IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **NO S110 OF 2019**

BETWEEN: **SANKO LORDIANTO**

First Appellant

INDRIANA KOERNIA

Second Appellant

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

Respondent

RESPONDENT'S SUBMISSIONS

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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 following questions concerning the construction of s 330(4)(a) of the *Proceeds of Crime Act 2002* (Cth) (**the Act**):

   (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?

   (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 the 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?

3. The appellants failed on all three of the above issues in the Court of Appeal (on the first issue by majority, and on the second and third issues unanimously). To succeed in this appeal, they must succeed on all three issues.

PART III NOTICE OF A CONSTITUTIONAL MATTER

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

PART IV MATERIAL FACTS

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

6. The first and second appellants were sophisticated investors, accustomed to transferring large sums of money across national borders and to dealing with currency controls and disclosure requirements: *Lordianto v Commissioner of the Australian Federal Police* [2018] NSWCA 199 (**CA**) at [162] **[CAB 107]** (Beazley P and Payne JA).

Ms Koernia

7. The second appellant (**Ms Koernia**) gave evidence that, despite having in the past transferred money to Australia by inter-bank transfers, she decided to use money remitters in Indonesia by reason of the fact they did not charge fees and offered a more

favourable exchange rate: *Commissioner of the Australian Federal Police v Lordianto* [2017] NSWSC 1196 (**PJ**) at [60], [114] **[CAB 23, 38]**. On the instruction of the remitters, she separated very large sums of Indonesian rupiah into smaller amounts, and deposited them in a series of separate transactions into a number of different bank accounts, including accounts of persons who were not the remitters and whom she did not know: PJ [60]-[61], [114] **[CAB 23, 38]**; Respondent's Book of Further Materials **(RBFM)** at **22:46, 23:15, 25:09; 26:17-21**. These included multiple transactions on the same day. The primary judge dismissed as "wholly unconvincing" Ms Koernia's evidence as to why, at some inconvenience to herself, she followed this procedure: PJ [115] **[CAB 38-39]**.

10 8. In one instance, on 5 June 2015, Ms Koernia made two separate transfers, each under 500 million Indonesian rupiah, into the same account (Karhane Salim), within some 30 seconds of each other. Ms Koernia said the money remitter told her that some people prefer that deposits into their account be below 500 million rupiah: PJ [61], [65]-[67], [114]-[115] **[CAB 23-24, 25-26, 28]**; CA [143] **[CAB 102]**; **RBFM 27:25-29:09**. On the same day, Ms Koernia also made three additional transfers, again each under 500 million Indonesian rupiah, into a different account, within a few minutes of each other: PJ [61] **[CAB 23-24]**. The learned primary judge found Ms Koernia's evidence in relation to her knowledge about threshold reporting requirements in Indonesia to be unconvincing, and the Court of Appeal agreed with that conclusion: PJ
20 [115]; CA [162] **[CAB 107]**.

9. Ms Koernia gave evidence that her instructions to and from the money remitters were never given in writing: PJ [62] **[CAB 24]**. At no stage did Ms Koernia obtain any written receipt or acknowledgment that she had paid the Indonesian rupiah into the Indonesian bank accounts in accordance with the directions given by the money remitters (even when depositing large amounts into the accounts of strangers): PJ [62] **[CAB 24]**; **RBFM 15:36-36, 23:07, 23:20, 25:13-41**. Ms Koernia's evidence was that she did not make any enquiries to ascertain whether or not the money remitters with whom she dealt were authorised under Indonesian law: **RBFM 42:07-22**.

30 10. Of the total of $4.5 million deposited into the appellants' Commonwealth Bank of Australia (**CBA**) accounts in the period from 22 October 2013 to 5 August 2015, in most cases this was by deposits in amounts under $10,000: CA [12] **[CAB 64]**. A total of $2,786,062 was deposited into the appellants' bank accounts by way of 390 deposits

in sums of less than $10,000: PJ [43]-[44]; CA [20] **[CAB 18, 66]**. The deposits were made in cash, at various bank branches across New South Wales, Queensland, Victoria, South Australia and Western Australia: CA [20] **[CAB 66]**. On one particular day, no fewer than 35 cash deposits were made into the one account, at branches in both NSW and Victoria, and all in amounts of less than $10,000: PJ [40] **[CAB 17-18]**.

11. Although she did not use internet banking (**AS [6]**), Ms Koernia telephoned her contact in the relevant branch of the CBA to ensure that funds had been deposited into her accounts: PJ [62]; CA [15] **[CAB 24, 65]**. She tallied up the individual deposits to ensure the total sum corresponded to the sum of her deposits in Indonesia: PJ [62]; CA [15] **[CAB 24, 65]; RBFM 47:05-25, 49:41-50:34**. She also received paper copies of her bank statements which disclosed the deposits, the branches at which they had been made, and that they had been made in cash: PJ [62], [116] **[CAB 24, 39]**. She read the account statements when they arrived: PJ [62], [116], [120] **[CAB 24, 39]**; **RBFM 47:35-41**. The primary judge rejected as "unconvincing" Ms Koernia's claim that she did not find the method of deposit into her Australian accounts to be odd or unusual: PJ [116] **[CAB 39]**.

12. From the information given to her by the CBA representatives and from the bank statements, Ms Koernia was aware that numerous cash deposits in small amounts were being paid into her bank accounts: PJ [120] **[CAB 40]**, CA [17], [144] **[CAB 65, 103]**; **RBFM 51:30-32, 52:05-08**. She was aware that almost 400 cash deposits of amounts under $10,000 were being made into her accounts at branches across Australia: CA [163] **[CAB 107]**; **RBFM 52:10-12**. Ms Koernia gave evidence that she knew that a very large number of them were being made within a single day: **RBFM 52:14-16**. She said that she did not make any enquiry of the money remitters in Indonesia or of the CBA as to why deposits were being made in that form or in those amounts: PJ [62], [116]; CA [17] **[CAB 24, 39, 65]**; **RBFM 52:39-53:05**. She did not know the identity of any of the depositors: CA [18] **[CAB 65]**; **RBFM 52:34-37**.

Mr Lordianto

13. Both appellants accepted that Ms Koernia kept the first appellant (**Mr Lordianto**) informed of the various deposits into the accounts and the manner in which the money was paid to the Indonesian money remitters: PJ [64], [111], [120] **[CAB 25, 37-38, 40]**; CA [144] **[CAB 103]**.

14. Mr Lordianto gave evidence that he knew, in the period from 2013 to 2015, that his wife was making arrangements to send large sums of money for investment in their bank accounts in Australia by using money remitters and he recognised that the amount of money his wife was transferring to Australia was a significant amount given what he earned during that period: PJ [64], [111] **[CAB 25, 37-38]**; **RBFM 62:19-28**. He also knew that his wife was transferring large sums of Indonesian rupiah, at the direction of money remitters, into various accounts in Indonesia.

15. On Mr Lordianto's evidence, his wife:

    (a) complained to him that it was time-consuming for her to make a lot of deposits rather than one deposit at the direction of the money remitters: **RBFM 72:50-73:02**;

    (b) told him that the money remitters were asking her to make a series of deposits into various accounts in Indonesian rupiah, rather than just making one bank transfer to the money remitters: **RBFM 72:37-41**;

    (c) told him that she was not receiving any receipts or written acknowledgment from the money remitters that recorded the deposits she was being asked by them to make: **RBFM 73:04-07, 79:10-14**; and

    (d) told him that, on each of the occasions she had made an arrangement with the money remitters to transfer money to Australia, she was careful to check that the agreed amount of money had in fact arrived in the CBA cash investment accounts; and that she had done so by tallying up the many small cash deposits that were showing in the CBA cash investment accounts: **RBFM 73:09-74:02, 79:16-20**.

16. Mr Lordianto had access to the account statements for the CBA cash investment account, which were sent to their address in Singapore, if he chose to look at them. He gave evidence that he could not remember whether he saw them at the time: **RBFM 75:24-76:01**.

17. Mr Lordianto was aware that his wife was dealing with two particular money remitters in the period from 2013 to 2015. He did not take any steps to check whether or not those two particular money changers were legal, regulated money remitters in Indonesia. Nor did he ask his wife to confirm that they were legal and regulated money remitters: **RBFM 75:03-14**.

PART V ARGUMENT

Statutory scheme

18. The principal objects of the Act include to deprive persons of the proceeds of offences and the instruments of offences, and to undermine the profitability of criminal enterprises.[1] Consistently with those objects, the Act aims to effect such deprivation of the proceeds of crime and, more generally, of the benefits of crime; to prevent the reinvestment of those proceeds and benefits; to punish and deter breaches of the law; and to enable law enforcement authorities to trace the fruits of offences.[2] Forfeiture schemes of the kind created by the Act have long been recognised, both within and outside Australia, as a means of deterring serious criminal activity of the kind that generates large profits or results in the accumulation of significant assets.[3]

19. The Act pursues its objects through a scheme for the restraint of proceeds and instruments of crime which can operate without any need for a finding as to the commission of a particular offence (s 19(4)); which adopts wide definitions of "property", "proceeds", "instrument" and "derived" (ss 338, 329, 336); and which includes special rules to extend the circumstances in which property "becomes" and "remains", and to narrow the circumstances in which property "ceases" to be, the proceeds or instrument of an offence (s 330). Once property is restrained, the Act then provides various means by which property that is subject to a restraining order may be forfeited to the Commonwealth (ss 47, 48, 49, 92).

20. There are certain circumstances in which a person with an interest in property the subject of a restraining order may apply to have their interest excluded from that order, which also removes that interest from the reach of the forfeiture regime.[4] However, consistently with the intended reach of the Act, "the circumstances are limited and the conditions strict".[5] The Act is not properly described as beneficial legislation. To the extent that the appellants submit that s 330(4)(a) should be construed widely on account

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1 *Proceeds of Crime Act 2002 (Cth)*, ss 5(a), 5(da).

2 *Commissioner of the Australian Federal Police v Hart* (2018) 262 CLR 76 (***Hart***) at 89 [32] (Gordon J).

3 *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319 at 345 [29] (French CJ).

4 *Proceeds of Crime Act 2002* (Cth), ss 29, 31.

5 *Hart* at [32] (Gordon J). See also, by analogy, *DPP (Vic) v Le* (2007) 232 CLR 562 (***DPP (Vic) v Le***) at [33] (Gummow and Hayne JJ).

of its purported "beneficial purpose" (**AS [2]**), that submission attempts to divorce the provision from its statutory context, and should be rejected.[6]

21. Relevantly for present purposes, an applicant may seek an exclusion order by showing that their interest in property the subject of a restraining order is neither the proceeds of an indictable offence nor an instrument of a serious offence.[7] An applicant for an exclusion order bears the onus of proving on the balance of probabilities that the relevant circumstances apply.[8]

22. Before turning to the grounds of appeal, which concern the various criteria that the appellants failed to prove when they applied for the exclusion order, it is necessary to be clear about the nature of the "property" that is in issue. The starting point is that the relevant restraining order that was made under s 19 of the Act restrained property identified as "funds standing to the credit of" five specified bank accounts held with the Commonwealth Bank of Australia (**CBA**). The application to exclude property from that restraining order[9] likewise sought to exclude their interest in the "funds standing to the credit of" those accounts. However, the primary judge found that the property in question was not properly identified as "funds standing to the credit of" the CBA accounts. Instead, her Honour held that the relevant property was a chose in action that entitled the appellants "to require the CBA to pay to them all or part of whatever amount was credited to the accounts at the time of their choosing": PJ [78] [**CAB 29**]. While the value of that right varied as deposits or withdrawals were made, the chose in action did not vary: PJ [78] [**CAB 29**]. That analysis led her Honour to hold that, as the relevant choses in action (one for each account) were acquired when the appellants first opened each CBA account, and as that occurred prior to the commission of the offences, no property was acquired by the appellants to which s 330(4) could apply. Property was not acquired each time a cash deposit was made because, while that altered the value of the pre-existing chose in action, "the applicants had no property in the money deposited. The money was the property of the CBA": PJ [83] [**CAB 30**].

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6 Further, as to the limits of this presumption when interpreting particular words in an Act, see *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232 at [33]-[34] (French CJ, Kiefel, Bell and Keane JJ) and [92]-[94] (Gageler J).

7 *Proceeds of Crime Act 2002* (Cth), ss 29(2)(d).

8 *Proceeds of Crime Act 2002* (Cth), s 317(1); *Hart* at 83 [7] (Kiefel CJ, Bell, Gageler and Edelman JJ).

9 Appellants Book of Further Materials pp 2-4.

23. The Court of Appeal disagreed, in part, with the primary judge's characterisation of the property. It agreed that the relevant property was not accurately described as "funds standing to the credit of the appellants' bank accounts": CA [2] [**CAB 61**]. It also agreed that "the appellants possessed a chose in action in respect of each of their bank accounts enforceable against the Commonwealth Bank constituted by the right to compel the bank upon demand to pay to, or at their direction, an amount equivalent to the amount standing to the credit of each of their accounts": CA [48], [80] [**CAB 76, 84**]. However, the Court of Appeal considered that the question in issue depended on the meaning of the defined terms in the Act, rather than on general principles concerning the characterisation of a customer's interest in a bank account: CA [54] [**CAB 77-78**]. It held that the "right to demand payment of the amount standing to the credit of the account is a 'right' or 'power … in connection with the property', being the appellants' chose in action as it affects a change in the amount of the demand which may be made": CA [81] [**CAB 85**]. That brought it within the definition of "interest" in s 338 of the Act, and thus within the definition of "property" in s 338, such that on each deposit the appellants acquired an interest in property for the purposes of the Act, notwithstanding that each deposit did not create a new chose in action: CA [62], [137] [**CAB 79, 101**].[10] There was no appeal against that aspect of the Court of Appeal's reasoning. As such, the "property" at issue in this appeal should be understood in the way just described.

24. The relevant property having been conceded to be the proceeds of crime (PJ [28]; CA [9] [**CAB 14-15, 63**]), it could not be excluded from the restraining order under s 29 of the Act unless it had "ceased" to have that status by reason of s 330(4). However, the primary judge held, and the Court of Appeal unanimously agreed, that the appellants had failed to discharge the burden of showing that s 330(4)(a) applied.[11]

25. To succeed in this appeal, the appellants therefore need to establish that the Court of Appeal erred in relation to <u>all three</u> of the following limbs of s 330(4)(a): (i) "third party"; (ii) "for sufficient consideration"; and (iii) "circumstances that would not arouse

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[10] See also *Commissioner of the Australian Federal Police v Kalimuthu (No 3)* [2017] WASC 108 at [116] (Allanson J).

[11] *Lordianto v Commissioner of the Australian Federal Police* [2018] NSWCA 199 at [117], [140] and [163] (Beazley P and Payne JA), [235] (McColl JA); *Commissioner of the Australian Federal Police v Lordianto* [2017] NSWSC 1196 at [127].

a reasonable suspicion". For the reasons that follow, the Court of Appeal's reasons disclose no such errors.

"third party"

26. Section 330(4)(a), read with s 317(1), requires an applicant for an exclusion order under s 29 to establish that he or she is a "third party". The text invites the question – "third party to what?" – and thereby presents a constructional choice. The appellants contend that the term "third party" here refers to a person who is not party to the criminal activity that causes the relevant property to become tainted. They embrace the construction advanced by McColl JA, in dissent on this point, who held that a third party is a person who was not "intentionally complicit"[12] in that criminal activity: CA [227] **[CAB 128]**; **AS [10], [16]**. On that basis, they contend that, because the structuring offences were transactions between unknown depositors and the CBA, they were third parties to that criminality, and thus satisfied this element in s 330(4)(a).

27. The primary judge, and a majority of the Court of Appeal (Beazley P and Payne JA), rejected that construction: PJ [105]; CA [117] **[CAB 36, 96]**. For the following five reasons, they were correct to do so.

28. *First*, starting with the text, the term "third party" is used in the Act only in s 330(4)(a), and is not defined. The ordinary meaning of that term encompasses "any person other than the principals to some transaction, proceeding, or agreement".[13] It is commonly used with that meaning in contract law, in connection with notions of privity.[14] By contrast, the term "third party" is not ordinarily used in the context of criminal law, where the relevant concepts are ordinarily expressed in terms of primary or secondary liability.

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[12] The word "intentionally" in that formulation appears at least substantially superfluous, as intention is inherent in complicity (leaving aside joint criminal enterprises, which are *sui generis*: *Miller v The Queen* (2016) 259 CLR 380 at [33]-[34]): see, eg, Criminal Code s 11.2(3), which provides that for a person to be complicit in the commission of an offence, he or she must have intended that his or her conduct would aid, abet, counsel or procure the commission of an offence; *Handlen v The Queen* (2011) 245 CLR 282 at 289 [9] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[13] Macquarie Dictionary Publishers 2019, *Macquarie Dictionary Online*. The Oxford Online Dictionary relevant defines "third party" as "a person besides the two primarily involved in a situation".

[14] See, for example, the use of that term in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 and *Gibbs v Mercantile Mutual Insurance (Australia) Ltd* (2003) 214 CLR 604 (denoting a person not a party to an insurance policy), and *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13 (a person not party to an arbitration agreement).

29. Consistently with its ordinary meaning the majority held that, in the context of s 330(4)(a), the term "third party" refers to a person who was not involved in the transaction by which the property first became the proceeds or an instrument of an offence: CA [101], [115] **[CAB 92, 95]**. Section 330(4)(a) directs attention not to whether a person is a third party to the criminality, but to whether a person who has acquired property was "wholly removed" from the property at the time that it became the proceeds or an instrument of an offence. That is consistent with the role of the "important concepts" in ss 329 and 330, which is to stamp property with the character of being proceeds or an instrument of an offence. The subject-matter of these sections is not the commission of offences, but the question of when and whether property is, becomes, remains and ceases to be proceeds or an instrument of an offence.[15] Their primary concern is with property, not criminal offending. That points against the term "third party" being concerned with involvement in criminal offending. So, too, does the immediate context in which the phrase appears, being "if it [the property] is acquired by a *third party* for sufficient consideration", that context being concerned with the circumstances in which property is acquired, rather than with responsibility for a criminal offence.[16]

30. *Second*, to construe the term "third party" as referring only to a person who is not intentionally complicit in the relevant offence gives that term little, if any, work to do. Indeed, the appellants admitted as much in submissions below, contending that the term "had no separate work to do in s 330(4)(a)": CA [100], [111] **[CAB 91, 94]**. That follows because of the cumulative requirement in s 330(4)(a) concerning knowledge or a reasonable suspicion of criminality, which would already eliminate a person who is intentionally complicit in the offending. One reason to reject the appellants' construction is therefore that it fails to give meaning to every word in the enactment.[17]

31. A related point is that the presence in s 330(4)(a) of an express mental element – the knowledge or reasonable suspicion limb – points against there being an additional

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[15] See *Commissioner of the Australian Federal Police v Kalimuthu [No 2]* [2018] WASCA 192 (***Commissioner of the AFP v Kalimuthu [No 2]***) at [396] (Murphy and Beech JJA).

[16] See ibid at [397] (Murphy and Beech JJA).

[17] *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).

(unexpressed) mental element framed in terms of "intentional complicity". Had Parliament intended to confine the meaning of "third party" to a person who was not intentionally complicit in the commission of an offence, it would be expected to have done so expressly, as it did elsewhere in the Act. For example, s 323(1)(c) allows the Court to award costs to a successful applicant for an exclusion order upon satisfaction that "the person was not involved in any way in the commission of the offence" in respect of which the relevant forfeiture order or restraining order was made. Similarly, s 102(2) of the Act, in the form in which it was enacted, permitted the court to make an order for the transfer of forfeited property provided that "the applicant was not, in any way, involved in the commission of the offence to which the forfeiture relate[d]". Section 330(4)(a) appeared alongside s 102(2) in this form until s 102 was amended in 2010, so the contrast in language is revealing.[18] In *Commissioner of the AFP v Hart*, Gordon J, with whose factual analysis and legal conclusions the other members of the Court agreed,[19] explained that, "notwithstanding that the applicant was not in any way involved in the commission of the offence to which the forfeiture relates", s 102(2) required the applicant to satisfy the court of two matters, one of which was that 'their interest in the forfeited property is, relevantly, not "proceeds of the offence"'.[20] That recognises that a person's involvement in an offence is an enquiry that is distinct from whether the relevant property constitutes or remains the "proceeds of an offence".

32. *Third*, the appellants' construction fails to take account of the context provided by reading s 330 as a whole, which has a temporal element.[21] Sub-section (4) governs the circumstances in which property "ceases"' to be proceeds or an instrument of an offence. By contrast, sub-ss (1) and (2) govern when property "becomes" proceeds or an instrument of an offence, while sub-s (3) governs when property "remains" proceeds or an instrument of an offence. Under s 330(4)(a), property "ceases" to be the proceeds or an instrument of an offence only if it is "acquired" by a third party without the third party knowing, or it being reasonable to suspect, that the property was proceeds (again, suggesting acquisition after property has been tainted). As a matter of logic, and on the ordinary meaning of the words used, the property must have been proceeds or an

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[18] By the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010* (Cth).
[19] *Hart* at 82 [2] (Kiefel CJ, Bell, Gageler and Edelman JJ).
[20] *Hart* at 102 [77]-[78] (Gordon J).
[21] *Commissioner of the AFP v Kalimuthu [No 2]* at [399]-[400] (Murphy and Beech JJA).

instrument of an offence before it can cease to have that character: see CA [102], [113], [116] **[CAB 92, 95-96]**.[22] Yet, on the appellants' construction of "third party", by one and the same transaction, property can simultaneously both "become" and "cease" to be the proceeds or an instrument of an offence. It is this construction, and not that of the majority in the Court below, that is productive of absurdity (cf **AS [22]**).

33. Contrary to **AS [17]-[18]**, s 330(4) does not contemplate that cessation takes place only upon the hearing of an application under ss 29, 49 or 73. To the contrary, the logic of s 330 is that property "ceases" to be proceeds or instrument of an offence under s 330(4) at the time when any of the events identified in sub-paragraphs (a) to (g) occur. That reading is supported by sub-s (5), which identifies circumstances in which property may again become the proceeds or instrument of an offence.

34. *Fourth*, the appellants' claim that a person is a "third party" provided he or she is not "intentionally complicit" in the criminal offending that results in property becoming the proceeds or instrument of an offence misapprehends the fundamental premise of the statutory scheme, which is that the forfeiture of property does not require proof of criminal conduct,[23] let alone proof of personal involvement in such conduct. As the majority recognised, the Act establishes a regime that focuses on transactions, rather than the involvement of persons in criminal conduct: CA [94]-[95] **[CAB 90]**. It evinces a legislative intention to "provide a broad intrusion upon private property rights with the avowed aim of forfeiting property which constitutes proceeds of an offence": CA [93] **[CAB 89-90]**.

35. *Fifth*, the appellants' submissions are founded upon an incomplete description of the legislative object of s 330(4)(a) – namely "to prevent the deprivation of property except for sufficient cause": **AS [18]**.[24] The legislative object is better understood as identified by the Australian Law Reform Commission in its report titled *Confiscation that Counts*, namely: "to eliminate, or reduce to the extent practicable, the scope for third parties to obtain relief from restraining and forfeiture orders … where the third party interest is

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[22] See also ibid at [174]-[176] (Buss P), [401] (Murphy and Beech JA).

[23] For example, the making of a restraining order does not require a finding that a particular offence has been committed: *Proceeds of Crime Act 2002* (Cth), s 19(4). Similarly, property can be proceeds of an offence or an instrument of an offence even if no person has been convicted of the offence: s 329(3).

[24] As to the role of the legislative object, see, eg, *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [14] (Kiefel CJ, Nettle and Gordon JJ).

acquired otherwise from a *bona fide* and at arm's length transaction."[25]

36. The focus of the Act on transactions and property, rather than criminal culpability, advances the objects of depriving persons of the proceeds and instruments of offences (s 5(a)); of preventing the reinvestment of proceeds or instruments in further criminal activities (s 5(d)); and of enabling law enforcement authorities effectively to trace proceeds and instruments of offences (s 5(e)). It also provides a direct incentive for persons to be vigilant in taking steps to ensure that: (a) they do not become party to transactions which first cause property to become tainted; and (b) they do not become party to any later transaction by which tainted property passes unless they can prove to the satisfaction of a court that their acquisition was for sufficient consideration and was in circumstances that would not arouse the specified reasonable suspicion. Where that incentive to be vigilant is increased, there is a consequential disincentive, and reduced opportunity, for criminals to engage in money laundering. Money launderers will find it more difficult to hide proceeds or instruments of crime. This serves the objects of deterring persons from breaching Commonwealth laws (s 5(c)); and of undermining the profitability of criminal enterprises (s 5(da)).

37. The appellants are wrong to assert that, on the majority's construction, "no acquirer of the proceeds of an offence may ever avail themselves of para 330(4)(a)" (cf **AS [20]**). The premise for that submission is that dealing with the proceeds of an offence is itself an offence contrary to Div 400 of the *Criminal Code* (Cth). That is not universally true, since it will depend upon the circumstances of the particular dealing.[26] In any event, the majority below considered this objection, and addressed it by holding that the relevant transaction to which a person must be a "third party" is the transaction by which property "first becomes" the proceeds or instrument of an offence: CA [115] **[CAB 95]**. On that construction, the term "third party" excludes a person who acquires property through the very transaction by which that property becomes proceeds or an instrument

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[25] Australian Law Reform Commission 1999, *Report 87: Confiscation that Counts* at [12.82], cited at **AS [14]**, and extracted at CA [90] **[CAB 87-88]**.

[26] Sections 400.3(1), 400.4(1), 400.5(1), 400.6(1), 400.7(1) and 400.8(1) of the Criminal Code require an actual belief that the money or property was the proceeds of, or an actual belief that it will become an instrument of, crime. Sections 400.3(2), 400.4(2), 400.5(2), 400.6(2), 400.7(2) and 400.8(2) require recklessness, and ss 400.3(3), 400.4(3), 400.5(3), 400.6(3), 400.7(3) and 400.8(3) require negligence, as to the relevant state of fact. Section 400.9 applies if it is reasonable to suspect that the money or property is the proceeds of crime, subject to the deeming provisions in sub-s (2), unless the defendant disproves reasonable grounds for suspicion (sub-s (5)), if the amount is $100,000 or more. Further, s 400.10 provides a defence of mistake of fact, as to the value of the money or property, in relation to each of these offences.

of an offence, but not a party to any subsequent transaction involving that property (even if the subsequent dealing with that property involves a further offence). The focus is on the transaction by which property "first becomes" proceeds or an instrument of an offence because, once property becomes "tainted property" (s 338), it retains that status even if converted into different forms, including by deposit into an account (ss 300(1) and 330(3)): CA [112] [**CAB 95**]. Subsequent dealings with the tainted property do not affect its character.

38. On that analysis the appellants were not third parties, because their interest in the funds in their account was acquired in the course of the very transaction (the making of the structured deposits into their accounts) that was an element of the offence that rendered that interest the proceeds or instrument of an offence.[27]

39. Contrary to **AS [21]**, the majority's construction is consistent with the example given in the Revised Explanatory Memorandum to the Proceeds of Crime Bill 2002 (Cth).[28] When A uses the proceeds of an offence to purchase a house from a vendor (B), the purchase money does not become, by that transaction, the proceeds or an instrument of an offence. The house would become proceeds of an offence.[29] But, provided B does not know and has no cause to suspect that the money used to purchase the house is the proceeds of an offence, B is a "third party" who may rely on s 330(4)(a),[30] because B was not a party to a transaction whereby the purchase money (as opposed to the house) became the proceeds of an offence.

40. As to **AS [22]** and **[24]**, the appellants' resort to "silly examples" should not divert the Court from the task of interpreting the language that Parliament has chosen.[31] There is no doubt that civil forfeiture regimes may operate adversely upon persons who are not

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27 The relevant offence being that created by s 142(1) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML Act**), which is reproduced at CAB 11-12.

28 Revised Explanatory Memorandum, Proceeds of Crime Bill 2002 (Cth) at 119.

29 Both by operation of s 330(1), and also by reason of s 329(1), as the house would have been wholly derived from the commission of an offence, being dealing with proceeds of crime.

30 In *Commissioner of the AFP v Kalimuthu [No 2]* at [453], Murphy and Beech JJA acknowledged that the analysis of the worked examples by Beazley P and Payne JA at [111], [112], [114]-[115] "may go towards resolving at least some, and perhaps many, of the anomalous consequences to which the respondents point".

31 See, eg, *ABCC v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at [94] (Keane, Nettle and Gordon JJ); *Waller v Hargraves Secured Investments Ltd* (2012) 245 CLR 311 at [16] (French CJ, Crennan and Kiefel JJ); *Turner v George Western Foods Ltd* [2007] NSWCA 67 at [59] (Campbell JA, with whom Beazley and Hodgson JJA agreed); *Commissioner of State Revenue v EHL Burgess Properties Pty Ltd* (2015) 209 LGERA 314, [2015] VSCA 269 at [72] (Tate JA, Kyrou JA and Robson AJA).

themselves complicit in an offence,[32] and that they may operate harshly,[33] including because the value of the property that is forfeited need not be in proportion to the contribution made by proceeds of crime.[34] However, it distorts analysis to focus just on one part of the regime, without consideration of other parts that may ameliorate what would otherwise be harsh operations.[35] Further, to the extent that harsh operations remain, Brennan J accurately identified the position when he stated in *Re Director of Public Prosecutions; Ex parte Lawler*[36] that "modern statutes which provide for the forfeiture of property owned by an innocent person" are "justified on the footing that the liability to forfeiture enlists the owner's participation in ensuring the observance of the law and precludes future use of the thing forfeited in the commission of crime".[37] In a similar vein in the same case, McHugh J observed:

> [f]orfeiture of property used or involved in the commission of a breach of the criminal or civil law has been seen for centuries as a reasonably appropriate means of obtaining compliance with such a law, irrespective of the degree of fault attributable to the owner of the goods.[38]

41. The Australian Law Reform Commission correctly summarised the position as follows: "[c]ourts in the United Kingdom, the United States and Australia have long recognised the draconian effects of *in rem* forfeiture and yet, notwithstanding their traditional tendency to seek to ameliorate the harsh application of laws, have had little difficulty in giving them full force and effect".[39]

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[32] See, in the context of the *Confiscation Act 1997* (Vic), *DPP v Nguyen* (2009) 23 VR 66 at [115] (Maxwell P, Weinberg JA and Kyrou AJA). There are provisions in the Act that may be invoked to ameliorate certain perceived injustices. For example, s 42(5)(b) empowers the court to revoke a restraining order if satisfied that it is in the interests of justice to do so. Section 72 obliges the court, in certain circumstances, to direct the Commonwealth to pay a specified amount to a dependant of a person whose property is forfeited, if this would relieve hardship to the dependant caused by the forfeiture order.

[33] Eg *Burton v Honan* (1952) 86 CLR 169 at 178-179, Dixon CJ observing that " in the history of English and Australian customs legislation forfeiture provisions are common, drastic and far-reaching".

[34] *Hart* at [10] and [14] (Kiefel CJ, Bell, Gageler and Edelman JJ).

[35] In addition to the provisions noted in fn 32 above, ss 77 and 78 of the Act provide for compensation in specified circumstances where property is subject to forfeiture or has been forfeited, but where a person holds an interest in that property that is not proceeds or an instrument of an offence.

[36] (1994) 179 CLR 270.

[37] *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 (***Lawler***) at 279 (Brennan J). See also *Cheatley v The Queen* (1972) 127 CLR 291 at 303 (Menzies J), 310 (Mason J).

[38] *Lawler* at 294 (McHugh J); and, to similar effect, see 276 (Mason CJ), 289-90 (Dawson J, with whom Toohey J relevantly agreed). See also *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 418-419 [20]; *White v Director of Public Prosecutions (WA)* (2011) 243 CLR 478 at 489 [26]-[27].

[39] Australian Law Reform Commission 1999, *Report 87: Confiscation that Counts* at [16.29].

"for sufficient consideration"

42. Even if the appellants were "third parties", their interest in the deposits in the CBA accounts did not cease to be proceeds of crime under s 330(4)(a) unless it was acquired "for sufficient consideration". That requirement places a constraint upon the circumstances in which property may be placed beyond the reach of the Act. It guards against circumvention of the civil forfeiture regime.[40]

43. Section 338 of the Act defines "sufficient consideration" as "consideration that is sufficient and that reflects the value of the property, having regard solely to commercial considerations".[41] The requirement that consideration be "sufficient" is familiar to contract and property law. Though the scope of that term varies depending upon the context in which it is used, at its core is the notion that some money or value must pass between parties to a transaction, in order to make a promise enforceable or to move a transfer.[42] This is based on the idea of reciprocity as a precondition for legal recognition,[43] and is reflected in the general principle that equity will not assist a volunteer.[44]

44. The Court of Appeal unanimously affirmed the primary judge's conclusion (PJ [107]-[110] **[CAB 36-37]**) that the appellants had failed to prove they had acquired their interest in the funds in their bank accounts "for sufficient consideration": CA [133], [140], [166] **[CAB 100, 102, 108]**. That finding was correct. The appellants' evidence was fundamentally inconsistent with their ability to prove that requirement, because their case was that they did not acquire property from the Indonesian money remitters to whom they paid funds. It follows that their rights against those money remitters under Indonesian law, whatever they may be, by reason of the money remitters' failure to transfer funds to the appellants' Australian bank accounts, remain. They are not before this Court.

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40 *DPP (Vic) v Le* at 577 [45] (Gummow and Hayne JJ). Their Honours dissented, but not on a relevant point. See also the Revised Explanatory Memorandum to the Proceeds of Crime Bill 2002 (Cth) at 119, noting that "[a] person who receives the proceeds of an offence as a gift (and therefore does not supply any consideration for the property) will be liable to forfeit that property".

41 Cf the legislation under consideration in *DPP (Vic) v Lee* (2007) 232 CLR 562.

42 *Chief Commissioner of State Revenue (NSW) v Dick Smith Electronics Holdings Pty Ltd* (2005) 221 CLR 496 at 504-505 [22]-[24] (Gleeson CJ and Callinan J); *Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)* (1948) 77 CLR 143 at 152 (Dixon J).

43 *DPP (Vic) v Le* at 591 [108] (Kirby and Crennan JJ).

44 *DPP (Vic) v Le* at 575 [37] (Gummow and Hayne JJ).

45. In this Court, the appellants frankly and correctly acknowledge that the hundreds of deposits into their bank accounts in sums of less than $10,000 "were made by strangers in the course of a money laundering process known as 'cuckoo smurfing'": AS [7]. It follows that there is no dispute that the funds in the appellants' bank accounts were placed there not by the money remitters, but by strangers who were engaged in money-laundering: CA [137] **[CAB 101]**. The appellants' interest arose from cash deposits made by those strangers. But the appellants provided no consideration to them. On their own case, the appellants "had no connection, contractual or otherwise" with the persons who made those deposits: CA [138] **[CAB 101]**. Further, they specifically disavowed any suggestion that they had agreed, with anybody, that money would be transferred from Indonesia to Australia by the making of structured cash deposits of under $10,000 at CBA branches across Australia: CA [138] **[CAB 101]**. Indeed, their claim to have been victims of "cuckoo smurfing" was that "the deposits in their Australian CBA accounts were sourced, not from their own funds, but from proceeds, in Australia, of criminal activity": PJ [55] (emphasis added) **[CAB 21-22]**. Their claim to have fallen victim to "cuckoo smurfing" was therefore in fundamental tension with their claim that the funds they had paid to Indonesian money transmitters were "transferred" into their CBA accounts, that being the only basis upon which they contended that the deposits into their accounts had been made "for sufficient consideration": PJ [58], [106] **[CAB 22, 36]**.

"circumstances that would not arouse a reasonable suspicion"

46. Even if the appellants were "third parties" who provided "sufficient consideration" for their interest in the funds in their bank accounts, that interest nevertheless did not "cease" to be the proceeds of an offence under s 330(4)(a) unless it was acquired by the appellants without them "knowing, and in circumstances that would not arouse a reasonable suspicion ... that the property was proceeds of an offence or an instrument of an offence".

47. The primary judge found that the appellants had not established that the property was acquired without their knowledge that it was either proceeds or an instrument of an offence: PJ [123] [**CAB 40**]. That finding was not disturbed on appeal, and it is not the subject of any ground of appeal to this Court, although it is mentioned in passing in the appellants' submissions: AS [34]. On that undisturbed finding of the primary judge,

s 330(4)(a) could have no application. It is therefore difficult to see why the Court need embark on any examination of the "reasonable suspicion" limb.

48. In any case, the primary judge found that the appellants' bank account statements demonstrated a pattern of activity that would arouse a suspicion in any reasonable person, as would the manner in which Ms Koernia was asked to make the deposits in Indonesia: PJ [126] **[CAB 41]**. The evidence before the primary judge, summarised at [6]-[17] above, provided ample support for that conclusion.[45] In particular, the fact that Ms Koernia deposited very large sums into the accounts of people she did not know, the manner in which the funds were deposited into the appellants' CBA accounts over a period of two years, the sheer number of structured cash deposits, the value of the money so deposited, and the fact that many of the deposits were made at multiple branches throughout Australia on a single day – all of which were matters known to the appellants – together with the absence of any explanation for the manner and form of the deposits, provided a firm basis upon which to conclude that the appellants failed to disprove the arousal of a reasonable suspicion that the property was the proceeds or an instrument of an offence.

49. Consistently with the primary judge's findings, the Court of Appeal unanimously considered the conclusion "inevitable" that the circumstances were such as to arouse a reasonable suspicion that the funds being paid into the appellants' bank accounts were the proceeds of an offence or an instrument of an offence: CA [163] **[CAB 107-108]**.

50. There is no basis to impugn that conclusion. The facts known to the appellants are not in dispute and, on the basis of those facts, the Court of Appeal's conclusion was clearly correct. To the extent that a reasonable suspicion is dependent on what is subjectively known to the person in question (AS [38]), the appellants point to no authority that suggests that this requirement extends to knowledge of the law. The appellants' complaint that the Court of Appeal did not identify the <u>particular offence</u> from which the proceeds would be reasonably suspected of having been derived is therefore

[45] At AS [47], [49], [56] and [67]-[69], the appellants describe Ms Koernia's evidence on this issue as "credible" and "unchallenged". However, at PJ [115] **[CAB 38-39]**, the primary judge found that Ms Koernia's evidence, as to the manner in which she made the deposits in Indonesia, was "wholly unconvincing"; and at PJ [116] **[CAB 39]**, her Honour found that Ms Koernia's denials that she ever thought the multiple sub-$10,000 cash deposits into her CBA accounts were odd or unusual, was "also … unconvincing". The findings at PJ [116], [120] and [123] **[CAB 39, 40]**, read fairly, constituted a rejection of Ms Koernia's denials recorded at PJ [63] **[CAB 24]**. Further, the denials collected at AS **[53]-[54]** themselves indicate that the appellants' evidence *was* relevantly challenged in cross-examination.

misplaced: **AS [36], [42]**. The submission reads words into the Act that are not there. All that s 330(4)(a) requires is a reasonable suspicion that property is the proceeds of "an offence". It is plainly possible for a person to have a reasonable suspicion that property is the proceeds of an offence without knowing what offence. For example, if a person is approached in a pub and offered designer goods at 10% of their market value on the basis that the goods "fell off the back of a truck", that would ground a reasonable suspicion that the goods were the proceeds of crime, although the particular offence could not be identified (possibilities involving, for example, theft, burglary, armed robbery or fraud). It would be inconsistent with the statutory regime for property to cease to be proceeds of crime simply because, even though there is an obvious basis to suspect that the property is the proceeds of crime, there is no way to link that suspicion to any particular offence.

51. Further, the appellants' argument that the suspicion must relate to a particular offence erodes the express distinction in the statutory text between "knowledge" and "reasonable suspicion". A "reasonable suspicion" is positioned somewhere on the continuum between "complete incredulity" and "comfortable belief".[46] The "reasonable suspicion" test is objective.[47] That application of that test is not limited or controlled by a person's subjective ignorance of the law.[48] To the contrary, the authorities concerning the meaning of "reasonable suspicion" direct attention to the facts that will satisfy that test. Thus, this Court has observed that "[t]he facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown."[49] A suspicion "in its ordinary meaning is a state of conjecture or surmise where proof is lacking".[50] As such, "the notion which 'reason to suspect' expresses... is... of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or

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[46] *Powell v Lenthall* (1930) 44 CLR 470 at 478; see also *Prior v Mole* (2017) 261 CLR 265 at [24] (Gageler J, dissenting).

[47] *DPP (Vic) v Le* at 565 [1] (Gleeson CJ), 595 [127]-[128] (Kirby and Crennan JJ). See also *Prior v Mole* (2017) 261 CLR 265 at 270 [4] (Kiefel CJ and Bell J), 277-278 [24]-[26] (Gageler J, dissenting), 292 [73] (Nettle J), 298 [99] (Gordon J); *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at [10].

[48] See further *Commissioner of the AFP v Kalimuthu [No 2]* at [289] (Buss P).

[49] *George v Rockett* (1990) 170 CLR 104 at 115 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) (emphasis added).

[50] Ibid. See also *Ruddock v Taylor* (2005) 222 CLR 612 at 632-633 [71] (McHugh J, dissenting).

fear".[51] If a reasonable person with knowledge of the facts known to the appellants would have a reasonable suspicion that property was the proceeds of an offence of some kind, then the appellants cannot escape that conclusion simply by claiming ignorance of the law.

52. It would be inconsistent with the objects of the Act, and would invite circumvention of the statutory scheme, if property was beyond the reach of the Act simply because it was transferred to a person who, while suspecting that the property was the proceeds of crime of some kind, was sufficiently ignorant of the law that he or she could not form that suspicion in relation to any specific offence. This is particularly so where the relevant offence is "of a relatively technical kind", the existence of which may not be widely known: cf **AS [43]**. That kind of problem is the very thing the "reasonable suspicion" limb of the test is designed to avoid.[52] For that reason, the Court of Appeal was correct to rely, albeit only by analogy, on the proposition that ignorance of the law is no excuse: CA [161] **[CAB 107]**. As Gleeson CJ and Kirby J said in *Ostrowski v Palmer*:[53]

> Professor Glanville Williams said that almost the only knowledge of law that many people possess is the knowledge that ignorance of the law is no excuse when a person is charged with an offence. This does not mean that people are presumed to know the law. Such a presumption would be absurd. Rather, it means that, if a person is alleged to have committed an offence, it is both necessary and sufficient for the prosecution to prove the elements of the offence, and it is irrelevant to the question of guilt that the accused person was not aware that those elements constituted an offence.

53. Consistently with the above, the Court of Appeal's construction of s 330(4)(a) does not "imput[e] knowledge" of the law to a person seeking to invoke the benefit of that provision (**cf AS [42]**). It simply requires a court to ask whether, in the prevailing factual circumstances known to the person who acquires property, a reasonable person would have suspected – that is, held an apprehension or fear, even though proof is lacking – that the property was the proceeds of an offence of some kind.

54. The appellants' criticism of the Court of Appeal's reliance on the above principle to inform the construction of a civil statute is misplaced: **AS [37], [45]**. It ignores the fact that the civil statute in question uses the words "reasonable suspicion" in a context that

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[51] *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 at 303 (Kitto J).

[52] *DPP (Vic) v Le* at 565 [1] (Gleeson CJ), 583-584 [72]-[73], 595 [127]-[128] (Kirby and Crennan JJ).

[53] (2004) 218 CLR 493 at 500 [1] (Gleeson CJ and Kirby J) (footnote omitted).

is directed to criminal offending. Given that ignorance of the law is not an excuse even in the criminal context (where the consequence of breach of the norm of which the person is ignorant may be severe punishment, and where concern for the rights of an accused is particularly acute), it would produce incoherence in the law if such ignorance took property beyond the reach of an Act that is specifically directed to restraining and seizing the proceeds of crime even where criminal liability was not established. For that reason, the appellants are quite wrong to submit that "[t]here is no reason… to deny third party property rights when an acquirer is ignorant of law": **AS [43]**. There is every reason to do so, so as to prevent circumvention of the statutory scheme. Ignorance of the law is no more relevant to the operation of the Act than it is in any other context.

10 55. The appellants' recourse to the principle of legality (**AS [44]**) similarly does not assist them. In *AG (NT) v Emmerson*, this Court considered an argument, based on the principle of legality, that a provision in the *Criminal Property Forfeiture Act* (NT) should be construed in a manner said to better advance the protection of fundamental property rights.[54] It rejected that argument, preferring a construction of the provision that aligned more closely with its text and that accorded with, rather than frustrated, the stated objectives of the statutory scheme.[55] The same approach is appropriate here.

56. For the above reasons, the appeal should be dismissed with costs.

PART VI ESTIMATE

20 The respondent estimates that up to 2.5 hours may be required for the presentation of his oral argument in this matter and in *Kalimuthu & Another v Commissioner of the Australian Federal Police* (P17/2019).

Dated: 5 June 2019

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[54] *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 439 [86].
[55] *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 439-440 [87]-[88].