IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No S110 of 2019

BETWEEN **SANKO LORDIANTO**

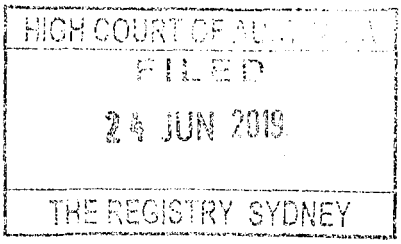
First Appellant

INDRIANA KOERNIA

Second Appellant

And **COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE**

Respondent



APPELLANTS' REPLY

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Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Reply to the respondent's submissions

2 The appellant uses terms as defined in its primary submissions.

A. The statutory scheme

3 The objects of an Act provide little assistance in resolving ambiguity in an exception provision such as para 330(4)(a). As D C Pearce and R S Geddes observed in *Statutory Interpretation in Australia*, 8th ed, LexisNexis Butterworths, 2014 at [9.5], '[e]xceptions may be included in the legislation to provide the practical balance between competing public interests. As such they should be interpreted carefully in order not to destroy that balance.'

4 At trial, Simpson J recognised the benevolent purpose of para 330(4)(a) {CAB 34.50-35.10 [101]} in a passage cited with apparent approval by the majority below {CAB 90.59 [97]}. The intent of para 330(4)(a) is to balance the otherwise harsh operation of the Act, and should be construed accordingly, contrary to the submission at RS [20]. Gordon J's description in *Commissioner of the Australian Federal Police v Hart* (2018) 262 CLR 76, 99 [66] (***Hart***) of the 'limited' circumstances and 'strict' conditions on which property may be excluded from the Act's operation, are observations on the Act's content, not directions for its interpretation.

B. Third party

5 For the reasons set out in the appellants' primary submissions, their construction of 'third party' is preferable. However, in the way he now puts his argument, even the Commissioner's construction renders the appellants third parties within para 330(4)(a). This arises from the strained meaning of 'property' employed at RS [37]-[39] to try to overcome the conflict with the Revised Explanatory Memorandum identified in the appellants' primary submissions.

6 As described by the majority below {CAB 84.45-85.25 [80]-[82]} and accepted by the Commissioner at RS [19], the relevant property acquired by a bank account holder comes into existence at the time of a deposit. The respondent contends that by subsec 330(3), property *retains* its status as proceeds or an instrument even if 'converted into different forms', such as being deposited into a bank account. The Commissioner's argument must then be that when created, the property constituted by the account holder's rights against the bank *retains* a prior

character. Such a notion defies logic and the ordinary meaning of the words. The concept of 'convertible' property sits uneasily with the sec 338 definition of property, and would deprive paras 330(1)(b) and 330(2)(b) of much of their effect.

7 If one ignores those difficulties in the Commissioner's argument, it follows that if banknotes are tainted prior to their deposit into a bank account, the newly created property acquired by the account holder would – subject to cessation under para 330(4)(a) – 'remain' proceeds or an instrument. The Commissioner's concept of convertible property allows the example in the Revised Explanatory Memorandum to proceed as intended while still employing the Commissioner's construction of third party because purchase monies would not *first* become tainted by their deposit into a bank account.

8 But having thus blunted the appellants' criticism of his construction by reference to the Revised Explanatory Memorandum, the Commissioner necessarily concedes the first ground of appeal, because he overlooks para 329(2)(b) of the Act. That provision renders property an instrument of an offence if it is intended to be used in or in connection with the commission of an offence. Immediately a person intends to use banknotes in transactions in contravention of the *AML Act*, those banknotes become instruments of an offence. When an offence is later committed by making the deposit, involving credits to the appellants' accounts, the newly acquired property would, on the Commissioner's case, 'retain' its character as an instrument of the offence, unless the acquisition of property satisfied the other requirements of para 330(4)(a).

9 So, for the present appellants, there was the necessary temporal separation between the banknotes becoming an instrument and being 'converted' into the appellants' property, being rights against the bank. They did not acquire their interest at the time the property first became an instrument. Once the operation of para 329(2)(b) is taken into account, the appellants are, on either construction, third parties.

10 In any event, the Court should still resolve the ambiguity in para 330(4)(a) as the appellants contend.

11 The Commissioner argues at RS [29] that 'third party' should attach to transactions rather than criminality because the subject matter of secs 329 and 330 is not the commission of offences (compare RS [54] where the Commissioner contradictorily submits that the context is 'directed to criminal offending'). In truth, the subject matter of secs 329 and 330 is both the characterisation of the property and the commission of offences because the commission of an offence is the means by which property becomes proceeds or an instrument. Absence of involvement in the criminality is the most coherent justification for allowing an

exception from the Act's consequences. The Commissioner's test based on transactions ignores the vast array of offences that do not involve transactions, by contrast with the appellants' universally applicable interpretation.

12 It does not follow, as the Commissioner contends at RS [30] that 'third party' has no work to do on the appellants' construction. A party involved in an offence may later receive the proceeds of that offence (including converted proceeds under the extended definition in subsec 330(1)(b)) without knowing its source, and thus having no basis to suspect that it was proceeds. The offender would fall foul of the 'third party' requirement even if satisfying the other elements of para 330(4)(a). Suppose a team of bank robbers steals cash. One of the robbers uses it to buy a car, and later sells it to his accomplice, who may have no reason to suspect that particular car was purchased with stolen funds. The purchaser is a 'third party' to the transaction by which the car became proceeds, but not a third party to the offending, and thus para 330(4)(a) will not assist him. Of the two alternatives, the appellants' construction yet again offers the outcome that better promotes the purpose of the para 330(4)(a) exception.

13 By fixating on McColl JA's phrase 'intentionally complicit' the Commissioner's argument at RS [31] fails to meet the case advanced by the appellants. Neither the first ground of appeal nor the appellants' submissions at AS [2(a)] is answered by attacking a construction of third party defined solely by a reference to intentional complicity. The appellants' construction includes no additional mental element.

14 There is no force in the argument at RS [31] that if Parliament had wanted third party to be construed as the appellants contend, it could have so provided. That argument applies equally to each party's proffered construction. As Simpson J commented, the drafting of para 330(4)(a) is 'infelicitous' {CAB 34.49 [101]}. The Commissioner agrees at RS [26] that it presents a constructional choice. Parliament's failure to better define 'third party' does not favour either contended construction – it creates an obscurity that this Court is called upon to clarify, using the orthodox methods of interpretation applied in the appellants' submissions.

15 Comparisons at RS [31] with the repealed subsec 102(2) do not assist. The difference in drafting is explained by the different starting points for each provision. As the original Explanatory Memorandum to the *Proceeds of Crime Bill 2002* explains, sec 102 was based on subsec 31(6) of the *1987 Act*, while para 330(4) was based on the *Criminal Assets Recovery Act 1990* (NSW).

16 The Commissioner's fourth construction argument at RS [34] wrongly approaches the provision as if an exception should be construed to promote the primary object of the Act. It is true that proof of involvement in criminal conduct is not required to render property tainted,

but it is also true that the para 330(4)(a) exception applies *only* to property acquired by those 'innocent' of the criminal conduct. The Commissioner's attempt to construe the exception provision by reference to a 'fundamental premise of the statutory scheme' fails to observe the caution urged by Pearce and Geddes (see [3] above) and devalues the plain words and obvious purpose of para 330(4)(a).

17 To RS [36], it is fanciful to invoke principles of general deterrence to resolve the competing constructions. To do so assumes that members of the public, including foreign citizens such as the appellants, should be familiar with the operation of the complex provision on which Australian intermediate courts of appeal may not agree. It assumes a recipient can control the manner in which a party transfers funds to her bank account. It also fails to grapple with examples such as insider trading where an anonymous market prevents the vigilance the Commissioner suggests should be exhibited.

C. Circumstances that would not arouse a reasonable suspicion

18 The Court of Appeal's reasons {CAB 104.10-105.30 [149]-[153]} and the parties' written submissions {Appellants' Supplementary Book of Further Materials 12.20-15.10 at [25]-[38] and 23.45-27.45 at [30]-[42]} reflect the way the proceeding was run below. The parties and the Court identified reasonable suspicion as the heart of the dispute for the knowledge element of para 330(4)(a).

19 Any applicant disproving that she had reason to suspect the property was tainted would necessarily disprove actual knowledge. This explains why the Court of Appeal did not directly address all of grounds 7 and 8 {CAB 49.45}.

20 If the Commissioner presses the point at RS [47] and is permitted to conduct the appeal to this Court on this new basis, the appellants will seek leave to amend their grounds of appeal. No substantive amendment to their submissions would be required.

21 At RS [50] the Commissioner wrongly asserts that the appellants seek to read words into the Act that are not there. The appellants rely on subsec 31(6), which imposes an obligation on the Commissioner to identify his grounds of opposition to an exclusion application. The Commissioner's grounds identified particular offences {AFM 5-8}. The Commissioner's grounds and the grounds an applicant must file under subsec 31(4) are the statutory procedural mechanism for delineating the issues between the parties and ensuring a fair hearing. An applicant need not negative a possibility not raised by the Commissioner: *Hart* 262 CLR at 83-4 [7] per Kiefel CJ, Bell, Gageler and Edelman JJ.

22 Contrary to the Commissioner's submissions at RS [50], if an applicant negatives the sole ground notified under subsec 31(6), that the goods that 'fell off the back of a truck' were stolen, it is not open to the Commissioner at trial to submit that the applicant had not negatived grounds to suspect that the goods were counterfeit, or involved in money laundering activity, or some unspecified offence. Holding the Commissioner to his articulated case is not 'inconsistent with the statutory regime'.

23 The respondent may not ignore the grounds filed below and now seek to put the appellants to the proof of negativing 'that property was the proceeds of an offence of some kind': RS [51].

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