SUPREME COURT OF QUEENSLAND

CITATION:	*Nguyen & Anor v Commissioner of the Australian Federal Police* [2014] QCA 293
PARTIES:	**MAU DUNG NGUYEN** (first applicant) **DUONG THI BICH LIEN** (second applicant) **v** **COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE** (respondent)
FILE NO/S:	Appeal No 507 of 2014 SC No 2518 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 November 2014
DELIVERED AT:	Brisbane
HEARING DATE:	6 June 2014
JUDGES:	Holmes, Muir and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant the extension of time to appeal.** **2. Dismiss the appeal with costs.**
CATCHWORDS:	CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – VALIDITY OF LAWS OF THE COMMONWEALTH – GENERALLY – where the primary judge granted an examination order under s 180(1) of the *Proceeds of Crime Act* 2002 (Cth) ("POC Act") for examination of the applicants and two others about the affairs of the applicants – where s 314 of the POC Act vests in the state courts jurisdiction with respect to matters arising under the POC Act – whether s 314 is invalid insofar as it purports to vest jurisdiction in the Supreme Court to make an examination order under s 180 on the ground that the POC Act alters the structure, organisation and government of the Supreme Court – whether Pt 3-1 and s 314 of the POC Act are invalid because in their operation they impair the institutional integrity of the Supreme Court as a court in which Commonwealth judicial power may be vested – whether it

is necessary to decide whether s 182(2) of the POC Act is invalid when the applicants were given notice of the applications made under s 180(1)

Criminal Assets Recovery Act 1990 (NSW), s 10(2), s 10(3)
Evidence Act 1977 (Qld), s 10(1), s 15
Judiciary Act 1903 (Cth), s 39B(1), s 39B(1A)(c), s 79
Proceeds of Crime Act 2002 (Cth), Pt 3-1, s 180, s 182(1), s 182(2), s 189, s 192, s 197(2), s 314, s 318, s 318A
The Constitution (Cth), Ch III, s 75(v), s 77(iii), s 109
Uniform Civil Procedure Rules 1999 (Qld), Ch 11

Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd (2003) 216 CLR 161; [2003] HCA 49, cited
Director of Public Prosecutions v Kamal (2011) 206 A Crim R 397; [2011] WASCA 55, cited
International Finance Trust Co Ltd v Crime Commission (NSW) (2009) 240 CLR 319; [2009] HCA 49, considered
Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51; [1996] HCA 24, cited
Kirk v Industrial Court (NSW) (2010) 239 CLR 531; [2010] HCA 1, cited
Le Mesurier v Connor (1929) 42 CLR 481; [1929] HCA 41, distinguished
Russell v Russell (1976) 134 CLR 495; [1976] HCA 23, cited

COUNSEL: G D Wendler with W R Chan for the applicants
N J Williams SC, with A S McDougall, for the respondent

SOLICITORS: Brisbane Criminal Lawyers for the applicants
Australian Government Solicitor for the respondent

[1] **HOLMES JA:** I agree with the reasons of Fraser JA and the orders he proposes.

[2] **MUIR JA:** I agree with the reasons of Fraser JA and with the orders he proposes.

[3] **FRASER JA:** On 14 January 2014 the applicants filed an application for an extension of time within which to appeal against an order made in the Trial Division on 31 July 2013 that pursuant to s 180(1) of the *Proceeds of Crime Act* 2002 (Cth) (the "POC Act") the applicants and two other persons be examined about the affairs of the applicants.

Extension of time

[4] The reason for the lengthy delay in appealing is that the applicants instead chose to commence proceedings in the High Court to challenge the constitutional validity of relevant provisions of the POC Act. Those proceedings were dismissed by consent on 10 January 2014 after the respondent disclaimed any opposition to the extension of time required for an appeal to this Court in which the applicants could pursue their constitutional challenge. Ordinarily a decision not to appeal would weigh heavily against a subsequent application for an extension of time to appeal. Another factor which weighs against an extension is that the applicants did not in the Trial Division agitate the points which they now seek to raise on appeal. It is nevertheless appropriate to grant the necessary extension of time, particularly

because there is no opposition to the application, the proposed ground of appeal raises only legal questions, and those questions concern the constitutional validity of legislation conferring jurisdiction upon the Supreme Court.

Background

[5] In December 2012 the respondent applied in the Supreme Court of New South Wales for orders against the first applicant and a son of both applicants, including a restraining order under s 19 of the POC Act that funds in bank accounts in their name must not be disposed of or dealt with by any person except in the manner and circumstances specified in the order, a forfeiture order under s 49 of that Act that the same property be forfeited to the Commonwealth, and ancillary orders. The application was supported by an affidavit by an Australian Federal Police officer which deposed to grounds for his suspicion as to the commission of offences against s 142(1) of the *Anti-Money Laundering and Counter-Terrorism Financing Act* 2006 (Cth) or against s 400.9(1) of the *Criminal Code* 1995 (Cth). On the same day an ex parte restraining order was made under s 19 of the POC Act. In mid-February 2013 the applicants applied for an order under s 29 of the POC Act excluding the restrained property from the order on the basis that the property was not the proceeds or instrument of any offence and for an order that the proceedings be transferred to the Supreme Court of Queensland. On 28 February 2013 McCallum J ordered that the proceedings be transferred to the Supreme Court of Queensland.

[6] The applicants subsequently applied in the Trial Division for summary judgment pursuant to r 293 of the *Uniform Civil Procedure Rules* 1999. The primary judge refused that application. The primary judge declined to hear the applicants' application to exclude property from the restraining order because s 32 of the POC Act provided that a court must not hear an application to exclude property from a restraining order which is in force where the "responsible authority" (in this case the respondent) has not been given a reasonable opportunity to conduct examinations in relation to the application. The primary judge granted the respondent's application for an examination order on the ground that it was appropriate to do so in order for the gathering of information envisaged by s 180 of the POC Act to proceed and for the application for exclusion to proceed after the examination.

The issues in the proposed appeal

[7] The applicant's notice of appeal contends that the examination order should be set aside on the ground that it was made without jurisdiction because the provisions of the POC Act conferring jurisdiction upon the Supreme Court to make such an order are outside the legislative power conferred by Chapter 3 of the Constitution and because those provisions are contrary to s 80 of the Constitution. At the hearing of the appeal, the applicants abandoned the second point. In relation to the first point, the applicants' argument raised two questions:

1. Is s 314 invalid insofar as it purports to vest jurisdiction in the Supreme Court to make an examination order under s 180 on the ground that the POC Act purports to alter the structure, organisation and government of the Supreme Court of Queensland?
2. Are Part 3.1 and s 314 of the POC Act invalid on the ground that in their operation they impair the institutional integrity of the Supreme Court of Queensland as a court in which federal jurisdiction and the judicial power of the Commonwealth is or may be invested and exercised?

[8] I will discuss those arguments after I have referred to the relevant provisions of the POC Act.

The POC Act

[9] The scheme of the POC Act is summarised in s 6 as being to confiscate the proceeds of crime by setting out in Ch 2 processes by which confiscation can occur, setting out in Ch 3 ways in which Commonwealth law enforcement agencies can obtain information relevant to these processes, and setting out in Ch 4 related administrative matters. Chapter 2 deals with orders by courts, including restraining orders prohibiting disposal of or dealing with property and forfeiture orders under which property is forfeited to the Commonwealth. The applicants' arguments focus upon some of the provisions in Ch 3, which s 8 describes as setting out "5 ways to obtain information…".

[10] The relevant provisions are in Pt 3-1 of Ch 3. That part concerns the obtaining of information by "examining any person about the affairs of people covered by examination orders…": s 8(1)(a). Section 180, in Div 1 of Pt 3-1, empowers the court that made a restraining order, or any other court that could have made the restraining order to make an order for the examination of any person about the affairs of "(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 (b) a person who is a *suspect in relation to the restraining order; or (c) the spouse or *de facto partner of a person referred to in paragraph (a) or (b)". (The word "affairs" is defined to include, but not to be limited to, "(a) the nature and location of property of the person or property in which the person has an interest; and (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.") An examination order can be made only on application by the responsible entity for (or for the application for) the "principal order", the definition of which includes a restraining order: s 182(1). Section 182(2) provides that the court must consider an application for an examination order without notice having been given to any person if the responsible authority requests the court to do so.

[11] Div 2 of Pt 3-1 concerns examination notices. Once an examination order is made, an "approved examiner" may, on application by the responsible authority, give to the person the subject of the examination order a written "examination notice" for the examination of the person: s 183(1). An "approved examiner" is either appointed by the Commonwealth Minister or holds office under regulations made under the POC Act: s 183(4). The fact that criminal proceedings have been instituted or have commenced does not prevent the approved examiner giving the examination notice: s 183(3).

[12] Div 3 of Pt 3-1 concerns the conduct of examinations. The examination must be conducted at the time and place specified in the examination notice or at another time and place decided by the approved examiner at the request of the person being examined or the person's lawyer, or the responsible authority, or a person who is entitled to be present because of the direction made by the approved examiner: s 186(1). The person the subject of the examination order may be examined on oath or affirmation by the approved examiner and by the responsible authority, and for that purpose the approved examiner may require the person to take an oath or make an affirmation and the approved examiner may administer that oath or affirmation to the person: ss 187(1), (2). The approved examiner may require the person being examined to answer a question put to the person at the examination which is relevant to the affairs of a person whose affairs can, under specified sections including s 180, be subject to the examination: s 187(5). The examination takes

place in private, the approved examiner may give directions about who may be present, and persons entitled to be present are the approved examiner, the person being examined and the person's lawyer, the responsible authority, and any person entitled to be present because of a direction about who may be present: s 188. Section 189(1) empowers the lawyer of a person being examined "at such times during the examination as the approved examiner determines" to address the approved examiner and examine the person about matters about which the approved examiner, or the responsible authority, has examined the person. That is qualified by the provision in s 189(2) that the approved examiner may require a lawyer to stop his or her examination if the lawyer "in the approved examiner's opinion, is trying to obstruct the *examination by exercising rights under subsection (1)…". Section 192 empowers the approved examiner, on his or her own initiative, or at the request of the person being examined or the responsible authority, to refer a question of law arising at the examination to the court that made the examination order. The approved examiner may cause a record to be made of statements made at the examination and for the record to be reduced to writing and signed by the person being examined: s 191.

[13] Div 4 of Pt 3-1 creates offences. It is an offence for a person who is attending an examination to answer questions or produce documents to refuse or fail to be sworn or to make an affirmation, to refuse or fail to answer a question that the approved examiner requires the person to answer, to refuse or fail to produce at the examination a document specified in the examination notice, and to leave the examination before being excused by the approved examiner: s 196(1). An effect of ss 197(1) and (2) is that s 196(1) obliges a person attending an examination to answer questions that the approved examiner requires the person to answer, and to produce at the examination documents specified in the examination notice, if the only reason or reasons why the person could not be compelled to do so under a law of the Commonwealth or a law of the State or Territory in which the examination takes place is privilege against self-incrimination or exposure of the person to a penalty, legal professional privilege, professional confidential relationship privilege, or inadmissibility in legal proceedings for a reason other than because the answer would be privileged from disclosure or the document would be privileged from production. Section 198 makes answers given or documents produced in an examination inadmissible in evidence in civil or criminal proceedings against the person who gave the answer or produced the document, except in criminal proceedings for giving false and misleading information, an application under the POC Act itself, proceedings ancillary to an application under the POC Act, proceedings for enforcement of a confiscation order, or in civil proceedings for or in respect of a right or liability conferred or imposed by a document produced in the examination.

[14] Sections 318 and 318A apply in relation to proceedings on an application for an order under the POC Act, proceedings ancillary to such an application, and proceedings for the enforcement of an order made under that Act. In any such proceeding, s 318 provides that "the transcript of any *examination is evidence of the answers given by a person to a question put to the person in the course of the examination." Section 318A applies: "if direct evidence by a person (the ***absent witness***) of a matter would be admissible in" such a proceeding: s 318A(1). Section 318A(2) makes admissible as evidence of the matter a statement that the absent witness made at an examination of the absent witness that tends to establish the matter if it appears to the court that the absent witness is dead or is unfit because of physical or mental incapacity to attend as a witness, or is outside the State or

Territory in which the proceedings are being heard and it is not reasonably practicable to secure his or her attendance, or all reasonable steps have been taken to find the absent witness but he or she cannot be found. This subsection also makes the statement admissible when neither of those matters appears to the court, "unless another party to the proceeding requires the party tendering evidence of the statement to call the absent witness as a witness in the proceeding and the tendering party does not so call the absent witness." Rules set out in ss 318A(4) – (6) apply if evidence of a statement is admitted under s 318(2). Relevantly, s 318A(4) provides:

> "In deciding how much weight (if any) to give to the statement as evidence of a matter, regard is to be had to:
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> (a) how long after the matters to which it related occurred the statement was made; and
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> (b) any reason the absent witness may have had for concealing or misrepresenting a material matter; and
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> (c) any other circumstances from which it is reasonable to draw an inference about how accurate the statement is."

[15] In Ch 5 of the Act, s 314(1) vests in the several courts of the States and Territories jurisdiction with respect to matters arising under the POC Act.

Question 1: Is s 314 invalid insofar as it purports to vest jurisdiction in the Supreme Court to make an examination order under s 180 on the ground that the POC Act purports to alter the structure, organisation and government of the Supreme Court of Queensland?

[16] In relation to the first question, the applicants contended that s 77(iii) was the sole source of Commonwealth legislative power to invest State courts with federal jurisdiction and that s 314 of the POC Act was not within s 77(iii). The respondent accepted that the sole constitutional source of s 314 was the provision in 77(iii) of the Constitution that with respect to any of the nine matters mentioned in ss 75 and 76 the Parliament may make laws "(iii) investing any court of a State with federal jurisdiction." The issue is whether other provisions of the POC Act purported to affect the constitution of the Supreme Court in such a way as to invalidate s 314 so far as it vested jurisdiction in the Supreme Court to make the examination order in this case.

[17] In *Le Mesurier v Connor*[1] the High Court held to be void various sections of the *Bankruptcy Act* 1924-1928 which purported to make the Commonwealth Registrar in Bankruptcy for the District of Western Australia an officer of the Supreme Court of Western Australia and to confer upon that officer various powers, duties and jurisdictions of that court, including the function of issuing bankruptcy notices purportedly delegated to that officer by three judges of that court. The majority (Knox CJ, Rich and Dixon JJ) observed that the power conferred by s 77(iii) "is expressed in terms which confine it to making laws investing State Courts with Federal jurisdiction", the power is "to confer additional judicial authority upon a Court fully established by or under another legislature", and that the power "is exercised and its purpose is achieved when the Parliament has chosen an existing Court and has bestowed upon it part of the judicial power belonging to the Commonwealth." The majority judgment continued:

> "To affect or alter the constitution of the Court itself or of the organization through which its jurisdiction and powers are exercised

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1 (1929) 42 CLR 481.

> is to go outside the limits of the power conferred and to seek to achieve a further object, namely, the regulation or establishment of the instrument or organ of Government in which judicial power is invested, an object for which the Constitution provides another means, the creation of Federal Courts. Sec. 77 (III.), therefore, does not enable the Parliament to make a Commonwealth officer a functionary of a State Court and authorize him to act on its behalf and administer part of its jurisdiction."[2]

[18] The applicants were therefore correct in submitting that s 77(iii) does not authorise a law which would invest federal jurisdiction in the Supreme Court of Queensland such as to "transmogrify the Supreme Court of Queensland into a de facto Federal Court" and reduce the Court to a "condition of legal servitude to the Commonwealth…". The question is whether the POC Act has any such effect. The applicants argued that it does because it produces the result that a Commonwealth officer appointed by a Federal Minister and chosen by the Federal Police, who is the examiner who conducts the examination ordered by the Supreme Court under s 180, "is inserted into the structure and government of the Supreme Court of Queensland…to take Queensland Supreme Court evidence and act as an arm of the Supreme Court in the exercise of its jurisdiction in the matter of the examinable affairs of the Applicants and proceedings for an application for a confiscation order in respect of their restrained property."

[19] That argument mistakes the effect of the statutory provisions. The POC Act confers federal jurisdiction upon the Supreme Court to hear and decide an application by a Commonwealth officer for an order for the examination of persons before a different Commonwealth officer, the examiner, and where such an order is made it confers upon the examiner statutory powers to conduct an examination. Unlike the legislation held to be invalid in *Le Mesurier v Connor*, the POC Act does not make the Commonwealth official a functionary of the Supreme Court, it does not authorise that official to act on behalf of the Supreme Court, and it does not authorise that official to administer any part of the Supreme Court's jurisdiction. That the examination relates to pending proceedings in the Supreme Court does not mean that the examiner acts as an officer of the Supreme Court in conducting the examination and related proceedings under the Act. The POC Act maintains a distinct separation between the examination and the jurisdiction of the Supreme Court to hear and decide the application for the examination and related proceedings under the Act. The powers and responsibilities conferred by the POC Act upon the examiner pertain only to the conduct of the examination. The examiner has no role in the exercise by the Supreme Court of its jurisdiction to hear and decide the application for an order for examination or any other matter. Conversely, the Supreme Court has no role in the examination.

[20] The applicants argued that s 318 of the POC Act indicated that the examination formed part of the exercise of the jurisdiction of the Supreme Court; that it revealed that evidence taken at such a examination was "Supreme Court evidence". In fact, s 318 merely produces the unremarkable consequence that a transcript of an examination is evidence of answers given by a person in the examination. It is s 318A which concerns the admissibility in evidence of statements made at an examination. Section 318A(2) renders admissible in proceedings under the POC

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2 (1929) 42 CLR 481 at 496 – 497.

Act statements made by the "absent witness" as set out in that subsection. The Supreme Court exercises federal jurisdiction in proceedings under the POC Act. There is no reason to doubt that the Commonwealth legislature was competent to define the rules of evidence applicable in such proceedings.[3]

[21] The applicants referred to *Russell v Russell*[4] for the proposition that the exercise of the jurisdiction of the Supreme Court in a closed court session was not authorised by s 77(iii) of the Constitution. The applicants also characterised the power conferred upon the examiner by s 189 as being designed to "limit the protective role of a lawyer acting for an examinee" and the applicants referred to the discretionary power conferred upon an examiner by s 192 to decline to refer questions of law to the Supreme Court. The applicants' argument that these matters supported their contention that s 314 was outside the legislative power conferred by s 77(iii) of the Constitution was again based upon the incorrect premise that the examiner exercises the jurisdiction of the Supreme Court.

[22] The applicants argued that the Commonwealth could not use the power in s 77(iii) of the Constitution "to recruit the Supreme Court of Queensland to make an examination order that empowers an Examiner to dictate, override and circumvent Queensland laws against self incrimination, oral and documentary discovery and avoid civil due process in Ch 11 of the *Uniform Civil Procedure Rules* 1999 (Qld)…". The applicants developed the self-incrimination argument by the contention that the "abrogation of the right to silence in s 197(2)" is contrary to the protection of such a right in s 10(1) of the *Evidence Act* 1977 (Qld). These arguments again mistake the effect of the provisions. Section 10(1) is not a free standing statutory protection of the "right to silence". Rather, its effect is that no other provision in the same Act renders "any person compellable to answer any question tending to criminate the person", a provision which is itself qualified by s 15 of the same Act in cases in which a person charged with an offence gives evidence in a criminal proceeding.

[23] The applicant's argument assumed that provisions of the *Evidence Act* 1977 (Qld) would apply in proceedings under the Act of their own force. That is not so. Because the Supreme Court exercises federal jurisdiction under the Act, the provisions of the *Evidence Act* 1977 (Qld) apply only if and to the extent that they are "picked up" and applied as federal law by s 79 of the *Judiciary Act* 1903 (Cth).[5] If there is any inconsistency between s 197(2) of the POC Act and s 10(1) of the *Evidence Act* 1977 (Qld) the Commonwealth law prevails to the extent of the inconsistency under s 109 of the Constitution. The curtailment of the privilege in the Commonwealth executive examination does not in any way affect the constitution of the Supreme Court. Nor is the constitution of the Supreme Court affected by the inapplicability in a Commonwealth executive examination of procedural rules governing civil litigation in Queensland Courts.

[24] Section 314 is not invalid on the ground identified in Question 1.

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3 See *Russell v Russell* (1976) 134 CLR 495 at 518 – 519, especially the approval at 533 – 534 (Stephens J), 535 – 536 (Mason J) and 554 – 555 (Jacobs J) of *Milicevic v Campbell* (1975) 132 CLR 307 at 316 (Gibbs J).

4 (1976) 134 CLR 495.

5 See, for example *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 174 – 175 [38] – [40] (Gummow J), 176 [48] and 177 [51] (Kirby J), 204 [132] and 209 [146] – [148] (Hayne J; Gleeson CJ and McHugh J agreeing).

Question 2: Are Part 3-1 and s 314 of the POC Act invalid on the ground that in their operation they impair the institutional integrity of the Supreme Court of Queensland as a court in which federal jurisdiction and the judicial power of the Commonwealth is or may be invested and exercised?

[25] In relation to the second question, the applicants relied upon the doctrine in *Kable v Director of Public Prosecutions (NSW)*.[6] The applicants contended that this doctrine disabled both State and Federal legislatures from impairing the institutional integrity of those courts in which the judicial power of the Commonwealth might be vested under Ch III of the Constitution. Although the respondent submitted that the *Kable* doctrine primarily operates as a constraint on State legislative power rather than Commonwealth legislative power, the respondent accepted that this application should be considered on the footing expressed by Martin CJ in *Director of Public Prosecutions (Cth) v Kamal*,[7] "that the legislative power of the Commonwealth does not extend to the conferral of functions upon State courts which are repugnant to or incompatible with the exercise by those courts of the judicial power of the Commonwealth." It is not necessary to discuss that proposition.

[26] The applicants argued that the power in s 192 and the inapplicability of the procedural rules for court ordered examinations in Ch 11 of the *Uniform Civil Procedure Rules* 1999 (Qld) in an examination ordered under the POC Act impaired the institutional integrity of the Supreme Court by removing its "supervisory jurisdiction over the outsourcing of its jurisdiction". Similarly, the applicants submitted that s 77(iii) of the Constitution was "being used by the Commonwealth as a vehicle to manipulate an abdication by the Supreme Court of Queensland of its supervisory jurisdiction to ensure procedural fairness in the exercise of Commonwealth judicial power" and that "the Commonwealth has created an island of Federal power immune from scrutiny by the very court it invests with federal jurisdiction." These arguments were again based upon the false premise that an examiner exercises the jurisdiction of the Supreme Court. They also assumed that it is a defining characteristic of the Supreme Court of the State that it has a supervisory jurisdiction over the exercise of Commonwealth executive power. That is incorrect. What *Kirk v Industrial Court of New South Wales*[8] established in this respect is that it is a defining characteristic of the Supreme Court of the State that such a body exists and has a supervisory jurisdiction to enforce the limits on the exercise of State executive and judicial power. The applicants' arguments also overlook the supervisory jurisdiction of the High Court under s 75(v) of the Constitution and of the Federal Court under ss 39B(1) and 39B(1A)(c) of the *Judiciary Act* 1903 (Cth).

[27] The applicants argued that s 182(2) of the POC Act obliged the Supreme Court to make an examination order without notice to any person affected by it contrary to principles of procedural fairness identified in *International Finance v NSW Crime Commission*.[9] Section 182 provides:

> "(1) 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.

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6 (1996) 189 CLR 51.
7 (2011) 206 A Crim R 397 at 402 [9].
8 (2010) 239 CLR 531.
9 (2009) 240 CLR 319.

> (2) The court must consider an application for an *examination order without notice having been given to any person if the *responsible authority requests the court to do so."

[28] The applicants submitted that s 182(2) was invalid for the same reasons that s 10 of the *Criminal Assets Recovery Act* 1990 (NSW) was held to be invalid in *International Finance v NSW Crime Commission*. The respondent advanced three arguments in reply. First, the respondent argued that s 182(2) does not operate in circumstances where a requirement for procedural fairness will necessarily be enlivened and that if that requirement is enlivened, it could be accommodated after an order under s 180 was made. The respondent distinguished *International Finance v NSW Crime Commission* on the ground that s 10 of the New South Wales Act provided for a restraining order having an immediate effect of preventing a person from disposing or dealing with property, whereas an order under s 180 instead sets in chain a course of events pursuant to which a person will subsequently be given notice of an examination (under s 183) and any "practical injustice"[10] will be avoided by the opportunity afforded to a person affected by the order of applying to have the order set aside before the examination occurs. The proposition that the requirement for procedural fairness might not be enlivened at all was supported by submissions that the requirement for procedural fairness did not require notice to be given to a person before the issue of a subpoena to give evidence and that the examination procedure is only investigative and does not result in any order directly affecting the interests of persons who claim an interest in property which ultimately might be forfeited under the POC Act. The respondent referred to extrinsic evidence[11] for the proposition that the principal policy underlying s 182(2) was a requirement to cater for situations where giving notice would risk subverting the examination procedure because, for example, delay would facilitate the destruction or concealment of evidence or dissipation of property that might otherwise confiscated.

[29] Secondly, the respondent argued that s 182(2) does not oblige the Supreme Court to make an examination order without notice to any person affected by it, but only to "consider" making such an order without the application having been served. The respondent submitted that such consideration necessarily must include consideration of whether there are good reasons why the application should be finally determined without notification and that, if the Court concluded that fairness required notice to be given to the respondent or to a prospective examinee, the court could adjourn the application and require notice to be given.[12] The respondent submitted that as an alternative the court could make an order under s 180 ex parte but immediately direct that notice be given to enable an effective person an opportunity to apply to set aside the order before the examination, as was done in *Re Commissioner of the Australian Federal Police*.[13]

[30] Thirdly, the respondent argued that where an examination order is made ex parte, the Supreme Court retains power to set aside the order, for example, if it subsequently comes to light that full disclosure of the facts was not made by the

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10 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2013) 214 CLR 1 at 13 – 14 [37] (Gleeson CJ), 34 – 35 [106] (McHugh and Gummow JJ), 38 – 39 [122] (Hayne J), and 48 [149] (Callinan J).

11 Explanatory memorandum for the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2)* 2010 (Cth), Report on the Independent Review of the Operation of the *Proceeds of Crime Act* 2002 (Cth) (2006) at Appendix D, D30, D31.

12 The respondent cited *Director of Public Prosecutions v Kamal* (2011) 206 A Crim R 397 at 417 – 418 [68].

13 [2013] NSWSC 626.

applicant for the order.[14] The respondent also submitted that even if s 182(2) were construed as requiring the court to proceed to *determine* an application under s 180 ex parte that would not be fatal to the validity of s 182(2).[15]

[31] It is not necessary to adjudicate upon those arguments. Section 182(2) is severable from s 182(1) and the other relevant provisions of the POC Act. It is in that respect distinguishable from s 10(2) of the *Criminal Assets Recovery Act* 1990 (NSW). Section 10(2) provided that the New South Wales Crime Commission "may apply to the Supreme Court, ex parte, for a restraining order". Section 10(3) obliged the Supreme Court to "make the order applied for under subsection (2) if the application is supported by an affidavit of an authorised officer" which included specific content. French CJ considered that the operation of s 10 was inextricably linked to the express authority which it conferred to make ex parte applications and which French CJ considered to be invalid, so that to read down s 10 to limit its operation to applications on notice "would impose a judicial gloss on the section at odds with its text".[16] The POC Act has a very different structure. It separates the provisions conferring power upon courts to make an order for examination (s 180) upon application (s 182(1)) from the provision (s 182(2)) which empowers ex parte consideration of applications. If s 182(2) is invalid it may be severed without doing any violence to the underlying legislative purpose so far as it concerns orders for examination made on notice.

[32] Accordingly, if s 182(2) is invalid for any of the reasons advocated by the applicants, the result is only that it might have been necessary for the applicants to have been given notice of the application and an opportunity to be heard in opposition to it. The applicants were given notice of the application and their legal representative appeared and made submissions at the hearing. It is therefore not necessary to decide whether s 182(2) is invalid on any of the grounds advanced by the applicants.

Proposed orders

[33] I would grant the necessary extension of time for an appeal but order that the appeal be dismissed with costs.

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14 *Kamal* (2011) 206 A Crim R 397 at [119]; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at 470 – 471 [39] – [43] (French CJ); *International Finance v NSW Crime Commission* (2009) 240 CLR 319 at 376 – 377 [130] – [131] (Hayne, Crennan and Kiefel JJ); *Uniform Civil Procedure Rules* 1999, rr 667(2), 668 (which the respondent submitted were applied by *Judiciary Act* 1903 (Cth), s 79: *CDPP v Mare & Ors* [2008] QCA 373 at [45], [56]).

15 The respondent cited *International Finance* (2009) 240 CLR 319 at 364 [89], 365 [93], 366 – 367 [97] (Gummow and Bell JJ); 378 [135] – [136] (Hayne, Crennan and Kiefel JJ); 384 [152] (Heydon J); French CJ (contra) at 338 [4], 352 – 356 [49] – [58].

16 (2009) 240 CLR 319 at 356 [59].