

ASSET CONFISCATION UPDATE – 17 June 2014

*Examination and
Revocation Orders under
the Proceeds of Crime
Act – AFP v Ling*



Applications for examination and revocation

On 17 June 2014, Dixon J handed down his decision in *Commissioner of Australian Federal Police v Ling & Ors* [2014] VSC 262.

In that case, the Commissioner had obtained *ex parte* restraining orders under s.19 (i.e. civil forfeiture restraining orders) of the *Proceeds of Crime Act 2002* (Cth) (**Act**).

The persons who claimed an interest in the restrained property made applications under s.42 of the Act seeking revocation of the restraining orders.

Relevantly, an application for revocation is different to an application for exclusion or compensation under the Act.

An application for revocation challenges the making of the restraining order in the first place, rather than seeking to exclude restrained property from a restraining order which was properly made.

The court can grant an application for revocation if it is satisfied that there is no basis upon which the restraining order can be made at the time the revocation application is heard.

It is, effectively, an *inter-partes* rehearing of the application for the restraining order, except that

the burden of proof shifts to the applicant seeking revocation.

After the applications for revocation were made under the Act, the Commissioner made applications under section 180 of the Act seeking to examine various people who had filed affidavits in support of the applications for revocation.

Critically, the Commissioner sought to carry out the examinations prior to the hearing of the revocation applications.

The applications for examination were opposed. A number of grounds of opposition were raised. One principal ground raised was that the Commissioner should not be permitted to examine any person until the application for revocation were determined since (1) by the terms of s.180 of the Act, examinations can only proceed whilst restraining orders remain in force and (2) the continuation of the restraining orders was under challenge.

The argument was substantially accepted by Dixon J, who determined that, although there was nothing to preclude his

Honour from ordering the examination of various persons at this point in time (at [69]):

... a careful reading of the whole Act reveals a predisposition against making an examination order while a revocation application is pending.

The applications for examination were adjourned until after the determination of the revocation applications.

Further information

For further information concerning litigation under the *Confiscation Act* 1997, visit www.confiscation.com.au.

About the author

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