

CONFISCATING CRIMINAL ASSETS THE NEW DETERRENT

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The traditional response of prosecution, followed by punishment is seldom of itself an adequate response to large-scale criminal activity which is aimed at accumulating wealth.² The motivation for such crime is greed and the aim is profit. To remove the profit is to reduce the motivation. As one commentator has observed:

The first thing to remember is that the organization of crime is directed towards the accumulation of money and with it power. The possession of the power that flows with great wealth is to some people an important matter in itself, but this is secondary to the prime aim of accumulating money. Two conclusions flow from this fact. The first is that the most successful method of identifying and ultimately convicting major organized criminals is to follow the money trail. The second is that once you have identified and convicted them you take away their money; that is, the money which is the product of their criminal activities.³

In recent times there has been a variety of new legislation, both in Australia and in other common law countries,⁴ aimed at confiscating the benefits derived from criminal conduct. I refer to this legislation generically as confiscation legislation. Few, if any, would disagree with the aim of this legislation, the general thrust of which would make true such hallowed maxims as "crime does not pay" and "no-one should profit from an illegal act" but issue has been taken with some of the measures adopted to achieve this aim.⁵

Confiscation legislation is premised on the basis of combatting organized crime.⁶ In the international sphere significant impetus was provided by the 1987 Vienna Conference dealing with organized crime and money laundering, although countries such as the United States of America and the United Kingdom already had legislation in place. In Australia, a series of Royal Commissions called for action against organized crime and

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- 1 Paper delivered at a public seminar entitled, "Money Laundering, Cash Transactions Reporting and Confiscation of the Proceeds of Crime", convened by the Institute of Criminology, The University of Sydney, 6 June 1990
 - 2 Fox and Freiberg, *Sentencing State and Federal Law in Victoria* (1985) p 210; "Profits of Crime and Their Recovery" (1984) *Cambridge Studies in Criminology* Vol III (The Hodgson Report) p 6
 - 3 Costigan, Q.C., "Organized Fraud and a Free Society" (1984) 17 *ANZJ* 7 p 12
 - 4 See generally McLean, "Seizing The Proceeds of Crime: The State of the Art" (1989) 38 *ICLQ* 334
 - 5 See, for example, Goode, "The Confiscation of Criminal Assets" (1986) 67 *Proceedings of the Institute of Criminology* 35; Fisse, "Confiscation of the Proceeds of Crime: Funny Money, Serious Legislation" (1989) 13 *Crim L J* 368
 - 6 See, for example, the Second Reading Speech on the Commonwealth *Proceeds of Crime Act*, House of Representatives Debates 1987 Vol 154 p 2317

the large funds it generated. The Williams and Stewart Royal Commissions explored the ramifications of large scale drug dealing. To this, the Costigan Royal Commission added the significant impact of large scale revenue fraud.

General agreement for confiscation action against those convicted of narcotics offences, was reached at the Special Premiers' Conference on Drugs in 1985. Model uniform legislation was agreed at the Standing Committee of Attorneys General. As it transpired, uniform legislation did not eventuate, but all States except Tasmania now have confiscation legislation. Having a common origin, many of the principles in the various Acts are consistent as regards the freezing and confiscation of assets.

The legislation is new. Many of the provisions have yet to be tested. Experience has shown that it takes at least two years to complete a large confiscation action under Commonwealth law even where there is a plea of guilty to the associated criminal charge.

The aim of this paper is to give an overview of Commonwealth confiscation legislation and some of the issues that have arisen under it.

BACKGROUND

The Commonwealth Director of Public Prosecutions Office has been active in the field of recovering ill gotten gains associated with criminal activity since 1985. Some of the legislation I will refer to pre-dates this time. The impetus provided in 1985 was the expansion of the DPP's civil remedies function⁷ and the allocation of resources with the specific task of implementing the legislative initiative.

The civil remedies function gives the DPP a role in normal civil recovery action by Government agencies in matters connected with, or arising out of, actual or proposed prosecutions, or a course of activity which is being considered for the purpose of deciding whether to institute a prosecution.⁸ This function involved no new powers of recovery or forfeiture.

Action taken in response to the revelation of the "bottom-of-the-harbour" tax frauds gave rise to the civil remedies initiative. Royal Commissioner Costigan Q.C. advocated that large scale tax fraud be tackled with task forces that would carry out criminal prosecutions and initiate civil proceedings to recover the tax. The special prosecutors, appointed in 1982 to handle these tax prosecutions, were the first to have an ancillary function to take or co-ordinate or supervise the taking of civil remedies on behalf of the Commonwealth and its authorities.

7 *Director of Public Prosecutions Amendment Act (Cth) 1985*

8 *Director of Public Prosecutions Act (Cth) 1983 s 6(8)*

The power to take civil remedies is not exclusive of the power of the defrauded agency to recover on behalf of the Commonwealth.⁹ To date the function has been exercised mainly by way of supervision and co-ordination with the litigation being conducted through the Australian Government Solicitor. The function applies in relation to the recovery of taxes¹⁰ and other matters or classes of matters specified in writing by the Attorney General.¹¹ The Attorney General has by instrument specified 26 matters. The most important are three class instruments covering respectively, social security fraud, medifraud and nursing home fraud.

The DPP's involvement in civil remedies comes from it being in a unique position to assemble information from a variety of Commonwealth agencies and to co-ordinate the activities of these agencies against particular individuals or entities with outstanding liabilities to the Commonwealth. The civil remedies function is also a recognition that where criminal means are used to obtain or keep funds from the Commonwealth there is a particular community interest in seeing that the funds are recovered. This may require that resources are applied to difficult recoveries in matters where direct cost benefit analysis, without law enforcement considerations, might not dictate that the resources be so applied.

The recovery of taxes has an important role to play in the effort to remove illegally obtained benefits from criminals. In the case of taxation fraud the benefits are recovered directly. With respect to other types of crimes, few criminals pay tax on their income. The raising and enforcement of default assessments can be an effective way of removing some or all of the proceeds from the offender. Since 1985 recoveries of tax pursuant to the civil remedies function total more than \$72m to 30 June 1990. Non-tax recoveries in the same period total more than \$2.7m.

CONFISCATION LEGISLATION

There is no common law crime-based forfeiture.¹² The ancient concepts of attainder and corruption of blood¹³ were abolished in the United Kingdom in 1870¹⁴ and in the Australian colonies shortly after.¹⁵ These old common law rules were also anathema in the American colonies. The framers of the United States Constitution and members of the First Congress rejected them.¹⁶

9 *Efstratiadis v. Commonwealth of Australia* (unreported, Federal Court per von Doussa J, 30 April 1990)

10 *Director of Public Prosecutions Act*, s 6(1)(fa)

11 *Director of Public Prosecutions Act*, s 6(1)(h)

12 *Gollan v. Nugent* (1988) 63 ALJR 11

13 See generally Chitty, *A Practical Treatise on the Criminal Law*, Vol II Ch XVII; Blackstone, *Commentaries on the laws of England*, Vol IV Ch XXIX

14 *Forfeiture Act* 1870 (UK)

15 See, for example, *Forfeiture for Treason and Felony Abolition Act* 1878 (Vic)

16 *United States Constitution*, Art III, s 3, Cl 2 provides "no attainder of Treason shall work Corruption of Blood or Forfeiture except during the Life of the Person attainted". The first Congress supplemented the Constitutional proscription with a statutory bar providing that no conviction for any crime would be permitted to work a corruption of the blood or any forfeiture of estate. Act of April 30, 1790, Ch 9, 1 Stat 117, s 24

Having effectively abolished common law forfeiture, the United States Congress then set about including *in rem* forfeiture provisions in a variety of statutes. These were originally patterned on the English *Navigation Acts* and involved the concept of the “guilty chattel”. Because it was often difficult to locate the owner of the ship or goods on board, transgressions of the *Navigation Acts* were dealt with by action against the vessel or goods themselves. Forfeiture could be ordered unless a claimant appeared and proved that the property at issue had not been used in violation of the *Acts*. Many of these early forfeiture provisions were to be found in Customs Legislation.

Australian Customs Legislation has from its early inception also contained forfeiture provisions triggered by the use of ships or other conveyances or the importation of goods in contravention of the legislative provisions. More recently, steps taken to combat the illegal use of narcotics has led to the extension of these provisions to cover money or goods derived from narcotics dealings as well as the notion of a pecuniary penalty order against a person based on the value of benefits derived by the person from their connection with narcotics.

The recent confiscation legislation enacted in Australia has a number of common features. Generally the legislation includes the following powers:

- forfeiture of property connected to an offence or derived from the proceeds of the offence;
- pecuniary penalties based on benefits derived from the offence;
- restraint of property at an early stage pending determination of the substantive applications; and
- investigative powers.

FORFEITURE

Customs Act Forfeiture

As discussed above, the forfeiture provisions in the *Customs Act* developed from the need to control the importation of goods. They do, however, have important application in relation to narcotic goods and it is this aspect upon which I will concentrate. The scheme is that ships, aircraft and goods used in contravention of the *Act* are declared forfeit. These may be seized and it is incumbent upon any claimant to seek to prevent their condemnation and disposal by the Commonwealth. Section 228 provides, *inter alia*, that ships not exceeding 80 metres in length and aircraft will become forfeit if used to smuggle goods or knowingly used to convey prohibited imports or exports. Ships over 80 metres in length are not forfeited but the owner is liable to a penalty not exceeding \$100,000 and the ship may be detained as security.

Paragraph 229(1)(j) provides that any carriage or animal used in smuggling or in the unlawful importation or conveyance of any goods, are forfeited to the Crown. This provision applies in relation to ships and aircrafts notwithstanding the more specific imports narcotics and vehicles used to convey illegally imported narcotics.

Section 229A covers monies or goods that come into the possession or under the control of a person by reason of his dealing in narcotic goods. These monies or goods are deemed to be forfeited upon being seized. The section allows for tracing into monies or goods exchanged for, purchased or otherwise acquired out of the original monies or goods. Section 229A does not extend to things that are neither goods or monies such as a bank account.¹⁷ The section does allow tracing through a bank account to goods in the possession or under the control of a person that were purchased or otherwise acquired out of monies to which the section applies.¹⁸ The section does not cover real property.

A police officer may seize any forfeited goods or any goods that he believes on reasonable grounds are forfeited goods.¹⁹ A seizure notice must be served. Any claimant must then make a claim within 30 days and, if required, follow up with an action to recover the goods within four months. The usual action is a claim in detinue or for conversion. If these time frames are not met the goods are automatically condemned as forfeited to the Crown.²⁰

Where the forfeiture of goods is as a result of the commission of an offence, the conviction of any person for the offence shall have effect as a condemnation of the goods.²¹ Narcotic related goods which are condemned as forfeited to the Crown are disposed of in accordance with the directions of the Commissioner or Deputy Commissioner of the Australian Federal Police.²²

Proceeds of Crime (POC) Act Forfeiture

The *POC Act* is conviction based. Where a person is convicted of an indictable offence a court may order that “tainted property” be forfeited to the Commonwealth.²³ Tainted property is property used in, or in connection with, the indictable offence or property derived or realised directly or indirectly by any person from the commission of the offence.²⁴

The application for a forfeiture order is made by the DPP and the court has a discretion to grant the order. The court may have regard to any hardship that the order may reasonably be expected to cause to any person, the use that is ordinarily made or is intended to be made of the property and the gravity of the offence concerned.²⁵ Property ordered to be forfeited vests absolutely in the Commonwealth except that registrable property vests in equity until the applicable registration requirements have been complied

17 *Vickers v. Minister for Business and Consumer Affairs* (1982) 43 ALR 389

18 *Kanbur Pty Ltd v. Adams* (1984) 55 ALR 158

19 *Customs Act*, s 203

20 *Customs Act*, ss 205 and 208A

21 *Customs Act*, s 262

22 *Customs Act*, s 208D

23 *POC Act*, s 19

24 *POC Act*, s 4(1)

25 *POC Act*, ss 19(3) and (4)

with.²⁶ The property cannot be dealt with by the Commonwealth until the end of the appeal periods in relation to the making of the forfeiture order and the person's conviction.²⁷

The other forfeiture provisions in the *POC Act* are triggered by what are called "serious offences". These are defined to mean:²⁸

- a narcotics offence involving more than a traffickable quantity of drugs;
- an organised fraud offence which is created by s.83 of the *POC Act*; or
- a money laundering offence in relation to the proceeds of a serious narcotics offence or an organised fraud offence.

Where a person is convicted of a serious offence any property which has been restrained under the *POC Act*, and which remains restrained at the end of a period of six months after the date of conviction, is automatically forfeited to the Commonwealth at the end of that period.²⁹ This forfeiture occurs simply by elapse of the six month period following conviction and does not require any assessment or order by the court.

To avoid automatic forfeiture a person must have a court lift the restraining order prior to the end of the six month period. To do that, the person must satisfy the Court that the property was not used in, or in connection with, any unlawful activity and was not derived by any person from any unlawful activity, and that the person's interest in the property was lawfully acquired.³⁰

It is not sufficient to satisfy the Court that the property was not linked to the offence for which the person was convicted. Unlawful activity means conduct that constitutes an offence against a law of the Commonwealth, a State, a Territory or a foreign country.³¹ All these possibilities must also be ruled out.

A person can make an application to have property unrestrained, for the purposes of statutory forfeiture, at any time following the making of a restraining order. It would be wise to make such an application at an early stage. Statutory forfeiture is not prevented by the making of an application but only by its determination by a Court in favour of the applicant.

26 *POC Act*, s 20(1)

27 *POC Act*, s 20(6)

28 *POC Act*, s 7

29 *POC Act*, s 30

30 *POC Act*, s 48(4)

31 *POC Act*, s 4(1)

Different approaches have been taken in relation to the phrase “in connection with” in its application to narcotics offences. The Queensland Court of Criminal Appeal has expressed the view that there must be a substantial connection between the use of the property and the conviction of the offence.³² It must be such that the offence could not have been committed without the use of the property. A vehicle used to convey drugs to the place of sale is unlikely to satisfy this test, nor is a house used to store drugs prior to sale. On a charge of possessing narcotics, no property may be liable to forfeiture as the place of possession may be thought irrelevant to the commission of the offence.³³

This approach was rejected by the New South Wales Court of Criminal Appeal.³⁴ The phrase “in connection with” should be given its ordinary grammatical meaning. The Court’s wide discretion on the question of forfeiture would enable it to avoid forfeiture in appropriate cases. A car used to convey drugs to the place of sale is tainted, but the Court declined to forfeit it because of the hardship it would cause to an innocent third party having an interest in the vehicle.

The approach adopted in interpreting the phrase is of particular importance in respect of serious offences. Forfeiture depends on whether the defendant can satisfy the Court that the property was not used in connection with any unlawful activity. The width given to the phrase “in connection with” may be determinative because there is no discretion not to forfeit the property.

PECUNIARY PENALTIES

Forfeiture operates against goods or property which are linked to, or not shown not to be linked to, the conduct which renders them forfeit or liable to forfeiture. Pecuniary penalty provisions operate against persons who have obtained benefits from the commission of certain acts. A penalty equal to these benefits can be ordered against the person and enforcement action taken against any of the persons property regardless of whether it can be linked to the acts from which the benefits were derived.

32 *R v. Ward, Marles and Graham* (1989) 1 Qd R 194. Carter J, with whom Kneipp J and Demack J agreed, found that forfeiture of a vehicle used to convey drugs to the place of sale should have been refused in the exercise of the Court’s discretion. He reiterated views about the need for a substantial connection between the property and the offence, that he had previously expressed in *Re An Application Pursuant To The Drugs Misuse Act 1986* (1988) 2 Qd R 506

33 *Re An Application Pursuant To The Drugs Misuse Act 1986* (1988) 2 Qd R 512

34 *R v. Hadad* (1989) 16 NSWLR 476

The *Customs Act* and *POC Act* contain similar schemes covering pecuniary penalties.³⁵ The most notable differences are that the *Customs Act* pecuniary penalty provisions apply only to dealings in narcotics and they are not conviction based. The proceedings are civil in nature and the Court has to be satisfied that the person engaged in a prescribed narcotics dealing. These are defined to include such things as importing, conspiring to import, possessing and selling narcotic goods in contravention of the *Customs Act*.³⁶ These dealings largely mirror the narcotics offences in the *Customs Act* except that there is no offence in relation to selling narcotic goods.

A pecuniary penalty can be ordered under the *Customs Act* regardless of whether or not a person has been convicted of an offence or had proceedings instituted against them in respect of any offence.³⁷ Where the ingredients of the prescribed narcotics dealing are the same as an offence of which the defendant has been convicted “the Court is bound by evidence of a conviction and cannot go behind it or permit a collateral attack on some element critical to it”.³⁸

If the Court³⁹ is satisfied that a person has engaged in prescribed narcotics dealings under the *Customs Act* then it shall assess the value of benefits derived and order that a pecuniary penalty equal to that value be paid to the Commonwealth.⁴⁰ The *POC Act* provides the Court with a discretion. Where the Court is satisfied that the person derived benefits from the commission of an offence it may assess the value of benefits so derived and order the person to pay the Commonwealth a pecuniary penalty equal to that value.⁴¹

In many cases there will be difficulties in quantifying benefits derived by a person from criminal activity. It is unlikely that the documentation and records usually associated with legitimate enterprises will be available. Relationships and dealings will be known

35 Pecuniary penalty provisions were inserted into the *Customs Act* in 1979 under Division 3 of Part XIII. The pecuniary penalty provisions of the *POC Act* were largely based on those in the *Customs Act* with a number of improvements added. In turn the *Customs Act* provisions were amended drawing on the improvements in the *POC Act*, particularly in relation to the restraint of assets and lifting the corporate veil. Many of the operative provisions of the two Acts are therefore the same or very similar.

36 *Customs Act*, s 243A

37 *Customs Act*, s 243B(3) This section has been applied in *Commissioner of Australian Federal Police v. Razzi and Others* (Unreported, Federal Court per Wilcox J, 24 August 1989)

38 *Commissioner of Australian Federal Police v. Butler and Another* (1989) 91 ALR 293 at 301

39 Pecuniary penalty applications under the *Customs Act* are brought in the Federal Court while the *POC Act* gives the State Courts jurisdiction. *POC Act* applications are brought by the DPP. Until the recent amendments the Commissioner of the Australian Federal Police was the relevant applicant under the *Customs Act*. The recent amendments provide that the DPP can also make an application under the *Customs Act*.

40 *Customs Act*, s 243B(2)

41 *POC Act*, s 26(1)

only to those involved. They will not be the most credible source of information. Both Acts provide that the penalty shall be assessed by the Court having regard to all or any of a number of prescribed factors.

The factors to be considered include the money or value of property coming into the possession or under the control of a person, the value of the defendant's property, before during and after the relevant event and, in the case of the *Customs Act*, the market value of similar narcotics to those sold.⁴² A comparable scheme for assessing benefits was described as "a somewhat rough and ready approach" in which the "niceties of accountancy principles or of the classification of legal relationships are not significant".⁴³

In assessing the benefit in relation to narcotics the court may have regard to expert evidence from a police or customs officer about the market value of narcotic goods at a particular time or during a particular period.⁴⁴ In ascribing a value the court may take into account whether a defendant is likely to have sold on a wholesale or retail basis.⁴⁵

It is the gross and not the net benefit which must be assessed.⁴⁶ Expenses or outgoings in connection with deriving the benefit are not to be taken into account.⁴⁷ Plainly this may lead to a penalty which far exceeds the actual benefit derived or retained by a person.

The approach in *Commissioner of Australian Federal Police v. Curran*⁴⁸ would ameliorate some of the potential harshness which may be thought to arise from these provisions. A distinction was drawn between expenses or outgoings which are not deductible in assessing the penalty and monies which pass through the hands of a particular defendant before being disbursed by way of division of the proceeds among several participants. Roden J in *R v. Fagher* did not find this approach attractive. To follow it would mean that the "deductibility of monies paid to a co-offender would appear to depend upon whether what was paid was an agreed fee or a percentage of the proceeds".⁴⁹ It would be difficult to discern such fine legal relationships in most criminal transactions.

Such a finding was made in *Commissioner of Australian Federal Police v. Lahood*.⁵⁰ After the importation of cannabis resin, the defendant paid a bribe of \$130,000 previously promised to a police officer to ensure that the drugs passed through customs. In assessing the penalty this payment was disregarded as an expense or outgoing. The Court

42 *POC Act*, s 27; *Customs Act* s 243C

43 *R v. Fagher* (1989) 16 NSWLR 67 at 80. The Act under consideration was the *Crimes (Confiscation of Profits) Act* 1985 (NSW)

44 *POC Act*, s 27(10); *Customs Act* s 243C(5)

45 *Commissioner of Australian Federal Police v. Cornwell and Bull* (unreported, Federal Court per Morling J, 14 August 1989)

46 *R v. Smithers; Ex parte McMillan* (1982) 152 CLR 477

47 *POC Act* s 27(8); *Customs Act* s 243C(6)

48 (1984) 55 ALR 697

49 (1989) 16 NSWLR 67 at 74

50 Unreported, Full Federal Court, 9 June 1989

found that the defendant did not receive the money on trust for or subject to any obligation to pay the money to the policeman.

Where receipts are passed between co-offenders it can lead to difficulties in assessing the penalty. Assessing the same benefit in the hands of more than one defendant does not sit easily with the concept in s.27(7) of the *POC Act* of not imposing a pecuniary penalty more than once in respect of the same benefit.

To some extent the size of the benefit may depend on which factors the Court relies on in making its assessment. Assessment by reference to money or the value of property coming into a person's possession will make no allowance for any outgoings. Asset betterment assessment will mean that any outgoings in connection with the offence will be allowed for as they will not have been used in accumulating the assets.

THE BASIS OF CONFISCATION

Forfeiture and pecuniary penalty provisions in the *Customs Act* are not conviction based. In the case of the forfeiture provisions it is the owner or possessor of the property prior to seizure that must bring the action to claim them back. However when a claim for conversion or in detinue is made, the onus is on the person who seized the goods to show that they are forfeited goods.⁵¹ In other words the Commissioner of the Australian Federal Police will have to establish, for example, that a motor vehicle was used to carry narcotics. The standard of proof is on the balance of probabilities.

Under the *Customs Act* pecuniary penalty provisions the applicant has to establish that the defendant engaged in prescribed narcotics dealings. The proceedings are civil in nature but the standard of proof is high based on the principles enunciated by Dixon J in *Briginshaw v. Briginshaw*.⁵²

Once a Court is satisfied that the defendant engaged in prescribed narcotic dealings the *Act* provides some assistance, in assessing the benefit derived from that dealing and the property that can be attached to satisfy the debt. For example, there is a rebuttable presumption that the benefit will be not less than any increase in the value of a defendant's property over the period of engaging in prescribed narcotics dealings.⁵³ The amount of the pecuniary penalty order becomes a debt due to the Commonwealth.⁵⁴ The

51 *Tran v. Commissioner of Australian Federal Police* (unreported, NSW Supreme Court per Studdert J, 5 April 1990)

52 1938 60 CLR 36 at pp 368-369. See *Commissioner of Australian Federal Police v. Butler*, *supra* n 39 at p 295; *Commissioner of Australian Federal Police v. Cornwell and Bull*, *op cit* at p 25

53 *Customs Act*, s 342C(3); *POC Act*, s 27(4)(a)

54 *Customs Act*, s 243B(4); *POC Act*, s 26(8)

debt may be enforced against property in which the defendant has no legal or equitable interest but which the Court finds is under the defendant's effective control.⁵⁵

Conviction of an indictable offence is a prerequisite to obtaining any final orders under the *POC Act*. Any question of fact to be determined in respect of an application under the *Act* is to be decided on the balance of probabilities.⁵⁶ With pecuniary penalties, once a conviction is obtained, the position with respect to quantifying the benefit and the property against which the debt can be enforced, is the same as under the *Customs Act*.

In the case of forfeiture orders the Court must be satisfied that the property is tainted in respect of the offence. Assistance is given in respect of property in a persons possession at the time of, or immediately after, the commission of the offence. In the absence of evidence to the contrary such property is presumed to have been used in, or in connection with, the offence.⁵⁷

Once a person is convicted of a serious offence, property derived from or used in prior criminal activity may be forfeited without the need to prove anything in relation to the prior criminal activity. The onus is on the defendant to establish that the property was not used in connection with or derived from any unlawful activity. In considering the amount of evidence required the Court will take into account any difficulties that may exist in proving a negative and the extent to which a defendant is in a position to know and prove the facts required.⁵⁸

The source of property may be determined on a practical basis rather than applying strict legal concepts.⁵⁹ In many cases establishing a legitimate source of income commensurate with ownership of the assets in question may take a defendant a long way towards satisfying the onus.

This reversal of onus in respect of serious offences is the highwater mark under Commonwealth legislation in terms of assistance in establishing the basis for confiscation. Its application is restricted to those convicted of the more grave offences. It might be thought that many who engage in this type of activity are unlikely to have done so on a one-off basis.

55 *Customs Act*, s 243CA; *POC Act*, s 28. This section has been used to recover against property held by companies and involving a trust, *Director of Public Prosecutions v. Walsh and Others* [1990] WAR 25. It would have been difficult, if not impossible, to recover against the properties through general insolvency laws.

56 *POC Act*, s 99

57 *POC Act*, s 19(6)

58 *Brauer v. DPP* (unreported, Full Court, Supreme Court of Qld, 15 December 1989)

59 *Director of Public Prosecutions v. Lynch* (unreported, Supreme Court of Western Australia per Commissioner Templeman QC, 6 October 1989)

RESTRAINING ORDERS

To ensure that the assets of criminals are not dissipated prior to the obtaining of final orders both the *Customs Act* and the *POC Act* provide for the restraining of assets at an early stage. Under the *Customs Act* a restraining order may be sought once a proceeding for a pecuniary penalty under s.243B has been instituted.⁶⁰ Usually the two applications are made at the same time. To grant the restraining order the Court has to be satisfied that there are reasonable grounds to believe that the defendant engaged in prescribed narcotic dealings and derived a benefit.⁶¹

Restraining orders may be sought under the *POC Act* from the time a person is charged or up to 48 hours prior to a charge being laid.⁶² Before it can make a restraining order the Court has to be satisfied that there are reasonable grounds for believing that the person committed an indictable offence, and that the property concerned is tainted, or that the person derived a benefit from the Commission of the offence.⁶³ In the case of serious indictable offences it is only necessary to show that there are reasonable grounds for believing that the defendant committed the offence.⁶⁴

The restraining order may direct that the property is not to be disposed of or dealt with by any person. Where the Court is satisfied that circumstances so require it may also direct the Official Trustee to take custody and control of the property.⁶⁵ This latter order will normally be sought to protect property such as money or other liquid assets that can easily be disposed of or where for some other reason it is necessary to provide an extra safeguard in respect of the restrained property. The other main reason to involve the Official Trustee is where there is a need to manage or maintain the property in question, for example, in one matter the Official Trustee is responsible for the management of a valuable horse stud.

Breach of a restraining order is an offence and any dispositions so made may be set aside.⁶⁶ The Commonwealth is required to give an undertaking as to damages and wherever possible restraining orders are sought over assets that are unlikely to depreciate in value or lead to other losses. Real estate generally fits this description. Businesses are avoided.

Restraining orders may involve a serious interference with a person's ability to deal with their property prior to any conviction. The decision to seek a restraining order is not taken lightly. In larger matters approval is normally only given at the highest levels within the DPP. Every effort is made to inconvenience people as little as possible in their use of restrained property. Usually a sale of restrained property by a defendant will be

60 *Customs Act*, s 243E(1)

61 *Customs Act*, s 243E(2)

62 *POC Act*, s 43

63 *POC Act*, s 44(2)

64 *POC Act*, s 44(1)

65 *POC Act*, s 43(2); *Customs Act*, s 243E(2)(c)

66 *POC Act*, s 52; *Customs Act*, s 243K

agreed to provided the proceeds of the sale, or sufficient of them to cover any likely confiscation order, are themselves restrained.

However, restraining orders are a key element in ensuring the effectiveness of confiscation legislation. Without them, many who are charged with offences would hide, transfer, consume or otherwise ensure that their assets were not available to meet any final orders. To allow this to happen would effectively defeat the objects of the legislation.

PAYMENT OF LEGAL FEES OUT OF RESTRAINED ASSETS

One of the most vexed questions under confiscation legislation is the extent to which a defendant should have access to restrained property to defend criminal charges. Competing interests are involved and there is no simple answer as to where to draw the line. The task involved was aptly described by Ryan J in the Federal Court:

In my view, the task of the Court in exercising the discretion conferred by s.243E(4)(c) or s.243F(1)(a) is to strike a balance between the interest of the defendant in having recourse to his assets to enable his defence in the criminal trial to be prepared and conducted as he thinks appropriate, and the interest of the community in preserving those assets intact to satisfy any pecuniary penalty that the defendant might ultimately be ordered to pay under s.243B.⁶⁷

One of the difficulties is who should represent the community interests in striking this balance? It may involve assessing the actions proposed and costs to be expended on the defence. While the DPP has responsibility for recovering proceeds, as the prosecuting authority it is in an awkward position to test these issues.

In striking the balance the first point to note is that Parliament has decided that legal expenses can be paid out of restrained property.⁶⁸ It may be thought this is stating the obvious but there are other models. In the United States, the *Racketeer Influenced and Corrupt Organisation Act* 1970, the *Continuing Criminal Enterprise Act* 1970 and the *Comprehensive Forfeiture Act* 1984 do not exempt legal fees from restraint and forfeiture.

The United States Supreme Court has found that the failure to provide such an exemption does not breach the Sixth Amendment right to counsel.⁶⁹ Part of the reasoning relied on the “relation-back” principle under which title in the property vests in the United

67 *Commissioner of Australian Federal Police v. Malkoun and Others* (unreported, Federal Court, 1 February 1989 at p 36)

68 *POC Act*, s 43(3)(3)(b); The *Customs Act* makes no specific mention of legal costs. In releasing funds for this purpose reliance has been placed on section 243E(4)(c) “reasonable living and business expenses” and section 243F(1)(a) “may make such orders in relation to that property as the Court considers just”. Pincus J has been critical of the lack of guidance in the *Customs Act* on the question of legal fees; *Commissioner of Australian Federal Police v. Kirk and Others* (unreported, Federal Court, 26 March 1990). He noted that approximately \$1.3m out of restrained assets had been expended on legal costs in the matter before him.

69 *Captin and Drysdale, Chartered v. United States* (1989) 57 USLW 4836; *United States v. Monsanto* (1989) 57 USLW 4826

States upon the commission of the act giving rise to forfeiture. Similarly under ss.228 and 229 of the *Customs Act*, ships and other conveyances become forfeited from the time they are involved in the prohibited conduct. They may be subject to a claim in detinue or conversion but in the meantime the Crown holds a defeasible title and a defendant has no access to them for legal fees.

Both under the *Customs Act* and the *POC Act* the release of restrained funds is subject to the Court being satisfied that the defendant cannot meet the expenses out of unrestrained assets.⁷⁰ This is a matter which the DPP can and does test. Relevant information may be available from the financial investigation. There are provisions for ancillary orders to require a person to furnish a verified statement of his property and for the examination of a person concerning, *inter alia*, the nature and location of any property. A relevant consideration may be whether it can be shown that funds have been sent off-shore and they cannot be located and brought under any restraining order.⁷¹

The Court has a discretion to release funds for legal expenses. No criteria are laid down to guide the exercise of this discretion. In *DPP v. Ward*,⁷² Kennedy J referred to three factors in exercising his discretion to refuse an application for living expenses. The first was that Ward had at all times admitted the offences of defrauding the Commonwealth and there was no suggestion that he would retreat from admissions made. The second was that the funds out of which living expenses were sought were moneys due from the Department which had been defrauded by Ward. The third factor was that in relation to benefits obtained there was likely to be a shortfall of some \$120,000 even if all Ward's assets were applied to satisfy his liability for the moneys defrauded.

*Commonwealth v. Jansenberger*⁷³ involved a civil claim for amounts allegedly defrauded from the Department of Social Security. A Mareva injunction was obtained over all of the defendant's assets. Southwell J refused to release funds for legal fees in respect of the associated criminal charges. He referred to the strong prima facie case that the defendant had defrauded the Commonwealth of significantly more than the assets secured and there was no evidence that any of the assets were obtained by lawful means or from lawful sources.

It may be that the courts will draw a distinction between property allegedly derived from unlawful activity and property lawfully acquired but restrained to meet any pecuniary penalty order. In the case of the former, the courts may be slow to release funds particularly where there is a strong prima facie case including unretracted admissions.

70 *POC Act*, s 43(4); *Customs Act* s 243E(4A)

71 Cf *Commissioner of Taxation v. Manners and Terrule Pty Ltd* (1985) 81 FLR 131. There was evidence that funds had been sent off-shore and out of the reach of a Mareva injunction. The court refused to release funds for legal fees. The defendants had not discharged their onus of showing that there were no other assets out of which they could pay legal fees.

72 Unreported, Supreme Court of Western Australia, 23 December 1988. The release of funds for legal expenses was also refused. Ward had made full admissions and there was nothing before the Court to indicate that he was seeking to defend the criminal charges.

73 Unreported, Supreme Court of Victoria, 3 October 1985.

The Court is only empowered to release funds to meet “reasonable” expenses. This requirement poses a dilemma for the DPP as well as the Court. It is not an unnatural reaction that a person facing serious charges will want to explore every possible avenue of avoiding conviction, regardless of how futile some actions may seem on any objective analysis. Combined with the knowledge that conviction may lead to the loss of all restrained property, the incentive to exhaust this property on even the most hopeless of defences is great. The property will be lost in any event. Why not spend it on legal fees rather than leave it to be recovered? Where the action itself is reasonable there is no incentive to limit the amount spent pursuing it.

To the extent that assets are spent on legal fees they are not available to meet any final orders. Under the *POC Act* the DPP is charged with the responsibility of recovering proceeds. As the prosecuting authority it is not in a position to comment on the merits of defence action. It is also difficult for a court to decide what is reasonable without some preliminary hearing of the issues, a course which it would be reluctant to embark on, particularly in the presence of the DPP.⁷⁴

This issue is not about the release of funds for legal expenses but rather about having some mechanism to allow the community’s interest to be given sufficient weight in determining the “reasonableness” of the amount of funds required. One possible mechanism would be to have a body such as a Legal Aid Commission oversight the expenditure of funds, not at the usual legal aid rates, but also not on hopeless causes.

THIRD PARTY RIGHTS

Action taken against property in connection with criminal activity has the capacity to seriously impinge on the rights of innocent third parties who have an interest in the property. The protection given to these third parties varies under the different legislation.

Forfeiture is not limited to property owned by an offender.⁷⁵ To so limit forfeiture would mean that the legislation could easily be circumvented by not using one’s own property and there would be no incentive for the owner to be concerned about its use. Ownership is not a relevant issue if the conditions enabling forfeiture are satisfied.

Where property is forfeited pursuant to ss.228 or 229 of the *Customs Act* there is no protection at all for an owner who was not involved in its unlawful use. The only way they can retain or recover their property is if a discretion is exercised not to seize the property in the first place or if in disposing of it the Commissioner of the Australian

74 In *Commissioner of The Australian Federal Police v. Malkoun and Others* Ryan J did refuse to allow the defendants unrestricted access to restrained assets “so as to allow a hopeless or extravagant defence to be mounted in the expectation that any funds left will inevitably be subsumed by orders for pecuniary penalties under s 243B” (*supra* n 68 at p 39). He allowed each defendant up to \$30,000 with liberty to apply.

75 *Forbes v. Traders’ Finance Corporation Ltd* (1971) 126 CLR 429. A commercial conveyance is not forfeited merely because a passenger carries narcotics on it. It is only forfeit if the person in control of it is engaged in the illegality. See Windeyer J at p 445

Federal Police, in exercising his wide discretion, gives the property back to the owner. An innocent owner's only remedy lies in an action for damages against the user whose unlawful conduct caused the property to be forfeited.

The position is different in respect of money or goods forfeited under s.229A of the *Customs Act*. In an action for condemnation or recovery, the Court shall return the money or goods to an innocent third party into whose hands the forfeited money or goods have passed, if satisfied that the third party took them without knowledge of or reason to suspect their unlawful origin.⁷⁶

The *POC Act* has a far more elaborate scheme protecting the rights of innocent third parties. Mortgagees may have more at risk under the *POC Act* which covers both real and personal property. A person claiming an interest in property may apply before, or with leave, after the forfeiture order is made, for orders to protect his interest.⁷⁷ The Court can either require the Commonwealth to transfer the interest to him or pay an amount equal to the value of the interest held. The person must satisfy the court that they were not involved in the commission of the connected offence. Where the interest is purchased after the commission of the offence the person must have acquired it for sufficient consideration and without knowledge and in circumstances that would not give rise to a suspicion that it was tainted. Financial institutions, for instance, would need to be careful with suddenly rich customers with no apparent legitimate source of income. Similar protection exists for persons with an interest in property statutorily forfeited pursuant to s.30.⁷⁸

Mortgagees in particular will be concerned to protect their interest at the restraining order stage. In the more serious cases it will not be unusual for offenders to be held in custody. It will take considerable time before final orders are sought and mortgagees can exercise their third party rights in relation to forfeiture. In the meantime they face the prospects of repayments ceasing and equity diminishing. There is power to exclude a person's interest from the restraining order.⁷⁹ The tests are similar to those applicable to the forfeiture provisions. The most satisfactory solution for all may be to sell the property, pay any mortgages and restrain the balance. In most instances the DPP would have no objection to this course being taken on the initiative of either a defendant or a mortgagee. There is however a difficulty where the basis of final orders will be that the restrained property was used in or in connection with the offences. To convert the property restrained would eliminate the basis for forfeiture. It cannot be argued that the proceeds of the property are connected to the offence. There is no power to trace in respect of this element of tainted property.

Third parties are protected in relation to pecuniary penalty orders. A charge over the restrained property is created at the restraining order stage under the *Customs Act* and

⁷⁶ *Customs Act*, s 229A(8)

⁷⁷ *POC Act*, s 21

⁷⁸ *POC Act*, s 31

⁷⁹ *POC Act*, s 48(3)

the pecuniary penalty order stage under the *POC Act*. In both instances the statutory charge is subject to prior changes.⁸⁰

INVESTIGATIVE POWERS

The *POC Act* contains a number of provisions for orders to assist in gathering financial information. These orders can be obtained before a person has been charged provided there are reasonable grounds for suspecting that an indictable offence has been or, in the case of monitoring orders, is about to be committed. Orders available under the *Act* are production orders, search warrants and monitoring orders.

Production orders⁸¹ are aimed at obtaining property tracking documents. These are documents which are relevant, for example, to identifying, locating or quantifying property of the alleged offender. These orders are obtained from a judge of the Supreme Court and may provide that documents be produced to a police officer or be made available to a police officer for inspection. Bankers books need only be made available for inspection, not produced. Because the recipient is put on notice to produce material, production orders are normally used to obtain information from financial institutions and other parties unlikely to be involved in the alleged offence.

Search warrants⁸² are provided as an alternative to production orders. They allow for the seizure of property tracking documents. The main advantage of a search warrant is that the possessor of the document is not put on notice. Search warrants may be obtained in the same circumstances as production orders, with the added requirement that before issuing a search warrant a judge must be satisfied that the use of a production order would not be effective. Search warrants are normally used to obtain documents from suspected offenders or persons associated with them.

Monitoring orders⁸³ are restricted to situations where serious indictable offences are alleged. They are an innovative and effective investigation technique which can be used at a very early stage. The orders require a financial institution to inform officers of either the Australian Federal Police or the National Crime Authority about transactions conducted through an account held by a person with the institution. The orders are for a specified period not exceeding three months. It is an offence to make an unauthorised disclosure of the existence or operation of a monitoring order. The orders are issued by a judge of the Supreme Court. In the first two years of operation of the *POC Act*, 27 production orders, 14 search warrants, and 11 monitoring orders were obtained.

In addition to these information gathering powers the *POC Act* also provides for warrants to search land and premises for tainted property.⁸⁴ Any property seized must

80 *POC Act*, s 50; *Customs Act*, s 243J

81 *POC Act*, s 66

82 *POC Act*, s 71

83 *POC Act*, s 73

84 *POC Act*, s 36

become the subject of a restraining within fourteen days of seizure or be returned. Warrants are issued by a magistrate.

CONCLUSION

The rationale for confiscation legislation has been variously described as including:

- deterrence;
- attacking the economic base of criminal enterprises;
- engendering public confidence in the criminal justice system by demonstrating that crime does not pay.

Qualitatively one would expect confiscation legislation to have these effects. It is of course very difficult to measure the extent to which the legislation is successful in achieving these aims.

The principal objectives set out in the *POC Act* are in more concrete terms. They include the recovery of proceeds and benefits derived from, and the forfeiture of property used in connection with, the commission of Commonwealth offences.⁸⁵ The *POC Act* together with the *Customs Act* provisions provide a very powerful armoury for achieving these objectives in respect of those convicted of Commonwealth offences.⁸⁶ They have been effective. Recoveries and forfeited property resulting from the use of both *Acts* total approximately \$6.4m to 30 June 1990. In addition, the net value of property restrained to meet future orders is more than \$46m.

Much has been achieved in a relatively short time. The pecuniary penalty provisions of the *Customs Act* have only been pursued with any vigour since June 1985. The *POC Act* commenced on 5 June 1987. It provides a complex and far reaching scheme to assist in combatting what was seen as the pressing problem of major crime in relation to drug trafficking and serious fraud on the revenue. The confiscation provisions have been assessed as being far from perfect but "a sensible and sane mechanism for dealing with an urgent and difficult problem".⁸⁷ Some of the provisions have the potential to operate oppressively if used indiscriminately. Adjustments will need to be made. Problems and anomalies will come to light as a variety of provisions are fully tested before the courts. It is early days yet. At this stage Commonwealth confiscation legislation would appear to be working reasonably well, at least in terms of achieving the principal objectives as set out in the *POC Act*.

85 *POC Act*, s 3. It has been suggested that these objectives are really means rather than ends; Fisse, *supra* n 5 at p 374

86 Although the confiscation provisions of the *Customs Act* are not conviction based, in the vast majority of cases there is an associated criminal prosecution.

87 Weinberg QC, "The Proceeds of Crime Act" in *New Despotism or Measured Response?* (forthcoming). The paper is highly critical of the offence provisions in the *POC Act*. For criticisms of the offence provisions see also Fisse, "The Proceeds of Crime Act; The Rise of Money Laundering Offences and The Fall of Principle" (1989) 13 *Crim L J* 5