



# Examinations under the Proceeds of Crime Act 2002

ASSET CONFISCATION UPDATE

21 FEBRUARY 2016

## Examinations - recent issues

In response to the decision of T Forrest J in *Commissioner of the Australian Federal Police v Zhang (Ruling No 1)* [2015] VSC 390,<sup>1</sup> the Commissioner made a large number of applications in various proceedings seeking examination orders under section 180 of the *Proceeds of Crime Act 2002 (POCA)* with a view to gathering evidence to support forfeiture applications. Since the examination power had rarely been used pre *Zhang*, a number of issues arising from its exercise have recently been the subject of judicial consideration.

### **Commissioner of the Australian Federal Police v Dong Hua Investments Pty Ltd & Anor [2016] VSCA 15**

The question arose whether the POCA entitled the Court to make an order for the examination of a

person resident in a foreign jurisdiction (relevantly China).

It is well known that courts will only in the most exceptional cases grant leave to serve subpoenas on persons resident in foreign jurisdictions. For example, in *Schneider v Ceaserstone Australia Pty Ltd* [2012] VSC 126, Davies J stated (at [6]):

*... The cases show a general reluctance by the Courts to exercise the power where the document to be served is a subpoena to give evidence or to produce documents. In Arhill Pty Ltd & Ors v General Terminal Co Pty Ltd & Ors Rodgers CJ Comm D explained that the power will seldom be exercised as the making of an order that requires a person who is resident in another country to attend before the court would infringe international law as*

<sup>1</sup> In which the Court determined that the Commissioner was required to establish his right to a forfeiture order before a

respondent to the forfeiture application/applicant for an exclusion application was required to go into evidence.

to comity. In *Stemcor (A/sia) Pty Ltd v Oceanwave Line SA* Allsop J advanced another reason:

*... Australian Courts cannot enforce compliance on pain of punishment. In the absence of enforcement procedures the order is an empty threat, or the equivalent of a mere request couched in imperative terms. The court should not be seen to be engaged in such conduct.*

Having dismissed the Commissioner's application for leave to appeal on a different ground, it was not strictly necessary for the Court of Appeal to determine the issue. Notwithstanding that fact, the Court (Redlich, Priest and Beach JJA) stated (at [51]), obiter:

*"Having regard to the conclusions we have expressed above, it is not strictly necessary for us to deal with the notices of contention filed by the respondents and Zhang. It is sufficient for us to say that we agree with Dixon J in Mah<sup>2</sup>, that the Act is intended to have an extra territorial operation and that there was no impediment to the trial judge making an order for examination had he chosen to do so."*

In light of this observation, Courts are likely to find themselves empowered to make orders for the examination of foreign residents. However, notwithstanding the apparent existence of such power, whether to order an examination or not will always be a matter of discretion. The particular circumstances will need to warrant the making of an examination order, particularly in respect of a foreign resident who, one would expect, would suffer much greater inconvenience by having to attend an examination in Australia than a proposed examinee within the jurisdiction.

### **Commissioner of the Australian Federal Police v Kaur [2016] VSC 13**

In *Kaur*, J Forrest J considered the manner in which notice of an application under section 180 of the POCA for examination orders was required to be given to a

proposed examinee. The POCA does not specify the manner of giving notice.

J Forrest J determined that, in accordance with Rule 6.04(3) of the *Supreme Court (Criminal Procedure) Rules 2008* (Victoria), an application for examination was required to be personally served, unless the court authorised some other manner of service.

### **About the author**

Christian Juebner is a barrister at the Victorian Bar and practices extensively in confiscation and proceeds of crime litigation in all Australian jurisdictions.

He was admitted to practice in 1996 and, prior to coming to the Bar in 2004, was a partner with Deacons (now Norton Rose Fulbright).

He can be contacted as follows:

- by email on [juebner@vicbar.com.au](mailto:juebner@vicbar.com.au)
- by phone on (03) 9225 8203 or 0410 657 177.

Christian is available to advise on proceeds of crime litigation in all Australian jurisdictions. He regularly appears in proceeds of crime matters throughout Australia.

For more information about proceeds of crime litigation in Australia visit [www.confiscation.com.au](http://www.confiscation.com.au)

<sup>2</sup> *Commissioner of Australian Federal Police v Mah* (2014) 242 A Crim R 184