IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY **NO P17 OF 2019**

BETWEEN: **GANESH KALIMUTHU**

First Appellant

MACQUELENE PATRICIA MICHAEL DASS

Second Appellant

AND: **COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE**

Respondent

RESPONDENT'S SUBMISSIONS

Filed on behalf of the Respondent by:
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PART I FORM OF SUBMISSIONS

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

PART II ISSUES

2. This appeal raises the same three questions concerning the construction of s 330(4)(a) of the *Proceeds of Crime Act 2002* (Cth) (**the Act**) that arise in *Lordianto & Another v Commissioner of the Australian Federal Police* (S110/2019), being:

   (i) Does the term "**third party**" include a person who is party to the transaction that causes property to become the proceeds or an instrument of an offence, even if the person is not complicit in any criminal offending?

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   (ii) Can a person prove that he or she has acquired property "**for sufficient consideration**" even if he or she fails to prove a causal connection between the payment of money and the receipt of property?

   (iii) Can a person rely on ignorance of the law in order to escape a finding that "property was acquired in circumstances that would... arouse a **reasonable suspicion**" that the property was the proceeds or instrument of an offence?

PART III NOTICE OF A CONSTITUTIONAL MATTER

3. No notice is required under s 78B of the *Judiciary Act 1903* (Cth).

20 **PART IV MATERIAL FACTS**

4. To the facts identified by the appellants, the respondent adds the following.

5. On 11 August 2014, the first appellant opened two bank accounts: one with the ANZ Bank, and one with the Commonwealth Bank of Australia (**CBA**): *Commissioner of the Australian Federal Police v Kalimuthu (No 3)* [2017] WASC 108 (**PJ**) at [14], [19] **[CAB 12, 13]**. The following month, on 25 September 2014, the second appellant opened a bank account with the ANZ Bank: PJ [24] **[CAB 13]**.

6. The deposits into those bank accounts included the following:

   (a) As to the first appellant's ANZ Bank account: 96 deposits in sums of between

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   $1,000 and $9,500 over the period from 13 August to 30 September 2014, including multiple deposits on the same day: PJ [16]-[17] **[CAB 11]**; Appellants' Book of Further Materials (**ABFM**) at **228-231**;

(b) As to the first appellant's CBA Bank account: 94 deposits of under $10,000 over the period from 11 August to 9 October 2014, including multiple deposits on the same day: PJ [21]-[22] **[CAB 12]**; **ABFM 222-226**; and

(c) As to the second appellant's ANZ bank account: 90 deposits of between $1,000 and $9,950 over the period from 25 September to 13 October 2014, many of which were on the same day. For example, on 1 October 2014, over $100,000 was deposited in 11 deposits of $9,000 or more: PJ [25] **[CAB 12]**; **ABFM 233-238**.

7. When the first appellant opened the ANZ and CBA accounts, he obtained "view only" internet banking which enabled him to check his bank accounts from Malaysia. He gave evidence that he "was not concerned with receiving printed statements, given that [he] had internet access to the accounts and was able to check the account balance at any time": PJ [41] **[CAB 15]**. The first appellant used this internet banking facility to check that amounts were being deposited into his Australian accounts in sums commensurate to the amounts he had given to his acquaintance in Malaysia, Mr Zamri, to be passed onto the money remitter (who was known only as Hameed): PJ at [36], [38], [40], [46]-[48] **[CAB 15-17]**.

8. The first appellant had actual knowledge of the matters set out in paragraphs 6(a) and 6(b), above: CA [294] **[CAB 141]**. He did not know who was making the deposits: PJ [42] **[CAB 16]**. He knew that, despite the fact that the cash amounts he gave to Mr Zamri were between about $65,000 and $500,000, his Australian bank accounts were being credited regularly with numerous small deposits in amounts of less than $10,000; indeed, he did not recall seeing any deposits over that amount: PJ [41] **[CAB 16]**; *Commissioner of the Australian Federal Police v Kalimuthu [No 2]* [2018] WASCA 192 (**CA**) at [296], [500] **[CAB 142-143, 197]**. He did not provide a cogent explanation of why this might have been so: CA [502] **[CAB 198]**.

9. The first appellant knew that he was obtaining a better exchange rate than could be obtained through a bank: PJ [24] **[CAB 60]**; CA [297], [502] **[CAB 143, 198]**.

10. The appellants accept that they acquired their interests in the funds standing to the credit of their Australian bank accounts when amounts were deposited into those accounts in a manner that involved the commission of a structuring offence contrary to s 142(1) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth): **AS [4]**.

This concession is consistent with their argument that they were the victims of the money laundering practice known as "cuckoo smurfing": PJ [2], [69]-[72] **[CAB 8, 20]**. The appellants' application for exclusion from the restraining order of their interest in the funds standing to the credit of their Australian bank accounts was therefore brought solely on the basis that, by reason of s 330(4)(a), that interest had ceased to be proceeds, or an instrument, of an offence: CA [343] **[CAB 153]**.

11. The appellants do not challenge the Court of Appeal's characterisation of the relevant "property". Murphy and Beech JJA adopted the analysis of the Court of Appeal in *Lordianto v Commissioner of the Australian Federal Police* [2018] NSWCA 199 (***Lordianto***) (without identifying the construction their Honours would have adopted absent that decision): CA [348] **[CAB 155]**. President Buss conducted his own analysis, which was materially the same as that of the Court of Appeal in *Lordianto*. His Honour considered that, when the appellants opened each of their bank accounts, they became entitled, in respect of each account, to a chose in action comprising a right to recover from the bank, upon demand, the balance standing to the credit of their accounts: CA [147] **[CAB 98]**. Importantly, each time the credit balance of their accounts was increased by the deposit of the moneys the subject of a structured deposit, the appellants became entitled to a benefit or advantage consisting of the amount by which the credit balance was increased: CA [148] **[CAB 98-99]**. That benefit or advantage was a "right, power or privilege" within the meaning of the term "interest" in s 338 of the Act, and was therefore "property" as defined in s 338: CA [148] **[CAB 99]**.

PART V ARGUMENT

"third party"

12. On the construction of the term "third party", the respondent relies on the submissions put at [26]-[41] of his written submissions in *Lordianto & Another v Commissioner of the Australian Federal Police* (S110/2019) (**Lordianto RS**). In addition, he makes the following further submissions.

13. The Court of Appeal unanimously held that the appellants had failed to establish that they were third parties within the meaning of s 330(4)(a). President Buss correctly construed the term "third party" as referring to "a person who was not involved with or connected to any transaction by which the property *became* proceeds of an offence or an instrument of an offence": CA [176] [**CAB 107**] (emphasis in original). Murphy and

Beech JJA reached the same result, on the ground that the construction adopted by the majority in *Lordianto* was not plainly wrong: CA [363]-[364] **[CAB 157-158]**.

14. The appellants contend that a third party is a person "who is not in any way complicit in the commission of the offence". They suggest that the term "third party" captures a person who is not an "accessory, in the criminal law sense": **AS [32]**. By the appellants' own admission, this leaves the term "third party" with "very little work" to do: **AS [35]**.[1] For the reasons given in **Lordianto RS [30]**, the appellants' construction fails to abide by the principle that every word in a statute should, where possible, be given meaning.[2] It is no answer to this deficiency to point to the existence of two other elements in s 330(4)(a): cf **AS [35]**.

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15. The appellants' distinction between "interpretive" and "substantive" provisions does little to advance their case: cf **AS [33]**. To the extent that the distinction has any significance in this context, it is to underscore that a definition should not be given a meaning that would "defeat the intention of the legislature" by operating contrary to the "evident policy or purpose of a substantive enactment".[3] That proposition undermines the appellants' case rather than supporting it. It favours a construction of s 330(4)(a) that is consistent with the Act's principal objects, which include to deprive persons of the proceeds and the instruments of offences, and to undermine the profitability of criminal enterprises.[4]

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16. The appellants' construction derives only limited support from the use of the term "third party" in the report of the Australian Law Reform Commission, *Report 87: Confiscation that Counts*: **cf [37]**. The report should not be read as though it were a substitute for the

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[1] Indeed, in the proceedings below, the appellants contended for a construction of "third party" as meaning no more than a person who met the other qualifying conditions of s 330(4)(a): CA [79] **[CAB 77]**.

[2] *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 38 [41] (French CJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 192 [97] (Gummow, Hayne, Crennan and Bell JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [71] (McHugh, Gummow, Kirby and Hayne JJ)..

30 [3] *Kelly v The Queen* (2004) 218 CLR 216 at 253 [103] (McHugh J); *Allianz Australia v GSF Australia Pty Ltd* (2005) 221 CLR 568 at 574-575 [12]-[13] (McHugh J).

[4] *Proceeds of Crime Act 2002* (Cth), ss 5(a), 5(da). See also *Commissioner of the AFP v Hart* (2018) 262 CLR 76 (***Hart***) at 89 [32] (Gordon J).

legislation. As Buss P observed at CA [116] and [192] **[CAB 90, 116]**, legislative history and extrinsic materials cannot displace the meaning of the statutory text.[5]

17. Moreover, the Commission's stated preference for a particular policy outcome does not speak to the statutory formulation by which that outcome was ultimately pursued. For example, at [12.93] the Commission expressed its support for the award of costs to an "innocent third party" who successfully obtains an exclusion order. As described in **Lordianto RS [31]**, the Act, as enacted, permitted such an applicant to recover costs upon proof that: (i) they were not, in any way, involved in the commission of the offence to which the forfeiture related; and, relevantly: (ii) their interest in the property was not the proceeds of the offence or the instrument of the offence.[6] In this formulation, the enquiry as to a person's involvement in the offence is entirely separate from the enquiry into whether the property is the proceeds of an offence (which, on the appellants' construction, will invite an enquiry into the applicant's involvement in criminal conduct). The example illustrates the artificiality of seeking to interpret the terms of the Commission's report with the precision that must be applied to the task of statutory construction.

18. Contrary to **AS [42]**, there is no difficulty in applying the respondent's construction of "third party" to bank accounts which receive the proceeds of an earlier money laundering offence. The distinction between property which already is, and property which becomes, tainted is a distinction integral to the Court of Appeal's test. As Buss P explained, "an acquisition of the property will not be by a 'third party' unless the acquisition occurs *after* the property became proceeds of an offence or an instrument of an offence": CA [189] **[CAB 111]**; see also [176] **[CAB 107]**. Since the proceeds of an earlier money laundering offence are already tainted, the recipient of those proceeds is not a party to the transaction which first caused the property to become proceeds. The problem posited at **AS [42]** does not arise. So much was explained in the reasoning of Beazley P and Payne JA in *Lordianto*,[7] which Buss P cited with approval at CA [188] **[CAB 110-111]**.

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[5] *Federal Commissioner of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503 at 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ); *Alphapharm Pty Ltd v H Lundbeck A/S* (2014) 254 CLR 247 at 287 [121] (Kiefel and Keane JJ).

[6] *Hart* at 102 [77]-[78] (Gordon J).

[7] *Lordianto v Commissioner of the Australian Federal Police* [2018] NSWCA 199 at [108]-[111].

19. The appellants' construction of "third party" should not be accepted. The preferable analysis is that identified by Buss P, by reference to: (i) the various textual considerations described at CA [174]-[180] **[CAB 107-108]**; (ii) the place of s 330 within the specific statutory scheme, being a relevantly non-fault based scheme which focuses on transactions, rather than the involvement of particular individuals in criminal conduct, as described at CA [179] **[CAB 107-108]**; and (iii) the four reasons given by Buss P at CA [184]-[188] **[CAB 109-111]** for declining to adopt the dissenting reasoning of McColl JA in *Lordianto*.[8]

"for sufficient consideration"

20. The Court of Appeal unanimously held that the appellants had failed to prove that their interest in the relevant property had been acquired "for sufficient consideration". President Buss, and Murphy and Beech JJA, did not disagree as to the appropriate legal test, recognising that s 330(4)(a) required consideration to be provided in exchange for the relevant property: CA [226], [468]-[469] **[CAB 121, 187-188]**.

21. As Buss P recognised, the circumstances of the appellants were not relevantly distinguishable, on this issue, from those of the appellants in *Lordianto:* CA [239]-[240] **[CAB 124]**. For the reasons given in **Lordianto RS [42]-[45]**, the appellants' claim to have acquired the relevant property "for sufficient consideration" within the meaning of s 330(4)(a) must fail.

22. The appellants suggest that only one of two conclusions is available: either the deposits were made in exchange for the appellants' payment of Malaysian ringgit to Mr Zamri, or the deposits were "wholly unrelated" to the payment of Malaysian ringgit: **AS [50]**. This is a false dichotomy, and a misunderstanding of the applicable test. The relevant question is whether the appellants have discharged their burden of proving that cash was deposited into their Australian bank accounts in consideration for the funds they had provided to Mr Zamri in Malaysia.

23. For the reasons given in **Lordianto RS [44]-[45]**, the appellants could not discharge that burden whilst simultaneously claiming to have been the unwitting victims of cuckoo smurfing. As Murphy and Beech JJA recognised, the appellants' asserted lack

[8] *Lordianto v Commissioner of the Australian Federal Police* [2018] NSWCA 199 at [198]-[200], [204]-[208], [215]-[225], [227].

of connection to the depositors was a "fatal obstacle" to the conclusion that they acquired the property for sufficient consideration: CA [471] **[CAB 187-188]**.

"circumstances that would not arouse a reasonable suspicion"

24. The Court of Appeal unanimously held – without recourse to the persuasive force of *Lordianto* – that the first appellant had failed to establish that he acquired the property in circumstances that would not arouse a reasonable suspicion that it was the proceeds of an offence: CA [298], [498], [502] **[CAB 143, 197, 198]**.[9] President Buss considered this to be "the only conclusion reasonably open" based on, among other things, the first appellant's knowledge that, despite the fact that the cash amounts he gave to Mr Zamri were between $65,000 and $500,000, his Australian bank accounts were being credited regularly with numerous small deposits in amounts of less than $10,000: CA [296], [298] **[CAB 142-143]**; and see, to similar effect, the reasons of Murphy and Beech JJA at CA [501]-[502] **[CAB 197-198]**.

25. In support of the correctness of the Court of Appeal's conclusion with respect to the first appellant, the respondent relies on his submissions in **Lordianto RS [48]-[55]**. To those submissions, he adds the following.

26. The appellants accept as uncontroversial **(AS [53])** the test for "reasonable suspicion" that was approved by this Court in *DPP (Vic) v Le* (2007) 232 CLR 562, namely, whether a reasonable person in the applicant's circumstances, and knowing what the applicant knew, would have formed a suspicion.[10] The appellants nonetheless advance a construction of the "reasonable suspicion" limb that is at odds with that test.

27. On the appellants' construction, circumstances cannot have been such as would arouse a "reasonable suspicion" unless a person seeking the exclusion of property from a restraining or forfeiture order had subjective knowledge of: (i) the existence of the offence the subject of the restraining or forfeiture order; and (ii) the physical and fault elements of that offence: **AS [61]-[62]**. The appellants' submission is that a reasonable suspicion would not be aroused because, on the Court of Appeal's analysis, the first appellant "did not, subjectively, know... the [depositors'] reason for structuring the

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[9] The Court reached the opposite conclusion with respect to the second appellant (CA [303], [504] **[CAB 144, 199]**), which conclusion is not challenged in this appeal.

[10] *DPP (Vic) v Le* (2007) 232 CLR 562 at 595 [127]-[128] (Kirby and Crennan JJ); Gleeson CJ agreeing at 565 [1].

deposits into small amounts" (CA [501] **[CAB 198]**). This, in the appellants' submission, should have been a complete answer to the objective enquiry: **AS [63]**.

28. The appellants' analysis impermissibly collapses the subjective ("knowledge") and objective ("reasonable suspicion") tests in s 330(4)(a) into what is, in substance, a singular subjective enquiry. For the reasons given in **Lordianto RS [51]** and at CA [285]-[290] **[CAB 138-40]** (Buss P) and [501]-[502] **[CAB 197-198]** (Murphy and Beech JJA), that analysis cannot be sustained. As Buss P observed at CA [288] **[CAB 139]**, a third party's subjective ignorance that the relevant actions or omissions were an offence is not part of the "circumstances" referred to in s 330(4)(a) or a basis for negating the existence of a "reasonable suspicion".

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29. In addition, the proposition that, in order for the first appellant to have had grounds for a reasonable suspicion, he must have had actual knowledge of the mental state (i.e. the purpose) of the depositors, is untenable: cf **AS [64]**. The appellants' reliance, in this context, of the reasons of Brennan J in *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 572 is misplaced. The appellants conflate the concept of *mens rea* – an element of criminal responsibility – with the proposition that in order to be convicted a person must know that the conduct in which they engaged was forbidden by law. But that plainly is not what *mens rea* requires. The error is exposed by the very passage from which the appellants quote, and which was extracted more completely in Brennan J's reasons:

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> it is also necessary at common law for the prosecution to prove that he knew that he was doing the criminal act which is charged against him, that is, that he knew that all the facts constituting the ingredients necessary to make the act criminal were involved in what he was doing. If this be established, it is no defence that he did not know that the act which he was consciously doing was forbidden by law. Ignorance of the law is no excuse.[11]

30. For the above reasons, the appeal should be dismissed, with costs. In the event that the appeal is allowed, the respondent requests an opportunity to be heard in opposition to any order for indemnity costs, as sought (without further explanation) in **AS [74]**.

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[11] *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 572 (Brennan J), quoting Jordan CJ in *R v Turnbull* (1943) 44 SR (NSW) 108 at 109 (emphasis added).

PART VI ESTIMATE

31. The respondent estimates that up to 2.5 hours may be required for the presentation of his oral argument in this matter and in *Lordianto & Another v Commissioner of the Australian Federal Police*.

Dated: 5 June 2019

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