
  - (i) a decision, on conviction, to make or decline to make an order against the convicted person for the payment of costs under section 364 or under the Costs in Criminal Cases Act 1967; or
  - (ii) a decision, on conviction, to make or decline to make an order under any of sections 200, 202, or 205 (suppression orders); or
  - (iii) a decision, on conviction, under section 208 to vary or revoke an order under any of those sections specified in subparagraph (ii).

**246 Prosecutor's right of appeal**

- (1) A prosecutor may, in accordance with this section, appeal under this subpart to the first appeal court against the sentence imposed for an offence, unless the sentence is one fixed by law.
- (2) An appeal under this subpart by a prosecutor may be brought only by or with the consent of the Solicitor-General.
- (3) However, if the defendant is the Crown Law Office, the appeal may be brought only with the consent of the Attorney-General and any decision to give consent must be given personally by the Attorney-General.

[40] Mr Morgan asks whether an appeal can lie when the Crown's argument on the substantive issue is that forfeiture is automatic, and the District Court had no power to make the order (for return of the gang insignia) in the first place?

[41] For the following reasons, I conclude this Court has jurisdiction to decide this appeal as an appeal against sentence, and has the jurisdiction to quash Judge Rowe's direction that the insignia be returned to Mr Leef.

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<sup>8</sup> Emphasis added.

[42] The definition of sentence under s 212 of the CPA is very broad. It “includes any method of disposing of a case following conviction.” I would favour a wide and purposive approach to interpreting that definition. What happened here is that the Judge’s direction followed conviction. It was the subject of a judicial hearing in its own right. The direction was intrinsically connected to and was a method of disposing of the case.<sup>9</sup> That the direction was allegedly unlawful does not derogate from the reality that it was part of the sentencing process.

[43] Nor does s 246(1), with its restriction on a sentence appeal if the sentence is one “fixed by law”, present a problem. Here, the very appeal point is whether what the Judge did was contrary to what might be called a fixed sentence — that is forfeiture. But in any case, the discretion given to the Court upon an appropriate application to destroy or otherwise dispose of the insignia takes s 7(3) out of the concept of a “sentence fixed by law.”

[44] In short, I agree with the Crown that a direction under s 7(3)(b) of the Act falls within the definition of a “sentence” under s 212 of the CPA. It is a “method of disposing of a case following conviction”.<sup>10</sup>

[45] The Crown can therefore bring this appeal against sentence under s 246 of the CPA. This Court must allow the appeal if satisfied there was an error in the sentence and a different sentence should be imposed.<sup>11</sup> Judge Rowe’s direction to return the gang insignia, if this Court finds it to be an error, qualifies as an “error in the sentence.” The powers of a Court upon a successful appeal are wide and include setting aside (quashing the sentence) or remitting the sentence back to the District Court to take action specified by the appeal court.<sup>12</sup>

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<sup>9</sup> The courts have traditionally taken a wide view of rights to appeal sentences. For instance, in 1998, in *Ministry of Fisheries v Dowey* [1998] 3 NZLR 5 (CA), in an appeal by a person under the Fisheries Act 1986 where the District Court Judge had refused to make an order “not barring him from fishing”, the Court of Appeal said:

While it is true that the forfeiture and ban is not imposed by the Court in the form of an order but simply by operation of law, it still remains as and has the effect of a penalty, imposed by the legislation as a consequence of the conviction. It is therefore part of the sentence.

<sup>10</sup> Criminal Procedure Act 2011, s 212 (a).

<sup>11</sup> Section 250(2).

<sup>12</sup> See, s 251.

[46] If there is any doubt about jurisdiction for this sentence appeal, in the Crown’s view this appeal could be easily amended and “converted” into an appeal on a question of law, under s 296 of the CPA. Under s 296(3)(a) the power to return the insignia is a question of law which unquestionably arose “in proceedings that relate to or follow the determination of the charge.” I agree. And there could be no prejudice in so doing, as Mr Morgan realistically accepted. The essence of the appeal and all the issues have been well understood from the outset.

### **The “three-pronged” approach in s 10 Legislation Act 2019**

[47] The starting point in any statutory interpretation exercise is the Legislation Act 2019. As it happened, the learned Judge, and also counsel for the Solicitor-General, both referred to the now superseded Interpretation Act 1999. As I later set out, nothing much turns on that oversight.

[48] Section 10 of the Legislation Act 2019 provides:

#### **10 How to ascertain meaning of legislation**

- (1) The meaning of legislation must be ascertained from its text and in the light of its purpose and its context.
- (2) Subsection (1) applies whether or not the legislation’s purpose is stated in the legislation.
- (3) The text of legislation includes the indications provided in the legislation.
- (4) Examples of those indications are preambles, a table of contents, headings, diagrams, graphics, examples and explanatory material, and the organisation and format of the legislation.

[49] As the learned authors of *Burrows and Carter Statute Law in New Zealand* observe, the modern trend is towards a “purposive” interpretation where the words of the legislation are read in their fullest context, and with a view to giving effect to the purpose of the legislation.<sup>13</sup> As s 10 now makes plain, a three-step process is involved, focussing (1) on the *text*, (2) in light of its *purpose*, and (3) its *context*.

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<sup>13</sup> Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 286 [SLNZ].

[50] As if foreshadowing s 10, in 2013 Glazebrook J, speaking extra-judicially, noted that the proper approach:<sup>14</sup>

“is to interpret... the specific provisions... in light of their purpose, in the context of the legislation as a whole and, to the extent relevant, against the background of the legislative history and other related legislation” and basic values (in or outside the New Zealand Bill of Rights Act 1990).

[51] In fact, irrespective of the words of the then Interpretation Act 1999, these comments reflected the approach the Courts were already taking.

[52] I now embark upon that three-step process in respect of s 7(3) of the Act.

*Text*

[53] For ease of reference, I set out s 7 of the Act in full, which is the relevant offence provision:

**7 Prohibition on display of gang insignia in public place**

- (1) A person commits an offence if the person knowingly, and without reasonable excuse, displays gang insignia at any time in a public place.
- (2) A person who commits an offence against subsection (1) is liable on conviction to a term of imprisonment not exceeding 6 months or a fine not exceeding \$5,000.
- (3) If a person pleads guilty to, or is convicted of, an offence against subsection (1), the gang insignia concerned—
  - (a) is forfeited to the Crown; and
  - (b) may be destroyed or otherwise disposed of as the court, either at the time of the conviction for the offence or on a subsequent application, directs.

[54] Consistent with the general form of offence provisions, s 7(1) sets out the offence and ss 7(2) and 7(3) provide the penalty for committing the offence. Section 7(3) provides that one part of the penalty is forfeiture of the insignia concerned.

[55] It is also worth setting out the very wide statutory definition of insignia found in s 4:

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<sup>14</sup> Justice Glazebrook “Statutory interpretation, tax avoidance and the Supreme Court” (paper presented to New Zealand Institute of Chartered Accountants 2013 Tax Conference, 7 November 2013) at 10–11.

**gang insignia—**

- (a) means a sign, symbol, or representation commonly displayed to denote membership of, or an affiliation with, a gang, not being a tattoo; and
- (b) includes any item or thing to which a sign, symbol, or representation referred to in paragraph (a) is attached or affixed (for example, clothing or a vehicle)

[56] The actual words of s 7(3) remain the most important starting point in the interpretative exercise. Mr Morgan in his helpful submissions emphasises that, given the wide variety of statutory formulations relating to forfeiture, its effect and who may seek relief from forfeiture, the key issue in this case is the interpretation of s 7(3). I agree.

[57] Self-evidently, the subsection is in two parts.

Section 7(3)(a)

[58] As did Judge Rowe, I accept that the first step at s 7(3)(a) is “forfeiture” to the Crown. This is unambiguous. As the Judge noted, “forfeiture” is not defined in the Act. He suggested four dictionary meanings which, I too, am content to adopt as follows:

- (a) The loss of property or money because of a breach of a legal obligation.<sup>15</sup>
- (b) The loss of rights, property, or money, especially as a result of breaking a legal agreement.<sup>16</sup>
- (c) *Law*: something confiscated as a penalty for an offence, breach of contract, et cetera.<sup>17</sup>
- (d) *Law*: property or a right or privilege lost as a legal penalty.<sup>18</sup>

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<sup>15</sup> Merriam -Webster Dictionary “forfeiture” (July 2025) <[www.merriam-webster.com](http://www.merriam-webster.com)>.

<sup>16</sup> Cambridge Dictionary “forfeiture” (July 2025) <[www.dictionary.cambridge.org](http://www.dictionary.cambridge.org)>.

<sup>17</sup> Collins Dictionary “forfeiture” (July 2025) <[www.collinsdictionary.com](http://www.collinsdictionary.com)>.

<sup>18</sup> Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2005) at 415.

[59] In addition, the Crown helpfully points to the *Black's Law Dictionary* definition of forfeiture as “the loss of a right, privilege, or property because of a crime, breach of obligation or neglect of duty”.<sup>19</sup>

[60] I agree with the Crown that all these definitions focus on the *loss* of the item forfeited. The key aspect of forfeiture in a penal context is that the offender loses possession of the forfeited item. It is this loss of possession that is the effect intended by Parliament in imposing forfeiture as the penalty for the offence. Thus, however forfeiture is specifically defined, it carries with it the loss of possession of the gang insignia. By operation of the section an offender loses any right to the insignia and the Crown then possesses and controls it.

[61] In his analysis, Judge Rowe contrasted s 7(3) with four different provisions in other statutes<sup>20</sup> where there was clear language conferring absolute ownership of the forfeited item on the Crown. His view (in essence) was that in the absence of such a provision here, the door is effectively not closed on the insignia being returned to a defendant as the defendant's ownership rights have not been removed.

[62] In the four provisions surveyed by the Judge, it is true that ownership and possession is explicitly removed from wrongdoers and vested in the Crown. Those additional words do not appear here.

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<sup>19</sup> Bryan Garner (ed) *Black's Law Dictionary* (12th ed, Thomson Reuters, St Paul, 2024).

<sup>20</sup> The four statutes which the Judge refers to with his Honour's comments are as follows:

- (a) Criminal Proceeds (Recovery) Act 2009, where, as per ss 50(3) and 50D(1), the Court on making specified assets forfeiture orders must order that the subject property “vests in the Crown absolutely”.
- (b) The Land Act 1948, s 146(3), which provides that certain Crown land under lease or licence may be declared forfeit for various specified reasons, in which case the lease or licence:  
... shall absolutely cease and determine as at the date of that declaration [of forfeiture]  
and the land comprised in the lease or licence, with all improvements thereon, shall revert to the Sovereign.
- (c) The Submarine Cables and Pipelines Protection Act 1996, s 31(2), which provides that property seized for a breach of that Act (which protects undersea cables and pipelines) is forfeited to the Crown and “shall upon forfeiture vest in the Crown absolutely and free of all encumbrances, liens, and interests”. While s 32 provides for relief against forfeiture for third parties, relief is explicitly not available for any person involved in the commission of the offence.
- (d) The Fisheries Act 1996, which establishes a detailed forfeiture regime for offences under that Act or associated rules and regulations, and, at s 256, permits the Court to order a range of remedies depending upon the Court's assessment of applications for relief against forfeiture which include “the retention of forfeit property by the Crown”.

[63] Nonetheless, I agree with the Crown that the “... fact that the effect of forfeiture, in terms of the transfer or vesting of property to the Crown, might be more fully defined in other statutes does not derogate from the fundamental distinction of forfeiture in a penal context, which is to remove the relevant property or right from the offender.”

[64] Also, it might be said that practical necessity dictates the reason for those provisions highlighted by Judge Rowe. In those cases, that which was forfeited is either valuable or significant personal property. Vesting of ownership in the Crown, for instance of proceeds of crime, or significant seized material such as undersea cables and pipelines, or material and personal property associated with fisheries breaches, means that the Crown can deal with the property as the owner. There is no imperative for such vesting of ownership provisions in this case. There is no inherent monetary value in the gang insignia itself, and no reason why, when seized, it could not be easily stored, presumably in perpetuity. In other words, there is no practical advantage in ownership vesting in the Crown. More importantly, that is why 7(3)(b) of the Act becomes necessary. It provides a formal route to destruction or disposal through Court direction (with some flexibility required, as will be discussed).

[65] I conclude, with respect, that Judge Rowe erred in finding that an offender’s property rights are not wholly excluded by forfeiture.<sup>21</sup> Likewise, I conclude that the Judge erred in determining that Parliament had not made clear its intention that forfeiture of the insignia is intended to remove it from the offender absolutely. In my view, that is inherent in the definition of “forfeited” in the context of s 7(3).

[66] That said, I accept the Crown’s submission that it does not appear Parliament intended forfeiture under s 7(3)(a) to necessarily extinguish all third-party interests in property forfeited to the Crown (as I discuss later) — for example, security interests in vehicles. In fact, the flexibility in the methods of disposal in s 7(3)(b) suggests that protecting third party interests was one of the purposes in providing the Court some discretion and oversight as to the means of disposal.

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<sup>21</sup> *New Zealand Police v Leef*, above n 2, at [82].

Section 7(3)(b)

[67] The second step is that forfeited insignia may be destroyed or otherwise disposed of as the court directs — either at the time of conviction or on a subsequent application. The keywords are “destroyed or otherwise disposed of”.

[68] Again, there are no definitions of “destroyed”, or “otherwise disposed of” in the Act. The natural meaning of “to destroy” something is to put an end to it; to damage something so badly that it ceases to exist. It is an absolute concept: the thing (the insignia) is annihilated.

[69] The immediately following words “otherwise disposed of” in my view must take their meaning from the word “destroyed.” “Disposed of” is not used in a vacuum and neither can it be interpreted in a vacuum. As Stamp J memorably noted:<sup>22</sup>

English words derive colour for those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back into this sentence with the meaning which you have assigned to them as separate words.

[70] Thus, “disposed of” must be understood in the context of the word “destroyed” against which it abuts.<sup>23</sup> Put another way, “destroyed or otherwise disposed of” must be read together. In that way disposed means “got rid of” or otherwise dealt with in a way that it similarly ceases to exist, at least in the form it was in when the offence was committed. Some flexibility is available with the concept of “otherwise disposed of” as in the cases of third parties discussed below. But the “other forms of disposal” should have a similar effect to destruction, which is to ensure the insignia cannot be displayed again.

[71] Also, and very importantly, both words need to be interpreted in the textual context of the item having been already forfeited to the Crown, as a matter of law.

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<sup>22</sup> *Bourne v Norhich Crematorium Ltd* [1967] 1 WLR 691 (Ch) at 696.

<sup>23</sup> In referring to this interpretive approach the authors of *SLNZ*, above n 12, refer to the Latin maxim *Noscitur a sociis* (the associated words rule) literally "it is known by the company it keeps."

[72] Mr Leef effectively asks how such a meaning of “otherwise disposed of” could apply here?

[73] In my view it applies to the situations the Crown highlights. The insignia might be displayed by means of being attached or affixed, for instance on, or to, an expensive Harley Davidson motorbike so that the whole vehicle falls within the definition of insignia and therefore becomes liable to destruction. Similarly, with insignia appearing on other motor vehicles or attached to valuable (including sentimentally valuable) clothing where the insignia could be easily detached. As the Crown suggests, outright destruction of the vehicle or clothing might be considered disproportionate. Also, it can be readily envisaged that there may be situations where the rights of third parties may be involved — such as where somebody else owns the vehicle on which insignia is painted, or where a financing agreement is in place.

[74] In those situations, rather than destroying the whole vehicle, the insignia could, for instance, be painted over and the car returned to the legal owner. In this way, a piece of property may be transformed from one that is gang insignia to one that is not. Or the vehicle might be sold to satisfy the finance obligations, with net proceeds returned to the defendant.

[75] Those are all situations where the use of the word “destroyed” may be thought inappropriate, but where the insignia can still be satisfactorily “disposed of”, as in got rid of. And that approach is consistent with the statutory definition of insignia, which specifically contemplates both separately existing insignia and insignia which includes that to which the insignia is attached or affixed. And the disposal is as a result of a court order after an appropriate application.

[76] In my respectful view, in focusing on the words “otherwise disposed of”, Judge Rowe did not properly interpret them in the context of subs (b) (and (a)) — as a whole. He therefore gave “otherwise disposed of” a very wide meaning, (practically unlimited) untethered from its text, and which (illegitimately) could include return to Mr Leef.

[77] I am fortified in this view because I read the subsection as comprising two consecutive, irreversible steps, the second of which follows from the first. The conjunctive use of “and” between the two parts has an important job. Thus, as a result of the first step, the insignia is forfeited; a defendant’s right to it is lost. That cannot be changed as a deemed legal consequence. The next step flows from that legal reality. And it is sequential in that the first step cannot be reversed. First forfeiture. Second, destruction or another form of disposal. There is a built-in time, or chronological, aspect.

[78] What the plain meaning of the subsection as a whole prevents is the undoing of the forfeiture. Time and legal effect cannot be unwound. Under the rubric of “otherwise disposed of”, the return to the defendant of that which has been already forfeited simply cannot take place.

Is s 7(b) a relief from forfeiture provision?

[79] Mr Morgan highlighted that “the issue of forfeiture, what then happens to the forfeited item, and whether it is described as relief against forfeiture or anything else, is commonplace in our statutes.” I agree. He provided a number of useful comparator provisions (which I discuss later). In fact, there are a bewildering array of inconsistent provisions all with slightly different formulations. All those differing examples simply emphasise the importance of focussing on the textual provision and the need to interpret the provision in its context. And all those examples, in my view, point clearly to the interpretation of s 7(3) that I have suggested.

[80] Judge Rowe interpreted s 7(3)(b) as a “relief from forfeiture” provision. With respect, I cannot agree. The meaning of the text simply does not and cannot support this view, at least not without the inclusion of more specific wording. This would include, for instance, words in (a) ordering forfeiture to the Crown if ordered by the court: discretion as to forfeiture would thus be introduced. Or, additional words following on from “otherwise disposed of” such as “including, where appropriate, return to the defendant.” Those words do not exist, and in my view cannot be read into the ordinary and natural meaning of the subsection.

[81] Mr Morgan provided (a non-exhaustive) list of examples of forfeiture, some of which clearly provided for discretionary forfeiture. For instance, s 142R of the Sentencing Act 2002 dealing with forfeiture of weapons provides:

**142R Forfeiture of weapons**

- (1) This section applies to a weapon that the court is satisfied that an offender used in committing, or in facilitating the commission of, an offence.
- (2) The court may order that a weapon to which this section applies—
  - (a) is forfeited to the Crown; or
  - (b) must be destroyed, or otherwise disposed of, as the court directs.
- (3) This section does not affect duties or powers of the court, or any person, under any other law, about the forfeiture, destruction, or other disposal of any weapon, or any other thing of any kind, used in committing, or in facilitating the commission of, an offence.

[82] There, unlike the provision here, forfeiture to the Crown (in subs (2)(a)) is clearly subject to the court’s discretion.<sup>24</sup>

[83] Mr Morgan also noted that s 128 of the Sentencing Act 2002 has complex provisions for the discretionary confiscation of motor vehicles used in offences, (“may confiscate”) with saving provisions to protect third party interests. In this case, in s 7(3)(a), no such discretion is introduced. Similarly, “instrument forfeiture” under ss 142B - 142Q of the Sentencing Act sets out a complex regime for the court to consider making (“may order”) an instrument forfeiture order. Also, a specific procedure for relief from forfeiture is set out.

[84] Mr Morgan also points to the Customs and Excise Act 2018 which, under s 176, provides that defined property is automatically forfeited to the Crown. There is no discretion under that section.

[85] He notes that s 188 of that Act allows the court a discretion in relation to forfeited goods in certain defined circumstances — where the forfeited goods have not been otherwise restored to the owner, or sold, or otherwise disposed of. The court may

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<sup>24</sup> In that provision it will be seen that a distinction is drawn between the concept of the weapon being forfeited to the Crown, and on the other hand the weapon being destroyed, or otherwise disposed of. In that provision the two are different, alternative concepts, whereas in s 7 of this Act they are linked, and the second must follow the first.

restore the forfeited goods to the person from whom the goods were originally seized. In my view, that provision strengthens the interpretation of s 7(3) that return of gang insignia to the offender is not permitted: unlike s 7(3) an explicit power to do so is statutorily provided. Section 189 of that Act also provides that “for the avoidance of doubt” the Crown has property in forfeited goods, and condemned goods (a statutory term) can be sold, used, destroyed etc as the Chief Executive considers appropriate. That provision, queried by Mr Morgan, does not derogate from the position here. First, it is merely an avoidance of doubt provision. Second, and more importantly, unlike here, that provision then explicitly allows for direct disposal by the Chief Executive — rather than the necessity for a court order as here.

[86] Finally, Mr Morgan points to the Marine Reserves Act 1971. Section 18G provides that upon conviction for a specified offence, property used to commit the offence, marine life in respect of which the offence was committed and any proceeds of sale from marine life “may”, on order of the court, be forfeited to the Crown if the court thinks fit. Again, statutory forfeiture is explicitly subject to a discretionary order of the court — which is not the case here. Section 18 G(4) of that Act deems that all forfeited property is owned by the Crown. Again, in answer to Mr Morgan’s question, this provision, unlike the present case, is necessary to allow disposal directly by the Director-General – as opposed to s 7(3) here, where a court order is contemplated for the destruction or another form of disposal of the insignia.

[87] In light of all these examples, and the text of the provision here, I conclude that, rather than s 7(3)(b) constituting a “relief from forfeiture provision”, it is what might be called a “disposal following forfeiture provision”. Or it might be described as a regime/mechanism to give effect to forfeiture.

[88] As the Crown persuasively submits, “... in this way s 7(3)(b) mirrors the language used in other penal forfeiture provisions, where Parliament clearly intends forfeiture to result in permanent removal of the relevant property from the offender.”

[89] The Crown provides two examples, and it is convenient to set them out (and the Crown’s submissions about them) in full:

Section 32(1) and (2) of the Misuse of Drugs Act 1975 [set out above], which provides as follows:

- (1) Every person convicted of an offence against this Act shall, in addition to any penalty imposed pursuant to this Act, forfeit to the Sovereign, by virtue of such conviction, all articles, if any, in respect of which the offence was committed and in the possession of such person.
- (2) Articles forfeited under the provisions of subsection (1) shall be sold, destroyed, or otherwise disposed of as the Minister directs.

Section 32(1) provides for mandatory forfeiture. This is not surprising, given property forfeited is most often controlled drugs. Section 32(2) provides the Minister discretion to “dispose of” forfeited property. Parliament clearly could not have intended the Minister would be free to return the forfeited property to the offender, contrary to the mandatory forfeiture.

Section 69 of the Arms Act 1983, provides as follows:

**69 Forfeitures**

- (1) If a person is convicted of an offence of using, carrying, or being in possession of any specified item, the convicting court must, as part of the sentencing, order that the specified item be forfeited to the Crown.
  - (1A) If a person is convicted of an offence under section 42A for breaching a firearms prohibition order and is in possession of any firearms or related items, the convicting court must, as part of the sentencing, order that the firearms or related items be forfeited to the Crown.
- (2) However, subsection (1) or (1A) does not apply and the convicting court need not make an order under that provision if the court considers that, given the circumstances of the offending, it would be unjust to make that order.
- (3) Anything ordered under subsection (1) or (1A) to be forfeited to the Crown:
  - (a) is forfeited to the Crown accordingly; and
  - (b) may be disposed of in any manner that the Commissioner [of Police] directs.

Again, Parliament cannot have intended the Commissioner of Police to have discretion to “dispose of” forfeited firearms or related items by returning them to the offender where the court has specifically ordered it be forfeited. Parliament has granted discretion to the Court to determine whether to remove the property from the offender, not the Commissioner. It would be wrong to interpret “disposed of” in s 69(3)(b) of the Arms Act to allow the Commissioner a discretion to dispose of the property contrary to the forfeiture ordered by the court.

In the present case, Parliament has mandated forfeiture. It would be equally wrong to interpret the phrase “disposed of” in s 7(3)(b) of the Gangs Act to provide the court discretion to dispose of the property contrary to the forfeiture mandated by Parliament.

[90] Mr Morgan sees a problem with these two examples — in that “the items, the subject of forfeiture in both those Acts, are unlawfully in the possession of the offender.” At least in the case of drugs, he says that return by the Minister to the defendant is out of the question because the Minister “would simply be making the offender commit the offence again.” But in my view the real importance of these two examples is Parliament’s specific use of words to differentiate between mandatory/automatic forfeiture and where forfeiture is discretionary. During argument in Court, Mr Morgan accepted this.

[91] In contradistinction to those two provisions, the Crown provided three further examples (in addition to those mentioned previously by Mr Morgan) where the language used does demonstrate Parliament’s intention that the court has a discretion whether property should be forfeited on conviction for an offence. For simplicity, I again repeat the Crown’s examples, verbatim:

Forfeiture provisions in the Fisheries Act 1996, which provide either that:

1. the relevant property is forfeit “unless the court for special reasons relating to the offence orders otherwise”; or
2. the court *may order* that any property used in the commission of the offence, or fisheries quota, is forfeit to the Crown.

Section 32 of the Misuse of Drugs Act 1975, which usefully provides an example of the distinction between the language used in respect of mandatory (ss 32(1) and (2)) and discretionary (ss 32(3)) forfeiture respectively.

Section 69 of the Arms Act, set out above, which provides the Court discretion not to order forfeiture provision “if the court considers that, given the circumstances of the offending, it would be unjust to make that order.”

#### Other matters

[92] Before leaving the detailed textual analysis, there are three final matters.

[93] First, I see no difficulty with the use of the word “may” in s 7(3)(b). It is an enabling word providing for what is to become of the insignia. After forfeiture, the insignia is under the control and possession (if not ownership) of the Crown. Presumably, this could continue in perpetuity. But an application can be made for the insignia to be destroyed or otherwise disposed of — usually by the Crown to facilitate the final fate of the insignia, or by the defendant (or a third party) if, for instance, the

insignia is affixed to or painted onto another valuable item. The “may” simply enables the court to make the appropriate order if sought by the police, as will often be the case.

[94] Second, I do not see a difficulty with the use of the word “application”. As Mr Morgan highlights, there is no bar to a defendant making an application him/herself. I agree with him that applications are not limited to third-party applications. However, in my view, that does not inferentially open the door to a defendant’s application for return of the forfeited item. It covers other situations, some already discussed, where (for example) insignia does not exist separately in its own right but is attached or affixed to clothing or a vehicle, which the defendant, or someone else, might own.

[95] Third, if the District Court decision was upheld, every defendant would be able to seek return of the forfeited insignia. That would open up each case to extensive argument. Evidence might be required. Affidavits would often be necessary. Decisions would involve nuanced questions of proportionality. “Insignia return” hearings, as it were, could become a significant component of District Court business. This could hardly have been Parliament’s intention. In my view, this is an important practical point. The door would be opened for a whole new field of “jurisprudential patch protection”, as it were. The practical implications would be significant. And Parliament has provided no guidance on when an insignia could be returned.

[96] And fourth, the difficulty with Judge Rowe’s approach, where return of the insignia was against the defendant’s undertaking not to wear the patch again in public, is that the undertaking is quite unenforceable. I accept that if the undertaking were breached it could trigger s 9 of the Act and result in a mandatory gang insignia prohibition order. But return of the insignia could thwart the immediate purpose of the Act in that the patch could be worn publicly again by the defendant, or for that matter by another gang member.

### *Purpose*

[97] I now turn to the second consideration in s 10 of the Legislation Act 2019 — to assess the provision *in light of its purpose*. The Act’s specified purposes are brief, and relevantly provide as follows:

### 3 Purpose

The purpose of this Act is to reduce the ability of gangs to operate and cause fear, intimidation, and disruption to the public by—

(a) prohibiting the display of gang insignia in public places:

...

[98] The expressed purposes of legislation need not be, and are usually not, exact and comprehensive in detail. But they do provide an understanding as to the “why” of the Act and its “raison d’etre”.

[99] I agree with Judge Rowe that the two-fold purposes of the legislation are first to reduce the ability of gangs to operate and secondly to reduce or eliminate “fear, intimidation, and disruption to the public”. It perhaps goes without saying that the wearing of gang insignia in public is sometimes precisely for the purpose of causing fear and intimidation. Ask any Judge who has been involved in trying or sentencing cases of gang violence meted out to members of the public by gang members acting together wearing gang insignia. That reality was clearly a concern and focus of the legislature.

[100] Leaving aside the issue of any incursion into the right to freedom of expression (which I discuss later) these expressed purposes are to be furthered by prohibiting the public display of gang insignia. That is the clear effect of s 7 of the Act.

[101] In my view, it is not inconsistent with those specific purposes for the Act to provide that the deliberate displaying of gang insignia, without reasonable excuse, will result in the forfeiture of the insignia and then its destruction or like disposal. Such is to prevent insignia being publicly displayed again.

[102] It is the s 7(3) consequence of breaching s 7(1) that, amongst other things, seeks to achieve the Act’s stated purposes. First, it deters gang members from displaying their insignia in public. Second, it ensures that the insignia cannot be displayed again.

[103] As the Minister of Justice said in both the First and Second readings of the Gangs Legislation Amendment Bill:<sup>25</sup>

The bill also contains a provision requiring those insignia to be forfeited to the Crown following a conviction. This will ensure that the insignia cannot be used again to cause further harm to the public.

[104] Put more explicitly, in my view, it would be inconsistent with the purposes of the Act for a forfeited gang patch to be returned to its owner simply on a defendant's unenforceable undertaking for it not to be displayed in public again. It seems to me that would potentially thwart, not further, the purpose of the Act.

[105] To that extent, the meaning of the text (as I have found it to be) sits comfortably with its expressed legislative purpose. The two are in harmony.

#### *Context*

[106] With respect, Judge Rowe did not seem to give the analysis as to context as much time as it deserved. Perhaps that was because of the inadvertent reference to the Interpretation Act 1999 which did not refer to the separate consideration of context.

[107] It is worth observing that the Law Commission in its work on the overhaul of the Acts Interpretation Act 1924, specifically recommended the inclusion of the words "and in its context" to the predecessor to s 10 of the Legislation Act 2019. Such was not to be. But even before the 2019 Act, the senior courts were already regularly and routinely looking at surrounding contextual matters as an aid to statutory interpretation. Here, reference to context provides a rich vein of helpful information. Before doing so, it is helpful to summarise what is meant by context.

[108] In this respect there is no need to set out the full detail as to everything that can comprise context. This is all discussed in the texts, such as *Burrows and Carter Statute Law in New Zealand*.<sup>26</sup> It is sufficient to say that for present purposes, context legitimately includes reference to previous legislation, the so-called scheme of the Act,

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<sup>25</sup> (30 July 2024) 777 NZPD 2096.

<sup>26</sup> The seminal English text: Diggory Bailey and Luke Norbury *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, LexisNexis, London, 2020), is also of assistance.

the parliamentary history including Select Committee reports (which may well have recommended and explained the need for changes), and Hansard containing the record of Parliamentary debates.

[109] The forerunner to the current Gangs Act was the Wanganui District Council (Prohibition of Gang Insignia) Bill first proposed in 2007.

[110] In its original form, the Bill which preceded that Act provided only for the seizure and forfeiture to the Crown of gang insignia displayed by a person in a specified place, and who had pleaded guilty to, or was convicted of, an offence very similar to the current s 7 of the Act.

[111] What is extremely relevant is that the original Bill (at cl 7) did *not* provide for what would happen to the gang insignia after seizure and forfeiture. The report on the Bill by the Law and Order Committee made several recommendations, one of which related to that very issue; that is, what would happen to the seized and forfeited gang insignia? The specific recommendation was as follows:<sup>27</sup>

We recommend amending clause 7 (2) so that where the accused was given diversion or pleaded guilty, the insignia would be forfeited to the Crown. The amendment would make it clear that anyone who was convicted of or subject to the diversion process for the offence would have to forfeit their insignia to the Crown.

We recommend inserting new clause 7 (3) to specify a process for the police to follow when applying to the court for destruction orders for seized gang insignia. We are concerned that if the bill were enacted as introduced there might be claims for the return of property. Court orders are the usual way of deciding what happens to the seized property.

[112] Subsequently, the Wanganui District Council (Prohibition of Gang Insignia) Act 2009 was enacted to reflect the very recommendation made by the Select Committee. The wording used in that Act, is virtually identical to that carried through and used in s 7(3) of the current Act. It is worth setting it out so as to demonstrate the similarity:

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<sup>27</sup> Wanganui District Council (Prohibition of Gang Insignia) Bill 2008 (171–2) (select committee report) at 2.

### **13 Powers of arrest and seizure in relation to persons displaying gang insignia**

...

- (2) Gang insignia seized under subsection (1)(b) is forfeited to the Crown if the person from whom the gang insignia is taken pleads guilty to, or is convicted of, an offence against section 12(2).
- (3) If gang insignia is forfeited to the Crown under subsection (2), the gang insignia may be destroyed or otherwise disposed of as the court, either at the time of the conviction for the offence under section 12(2) or on a subsequent application, directs.

[113] It can therefore be said with some confidence that the current provision contained in s 7(3) was enacted in the context of, and with knowledge of, the debate and reasoning that surrounded the original inclusion of the provision, back in 2009.

[114] There are several things to be said about the Select Committee's recommendation. (This is apart from the Committee's recommendation that a person pleading guilty and subject to diversion would also "have to forfeit" their insignia).

[115] First, the inference from the use of the words "have to forfeit" is that the Committee considered forfeiture to the Crown be permanent and irreversible.

[116] Second, the Committee anticipated that without the amendment there might be claims by defendants for return of the forfeited property. This must be in the context of the police having custody of the insignia and the request for return being made to the police. The Committee was alert to this possibility and clearly wanted to close it off. To be clear, I conclude the Committee understood the proposed amendment as a way of foreclosing on any possibility of the insignia ever being returned.

[117] Third, the Committee wanted to ensure a process that would ensure destruction or like disposal in a way that was supervised by the courts (rather than the police). That is the context of the Committee's concluding comment that "Court orders are the usual way of deciding what happens to the seized property." In light of the Committee's previous analysis, that comment cannot be read as opening the door for the court to returning the seized/forfeited insignia to the defendant. It is simply a comment confined to the necessity for a court to rule as to destruction or final disposal. As previously discussed, this likely referred to possible third party claims etc.

[118] Fourth, the Committee proposed the process for destruction of forfeited insignia as a process for the police to follow. It was not contemplated that the application process would be used by a defendant. That is consistent with the understanding that the process would relate to destruction or otherwise irreversible disposal — rather than the insignia ever going back to the defendant.

[119] In my view, the context of the original Select Committee report supports the conclusion that forfeited insignia was not to be returned to the person from whom it was forfeited, and this was originally Parliament's clear intention. And all of this, supports the plain meaning of the text, already analysed.

[120] Judge Rowe was not able to give the time to analysing the legislative history of the Act, and understandably so, given the pressures on that busy first instance court. However, this Court has time for more considered reflection.

[121] This is the case, where the words of Davison CJ resonate. The Chief Justice's comments were in the context of quite different legislation. But I adopt them in the interpretative analysis of s 7(3),<sup>28</sup> as the thrust of his conclusions apply here:

If I had been in doubt as to the meaning to be given to the section, it would be dispelled by reference to the report...where [the committee] considered the various matters which led to the passing of the Contractual Remedies Act 1979. That report makes it plain that the interpretation contended for...was at least the one intended by the reform committee and its recommendations to Parliament.

[122] Here, the interpretation contended for by the Crown, also matches the clear intention of the Committee reporting back on the Wanganui Bill.

[123] But there are more contextual pointers. The relevant debates recorded in Hansard are predicated on the understanding by all those debating the Gangs Bill that the gang insignia, when forfeited, could not be returned. In the Second Reading debate of the Gangs Legislation Amendment Bill on 30 July 2024, the Honourable Paul Goldsmith said (as already mentioned):<sup>29</sup>

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<sup>28</sup> *Worsdale v Polglase* [1981] 1 NZLR 722 (HC) per Davison CJ at 726.

<sup>29</sup> (30 July 2024) 777 NZPD 4803.

The bill also contains a provision requiring these insignia to be forfeited to the Crown following the conviction. This will ensure that the insignia cannot be used again to cause further harm to the public.

[124] The unarguable inference is that the government intended that forfeited insignia could not be used again — which they could be if they were returned.

[125] Moreover, throughout the debate, it seems to me that even the opposition parties assumed that the patches would be lost after they were forfeited. For instance, the Honourable Ginny Anderson (of the Labour party) said “by treating gangs in isolation and demonising them and taking their patches off, it does absolutely nothing for the next generation of young people.”<sup>30</sup> Similarly, Kahuirangi Carter (of the Green party) said “If simply removing a piece of clothing could solve the real issues we are facing in New Zealand, we could all go away on holiday.”<sup>31</sup> And Dr Tracey McLellan, when speaking of the Whanganui experience and the comments of Dr Michael Laws (the former Mayor of Whanganui), said “so what happened? Did people just stop being in gangs when you took their gang patches off them?” The answer is not relevant, but the question shows the Members’ understanding that the Bill had the effect of absolutely removing the insignia from the gang member’s control and possession.<sup>32</sup>

[126] And in similar vein, Rima Nakhle (of the National party) said we [the government] are trying to implement changes that are going to ban gang insignia in public, forfeit insignia to the Crown...<sup>33</sup>

[127] Thus, all those taking part in the Second Reading debate seemed quite sure that forfeited insignia would never be returned.

[128] This understanding is also clear in the subsequent debate about the Bill when Parliament sat as a Committee of the Whole House in its debate of the parts of the Bill.<sup>34</sup>

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<sup>30</sup> (30 July 2024) 777 NZPD 4805.

<sup>31</sup> At 4811.

<sup>32</sup> At 4820.

<sup>33</sup> At 4820

<sup>34</sup> At 4950 and following.

[129] For instance, in the debate as to pt one — the preliminary provisions of the Bill. the Honourable Dr Duncan Webb (of the Labour party) was concerned about confiscation, as he put it, when gang insignia is a sticker on the family car.<sup>35</sup> He noted that the entire car is liable or expected to be confiscated and destroyed. He sought an answer as to whether it is appropriate that everything that the insignia itself is affixed to is included in confiscation. It was made clear that confiscation only referred to the “sticker affixed to it.”<sup>36</sup> And that somebody “at risk of having the whole car forfeited would ‘probably peel the sticker off’”. Whatever else emerged from the debate, clearly no member raised the possibility of forfeited insignia being returned.

[130] That part of the debate also supports the conclusions I reached as to why the words “or otherwise disposed of” are needed in s 7(3) of the Act.

[131] I add that in the subsequent debate as to pt 2 of the Bill, dealing with the “Prohibition on display of gang insignia in public places” there was apparently no discussion as to the strictures or meaning of forfeiture and what would happen to the forfeited insignia. Most of the debate focussed first on whether the provision would actually reduce gang membership or would have any effect on gang behaviour, and second as to whether the proposed Prohibition Orders for repeat offences (contained in s 9 of the current Act) were workable, fair and proportionate.

[132] An inference to be drawn from the debate on pt 2 of the Bill, was that destruction or permanent disposal of the insignia was taken for granted. But no more than that can be said with any confidence.

*Conclusion – applying s 10 of the Legislation Act 2019*

[133] After undertaking the required s 10 exercise — the meaning of s 7(3) of the Act being “ascertained from its text in light of its purpose and its context” — I conclude that return of the forfeited insignia to a defendant is not permitted.

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<sup>35</sup> At 4953.

<sup>36</sup> At 4953, by the Honourable Paul Goldsmith.

[134] Specifically, upon forfeiture to the Crown, a defendant irretrievably loses their insignia, which remains in the custody of the Crown (ordinarily the police). There it remains until an application is made to the court, usually by the police (but possibly by a third party or even a defendant), at the time of a guilty plea or conviction, or at a later date, for the forfeited insignia to be destroyed or permanently disposed of, depending on the nature of the insignia and how it is displayed (e.g. on a car or attached to some other item). Whether it is “destroyed or otherwise disposed of”, the insignia cannot be returned to a defendant. The effect of the order will usually be that the actual insignia will cease to exist.

### **Wider considerations and fundamental principles**

[135] However, the above “preliminary” conclusion is not the end of the interpretative exercise. Wider, “values-based” factors must be considered, both in common law and parallel legislation. These are important tools in statutory interpretation. Here they provide an additional dimension to the required interpretative exercise. In one sense they provide an important cross check.

[136] As observed by the learned authors of *Burrows and Carter Statute Law in New Zealand*, these factors, not so obviously deriving from the intention of the lawmakers, constrain or influence statutory interpretation.<sup>37</sup> Even when the text of the legislation and its purpose seem clear (as here), the court “may examine other considerations to see whether its initial impression was the most satisfactory one.”<sup>38</sup>

[137] Here two such considerations that require analysis. First, the common law “principle of legality”. Second, the effect of NZBORA. Both were comprehensively considered by Judge Rowe.

[138] At this stage, I observe that there is an artificiality in this sequential approach because, in one sense, these wider considerations are factored in simultaneously with the s 10 factors, or at least before conclusions as to the meaning of s 7 are finalised.

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<sup>37</sup> *SLNZ*, above n 12, at 431.

<sup>38</sup> At 431.

## The principle of legality

[139] The courts have always striven to ensure that deep-seated values, ingrained in our unwritten constitution, are not easily dispensed with. The courts will always strive to reach an interpretation of legislation which is consistent with preserving those rights.

[140] This approach, is often called the principle of legality, recently described by the Supreme Court in the following terms:<sup>39</sup>

The latter is a common law principle of statutory interpretation which exists independently of the Bill of Rights, to protect and uphold certain rights and values that the common law has identified as fundamental or as having a constitutional nature. Although it operates to protect the rights and freedoms affirmed in the Bill of Rights, it is not displaced or confined by the Bill of Rights. As a common law principle it continues to develop, as seen in recent decisions of the United Kingdom Supreme Court and the decision of this Court in *D v New Zealand Police*

[141] The classic formulation of the principle usually referred to is that by Lord Hoffman:<sup>40</sup>

Parliamentary sovereignty means the Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. ... The constraints upon [the exercise of this power] by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. *In the absence of express language or necessary implication to the contrary*, the Courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

(Emphasis added)

[142] This passage was also set out in full by Judge Rowe. Interestingly, his Honour highlighted a different part than I have. Judge Rowe emphasised the sentence “fundamental rights cannot be overridden by general or ambiguous words”. That, of course, is consistent with his view, already set out, as to the open-ended, ambiguous, and general meaning of s 7(3). But I have concluded that the meaning of the

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<sup>39</sup> *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [51].

<sup>40</sup> *R v Secretary of State for the Home Department, ex parte Simms* [1999] UKHL 33, [2002] 2 AC 115 at 131 per Lord Hoffman.

subsection is precise and clear, and therefore I highlight that express language or necessary implication (which is the case here) is required to override fundamental rights.

[143] The principle has been the subject of much academic and judicial consideration. As was noted by Lord Justice Singh, in a recent paper:<sup>41</sup>

In some ways this [the principle of legality] may be a misnomer since what it really concerns is a presumption that Parliament does not legislate to infringe fundamental rights in the common law unless it makes that intention clear, either expressly or by necessary implication. In particular, it has led to a principle of statutory interpretation that general words in primary legislation will not be construed to confer power on the executive to infringe basic rights protected by the common law. With hindsight it might be better if the phrase “the principle of legality” were used for another purpose, to reflect the principle in human rights law that an interference with a fundamental right must be “prescribed by law” or “in accordance with law”.

[144] This decision is not the place to fully unpack the principle of legality,<sup>42</sup> nor to list those deep-seated fundamental rights and values. Suffice to say that one way or another, most have been at the heart of common law jurisdictions for a long time.

[145] For present purposes, I accept (as did Judge Rowe) that the right to own and possess personal property is one of them. So too, freedom of expression, (which includes the right to wear what one chooses — such as gang insignia).

[146] Specifically, the relevant s 7(3) provision is about interference with property rights, not freedom of expression. But to the extent that forfeiture of gang insignia will affect future freedom of expression by an offender, s 7(3) indirectly affects that right too.

[147] On the face of the provision, and without detailed analysis, I would be prepared to accept that 7 (3) breaches those rights.

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<sup>41</sup> Lord Justice Rabinder Singh “*Substantive Principles of Administrative Law: Developments since 1987*” (lecture presented to the London School of Economics, London, March 2026).

<sup>42</sup> Palmer J provides a detailed analysis of the principle in *Four Midwives v Minister for Covid-19 Response and Attorney General* [2021] NZHC 3064, [2022] 2 NZLR 65 at [54] - [64]. Palmer J also observed that it is a legitimate question whether the principle of legality has greater reach than s 6 of the New Zealand Bill of Rights Act 1990, which I discuss in the next section of this judgment. However, his own view was that, in the interests of consistency and coherence, the principle should not extend that far.

[148] That being the case, the question becomes whether Parliament’s intention to breach the right to own personal property was made clear, either expressly or by necessary implication?

[149] Little time is needed to address this question, given my conclusion that the words of s 7(3) are clear and do not admit of any other meaning. In other words, with its eyes wide open, Parliament deliberately enacted this provision, knowing that its width almost certainly breached fundamental and enduring values that New Zealanders would hold dear, such as brought about by the confiscation of gang insignia as personal property. So be it. The court’s job is to uphold the plain and natural meaning of the provision when, as here, it is clear, and no other interpretation is possible.

[150] And as the Crown realistically submits, penal provisions such as s 7(3) by their nature involve encroachment on rights — in fact, that is their very purpose. Accordingly, the Crown fairly argues that the presumption that “Parliament legislates consistently with fundamental rights” needs to be cautiously applied in this light when interpreting penal provisions.<sup>43</sup>

[151] Furthermore, the Crown emphasises that not only is forfeiture, as a penalty, intended to encroach on property rights,<sup>44</sup> but also, in respect of criminal forfeiture regimes (referring to a leading text), “takings are clearly intended for property used to commit crimes.”<sup>45</sup>

### **New Zealand Bill of Rights Act 1990**

[152] In any statutory interpretation exercise, it is now well-established that the constraints provided by the fundamental values and freedoms discussed above will primarily fall to be analysed under the NZBORA — because that is where many of them are now enshrined.

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<sup>43</sup> *New Health New Zealand v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [292] per Elias CJ.

<sup>44</sup> *R v Elliot* HC Gisborne CRI 2009-016-3799, 19 November 2010 at [73]–[74].

<sup>45</sup> *SLNZ*, above n 12, at 435, citing *R v Elliot* at [73] – [73].

[153] The guidance for the proper interpretative analysis is found in ss 4, 5 and 6 of NZBORA:

**4 Other enactments not affected**

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—

- (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
- (b) decline to apply any provision of the enactment—

by reason only that the provision is inconsistent with any provision of this Bill of Rights.

**5 Justified limitations**

Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

**6 Interpretation consistent with Bill of Rights to be preferred**

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[154] The interplay between these three sections has proved more than a little complicated to navigate. Much judicial ink has been spilt on the issue.<sup>46</sup> There is little profit in me adding to that discussion here. The “six-step approach” suggested by Tipping J in *R v Hansen*<sup>47</sup> is invariably referred to in every judicial analysis (and often adopted) although the Court was not there prescribing a methodology that applied in all circumstances.<sup>48</sup>

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<sup>46</sup> The differences in approach are well summarised by Palmer J in *Four Midwives v Minister for Covid -19 Response and Attorney General*, above n 41, at [40] – [52]. Palmer J makes the point that any divergence in legal methodology “...is more apparent than real.” All the leading texts discuss the relationship between these three sections at some length. See for instance the helpful analysis in *SLNZ* 509 – 524. The Court of Appeal in *Make It 16 Inc v Attorney-General* [2021] NZCA 681, [2022] 2 NZLR 440 at [15] also recorded the divergence in approaches to ss 4, 5 and 6 of NZBORA. There, the Court considered the appeal did not turn on the issue, so declined to engage in the merits of particular methodology.

<sup>47</sup> *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [92].

<sup>48</sup> This is the point made by Winkelmann CJ in *Fitzgerald v R*, above n 38, at [44] – [47]. There, the Chief Justice proceeded on the basis that there was no need in the circumstances of the case to apply the six-step methodology. The Chief Justice also noted that

it is not clear from the judgment whether step one [ascertaining Parliament’s intended meaning] includes consideration of the s 6 direction [step 5]. There is some suggestion in Tipping’s J reasons that it does, but logic suggests that it does not – otherwise no purpose would be fulfilled by step 5.

This was the point I was attempting to make at [116] of this judgment: a strictly sequential analysis leaves s 6 considerations until after the meaning of the provision (at least on a preliminary) basis has been ascertained. This can reduce the force and utility of s 6.

[155] Tipping J summarised the approach as follows:<sup>49</sup>

Step 1. Ascertain Parliament’s intended meaning.

Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.

Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.

Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament’s intended meaning prevails.

Step 5. If Parliament’s intended meaning represents an unjustified limit under s 5, the court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.

Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament’s intended meaning be adopted

[156] Put another way, many authorities suggest that at least in the present case (where I adopt the approach in *Hansen*), the key NZBORA sections should be deployed in the following sequence:

- (a) Section 5 is the starting point. The court must assess whether s 7(3) breaches a defined right. Is the natural meaning of s 7 a “justified limitation” on that right? This involves a nuanced enquiry into whether the right is reasonably limited and demonstrably justified in a free and democratic society. If it is so justified, as emphasised in *Four Midwives*, there is no need for further analysis: the intended meaning prevails.<sup>50</sup> As Palmer J concluded, applying s 6, irrespective of the s 5 consideration, “would involve applying only half the Bill of Rights to interpretation.” However, if not a justified limitation, then the enquiry under s 6 is engaged.
- (b) Section 6 asks the court to assess whether a rights-consistent meaning can be given to s 7(3) of the Gangs Act? Such a meaning may not be available because the legislature has expressly limited the right, and/or

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<sup>49</sup> *R v Hansen*, above n 46, at [92].

<sup>50</sup> This is the conclusion reached by Palmer J in *Four Midwives*, above n 41, at [51]–[52].

the natural and plain meaning just cannot fit with that right. The authorities emphasise that this enquiry is dependent on the availability of a tenable rights-consistent interpretation of, in this case, s 7. Courts are not required to embark on an etymological expedition, armed with dictionaries and a thesaurus, to discover obscure or hidden meanings or latent uncertainties that are rights-consistent.<sup>51</sup> If a tenable rights-consistent meaning is available, that meaning is to be preferred. The most recent Supreme Court discussion of this step is found in *Fitzgerald v R*. There, Winkelman J went so far as to observe that:<sup>52</sup>

[55] Clearly, s 6 incorporates aspects of the principle of legality in relation to the affirmed rights and freedoms, in that courts applying it will proceed on the basis that clear words are needed if legislation is to be construed as abridging fundamental freedoms. Just as with the principle of legality, it is the language of the statute which must be clear enough to exclude the possibility of a rights-consistent purpose and effect – it is not enough that parliamentary materials might suggest this.

...

[58] The next issue that arises is how far the courts should go in striving for a rights-consistent meaning. The answer is to be found in a conventional analysis of ss 4 and 6. I start with s 6, which is where the interpretation process should start. The rights-consistent meaning must only be possible – it need not be the most likely meaning or even a likely meaning. In *Hansen*, “possible” was construed as meaning *reasonably* possible. I have concerns that reading in the word “reasonably” imposes a limitation which does not appear in the text and is also unnecessary, as the Act itself provides all necessary limits on the s 6 process. The word “reasonable” also tends to have perambulatory meaning – one person’s strained but available meaning is another’s unreasonable meaning. However, if the word means no more than “tenable”, as Tipping J suggests in *Hansen*, I am content with it, since that is consistent with the words of s 6 itself: a meaning that “can be given”.

[59] Section 6 makes clear that it must be possible to arrive at the rights-consistent meaning *through the process of interpretation*. This is familiar territory for courts. It is the courts’ constitutional function to interpret and apply legislation enacted by Parliament, and the courts have a range

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<sup>51</sup> In *R v Hansen*, above n 46, at [13] and [25] Elias CJ emphasised that meanings adopted in reliance on s 6 must be “tenable on the text...of the enactment.”

<sup>52</sup> *Fitzgerald v R*, above n 38, at [55] and [58]–[59] (emphasis original, footnoted omitted).

of common law techniques to assist with this. Which of these techniques is appropriate in any given case may vary depending upon the nature of the right and upon the nature of the breach that is sought to be avoided. The Bill of Rights operates differently depending on the type of rule in question and the problem it poses to the right at stake. ...:

The availability, or tenability of a (more) rights-consistent interpretation is a question of “constitutional significance”.<sup>53</sup> The Supreme Court has adopted the statement of Lord Hoffman, discussing the principle of legality, that “[f]undamental rights cannot be overridden by general or ambiguous words.”<sup>54</sup> Winkelmann CJ observed that, just as under the principle of legality, statutory language “must be clear enough to exclude the possibility of a rights-consistent purpose and effect — it is not enough that parliamentary materials might suggest this.”<sup>55</sup> However, Winkelmann CJ referred to the United Kingdom’s approach under the Human Rights Act 1998 that interpreting a piece of legislation in a rights-consistent way will be illegitimate if that interpretation is inconsistent with the scheme of the legislation, its essential principles or “underlying thrust”.<sup>56</sup>

- (c) Section 4 comes into play if a rights-consistent interpretation is not available. In that case, the courts must adopt a rights-inconsistent meaning — here for s 7. The legislature’s intention must be given effect to and cannot be judicially subverted or thwarted.<sup>57</sup>

[157] I now apply that approach to this case.

[158] Relevant rights in NZBORA identified by Judge Rowe as potentially infringed by s 7 of the Act are:

- (a) Section 9 — disproportionality of sentence;

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<sup>53</sup> *Fitzgerald v R*, above n 38, at [66].

<sup>54</sup> At [52] citing *R v Secretary of State for the Home Department*, above n 39, at 131.

<sup>55</sup> *Fitzgerald v R*, above n 38, at [51].

<sup>56</sup> At [67] citing *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557 at [121] and *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43; [2005] 1 AC 264 at [28].

<sup>57</sup> *Fitzgerald v R*, above n 38, at [185] per O’Regan and Arnold JJ and [250] per Glazebrook J.

- (b) Section 14 — freedom of expression;
- (c) Section 21 — the right to be secure against unreasonable seizure; and
- (d) Section 27 — right to justice.

[159] Judge Rowe concluded that all of these rights, to some extent, were on their face breached, or potentially breached by s 7(3). I deal with each of them separately.

*Section 9 – disproportionality of sentence*

[160] Section 9 provides:

**9 Right not to be subjected to torture or cruel treatment**

Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

[161] In my view, this is the most significant of the rights potentially infringed by s 7(3) given it is a penal provision. Here, it is only the last of the listed concepts mentioned in s 9 — disproportionately severe treatment or punishment, that is potentially infringed.

[162] In *Fitzgerald* the Supreme Court focussed on this very right and its interplay with ss 5 and 6 of NZBORA.<sup>58</sup> I do not repeat that comprehensive analysis, other than to note the comments that limits on s 9 can never be reasonably justified. That is because in the case of disproportionately severe treatment, any proportionality inquiry will have already taken place in determining if the right is breached, leaving nothing additional for s 5 to do.”<sup>59</sup>

[163] I accept the Crown’s submission that disproportionate punishment “must take its colour from the rest of s 9 of NZBORA — that is, torture and cruel or degrading punishment.”<sup>60</sup> The threshold for determining if a sentence is disproportionality severe in this context is therefore a very high one.

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<sup>58</sup> *Fitzgerald v R*, above n 38, from [74]- [82] (Winkelman J) and [160] (O’Regan and Arnold JJ).

<sup>59</sup> At [78].

<sup>60</sup> At [161]

[164] As summarised by Winkelman CJ in *Fitzgerald* the threshold has been variously described as treatment “so out of proportion to the particular circumstances as to cause shock and revulsion”; “so excessive as to outrage standards of decency”, or, as “conduct which is so severe as to shock the national conscience.”<sup>61</sup> All these definitions involve a somewhat challenging assessment of the “national psyche” made more difficult still when the issue is punishment (of gang members) where there are a wide spectrum of views. The threshold is sometimes expressed as punishment/treatment that is grossly disproportionate to the circumstances. In this case, where forfeiture is so controversial, that may be the most useful description of the threshold.

[165] Here, forfeiture is accompanied by a discretionary fine of up to \$400. There is no possibility of imprisonment. Only property is affected. The Crown submits that s 9 of NZBORA is unlikely to have been intended to apply to economic penalties such as a discretionary fine.

[166] The Crown also submits the severity of punishment should be considered objectively. Accordingly, although gang members may attribute significant sentimental value to their patches and other insignia, the Crown’s view is that it is unlikely that forfeiture of a gang patch will ever be sufficiently severe to be grossly disproportionate to the offending envisaged by s 7 of the Act.

[167] I think that submission may rather undervalue the significance of the patch. Although there is no evidence before me on this point, a would-be gang member is generally understood to “prospect” for gang membership. Membership, and thus the patch, is earned (not purchased), often after performing tasks specified by the leadership. In my experience as a former Principal Youth Court Judge, these assigned tasks often included carrying out criminal activities. Patch ownership is difficult to obtain and extremely significant.

[168] For a patched gang member, the patch symbolises identity. It is intrinsic to a gang member’s self-worth. The expressive value of gang insignia was considered in the Gangs Legislation Amendment Bill regulatory impact statement:

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<sup>61</sup> *Fitzgerald v R*, above n 38, from [79] (Winkelman J).

[102] ...gang insignia are capable of different meanings depending on context, including the purpose and conduct of the wearer. While some symbolic expression may be perceived as intimidation, others may design and intend it as a simple statement of identity and belonging or have broad political meanings, which are protected by the core right to freedom of expression.

[169] The expressive content of gang insignia is carefully explored by Liam Connolly in a recently published Honours Dissertation.<sup>62</sup> In his comprehensive analysis he refers (amongst other things) to several academic commentators:

Moana Jackson explains that the involvement of Māori in gangs can be understood as “an extreme manifestation of the pressures which have shaped that community.”<sup>63</sup>

Jarrold Gilbert observes that gang insignia are “visible manifestations of rebelliousness”.<sup>64</sup>

Fatupaito, Ormsby and Elers describe the rather than “patch”, some members of the Mongrel Mob now call it a “korowai” “a symbol of honour and cultural significance”, “worn with pride — it is a taonga”.<sup>65</sup>

[170] I accept that the value of the patch for its owner is more than sentimental, which was one of the descriptions used by Judge Rowe. The right to own and wear it is significant. Its forfeiture will likely be a devastating blow to the gang member.

[171] Nevertheless, public patch display will have other effects and purposes. The Attorney-General’s report refers to the purposes of the Bill, but also refers to the explanatory note that records a purpose of the Bill is to disincentivise gang membership, noting that:<sup>66</sup>

Gang insignia displayed in public may cause some people to feel fearful or intimidated. The display of gang insignia as a status symbol may also assist gangs in marketing themselves to potential prospects and future recruits. As gang members are readily identifiable by their insignia, the display of insignia may exacerbate inter-gang rivalries that eventuate into gang violence in public spaces.

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<sup>62</sup> Liam Connolly “The Gangs Act 2024: a critical analysis of the discursive construction and constitutional protection of the right to freedom of expression in Aotearoa ” [2025] UOtaLawTD 7, particularly at pp 47-57.

<sup>63</sup> Moana Jackson *The Maori and the Criminal Justice System – A New Perspective: He Whaipaanga Hou (Part 2)* (New Zealand Department of Justice, Study Series 18, November 1988) at 31.

<sup>64</sup> Jarrold Gilbert “The Rise and Development of Gangs in New Zealand” (PhD Thesis (Sociology), University of Canterbury, 2010) at 260.

<sup>65</sup> Sonny Fatupaito, Paula Ormsby and Steve Elers “The Whakapapa of the ‘Patch’: He Korowai Tēnei” (2024) 6(1) *Decolonization of Criminology and Justice* 19 at 25.

<sup>66</sup> Judith Collins *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Gangs Legislation Amendment Bill* (26 February 2024).

[172] Forfeiture of a patch fulfils many purposes indirectly identified by Parliament. A forfeited patch cannot be used again in public. If it were just a matter of the significance of forfeiture to the owner, I doubt whether forfeiture could be classed as being anywhere near grossly disproportionate or as satisfying any of the descriptors identified at [164] above.

[173] What does concern me is that forfeiture is absolute and irreversible — irrespective of the circumstances. There is a world of difference between large public gatherings of insignia-clad gang members in broad daylight, where the patch is worn to intimidate or provoke, and a quick trip down to the local dairy late at night by a gang member wearing a patch, where the streets are empty, to buy a bottle of milk or a loaf of bread. Both attract forfeiture. The plain meaning of the legislation provides no wriggle room for the court. The old saying punishment should fit the crime is not trite. Courts are usually best positioned to tailor the punishment to the circumstances. This is not possible with s 7(3).

[174] In my view, it is the inflexibility and universality of forfeiture for the defendant, combined with the value of the patch as I have discussed, which takes s 7(3) very close to breaching s 9 of NZBORA. This was clearly a real concern to Judge Rowe. I accept there may be some situations where forfeiture is, at the least, severe, or disproportionate, but that is not the test.

[175] I also agree with the Crown that there is some forfeiture flexibility — albeit not with respect to the defendant. To the extent that the definition of insignia captures items of significant value (e.g. motor vehicles) or where there are legitimate third-party interests, the impact of forfeiture can be mitigated by the court directing other means of disposal other than destruction (but not return of the item to the defendant in its original state as “gang insignia”) to avoid disproportionate punishment. For example, as previously discussed, the court may direct that a vehicle be painted and sold, with the net proceeds returned to the offender.

[176] I also add that any disproportionality of sentence may be reduced given that there is a built in “reasonable excuse” defence to the offence itself. That defence will give the opportunity for escape from the rigours of s 7(1). Forfeiture will therefore

not be engaged if successful “reasonable excuse defences” are raised. There are also possible arguments, as to rights consistent interpretations of the definition of insignia, which may further restrict the ambit of the offence creating provision (and therefore the operation of forfeiture). Such arguments are foreshadowed in a recent article in the New Zealand Law Journal.<sup>67</sup>

[177] All in all, I do not consider the plain meaning of s 7(3) reaches the very high threshold required to constitute disproportionately severe punishment. Severe, and excessive as it may be for the defendant, it is not grossly disproportionate. And whatever descriptor is used, it is not for instance “so out of proportion to the particular circumstances as to cause shock and revulsion”.

[178] In concluding this analysis, I note that the Attorney-General’s report to Parliament did not consider the NZBORA implications of s 9 on the forfeiture provision. One inference is that it was thought that s 9 was simply not infringed by s 7(3) of the Act. In any case that is the conclusion I have reached. Beyond that, I resist further speculation.

[179] In respect of s 7(1) and its ramifications on the right to freedom of expression in s 14 of NZBORA, the Attorney-General considered the purposes and objectives of the Bill sufficiently important to justify some limitation on the freedom of gang members. The report concluded that the proposed limitation on public display of insignia is rationally connected with this objective. However, it concluded that less intrusive measures could achieve the social purpose before a complete ban would be justified, and therefore the legislation would breach s 14.

[180] That report may have some implications for the forfeiture provision. If freedom of expression were breached by an absolute ban on public display of gang insignia, it might be considered that absolute forfeiture of any publicly displayed forfeiture was also unjustified. But that logic only follows if s 9 of NZBORA as to disproportionately severe treatment/punishment might be or would be breached. And as I say, the report did not address this.

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<sup>67</sup> Tim Conder and Dr Jarrod Gilbert *A patch by any other name* [2025] NZLJ 327.

[181] Given the comments in *Fitzgerald*, previously noted, and my conclusion that s 9 is not breached by s 7(3) of the Act, a specific analysis of s 5 of NZBORA is not required. In any case, it follows that the absolute forfeiture of the defendant's insignia does not exceed reasonable limits as can be demonstrably justified in a free and democratic society.

[182] Strictly speaking, there is no need for me to turn to s 6 of NZBORA. Section 7(3) plain meaning does not infringe the s 9 right.

[183] But even if it did, and therefore failed the s 5 test, I hold that s 7(3) could not be given a meaning that is consistent with the rights and freedoms contained in NZBORA — in this case s 9 of NZBORA.

[184] I need no convincing that a rights consistent meaning should be preferred if such a tenable meaning is available. But here, as discussed, there isn't: forfeiture, as far as the defendant is concerned, is absolute and irreversible. I agree that Judge Rowe's approach provides flexibility and ameliorates what will sometimes be the harsh rigours of s 7(3) of the Act. But that alternative view is not tenable given the meaning of the provision I have settled on.

[185] In my view, it is all too tempting to begin the interpretative exercise by immediately asking whether the provision in question is a justified breach of NZBORA and if an alternative meaning can be discovered? As the courts have repeatedly emphasised, there is no substitute for first establishing the plain meaning of the provision from its text, in light of its purpose and context. There is no avoiding this important spadework. It might be said that this is where the judicial elbow grease is initially required.

[186] In *Hansen*, in a concurring judgment, McGrath J observed that:

Section 6 [of NZBORA] adds to, but does not displace, the primacy of s 5 of the Interpretation Act [now s 10 of the Legislation Act 2019], which directs the courts to ascertain meaning from the text of an enactment in light of the purpose, and it does not justify the court taking up a meaning that is in conflict with s 5. That would be contrary to s 4 [of NZBORA]. Rather s 6 makes New Zealand's commitment to human rights part of the concept of purposive interpretation. To qualify as a meaning that can be given under s 6 what emerges must always be viable, in the sense of being a

reasonably available meaning on that orthodox approach to interpretation. When a reasonably available meaning consistent with protected rights and freedoms emerges the courts must prefer it to any inconsistent meaning.

[187] This position was essentially adopted by the Chief Justice in *Fitzgerald* where she noted:<sup>68</sup>

In summary, therefore, s 6 is powerful interpretative obligation that complements and strengthens the use of common law purposive interpretative techniques together with the principle of legality. But meanings reached by way of s 6 must still be arrived at through the process of interpretation. Where the language of a provision is clear enough to exclude the possibility of a rights-consistent meaning, s 4 requires the courts to give effect to that rights-inconsistent meaning.

[188] In my view, having ascertained the meaning in this case, it can only be concluded that Parliament has made its intention clear in enacting s 7(3) to breach a fundamental right (if that had been my conclusion), despite any indirect warning sounded by the Attorney-General. Parliament's intentions cannot be thwarted in this situation: s 4 of NZBORA requires the provision is given effect to.

#### *Section 14 – freedom of expression*

[189] Section 14 of NZBORA provides:

#### **14 Freedom of expression**

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[190] The Crown accepts that s 7 of the Act limits the right to freedom of expression and that the limitation is not justified. This is because the legitimate social objective of eliminating fear and intimidation caused by displays of gang insignia could have been achieved by something less than an outright ban, operative at all times, irrespective of whether members of the public were even present.

[191] However, as already discussed, the right is not directly engaged here, where the issue is what happens to forfeited insignia following conviction. I agree with the Crown that “a person's right to express themselves by displaying their gang insignia

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<sup>68</sup> *Fitzgerald v R*, above n 38.

in public continues to be equally limited, whether or not they receive their insignia back, because they are still prohibited from displaying it in public.” I also accept, to put it another way, that an interpretation of s 7(3) that allows an offender to receive their insignia back is no more consistent with s 14 of NZBORA than one that doesn’t. No further discussion is required regarding s 14.

*Section 21 - unreasonable search and seizure*

[192] Section 21 of NZBORA provides”

**21 Unreasonable search and seizure**

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

[193] Judge Rowe noted that s 21 of NZBORA “does not squarely arise in the present analysis in the sense that the property has already been seized”. However, his Honour did suggest that s 21 recognises a person’s right to property as a protected right, to be removed only when reasonable, meaning, under s 5 of NZBORA, when demonstrably justified in a free and democratic society.

[194] Despite Judge Rowe’s observations, I accept the Crown’s submission that this right is not engaged in these circumstances. The provision does not provide a general right to the possession of personal property. A right to property and other economic rights were deliberately not included in NZBORA. I agree with the Crown that the right to property is protected through the principle of legality, previously discussed.

*Section 27 - right to justice*

[195] Section 27 of NZBORA relevantly provides:

**27 Right to justice**

- (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person’s rights, obligations, or interests protected or recognised by law.
- (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply,

in accordance with law, for judicial review of that determination.

[196] In respect of s 27, I accept the Crown's submission that s 7(3) can be interpreted consistently with this right. The ability of any party, including third parties, and even the defendant, to apply to the court for directions as to the means of disposal of the forfeited gang insignia means any person with an interest in the gang insignia (or underlying property) can be heard on the issue. The Crown submits, in fact, that this is the primary purpose of such applications — though there is no need for me to make a finding in that respect.

**Is a court direction as to destruction or disposal *always* required?**

[197] There is one final matter to address. The Crown submitted that Judge Rowe erred in finding that the Crown should always seek a direction from the court before destroying or otherwise disposing of an insignia. The Crown's view is that, where there is no application for an alternative means of disposal, and no order is made on the court's own motion, the Crown should be free to destroy or otherwise dispose of the insignia at its own discretion.

[198] This question indirectly arises in interpreting s 7(3) and it will arise given the result of this appeal is to remit the case back to the District Court. So, addressing it is unavoidable.

[199] The Crown's view is that on a plain reading, s 7(3)(b) provides for two separate means by which forfeited insignia may be dealt with the Crown:

- (a) they may be destroyed; or
- (b) they be otherwise disposed of as the court directs.

[200] The Crown goes so far as to submit that “both a plain reading and purposive interpretation ... consistent with legislative context, provide that the Crown may destroy a forfeited gang insignia unless the court directs another form of disposal. On this interpretation, the Crown may destroy a forfeited insignia without any direction from the court.”

[201] Indeed, the Crown’s view is that destruction (by the Crown) is the default position.

[202] I am by no means sure this is the correct interpretation. The Crown boldly states that the meaning it advocates is plain. But no reasoning is provided. Along with Judge Rowe on this point, I take the opposite view: a plain reading of s 7(3) does require a court direction. Either the order/direction is made at the time of sentencing, or later, after application. But either way, the meaning of the subsection contemplates court involvement and the court making the direction.

[203] The starting point must be the words of s 7(3)(b) itself, and in this case the absence of a comma between the words “destroyed” and “or”. For the Crown’s interpretation to succeed, the provision would have to read “may be destroyed, or otherwise disposed of as the court ...”. This is what the grammar/punctuation textbooks all say. “Two-part sentences of which the second member is introduced by *as* (in the sense of ‘because’), *for*, *or*, *nor*, or *while* ... require a comma before the conjunction.”<sup>69</sup> Another formulation of the rule is that “commas are used when two complete sentences are joined together, using such conjunctions as *and*, *or*, *but*, *while* and *yet*.”<sup>70</sup> Who would have thought that the absence of a comma could be so significant? Or that the rules of grammar, so painstakingly learnt (and quickly forgotten) in secondary school would be so important?

[204] The absence of the comma can be assumed to be deliberate by the legislative drafters. Its absence strongly suggests that the phrase “as the court ... directs” controls both “*destroyed*” and “*otherwise disposed of*”. Without the comma, there are not two

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<sup>69</sup> William Strunk JR and EB White *The Elements of Style* (4th ed, Allyn & Bacon, Massachusetts, 2000) at 5.

<sup>70</sup> Lynne Truss *Eats, Shoots & Leaves - The Zero Tolerance Approach to Punctuation* (Profile Books, London 2003) at 87.

See also, Duke University “Rules for Comma Usage” The Writing Studio <<https://twp.duke.edu/sites/twp.duke.edu/files/file-attachments/commas.original.pdf>> there it is emphasised:

The comma allows for a brief pause between separate parts of a sentence, a basic purpose that becomes more obvious if you read a passage aloud. The following guidelines, condensed mostly from *The Chicago Manual of Style (14th Ed.)*, are not an exhaustive outline but rather an introduction to the basic rules. If in doubt about whether or not to use a comma, read your sentence aloud and consider whether you need pause anywhere.

Compound Sentences

When two independent clauses that each contain a subject and a verb are connected by *for*, *and*, *nor*, *but*, *or*, *yet*, or *so* (a list of coordinating conjunctions also known by the acronym FANBOYS), put a comma before the FANBOYS.

sentences — as the Crown suggests in its division of s 7(3)(b). Without the comma, there is one sentence, albeit with two options and with both requiring a court direction.

[205] After all, this was the intention back in 2008 when Parliament first introduced the forerunner to this section in the Wanganui District Council (Prohibition of Gang Insignia) Act 2009. Section 13 of that Act was carried through in identical form into this Act. It will be remembered that the Select Committee specifically recommended:

*We recommend inserting new clause 7 (3) to specify a process for the police to follow when applying to the court for destruction orders for seized gang insignia. We are concerned that if the bill were enacted as introduced there might be claims for the return of property. Court orders are the usual way of deciding what happens to the seized property.*

(emphasis added)

[206] Parliament's intention was clearly to have the court (not the Crown) decide how seized insignia should be dealt with. Given the controversy surrounding the Act, this is a principled approach. Thus, the contextual material supports the interpretation as to the necessity of a court direction.

[207] This interpretation is also consistent with the wording of comparator statutes, already discussed. Section 7(3) does not contain a provision giving the relevant Chief Executive — here it would be the Commissioner of Police — the power to destroy or dispose of the insignia.<sup>71</sup> Nor does it vest the insignia in the Crown so as to give the Commissioner of Police that power, at least by implication.<sup>72</sup> The absence of such provisions strongly suggest that Parliament intended for the court to make relevant directions.

[208] Finally, the Crown raises two problems with the interpretation I have settled on. First, it is said that the necessity for a court order will place an undue burden on the court's resources. That suggested problem is easily dispensed with. In practice, in the circumstances outlined by the Crown, an unopposed application could be

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<sup>71</sup> See s 32(2) of the Misuse of Drugs Act 1975 as discussed at [89] previously. See also, s 189 of the Customs and Excise Act 2018 discussed at [85] and the Marine Reserves Act 1971 discussed at [86].

<sup>72</sup> See 10G of the Marine Reserves Act 1971. See also for examples above n 19.

determined by the court very quickly — in the same way orders for destruction are now made in other situations at the time of sentence. The Crown’s foreshadowed difficulty is more apparent than real. Where third parties are involved, then of course more time will be needed but there is not getting around that.

[209] Second, the Crown says in support of its interpretation that “the police and the District Court have also adopted this interpretation in almost all of the dozens of prosecutions under s 7 concluded to date.” I have no information confirming that, other than the submission from the bar. But in any case, the real question is what s 7(3) allows. In my view, if that is the practice, then there is no basis for it, and it must stop. Also, I am by no means sure that this has been the standard practice. In both this case, and the associated case of *Gray-Gill*, the police (correctly) sought a court order for destruction of the insignia at the time of conviction. The police’s application is recorded in the summary of facts. So, any such practice relied on by the Crown has not been universal.

[210] There is also a practical problem arising from the Crown’s interpretation that it has rather skated over. The Crown acknowledges that it would be appropriate for it to delay destruction for a reasonable period to allow for any applications to be made. But what is a reasonable period? And from whose perspective? And what happens if, after destruction by the Commissioner, a third-party application materialises? It is much the safer option in this case for the court to provide supervisory oversight as to destroying or otherwise disposing of the patch.

## **Conclusion**

[211] I therefore conclude that Judge Rowe, in his very careful decision which deserves considerable respect, reached a conclusion that was wrong in law. Section 7(3) of the Act provides for the following two-step process, which I summarise as follows:

- (a) If a defendant pleads guilty to, or is convicted of, an offence against s 7(1) of the Act, the gang insignia concerned is forfeited to the Crown under s 7(3)(a). This is the first step in a two-step process.

- (b) Forfeiture is automatic and absolute. Upon forfeiture to the Crown, a defendant irretrievably loses their insignia.
- (c) The forfeited insignia is then in the custody of the Crown (usually the police).
- (d) The insignia remains in the Crown's possession until an application is made to the court. This is the second step, under s 7(3)(b).
- (e) Usually, the application will be made by the police, but potentially can be made by a third party or even the defendant. The application must be for the insignia to be destroyed, or otherwise permanently disposed of depending on the nature of the insignia and the manner in which it is displayed (e.g. on a car or attached to some other item). See paras [72] [76] previously for a fuller discussion.
- (f) Such an application may be made at the time of the defendant's guilty plea or conviction, or at any time thereafter.
- (g) Whether the insignia is "destroyed or otherwise disposed of", the one thing that s (7)(3) does not permit is for the forfeited insignia to be returned to the defendant. The two-step process cannot be reversed.
- (h) The meaning of the subsection is precise and clear. The necessary and clear implication of the subsection is to override the common law right to own personal property.
- (i) It is not possible to find a tenable meaning that is consistent, or less inconsistent, with the rights affirmed in NZBORA. Parliament's intention is clear and must be given effect to.

## **Result**

[212] This Solicitor-General's appeal is allowed. The direction to return the gang insignia to Mr Leef is quashed.

[213] This Court previously made an interim order suspending the District Court direction for the return of the gang insignia to Mr Leef. For the record, that order can now be made permanent.

[214] The matter is referred back to the District Court, in light of this decision, to make an order for the destruction of the gang insignia, or to deal with any other application that might arise — save for the return of the insignia to Mr Leef.

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**Becroft J**