MAHONEY

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE

Not Restricted

No. 03069 of 2013

IN THE MATTER OF THE *PROCEEDS OF CRIME ACT 2002* (CTH)

AND

IN THE MATTER OF PROPERTY SUSPECTED OF BEING THE PROCEEDS OF AN INDICTABLE OFFENCE AND/OR THE INSTRUMENT OF A SERIOUS OFFENCE

AND

IN THE MATTER OF AN APPLICATION BY:

THE COMMISSIONER OF AUSTRALIAN FEDERAL POLICE — Applicant

v

MAH MENG LING and OTHERS — Respondents

JUDGE:	DIXON J
WHERE HELD:	MELBOURNE
DATE OF HEARING:	7 and 8 MAY 2014
DATE OF JUDGMENT:	17 JUNE 2014
CASE MAY BE CITED AS:	COMMISSIONER OF AUSTRALIAN FEDERAL POLICE v MAH & ORS
MEDIUM NEUTRAL CITATION:	[2014] VSC 262

PROCEEDS OF CRIME – Application for examination orders – Extant application for revocation of related restraining order – Money in bank account – Discretionary considerations - *Proceeds of Crime Act 2002* (Cth) ss 32(b), 42, 75(3), 76, 79(3), 79A, 94(5), 94(6), 94A(8), 94A(9), 104(6), 104(7), 180, 183, 186(2) and 19, *Criminal Code Act 1995* (Cth) s 400.9(1), *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 142.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr J. Rapke QC with Mr S. McGregor of counsel	Australian Federal Police Proceeds of Crime Litigation
For the first Respondent Mah Meng Ling	Mr J. Burnside QC with Mr P. Haag of counsel	Charles Fice Solicitors
For the second Respondent Wong Chang Song	Mr C. Juebner of counsel	Earl & Associates

HIS HONOUR:

1 The Commissioner of the Australian Federal Police ("the Commissioner") has the benefit of restraining orders[1] under ss 18 and 19 of the *Proceeds of Crime Act 2002* (Cth) in respect of money in various bank accounts owned by the first defendant Mah Meng Ling (Mah) and the second defendant Wong Chang Song (Wong). The Commissioner now applies, based on the first of those restraining orders, for an examination order under s 180 of the Act against the defendants. Mah has applied to set aside the initial restraining order and when the Commissioner's application came on, both Mah and Wong intended to, and now have, made a like application in respect of the more recent restraining orders. Having retained lawyers in the jurisdiction, Mah and Wong have been served with this application and supporting affidavits. The remaining defendants, Wong Pen Wah (Wong Snr), Wong Shwu Bing (Ms Wong), and Naina Mohamed Bin Sahul Hamid (Hamid) reside outside the jurisdiction, in Malaysia, and the Commissioner proceeded against them *ex parte*. Mah and Wong opposed the application and applied for their applications to set aside the restraining orders to be set down for hearing.[2]

2 I commence with some relevant procedural history. On 18 June 2013, Ginnane J granted the Commissioner's application for a restraining order in respect of two nominated accounts with a combined balance of $4.3M in Mah's name at the Mount Waverley branch of the National Australia Bank (the NAB restraining order). That restraining order was made *ex parte*.

3 On 20 June 2013, the Commissioner applied for a forfeiture order.

4 On 23 July 2013, Mah filed an affidavit that foreshadowed an application for revocation of the NAB restraining order[3] and she filed that application on 24 September 2013. There was an application made by the Commissioner for discovery

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1 Orders of Ginnane J made 18 June 2013 and 11 April 2014.

2 It is convenient to consider Wong's revocation applications with those of Mah, as they will, in all likelihood, in due course be heard together.

3 On 26 July 2013, Macaulay J extended time for filing that application.

from Mah, which Ginnane J refused,[4] and Mah applied for an exclusion order on 17 December 2013.

5 The Commissioner filed the present application for examination orders on 13 February 2014. Mah filed her application to set the revocation application down for hearing on 18 February 2014.

6 On 11 April 2014, Ginnane J granted[5] two further restraining orders on the Commissioner's application. The first order restrained four nominated accounts in Wong's name at the Box Hill branch of the ANZ bank and any other ANZ account in his name (the Wong restraining order). The second order restrained a nominated account in Mah's name at the DBS Hong Kong bank in Hong Kong (the Hong Kong restraining order). Revocation applications in respect of these restraining orders were filed on 8 May 2014.

7 Mah is a Buddhist nun who is the spiritual leader and President of a Buddhist Temple in Malaysia. On this application, the property alleged by the Commissioner to be proceeds of crime is the $4.3M in the National Australia Bank accounts. She says that the money is her property, which she intended to use to purchase and establish a Buddhist centre in Melbourne. The Commissioner points to the fact that a significant part of the money - he alleged $800,000, but the correct figure may be $617,300 - was deposited by 78 cash deposits of less than $10,000 each made in Australian banks.

8 There is evidence of investigations that the Commissioner has undertaken upon becoming aware of the National Australia Bank accounts and since the NAB restraining order, which I will come to later.

9 The Commissioner's application for examination orders identified the NAB accounts as the property that is the subject of the restraining order supporting the application. There are five proposed examinees:

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4 *Application by Commissioner of the Australian Federal Police* [2013] VSC 686.
5 *Application by the Australian Federal Police (No.2)* [2014] VSC 191.

(a) Mah is nominated as claiming an interest as owner of the property;

(b) Wong Snr has deposed to being an adviser to Mah, and is intimately involved in her financial affairs, having deposed to making internet transfers into one of the restrained accounts;

(c) Ms Wong assisted in opening the restrained accounts; and

(d) Hamid has been involved in remitting money into the restrained accounts.

10 These proposed examinees will be examined about the property, including the circumstances surrounding the opening of the restrained bank accounts and the origin of the monies deposited into those accounts. I pause to observe that the application appears poorly framed as the section envisages an examination about the affairs of a person rather than about the property. The application also sought production of enumerated classes of documents. Although that relief was not pressed, the categories of documents sought, in some instances, appear to relate to the affairs of Mah other than in connection with the property. It may be open to the court to make an examination order in constrained terms.

11 The Commissioner's entitlement to the examination orders that he seeks is found in s 180 of the Act.

> **Examination orders relating to restraining orders**
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> (1) If a restraining order is in force, the court that made the restraining order, or any other court that could have made the restraining order, may make an order (an examination order) for the examination of any person, including:
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> (a) a person whose property is, or a person who has or claims an interest in property that is, the subject of the restraining order; or
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> (b) a person who is a suspect in relation to the restraining order; or
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> (c) the spouse or de facto partner of a person referred to in paragraph (a) or (b);
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> about the affairs of a person referred to in paragraph (a), (b) or (c).

(2) The examination order ceases to have effect if the restraining order to which it relates ceases to have effect.

12 Restraining orders are presently in force and this court may make an examination order. Four observations about the section are pertinent. First, the parties accepted, correctly, that the word 'may' shows legislative intent that whether such an order is made is in the discretion of the court.[6] Second, any person may be the subject of an examination order, not just the persons specifically nominated in the subsection. Third, the examination order is dependent on the restraining order to which it relates and an examination order ceases to have effect if the related restraining order ceases to have effect. Fourth, although any person may be examined, the subject matter of the examination is the affairs of owners of restrained property, persons who claim or have an interest in the property, suspects, and the spouse or de facto partner of owners. 'Affairs,' 'property' and 'interest' are defined terms.[7]

> "**affairs**" of a person includes, but is not limited to:
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> (a) the nature and location of property of the person or property in which the person has an interest; and
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> (b) any activities of the person that are, or may be, relevant to whether or not the person has engaged in unlawful activity of a kind relevant to the making of an order under this Act.
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> "**property**" means real or personal property of every description, whether situated in Australia or elsewhere and whether tangible or intangible, and includes an interest in any such real or personal property
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> "**interest**", in relation to property or a thing, means:
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> (a) a legal or equitable estate or interest in the property or thing; or
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> (b) a right, power or privilege in connection with the property or thing;
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> whether present or future and whether vested or contingent.

13 The separate applications were heard together.[8] Section 182 of the Act provides that an examination order can only be made on application by the responsible authority for the principal order, or the application for a principal order, in relation to which the examination order is sought. In this case, the Commissioner is the responsible authority. The section also provides that a court must consider an application for an

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6 *Lee v Director of Public Prosecutions (Cth)* [2009] NSWCA 347 (22 October 2009), [49].

7 See s 338 *Proceeds of Crime Act 2002* (Cth).

8 See s 315A *Proceeds of Crime Act 2002* (Cth).

examination order without notice having been given to any person if the responsible authority requests the court to do so. The Commissioner has requested that I determine this application *ex parte* against Wong Pen Wah, Wong Shwu Bing, and Naina Mohamed Bin Sahul Hamid.

14 I accept that an examination order can be made even though a s 42 revocation application has been initiated. Noting in the structure of the Act precludes that outcome. However as I will later explain, the initiation of a s 42 revocation application is a matter that is relevant to the exercise of my discretion.

15 The process of examination, once an examination order is made, is controlled by an approved examiner.[9] The Commissioner, as the responsible authority, applies to an approved examiner who may give a person who is the subject of an examination order an examination notice for that person's examination.[10] The approved examiner has a discretion whether to issue an examination notice, although the circumstances in which an examination notice may be given are constrained. Section 183 states:

> (2) However, the approved examiner must not give the examination notice if:
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> (a) an application has been made under section 42 for the restraining order to which the notice relates to be revoked; and
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> (b) the court to which the application is made orders that examinations are not to proceed.
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> (3) The fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) does not prevent the approved examiner giving the examination notice.

The Commissioner did not press for the orders that were specified in the application for the production of documents as part of the examination order because the form and content of an examination notice is provided for by s 185 and includes a power to require the production of documents. These are matters for the approved examiner.

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9 As to this office, see s 183(4) *Proceeds of Crime Act 2002* (Cth).

10 s 183(1) *Proceeds of Crime Act 2002* (Cth).

16 An examinee can be compelled to answer questions.[11] An examinee who fails to attend in response to a notice can be punished,[12] as can an examinee who attends and refuses to answer questions.[13] The rights to decline to answer a question or to produce a document in the examination on the grounds of self-incrimination or exposure to a penalty have been expressly removed.[14] The use of evidence obtained at an examination is limited.[15] An answer given or a document produced, cannot be introduced in civil or criminal proceedings against the examinee except in specified situations, including criminal proceedings for giving false and misleading information, in proceedings on an application under this Act or proceedings ancillary to an application under the Act.

17 The Commissioner contended that the scheme of the Act is that evidence received at the examination can be used in the hearing of all applications, whether for revocation, exclusion, or compensation. Mah and Wong disputed this contention in part. They did not dispute that evidence obtained at an examination could be used on applications, but submitted that the Act demonstrated a predisposition against an examination order being made while a revocation application was pending, which had the practical effect that on a revocation application the Commissioner is not aided by evidence obtained at an examination. I will return to this contention.

18 The constraint in s 183 on giving an examination notice when an application has been made to revoke the restraining order to which the notice relates operates on the discretion of the approved examiner, not that of the court – s 180 contains no like provision. That is not to say that an application to revoke a restraining order is not relevant to the court's discretion whether to grant an examination order, as s 180(2) makes clear. The circumstances of such an application may be relevant, which relevance is best understood by having regard to the statutory purposes and the statutory scheme about which I will say a little more.

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11 s 187(5) *Proceeds of Crime Act 2002* (Cth).
12 s 195 *Proceeds of Crime Act 2002* (Cth).
13 s 196 *Proceeds of Crime Act 2002* (Cth).
14 s 197 *Proceeds of Crime Act 2002* (Cth).
15 s 198 *Proceeds of Crime Act 2002* (Cth).

19 The principal objects of the Act, relevant for present purposes are:

(a) to deprive persons of the proceeds of offences, the instruments of offences, and benefits derived from offences, against the laws of the Commonwealth ...;

(b) to punish and deter persons from breaching laws of the Commonwealth ...;

(c) to enable law enforcement authorities effectively to trace proceeds, instruments ...;

(d) to give effect to Australia's obligations under the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, and other international agreements relating to proceeds of crime.[16]

20 In *Lee v Director of Public Prosecutions (Cth)*,[17] an issue before the New South Wales Court of Appeal was whether the primary judge properly refused a stay of an application for an examination order. Like this application, the appeal raised important questions with respect to the proper construction and operation of the Act. The issues in that case were not the same issues that I must determine but, because this proceeding is an exercise of federal jurisdiction, I should not decline to follow principles established by an interstate intermediate appeal court under the same Act unless persuaded that the decision was distinguishable or plainly wrong.[18] The Court of Appeal set out at some length its analysis of the nature of the statutory scheme created by the Act and I need not repeat that exercise.[19] I am content, with respect, to adopt the Court's analysis, merely noting some of the Court's conclusions that assist my task.

21 The Act permits an application for a restraining order in respect of identified property where there are reasonable grounds to suspect that the property is the

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16 s 5 (a), (c), (e), (f) *Proceeds of Crime Act 2002* (Cth).
17 [2009] NSWCA 347, (2009) 75 NSWLR 581.
18 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 81 ALJR 1107, [135].
19 *Lee v Director of Public Prosecutions (Cth)* [2009] NSWCA 347, [14] – [31].

proceeds of an indictable offence and the application is supported by an affidavit of an authorised officer stating the officer's suspicion to that effect.[20] If those conditions are satisfied, the order must be made. Once a restraining order has been in force for six months, a forfeiture order is liable to follow, virtually as of course, unless the person interested in the property has sought to have the property excluded from the restraining order.[21] Before an exclusion application can be entertained, the Director must have had an opportunity to examine, pursuant to an order under s 180.

22 An important aspect of the Act is to provide for the confiscation of the proceeds of suspected crime, in the absence of criminal proceedings or conviction. Section 315(2) provides that 'the rules of construction applicable only in relation to the criminal law do not apply in the interpretation of this Act.' However, there will not be found a statutory intention to modify or abolish fundamental rights or freedoms absent clear and unambiguous language. Express reference to such rights is not required, but the intention to modify or abolish them must arise by necessary implication from the terms of the statute. The Act manifests a plain and clear intention to effect the confiscation of property in the circumstances that it prescribes, regardless of the interests of any person in the property. The taking of the property in the prescribed circumstance is the primary purpose of the legislation. The interests of a person in property that is the subject of a valid restraining order are deliberately and expressly at risk of confiscation, absent affirmative steps to exclude property on the application of the interested person. There is thus a clear and manifest intention to interfere with property rights.

23 The legislative scheme recognises in express terms the right not to incriminate oneself but removes this right in respect of answers and documents sought in an examination under the Act. While it provides protection against use of such answers and documents, that protection does not extend to proceedings or an application under the Act itself, whether or not there could have been objection on the grounds of self-incrimination in those proceedings. The answers or documents are

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20 s 19 *Proceeds of Crime Act 2002* (Cth).

21 s 49(1)(c) and (3) *Proceeds of Crime Act 2002* (Cth).

inadmissible in evidence, but their use in other ways is not excluded. This reflects the purposes of an examination. Certain other protections are provided, at the discretion of the examiner, as directions are permitted which prevent or restrict the disclosure of answers or documents to the public, but otherwise, the scope of the use to which an answer or a document may be put will depend upon the purpose of the examination.

24 The Act provides for a variety of other forms of order beyond a restraining order, an examination order, an exclusion order, and a forfeiture order. Relevantly, to avoid forfeiture, a person may apply[22] to revoke the restraining order, pursuant to s 42 of the Act. The court may revoke the restraining order if satisfied that there are no grounds on which to make the order at the time of considering the application to revoke the order, or that it is otherwise in the interests of justice to do so.

25 The precise basis of this jurisdiction is yet to be mapped in the cases. In *Lee*, the court remarked:

> It has been held that this provision imposes on the applicant a burden of so satisfying the court. Because the Director may adduce material to the court and the applicant may need to rely upon his or her own evidence, there is no reason to suppose that the factual basis for the court's determination need be the same as that relied upon when the original order was made. Whether the relevant statutory basis for an order must be the same as that relied upon in making the restraining order has not been decided: see *Director of Public Prosecutions (Cth); re Sunshine World Holdings Ltd* [2005] NSWSC 117; 62 NSWLR 400 at [19] (Greg James J). The nature of the test has also not been determined, the possibility that "irrational, improper or unlikely grounds for suspicion" might be sufficient to sustain an order having been left open in *Director of Public Prosecutions (Cth) v Tan* [2003] NSWSC 717 at [14] (Shaw J). It seems preferable, however, to treat s 42(5) as requiring satisfaction at the time of the revocation hearing as to the absence of such grounds as could have been relied upon to justify a restraining order, being the grounds specified in whichever of ss 17, 18 or 19 formed the basis of the original order. On that view, the order would be liable to revocation if the Court were satisfied that there were no reasonable grounds for the suspicion which had been relied upon. None of these issues need be resolved for present purposes.

26 In *Lee*, the Court of Appeal declined to stay the application for an examination order because it was premature to do so. The applicant was not about to be examined. A

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22 Within 28 days or any extension allowed under s 42(1A) of the Act.

court was yet to make an examination order and, *ipso facto*, an approved examiner had not issued an examination notice.

27 The Commissioner submitted that an ancillary, and equally important, effect of the legislative scheme is to ensure that the court that is called upon to adjudicate on competing claims will be in full possession of all relevant evidence and information. The Commissioner noted that Ginnane J[23] 'seemed to be troubled' by the possibility that documents alluded to or referred to by Mah in her affidavits might be relied on without having been produced. I do not read Ginnane J's judgment as expressing that he was 'troubled' and the admissibility of the affidavits on which the revocation application will proceed is a matter for another time.

28 Having regard to the purpose and structure of the statutory scheme, I consider that the discretion whether to grant an examination order is conditioned by:

(a) the proposed examinee and the subject matter of the proposed examination;

(b) whether there are material investigations to be carried out by that process that would inform applications under that Act;

(c) the circumstances of the restraining order that is in force;

(d) whether there is an application to set aside or revoke the restraining order and, if so, the basis for and merits of that application;

(e) the nature and basis for the suspicions that founded the application for the restraining order; and

(f) whether there are other applications, such as for forfeiture or exclusion.

29 Before turning to those considerations, I should set out the background to the applications from the affidavits.

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23 *Application by Commissioner of the Australian Federal Police* [2013] VSC 686, [76].

30 The Commissioner relied on the affidavit of Ms Rix, an AFP agent, to obtain the NAB restraining order. In June 2013, Ms Rix suspected that Mah travelled to Australia to open bank accounts, and has not returned, and unknown persons have deposited money into the accounts for unknown reasons. She suspected that the moneys in the NAB accounts were:

(a) proceeds derived from the offence of dealing with property suspected of being the proceeds of crime, contrary to s 400.9(1) of the *Criminal Code Act 1995* (Cth); and

(b) an instrument of the offence of structuring deposits in a manner that does not give rise to a threshold transaction, contrary to s 142 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (money laundering legislation),

each of which is a serious offence as defined by the Act.

31 Mah states she is a Buddhist nun, the head of a Buddhist order, centred in a temple in Kuala Lumpur, where she lives. She had access to a very large amount of money in cash. These funds came from two sources, personal donations to her that was money available for her personal use and funds generated by the temple and its various associated entities that were available to her to use in furtherance of both the temple and Buddhism. These funds had been kept hidden in tins under the floorboards of the temple. Acting on advice from Wong Pen Wah (Wong Snr), she opened some bank accounts in Hong Kong with Citibank and DBS Bank Hong Kong.

32 Mah stated that in order to spread Buddhism and to provide a haven against the consequences of any racial or religious problems in Malaysia, she came to Melbourne in December of 2012 to investigate the possibility of setting up a temple or some Buddhist centre here in Melbourne, and to that end looked for potential sites. When in Melbourne, Mah opened two bank accounts with the National Australia Bank in Mt Waverley, apparently choosing that branch as she happened to be in the area at the time. Eight days after she arrived in Australia, Mah returned to

Malaysia. The Commissioner believes that she has not returned to Australia since that time.

33 Wong Snr supported Mah's account confirming that he was her financial adviser. He stated that the funds were transferred to Australia into the NAB accounts in two ways, by telegraphic bank transfer from the Hong Kong accounts by the relevant banks and by a money changer in Selangor, Malaysia, Rubiy Traders (Hamid), who offered exchange rates that were more advantageous and did not charge commission. Wong Snr gives some details of these transfers that are not presently relevant.

34 Hamid transferred the funds through another money changer, a friend of his based in Singapore who agreed to deposit the required amount of Australian currency in the NAB accounts. Apparently, funds in Malaysian Ringgit were deposited into a number of Malaysian bank accounts controlled by the friend who then used money changers in Australia and Indonesia to 'cause the appropriate sums of Australian dollars to be deposited onshore in Australia into Madam Mah's NAB bank account.'

35 Ms Rix stated that after the NAB accounts were opened, in excess of $4 million came into Australia through those bank accounts. She had observed that some of the money was transmitted through money remitters rather than banking channels. Some of the money was deposited into the accounts by multiple deposits each under $10,000, made at about the same time. There were 78 deposits made at different branches of banks throughout Victoria and New South Wales in amounts under the threshold reporting limit under money laundering legislation. Most of these transactions were between January and June 2013. These deposits were made by third parties who consistently refused to provide identification to bank staff and appeared evasive during the transaction. The application form at the NAB stated that the account owner's occupation was 'home duties'. Other inquiries showed that the applicant was in Australia for 8 days on a tourist visa.

36 The Commissioner knew this much in June 2013 when he applied for the NAB restraining order. The Commissioner's suspicion was that the bank accounts were the proceeds of a crime, money laundering. The application for the NAB restraining order proceeded on the basis that the multiple deposits totalled about $800,000 showed conduct described as structuring. Structuring is conduct by which money is deposited into accounts in a structured way, which is designed to avoid money laundering legislation reporting conditions.

37 Ms Rix described the basis for her suspicions as at June 2013 in the following terms.

> It was based on the information that I had available to me at the time relating to the opening of the bank account, the transactions that had occurred on the bank account, Ms Mah's travel to Australia, the descriptor of her occupation, the visit, the type of visa she arrived on, and her, what appeared to be no connections to the jurisdiction which, in my mind, gave rise to suspicions of being a member of a syndicate that was engaged in moving money to Australia. The deposits commenced, particularly the structured deposits, Your Honour, commenced when Ms Mah was out of the country. There was nothing to show that she was in the country. She had not - she had departed Australia on 8 December 2012 and had not returned using that identity. The deposits were made both in Sydney and in Melbourne on the same days, often at similar times or at branches that were not geographically close to each other, so that would have required the organisation of other persons to make those deposits into that account. It could not have been done by an individual acting alone. I would have had to have been a group of persons and my knowledge of this type - these type of deposits is that they are performed by members of a syndicate and that that syndicate is controlled, often times, by persons offshore. I had no indication as to the purpose of her travel, all I knew was that she had travelled to Australia for a period of approximately eight days. She had travelled - she had entered Australia on a visitor's visa. I had no information about any travel companions, if there were any, and again I drew upon my knowledge and my experiences to ground my suspicions that she may have travelled to Australia acting upon instructions, or out of her own making, to open those accounts in order to facilitate the deposit of that money into those accounts. It was unusual, I felt, that they were opened at a suburb and branch, particularly where she was here on a tourist visa. I would have expected that tourists would have probably have stayed in the central business district, but again, I had no knowledge of any connection that she may or may not have had to the jurisdiction.

38 The Commissioner then became aware of the matters revealed by Mah and Wong in their affidavits in support of the revocation and discovery applications after the NAB restraining order was made. The Commissioner later became aware of further bank accounts containing large sums of money that had not been disclosed in those

affidavits by Mah. In March 2014, AU$930,000 was moved from these accounts to accounts in Hong Kong. The NAB restraining orders, *prima facie*, defined the matters for examination. As I have already noted, Ginnane J granted the Commissioner's application for further restraining orders. It was clear that the examinations, if permitted, would be broadly directed to enable the Commissioner to probe all aspects of this matter, to understand the basis of the resistance to forfeiture, to identify relevant documentation and other relevant witnesses and provide a basis for assessing whether there was merit in the contentions of the examinees.

39 The Commissioner submitted that examining persons to understand the basis of the applications for revocation of the restraining order was a proper purpose under the Act. An examination was, the Commissioner submitted, for the purposes of gathering information relevant to the primary purpose of the Act that is to determine whether or not in a particular instance the restrained moneys were the proceeds of crime and whether appropriate forfeiture orders should be made. Further, the Commissioner submitted that I could not constrain a s 180 examination. The matters to be covered in the examination, how it would be conducted, and the documents that might be required to be produced are matters for the approved examiner who sets the parameters of the examination by the notice given under s 183 of the Act. The breadth of the matters that may be the subject of examination follows from the statutory language adopted.

40 Invited to identify the evidentiary basis of the application for examination orders, the Commissioner nominated all of the substantive affidavits that had been filed and served. The Commissioner submitted that in exercising my discretion as to whether there should be an examination order, I ought to take into account all of the circumstances that might be the subject of an examination. In particular, the Commissioner submitted that Mah's explanation of her activities in Melbourne relating to the NAB accounts was incomplete and the examination, having an investigative purpose, would test the claim that the activities on the account were legitimate. That investigative purpose meant that all of the financial affairs disclosed

to date were interrelated, and appropriately the subject of an examination based on the NAB restraining order.

41 However, Mah and Wong submitted that any examination order must be limited to that sought by the application and has to relate only to the restrained property that is identified by the NAB restraining order. The Commissioner did not suggest, they submitted, that money in the NAB accounts had been channelled through those other bank accounts. The more recent affidavits do not refer to the NAB accounts; rather what is alleged is a wholly different set of transactions. Mah and Wong submitted that as there are separate restraining orders, there must be separate applications for examination. This consequence followed because there are extant applications to revoke all restraining orders. The possibility is open that when those applications are resolved one or more restraining orders may be revoked or amended. That consequence would necessarily alter the subject matter of an examination, if not result in the examination order falling away. The Commissioner, they submitted, could not legitimately introduce new material about other bank accounts relating to a different restraining order or amend the current application for examination to include the subject matter of separate restraining orders that are the subject of separate revocation applications.

42 A preliminary issue arose. Was the Commissioner entitled to rely upon all material filed in these proceedings, including that in support of the most recent restraining orders as well as material that was filed last year in support of the application to revoke the NAB restraining order? Was the Commissioner to be restricted to the material on which he sought the NAB restraining order in June 2013? I ruled that all of the affidavit evidence was admissible on the application, being satisfied that the matters deposed to in the disputed affidavits could rationally affect the assessment that I must make of the matters to be considered in the exercise of my discretion.

43 Following my ruling, Ms Rix was cross-examined. The substance of her evidence was that her suspicion was aroused by the fact of structured deposits. Ms Rix agreed that in June 2013 she understood that a deposit could be a structured deposit even if

it is more than $10,000, although she accepted that her understanding of what constituted a structured deposit did not accord with s 142 of the money laundering legislation. Ms Rix explained that persons might attempt to conceal the quantum of deposits into their bank accounts by breaking it up into a variety of amounts, some of which may be above the reporting threshold, and some of which may be below that threshold. As an investigator looking at cash deposits into bank accounts, she considered that deposits greater than $10,000 may be made in order to conceal the total quantum of cash being deposited into that account over a period of time, when that total is broken down into smaller amounts that may be above or below the threshold. Ms Rix accepted that of a total sum found in the NAB accounts of approximately AU$4.3M, the only amounts in those accounts that could have been structured deposits, in the sense that they were below the threshold, was a total of AU$617,300. There were larger deposits within the cash range of AU$20,000 - $25,000. Including those amounts raised her suspicions about a sum of approximately AU$800,000. There were larger international funds transfers in the hundreds of thousands of dollars that accounted for about AU$3M of the funds. Those large funds transfers could not be structured deposits that contravened s 142 of the money laundering legislation.

44 The only criminal activity suspected by Ms Rix when the NAB restraining order was obtained was structuring. She referred to s 400.9 of the Criminal Code making specific reference to moneys or property that is derived from structuring, so that if money is the instrument of structuring that money is also a proceed of the crime. Although Ms Rix accepted that only AU$617,300 could have anything to do with a structuring or possible structuring offence, she contended that the accounts were tainted by the money that has been structured into them. On that basis, all of the funds in the accounts were suspected of being proceeds of crime. This proposition is one of law and it was not developed on this application, but Ms Rix conceded that her suspicion was that approximately AU$3.7M in the NAB accounts was tainted because it may have deposited money that was the subject of structured transactions. Ms Rix was not aware in June 2013 of the source of the deposits into the accounts

and could not determine whether the funds above AU$617,300 came from a legitimate source. In respect of the balance of approximately AU$3.8M, Ms Rix agreed that those funds could not be an instrument of structured deposits into the NAB accounts, but she suspected that had those funds been deposited into another account in a structured fashion and then transferred to the NAB accounts, the total sum could have been an instrument of structuring. She agreed that her affidavit in support of the NAB restraining order did not disclose any evidence about other cash deposits or other deposits into the account beyond the 78 transactions. Her statement of her suspicion that all of the money in the NAB accounts was an instrument of the offence of structuring deposits would have been better expressed if preceded by 'in part' referring to the amount of AU$617,300 only.

45 Ms Rix suspected that some of the money in the accounts might have come from 'cuckoo smurfing'. This activity was explained in these terms. The process starts with an innocent overseas customer (such as Mah) of a financial market player (such as Rubiy Traders) and an innocent Australian customer (Mah) of a financial market player (NAB). Money to be deposited by the innocent overseas customer is handed over to the overseas financial market player (as a transfer agent). Instead of being sent to the Australian recipient's account, an equivalent amount is deposited in the Australian customer's account from illegal sources, not uncommonly by structuring. The essence of cuckoo smurfing is that an innocent customer, both overseas and in Australia, who is expecting to send or receive a specific sum of money, unwittingly respectively pays or receives that money, but no money is in fact transmitted because an equivalent deposit is made from dishonestly obtained funds within Australia. Both the sender in Malaysia and the recipient in Australia could be innocent victims of a money-laundering scheme operated by others that permits those others to receive funds overseas from an apparently legitimate source in return for a deposit in Australia of illegally sourced funds.

46 Ms Rix explained that her suspicion was based on the manner in which AU$617,300 was deposited, and given the organised nature of the deposits over the course of a

number of days, that it had been deposited by a syndicate or an organised group of persons. She had no knowledge of the funds transferred by Mah to Rubiy Traders, or evidence that such funds left Malaysia or of what happened to Mah's funds. She now has evidence that Rubiy Traders entered into arrangements with other money remitters that I described above but did not have evidence that Mah's money given to Rubiy Traders came into Australia, or that it left Malaysia. Ms Rix considered that the evidence from Hamid and Wong Snr confirmed her suspicion that the money given to Rubiy Traders had been handled by a money remitting syndicate outside of traditional banking channels. The information provide by Hamid did not demonstrate that the funds ended up in any bank accounts that could be traced to Mah or Wong and her inquiries about the Australian deposits turned up deposit vouchers that either did not identify the depositor at all or provided inadequate information to trace the depositor. Ms Rix agreed that in November 2013 she still suspected that some of the deposits were the result of structuring which could be linked to cuckoo smurfing.

47 Ms Rix had no information to found any suspicion other than that the criminal activity that she might be investigating was structuring until she received the affidavits of the proposed examinees. She then formed a view that the money that came from Mah into the NAB accounts could be income that Mah had not declared to Malaysian income tax authorities, given the further fact of money transfers out of Malaysia to Hong Kong. Ms Rix still entertains this suspicion but accepted that it was not a suspicion that she initially entertained as a viable proposition when the Commissioner sought the NAB restraining order. Since that time, a mutual assistance request through the Attorney-General's Department to Malaysia and Hong Kong has been initiated. The Malaysia request is confined to bank records in respect of an account identified by Wong Snr. The Hong Kong request is confined to bank records in respect of the DBS and Citibank accounts identified by Mah. Ms Rix agreed that the information provided in the affidavits assisted in framing the requests and she stated that the purpose of the requests was to obtain banking

documents that could confirm Mah's assertions and statement and provide information or corroboration about the transfer of money into the NAB accounts.

48 I am satisfied that there are numerous issues surrounding the operation of the NAB accounts that may be better understood following examinations and that there is a legitimate forensic purpose in the proposed examinations, particularly in the context of the extant applications for exclusion and forfeiture. I do not think that Mah and Wong suggested otherwise. Of itself, this is an important consideration in favour of granting the examination orders sought.

49 Mah and Wong raised a number of considerations that, they submitted, favoured refusal of the Commissioner's application. First, it was submitted that notwithstanding that the Commissioner no longer pressed for relief by order for production of enumerated classes of document, the application was an abuse of process, being substantially in furtherance of the same issues that were determined in the discovery proceeding. I am satisfied that the abandoned application for production of document sought production of substantially the same documents, discovery of which was refused by Ginnane J.[24] Mah and Wong submitted that multiplicity of proceedings is to be avoided.[25] The categories of conduct that may constitute an abuse of the process are not closed.[26] In *Rogers v R*[27] McHugh J observed that abuses of procedure usually fall into one of three categories: invoking court procedures for an illegitimate purpose, using court procedures in a manner unjustifiably oppressive to one of the parties or using court procedures to bring the administration of justice into disrepute.[28] While I accept that bringing proceedings that raised the same or similar issues to those determined in earlier proceedings can be unjustifiably oppressive,[29] I do not accept that the application for examination

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24 *Application by the Commissioner of the Australian Federal Police* [2013] VSC 686, [54]-[73].

25 Section 29(2) *Supreme Court Act 1986* (Vic); *Roberts v Gippsland Agricultural and Earthmoving Contracting Co* [1956] VLR 555, 564.

26 *Kermani v Westpac Banking Corporation* (2012) 36 VR 130, 152 [94], following *Michael Wilson & Partners Ltd v Nicholls* [2011] 244 CLR 427, 452 [89].

27 (1994) 181 CLR 251, 286.

28 See also *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, 452 [90]; *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256, 267 [15]; *PNJ v R* (2009) 83 ALJR 384, 386.

29 *Kermani v Westpac Banking Corporation* (2012) 36 VR 130, 152-158 [93]-[114].

orders is sufficiently similar to the application for discovery that was refused to warrant classifying this application as unjustifiably oppressive.

50 That argument may have had merit if the Commissioner had persisted with his application for production of enumerated classes of document. Had that application not been abandoned, the features of this application that might warrant the conclusion that he was unjustifiably oppressive could have been dealt with by refusing that aspect of the relief sought.

51 Further, as I have noted above, the power to require the production of documents in an examination resides in the approved examiner. As an examination order has not been made and an approved examiner appointed, the content of an examination notice has not been considered. In the context of the failed discovery application, it is premature to determine whether an examination might constitute an abuse of process.

52 Next, Wong and Mah submitted that the NAB restraining order was tainted because the Commissioner failed to disclose all that should have been disclosed and materially misstated the facts relied on. They submitted that it was unnecessary to seek a restraining order on an ex parte basis as the Magistrates' Court granted a freezing order over the NAB accounts on 14 June 2013. Those funds could have been preserved by extending that freezing order and allowing Mah an opportunity to be represented on the application for a restraining order over the funds. They contended that the Commissioner failed to inform the court that the ex parte restraining order was unnecessary to preserve the impugned funds from dissipation pending the hearing of the application for a restraining order. By proceeding ex parte and obtaining a restraining order, the Commissioner was advantaged because, on the application for the restraining order, the Commissioner bore the onus of proof.[30] That onus was more readily discharged at an ex parte hearing. Once Mah is the applicant for revocation of that order, the burden of proof shifts to her. Further, the Commissioner has obtained the forensic advantage of an opportunity to seek an

30 Section 317 *Proceeds of Crime Act 2002*.

examination order. I consider that a purpose of the statutory scheme is to give a forensic advantage to the Commissioner.

53 Mah and Wong further contended that the Commissioner failed to inform the court that there was no reasonable basis to sustain the suspicion that -

(a) a particular money laundering syndicate existed and that Mah was a member of that syndicate;

(b) Mah travelled to Australia for the purpose of opening Australian bank accounts;

(c) Mah was in Australia in furtherance of the purposes of an international money laundering syndicate of which she was a member; and

(d) all of the money in the frozen bank accounts was the proceeds of crime, in particular that the balance of the accounts above the sum of $617,300 was either an instrument of, or the proceeds of, money laundering.

54 Mah and Wong contended that the Commissioner failed to inform the court of other matters, including that:

(a) Mah may well have been the innocent victim of a 'cuckoo smurfing scheme';

(b) although required by s 15J of the Act to be served on Mah, the freezing order obtained on 14 June 2013 had not been served and no attempt was made to serve it;

(c) the Commissioner wrongly claimed that approximately $800,000 was deposited into the NAB accounts by way of 78 deposits under the reporting threshold which was untrue. The 78 deposits totalled $617,300; and

(d) the Commissioner incorrectly informed the court that the freezing order would expire on 18 June 2013 when it expired on 19 June 2013.

55 The merits of the extant application to revoke the NAB restraining order insofar as

they may be considered on this application are relevant to my discretion whether to grant an examination order. Most of the material on which that revocation application will proceed is now before the court. I will assume that the freshly issued applications to revoke or set aside the Wong restraining order and the Hong Kong restraining order will be based on similar considerations. I am satisfied that there are serious questions to be tried on these applications, which include a challenge to the basis for the Commissioner's suspicions that found the application for the restraining order as presently expressed. I need say no more than that, as the applications are yet to be heard. Mah and Wong submit that a powerful factor that should influence my discretion against granting an examination order is that the Commissioner is seeking to profit from an order that may be revoked.

56 Mah and Wong further submitted that the Commissioner used information from the affidavits they filed in support of a revocation order in breach of the obligation commonly described as a *Harman*[31] undertaking. The law recognises a substantive obligation, once described as an 'implied undertaking', not to use documents or information filed in court for a purpose unrelated to the conduct of proceedings. This principle is well established in Australian law.[32] The High Court has described the obligation in these terms:

> Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence. The types of material disclosed which this principle applies include ... affidavits.[33]

57 In essence, Mah and Wong allege that the mutual assistance requests that were made to Malaysia and Hong Kong were based upon information obtained from their affidavits and following those requests, the Commissioner advanced a new case theory based upon breach by Mah of Malaysian tax laws.

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31 *Harman v Secretary of State for Home Department* [1983] 1 AC 280.
32 *Hearne v Street* (2008) 235 CLR 125.
33 Ibid, 154 [96].

58 These propositions were put to Federal Agent Rix and I accept her explanation that the mutual assistance requests were limited to obtaining bank statements. The purpose of agent Rix's inquiries was, on her evidence, which I accept, wholly related to investigation of, or verification of, issues that arise in this proceeding. The information that was disclosed appears to be the identification particulars of certain bank accounts.[34] That information was given by Mah to demonstrate that the Commissioner's suspicions were misplaced. I am satisfied that the disclosure of that information in the circumstances described was not use of it for a purpose other than that for which it was given.

59 Mah and Wong submitted that if an examination order was granted, there was a risk that the Commissioner would use the examination to provide further information to partner agencies in Malaysia and Hong Kong. Further, any examination that is now conducted would be informed by information that had been provided to the Commissioner by those partner agencies because of the Commissioner's breach of the *Harman* principle. I disagree for two reasons. The statute governs use of material provided to an examination. Breach of the *Harman* principle ought not be anticipated and would need to be proved. Conceivably, proof of a *quia timet* risk of breach could be relevant to my discretion, but I am not presently satisfied that there is material risk of a breach of the *Harman* principle in the future through information to partner agencies in Malaysia and Hong Kong. At the appropriate time, the basis for exchange of information between partner agencies would need to be closely examined to make good such a claim. The issue has been raised and the Commissioner can take, and act on, advice in his future dealings with partner agencies.

60 Mah and Wong submitted that allowing an examination in these circumstances affords the Commissioner an illegitimate forensic advantage. Once the object and scheme of the Act is properly appreciated, it is clear that parliament intended that investigators be afforded a forensic advantage in their work tracing proceeds of

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34 The documentation for the mutual assistance requests was not in evidence.

crime and money laundering, and that this advantage has been expressly conferred.[35] The opportunity to build their knowledge base by examinations and production of documents is part of the information gathering process specified by the Act. In no sense can this process be regarded as affording an illegitimate forensic advantage. Having regard to the scheme of the Act, an examination that explored and tested information provided in the course of applications under the Act is unlikely to offend the *Harman* principle.

61 Mah and Wong contended that the forensic advantage of an examination order should be denied until the application for revocation is determined. They submitted that the foundation for the suspicions that support the restraining order has shifted. Initially, Mah was suspected of being a member of an international money laundering syndicate and that all of the money in the NAB accounts was an instrument of the offence of structuring deposits and was the proceeds of crime. Since that restraining order was granted, the Commissioner now seems to suspect that Mah has avoided Malaysian income tax, engaged in money laundering in Malaysia and currency offences in both Malaysia and Hong Kong.

62 The Commissioner submitted that I should grant an examination order to enable the revocation application to be conducted efficiently. The Commissioner submitted that the proposed examinees would not attend to give evidence on the revocation application or would not produce relevant documents. The examination would allow the Commissioner to examine the proposed examinees prior to the application occurring. Documents could be produced and inspected through the examination and any further inquiries arising out of these documents could be followed up. Counsel for Mr Wong pointed out that his client lives in Melbourne and would make himself available for cross-examination if required to do so. Further, the Commissioner could employ subpoenas or notices to produce to require particular documents to be made available at the hearing of the revocation application. There is no reason to suppose that the applicants will not be anxious to prosecute those

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35 See e.g. *Sherlock & Vagrand Pty Ltd (in liq) v Permanent Trustee Australia Ltd* (1996) 22 ACSR 16, 48.

applications successfully. Further, the opportunity to use technology, such as video link may alleviate some difficulties.

63 Counsel for Mah put two further submissions. First, as Mah was resident in Malaysia, the court should be slow to assert its jurisdictional power beyond territorial limits to interfere with the sovereignty of a foreign state.[36] Counsel submitted that where s 183 of the Act is read together with order 6.04(3), no specific power enabling service of an examination notice in Malaysia is revealed. Granting the application would require any examination notice given to an examinee to be served personally notwithstanding that there is no rule authorising the service to be effected overseas. I am not persuaded that any issue of interference with the sovereignty of Malaysia properly arises.

64 Secondly, counsel submitted that making an examination order would be futile for the reasons just advanced. There is no power under Chapter 6 of the Rules to order or authorise any examiner to serve an examination notice overseas. An authorised examiner is not an officer of the court. Rule 6.09 has no application to service of an examination notice. The court could not enforce compliance with the notice. That power rests with the examiner under Division 4 of the Act. Further, Mah would be beyond the reach of any attempts by the examiner to prosecute her for criminal offences under Division 4 of the Act in the event of non-compliance with an examination notice. Counsel submitted that the constraints in service of an examination notice in Malaysia and the enforcement of compliance of an examination notice militate against the court extending its jurisdiction to cover the legal territory of Malaysia. Futility is not conclusively established. For one thing, the proposed examinees appear co-operative and there is no reason to suppose that they will cease to be co-operative while substantial funds are frozen by restraining orders. Mah has not stated that her intentions to establish a Buddhist centre in Melbourne have been abandoned.

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36 Citing *Gloucester (Sub-Holdings) Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 1419, [16].

Conclusions

65 As I have stated, I am satisfied that there are material investigations to be carried out by examination of each of the proposed examinees that would inform applications under that Act. In particular, I have regard to the extant applications for forfeiture and for exclusion.

66 I have set out the circumstances in which the restraining order that is in force was obtained and the nature and basis for the suspicions that founded the application for the restraining order. Although the Commissioner's investigations have moved on from the initial suspicions that prompted the NAB restraining order, for the reasons that I have set out above there are serious questions to be determined on the applications to set aside or revoke the restraining orders. Of course, whether the restraining orders continue in their present or an amended form will be determined on the material considered at the time of the revocation applications.

67 It is common ground that the existence of the restraining order gives the court jurisdiction to make an examination order and that an examination order ceases to have effect if the related restraining order is revoked. I have already set out the substance of the submissions that the Commissioner failed to bring to the court's attention all material facts and failed to correct errors in the information that he placed before the court. Although the application for revocation of the NAB restraining order is not presently before me, I have looked carefully at the issues raised because the merits of that application weigh heavily on my discretion. Having formed the view that there are serious questions to be tried on that application and having regard to the nature of those questions, I consider that the Commissioner should not presently have an examination order.

68 A statutory preference for an examination not to proceed while an application for revocation of the related restraining order is extant is evident from s 183(2) of the Act. The sub-section precludes the approved examiner from giving an examination notice where an application for the revocation of a restraining order has been made, and the court to which the application is made orders that the examinations are not

to proceed. The Commissioner contended that those provisions provide protection for the rights of examinees at a stage after the court makes an examination order and that it is inappropriate for the court to refuse to make an order because the approved examiner is not able immediately to issue an examination notice. I do not accept this submission.

69 In my view, as Mah and Wong submitted, a careful reading of the whole Act reveals a predisposition against making an examination order while a revocation application is pending. A presumption that examinations ought not be ordered or conducted while a revocation application is on foot is discernible from the following matters:

(a) A restraining order must be in force before an examination order can be made [s 180].

(b) Any examination order ceases to have effect when the relevant restraining order ceases to have effect [s 180(2)].

(c) Section 183(2) expressly contemplates the court making an order that the examination not proceed if an application for revocation under s 42 of the Act is being made.

(d) Section 186(2) of the Act expressly contemplates the withdrawal of an examination notice or the cessation of an examination that has commenced if an application for revocation under s 42 has been made.

(e) The Act does not contain any other provision that expressly contemplates delaying an examination except for the provisions to which I have just referred.

(f) Numerous other provisions of the Act expressly confer a benefit on the Commissioner by precluding the opposing party from taking steps under the Act until the Commissioner has had a reasonable opportunity to examine relevant persons [s 32(b), s 75(3), s 76, s 79(3), s 79A, s 94(5) and (6), s 94A(8) and (9) and s 104(6) and (7)]. What is significant is that there is no similar

provision conferring upon the Commissioner the right to conduct examinations prior to the court determining an application for revocation of a restraining order.

70 The distinctive treatment of revocation orders in this way is unsurprising, given the statutory procedure by which they may be obtained, particularly the fact that, as in this case, restraining orders are commonly obtained *ex parte* and on the basis of suspicion. However, the course that I will adopt does not deny to the Commissioner the opportunity to seek any of the forensic advantages properly granted to him by the Act in dealing with the applications for exclusion and forfeiture.

71 I am not persuaded to exercise my discretion in favour of the Commissioner and grant his application for examination orders, but I propose, rather than refusing the application, to adjourn it for determination immediately after the resolution of the applications to revoke the restraining orders. Further, unless persuaded that there is good reason not to do so, I propose to hear together all extant applications to revoke the restraining orders. The alternative disposition would be dismissal of the application but if the revocation applications fail to wholly discharge the restraining orders, the Commissioner could simply renew his application.

72 I will hear counsel as to the appropriate directions to bring the revocation applications on expeditiously for hearing before me. Subject to any submission from counsel to the contrary, I will reserve the question of costs until the application is finally dealt with.

CERTIFICATE

I certify that this and the 28 preceding pages are a true copy of the reasons for judgment of Dixon J of the Supreme Court of Victoria delivered on 17 June 2014.

DATED this 17th day of June 2014.