



*Commissioner
of AFP v
Surinder Kaur
[2016] VSC
423*

ASSET CONFISCATION UPDATE – EDITION 9 / 2016

1 AUGUST 2016

Examinations under the POCA

Commissioner of the Australian Federal Police v Surinder Kaur

On 1 August 2016, J Forrest J handed down his decision in *Commissioner of the Australian Federal Police v Surinder Kaur* [2016] VSC 423.

The facts

The Commissioner of the Australian Federal Police (**Commissioner**) sought an examination order of Ms Kaur under the *Proceeds of Crime Act* 2002 (**Act**). Ms Kaur had not been charged with any offences. Property belonging to her had been restrained under the Act. Ms Kaur was the mother and mother-in-law of the two accused, whose charges remained pending. Other than the Commissioner's examination application, all other applications under the Act had been stayed until the conclusion of the criminal charges against Ms Kaur's son and daughter-in-law.

The application for examination was opposed by Ms Kaur and by the accused (who were separately represented).

As a "fall back" it was contended on behalf of the accused that if Ms Kaur was to be examined, then an order ought to be made (as contemplated in the recently amended section 266A) preventing the disclosure of any of the information arising from the examination to the prosecuting authority; the Commonwealth Director of Public Prosecutions. The accused feared that the dissemination of such information carried with it a real risk of prejudice to their defence of the criminal charges.

Discussion

J Forrest J provided the following helpful analysis in respect of examination applications (at [42]):

The following propositions emerge from the text of the statute (including the 2016 Amendments) and its application by State Courts and the High Court:

- (a) *The power of a court to make an examination order under s 180 or s 180A is dependent upon the existence of a restraining order relating to the subject matter of the proposed examination.¹*
- (b) *Any person may be the subject of an examination order.²*
- (c) *The Commissioner bears the onus of proof in establishing an entitlement to an examination order – and the burden is on the balance of probabilities.³*
- (d) *The Commissioner is entitled (by statute) to conduct an examination prior to the hearing of exclusion or compensation applications.⁴*
- (e) *The making of an order for an examination under ss 180 or 180A of the Act is discretionary and should only be made where there are adequate grounds for such an order.⁵*
- (f) *The power of the court to make an examination order is not precluded by the*

existence of a pending criminal charge against the examinee.⁶ This proposition is fortified by the 2016 Amendments to s 319(2) of the Act.⁷

- (g) *The fact that an examinee may be charged in relation to the subject matter of an examination is not a reason to deny the Commissioner an examination order.⁸*
- (h) *There must be a real (not speculative or theoretical) risk to the administration of justice in the conduct of a criminal trial to justify the refusal of an application for an examination under s 180.⁹*
- (i) *An examination can only be conducted consistent with the objects of the Act – to obtain information for proceedings instituted under the Act.¹⁰*
- (j) *In the event that one of the accused are convicted, all of the property restrained under s 18 of the Act will be liable to automatic forfeiture under s 92, unless excluded under s 94: this is the 'conviction based confiscation regime'.¹¹*

His Honour then noted the significance of the recent amendments made to section 266A, namely new section 266A(2)(b), which "acknowledges the court's ability to prevent direct or derivative use of material by a prosecuting authority (and other public officials and

¹ Section 180(1) of the Act.

² Section 180(1)(a)-(c) and s 180A(1)(a) and (b). These provisions also identify specific classes of person who may be the subject of an order.

³ Section 317 of the Act.

⁴ Sections 32, 76 and 79A of the Act; *Commissioner of the Australian Federal Police v Dong Hua International Investments Pty Ltd* [2016] VSCA 15 [25].

⁵ *Lee v DPP (Cth)* (2009) 75 NSWLR 581, 593 [46], 593 [50] - 594 [52]; *DPP v Chan* (2004) 185 FLR 399, 404 [24], 405 [26]-[27]; see also *Commissioner of Australian Federal Police v Mah* (2014) 242 A Crim R 184, 187 [12]; *Hammond v Commonwealth* (1982) 152 CLR 188; *X7 v Australian Crime Commission* (2013) 248 CLR 92.

⁶ *Lee v NSW Crimes Commission* (2013) 251 CLR 196, 230 [55], 250 [129]-251 [132], 294 [268], 317 [326]-319 [335] in relation

to the Criminal Assets Recovery Act 1990 (NSW) ('Lee (No.1)').

⁷ Section 319(2)(a) & (b) of the Act. See Explanatory Memorandum, Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015, [47]-[50].

⁸ *R v Independent Broad-Based Anti-Corruption Commissioner* (2016) 329 ALR 195, 205 [48]; *Commissioner of the Australian Federal Police v McGlone* [2016] NSWCA 103 ('McGlone'), [122]-[124]; S 319(2)(a) & (b) of the Act

⁹ *Lee (No.1)* (2013) 251 CLR 196, 319 [336] - 320 [337]; *Zhao* (2015) 255 CLR 46 [30] in relation to a forfeiture orders; *McGlone* [2016] NSWCA 103, [49]-[57], [70], [89]-[91] in relation to examination orders.

¹⁰ *Lee (No.1)* (2013) 251 CLR 196, 317 [327] - 318 [328].

¹¹ See the description in the Explanatory Memorandum, Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015.

organisations identified in the table) in the course of an examination" (at [46]).

Ultimately, J Forrest J determined that "there is no good reason not to permit Kaur to be examined" (at [79]). The reasons for that conclusion (in so far as relevant beyond this decision) were as follows (from [80]):

First, Kaur is not the subject of any criminal charges and there is no suggestion that there (sic) charges will be laid against her. No question of oppression or self-incrimination arises.

Second, the orders which I propose to make set out at [70] in relation to dissemination of the examination material will preclude any misuse of the information by the prosecuting authority.

Third, there is a potential forensic prejudice to Kaur in relation to answers compulsorily given during the examination being used in her claim for exclusion and compensation orders. However, the Act, by ss 266A(3) and (4) specifically permits such use.

Fourth, several of the recent amendments to s 319 set out at [35] highlight the considerations of expedition, cost and inconvenience to the Commonwealth when determining whether to grant a stay of a forfeiture or associated application.

...

Sixth, the fact that there is no demonstrable pressing need (and that the property has been 'frozen') for an examination does not mean that it should not be held promptly. I accept the Commissioner's submission that the sooner an examination of Kaur can be held, the better. This will minimise the risk of diminishing memory and give the Commissioner time in which to conduct other enquiries relevant to the forfeiture and associated applications – including the procurement of documents. It means that the hearing of these applications can take place soon after the conclusion of the criminal proceedings, as opposed to a further

delay whilst arrangements are made for an examination after the trial and then, quite possibly, further delay whilst the Commissioner makes additional inquiries.

Seventh, I do not accept that it is necessary for the Commissioner to demonstrate specific prejudice (for example, by reason of deteriorating health, potential departure from Australia, etc.) in order to obtain an order for examination. To the contrary, the objects of the Act and the complex non-conviction based confiscation regime set up under the Act, point squarely to examinations being carried out well before the forfeiture and associated applications. Absent a compelling reason, the examination should not be delayed. It should be made sooner rather than later. Decisions of other trial judges and Courts of Appeal in this state and New South Wales demonstrate that this is so in cases involving examinations of associates of the accused.¹²

Eighth, this application does not raise the spectre of a 'multiplicity of proceedings'. There is no current application to examine Singh and Arora. The forfeiture and associated applications have been stayed.¹³ It is, as I have just said, consistent with the structure set up under the Act.

Ninth, I reject the argument of Kaur that the examination should be stayed because there is an overlap in the evidence likely to be given in the examination with that of the trial. As I have said, any potential risk of dissemination of material from the examination is obviated by the orders under s 266A(2)(b), which I have set out at [70].

Tenth, I reject the proposition that a conviction of Singh and Arora and the triggering of the conviction based process under the Act is a legitimate reason to deprive the Commissioner of the right to carry out an examination of Kaur prior to the trial of Singh and Arora. The Commissioner is entitled to carry out its information gathering in relation to Kaur's exclusion and compensation applications as the Act envisages.

¹² For example, see McGlone [2016] NSWCA 103 [133 – 135]; Commissioner of AFP v Cacu [2015] NSWSC 1232 [43].

¹³ McGlone [2016] NSWCA 103 [127]-[131].

To my mind, there is no injustice to Kaur by ordering the examination to take place in the next couple of months. Nor is there any injustice to Singh and Arora, as long as the information obtained is quarantined and direct and derivative use of the material obtained precluded from disclosure to the prosecuting authority.

Ultimately, the application for examination was granted, but orders were made quarantining the information derived from the examination so as not to prejudice the criminal proceeding against the family members of Ms Kaur.

The case provides useful guidance concerning principles which govern the making of examination orders under the Act. Further, the decision provides a good example of the practical steps that can be taken towards safeguarding a future criminal trial.

However, where examination is sought of an accused (as opposed to a third party), the Court will be far more hesitant in ordering an examination; see *Commissioner of the Australian Federal Police v McGlone* [2016] NSWCA 103 (a decision which, as at the date of this update, is not yet available online).

About the author

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