Terms of reference

Proceeds of crime

Australian Law Reform Commission Act 1996

I, DARYL WILLIAMS, Attorney-General of Australia, HAVING REGARD TO:

(a) the importance of effective provision for forfeiture of the proceeds of crime to Australia's efforts to counter serious crime
(b) Australia's obligations under international law, including under —
- The 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and
- bilateral treaties dealing with mutual assistance in criminal matters.

(c) the proposed ratification by Australia of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime
(d) the need for proceeds laws in Australia that enable reciprocal assistance to be granted on request by other countries with respect to the tracing, restraining and forfeiture of proceeds
(e) the responsibility of the Commonwealth to respect and maintain human rights and civil liberties and the need to maintain a proper balance between those rights and liberties on the one hand and protection of the community by effective and appropriate law enforcement measures on the other hand
(f) the need to make provision for the fair, prompt and effective resolution of disputes and other issues arising in the course of the restraining and forfeiture process without imposing time limits that create difficulties in relation to the continuing workload of the courts
(g) the operation since enactment of the *Proceeds of Crime Act 1987*, the *Crimes (Superannuation Benefits) Act 1989*, and the *Australian Federal Police Act 1979* Part VA and
(h) the various laws of the Australian States and Territories with respect to the forfeiture of the proceeds of crime and any relevant experience of the operation of those laws.

IN PURSUANCE of section 20 of the *Australian Law Reform Commission Act 1996*, HEREBY REFER to the Australian Law Reform Commission for inquiry and report the *Proceeds of Crime Act 1987* (Cth) the *Crimes (Superannuation Benefits) Act 1989* (Cth) and Part VA of the *Australian Federal Police Act 1979* (Cth).

The Commission is to have regard to the matters set out above, and, in particular, is to inquire into and report on:

(1) the need for appropriate recognition of rights of third parties, including on forfeiture of jointly owned property, and the relationship of forfeiture of assets to rights of secured and unsecured creditors, including, in event of the bankruptcy of a person charged with or convicted of a serious Commonwealth offence, and the effect of such bankruptcy on the forfeiture process

(2) the relationship of forfeiture of proceeds of a crime to the possibility of compensation of, or restitution to, a victim of the same crime and whether Commonwealth legislation should make provision for such compensation or restitution where forfeiture of proceeds is sought

(3) the control of restrained assets and the prevention of unreasonable dissipation of restrained assets on legal expenses

(4) existing provisions in Commonwealth law for non-conviction-based (*in rem*) forfeiture, and whether Commonwealth law should be modified in that regard; and whether the civil forfeiture regime of Division 3 of Part XIII of the *Customs Act 1901* should be integrated into the Proceeds of Crime Act

(5) possible legislation to cover 'literary proceeds'

(6) the adequacy of, and any need and justification for expansion of, police powers to obtain information from financial institutions for purpose of locating proceeds and

(7) existing provisions for loss of Commonwealth superannuation entitlements and benefits following conviction for a 'corruption offence' and whether there is any need for change in the existing law.

IN PERFORMING its functions in relation to the reference, the Commission is to consult widely among the Australian community, with the Australian Federal Police, the Director of Public Prosecutions, the National Crime Authority and other relevant Commonwealth, State and Territory authorities and with relevant non-government organisations.

THE COMMISSION IS REQUIRED to report not later than 31 December 1998.

Dated 7 December 1997

Daryl Williams
Attorney-General

Proceeds of crime — alteration of terms of reference

Australian Law Reform Commission Act 1996

I, DARYL WILLIAMS, Attorney-General of Australia, HAVING REGARD TO:

- the reference entitled 'Proceeds of Crime' (the reference) given to the Australian Law Reform Commission on 7 December 1997 and
- the desirability of the reference including a consideration of the impact of the *Proceeds of Crime Act 1987* on business

IN PURSUANCE of subsection 20(2) of the *Australian Law Reform Commission Act 1996* hereby alter the reference as follows:

(a) the Commission is also to inquire into and report on the additional matter of the impact of the *Proceeds of Crime Act 1987* on business and
(b) in performing its functions in relation to that additional matter, the Commission is to have regard to
  (i) the requirements for legislation reviews set out in the Competition Principles Agreement and
  (ii) the requirements for regulation assessment as outlined in the statement by the Prime Minister, the Hon John Howard MP, 'More Time for Business' (24 March 1997) and the document 'A Guide to Regulation' (October 1997).

NOTING that the reporting date of the reference issued on 7 December 1997 is and remains 31 December 1998, I direct that the Commission is required to report in respect of the additional matter listed above not later than 31 December 1998.

Dated 14 April 1998

Daryl Williams
Attorney-General

Abbreviations

ABA	Australian Bankers' Association
ABCI	Australian Bureau of Criminal Intelligence
ACO	Asset Confiscation Office (Vic)
AFC	Australian Finance Conference
AFP	Australian Federal Police
AFP Act	*Australian Federal Police Act 1979* (Cth)
AGD	Attorney-General's Department (Commonwealth)
AGS	Australian Government Solicitor
ANAO	Australian National Audit Office
APMC	Australian Police Ministers' Council
ASCPA	Australian Society of Certified Practising Accountants
ATO	Australian Tax Office
AUSTRAC	Australian Transaction Reports and Analysis Centre
Bankruptcy Act	*Bankruptcy Act 1966* (Cth)
CAC Act (SA)	*Criminal Assets Confiscation Act 1996* (SA)
CAR Act (NSW)	*Criminal Assets Recovery Act 1990* (NSW)
CC Act (Qld)	*Crimes (Confiscation) Act 1989* (Qld)
CCP Act (Tas)	*Crimes (Confiscation of Profits) Act 1993* (Tas)
CCP Act (WA)	*Crimes (Confiscation of Profits) Act 1988* (WA)
CFP Act (NT)	*Crimes (Forfeiture of Profits) Act 1988* (NT)
Commission	Australian Law Reform Commission
Confiscation Act (Vic)	*Confiscation Act 1997* (Vic)
COPOC Act (NSW)	*Confiscation of Proceeds of Crime Act 1989* (NSW)
Crimes (Super) Act	*Crimes (Superannuation Benefits) Act 1989* (Cth)
CSS	Commonwealth Superannuation Scheme established by the *Superannuation Act 1976* (Cth)
Customs	Australian Customs Service
Customs Act	*Customs Act 1901* (Cth)
DTCP Act	*Drug Trafficking (Civil Proceedings) Act 1990* (NSW) since renamed the *Criminal Assets Recovery Act 1990* (NSW)
Family Law Act	*Family Law Act 1975* (Cth)
FATF	OECD Financial Action Task Force
FTR Act	*Financial Transaction Reports Act 1988* (Cth)
GBE	Government Business Enterprise
Income Tax Assessment Act	*Income Tax Assessment Act 1936* (Cth)
ITSA	Insolvency Trustee Service of Australia
MA Act	*Mutual Assistance in Criminal Matters Act 1987* (Cth)
NCA	National Crime Authority
NCA Act	*National Crime Authority Act 1984* (Cth)

OECD	Organisation for Economic Co-operation and Development
OT	Official Trustee
POC Act	*Proceeds of Crime Act 1987* (Cth)
POC Act (ACT)	*Proceeds of Crime Act 1991* (ACT)
PPO	Pecuniary Penalty Order
PSS	Public Sector Superannuation Scheme established under the *Superannuation Act 1990* (Cth)
Reserve	Confiscated Assets Reserve established by section 34A of the *Proceeds of Crime Act 1987* (Cth)
SAPOL	South Australia Police
SCAG	Standing Committee of Attorneys-General
UN	United Nations

PART A

SCOPE AND PRINCIPLES

1. Introduction

Commissioning of the review

1.1 On 7 December 1997 the Attorney-General of Australia, the Hon Daryl Williams AM QC MP, pursuant to section 20 of the *Australian Law Reform Commission Act 1996*, referred to the Australian Law Reform Commission (the Commission) for inquiry and report the *Proceeds of Crime Act 1987* (POC Act), the *Crimes (Superannuation Benefits) Act 1989* (Crimes (Super) Act) and Part VA of the *Australian Federal Police Act 1979* (AFP Act).

1.2 In conducting its inquiry, the Commission was also requested to inquire into and report on

- the need for appropriate recognition of the rights of third parties
- the relationship between forfeiture and restitution or compensation to victims of crime
- the control of restrained assets and the prevention of their unreasonable dissipation on legal expenses
- other provisions in Commonwealth law for non-conviction based forfeiture, including whether the civil forfeiture regime contained in Division 3 of PartXIII of the *Customs Act 1901* (Customs Act) should be integrated into the Proceeds of Crime Act
- possible legislation to cover literary proceeds
- the adequacy of police powers and
- the appropriateness of current Commonwealth laws dealing with the loss of Commonwealth superannuation entitlements and benefits following a conviction for a 'corruption offence'.

1.3 On 14 April 1998, the Attorney-General broadened the reference by further requesting the Commission to inquire into and report on the impact of the POC Act on business, taking into account

- the requirements for legislation reviews set out in the Competition Principles Agreement
- the requirements for regulation assessment as outlined in the statement by the Prime Minister, the Hon John Howard MP, 'More Time for Business' (24March 1997) and
- the document 'A Guide to Regulation' (October 1997).

1.4 The Commission was asked to report by 31 December 1998.

Why is a review needed?

1.5 In commissioning the review, the Attorney-General pointed to the need for effective provision for forfeiture of the proceeds of crime in serving Australia's efforts to counter serious crime both inside and outside of Australia. With respect to the latter, he pointed to Australia's international obligations, particularly under

- the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
- the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and
- bilateral treaties dealing with mutual assistance in criminal matters.

1.6 The POC Act, as discussed more fully in chapter 2, was developed in consultation with the States and internal Territories in what had been intended to form a consistent, if not uniform, Commonwealth wide legislative package providing for conviction based forfeiture of property with orders made in one jurisdiction being capable of enforcement in any other.

1.7 Since that time, only two States have completely overhauled their original legislation while others have introduced a non-conviction based forfeiture regime in addition to the conviction based one. While fine tuning amendments have from time to time been made to the Commonwealth Act, it still embodies the basic scheme first enacted in 1987 and, so seen, can be regarded as 'first generation' legislation which — in the light of developments — needs to be revisited, *inter alia*, to ensure that its basic objectives are being met.

Identification of issues

1.8 On 4 May 1998 the Commission published a booklet entitled *Commonwealth legislation relating to the forfeiture of the proceeds of crime — An introduction to the inquiry*. This document was widely distributed to persons and organisations considered likely to have some level of interest in the inquiry.

1.9 The booklet identified a number of significant issues which the Commission believed needed to be addressed in the course of its inquiry. Those issues were identified both as a result of the Commission's own research as well as consultations with significant stakeholders, including the Attorney-General's Department as the administering Department, the Director of Public Prosecutions, law enforcement agencies, the defence bar, and business and civil liberties organisations. As a result of that publication, a number of persons and organisations made submissions to the Commission putting forward their points of view on the issues raised and identifying additional matters for the Commission to consider.

1.10 The information and views obtained through submissions have been supplemented by various subsequent consultations with key stakeholders and honorary consultants.

Truncated consultation

1.11 At the time of receiving the reference from the Attorney-General on 7-December 1997 the Commission entertained concerns about whether such a substantial reference could be completed by 31 December 1998. With this risk in mind the Commission put in place a plan of action that would optimise its capacity to achieve that deadline.

1.12 That involved decisions that

- a brief issues paper be published in about May 1998 to provide a vehicle for attracting submissions on key issues
- a discussion paper, drawing upon the Commission's own research and analysis and the submissions received in response to the proposed May paper, be published in August/September with a view to providing the basis for public consultations in October/November and a report at about year's end.

1.13 Against this background, the Commission became aware in the early part of 1998 that the Government was giving consideration to extending its terms of reference to include a review of the impact of the POC Act scheme on business, including in relation to competition and regulatory costs.

1.14 While welcoming this additional work, the Commission informed the Attorney-General's Department that it would be unlikely to be able to complete both that work and the proposed business review by 31 December 1998. It therefore suggested that it continue to direct its energies to completing the initial terms of reference by 31 December 1998 and be given until 30 June 1999 to complete the business review on which it would concentrate after completing the work under the initial terms of reference.

1.15 The Government did not accede to that request, the result being that the additional terms of reference signed on 14 April 1998 required the Commission to report on all issues simultaneously on 31 December 1998.

1.16 By early September 1998, it was clear from both an analysis of such submissions as had been received and from the Commission's own research and analysis that the key issues were of greater depth and complexity than had been apparent at the commencement of the reference. In addition, the paucity of detailed information and analysis in some submissions coming to hand from key stakeholders was increasingly pointing to the probability that the Commission's own research and analysis would have to be greatly broadened and deepened beyond what had been anticipated.

1.17 This led the Commission to make known informally in late September and early October to the Attorney-General's Department its concerns that the reporting date of 31 December 1998 would not be able to be met if, as the Commission still believed appropriate, a discussion paper should be published and form the basis of comprehensive public consultations ahead of a final report.

1.18 As work continued during October the Commission's sense that a discussion paper followed by further public consultations was highly desirable firmed to the point that the President wrote to the Attorney-General on 30 October 1998 seeking an extension of the reference until 31 August 1999.

1.19 The Attorney-General replied to the President's letter of 30 October 1998 on 5 January 1999. In his response, the Attorney-General, while acknowledging the need for the Commission to have some additional time to progress the reference, agreed to the extension of the reporting date only to 31 March 1999.

1.20 In the light of the Attorney-General's letter of 5 January 1999, the Commission's work has been directed exclusively to seeking to complete a final report by 31 March 1999. This has necessarily involved decisions not to proceed with the projected discussion paper and thus dispense with the Commission's normal process of testing and refining reform options and proposals through a rigorous public consultative process.

1.21 This introductory chapter would be incomplete if the Commission were not to say something about the Commission's sense of the nature of the task assigned to it by this reference and the methodology it has chosen to enable it to address that task.

1.22 The Terms of Reference clearly direct the Commission's enquiries to what needs to be done to significantly improve the effectiveness of the POC Act. The Commission was not asked to revisit the fundamental policy issues, and associated philosophical debate, regarding the need for, and desirability of, a federal proceeds regime.

1.23 That said, the Commission acknowledges that there exists within the Australian community a body of concerned opinion about the civil liberties aspects of proceeds legislation and whether proceeds legislation represents an effective policy response to the problems that it is intended to address. While some may be disappointed that these fundamental issues are not readdressed in this report, the Commission remains firmly of the view that such issues remain outside the scope of its inquiry. Of course, where options for reform considered by the Commission give rise to new such concerns they are addressed in the report.

Outline summary of the report

1.24 ***Part A Scope and principles*** sets out the background to this review and gives a history of the development of proceeds laws in Australia. It reviews the underlying principles of the POC Act and forms the view that there is a clear basis in principle for extending the scope of the recovery of profits beyond the present POC Act boundaries of proven criminal conduct to conduct that is unlawful and is prescribed. As a result of the analysis leading to this view, it recommends that the POC Act should be renamed the 'Confiscation (Unlawful Proceeds) Act' and that the principal objectives be broadened.

1.25 ***Part B Major reform issues*** deals with significant matters affecting the efficacy of the existing confiscation scheme other than the specific reform issues dealt with in PartC.

1.26 It considers the present judicial discretions in relation to the ordering of confiscation and recommends, in relation to profits, that confiscation should both be mandatory and not be taken into account in determining penalty in cases where confiscation is in respect of conviction of a criminal offence.

1.27 It reviews the conviction based confiscation regime and, while recommending a widening of the 'serious offence' category attracting statutory forfeiture, reaches the conclusion that a solely conviction based regime fails to meet either the objectives of the POC Act or public policy expectations. As a consequence, it recommends augmenting the POC Act with a civil forfeiture regime enabling confiscation, upon proof to the civil standard, of profits derived from engagement in prescribed unlawful conduct. Where engagement in such conduct is established, a court would be required to order confiscation of profits, and a person would be required to satisfy the court of the lawful provenance of his or her property presumed to be profits in order to avoid its forfeiture. Where a pecuniary penalty order is sought, it recommends that there be a rebuttable presumption that all expenditure incurred in a period of six years preceding the date of the making of the application of the order be treated as profits of the prescribed unlawful conduct.

1.28 It also considers the restraining order regime and recommends a number of changes, including as to the time such an order remains in force and a simplified and consolidated process for the making and considering of applications in both conviction and non-conviction based circumstances.

1.29 It addresses the absence of statutory priorities under various Commonwealth laws and recommends that confiscatory action under the POC Act, where commenced, should be given priority over sequestration action under the Bankruptcy Act and property settlement action under the Family Law Act.

1.30 It also deals with the adequacy of the money laundering offence provisions in the POC Act and recommends a broadening of the current offences, the creation of new offences relating to the importation or exportation of property for the purpose of committing, or facilitating the commission of, any indictable offence, whether against the law of the Commonwealth, a State or a Territory or, for

that matter, the law of a foreign state, or as a consequence of any such offence. It recommends a number of evidentiary aids and also that money laundering offences should be included in the category of 'serious offences' attracting statutory forfeiture. It also recommends the inclusion of provision for the making of a judicially ordered 'transaction suspension order', requiring a financial institution to notify the relevant law enforcement agency of certain proposed transactions and to refrain from effecting such transactions for 48 hours.

1.31 This Part also deals with questions of jurisdiction, statutory time constraints and the administration of restrained assets and concludes by recommending that a further attempt be made through the Standing Committee of Attorneys-General (SCAG) to achieve uniformity of forfeiture laws throughout Australia.

1.32 ***Part C Other specific reform issues*** deals with those matters covered by the Commission's specific terms of reference.

1.33 It commences by dealing with the recognition of the rights of third parties in relation to restrained property which is subject to forfeiture or has been forfeited. It recommends the explicit recognition of *bona fide* encumbrances and makes provision for a simplified and uniform test to be satisfied by a third party when seeking exclusion of interests other than encumbrances. It also proposes that the legislation make clear that a successful applicant is entitled to be awarded costs of the making of the application.

1.34 It also considers the scope of property which may be restrained and, in this context, the definitions of 'effective control', 'tainted property' and 'proceeds', and recommends clarification and a widening of 'tainted property' to include property intended to be used in the commission of an offence.

1.35 It next deals with the relationship between reparation or compensation and forfeiture and proposes that such reparation or compensation should be covered by the POC Act and given priority in the distribution of forfeited property.

1.36 This Part then considers whether in any circumstances legal defences should be funded from restrained assets and recommends that there should be no capacity to release restrained assets for that purpose. In lieu, it recommends that defendants rendered indigent by restraint of their assets should be eligible for legal assistance with legal aid commissions being able to draw down the costs of such defences from the Confiscated Assets Reserve, thereby not disadvantaging the current legal aid clientele. As an added safeguard, such defendants would be able to seek court review of the nature and content of the defence proposed to be provided to ensure its adequacy in particular in relation to the nature and complexity of the issues to be tried and the level of representation ordinarily provided by the DPP in a matter of similar complexity.

1.37 This Part also considers administrative or *in rem* forfeiture and recommends that financial institutions be kept abreast of information which may have a bearing on decisions to secure particular chattels and that Commonwealth authorities be required to search encumbrance registers and notify encumbrancees of any possible forfeiture. It expressly recommends that, under certain circumstances, public conveyances should be excluded from administrative forfeiture.

1.38 Next it considers the non-conviction based forfeiture regime contained in Division 3, Part XIII of the Customs Act, and recommends both that that regime be incorporated into the proposed non-conviction based regime in the POC Act and that it be broadened to include asset forfeiture provisions.

1.39 This Part also deals with the question of 'literary proceeds' or commercial exploitation of criminal and other prescribed unlawful activities and proposes that profits generated by a defendant, or by any other person on the defendant's behalf, might be confiscated. The court would have a discretion as to whether to order forfeiture, either in whole or in part, by having regard to certain factors.

1.40 The adequacy of law enforcement powers is analysed and certain recommendations made. These include the repeal of the POC Act search warrant provisions and the complementary widening of the Crimes Act provisions as well as the issue of an administrative notice by a ranking police officer, for strictly limited purposes, requiring a financial institution to provide certain account or transaction information. The financial institution and its officers would be protected from any proceedings relating to responding to such a notice and precluded from disclosing to the client the fact of the existence of the notice and any response made to it.

1.41 Part C then considers the current provisions in both the Crimes (Super) Act and Part VA of the AFP Act relating to the extinguishment of a person's entitlement to employer funded superannuation benefits after conviction of an offence involving corruption in office and the imposition of a minimum penalty. It recommends that the provisions in the two Acts should, as far as possible, be aligned and, more importantly, that some protection for innocent spouses and dependants not involved in the corrupt conduct be provided.

1.42 The Part also deals with the impact of the POC Act on business and recommends a number of further reviews to minimise the regulatory impact on financial institutions. In particular, these reviews, which are to involve relevant peak bodies such as the ABA and AFC, would seek to

- harmonise document and record retention requirements under the POC and FTR Acts
- ensure clarity and admissibility of records into evidence, particularly electronic records
- explore the cost benefit and evidentiary implications of retaining documents in facsimile, including digital, form

- reduce the statutory retention period of account opening documents from seven to five years, and to consider whether such retention period should run from the date of closure of the relevant account or an earlier period and
- increase to $2000 from $200 the amount of a transaction in respect of which documentation must be retained pursuant to section 77(2) and (3) of the POC Act.

1.43 Additionally, it recommends that there should be a governmental duty to provide guidance to financial institutions about their obligations under the Act analogous to that provided by AUSTRAC pursuant to the FTR Act.

1.44 Finally, this Part deals with operational aspects and proposes that the power to institute and conduct civil forfeiture proceedings should be exercisable exclusively by the head of the Commonwealth department or agency having responsibility in relation to the relevant prescribed unlawful conduct. It also recommends a review of its investigatory, operational liaison and accountability arrangements necessary to ensure optimal operation of both the existing conviction based, and proposed non-conviction based, regimes.

2. Proceeds of Crime Act: development, scope and underlying principles

Background

2.1 Forfeiture as a consequence of wrongful action is a concept whose origins in English law can be traced back to antiquity.

2.2 One early manifestation was in the feudal law of 'deodand' (Deo — to God; dandam, to be given) originating in Norman times. The effect of deodand was to render forfeit any instrument or animal that was the cause of accidental death of a person. This, in turn, had its genesis in the even earlier Anglo-Saxon concept of brana (the slayer) where the object causing death was forfeited and given to the family of the deceased.

2.3 Perhaps the best known forfeiture was that under which, at common law, the goods and chattels of a person convicted of a felony became forfeit to the Crown. A related concept was that of 'attainder' under which all civil rights and capacities were automatically extinguished on sentence of death upon conviction for treason or felony.

2.4 All ancient forms of forfeiture were formally abolished in the 19th and 20th centuries. A detailed discussion of the old forms of forfeiture is to be found in the celebrated article *The Goring Ox* by JJ Finkelstein.[1] Other accounts can be found in standard criminal law texts.[2]

2.5 A more recent development in English law has been in *in rem* forfeiture laws which permit confiscation of goods employed for, or derived from, illegal activity.

2.6 Perhaps the best known of these are those laws which provide for the forfeiture of conveyances used for the purposes of smuggling contraband and the contraband itself. Similar such laws are to be found in current Australian statutes notably the *Customs Act 1901* and the *Fisheries Management Act 1991*.[3] The origins of *in rem* forfeiture are more particularly described in Chapter 16 below which is devoted exclusively to such laws.

1.(Vol 46 — 1973) *Temple Law Quarterly*.

2.For example Turner, *Kenny's Outlines of Criminal Law* 18th ed Cambridge University Press, UK 1964.

3.s 106. Whilst the forfeiture is court ordered it flows purely from the fact that the vessel and equipment was used in the commission of a fisheries offence.

2.7 For present purposes, it is of interest to note that the Customs Act was amended in 1977 to extend the reach of *in rem* forfeiture to money used in or in connection with drug related conduct found in the possession or control of a person.[4]

2.8 In a broad policy context, the 1977 amendment can be seen to have a connection with the enactment of the first Commonwealth legislation having characteristics shared by the first generation of national proceeds of crimes laws described later in this chapter.

2.9 That Commonwealth legislation was the enactment in 1979, as a further response to concerns about the growth of the narcotics trade and dealings, of Division 3 of Part XIII of the Customs Act — provisions which established a civil confiscatory regime in respect of benefits derived from a range of drug related activity based on a pecuniary penalty regime capable of being enforced against restrained property. This scheme is more particularly described and discussed in chapter 4, dealing with the need for a general non-conviction based forfeiture regime, and chapter 17, which considers whether the Customs Act scheme should be integrated into the POC Act.

History of proceeds laws in Australia

2.10 The POC Act and related State legislation owe their beginnings to an invitation extended by the Australian Police Ministers Council (APMC) in 1983 to the Standing Committee of Attorneys-General (SCAG) to develop legislation allowing for the forfeiture of criminally derived assets. A firmer proposal was developed by a working party of the APMC and the matter given political impetus by a resolution of the Special Premiers Conference on Drugs in 1985. Model legislation was prepared by the Parliamentary Counsels Committee, the aim being to produce relatively uniform, or at least consistent, legislation throughout Australia. Due to a series of delays and local considerations, each jurisdiction introduced its own version, although the basic scheme adopted by SCAG was, by and large, adhered to in all jurisdictions at first.

2.11 The SCAG Bill was based on the premise that, where a person had profited from criminal activity, those profits should be returned to the society whose laws were infringed. In addition, property otherwise lawfully obtained but used in the commission of the offence or offences could also be forfeited.

2.12 The initial raft of legislation broadly giving effect to the SCAG scheme was enacted by all Australian jurisdictions between 1985 and 1993.

---

4. *Customs Act 1901* s 229A.

2.13 In several jurisdictions, notably the Commonwealth, the Northern Territory, the ACT, Tasmania and Queensland, the original legislative scheme continues substantially as originally enacted.

2.14 In New South Wales, South Australia, Western Australia and, most recently, Victoria, more significant modifications or additional reforms have taken place.

2.15 In New South Wales, the initial 1985 legislation was replaced in 1989 by a new Act which included a number of matters contained in the POC Act that were not included in the 1985 New South Wales legislation. The new Act provided greater information gathering powers to identify and trace property obtained through illicit activities; reversed the onus of proof of the source of property on defendants convicted of drug trafficking; created the offence of money laundering and enabled reciprocal interjurisdictional enforcement of restraining and confiscation orders.

2.16 In 1990, a very significant further reform took place in New South Wales with the enactment of what is now called the *Criminal Assets Recovery Act 1990* (CAR Act (NSW)) establishing a non-conviction based confiscatory regime for a range of serious criminal activity.

2.17 In South Australia, the original 1986 legislation was replaced by new legislation in 1996, one of the purposes of which was to simplify the extremely complex SCAG based legislative scheme. By and large, however, the fundamentals of the SCAG scheme remain in place.

2.18 The West Australian Parliament enacted a range of amendments in 1990. As in South Australia, the amendments sought to simplify the legislative scheme. Additionally, the reach of the legislation was extended to include property acquired unlawfully otherwise than in relation to the commission of the offence triggering the operation of the Act.[5]

2.19 In 1997, the Victorian SCAG scheme legislation was replaced by new legislation, a feature of which is the inclusion of a non-conviction based regime in relation to a range of serious offences.

2.20 All of the confiscation Acts,[6] except the Customs Act, Part XIII, the CAR Act (NSW) and the Confiscation Act (Vic), require a conviction or deemed

---

[5].CCP Act (WA) s 3 and 10.

[6].The following is a list of Australian proceeds legislation, including first generation SCAG scheme legislation that has been superseded by later legislation.

Commonwealth

Customs Act 1901, Division 3 of Part XIII providing for non-conviction based pecuniary penalty orders in respect of certain narcotics dealings.

Proceeds of Crime Act 1987 (POC Act)

New South Wales

conviction before a forfeiture or a pecuniary penalty order can be made. With respect to the three non-conviction based regimes, however, only that in the Confiscation Act (Vic) requires the laying of a criminal charge (although it might later be withdrawn) in relation to the unlawful conduct concerned as a condition precedent to the seeking of a restraining order ahead of the trial of the civil proceedings. In the case of all three regimes, the alleged conduct needs to be established only on the civil onus, namely, on the balance of probabilities.

Related international developments

2.21 When the APMC first suggested proceeds legislation in 1983, work had already commenced on the development of what was to become the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. This Convention recognised the international dimension of the drug trade and its associated money laundering activities and contained what could be termed as mini extradition and mutual assistance treaties. The Convention obliges the parties thereto to have laws which criminalise drug related money laundering, and enables them to trace, restrain and ultimately confiscate proceeds of drug trafficking both domestically and at the request of other party states. Australia played a major role in the development of that Convention and ratified it in November 1992. The convention came into effect for Australia in February 1993.

2.22 At the invitation of the Council of Europe, Australia also participated in the development of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. Following ratification, this Convention came into force for Australia on 1 November 1997. It contains similar obligations to those in the UN Convention but in relation to criminal conduct not

---

Crimes (Confiscation of Profits) Act 1985, repealed and replaced by *Confiscation of Proceeds of Crime Act 1989* (COPOC Act (NSW))
Drug Trafficking (Civil Proceedings) Act 1990 , since renamed *Criminal Assets Recovery Act 1990* (CAR Act (NSW))
South Australia
Crimes (Confiscation of Profits) Act 1986, repealed and replaced by *Criminal Assets Confiscation Act 1996* (CAC Act (SA))
Victoria
Crimes (Confiscation of Profits) Act 1986, repealed and replaced by *Confiscation Act 1997* (Confiscation Act (Vic))
Western Australia
Crimes (Confiscation of Profits) Act 1988 (CCP Act (WA))
Northern Territory
Crimes (Forfeiture of Proceeds) Act 1988 (CFP Act (NT))
Queensland
Crimes (Confiscation of Profits) Act 1989 , since renamed *Crimes (Confiscation) Act 1989* (CC Act (Qld))
Australian Capital Territory
Proceeds of Crime Act 1991 (POC Act (ACT))
Tasmania
Crime (Confiscation of Profits) Act 1993 (CCP Act (Tas))

restricted to drug trafficking. Australia was the first country not a member of the Council of Europe to become a party to that convention.

2.23 The effect of Australia's becoming a party to the conventions is that the enactment of proceeds laws in all Australian jurisdictions to the extent provided for in the conventions, and which had preceded the entry into force of the conventions, must be maintained if Australia is to continue to fulfil its international legal obligations.

2.24 In the same year that the POC Act was passed, the federal Parliament enacted the *Mutual Assistance in Criminal Matters Act 1987* (MA Act), enabling Australia to negotiate bilateral treaties and to give effect to the Commonwealth Scheme for Mutual Assistance in Criminal Matters adopted by the Commonwealth Law Ministers' Meeting held in Harare, Zimbabwe, in 1986. Australia also played a leading role in the preparation of that scheme and chaired the Senior Officials' meeting in London which finalised the scheme for submission to the Law Ministers.

Outline of the POC Act

2.25 The Commonwealth POC Act continues to reflect the fundamentals of the originally agreed SCAG scheme. It continues to rely on a conviction for an indictable criminal offence as a condition precedent to any confiscation action.

2.26 Its objectives were succinctly put by the then Attorney-General, the Hon Lionel Bowen MP, in the Second Reading Speech on the introduction of the POC Bill into the Parliament in 1987. He said, in part

> The Proceeds of Crime Bill provides some of the most effective weaponry against major crime ever introduced into this Parliament. Its purpose is to strike at the heart of major organised crime by depriving persons involved of the profits and instruments of their crimes. By so doing, it will suppress criminal activity by attacking the primary motive profit and prevent the re-investment of that profit in further criminal activity.
>
> All the evidence available to the government from royal commissions and other inquiries in recent years suggests that major crime, particularly drug trafficking and serious fraud on the revenue, is growing and is becoming increasingly international in scope. Traditional methods of punishment by imprisonment and fine are not enough. Stronger measures are called for. Further, measures are required to target not only the pushers and others physically involved in criminal activity but also those who direct, finance and reap the most reward from crime.[7]

2.27 Mr Bowen reinforced these comments in the Financial Impact Statement where he stated

---

[7] *Hansard (H of R)* 30 April 1987, 2314.

> The Bill provides mechanisms which not only deny to the perpetrators the proceeds of crime but also return those proceeds to society...[8]

2.28 This sense of purpose is, correspondingly, reflected in section 3(1) of the Act, which describes the 'principal' objectives of the Act as being

> (a) to deprive persons of the proceeds of, and benefits derived from, the commission of offences against the laws of the Commonwealth or the Territories;
> (b) to provide for the forfeiture of property used in or in connection with the commission of such offences; and
> (c) to enable law enforcement authorities effectively to trace such proceeds, benefits and property.

2.29 The centrepiece of the legislation is the conferment on State and Territory criminal trial courts of power to order the forfeiture of property that constitutes either the profits (that is proceeds) of a particular crime or is property used in, or in connection with, the commission of that crime.

2.30 Thus, for example, in respect of a crime involving the theft of Commonwealth property, money realised from the sale of the stolen property would be liable to forfeiture as proceeds of the crime and a vehicle used for carrying away the stolen property from the scene of the crime would be liable to forfeiture as property used in, or in connection with, the crime.

2.31 While, as commented by Mr Bowen, the major thrust of the legislation is directed at organised crime, particularly drug related crime, the confiscation regime applies to all indictable offences against Commonwealth law.

2.32 The Act does, nevertheless, apply more rigorously to the recovery of the proceeds of, and property used in, or in connection with, the commission of what are termed 'serious offences'. These offences are serious narcotics offences, organised fraud offences, and some money laundering offences, all of which by their nature ordinarily relate to behaviour engaged in by persons involved in criminal conduct of a continuing nature.

2.33 Forfeiture under the Act, in relation to conduct that constitutes an ordinary indictable offence or an indictable offence that is a serious offence, can only be precipitated by conviction for the particular offence.

2.34 Where the conviction is for an ordinary indictable offence, property that has been made the subject of an earlier restraining order to keep it intact against the possibility of forfeiture (see explanation below) can be ordered to be forfeited by the trial court where it is satisfied that the property is proceeds of, or was used in or in connection with, the commission of, the offence. Whether the court makes such a

---

[8].id 2317.

forfeiture order, and the extent to which the order applies to such property, is, in the case of an ordinary indictable offence, entirely a matter for the discretion of the court (the court is not limited to ordering the forfeiture of restrained property, provided that the unrestrained property is demonstrated to be proceeds or property used in, or in connection with, the commission of the offence).

2.35 Where a person is convicted of a serious offence, the effect of the Act is to render all restrained property automatically forfeited six months after conviction except to the extent that the defendant can prove that the property was legitimately acquired (ie lawfully, involving no taint at all). This is generally known as 'statutory forfeiture' because it is the statute itself, rather than a separate court determination (as in the case of an ordinary indictable offence), that effects the forfeiture.

2.36 The effect of statutory forfeiture for a serious offence can thus be seen to be a more far reaching and severe consequence than judge ordered forfeiture for an ordinary indictable offence. Firstly, judicial discretion is removed in the case of statutory forfeiture. Secondly, the onus falls on the defendant convicted of a serious offence to prove the legitimate acquisition of restrained property if it is to be removed from automatic forfeiture. By contrast, there is an obligation on the prosecution, in the case of a conviction for an ordinary indictable offence, to prove that the restrained property is in fact proceeds, or was in fact used in, or in connection with, the commission of the offence.

2.37 It will be immediately recognised from the foregoing outline that restraining orders play a pivotal role in the scheme. The central purpose of the restraining order is to ensure that a person who is, or is about to be, charged with an indictable offence against Commonwealth law (whether ordinary or serious) is denied the opportunity of dissipating or hiding assets, including the proceeds of the particular alleged crime, before his or her guilt has been determined.

2.38 The Act empowers the Director of Public Prosecutions to apply to a Supreme Court of a State or Territory, as early as 48 hours prior to the charging of a person with an indictable offence against a Commonwealth law, for a restraining order over property of the defendant, or a third person. Such an application may also be made at any time after the charge is laid or upon conviction.

2.39 A restraining order may be sought against

- specified property of the defendant
- all property of the defendant
- all property of the defendant other than specified property
- specified property of a person other than the defendant.

2.40 Except in cases where the defendant has already been convicted, an application must be supported by an affidavit of a police officer deposing to his or her belief that the defendant has committed the relevant offence and the court must satisfy itself that there are reasonable grounds for holding that belief.

2.41 Where the offence is an ordinary indictable offence or, in the case of a serious offence, the application for a restraining order relates to the property of a person other than the defendant, the affidavit must depose to various other relevant beliefs appropriate to satisfy the court that the property in question may, if a conviction results, be liable for forfeiture.

2.42 Additionally, in the case of an ordinary indictable offence, the court must be satisfied that it is in the public interest to make a restraining order. Where, however, the offence is a serious offence, the court is required to make a restraining order sought in respect of property of the defendant.

2.43 Bearing in mind, as already explained, that a defendant convicted of a serious offence is put to the proof as regards the legitimacy of all restrained property (which otherwise will be automatically forfeited by reason of the statutory forfeiture regime), it is common for restraining orders in respect of such offences to be more widely cast than in respect of ordinary indictable offences.

2.44 There is a range of provisions enabling third parties whose property interests are affected by a restraining order or are subject to statutory forfeiture following conviction of a person of a serious offence to have that property removed from the restraining order or statutory forfeiture upon satisfying the court in accordance with appropriate criteria of the legitimacy of the property.

2.45 There is also provision for a defendant to apply to have his or her property removed from the application of a restraining order, but the scope for obtaining such relief is considerably more limited than for a third party, particularly where the offence is a serious offence.

2.46 In addition to forfeiture of proceeds and property used in, or in connection with, the commission of an offence, the Act makes provision for the making of what is known as a pecuniary penalty order.

2.47 A pecuniary penalty order requires the defendant to pay to the Commonwealth an amount assessed by the court as being the value of the benefit derived by the person from the commission of the relevant offence. A complex formula is provided for determining that benefit.

2.48 Broadly stated, it involves a betterment exercise which includes taking into account, for the purpose of determining benefit, of amounts invested in the criminal activity in question as well as the profits gained from that investment. The value of property forfeited under a forfeiture order is, however, deducted from the amount of benefit assessed for the purposes of the order.

2.49 Likewise any taxes paid in respect of the assessed benefit are deducted.

2.50 A pecuniary penalty order may be in addition, or as an alternative, to a forfeiture order in respect of either an ordinary offence or a serious offence. Where it is sought in respect of the latter, the order may not be made until the expiration of the six month period following conviction that must expire before any statutory forfeiture in respect of the offence takes effect.

2.51 A pecuniary penalty order automatically becomes, by operation of the Act, a charge against any property of the defendant that remains the subject of a restraining order under the Act in respect of the relevant offence.

2.52 Ordinarily, pecuniary penalty orders are sought where a forfeiture order is, or would be likely to be, insufficient to recover the benefit that the defendant has achieved by reason of the commission of the relevant offence.

2.53 The effectuation of the above described principal components of the POC Act scheme is supported by many other provisions. These include the conferment of a range of investigatory and search powers on law enforcement officers designed to ensure that property liable to forfeiture is able to be identified, located and seized.

2.54 Other provisions confer on an Official Trustee power to take control of and manage restrained assets and establish a Confiscated Assets Reserve into which are paid moneys realised from forfeitures of property and enforcement of pecuniary penalty orders and, amongst other things, moneys paid to the Commonwealth under foreign or interstate forfeiture orders enforced under the POC Act in accordance with international mutual assistance and interstate enforcement arrangements.

2.55 Moneys in the Reserve are required to be applied for such purposes as meeting the Commonwealth's obligations under such international mutual assistance and interstate arrangements, and making restitution to innocent third parties who have occasioned loss by reason of the forfeiture and sale of property interests under the Act and to certain Commonwealth Government Business Enterprises that have suffered financial loss as a result of a relevant offence.

2.56 Recognising the special importance of being able to have access, for proceeds tracing and recovery purposes, to information held by financial institutions such as banks, building societies and credit unions, the Act imposes special record retention requirements on such bodies. Additionally, power is conferred on Supreme Courts to issue monitoring orders directed to financial institutions requiring them to monitor certain account activity during periods not exceeding three months in any case.

2.57 The POC Act is also employed as the legislative vehicle for the outlawing of certain money laundering and organised fraud activities. While this part of the Act is not strictly part of the proceeds regime as such, the investigation and prosecution of persons engaged in such activities is related to proceeds recovery in the sense that each forms a part of a total legislative response to organised criminal

activity and money laundering is very often undertaken for the specific purpose of removing profits of criminal activity from the reach of proceeds laws.

Underlying principles

2.58 In approaching the review of any legislative scheme, a foundation task involves identification of its underlying principles.

2.59 Where, as in the present case, the task is to consider how the legislative scheme may be made to operate more effectively, rather than review the fundamental policy underpinnings themselves, identification of the underlying principles is necessary for two purposes

- firstly, to assess whether the scheme is operating according to those principles and
- secondly, to provide essential guidance in shaping reform proposals for the more effective achievement of the objectives constructed from these principles.

2.60 It is clear from the Second Reading Speech accompanying the introduction of the POC Bill in 1987, and from the provisions of section 3 of the POC Act, that three principal objectives were sought to be achieved

- firstly, persons who gain material advantage from the commission of indictable offences against Commonwealth law should be able to be deprived of the whole of that advantage (hereafter in this chapter referred to as 'profits') — section 3(1)(a)
- secondly, persons who use, or permit to be used, any property in, or in connection with, the commission of such offences should be exposed to possible forfeiture of such property — section 3(1)(b) and
- thirdly, law enforcement authorities should be provided with an appropriate armoury of powers to enable the first two objectives to be achieved — section 3(1)(c).

2.61 An analysis of these provisions suggests that

- the first of these objectives is founded on the principle that a person should not be allowed to become unjustly enriched at the expense of other individuals and society in general as a result of criminal conduct;
- the second objective is based on the principles that
  - property used in, or in connection with, the commission of a criminal offence, should be able to be confiscated to render it unavailable for similar future use in connection with such conduct and
  - such confiscation should be available as a suitable punitive sanction (in addition to the traditional sanctions of fines and imprisonment) for engaging in such conduct and

- the third objective is based on the principle that law enforcement agencies must be given the powers necessary to enable them to ensure that the other two principal objectives are able to be achieved.

2.62 Since the POC Act is, at the present time, entirely conviction based, what this analysis falls short of demonstrating is whether the first of the above principles — that relating to denial of the benefits of unjust enrichment — is a concept limited to recovery of the profits of criminal conduct in respect of which a conviction has been recorded or is capable of wider application to unjust enrichment as a result of unlawful (as opposed to strictly criminal) conduct in the broad.

2.63 The answer to this question is of pivotal importance in addressing the key issue whether the current conviction based scheme might justifiably be complemented by a non-conviction based civil scheme similar in concept to the non-conviction based schemes in the CAR Act (NSW) and in the Confiscation Act (Vic).

2.64 If the conclusion is reached that the justification for confiscation of profits springs from conviction for a criminal offence, the establishment of a complementary civil regime under which confiscation would follow from a civil finding of unlawful conduct on the balance of probabilities could be seen to give rise to civil liberties concerns. Specifically, the question might be raised whether what was seen as in essence a remedy ancillary to a finding of proven criminality beyond a reasonable doubt could now be brought to bear on a defendant without such a finding, ie by the discharge of the lower civil burden of proof.

2.65 If, on the other hand, the better analysis is that the denial of profits is to be regarded as rooted in a broader concept that no person should be entitled to be unjustly enriched from any unlawful conduct, criminal or otherwise, conviction of a criminal offence could properly be seen as but one circumstance justifying forfeiture rather than as the single precipitating circumstance for recovery of unjust enrichment.

2.66 It is the Commission's considered opinion that the latter analysis is to be preferred. Its assessment is based on public policy considerations, taking into account a clear pattern of developing judicial and legislative recognition of a general principle that the law should not countenance the retention by any person, whether at the expense of another individual or society at large, of the profits of unlawful conduct.

2.67 So far as concerns the criminal law, the common law presumption, as recognised by the High Court as recently as in 1988 in *Gollan v Nugent & Ors*,[9] has been that, except where another person can prove better title, for example, in detinue or conversion, the wrongdoer is entitled to retain the proceeds of his or her criminal acts. That presumption is being progressively and definitively displaced in

---

[9].*Gollan v Nugent & Ors* (1988) 63 ALJR 11, and see also the celebrated English *Operation Julie* case, Cuthbertson [1981] AC 71.

Australia, at least in relation to indictable offences, by the POC Act and the corresponding laws of the States and Territories.

2.68 In the area of civil law, the need for the law to respond to unjust enrichment as a result of unlawful (or wrongful) conduct short of criminality resulting in conviction for an offence has been recognised on two fronts.

2.69 Judicially, the need to redress injustices resulting from allowing persons to enrich themselves at the expense of others has led to significant, and continuing, developments under the general rubric of the law of restitution.

2.70 While, as the leading works by Goff and Jones,[10] Birks[11] and Mason and Carter[12] amply demonstrate, there are uncertain dimensions to these developments, one thing is undoubtedly clear. That is that the development of the common law in this area is driven by a public policy recognition of the notion that persons ought not, as a matter of principle, be permitted to become unjustly enriched at the expense of others. This is seen by the Commission as a significant broadening of the common law which formerly recognised the concept of unjust enrichment (albeit not in those precise terms) in a more limited way through particular rules such as that denying a person who has unlawfully caused the death of another person from benefitting from the estate of that person.[13]

2.71 Although it must be acknowledged that the development of the common law relating to unjust enrichment is generally confined to restitution inter partes, whereas proceeds recovery involves, in the main, 'claw back' of profits for the benefit of the state, the common law developments reflect nonetheless a growing public policy recognition of the need to deny persons the fruits of unjust enrichment.

2.72 On the legislative front, such recognition has already manifested itself beyond strictly conviction based recovery in the enactment, firstly, of Division 3 of Part XIII of the Customs Act in 1979, secondly, in the more recent enactment of non-conviction based proceeds regimes in New South Wales (CAR Act) and Victoria (Confiscation Act) and, thirdly, in the growing interest the Commission senses in other Australian jurisdictions in such regimes.

2.73 Moreover, federal civil forfeiture regimes in the United States applicable to profits from unlawful activities have been in force for many years[14] and a civil forfeiture regime is under consideration in the United Kingdom.[15]

---

[10].Goff and Jones *The Law of Restitution* 5th ed, Sweet & Maxwell London 1998.

[11].P Birks *An Introduction to the Law of Restitution* Clarendon Press Oxford 1985.

[12].Mason and Carter *Restitution Law in Australia* Butterworths Sydney 1995.

[13].See *Riggs v Palmer* 115 NY 507, and see also *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147; *Lundy v Lundy* (1895) 24 SCR 650; *Hetton v Allen* (1940) 63 CLR 691.

[14].See 21 USC 881 and 18 USC 981.

2.74 It must, of course, be acknowledged that civil forfeiture regimes in Australia and in the United States remain focussed, in the main, on unlawful conduct constituting criminal activity as opposed to other unlawful conduct. However, the Commission sees that as reflecting caution on the part of legislatures in ensuring that the operation of what is still a relatively recent and far reaching concept is not extended beyond what the community is able to accept as unarguably necessary to claim back profits of unlawful activity, rather than as qualifying the validity of the general underlying principle that persons ought not be permitted to be unjustly enriched at the expense of individuals or society at large by unlawful conduct.

Implications of the principles for review

2.75 From the above analysis, several conclusions of key importance to the Commission's review can be drawn.

2.76 The first, and most far reaching conclusion, is that there is a clear basis in principle for extending the scope of the recovery of the proceeds (*qua* profits) of unlawful activity beyond the present POC Act boundaries of proven criminal conduct to include any conduct that is unlawful either under the criminal or civil law that results in the unjust enrichment of the perpetrator.

2.77 Secondly, the principle is not confined to the recovery of unjust enrichment by a person able to demonstrate that the enrichment was as a result of a wrong done to him or her but has a wider public policy application to the removal of such enrichment generally.

2.78 Thirdly, the concept that a person should not be entitled to be unjustly enriched by reason of unlawful conduct is distinguishable from the notion that a person should be punished for criminal wrongdoing. That is to say that, while a particular course of conduct might at the one time constitute both a criminal offence and grounds for the recovery of unjust enrichment, the entitlement of the state to impose a punishment for the criminal offence, and the nature of that punishment, are independent in principle from the right of the state to recover the unjust enrichment and vice-versa.

2.79 Fourthly, the principle that property used in or in connection with criminal conduct should be liable to confiscation is separate and distinct in principle from the notion that perpetrators of the criminal conduct should not be entitled to be unjustly enriched as a result of that criminal act.

2.80 Such confiscation is supportable on the twin bases that a person who engages in criminal conduct should, where it is considered necessary and appropriate to do so, be deprived of the capacity to use that property for further criminal enterprise,

---

[15].Home Office Working Group on Confiscation *Third Report: Criminal Assets* London November 1998.

and that such deprivation should also be available to serve a punitive function in relation to that criminal conduct.

2.81 Fifthly, relevant public officials should be provided with appropriate powers to facilitate the attainment of two separate and distinguishable objectives

- denying unjust enrichment to persons who engage in unlawful conduct
- recovering from persons who commit criminal offences the means by which they have committed such offences so as to prevent the use of such means for further criminal activity and to punish the offenders.

2.82 These conclusions and the principles to which they give recognition play an important part in the Commission's consideration of a number of issues dealt with in this report.

2.83 For instance, the Commission's conclusion that there is justification in principle for the recovery of the profits of any unlawful conduct, whether criminal or civil, is central to the Commission's recommendation in chapter 4 that the POC Act should be extended to incorporate a non-conviction based scheme.

2.84 That recommendation in turn points to the need for section 3(1)(a) of the Act to be extended appropriately[16] and for the short title of the Act to be restyled accordingly.

2.85 The importance of the above conclusions to the Commission's review is further exemplified in chapter 3 dealing with the distinction between confiscation of profits and confiscation of other property and the interface between confiscation of profits and sentencing.

2.86 The Commission has also identified other key underlying principles which have important implications for its task.

2.87 Of these, perhaps none is more important than the principle that the need to preserve the integrity of property that may become confiscable is such as to justify the exceptional course, already a feature of the legislation, of enabling courts to make restraining orders. The need for this principle to be upheld and appropriately reinforced is discussed in chapter 5 below. The adequacy of the apparatus provided in the POC Act for the management and preservation of restrained property is canvassed in chapter 10.

2.88 The principle is also important in relation to the scope of the property that should be available for confiscation, an issue considered in chapter 13. It is likewise recognised in chapter 15 as having important implications for the question of how most appropriately to provide legal assistance to persons whose capacity to defend

---

16. A consequential textual amendment to s 3(1)(b) would also be required to accommodate the altered language of s 3(1)(a).

proceedings has been eliminated or significantly reduced by reason of a restraining order.

2.89 Related to the preservation of property principle is the equally important counterbalancing principle that confiscation and restraining orders should not impact unfairly on innocent third parties. This issue is dealt with in detail in chapter 12 and has implications for chapter 13 dealing with the scope of property caught by the scheme.

2.90 Also related to third parties is the associated need, underlying the additional terms of reference given to the Commission on 14 April 1998, for the legislation to operate in a manner which ensures that its regulatory and cost impact on business is kept to a minimum. This is considered in chapter 21.

2.91 Earlier in this chapter, reference was made, in relation to the second principal objective set out in section 3(1)(b) of the POC Act, to the underlying principles, firstly, that property used in, or in connection with, the commission of a criminal offence should be able to be rendered unavailable for future use for such purposes and, secondly, that confiscation of such property should also be available as a punitive sanction. While the maintenance of these principles has not been called into question and is not the subject of discrete consideration in this report, the principles nevertheless form an important backdrop to the discussion of issues such as the role that confiscation of profits should have in sentencing (chapter 3) and the scope of property that should be available for confiscation (chapter 13).

2.92 The Commission has also identified earlier in relation to the objective set out in section 3(1)(c), the underlying principle that law enforcement authorities should be provided with the powers necessary to enable them to ensure the maintenance and execution of the POC Act. In connection with this principle, chapter 19 reviews the adequacy of investigative and enforcement powers, and chapter 21 deals, *inter alia*, with issues related to the record retention obligations of financial institutions that are ancillary to the investigative and enforcement process.

2.93 While, as will be apparent from the foregoing discussion, many issues for consideration by the Commission in this review bear a direct relationship to the major underlying principles identified above, a number of other issues of importance not so directly related to those principles fall also to be considered.

2.94 These include consideration of

- the interrelationship between the POC Act and other Commonwealth laws, notably those relating to bankruptcy and family, taxation and customs law (chapter 6)
- the adequacy of the money laundering provisions of Division 1 of Part V of the Act (chapter 7)
- the practicality of certain existing time constraints in the Act (chapter 8)
- the appropriate courts to exercise jurisdiction under the Act (chapter 9)

- the need for national uniformity of proceeds laws (chapter 11)
- the extent to which recovered property ought to be applied to the restitution and compensation of victims (chapter 14)
- the appropriateness of the existing section 43 regime under which restrained assets may be made available for the purpose of funding a defendant's trial (chapter 15)
- the continuing need for *in rem* forfeiture, as distinct from forfeiture under the POC Act and Division 3 of Part XIII of the Customs Act, and the desirability of incorporating the latter provisions into the POC Act (chapters16 and 17)
- whether provisions should be included in the Act for the confiscation of literary proceeds of criminal activity or criminal notoriety (chapter 18)
- whether there is any need for reform of the Crimes (Superannuation Benefits) Act or the corresponding provisions of the Federal Police Act (chapter 20)
- the impact of the Act on business in terms both of competition and business regulatory costs (chapter 21).

2.95 Finally, and as a necessary consequence of its consideration of the range of other issues, the Commission gives consideration in chapter 22 to the operational adequacy of particular elements of the scheme currently entrusted to various law enforcement agencies and the need for any change in that regard.

Recommendation 1. That the legislation be renamed the 'Confiscation (Unlawful Proceeds) Act'.

Recommendation 2. That the principal objectives of the legislation enunciated in section 3(1)(a) and (b) be recast as follows

- to deprive persons of the proceeds of, and the benefits derived from, unlawful conduct
- to provide for forfeiture of property used in or in connection with the commission of offences against the laws of the Commonwealth or the Territories.

PART B

MAJOR REFORM ISSUES

3. Scope of judicial discretion — confiscation and sentencing

Introduction

3.1 In chapter 2, the Commission has identified the distinctly different principles underpinning, on the one hand, the confiscation of the profits and, on the other hand, the confiscation of property used for, or in connection with, the commission of an offence.

3.2 In summary, the principle underlying the former is the concept of denial of unjust enrichment from criminal activity.

3.3 The dual principles underlying the latter are, firstly, the need to deprive a person of the opportunity of further using the same property for criminal activity and, secondly, the punitive effect of confiscating such property.

3.4 As discussed in chapter 2, these distinctly different principles are reflected, as to the first of them, in the principal objective set out in section 3(1)(a) and, as to the other two principles, in section 3(1)(b).

3.5 Somewhat remarkably, in the light of that articulation in section 3, these distinctions appear to have little practical significance under the POC Act scheme beyond section 3 itself. Most significant, in the Commission's view, is the absence from the legislation of any express guidance in relation to the implications that these distinctions might have in two areas of pivotal importance — discretionary forfeiture and sentencing.

3.6 In respect of each, this chapter

- outlines the current position under the Act
- discusses developments in other Australian jurisdictions
- considers whether, having regard to the underlying principles identified in section 3, any change is warranted.

Discretionary forfeiture

Current position under POC Act

3.7 Under section 19 of the POC Act, the court is given complete discretion in relation to forfeiture of tainted property upon conviction for an ordinary indictable offence.

3.8 Similarly, under section 26, the court is given complete discretion in relation to the imposition of a pecuniary penalty in respect of the value of benefits derived by a person from the commission of either an ordinary indictable offence or serious offence, being that value as assessed in accordance with the formula set out in section 27 of the Act.

3.9 Under both section 19 and section 26, the decision whether to make an order depends upon whether the court 'considers it appropriate' so to do.

3.10 In respect of the exercise of the discretion under section 19, some guidance is, however, provided by subsections (3) and (4) as follows

> (3) In considering whether it is appropriate to make a forfeiture order in respect of particular property, the court may have regard to:
> (a) any hardship that may reasonably be expected to be caused to any person by the operation of such an order; and
> (b) the use that is ordinarily made, or was intended to be made, of the property;
>
> (4) In considering whether it is appropriate to make a forfeiture order under subsection (1) in respect of particular property, the court may also have regard to the gravity of the offence concerned.

3.11 Neither subsection encourages the court to make any distinction between profits, on the one hand, and property used in, or in connection with, the commission of the offence, on the other hand, although, arguably, paragraph 3(b) is likely to be of most relevance to the latter.

3.12 Certainly, there is nothing in either provision to suggest that a view less sympathetic to the defendant ought to be taken in respect of profits.

3.13 In the case of forfeiture under section 19, the court also has complete discretion in relation to the quantum of tainted property forfeited.

3.14 By contrast, under section 26, the court, having exercised its discretion to make a pecuniary penalty order, is bound to make its assessment of benefits in the manner prescribed in section 27.

3.15 Section 26 does, however, confer a discretion on the court to reduce the penalty order by any tax paid in respect of the benefits[17] and by an amount equal to the amount payable by the person by way of fine, restitution, compensation or damages in relation to the offence.[18]

3.16 Additionally, section 26(3) requires that the penalty order be reduced by an amount equal to the value of property that is proceeds of the offence that has

---

[17].POC Act s 26(4).

[18].POC Act s 26(5).

been forfeited under the POC Act or any other law of the Commonwealth or a Territory in relation to the offence or is proposed to be forfeited.

3.17 It is noted that the effect of the assessment process prescribed under section 26 is that 'benefits', while clearly including proceeds (*qua* profits) of the offence, go beyond profits. Notably, section 27(8) provides that

> In calculating, for purposes of an application for a pecuniary penalty order the value of benefits derived by a person from the commission of an offence or offences, any expenses or outgoings of the person in connection with the commission of the offences shall be disregarded.

3.18 The pecuniary penalty regime under Division 3 of Part XIII of the Customs Act is, in all relevant respects, the same as that under Division 3 Part II of the POC Act.

3.19 By contrast with sections 19 and 26 of the POC Act, the effect of section 30 of that Act, in relation to serious offences, is to deny the court any discretion in relation to the forfeiture of restrained property upon conviction for such an offence. Accordingly, section 30 does not require further consideration in the present context.

3.20 Two conclusions can be drawn from the foregoing

- firstly, that in exercising its discretion under section 19 in relation to forfeiture in respect of an ordinary indictable offence, the court is neither invited, nor required, to make any distinction between proceeds (ie profits) of the offence and other tainted property in respect of the offence (ie property used, in or in connection with, the commission of the offence)[19] and
- secondly, that in exercising its discretion under section 26 whether to make a pecuniary order, the court similarly is neither invited, nor directed, to take account of the nature and extent of profits from the commission of the offence as distinct from other benefits.

Developments in other jurisdictions

3.21 In South Australia, the CAC Act now provides in section 10(1) that

> A court must make an appropriate forfeiture order under this Part if the court is satisfied that forfeiture is necessary to prevent the defendant from retaining the profits of criminal activity.

3.22 The retention of a discretion in relation to property that does not constitute profits is secured by section 10(2), as follows

---

[19] See definition of 'tainted property' in s 4(1).

> The court's power to order forfeiture of property beyond what is required under subsection (1) is discretionary.

3.23 While both NSW and Victoria have introduced non-conviction based schemes, the question whether a legislative distinction should be made, as regards forfeiture, between profits and property used in, or in connection with the commission of the offence, has not arisen for consideration because forfeiture is mandatory in respect of relevant property.

The Commission's view

3.24 In the Commission's view, the retention by the courts of any discretion not to order forfeiture under section 19 of property constituting the profits of an ordinary indictable offence or not to order a pecuniary penalty under section 26 in respect of the profits of an ordinary indictable offence or a serious offence flies directly, and unacceptably, in the face of the principle underlying the principal objective enunciated in section 3(1)(a) of the POC Act, namely, that a person should not be entitled to be unjustly enriched as a result of unlawful conduct.

3.25 As the Commission's analysis in chapter 2 demonstrates, the nature of that principle is such that it does not admit of exceptions, particularly discretionary exceptions.

3.26 The Commission considers, therefore, that section 19 should be amended to require mandatory forfeiture of such profits in the case of an ordinary indictable offence and that section 26 likewise should be amended to require the mandatory making of a pecuniary penalty order sought in respect of such profits in the case of both an ordinary indictable offence and a serious offence.

3.27 However, in relation to pecuniary penalty orders, the existing requirement to reduce the amount of the penalty by the value of any property already forfeited, or proposed to be forfeited, should continue to the extent that the forfeiture relates to profits. Similarly, the discretion of the court to deduct the amount of any tax paid should be removed and replaced with a requirement for the court to so reduce the order, again limited to tax paid in respect of such profits. Likewise, the court should be required to deduct an amount equal to any restitution, compensation or damages that can be specifically identified as relating to such profits. These changes would ensure that it is only 'unjust enrichment' which is mandatorily removed, consistent with the principles earlier identified.

3.28 The existing discretion to deduct the amount of any fine from the assessment, on the other hand, should not be allowed because, on the basis of the Commission's analysis in chapter 2, the denial of unjust enrichment is not punitive and, accordingly, any offset against confiscable profits of an imposition that was entirely punitive in nature would be unsupportable in principle.

3.29 The Commission does not, however, consider that the existing discretions under sections 19 and 26 need to be altered so far as they concern property used in or in connection with the commission of the relevant offence. Consistent with its analysis in chapter 2 of the principles underlying the principal objective enunciated in section 3(1)(b), the Commission considers that the exercise of judicial discretion is appropriate in determining the extent to which the forfeiture of such property is necessary for either or both denying the offender the opportunity of using that property for future such conduct and as punishment for the offence.

Sentencing

Current position under POC Act

3.30 In relation to confiscation orders, the POC Act makes only one specific reference to sentencing. That is in section 18, subsection (2) of which provides

> Where:
> (a) an application is made for a confiscation order in respect of a person's conviction of an offence;
> (b) the application is made to the court before which the person was convicted; and
> (c) the court has not, when the application is made, passed sentence on the person for the offence;
> the court may, if satisfied that it is reasonable to do so in all the circumstances, defer passing sentence until it has determined the application for the confiscation order.[20]

3.31 At first blush it might be thought that this provision contemplates that the scope and impact of a confiscation order may properly be taken into account by a court in determining sentence in respect of the offence to which the confiscation relates. A closer examination of the provision in the context of the Explanatory Memorandum suggests, however, that it is intended to merely be a temporal aid designed to permit the court to defer sentencing so as to enable higher priority restraining action to be taken. This probably accounts for the absence of any reference to this provision in the Federal Court decisions in *McDermott* and *Tapper* discussed below.

3.32 The Commission notes for completeness that it may be possible to draw an implication from section 19(4) that a court can be expected to take a sentence into account in determining whether to make a forfeiture order under that section, although the drawing of such an implication involves inferring that the reference to 'the gravity of the offence' admits of consideration of the sentence.

3.33 There is, however, nothing in the Act that clearly directs the court, when determining sentence, or in deciding whether to make a confiscation order

---

[20].'Confiscation order' is defined in s 4 to mean 'a forfeiture order or a pecuniary penalty order'.

(including, in the case of a forfeiture order under section 19, the scope of the forfeiture), to observe any distinction between profits, on the one hand, and property used in, or in connection with, the commission of the offence, on the other hand.

3.34 Not surprisingly, therefore, in two full court decisions,[21] the Federal Court has held that a pecuniary penalty order must be taken into account in sentencing, notwithstanding that, in both cases, the pecuniary penalty order in question related entirely to profits from the criminal conduct in question.

3.35 The first of these cases, *McDermott*, had been preceded in 1989 by a decision of the Victorian Court of Criminal Appeal in *Allen*.[22] In *Allen*, the court decided that, under the provisions of the *Victorian Crimes (Confiscation of Profits) Act 1986* corresponding with relevant provisions of the POC Act, confiscation of proceeds (as distinct from property used in the commission of an offence) is a relevant factor to be taken into account in the assessment of a sentence.

3.36 In support of the contention that the assessed profits of $600000 from narcotic trading in that case be disregarded for sentencing purposes, the Crown sought to draw an analogy between a proceeds order in such circumstances and a compensation order. In rejecting this contention, the court stated, *inter alia*

> ... Compensation orders have been held to be a means of summary recovery and not a provision for additional punishment. Moreover, they are made on the application not of the Crown as prosecutor but of a person who has suffered as a result of the commission of the offence.
>
> Orders under the Crimes (Confiscation of Profits) Act on the other hand are obtained on the application of the Director of Public Prosecutions and are clearly intended to be part of the retribution extracted from offenders on behalf of the community.23

3.37 It considered as a separate issue the question of the weight to be attached in sentencing to the making of such an order, finding in that case that the sentencing judge may have given it too much weight.

3.38 In *McDermott* a pecuniary penalty order was made in an amount representing moneys received by way of secret commissions by the defendant. In sentencing McDermott, Miles CJ in the ACT Supreme Court, citing *Allen*, acknowledged that the making of the order may have a bearing on the sentence. He concluded, nevertheless, that

> ... the pecuniary penalty order in this case is not to be regarded as an additional punishment, but simply the recovery of the proceeds of the offences for which

---

21.*McDermott v R* (1990) 49 A Crim R 105 and *Tapper v R* (1992) 111 ALR 347.

22.*Peter John Allen* (1989) 41 A Crim R 51.

23.id 56.

> McDermott has been convicted or as was said in Allen's case, the removal of ill-gotten gains. What I consider to be a proper sentence for each of these convictions is unaffected by what I have decided should be the appropriate order in the application under the Proceeds of Crime Act.[24]

3.39 On appeal, the Full Federal Court, Gallop, Neaves and Foster JJ (Neaves J dissenting) held that the trial judge had been in error in failing to take into account the pecuniary penalty order. In the words of Foster J, that order 'had significant punitive and deterrent effect ...'. For this reason, *inter alia*, the custodial sentence imposed was reduced.

3.40 Subsequently, in *Tapper*,[25] a case in which a pecuniary penalty order had been made in the sum of $75500, that being the amount in respect of the theft of which the defendant had been convicted, the Full Federal Court reaffirmed the position taken in *McDermott*.

3.41 Notwithstanding that the whole amount of the pecuniary penalty order represented fraudulently acquired profits, the court (Burchett, Miles and O'Loughlin JJ) said

> The majority of this court in *McDermott* (1990) 49 A Crim R 105 held that a pecuniary penalty order must be taken into account at the time of sentencing and that it was wrong in the circumstances of the case to regard the pecuniary penalty order as simply the removal of ill-gotten gains and not as an additional punishment. Different views have been taken on these matters in the courts of the States: see *Allen* (1989) 41 A Crim R; *R v Fagher* (1989) 16 NSWLR 67 and *R v Araya*; *R v Joannes* (Court of Criminal Appeal (NSW), 17 July 1992, unreported). In the last mentioned case the court considered *McDermott* but found it unnecessary to decide whether a sentencing judge may take into account an order for the confiscation of property, holding that it was a question which should await adjudication in an appropriate case.
>
> Nevertheless, this court should continue to follow McDermott and in doing so make the observation that there is nothing in McDermott to contradict the proposition that the extent to which a pecuniary penalty order should affect a sentence will depend on the circumstances. Where the pecuniary penalty order is not likely to have any impact upon the offender or his assets, it might have little or no impact upon the sentence.26

3.42 The same issue arose again more recently in the New South Wales Court of Criminal Appeal proceedings in *R v Jennifer Rose Purdon*[27] relating to a conviction for social security fraud that had resulted in a pecuniary penalty order under the POC Act. In the course of his judgment, Hunt CJ at Common Law observed that

---

24.*McDermott v R* (1990) 49 A Crim R 105, 119–120 as cited per Neaves J.

25.*Tapper v R* (1992) 111 ALR 347.

26.id 353.

27.(Unreported) proceedings no 60659 of 1996, 27 March 1997.

> ... different views are held as to what effect [a pecuniary penalty order] should have on the sentence ... the balance of authority ... appears to be that the extent to which the order can be complied with is a matter to be taken into account.[28]

3.43 It is clear from the foregoing that, based on the authority of *McDermott* and *Tapper*, the prevailing jurisprudence is that

- a pecuniary penalty order has punitive characteristics, notwithstanding that it may relate exclusively to profits and
- as such, must be taken into account in sentencing
- the weight to be given to the pecuniary penalty order will depend on the circumstances of the case, including the likely impact of the order on the defendant's assets.

3.44 The Commission is not aware of any authoritative judicial pronouncements on the reciprocal issue of the extent to which sentence should be taken into account in determining whether a confiscation order should be made and, in the case of a forfeiture order under section 19, the extent of such forfeiture. As earlier discussed, an argument might possibly be constructed on the basis of section 19(4) to the effect that a court can be expected to take sentence into account in determining whether to make a forfeiture order under that section, but the argument is not strong. More importantly, there is nothing in the legislation suggesting that the court may not take sentence into account in such circumstances.

Developments in other jurisdictions

3.45 Since first generation proceeds legislation was enacted throughout Australia, several jurisdictions have taken important steps to separate confiscation of proceeds (*qua* profits) from the sentencing process.

3.46 The NSW COPOC Act now provides, in section 18(2), that, in taking account of any hardship that might arise from a forfeiture order

> The court shall not take into account the sentence imposed in respect of the offence.

3.47 The converse, namely, the extent to which an actual or apprehended forfeiture may be taken into account in sentencing, is not addressed in legislation.

3.48 In relation to the issue of the extent to which a forfeiture order may be taken into account in Victoria, a comprehensive approach has been taken in 1991 amendments of the Sentencing Act which inserted into section 5 the following subsection

> (2A) In sentencing an offender a court —

---

[28] .id 8.

(a) may have regard to a forfeiture order made under the *Crimes (Confiscation of Profits) Act 1986* in respect of property -

(i) that was used in, or in connection with, the commission of the offence:
(ii) that was intended to be used in, or in connection with, the commission of the offence:
(iii) that was derived or realised, directly or indirectly, from property referred to in sub-paragraph (i) or (ii);

(b) must not have regard to a forfeiture order made under that Act in respect of property that was derived or realised, directly or indirectly, by any person as a result of the commission of the offence;

(c) may have regard to a pecuniary penalty order made under that Act to the extent to which it relates to benefits in excess of profits derived from the commission of the offence;

((d) must not have regard to a pecuniary penalty order made under that Act to the extent to which it relates to profits (as opposed to benefits) derived from the commission of the offence.[29]

3.49 The effect of the Victorian legislation is to put beyond any doubt in that State the impermissibility of taking any confiscation of profits into account in sentencing. Moreover, the legislation expressly reaffirms that any confiscation relating otherwise than to profits may legitimately be so taken into account.

3.50 Reforms along similar, although not identical lines, have been enacted in South Australia in section 10 of the CAC Act (SA), subsections (1) and (2) of which have been referred to earlier in this chapter.

3.51 Section 10 provides

(1) A court must make an appropriate forfeiture order under this Part if the court is satisfied that forfeiture is necessary to prevent the defendant from retaining the profits of criminal activity.

(2) The court's power to order forfeiture of property beyond what is required under subsection (1) is discretionary.

(3) In deciding whether to impose a discretionary forfeiture and, if so, the extent of the forfeiture, the court may take into account any penalty imposed on the defendant for the forfeiture offence and, conversely, the court may take a discretionary forfeiture into account in fixing penalty for the relevant forfeiture offence.

3.52 The intended effect of subsection (3) appears to be twofold

---

[29] *Sentencing Act 1991* (Vic).

- Firstly, the subsection permits the court to take penalty into account in determining whether to order a forfeiture otherwise than in respect of profits. By necessary implication, it would appear also to have been the legislative intention to deny the court the ability to take penalty into account in determining whether to order forfeiture of profits. In both respects the South Australian legislation goes a step beyond the Victorian legislation.
- Secondly, it permits the court to make a forfeiture otherwise than in respect of profits into account in fixing penalty and, by necessary implication, would seem intended to deny the court such a capacity in respect of forfeiture of profits. In this respect the provision would appear to have the same effect as section 5(2A) of the Confiscation Act (Vic).

The Commission's view

3.53 Given the pivotal importance, discussed both in chapter 2 and earlier in this chapter, of the principal objective enunciated in section 3(1)(a) and the underlying principle of denial of unjust enrichment, the Commission is in no doubt that permitting the courts to take confiscation of profits into account in sentencing and, conversely, to take penalty into account in determining whether to confiscate profits, is entirely incompatible with the maintenance of the integrity of that principle and the achievement of that objective and should be prohibited.

3.54 The effect of the Commission's conclusion in the first part of this chapter that forfeiture should, in all cases, be mandatory in relation to profits would, if translated into legislative reform, of itself remove from the courts the capacity to take sentence into account in confiscating profits.

3.55 As regards the court's capacity to take confiscation of profits into account in sentencing, the Commission fully concurs with the relevant reforms in Victoria and South Australia and proposes that a similar prohibition be included in the POC Act.

3.56 The effect of the Commission's proposal would, of course, be to reverse the present situation under the POC Act in which, in the absence of express legislative guidance to the contrary, Federal Court jurisprudence in *McDermott* and *Tapper* has led the courts to treat confiscation of profits as having punitive characteristics and, therefore, as being appropriate to be taken into account in sentencing. The Commission notes, however, that the Federal Court in those cases did not undertake an analysis of the kind undertaken by the Commission in chapter 2. While such an analysis is an essential part of the Commission's review task, the conclusions reached by the court are entirely understandable in view of the failure of the legislation to carry the principle underlying the principal objective in section 3(1)(a) through in a complete and consistent manner into issues such as the impact that confiscation should be permitted to have on sentencing.

3.57 The Commission does not, however, disagree that it is appropriate for the court to continue to take confiscation otherwise than in respect of profits into account in sentencing. Such confiscation would involve forfeiture of property used in, or in connection with, the commission of an offence, and assessed benefits under a pecuniary penalty order that are additional to profits. Similarly, the Commission sees no objection, in cases where sentencing precedes confiscation, to the courts taking into account penalty in determining whether to exercise a discretionary power to confiscate property other than profits.

3.58 In relation to these matters the Commission notes its conclusion, elaborated in chapter 2, that confiscation of property used in, or in connection with, the commission of an offence is based on two principles, one of which is punitive. Determination of the extent to which such confiscation should impact on penalty and vice-versa is, therefore, properly a matter for judicial discretion.

3.59 For these reasons the Commission would favour the inclusion in the Act of express provisions to the above effect.

Recommendation 3. Forfeiture under section 19 of the POC Act should be mandatory in respect of the profits of an ordinary indictable offence but continue to be discretionary in respect of property that is not such profits.

Recommendation 4

- A pecuniary penalty order under section 26 of the POC Act should be mandatory in respect of the profits of an ordinary indictable offence or a serious offence but the existing discretion under that section should be retained in respect of confiscation of benefits other than profits.

- The court should be required, in relation to a mandatory pecuniary penalty order in respect of the profits of an offence, to reduce the amount of the order by an amount equal to the value of
  - any forfeiture of such profits that has already occurred under Commonwealth or Territory law and any proposed forfeiture in respect of those profits (cf section 26(3))
  - any tax paid in respect of those profits (cf section 26(4))
  - any amount payable in respect of those profits by way of restitution, compensation or damages (but not any such amounts paid by way of fine) (cf section 26(5)).

Recommendation 5. The POC Act should expressly prohibit the court from taking into account in sentencing in respect of an offence any confiscation order made under the Act in respect of the profits of that

offence.

Recommendation 6. The POC Act should expressly authorise the court to take into account in sentencing a person in respect of an offence any confiscation order made under the Act otherwise than in respect of profits of the offence.

Recommendation 7. The POC Act should expressly authorise the court, in making any confiscation order in respect of property other than profits of an offence, to take into account any sentence that may have been imposed in respect of that offence.

4. Conviction and non-conviction based recovery

Introduction

4.1 In chapter 2, the Commission related the historical backdrop to the development of the POC Act and gave a brief outline of the regime established by it. In that chapter, the Commission also analysed the principles underlying the regime and, in chapter 3, the Commission reached the view that a proper application of those principles precluded any judicial discretion in relation to the forfeiture of proceeds *qua* profits. Furthermore, as such forfeiture constitutes the removal of something to which there was no entitlement *ab initio*, it does not have a punitive aspect and should not to be taken into account in determining the penalty for the offence.

4.2 This chapter deals with other perceived shortcomings related to the current solely conviction based regime and discusses what needs to be done to achieve better proceeds recovery.

Current conviction based regime

4.3 Before considering the operative forfeiture provisions, it should be noted that, under the POC Act as it presently stands, confiscation, whether by way of forfeiture order or pecuniary penalty order, is the last stage of combined criminal and civil processes, although both are adjudicated upon by criminal courts. The civil process usually commences with the obtaining of a restraining order over property which can occur up to 48 hours before the defendant is charged, and then remains in abeyance pending the criminal committal and trial process. If a conviction results from that latter process, the confiscation process then resumes, the conviction fulfilling the condition precedent for the making of the necessary order, or the occurrence of statutory forfeiture pursuant to section 30.

4.4 The POC Act makes different provision depending on whether confiscation follows conviction for

- an ordinary indictable offence or
- a serious offence.

4.5 At the outset it should be noted that the term 'conviction' is given an extended meaning for the purposes of the POC Act and includes where a person

- is found guilty but discharged without conviction

- consents to the court taking the offence into account when being sentenced for another offence
- absconds in connection with the offence.[30]

Ordinary indictable offences

4.6 An ordinary indictable offence is defined as an indictable offence that is not a serious offence. 'Indictable offence' is in turn defined to mean an offence against a law of the Commonwealth, or a law of a Territory, that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).[31]

4.7 In respect of a conviction for such an offence, the DPP may apply for a confiscation order which can be one or both of

- a forfeiture order against property that is tainted property in respect of the offence or
- a pecuniary penalty order against the person in respect of benefits derived by the person from the commission of the offence.[32]

4.8 The Act requires such an application to be made within six months of the conviction or 'deemed conviction'[33] and precludes an application for either order, except with leave of the court, where an application has previously been made under any law of the Commonwealth or of a Territory and that application has been determined on the merits.[34] An application may be made in respect of one or more indictable offences.[35]

4.9 Confiscation orders may not be made where a person has absconded unless either the person had been committed for trial for the offence or the court is satisfied, having regard to the evidence before it, that a reasonable jury, properly instructed, could lawfully find the person guilty of the offence.[36] There can thus be no confiscation order without an evaluation of the evidence in these cases.

4.10 Finally, the POC Act provides that, in dealing with the confiscation application, the court may have regard to the committal hearing and trial transcripts and to the evidence given in those proceedings,[37] and may, if it is satisfied that it is

---

[30].POC Act s 5.

[31].POC Act s 4.

[32].POC Act s 14(1).

[33].POC Act s 14(2) and definition of 'relevant application period' in s 4.

[34].POC Act s 14(3) and (4).

[35].POC Act s 14(6).

[36].POC Act s 17.

[37].POC Act s 18(1).

reasonable to do so in all the circumstances, defer passing sentence for the offence until it has determined that application.[38]

4.11 The POC Act then goes on to make specific provisions in relation to each of the two confiscation orders.

4.12 ***Ordinary indictable offence: forfeiture orders.*** Section 19 of the Act deals with the making of forfeiture orders in respect of property and gives the court power to make a forfeiture order if the court is satisfied that the property is tainted property in respect of the offence.[39]

4.13 When the court makes the forfeiture order it must, if it relates to property other than money, specify the amount that it considers to be the value of the property.[40] The value determined is relevant in settling finally the amount of any pecuniary penalty order which might also be ordered, as discussed in the next section.

4.14 The Act permits the court, in determining whether to make the forfeiture order, to have regard to hardship that may be caused to any person, the use ordinarily made or intended to be made of the property and the gravity of the offence.[41] It also contains an evidentiary aid which, in short, provides that property found in the person's possession at the time of, or immediately after, the commission of the offence shall, in the absence of evidence to the contrary, be deemed to have been used in or in connection with the offence.[42]

4.15 The effect of a forfeiture order is that the property vests absolutely in the Commonwealth.[43]

4.16 ***Ordinary indictable offence: pecuniary penalty orders.*** In addition to the ability to make forfeiture orders, section 26 of the Act permits the court to make a pecuniary penalty order provided that it is satisfied that the person derived benefits from the commission of the offence. The amount so ordered is required to be assessed in accordance with section 27, but the court must deduct from the amount so calculated the amount equal to the value of any property ordered forfeit in respect of the same offence.[44] It may also reduce the amount by tax paid which is attributable to the assessed benefit,[45] as well as by any amount payable by the

---

[38].POC Act s 18(2).

[39].POC Act s 19(1).

[40].POC Act s 19(2).

[41].POC Act s 19(3) and (4).

[42].POC Act s 19(6).

[43].POC Act s 20.

[44].POC Act s 26(3).

[45].POC Act s 26(4).

person by way of fine, restitution, compensation or damages in relation to the offence.[46]

4.17 Any amount so ordered to be paid by a person constitutes a civil debt due by that person to the Commonwealth[47] and may be enforced as a civil judgment debt.[48]

4.18 Section 27 sets out the formula to be applied in determining the value of the benefits derived by the person from the offence or offences and hence the amount of the pecuniary penalty order that the court may impose.

4.19 In short, when making the assessment of the value of benefits derived by a defendant from the commission of an offence or offences, the court is to have regard to the evidence before it concerning all or any of

- money or the value of other property that came into the possession or under the control of the defendant or another person at the request or direction of the defendant, by reason of the commission of the offence(s)
- the value of any other benefits similarly provided to the defendant or another by reason of the commission of the offence(s)
- if the offence(s) involved drugs, the market value of the drugs at the time of the offence or the amount ordinarily paid for the doing of a similar thing
- the value of the defendant's property, income and expenditure before, during and after the commission of the offence or, where more than one, the earliest of those offences was committed and ending when the last of those offences was committed.[49]

4.20 Once the assessment is made, the court is required to treat the value of the benefits derived as being not less than the amount of greatest excess but must reduce that amount if the defendant satisfies the court that that excess is, in whole or in part, due to causes unrelated to the commission of the offence(s).[50]

4.21 The Act specifically provides that the court must disregard outgoings in making the assessment; thus the amount assessed is a gross not net amount.[51] This issue is revisited later in this chapter.

---

[46].POC Act s 26(5).

[47].POC Act s 26(8).

[48].POC Act s 26(9).

[49].POC Act s 27(2).

[50].POC Act s 27(4) in relation to a single offence and s 27(5) in relation to a multiplicity of offences.

[51].POC Act s 27(8).

4.22 Finally, benefits in respect of which a pecuniary penalty has already been imposed under the POC Act, Division 3 of Part XIII of the Customs Act or under any law of a State or Territory, is not to be included in making the assessment.

Serious offences

4.23 In relation to serious offences, the forfeiture order regime is significantly different from that which applies to ordinary indictable offences. The pecuniary penalty regime, on the other hand, is similar but with the addition of a significant evidentiary presumption.

4.24 Serious offences are a limited range of offences, defined in section 7 as being

- a serious narcotics offence, which is in turn defined as an offence constituted by the production, possession, supply, importation of a narcotic substance equal to or greater than the trafficable quantity within the meaning of the Customs Act or such other law against which the offence is committed
- an organised fraud offence, which requires proof of three or more public fraud offences, in turn defined as offences against any of sections 29D and 86A of the *Crimes Act 1914* or sections 5, 6, 7 and 8 of the *Crimes (Taxation Offences) Act 1980*[52] or
- a money laundering offence in relation to the proceeds of a serious narcotics offence or an organised fraud offence[53] as well as attempting, or conspiring, to commit such an offence or being an accessory, before or after, to the commission of such an offence.

4.25 ***Serious offence: statutory.*** Section 30 provides that, where a person is convicted of a serious offence (apart from a deemed conviction resulting from the person's absconding) and a restraining order is in force in respect of that person's property, any property still subject to restraint six months after conviction is forfeited to the Commonwealth by operation of the section. Section 30A permits the court to extend for up to nine months the period within which statutory forfeiture will occur in cases where there is a pending application to have property excluded from the restraining order.

4.26 Property may only be excluded from a restraining order if the defendant satisfies the court that

- the property was not used in, or in connection with, any unlawful activity and was not derived, directly or indirectly, by any person from any unlawful activity and

---

[52].Organised fraud is created as an offence by s 83 of the POC Act.

[53].Money laundering is created as an offence by s 81 of the POC Act.

- the defendant's interest in the property was lawfully acquired.[54]

4.27 ***Serious offence: pecuniary penalty orders.*** Section 14 of the Act, which deals generally with confiscation orders in respect of ordinary indictable offences, provides specifically that an application may be made for a pecuniary penalty order in respect of a serious offence.[55]

4.28 As in the case of forfeiture orders for serious offences, the pecuniary penalty order provision is cast in much wider terms than those in respect of ordinary indictable offences, and contains a rebuttable presumption, not only in relation to all property of the person at the time the application is made, but also in respect of any property which may have been that of the person for a period of up to five years before the making of the application for the pecuniary penalty order but in no case exceeding the period between the date of the offence, or earliest offence, and the application for the penalty order.

4.29 Section 26(6) provides as follows

> Where an application is made for a pecuniary penalty order against a person in relation to a serious offence or serious offences:
> (a) all property of the person at the time the application is made; and
> (b) all property of the person at any time:
> (i) within the period between the day the offence, or the earliest offence, was committed and the day on which the application is made; or
> (ii) within the period of 5 years immediately before the day on which the application is made;
>
> whichever is the shorter;
>
> shall be presumed, unless the contrary is proved, to be property that came into the possession or under the control of the person by reason of the commission of the offence or offences.

Perceived shortcomings of conviction based regime

4.30 According to law enforcement submissions, there are several weaknesses in the current conviction based forfeiture regime which result in it falling well short of recovering the full profits of criminal behaviour.

Weaknesses common to both serious offences and ordinary indictable offences

4.31 The principal shortcoming according to the submissions is the need to secure a conviction for a predicate offence in order to trigger the forfeiture regime. They refer to cases where, although the evidence was inadequate to secure a

---

[54].POC Act s 48(4).

[55].POC Act s 14(7).

conviction, available material pointed strongly to involvement in criminal activity and consequent unjust enrichment.

4.32 The National Crime Authority has provided case studies which it submits illustrate the disadvantages of relying on a wholly conviction based regime and the advantages to proceeds of crime action of non-conviction based legislation. The following three studies illustrate how, when the National Crime Authority could not take action under the POC Act, after referral by it to the New South Wales Crime Commission, the assets were able to be restrained pursuant to the CAR Act provisions.

Case 1

A large sum of money was telegraphically transferred by D to off-shore bank accounts. The transfers were made from different banks over a short period of time in amounts under $10,000.

There is intelligence indicating that D is involved in the importation and distribution of narcotics. D has an affluent lifestyle yet is not employed, has never lodged a taxation return, has no assets in his name and no apparent lawful source of income. D is associated with members of a syndicate responsible for telegraphically transferring several million dollars in structured payments to another country. Due to D's activity and that of his associates, the money is suspected of being proceeds of drug related activity.

D has on the face of things committed structuring offences contrary to s 31 of the Financial Transaction Reports Act 1988 (FTR Act). However, there was insufficient evidence to support those charges or an order under the POC Act to restrain dealings with the funds. However, the NSW Crime Commission successfully applied for a restraining order pursuant to the DTCP Act on the basis of being able to show on the balance of probabilities that D was involved in drug-related criminal activities.

Case 2

M and F were apprehended after NCA officers observed their involvement in a drug transaction with a third person. Cash was found in M and F's car but no drugs were located. As there was insufficient evidence of the money being proceeds of a specific offence or of it having been used in the commission of such an offence, it was not possible to restrain the money pursuant to the POC Act. The NSW Crime Commission successfully applied for a restraining order over the money pursuant to the DTCP Act. There was insufficient evidence to prove a criminal offence yet the NSW Crime Commission obtained a forfeiture order by proving on the balance of probabilities that the accused was engaged in drug-related activity.

Case 3

Several persons were charged under the *Customs Act 1901* with offences relating to the importation of narcotics. L, one of the principals, had previously been

> arrested and tried in relation to a previous importation but a conviction was not obtained and action to restrain L's assets under the POC Act could not be continued. However, on the basis of evidence of L's drug-related activities obtained during the course of the NCA investigation, the NSW Crime Commission was able to obtain a restraining order pursuant to the DCTP Act. The assets included property in Australia and cash in an overseas bank account.[56]

4.33 The submission from the South Australia Police argues as follows

> In South Australia, confiscation is dependent on conviction. Police confiscation investigations have been conducted which successfully identified illicit income but have not resulted in forfeiture as the defendant avoided conviction for the predicate offence. SAPOL investigators have been examining non-conviction based legislation such as the New South Wales *Criminal Asset Recovery Act* 1990, and believe that efficiency of investigations and effectiveness of confiscation legislation can be greatly improved by the provision of non-conviction based forfeiture.
>
> For confiscation legislation to be successful, it must be cost effective to enforce. ... It is important to recognise that it is not cost effective to expend scarce policy resources to prove a person has substantial unexplained (illicit) income only to be precluded from taking action because there is no conviction to trigger the legislation.[57]

4.34 For its part, the AFP submission argues in favour of including a non-conviction based regime similar to that in the New South Wales CAR Act to overcome difficulties similar to those identified by the NCA and SAPOL.[58]

4.35 In its submission, the Australian Bureau of Criminal Intelligence (ABCI) draws attention to its annually published *Australian Illicit Drug Report* (AIDR) which contains a chapter on proceeds of crime. The chapter draws upon input from a range of sources, including all the Australian police services and crime commissions, and reports on the problems associated with proceeds legislation in each of the jurisdictions, as well as money laundering in general. According to the ABCI

> The primary issue identified by most jurisdictions was the inadequacy of conviction based forfeiture legislation to fully deprive criminals of assets gained through criminal activities. On numerous occasions, property/assets are identified as being derived through criminal activity, however, when insufficient evidence exists to sustain the predicate conviction required to invoke POC Acts, the investigating agency is powerless to take any proceeds action in relation to the property/assets.[59]

---

[56].NCA *Submission 16*.

[57].SA Police *Submission 23*.

[58].AFP *Submission 7*.

[59].ABCI *Submission 20*.

4.36 ***Commission's view.*** While recognising the force of the concerns raised by submitters, the Commission is not convinced that the answers to those concerns lie in removing the requirement of a conviction for a predicate offence from the current scheme. In the Commission's view, it is absolutely fundamental to the very nature of a conviction based scheme that a conviction be recorded as an essential prerequisite to confiscation. Rather, the Commission sees these concerns as more directly relevant to the later considered issue whether a non-conviction based scheme should be introduced, a conclusion that gains support from the NCA and SAPOL submissions referred to above.

Perceived weaknesses relating to ordinary indictable offences

4.37 In addition to the requirement to secure a conviction, the submissions identify as a major weakness the need to establish a link between a predicate ordinary indictable offence and the property sought to be forfeited. This in turn raises two further, but related, issues, namely

- the inability to recover other property that is obviously unlawfully acquired but is not referable to the particular offence of which the person has been convicted and
- the range of offences attracting statutory forfeiture.

4.38 These are dealt with in the next section of this chapter.

4.39 ***Need for linkage of property and offence.*** In relation to forfeiture orders for ordinary indictable offences in general, section 19 of the POC Act provides

> 19.(1) Where:
> (a) the Director of Public Prosecutions applies to a court for an order under this section against property in respect of a person's conviction of an offence; and
> (b) the court is satisfied that the property is tainted property in respect of the offence;
> the court may, if it considers it appropriate, order that the property, or such of the property as is specified by the court in the order, is forfeited to the Commonwealth.

4.40 The limitation contained in section 19(1)(b) is clear. The forfeiture can only be ordered of property referable directly or indirectly to the offence for which the person has been convicted.

4.41 A correspondingly similar limitation applies to pecuniary penalty orders. Section 26 of the POC Act provides, as follows

> 26.(1) Where:
> (a) an application is made to a court for an order under this section in respect of benefits derived by a person from the commission of an offence; and

(b) the court is satisfied that the person derived benefits from the commission of the offence;

the court may, if it considers it appropriate:

(c) assess, in accordance with section 27, the value of the benefits so derived; and

(d) order the person to pay to the Commonwealth a pecuniary penalty equal to the penalty amount.

4.42 Thus under the POC Act, in cases of ordinary indictable offences, forfeiture and pecuniary penalties orders can only be made in relation to property linked to, or the benefits of, the predicate offence. This is so even if the predicate offence is the last of a series of offences, there being insufficient evidence to warrant prosecution for the earlier offences.

4.43 The AFP sees the need to prove such connection as an important weakness. According to the AFP, if it were not necessary to demonstrate that proceeds were directly generated by a specific offence, the effectiveness of the confiscation scheme would not be so much in issue.

4.44 In support of this point, the AFP has provided a case example involving a heroin importation. Unsuccessful attempts had been made to intercept a group of heroin importers while they were still in possession of the drugs. Consequently, insufficient evidence was available to prosecute offences in respect of the importation. However, a thorough assessment of the suspects' financial affairs was undertaken and a cash flow analysis revealed suspected tainted assets. The Australian Federal Police then charged the persons under Queensland law with the offence of possession of property that may reasonably be suspected of being tainted property. In this case, there was no need to prove the initial offence, but an asset betterment test demonstrated that the suspects had lived well beyond their means. All assets which the persons could not establish they had lawfully obtained were forfeit.[60]

4.45 No equivalent offence of possession could be established under the POC Act. While property was ultimately confiscated under the Queensland law, it was not on the basis of the criminal conduct which generated those assets.

4.46 ***Commission's view.*** Given that the special considerations justifying the application of the wider ranging statutory forfeiture in relation to serious offences are not generally applicable to ordinary indictable offences, some other special consideration would be needed to justify the removal of the present linkage between tainted property relating to a particular ordinary indictable offence and a conviction for such offence. No such special consideration has been placed before the Commission that would justify the taking of that exceptional course. Rather, the concerns that have led to the raising of that issue seem to the Commission to be more directly relevant to the issues whether the range of offences that are serious

---

[60].AFP *Submission 7*.

offences should be broadened (this is one of the two sub-issues identified above) and whether a non-conviction based scheme should be introduced.

4.47 That leaves for consideration the two related issues identified in paragraph4.37 above.

Possible improvements to the existing conviction based regime

4.48 While rejecting suggestions that the requirements of a conviction for a predicate offence, and of a linkage between tainted property and a predicate ordinary indictable offence, be removed, the Commission considers that two further related issues raised in various submissions, merit consideration. These issues concern

- the inability, in cases of ordinary indictable offences which involve serial or continuing unlawful conduct, to be able to achieve judicially ordered forfeiture of property linked to unlawful conduct other than the particular offence for which the person is convicted and
- the range of offences to which statutory forfeiture applies.

4.49 Associated questions relating to the need for reform of the restraint regime are dealt with in the next chapter.

Property apparently unlawfully acquired but not referable to predicate offence

4.50 Most law enforcement agency submissions to the Commission are highly critical of the fact that forfeiture, whether direct or indirect, relates only to the offence in respect of which the person was convicted, particularly in cases where there is evidence of large scale unexplained wealth. According to the submissions, and reiterated in face to face meetings, forfeiture either does not occur at all or, if it does occur, relates only to the first time the person was caught, even though he or she has in all probability engaged in unlawful conduct of the same kind for a significant period of time.

4.51 The NCA, the AFP and the AFP liaison officer based at AUSTRAC have all drawn the Commission's attention to specific cases, particularly drug related, where investigations over a period of time have revealed an apparent number of successful importations the proceeds of which have either been used to acquire property or have been transmitted overseas.[61] When a subsequent arrest based on those investigations has been made involving the seizure of drugs, no proceeds have been generated. Where extensive investigations have revealed the existence of significant assets, some concealed, with no apparent lawful explanation for their acquisition but, for evidentiary reasons, a serious offence attracting statutory

---

[61].NCA *Submission 16*; AFP *Submission 7*; and in consultations.

forfeiture under section 30 cannot be proved, those assets have not been available for confiscation under the POC Act because they were acquired before the commission of the ordinary indictable offence in respect of which the person is prosecuted.

4.52 The law enforcement perspective is that, since in cases such as these a judicial forfeiture only is available, there should be a reverse onus upon the convicted person to satisfy the court as to the lawful provenance of those assets which, while not able to be shown to be 'tainted property' in relation to the predicate offence, have been acquired in circumstances suggesting that they were acquired as a result of antecedent criminal activity.

4.53 The submission of the South Australia Police makes the case in the following terms

> Presumptions are employed in most jurisdictions with the intention of ensuring a person does not retain the proceeds of long term criminality. A specific offence "triggers" a presumption, recognising that conviction is very rarely obtained for the commission of offences over a period of time. Therefore the benefits reaped from the offence for which the defendant was caught are often small or nil, whilst the overall criminal enterprise may have generated a fortune.
>
> Presumptions that "property of a defendant is tainted" are now common place throughout Australia. However, criminals are no longer naive to asset confiscation laws and often lay a contemporaneous paper trail to their tangible assets displaying to the court the "lawful acquisition" of property.
>
> To reap the benefits of their enterprise, criminals integrate their illicit funds into the "legitimate" environment in which they live. A common example is the repayment of mortgages with legitimate income (often Social Security benefits) whilst living off the proceeds of crime. By structuring finances in this manner persons can avoid presumptions relating to specific items of property even though when viewed globally (using betterment analysis) it is obvious the person has spent far more than their legitimate income over a given period.
>
> In order to combat this form of money laundering some jurisdictions, (notably New South Wales and now Victoria) have incorporated presumptions that in essence mean "income of a defendant (for six years before the action) has been derived from unlawful activity." Such a presumption forms the foundation of proceeds of crime confiscation under the Drug Trafficking Act, 1994 (UK).
>
> No person who participates in criminal activity should be permitted to benefit from their crimes. Therefore legislation should provide for all forms of benefit to be taken into consideration when calculating a defendant's liability to forfeiture. In all situations any of a defendant's assets (whether legitimately obtained or not) should be made available to satisfy a forfeiture order.62

62.SA Police *Submission 23.*

4.54 The ABCI submission also expresses concern about what it too regards as the inadequacy of conviction based forfeiture to fully deprive criminals of assets gained through criminal activities.[63]

4.55 The Australian Federal Police submission sums the problem up thus

> ... a large number of investigations conducted by the AFP are drug related. A successful drug operation will normally result in an offender being found in possession of the drugs which are subsequently seized. There are in such cases no proceeds of the crime, beyond the drugs themselves, for which the offender is charged. It is this temporal and physical relationship between a conviction for a specific offence and the assets that the person controls that is most problematic in a conviction based scheme. If it were not necessary to demonstrate that the proceeds were directly generated by a specific offence then the conviction base for proceeds of crime legislation would not be so much in issue.[64]

4.56 The National Crime Authority proposes the following solution

> The scope of forfeiture orders should extend beyond 'tainted property' to all property of the accused, as is the case upon conviction for a 'serious offence'. The onus should be on the relevant person to show that the property was not acquired from criminal activity. It has been established that such an onus is not difficult to discharge and may be made out by the person denying on oath that the property was derived from such activity. Comparisons can be made with other legislation which permits restraining orders in respect of all property of the defendant.[65]

4.57 ***The Commission's view.*** In order to give effect to those submissions, it would be necessary, in the Commission's view, to create a second class of ordinary indictable offence to encompass such offences as are ordinarily committed in the course of organised criminal activity of an ongoing nature. Moreover, a statutory presumption would need to be established to the effect that all property of the defendant acquired within a specified period, say six years, of the offence was to be deemed to be tainted property in respect of the offence.

4.58 The result would be to visit an ordinary indictable offence with confiscatory consequences broadly analogous to those which are currently permitted in respect of serious offences attracting statutory forfeiture. In the Commission's view, much more by way of justification for the adoption of such a far reaching and exceptional course would need to be offered than those raised in the relevant submissions.

63.ABCI *Submission 20*.

64.AFP *Submission 7*.

65.NCA *Submission 16*.

4.59 Again, these concerns are, in the Commission's view, best addressed in the context of the questions whether serious offences should be more widely defined and whether a non-conviction based regime should be introduced.

4.60 In this connection, the Commission notes the suggestion in three submissions[66] that the creation of such an additional category of ordinary indictable offence would be tantamount to the creation of a back door non-conviction based regime.

4.61 Victoria Legal Aid, in its submission, succinctly states the position as follows

> ... If a conviction based scheme only is in force, the court should not be able to go beyond the offences of which the person is convicted. Otherwise, the outcome would be the same as if a non-conviction based scheme were in operation.[67]

4.62 The Commission finds this reasoning compelling in relation to ordinary indictable offences, particularly in the light of its proposal that a civil non-conviction based regime be introduced in respect of particular kinds of conduct. It does not recommend, therefore, that the POC Act should be amended in the manner proposed by the law enforcement submissions in relation to ordinary indictable offences.

Range of offences attracting statutory forfeiture

4.63 The POC Act was the first Australian forfeiture act to introduce a concept of statutory, as opposed to judicially ordered, forfeiture. However, as already noted, that scheme applies to only a very limited range of offences.

4.64 The effect of statutory forfeiture is that all property which remains the subject of a restraining order after conviction is automatically forfeited after six months, or such longer period as is required by virtue of section 30A.

4.65 In order to exclude property from the restraining order relating to a statutory forfeiture offence, the defendant must satisfy the court that

> (i) the property was not used in, or in connection with, *any unlawful activity* and was not derived, directly or indirectly, *by any person from any unlawful activity*; and
>
> (ii) the defendant's interest in the property was lawfully acquired.68 (Emphasis added.)

66.Victoria Legal Aid *Submission 4;* Victorian Bar Council and Criminal Bar Association *Submission 33*; and letter dated 27.1.99 from Mr Stephen Odgers, representing the Law Council of Australia.

67.Victoria Legal Aid *Submission 4*.

68.POC Act s 48(4).

4.66 In other words, for property to be liable to such forfeiture it does not need to be shown to relate to the offence which gave rise to the conviction; nor, as pointed out in an earlier cited passage from the AFP submission,[69] is there a need to establish a temporal and physical link between the property and the offence.

4.67 The policy underpinnings of the statutory forfeiture regime were admirably summed up by Derrington J in the Queensland Court of Appeal case of *Brauer v Director of Public Prosecutions* as follows

> Their purpose which this court is, not unwillingly, obliged to observe is, so far as it is relevant in this case, to deprive persons who have been convicted of very serious offences of their property which has been derived from or used in crime, whether it be the offence of which he has been convicted or otherwise. Because of the impossibility or grave difficulty in most cases of proving the association of the property with such crime, the statute reverses the onus of proof and casts it upon the convicted person. Despite the natural aversion of all lawyers to the imposition of the onus of proof upon the subject by any statutory provision which in effect imposes what may be a very substantial penalty, an aversion which must be subjected to discipline so as to be applied suitably in the construction of such a statute, it must be recognised that certain circumstances may justify such a reversal of onus.
>
> In legislation of the present kind it is not difficult to understand that the legislature, in conformity with the general wishes of society, does indeed have the intention both of depriving those who make very substantial fortunes from criminal activities of the proceeds of such activities or of property associated with them, and of enacting strong legislative measures to that end. For that reason, the court should not easily be moved by the usual principle to a construction of the statute which has a less onerous effect ...
>
> With an understanding of the mischief at which this legislation is directed and the difficulty in the way of its cure, the court has little difficulty in recognising and giving effect to the thrust of its operative provisions. It must be remembered that the subject of the reversal of the onus of proof is a person who has already been convicted of a very serious offence, and insofar as substantial property will obviously be the object of any contention, that person should best be in the position to be able to demonstrate its origin and uses and should usually have little difficulty in doing so because of its value.[70]

4.68 There are clear advantages for investigators where the onus is transferred to the defendant to prove that his or her property was not unlawfully obtained.

4.69 According to the National Crime Authority's publication *National Proceeds of Crime Conference Sydney 18–20 June 1993*

---

69. AFP *Submission 7*.

70. *Brauer v Director of Public Prosecutions* 45 A Crim R at 119 as cited in National Crime Authority *National Proceeds of Crime Conference, Sydney 18–20 June 1993*. Also reported at 91 ALR 491.

> Such a provision reduces the investigative resources needed to successfully conduct confiscation proceedings; it is a provision that all investigative agencies desire. The issue of conferring the benefits of this provision on all agencies, via the corresponding State or Territory legislation, is appropriate for debate at a national working party level, as is suggested in more detail later.
>
> These provisions have greatly enhanced the investigators' prospects of detecting evidence of criminal activity and of shifting the balance of power from those engaged in criminal activity to those investigating it. The legislation has created a system of procedures that both help to detect suspicious activity and make concealment of unlawful assets much more difficult.[71]

4.70 In *Brauer v Director of Public Prosecutions*, Derrington J also recognised that the Act was not unprincipled in that it does not intend unjustly to deprive even a person convicted of a serious offence of any property which is not tainted as required. He said

> Attention must be given to safeguards which are implicit in the legislation, for it is also manifest that the legislature does not intend unjustly to deprive even a person convicted of such a serious offence of any of his property which may not be tainted in the way described in the statute. This is achieved, not by requiring the prosecution to prove some *prima facie* association of the property with a crime, but by applying the usual standards to the burden of proof which always remains on the owner of the property itself. Accordingly, the court will take into account any difficulty which may exist in some cases in the proof of a negative and in other appropriate cases any difficulty in the person's capacity to lead suitable evidence to discharge his onus of proof. In the absence of any evidence or any suggestion that the property is so tainted, the court may well find that the onus is discharged by even slight evidence.[72]

4.71 Queensland and Victoria have also introduced statutory forfeiture for some offences, although the legislation in those States uses the term 'automatic forfeiture'.

4.72 In Queensland, automatic forfeiture applies to convictions in respect of serious drug offences.[73] 'Serious drug offence' is defined as an offence against Part2 of the *Drugs Misuse Act 1996* (Qld), carrying a sentence of imprisonment for 20 years or more, or money laundering in respect of such an offence as well as ancillary offences.[74] 'Ancillary offence' is defined to include conspiracy, attempts or accessory after the fact in relation to the aforementioned offences.

71.National Crime Authority *National Proceeds of Crime Conference*, 251.

72.91 ALR at 501–2; and see *Director of Public Prosecution v Jeffrey* 58A Crim R10.

73.CC Act 1989 (Qld) s 25.

74.CC Act 1989 (Qld) s 4.

4.73 As in the Commonwealth Act, the Queensland Act provides for automatic forfeiture of property still the subject of a restraining order six months after conviction.[75]

4.74 The test to be satisfied for a defendant to have property excluded from a restraining order, thereby preventing it becoming the subject of automatic forfeiture, is identical to that contained in the POC Act,[76] with the onus of establishing the conditions for exclusion being on the defendant.

4.75 The Victorian automatic forfeiture regime applies to a wider range of offences than does the Commonwealth Act. An 'automatic forfeiture offence' is defined to mean an offence referred to in Schedule 2 to the 1997 Act as well as some interstate offences which are not relevant for present purposes.[77] Schedule 2 lists drug offences (minus the federal elements) similar to those contained in the POC Act statutory forfeiture regime, but with one difference. The Victorian provision requires the offence to be in respect of a 'commercial quantity', whereas a 'traffickable quantity' can suffice under the Commonwealth Act. Traffickable quantities are smaller than commercial quantities. For example, under the Customs Act, two grams of heroin constitutes a traffickable quantity, whereas 1.5kilos constitutes a commercial one.

4.76 The schedule then also lists further offences as follows

> 2. An offence against any of the following provisions of the Crimes Act 1958:
> (a) section 81(1) (obtaining property by deception) where the value of the property in respect of which the offence is committed is $100,000 or more;
> (b) section 82(1) (obtaining financial advantage by deception) where the value of the financial advantage obtained is $100,000 or more:
> (c) section 321(1) where the conspiracy is to commit an offence referred to in paragraph (a) or (b).
>
> 3. An offence against section 122(1) of the Confiscation Act (money laundering) where the money or other property is proceeds of an offence referred to in item 1 or2.
>
> 4. An offence of—
> (a) conspiracy to commit; or
> (b) aiding, abetting, counselling or procuring, or being in any way knowingly concerned in, the commission of—
> an offence referred to in item 3.
>
> 5. An offence of attempting to commit any offence referred to in items 1 to 3.

75.Although the Supreme Court may extend this by a period of not more than three months, CC Act (Qld), s 25 (1) and (2).

76.CC Act (Qld) s 44.

77.Confiscation Act (Vic) s 3.

> 6. A continuing criminal enterprise offence within the meaning of Part 2B of the Sentencing Act 1991 for which the offender is liable to be sentenced under that Part as a continuing criminal enterprise offender.
>
> 7. The common law offence of conspiracy to defraud where the property, financial advantage or economic loss in respect of which the offence is committed is $100,000 or more.

4.77 Broadly stated, in relation to fraud or fraud related offences, the effect of the Victorian legislation is to apply automatic forfeiture to a single fraud offence provided a monetary threshold is met. Under the Commonwealth Act, automatic forfeiture only applies to organised fraud, necessitating proof of a multiplicity of at least three individual offences. Money laundering would also, under the Victorian Act, attract automatic forfeiture if it related to a single qualifying fraud offence.

4.78 After conviction of one of the prescribed offences under the Victorian Act, all property the subject of a restraining order 60 days after the making of that restraining order or the conviction, whichever occurs later, is automatically forfeited without further judicial intervention.[78] Again, the onus is on the applicant for an exclusion order to satisfy the court of matters similar to those that are required under the Queensland and Commonwealth Acts.[79]

4.79 Both the Australian Federal Police and the Director of Public Prosecutions raise as an issue the scope of the statutory forfeiture regime.[80] Each queries the appropriateness of defining the term 'serious offence' by reference to a limited range of specified offences as opposed to defining it generically by reference to all offences which carry a minimum specified sentence. In their submissions, they argue that the latter approach would enable the operation of section 30 to be widened but not so as to pick up conduct which is insufficiently serious to attract statutory forfeiture. As noted in the previous chapter, the offences to which the non-conviction based scheme under the CAR Act (NSW) applies are ascertained by reference to such a generic benchmark.

4.80 Views expressed by the NCA in its submission in relation to judicially ordered forfeiture also implicitly lend support to the view shared by the AFP and DPP.[81]

4.81 ***The Commission's view.*** Clearly one of the key policy underpinnings of the statutory forfeiture provisions of the POC Act is that those offences (therein defined as 'serious offences') have such characteristics, by reason of type and dimension, that they are likely to be of an organised continuing criminal enterprise nature. Thus, the far reaching step of putting defendants to the proof regarding

---

78.Confiscation Act (Vic) s 35.

79.Confiscation Act (Vic) s 22.

80.AFP *Submission 7*; DPP *Submission 8*.

81.NCA *Submission 16*.

legitimate acquisition of a wide range of property (extending beyond what can be demonstrated to be proceeds or property used in connection with the predicate offence) is warranted in all the circumstances.

4.82 A preliminary question that arises for consideration is whether, in the light of the Commission's proposal later in this chapter that a civil forfeiture regime should be introduced, the retention of a statutory forfeiture regime continues to be warranted, particularly as the proposed new scheme can be expected to include some conduct that also constitutes a serious offence for the purposes of statutory forfeiture.

4.83 In this regard the Commission readily envisages that cases will arise where, in respect of a single course of criminal conduct, the options of both conviction based and non-conviction based forfeiture present themselves. Moreover, the taking of non-conviction based forfeiture may, in the particular circumstances, clearly be the option likely to offer the best prospects of recovery or the most effective course for such recovery.

4.84 However, such considerations and possibilities do not, in the Commission's view, provide a sufficient basis for abandoning statutory based forfeiture for serious offences. Indeed, it is not difficult to envisage circumstances in which, given a ready capacity to identify all the defendant's property and the prospect of a plea of guilty to a serious offence, conviction based forfeiture appears the most immediate and cost effective prospect of substantial forfeiture.

4.85 The question that then falls for consideration, particularly in the light of the submissions from the AFP and the DPP, is whether experience demonstrates the need for a wider range of offences to be recognised as having the characteristics justifying their inclusion within the definition of 'serious offence'. In the view of the Commission, further detailed examination of particular offences is likely to point to there being such a basis for widening the statutory forfeiture regime. However, given the Commission's inability to undertake a wide ranging consultative process in this reference, it is not in a position to make specific considered recommendations (apart from that in Recommendation 30 relating to money laundering) as to the additional offences that might be so included and proposes that this be further considered by the government.

4.86 As that task would involve a review of existing criminal laws of the Commonwealth, it might most effectively be carried out by a committee of officials chaired by the Attorney-General's Department and including officers of the DPP, NCA and AFP.

4.87 In summary the Commission has reached the view that, in the context of a conviction based forfeiture regime based on criminal conduct in the traditional sense, conviction for an offence must remain an essential prerequisite. Equally, except in the cases of conviction for serious offences to which special considerations apply, no adequate information has been furnished to the Commission which would warrant the removal of a linkage between tainted property and the particular

offence. While there may be a justification for broadening the range of offences attracting statutory forfeiture and hence removing the need to establish that link, suggestions that a further category of offences be created to achieve the same result, in respect of what are now ordinary indictable offences, cannot be supported in principle in the context of a conviction based regime.

The case for non-conviction based confiscation

4.88 Expansion of the range of criminal offences that are serious offences, however, would not alone address the concerns raised in the submissions referred to earlier in this chapter.

4.89 In particular, the concerns of law enforcement agencies that recovery of the proceeds of criminal conduct is often impeded by the need to prove the commission of a predicate criminal offence, and to so prove that offence against the criminal standard of beyond a reasonable doubt, remain to be further considered.

4.90 It is noted that the NCA, AFP and SAPOL submissions all point in this regard to the perceived advantages of the New South Wales non-conviction based scheme — a scheme that enables, firstly, the ordering of confiscation based on a civil finding on the balance of probabilities of particular classes of serious offences and, secondly, the imposition of a reverse onus on defendants in such cases to prove the lawful provenance of their entire restrained assets.

4.91 In the light of these submissions, an examination of the scope of operation of the CAR Act (NSW) and the more recently enacted non-conviction based scheme included in the Confiscation Act (Vic) is essential to the Commission's consideration of how these residual concerns might best be met. But before undertaking such an examination, it is first appropriate to say something about the Commonwealth fore-runner of those state regimes — namely the non-conviction based regime established in 1979 by Division 3 of Part XIII of the Customs Act.

Non-conviction based regime of Division 3 of Part XIII of the Customs Act

4.92 ***Background.*** In 1977, in response to the rise of sophisticated and organised drug importation, the Customs Act was amended by the insertion of section 229A. Its effect was to apply the administrative or *in rem* forfeiture regime of the Customs Act to certain money and property obtained by persons as a result of drug related activities. The money and property had to be found to be in the actual possession or under the control of the person before the provision applied. The law contained no mechanisms for assessing other benefits of drug activity.

4.93 Further changes were made to the Customs Act in 1979 by the insertion of Division 3, Part XIII. This was the first Australian non-conviction based forfeiture regime designed to remove unjust enrichment in relation to 'prescribed narcotics dealing(s)' which are defined to include selling or dealing in narcotics imported into Australia, importing or exporting narcotic goods into or from Australia, possessing

imported narcotic goods or agreeing to do any of the former as well as conspiracy to import or export such goods or being in any way knowingly concerned in the sale or dealing, import, export or possession of them.

4.94 In introducing the legislation, the then Attorney-General, Senator the Hon Peter Durack said

> ... Mr President, I have already mentioned that the provisions enacted in 1977 have had a significant impact. However, they have proved to be inadequate to deal with the sophisticated asset accumulations. The measures I now introduce provide for a scheme designed to deal with sophisticated methods of disposing of — what is often called 'washing' — the profits of illegal drug trafficking. These provisions will, with the support of the Senate, enact a new division into Part XIII of the Customs Act — entitled 'Recovery of Pecuniary Penalties for Dealing in Narcotic Goods.' The essential objective of this extremely complex proposed law is, through proper civil court proceedings, to empower the Federal Court of Australia to order against a person a pecuniary penalty equivalent to the benefit derived from dealings in illicit drugs.[82]

4.95 ***Basic scheme of Division 3 of Part XIII.*** Under the Customs Act provisions, a civil proceeding may be instituted seeking an order that a person pay a pecuniary penalty to the Commonwealth in respect of a particular prescribed narcotics dealing or prescribed narcotics dealings.

4.96 While the conduct prescribed in section 243A(2) as a 'prescribed narcotics dealing' is to a significant extent conduct that separately constitutes a criminal offence under the Customs Act, or related inchoate offence under that Act, not all such conduct has that character. Nor does the prescription of conduct as a prescribed narcotics dealing have the effect of rendering such conduct criminal *per se* by reason of such prescription.

4.97 If satisfied that the person has engaged in the alleged activities, the court has no discretion but *must* make an assessment of the value of benefits derived by the person and order the person to pay to the Commonwealth a pecuniary penalty equal to the value assessed.[83] The Act provides a formula for assessing the pecuniary penalty not dissimilar to that contained in the POC Act.[84] The civil action can be brought whether or not the person has been convicted of an offence or, for that matter, even if no proceedings for an offence have been instituted.

4.98 There are other provisions permitting the court to make restraining orders, lifting the corporate veil and determining 'effective control' of property, similar to those contained in the POC Act, which are not relevant for the purposes of this chapter.

82.Hansard (Sen) 5 June 1979, 2618–9.

83.Customs Act s 243B.

84.Customs Act s 243C.

4.99 Significantly, the Act makes no provision for the forfeiture of property that is the proceeds of, or has been used in or in connection with, the prescribed narcotics dealing.

4.100 Accordingly, restrained property, which may include all the property of the defendant, may only be confiscated for the purpose of meeting a pecuniary penalty order based on an assessment of the benefits derived by the defendant from engaging in the prescribed narcotics dealing.

4.101 There are no statutory presumptions the effect of which would be to presume, for example, that property owned by the defendant at a particular time, or expenditure by the defendant during a particular period, was derived from a prescribed narcotics dealing (cf section 27(6) in respect of a serious offence).

4.102 The constitutional validity of this civil forfeiture regime was challenged, *inter alia*, on the basis that it amounted to an acquisition of property by the Commonwealth otherwise than on just terms contrary to section 51 (xxxi) of the Constitution. The High Court rejected this argument, holding that a civil cause of action in respect of penalties imposed under the Customs Act does not involve an acquisition of property within the meaning of that placitum. The Court also held that it was a legitimate exercise of power by the Commonwealth to make the relevant conduct the occasion for liability to civil action for penalties of the traditional kind to deprive the offender of the financial rewards gained by the conduct.[85]

4.103 ***Operations under Division 3 of Part XIII.*** The Commission notes that these far reaching provisions have been infrequently used. One reason for this lack of use is said by the DPP to be

> ... that they can only be used where it can be shown that a defendant derived money from a specific provable act. Most Commonwealth drug cases arise from a drug seizure. If drugs are seized before they can be sold, there is usually no income from the offence, and nothing to recover under a pecuniary penalty regime.[86]

4.104 A similar point has been made by the Attorney-General's Department in seeking to explain the low level of use of the provisions.[87]

4.105 So seen, the current Customs Act civil forfeiture regime would seem to share some of the disadvantages of the conviction based regime to which reference has already been made, namely

---

[85].*R v Smithers and Another; Ex parte McMillan* 44 ALR 53 and (1982) 152 CLR 477.

[86].DPP *Submission 8*.

[87].Attorney-General's Department *Submission 3*.

- the need to prove a temporal and physical link between profits and the prescribed conduct, and
- in the absence of a property forfeiture provision, the inability to put a defendant to proof as to the lawful provenance of his or her property.

4.106 When regard is had to the fact that a statutory forfeiture regime was subsequently enacted in section 30 of the POC Act in relation, *inter alia*, to broadly analogous criminal conduct — presumably to avoid the very weaknesses that were already manifesting themselves in Division 3 of Part XIII — it would not have been surprising if remedial legislative action had been taken at the same time in respect of Division 3 of Part XIII.

4.107 Moneys recovered since 1988 pursuant to this regime leave no doubt that, for whatever reasons, it has failed to live up to expectations. Between 1985 and 1990, only $2083235 was recovered. Annual figures thereafter are as follows

1991–92	$92909
1992–93	$444554
1993–94	$193148
1994–95	$76673
1995–96	$1117242
1996–97	$19673
1997–98	Nil.[88]

4.108 The derisory nature of these amounts in the context of either the drug market as a whole, or even in the context of the value of individual well publicised drug seizures, speak for themselves.

Non-conviction based regimes in New South Wales and Victoria

4.109 ***The CAR Act of NSW.*** In 1990, the Drug Trafficking (Civil Proceedings) Act (DTCP Act) was enacted by the New South Wales Parliament. As its name suggests, in its original form the Act provided a civil forfeiture regime in relation to drug trafficking offences. It has since been extended to a wider range of offences and renamed the *Criminal Assets Recovery Act 1990* (CAR Act).

4.110 The conduct to which it extends is described as 'serious crime related activity' which is defined so as to include drug offences and a number of other offences punishable by five years or more and involving theft, fraud, obtaining financial benefit from the crime of another, money laundering, extortion, violence, bribery, corruption, harbouring criminals, blackmail, obtaining or offering a secret commission, perverting the course of justice, tax or revenue evasion, illegal gambling, forgery or homicide. The definition does not apply to any conduct that is not criminal *per se*.

88.Director of Public Prosecution *Annual Report*[s] 1990/91 to 1997/98.

4.111 When introducing the original legislation, the then Premier of New South Wales, the Hon Nick Greiner MP, justified the Bill in his second reading speech as follows

> This legislation is aimed squarely at those associated with major drug crime. Its purpose is to deprive those involved in the drug trade of their illicit profits — profits earned at the expense of their victims and of the community generally. Importantly, *it is not only the profits of a discrete transaction but the proceeds of a life of crime that will be confiscated*. Also crucial is the fact that it is not only the person directly involved in the transaction but also those who knowingly benefit from his or her activities who will be called to account for drug-derived assets and profits. Therefore, the legislation represents a comprehensive scheme designed to undermine entire organisations engaged in the drug trade. (Emphasis added)

4.112 After noting various findings of Royal Commissioners, in particular the lack of success in convicting leaders of criminal networks and the need to destroy such networks and their power by targeting their money and assets, Mr Greiner continued

> *The most innovative and controversial aspect of this legislation is that it will create a scheme of asset confiscation that will operate outside and completely independent of the criminal law process*. All existing confiscation schemes in Australia, with the notable exception of the Commonwealth Customs Act, are conviction-based — that is to say, before a person's assets can be confiscated the person must have been convicted in the criminal courts. *This legislation, like the Commonwealth Customs Act, treats the question of confiscation as a separate issue from the imposition of a criminal penalty*. It essentially provides that a person can be made to account for and explain assets and profits whether or not the person has been convicted, and even if the person has been acquitted in the criminal courts. The critical thing that must be proved is that it is more probable than not that the person engaged in serious drug crime. Proof on the balance of probabilities is the same standard of proof as that used in ordinary civil litigation. The more stringent standard of proof beyond a reasonable doubt is a creature of the criminal law.
>
> *I want to emphasise, however, that no criminal consequences will flow from this legislation.* Rather, the consequences are that the person has to justify, account for and explain where his or her assets came from. Only if the person cannot show the assets were derived lawfully will they be retained by the Crown. The Supreme Court can also assess the amount of profit made from a drug activity. This amount becomes a debt recoverable by the Crown out of the person's assets. But once again the focus is on accounting for profits.[89] (Emphasis added.)

4.113 ***Basic Scheme of the CAR Act (NSW).*** The CAR Act (NSW) spells out that applications for forfeiture or proceeds assessment orders are not criminal proceedings and that, except in relation to an offence under the Act, the rules of construction applicable only to the criminal law do not apply in the interpretation of the provisions within it. Additionally, it explicitly states that the rules of evidence

---

[89] *NSW Hansard (LA)* 8 May 1990, 2527–2529.

applicable in civil proceedings apply — those applicable only in criminal proceedings do not.[90]

4.114 Applications under the Act can only be made to the Supreme Court by the New South Wales Crime Commission. The New South Wales Crime Commission may apply to the Supreme Court *ex parte* for a restraining order in respect of specified interests, a specified class of interests or all the interests in property of a person suspected of having engaged in serious crime related activity as well as similar interests in the property that are interests of another person.[91]

4.115 If the conditions precedent are met, the Supreme Court has no discretion; it must make the order,[92] which remains in force for 48 hours within which time an application must be made for either an assets forfeiture order or a proceeds assessment order.[93]

4.116 When the Crime Commission applies for an assets forfeiture order, it may seek a vesting in the Crown of all or any of the interests in property the subject of the restraining order. Once again, the court has no discretion but must make the assets forfeiture order if it finds it to be more probable than not that the person whose suspected serious crime related activity formed the basis of the restraining order was, at any time not more than six years before the making of the application for the assets forfeiture order, engaged in serious criminal activity as defined.[94] The onus is placed upon the defendant to prove the lawful provenance of property that he or she seeks to have excluded from forfeiture.

4.117 Section 22(8) goes on to provide that the making of an assets forfeiture order does not preclude the making of a proceeds assessment order.

4.118 The Crime Commission may apply to the Supreme Court for a proceeds assessment order requiring a person to pay to the Treasurer an amount assessed by the court as the value of proceeds derived from illegal activity of the person that took place not more than six years before the making of the application for the order. As is the case with an assets forfeiture order, if the Supreme Court finds it to be more probable than not that the person against whom the order is sought was, at any time not more than six years before the making of the application, engaged in serious crime related activity, the court has no discretion but must make the order,[95] using the assessment criteria provided.[96]

---

[90].CAR Act (NSW) s 5.

[91].CAR Act (NSW) s 10(2).

[92].CAR Act (NSW) s 10(3).

[93].CAR Act (NSW) s 10(9).

[94].CAR Act (NSW) s 22.

[95].CAR Act (NSW) s 27.

[96].CAR Act (NSW) s 28.

4.119 In making the assessment of benefits, the court is assisted by a rebuttable statutory presumption that the amount of all expenditure of the defendant within a period of six years preceding the application for the order was proceeds derived from an illegal activity or activities.[97]

4.120 ***Operations under the CAR Act (NSW).*** Applications under the CAR Act (NSW) can only be made by the New South Wales Crime Commission.

4.121 According to that Commission, it has several advantages over other jurisdictions because it is a single agency with a parcel of resources focused on restraining and confiscating property under the CAR Act (NSW). Approximately one-third of its almost 90 staff are dedicated to this task.

4.122 Additionally, the devotion of resources to this task in NSW is based on a successful partnership with the New South Wales Police Service, which gives the Crime Commission access to arrest details enabling the Crime Commission to identify 'proceeds probable' cases and to second task force officers including financial analysts. The most significant structural dimension to the 'confiscation practice' of the Crime Commission is that its Financial Investigation Team is headed by a forensic accountant.

4.123 The Crime Commission has indicated that it has been unsuccessful in only two matters plus 'a few interlocutories' in eight years. While in the early years most matters were litigated, now 99% of cases are completed by negotiated civil settlements which are subsequently submitted to the Supreme Court for endorsement. The Crime Commission today approaches each case from the perspective of negotiating a settlement which recovers for the State the maximum possible net value of unlawfully obtained assets at the least cost.[98]

4.124 This approach is possible because, according to the Crime Commission, its primary responsibility is, in these cases, to recover proceeds. A prosecuting authority may, it is suggested, not be able to adopt this approach for two reasons

- a perceived conflict of interest between the primary responsibility to exercise the prosecutorial discretion in the public interest and the recovery of proceeds and
- the unwillingness of targets to negotiate with the same body that would ultimately prosecute them.

4.125 As noted in chapter 22, during 1997–98 the NSW Crime Commission obtained 166 restraining orders, 46 pecuniary penalty orders and 128 forfeiture orders, and recovered $11025605 — an outcome that compares more than

---

97.CAR Act (NSW) s 28(2).

98.Oral consultations with the NSW Crime Commission.

favourably with recoveries under the POC Act and Division 3 of Part XIII of the Customs Act.

4.126 ***The Confiscation Act of Victoria.*** Victoria is the most recent jurisdiction to introduce a civil forfeiture regime, although it is limited to serious drug offences. It has done this in a manner significantly different from New South Wales. In the latter State, the CAR Act stands alongside the COPOC Act which embodies the conviction based regime.

4.127 Victoria, on the other hand, has a consolidated forfeiture Act, the *Confiscation Act 1997*, which came into effect on 1 July 1998. It repealed the pre-existing *Crimes (Confiscation of Profits) Act 1986*.

4.128 The Confiscation Act permits the making of forfeiture and/or pecuniary penalty orders in respect of a

- 'forfeiture offence', being any indictable offence or scheduled summary offence
- 'automatic forfeiture offence', being an offence related to commercial quantities of narcotics as well as an offence stipulated in Schedule 2 and
- 'civil forfeiture offence', as set out in Schedule 3, again being an offence related to commercial quantities of narcotic goods.[99]

4.129 The Victorian civil forfeiture offences deal with conduct not dissimilar (albeit criminal) to the conduct dealt with in the Customs Act, Part XIII Division 3, and hence narrower than that covered by the CAR Act (NSW), although under the Victorian legislation a commercial quantity of drugs must be involved whereas any quantity suffices under the Customs Act.

4.130 In introducing the *Confiscation Bill 1997*, the Victorian Attorney-General, the Hon Jan Wade, said in her second reading speech

> Some 10 years ago, all States and the Commonwealth agreed to introduce legislation providing for the confiscation of the proceeds of crime. The move followed a number of royal commissions into organised crime which focused attention on the profits made from criminal activity and the increasingly sophisticated devices used by criminals to conceal their profits.
>
> The Government has monitored this rapidly developing area of the law and has identified major deficiencies in the operation of the Crimes (Confiscation of Profits) Act 1986 which have weakened the effectiveness of the legislation in the fight against profit motivated crime. Activities such as commercial drug trafficking can reap enormous profits for those involved at the expense of the broader community who pay the price in ruined lives...As with drug trafficking, both the economic aspect and the criminal aspect of commercial crime need to be addressed in the justice process. Under the current legislative scheme,

---

99.Confiscation Act (Vic) s 3.

> prosecuting authorities have faced significant problems in pursuing confiscation proceedings, with the result that the deterrent value of the legislation has been substantially reduced.
>
> The reforms introduced by this Bill will strengthen the effectiveness of assets confiscation in the State to ensure that crime does not pay. The Bill repeals the Crimes (Confiscation of Profits) Act 1986 ("The Act") and replaces it with a clearer, more effective assets confiscation scheme. The reforms are directed at these key objectives:

- To improve the operation of existing provisions to enable law enforcement authorities to more readily identify, track and confiscate proceeds of crime, particularly in relation to serious crimes where large amounts of profit are generated;

- To broaden the scope of the legislation so that it captures accumulations of wealth derived from long term criminal activity ...[100]

4.131 ***Basic scheme of civil forfeiture under the Confiscation Act (Vic).*** Action under the Act is effectively commenced by the making of a restraining order which can be sought in relation to a 'civil forfeiture offence'.[101]

4.132 In relation to a civil forfeiture offence, the restraining order remains in force for 48 hours, provided the person is charged with such an offence within that period, and thereafter, up to seven days subject to an application for a civil forfeiture order or a pecuniary penalty order being instituted in the Supreme Court.[102] There is a capacity, typically found in proceeds legislation, to seek exclusion of property from the restraining order in cases where the court is satisfied that the property was lawfully acquired, is not tainted property, and is not required to satisfy any pecuniary penalty order or a restitution or compensation order.[103]

4.133 With respect to applications for civil forfeiture orders, notice must be given to the defendant and any other person believed to have an interest in the property, and the application may not be heard and determined before the expiration of 60 days after the making of the application for the order.

4.134 If satisfied on the balance of probabilities that the defendant engaged in the conduct constituting the civil forfeiture offence, the Supreme Court has no discretion but to order that the restrained property be forfeited to the State,[104] although it may exclude particular property from the order if satisfied that, otherwise, hardship may reasonably be likely to be caused to any person by the

---

100. *Vic Hansard (LA)* 13 Nov 1997, 1146.

101. Confiscation Act (Vic) s 15.

102. Confiscation Act (Vic) s 27(1) and (2).

103. Confiscation Act (Vic) s 24.

104. Confiscation Act (Vic) s 38(1).

order.[105] Generally, however, the defendant may only have restrained property excluded from such forfeiture where he or she can satisfy the court as to its lawful provenance.[106]

4.135 Consent civil forfeiture orders may be made.[107]

4.136 With respect to civil pecuniary penalty orders, again an application may not be heard and determined before the expiration of 60 days from the making of the application.[108]

4.137 Again, the Supreme Court has no discretion. If it finds, on the balance of probabilities, that the defendant engaged in the conduct constituting the civil forfeiture offence with which he or she was charged, it must assess the value of any benefits and order the defendant to pay to the State a pecuniary penalty equal to that value less, subject to the court's discretion, any amount paid or payable by way of restitution or compensation.[109]

4.138 For the purposes of assessing benefits, there is a rebuttable presumption that all property in which the defendant had an interest at the time of the application for the pecuniary penalty order and all expenditure within the previous six years are the benefits of the offence.[110]

4.139 ***Operations under the Confiscation Act (Vic).*** Applications under the civil forfeiture regime can only be made by the Director of the Asset Confiscation Office or by the Director of Public Prosecutions. As discussed in chapter 22, in practice the Director of the Asset Confiscation Office alone makes such applications.

4.140 The Asset Confiscation Office was created administratively and is responsible for co-ordinating key areas of the confiscation process, managing restrained assets and playing a central role in ensuring that orders for the forfeiture of property or the payment of pecuniary penalties are enforced.

4.141 As the Act only commenced on 1 July 1998, information is not yet available to the Commission regarding the effectiveness of its operation.

The Commission's view

4.142 Having regard to criticisms raised in submissions and related consultations, the considerations that have led to the expansion of NSW and

---

[105].Confiscation Act (Vic) s 38(2).

[106].Confiscation Act (Vic) s 24.

[107].Confiscation Act (Vic) s 39.

[108].Confiscation Act (Vic) s 63(8).

[109].Confiscation Act (Vic) s 64.

[110].Confiscation Act (Vic) s 68(3)(f).

Victorian proceeds laws to include non-conviction based regimes, and the very modest returns achieved under the existing Commonwealth regimes, the Commission is in no doubt that the POC Act and Customs Act regimes have fallen well short of depriving wrongdoers of their ill-gotten gains.

4.143 It is clear that the comparative success of the NSW CAR Act non-conviction based regime owes much to its inclusion of characteristics that have obviously been tailored to meet concerns similar to those expressed by submitters in relation to the Commonwealth regimes. These include

- the ability to obtain forfeiture and confiscation on the basis of proof to the civil standard of balance of probabilities that the defendant engaged in the relevant unlawful conduct
- the putting of the defendant to proof in all cases of the lawful provenance of all restrained property
- the rebuttable statutory presumption, in relation to the assessment of benefits for the purposes of a pecuniary penalty order, that an amount equal to all expenditure of the defendant over the preceding six years is to be deemed to be proceeds of unlawful activity

4.144 The Commission is in no doubt that the expansion of the POC Act regime to include a non-conviction based regime broadly comparable to the NSW scheme could be expected to greatly enhance the level of recovery of proceeds of unlawful activity.

4.145 However, whether such a regime could be constructed consistently with the principles identified in chapter 2 and so as not to impinge unacceptably on the rights of citizens is a separate matter involving a number of related issues to which the Commission turns its attention in the remainder of this chapter.

4.146 ***The basis in principle for a non-conviction based regime.*** As elaborated in chapter 2, it is the Commission's view that recovery by the state of the profits of unlawful conduct has its foundation in the increasingly recognised principle that no person should be entitled to become unjustly enriched as a result of his or her unlawful conduct — unlawful conduct that is not confined to criminal wrongdoing but extends across the full range of activities rendered unlawful under civil and criminal law.

4.147 Thus, on the Commission's analysis, conviction based proceeds recovery, to the extent that it deals with profits of the relevant unlawful activity, has its foundation in a principle that equally provides justification for the civil recovery of profits of that and other unlawful activity, both civil and criminal.

4.148 In the Commission's view, therefore, it is incorrect to view the recovery of the profits of unlawful activity as a part of the criminal justice process and, as such, justifiable only on the basis of a prior finding of guilt according to the criminal standard of proof beyond a reasonable doubt.

4.149 As also explained in chapter 2, the broad principle justifying the recovery of the profits of unlawful conduct does not, however, go so far as to support, on the basis of a civil finding alone, the confiscation of property (not being itself profits) used in or in connection with the unlawful conduct in question.

4.150 On the Commission's analysis, such confiscation has its foundation in the narrower principle that property used in or in connection with criminal activity should be able to be confiscated either for the purpose of denying the criminal the opportunity to use that property for the commission of further offences or as part of the punishment meted out in respect of the offence.

4.151 For these reasons the Commission is satisfied that the inclusion in the POC Act of a non-conviction based regime for the confiscation of profits of unlawful conduct on proof of the commission of the unlawful conduct against the civil onus has a sound basis in principle.

4.152 The Commission notes, by way of contrast, that the non-conviction based regimes under the CAR Act (NSW) and the Confiscation Act (Vic) are not so limited, but extend to the forfeiture of property used in or in connection with the unlawful conduct in question.

4.153 The Commission notes also, in relation to the regime established under Division 3 of Part XIII of the Customs Act, that while the assessment of a pecuniary penalty order is limited to an assessment of benefits, such benefits are not confined to profits and may, for example, include lawfully acquired capital invested for the purpose of generating unlawful profits.

4.154 The Commission further notes that, notwithstanding the prominence given to the issue of a new-conviction based forfeiture in its May 1998 booklet, only two submitters expressed outright opposition to the establishment of a non-conviction based regime.

4.155 These were the Victorian Bar Council and Criminal Bar Association (in a joint submission)[111] and Victoria Legal Aid.[112] Both submissions emphasise the need for forfeiture to be conviction based and to be limited to property related to the offence charged.

4.156 One further submission, from the NSW Bar Association,[113] questions whether a non-conviction based scheme of forfeiture is really necessary, having regard to the current availability and use of restraining orders. The Commission considers that the NCA submission in particular points convincingly to an affirmative response to that question.

---

111. Victoria Bar Council and Criminal Bar Association *Submission 33*.

112. Victoria Legal Aid *Submission 4*.

113. NSW Bar Association *Submission 24*.

4.157 Likewise, the NCA submission and case studies seem to the Commission to provide an adequate response to doubts expressed by the DPP[114] regarding the likelihood of there being many cases where evidence sufficient to discharge the civil onus is available but evidence sufficient to discharge the criminal onus is not.

4.158 It is also appropriate to note at this point that, within the broad community, including amongst those supporting a federal non-conviction based regime, there seems to be a widely held assumption that assets confiscation is an adjunct of the criminal process and that non-conviction based forfeiture is to be seen as a justifiable exception in particular circumstances to the need for proof beyond a reasonable doubt of the commission of a criminal offence, rather than as having a separate, distinguishable and broader basis in principle founded on the notion of denial of unjust enrichment.

4.159 It is likely, in the Commission's view (based on the Commission's analysis in chapter 2), that this unsupportable assumption has been reinforced by the fact that the non-conviction based regimes under the CAR Act (NSW) and the Confiscation Act (Vic) are not limited to profits and that the unlawful conduct that can be proved on the civil onus to have occurred is in every case conduct that constitutes the commission of a criminal offence and is so identified in the legislation.

4.160 That said, there is no doubt that the driving force behind the enactment of all three non-conviction based regimes, as evidenced by the second reading speeches of Senator the Hon Peter Durack, the Hon Nick Greiner and the Hon Jan Wade quoted earlier in this chapter, was the recognised need to deprive wrongdoers — particularly those involved in the drug trade — of the 'profits' or 'accumulations of wealth' derived from their unlawful activities.

4.161 ***The scope of a federal non-conviction based regime.*** While the Commission has concluded that civil recovery of unjust enrichment acquired as a consequence of unlawful conduct is clearly supportable in principle, identification of particular conduct that should be the subject of such recovery is another matter that involves important public policy considerations.

4.162 The most important of these is the widely held sense amongst legislators and the community that forfeiture of property should be permitted only to the extent that it can be shown to be essential to public order and good government.

4.163 This sense is, in the Commission's view, evident in the successive generations of proceeds laws thus far enacted in Australia.

4.164 It is, for example, clear that the enactment in 1979, in Division 3 of Part XIII of the Customs Act, of a pioneering regime that was quite exceptional for its

---

114 DPP *Submission 8*.

time was seen as justifiable because of the urgent need then manifesting itself in Australia to move resolutely and effectively against organised drug operations.

4.165 The enactment of that legislation dramatically underscored the absence from the established legal fabric of any process for the denial of benefits derived from unlawful conduct — in that case, particularly egregious and harmful drug related conduct.

4.166 It is often overlooked that that legislation goes beyond recovery of the benefits derived from the commission of particular criminal offences to include related profit making activity not of itself criminal conduct under Commonwealth law, although plainly related to such conduct.

4.167 The SCAG Bill, which was to provide the basis and impetus for the first generation of conviction based proceeds legislation throughout Australia, similarly reflected the community sense of the time that the legal lacuna relating to the recovery of the proceeds of unlawful conduct was in urgent need of redress so as to discourage criminal activity perceived as becoming more prevalent and organised throughout the country than previously.

4.168 As the SCAG Bill necessarily represented a national consensus, it was understandable that it should be limited in its scope to the extent necessary to ensure public acceptance throughout Australia — that is to say, limited to conduct resulting in conviction of an offence.

4.169 Subsequent extensions of confiscation regimes beyond the first generation SCAG model, including the incorporation of more far reaching confiscation provisions in the POC Act itself in relation to serious offences and, later, the enactment of non-conviction based regimes in NSW and Victoria, likewise manifested acceptance in the respective jurisdictions of the need for wider and more intrusive confiscatory reach to counter increasingly well organised and sophisticated unlawful activity.

4.170 The question that the Commission needs, therefore, to address is the extent to which a non-conviction based regime can be demonstrated as necessary at the federal level to achieve objectives the attainment of which has failed to be realised by the existing Commonwealth regimes.

4.171 In the Commission's view, the answer is to be found in the various submissions, case studies and related information provided to the Commission in the course of this reference and discussed earlier in this chapter.

4.172 It is clear from that material that the non-conviction based regime of the POC Act, while generally appropriate to deal with *ad hoc* isolated criminal conduct, is inadequate to bring to account the profits obtained by means of continuous or serial wrongdoing, particularly activities related to drugs, fraud and money laundering.

4.173 It is apparent that the non-conviction based regime of Division 3 of Part XIII of the Customs Act is too narrowly drawn to overcome this inadequacy. Moreover, that regime is limited to particular drug related activity.

4.174 The inadequacy of these regimes is shown to be attributable to several key considerations or shortcomings.

4.175 Firstly, there is the requirement under the POC Act to prove the commission of a predicate offence. Two relevant effects of this requirement are that

- it excludes from confiscation property the acquisition of which can only be explained as the profits of continuing or serial criminal conduct in respect of which evidence sufficient to satisfy a court on the balance of probabilities of the commission of that conduct is available, but in respect of which there is insufficient evidence to prove the commission of a criminal offence beyond a reasonable doubt
- it excludes also from confiscation the profits of non-criminal unlawful activity (such, for example, as customs and tax 'offences' that are not strictly criminal in nature) the commission of which on a continuing or serial basis has led to substantial unjust enrichment.

4.176 Secondly, the requirement in respect of an offence that is an ordinary indictable offence to prove a link between the offence and confiscable property means that, even where the offence is demonstrably part of a course of continuing or serial unlawful conduct, recovery is limited to property able to be linked to the commission of the ordinary indictable offence.

4.177 This difficulty manifests itself most tellingly when the commission of an offence is interrupted as a result of an arrest and there is a lack of evidence necessary to sustain prosecution of earlier offences forming part of the suspected ongoing unlawful activity. In that event, the very interruption of the offence means that no profits of that offence are available for confiscation and the perpetrator's profits from previous such conduct are not put at risk of confiscation.

4.178 Similarly, the assessment of a pecuniary penalty in respect of an ordinary indictable offence is limited to the benefits of the predicate offence and is not aided by any presumption regarding earlier acquired wealth.

4.179 While the requirement of a conviction poses less difficulty where the offence is a serious offence, since the defendant is required to prove the lawful provenance of all the restrained assets, the presumption in section 27(6)(b) relating to the assessment of the benefits derived from the offence fall short of what is appropriate to achieve confiscation of the profits of earlier such activity forming part of continuing or serial conduct of that kind.

4.180 Thirdly, in relation to the non-conviction based regime in Division 3 of PartXIII of the Customs Act, the efficacy of the regime is considerably limited by the fact that it is confined to the making of pecuniary penalty orders. Moreover, the need to satisfy the court that the assessed benefits are those derived from a particular narcotics dealing, or two or more such dealings, means that the defendant is not put to proof as to the lawful provenance of profits likely to have been obtained from earlier such conduct forming part of continuing or serial conduct of which the prescribed narcotics dealing or dealings forms but a part. In particular, the court does not have the benefit of even limited presumptions comparable to those provided for in section 27(6)(b) of the POC Act in relation to pecuniary penalty orders in respect of serious offences.

4.181 The Commission is satisfied that all of the above matters would need to be successfully addressed in any new non-conviction based regime that offers the prospect (together with a conviction based regime improved as recommended in this Report) of meeting reasonable public expectations regarding the recovery of proceeds of unlawful activity from persons who would otherwise be unjustly enriched thereby.

4.182 ***Conclusions.*** In the light of foregoing analysis and discussion in this chapter, the Commission proposes that a new non-conviction based regime along the following lines be incorporated into the POC Act.

4.183 Consistent with the principles identified and elaborated upon in chapter 2, the regime should apply only to the confiscation of profits.

4.184 The regime should be limited in its application to the confiscation of profits of specifically prescribed conduct (prescribed unlawful conduct), being conduct, related to conduct that is unlawful under civil or criminal law, that is of a kind ordinarily engaged in on a continuing or serial basis for the purpose of profit.

4.185 Prescribed narcotics dealings to which Division 3 of Part XIII of the Customs Act applies would seem to the Commission to be of such a character and accordingly should be included amongst the conduct prescribed as unlawful conduct for the purposes of the regime.

4.186 Given the time constraints relating to this inquiry, the Commission is unable to undertake the review of Commonwealth laws that would be necessary in order to formulate a comprehensive list of other conduct (such, for example, as customs and tax 'offences') appropriate for prescription. Such a review would best be undertaken by the committee earlier suggested as appropriate to review the offences that should be included within the definition of 'serious offence' for the purpose of the conviction based regime.

4.187 A key element of the proposed new regime should be a requirement that, upon a finding by a court on the balance of probabilities (the civil onus) that the defendant has engaged in particular prescribed unlawful conduct, the court should

be required to order forfeited all property subject to the restraining order and make any pecuniary penalty order sought in relation to profits from that conduct. The Commission's reasons for so proposing mandatory confiscation are the same as those discussed in chapter 3 in relation to the Commission's recommendation in that chapter that confiscation under the conviction based regime should, as regards profits, be mandatory.

4.188 Further in relation to pecuniary orders, in the assessment of profits under the new regime it should be presumed, unless the contrary is proved, that such profits include all expenditure by the defendant in the period of six years preceding the date of the application of the order. Such provision would be analogous to comparable provisions included in both the NSW and Victorian regimes.

4.189 Consistent with the proposal that the new regime be limited to the confiscation of profits, the court should be required to deduct from any assessment of profits under a pecuniary penalty order, any forfeiture of such profits as has already occurred and any tax paid in respect of such profits.

4.190 To ensure that the regime does not operate oppressively so as to deprive a defendant of a reasonable opportunity to demonstrate that particular property or accumulated wealth was acquired lawfully, provision should be included to enable the defendant to obtain a 14 day stay of execution of a confiscation order

- in the case of a forfeiture order, to enable the defendant to satisfy the court that the particular property should be excluded from the order on the grounds that it
  - does not represent profits from that or any other prescribed unlawful conduct or any other unlawful activity
  - will not be required to satisfy any pecuniary penalty order and
  - was lawfully acquired by the defendant.
- in the case of a pecuniary penalty order, to enable the defendant to seek to rebut, in whole or in part, the presumption that all expenditure of the defendant in the period of six years preceding the application for the order constitutes such profits.

Recommendation 8

- The range of offences to which the statutory conviction based forfeiture regime contained in section 30 of the POC Act applies should be broadened to include other offences which have the characteristics of organised continuing criminal enterprise.

- Identification of additional offences to which statutory forfeiture should apply should be the subject of a review to be conducted by a committee of officials chaired by the Attorney-General's Department and including officers from the DPP, NCA, AFP and other relevant departments.

Recommendation 9

- A non-conviction based regime should be incorporated into the POC Act to enable confiscation, on the basis of proof to the civil standard, of profits derived from engagement in prescribed unlawful conduct.

- Prescribed unlawful conduct should include all conduct that presently constitutes a prescribed narcotics dealing for the purposes of Division 3 of Part XIII of the Customs Act.

- Prescribed unlawful conduct should include other conduct, related to conduct that is unlawful under criminal or civil law, that is of a kind ordinarily engaged in by a person continuously or serially for the purpose of profit.

- Identification of the range of such conduct that should be so prescribed as prescribed unlawful conduct should be the subject of consideration by the expert committee proposed in Recommendation8.

Recommendation 10. Under the proposed non-conviction based civil forfeiture regime, the court should be required, upon a finding that a person has engaged in prescribed unlawful conduct, to

- order the forfeiture of all property the subject of the restraining order
- make any pecuniary penalty order sought in relation to profits from that conduct.

Recommendation 11. In the assessment for the purpose of a pecuniary penalty order of the profits derived by the defendant from the prescribed unlawful conduct, it should be presumed, unless the contrary is proved, that such profits include all expenditure by the defendant in the period of six years preceding the date of the application for the order.

Recommendation 12. Upon the application of the defendant, the court should be empowered to stay the execution of a forfeiture order for a period of 14 days to enable the defendant to satisfy that court that property should be excluded from forfeiture on the grounds that the property

- does not represent profits from that or any other prescribed unlawful conduct or any other unlawful activity
- will not be required to satisfy any pecuniary penalty order and
- was lawfully acquired by the defendant.

Recommendation 13. Upon the application of the defendant, the court should be empowered to stay the execution of a pecuniary penalty order for a period of 14 days to enable the defendant to seek to rebut, in whole or in part, the presumption that all expenditure of the defendant in the period

of six years preceding the application for the pecuniary penalty order constitutes such profits.

Recommendation 14. The court should be required to deduct from any assessment of profits under a pecuniary penalty order

- any forfeiture of such profits as has already occurred
- any tax paid in respect of such profits.

5. Restraining orders and their scope

Introduction

5.1 The restraining order provisions in the POC Act are a linchpin in the forfeiture and pecuniary penalty regime as a whole. They are designed to ensure that relevant property remains amenable to that regime.

5.2 It is clear from a study of sections 43, 44 and 48 that the legislative intent was to ensure that the restraint provisions would be co-extensive with the forfeiture and pecuniary penalty provisions. Put another way, any property the subject of potential forfeiture or property which might be required to satisfy a pecuniary penalty order was to be capable of being restrained so as to be available in satisfaction of the relevant order once made.

5.3 In the case of serious offences attracting statutory forfeiture pursuant to section 30, a wider range of property could be restrained as ultimately not only property tainted by the specific predicate offence might be forfeited. In those cases the defendant could only 'claw-back' from statutory forfeiture such property in respect of which the court was satisfied that it was not used in, or in connection with, any unlawful activity, was not derived by any person from any unlawful activity and, additionally, was lawfully acquired by the defendant.[115] 'Unlawful activity' is defined to mean an act or omission that constitutes an offence against a law in force in the Commonwealth, a State, a Territory or a foreign country.[116]

5.4 At the outset of any consideration of the adequacy of the restraining order provisions, it is necessary to recognise and take into account the intimate relationship between those provisions and the forfeiture and pecuniary penalty order provisions. In common with those provisions, the restraining order provisions are, necessarily, restricted in their scope and operation by one key fundamental underlying the Commonwealth legislative scheme. That is, that, with one limited exception discussed later in this chapter, it is a scheme relating to the confiscation of the proceeds of a particular predicate offence of which the defendant has been convicted.

5.5 The impact of this consideration on any assessment of the adequacy of the current restraining order provisions is discussed in more detail below under the heading 'Adequacy of the current restraint regime'.

---

[115].POC Act s 48(4) and 30(1); and see s 31(6)(b) in relation to 'clawing back' after statutory forfeiture.

[116].POC Act s 4.

5.6 This chapter examines the scope and adequacy of the current statutory restraining orders regime in relation to both serious offences and ordinary indictable offences. Other issues relating to restraining orders, including the duration of such orders, the scope of the terms 'effective control' and 'tainted property', the rights of innocent third parties, dissipation of restrained assets on legal expenses and administration of restrained assets are dealt with in other chapters of this Report. Consideration is also given to the implications for the restraining regime of the Commission's proposal that a non-conviction based forfeiture scheme be incorporated into the POC Act.

Restraining orders — current statutory position

5.7 The usual way of commencing forfeiture or pecuniary penalty proceedings, both in respect of serious and ordinary indictable offences, is pursuant to section 43 of the POC Act. The Director of Public Prosecutions makes an application for a restraining order over one or more of the following

- specified property of the defendant
- all the property of the defendant including after acquired property
- all the property of the defendant other than specified property and
- specified property of a person other than the defendant.

5.8 Such an application may be made after conviction of an indictable offence (including a 'serious offence') or where a person is about to be charged with such an offence, but in the latter case any restraining order made lapses 48 hours after being made if the person is in fact not charged.[117]

5.9 The section goes on to make provision in relation to the conditions subject to which the order is made and the capacity to direct the Official Trustee to take care and custody of property. These are not relevant for the purposes of the present discussion.

5.10 A common condition precedent applying to both categories of offences, in cases where a restraining order is sought prior to the charging or conviction of the defendant, is that the application for the order must be supported by an affidavit of a police officer stating that the officer believes the defendant committed the relevant offence.[118] The court must be satisfied, having regard to the matters contained in the affidavit, that there are reasonable grounds for holding that belief.

5.11 Under section 43(4), if the restraining order is applied for prior to the charge, the court may only make the order if it is satisfied that the person will be charged within 48 hours.[119]

---

[117].POC Act s 57(1).

[118].POC Act s 44(3).

[119].POC Act s 43(4).

5.12 The remaining conditions precedent differ, based on whether the offence is a serious offence or an ordinary indictable one and, in either case, whether the property sought to be restrained is that of the defendant or of a third party.

(i) Serious offences

5.13 Section 44 provides that, in respect of a serious offence, the court must make a restraining order, subject to subsections (3), (4), (7A) and (10). By contrast with the provisions relating to ordinary indictable offences (not 'serious offences') there is no requirement for the court to be satisfied regarding the character of property sought to be restrained. This suggests that the legislature intended that the court not have a discretion (subject to the application of 'claw back' provisions) in relation to the property to be covered by the order. However, it has been held in some cases that the court retains a discretion over the extent or quantum of the property to be restrained.[120]

5.14 Pursuant to section 48(4) the defendant can apply for a declaration in relation to all or part of the property, the effect of which is to exclude the property from restraint for the purposes of statutory forfeiture under section 30. However, it remains subject to restraint for the purpose of any pecuniary penalty order which may be imposed. Pursuant to section 57(2), the restraint ceases only upon the satisfaction of the pecuniary penalty order.

5.15 In order to succeed in obtaining such a declaration, the defendant must, under section 48(4), satisfy the court that the property was not used in, or in connection with, any unlawful activity, was not derived, directly or indirectly, by any person from any unlawful activity and, in addition, that the defendant's interest in the property was lawfully acquired.

5.16 Subsections 44(3) and (4) have already been dealt with as conditions precedent common to both categories of offences.

5.17 Section 44(7A) deals with the conditions precedent to restraining property of a third party in relation to a serious offence. The additional conditions precedent are that the affidavit of the police officer must also state that the police officer believes that the property is tainted property in relation to the offence or that the property is subject to the effective control of the defendant. Again, the court must be satisfied, having regard to the matters set out in the affidavit, that there are reasonable grounds for holding that belief. It is also relevant to note that, whereas all property of a defendant may be restrained, only specified property of a third person may be restrained.

---

120 *Brauer v DPP* (1989) 91 ALR 491, 496 (Thomas J); *DPP v Daubney and Bowtell*, (unreported) Supreme Court of NSW, 13 July 1990 (Smart J) at 9–10; *DPP (Cth) v Craig Cant* (unreported), Supreme Court of the NT, No 126 of 1997 (9713848) 29 July 1997.

5.18 The concept of effective control is dealt with separately in chapter 13 of this Report.

5.19 Where a restraining order is made pursuant to section 44(7A) in relation to specified property of a third person, that person can seek to have the property excluded from the restraining order provided that they can satisfy the court that

- the person was not in any way involved in the commission of the offence
- the property is not tainted property in relation to the offence and
- the person's interest is not subject to the effective control of the defendant.[121]

5.20 It should be noted that the Act appears in section 48(3)(f) to envisage that, although the offence is a serious offence, the restraining order in respect of third party property might be made pursuant to section 44(7), notwithstanding that that subsection is expressed only to apply to an ordinary indictable offence.[122] The conditions precedent prescribed by section 44(7) differ from those prescribed under section 47(7A). This matter is clearly in need of legislative clarification.

5.21 The need for such clarification is reinforced when regard is had to the fact that the matters required to be established under section 48(3)(f) for the release of third party property from a restraining order under section 44(7) differ from those prescribed in section 48(3)(fa) for such release from a section 44(7A) order.

(ii) Ordinary indictable offences

5.22 In the case of ordinary indictable offences, unlike with respect to serious offences, a court has a discretion whether to make a restraining order.

5.23 Section 44(2) provides

> Where the offence concerned is an ordinary indictable offence the court shall, subject to subsections (3), (4), (5), (6), (7) and (10), make a restraining order against the property unless the court is satisfied that it is not in the public interest to make such an order.

5.24 Subsections (3) and (4) have already been dealt with. These are conditions precedent common to both classes of offence.

5.25 Pursuant to section 44(5), when a restraining order is sought only against specified property of a defendant, it is necessary for the affidavit of the police officer to state that the officer believes either that the property is tainted property in relation to the offence or that the defendant derived a benefit, directly or indirectly,

---

[121].POC Act s 48(3)(fa).

[122].POC Act s 48(f).

from the offence and the court must be satisfied, having regard to the matters contained in the affidavit, that there are reasonable grounds for holding that belief.

5.26 If, on the other hand, the restraining order is sought in respect of all the property of the defendant, or all of the property of a defendant other than specified property, or specified property of the defendant and all other property of the defendant then, pursuant to subsection 44(6), it is only necessary that the affidavit state that the police officer believes that the defendant derived a benefit, directly or indirectly, from the commission of the offence and the court must be similarly satisfied as in the preceding subsection.

5.27 In order to have his or her property excluded from the order, regardless of whether it was made pursuant to section 44(5) and (6), the defendant must, under section 48(3)(e), satisfy the court both that the defendant's interest therein is not tainted and that a pecuniary penalty order cannot be made against him or her.

5.28 In respect of third party property, the restraining order can only be made with respect to specified property pursuant to section 44(7). The court can only make the order if the application is supported by an affidavit of a police officer to the effect that the police officer believes

- that the property is tainted in relation to the offence,[123] or
- that the property is subject to the effective control of the defendant and that the defendant derived a benefit from the commission of the offence.[124]

5.29 By virtue of section 48(3)(d), the circumstances in which a third party may seek to have his or her property excluded from a section 44(7) order are as follows

- if the order was made pursuant to section 44(7)(a)(ii), the court must be satisfied that the property is not tainted property and either that a pecuniary penalty order cannot be made against the defendant or that the applicant's interest in the property is not subject to the control of the defendant
- if the restraining order was made under another provision, for example sections 44(7)(a)(i) or 44(5) and (6) (where the third party claims an interest in property restrained as being that of the defendant), he or she would only need to satisfy the court that the property, or interest therein, is not tainted.

Adequacy of the current restraint regime

5.30 At the commencement of this chapter the Commission noted the intimate inter-relationship between the restraining order provisions and the confiscatory

---

[123].POC Act s 44(7)(a)(i).

[124].POC Act s 44(7)(a)(ii).

provisions and the fact that both are necessarily limited in their scope of operation by reason of the fact that POC Act forfeiture applies only to a predicate offence for which the defendant has been convicted and (with one exception) to the proceeds of the offence and property used in or in connection with that offence. The exception relates to automatic forfeiture for serious offences whereby, under section30, all property still subject to a restraining order which is not subject to an exclusion order under section 48(4) is forfeited six months after conviction.

5.31 In chapter 4, the Commission has discussed a number of case studies presented by the NCA demonstrating what it considered to be inadequacies of the existing confiscation regime, particularly in relation to continuing criminal enterprises.[125]

5.32 Based on its analysis of these case studies and the legislative scheme, the Commission concluded that the inadequacies illustrated by those case studies needed to be addressed by the establishment of a non-conviction based scheme.

5.33 If this proposal were to be accepted and implemented, the current restraint regime would obviously need to take that regime into account.

5.34 Since the proposed non-conviction based scheme would apply to specifically prescribed unlawful conduct, and not simply to conduct constituting serious offences as in the case of the NSW and Victorian schemes, the application processes, for example, will need to take account of the distinction between apprehended criminal conduct and prescribed unlawful conduct.

5.35 That said, the Commission considers, nevertheless, that a simplified restraining order process with elements common to both circumstances is clearly feasible.

5.36 In this regard, it notes the close commonality between the current restraining order processes under both the POC Act and the non-conviction based regime of Division 3 of Part XIII of the Customs Act.

5.37 To assist it in formulating proposals, having as their focus the need for commonality of elements, the Commission reviews below in the section entitled 'Restraining order regimes of other Australian jurisdictions', the various powers available under the proceeds legislation of those other jurisdictions.

5.38 The Commission's conclusions regarding an appropriate future model for the Commonwealth scheme are then discussed in the section entitled 'A simplified and consolidated restraining order process'.

---

[125].NCA *Submission 16*.

5.39 Before proceeding to the review of other regimes, reference should be made to submissions in so far as they relate to the existing restraining order regime and the need for its reform.

What the submissions say

5.40 While some submissions, notably those from the NCA[126] and DPP,[127] have touched upon difficulties encountered in relation to restraining orders, those difficulties have in the main related more to limitations inherent in the confiscation regime than in the necessarily co-extensive restraining order regime. For example, it is clear from the case studies referred to in chapter 4 and 7 that the concerns and frustrations that have arisen for authorities in not being able to intervene in such activities as obvious money laundering ahead of being able to identify a predicate offence on which POC Act action could be based have been exacerbated by the corresponding limitations on the capacity to issue restraining orders ahead of charging, or imminent charging, of a defendant in respect of such specific predicate offence.

5.41 Reforms involving the establishment of a non-conviction based regime and radical changes to the money laundering provisions of the POC Act are dealt with in chapters 4 and 7 and need not be repeated here. Suffice it to say, as already recognised earlier in this chapter, the adoption of such reforms will necessitate co-extensive reforms to the restraining order regime.

5.42 The submissions have, however, raised two important matters for consideration which, while related to the proposed reforms in chapters 4 and 7, require discrete consideration. The first is the proposal from both the DPP and NCA that the basic threshold requirement, namely that the officer seeking a restraining order must depose to a *belief* that the property has the relevant characteristics, should be replaced by a requirement that the officer have reasonable grounds for suspicion.[128]

5.43 The NCA has raised the associated issue of the time at which the restraining order may be sought.[129]

5.44 The observation has been made in discussions with law enforcement bodies that many of the difficulties involved in the current restraining order regime would be avoided if an *in rem* forfeiture process such as applies under the Customs Act were to be adopted so as to permit assets to be seized on a reasonable suspicion that they are 'tainted'. Under such a process, a notice would be served on the owner or possessor who would be required to bring an action either claiming that the

---

126.ibid.

127.DPP *Submission 8*.

128.DPP *Submission 8*; NCA *Submission 16*.

129.NCA *Submission 16*.

seizure was unreasonable in the circumstances or, alternatively, seeking to demonstrate the lawful provenance of the property. As will be observed in chapter-16, dealing with administrative, or *in rem*, forfeiture in other Commonwealth legislation, the Commission recognises that such forfeiture is justified in certain circumstances. However, it would not countenance such a drastic course as the general adoption of *in rem* forfeiture in substitution for a due process restraining and forfeiture regime such as is the foundation of the current legislation and corresponding legislation in other Australian jurisdictions.

5.45 Returning to the issue of the time at which an application for a restraining order may be made, the NCA submission emphasises the problems that arise, particularly in connection with transnational criminality, where the proceeds of Australian offences involving a continuous course of criminality cannot be restrained ahead of transfer offshore because information sufficient to justify the laying of charges for a predicate offence has not been able to be brought together.

5.46 Leaving aside the question of transferring funds offshore, which is dealt with in chapter 7, the Commission recognises that there is a need for greater flexibility. The current 48 hour charging requirement is clearly too restrictive. That said, existing protections such as the need for the applicant for the restraining order to give security for costs and damages,[130] and the right of a person whose property is restrained to seek to 'claw-back' in certain circumstances legitimately obtained property, must be preserved in any reform. A suggested way of dealing with this issue is discussed below in the section entitled 'A simplified consolidated restraining order process'.

5.47 Closely associated with this is the other issue raised in submissions, namely, the threshold test to be discharged by the deposing officer. In relation to both this and the issue of the time at which an application for a restraining order might be made, the NCA has suggested that

> It is in the public interest that the POC Act be amended to permit a restraining order to be made where there are reasonable grounds to suspect a person has engaged in criminal activity.[131]

5.48 In support of its contention, the NCA points to the fact that

> In contrast to the POC Act, the Criminal Assets Recovery Act 1990 (NSW) (CAR Act) provides for restraining orders to be obtained by satisfying the Supreme Court that there are reasonable grounds to <u>suspect</u> that a person has engaged in criminal activity.[132]

130.POC Act s 44(10) and (11).

131.NCA *Submission 16*.

132.ibid.

5.49 In its submission, the DPP focuses on the difficulties that the threshold of belief poses in the case of orders in respect of third party property, although its concerns are understood to apply equally to orders in respect of defendants' property.[133] The submission says that

> In order to apply for a restraining order over third party property, it is necessary to show that a police officer believes that the property is either tainted or subject to the effective control of the defendant. It is not enough for a police officer to suspect those things on reasonable grounds. That can be a difficult test to satisfy if the criminal assets investigation is still at an early stage. Property may be dissipated by the time the investigators have the material needed to confirm the suspicions they hold in relation to it.[134]

5.50 The Commission has considerable sympathy with the concerns expressed by the NCA and the DPP. In addition to the concerns elaborated by the NCA and DPP the Commission is sensitive to the reality that the larger and more mature an investigation is required to become before restraining action may be taken, the greater the likelihood that the criminal will become aware of the investigation and be able to hide or dissipate assets before a restraining order can be obtained.

5.51 Again, the kinds of changes that might be appropriate to overcome those difficulties are discussed below in the section entitled 'A single consolidated restraining process'. As earlier indicated, it is necessary to review the requirements in other Australian jurisdictions in order to draw on relevant experience in formulating proposals for a reformed restraining order regime under the POC Act.

Restraining order regimes in other Australian jurisdictions

5.52 Other Australian jurisdictions whose conviction based regimes have provisions for obtaining restraining orders which mirror those of the POC Act are the ACT, the NT and Tasmania.[135] The Northern Territory and Tasmanian regimes, however, make no distinction between ordinary indictable offences and serious offences because neither contains a statutory forfeiture regime.

5.53 Under the CCP Act (WA) the conditions precedent have been simplified. Where the person has not been charged, again the 48 hour period applies.[136] However, the police officer's affidavit need only set out his or her belief — and the grounds for that belief — that the person about to be charged committed the offence and

---

133.DPP *Submission 8*.

134.ibid.

135.POC Act (ACT), CFP Act (NT) and CCP Act (Tas).

136.CCP Act (WA) s 20(8).

- in the case of an application in respect of specified property of the person or subject to the effective control of the person, that either a forfeiture order or pecuniary penalty order may be made upon conviction
- in the case of an application in respect of all the property of a person or under the person's effective control, that a pecuniary penalty order may be made upon conviction.[137]

5.54 One apparent reason for this simplified test is that, once the person is convicted, a forfeiture order or pecuniary penalty order may relate to property or benefits derived from any 'unlawful act' and not only in respect of the offence for which the person was convicted.[138] Furthermore, there is a presumption that any property acquired six years prior to the commission of the offence was obtained as a result of an 'unlawful act',[139] which is defined to mean an act or omission that constitutes a relevant offence,[140] whether or not that act or omission is the subject of a conviction.[141]

5.55 New South Wales, in its conviction based legislation, has also come up with a less complex formula than in the POC Act. Similar basic criteria relating to charging within 48 hours, and a belief that the person committed the offence, are required.[142] Thereafter, the grounds differ only on the basis of whether the property sought to be restrained is that of the defendant or of another person; those tests are analogous to, but simpler than, those contained in the POC Act.[143]

5.56 The most recently reformed solely conviction based regime is that of South Australia. The CAC Act (SA) does not provide for pecuniary penalty orders and defines property as liable to forfeiture

> (a) if the property is tainted property; or
> (b) if –
> (i) a forfeiture offence has been committed or there are reasonable grounds to suspect the commission of a forfeiture offence; and
> (ii) there are reasonable grounds to suppose that the property may be required to satisfy a present or future forfeiture order.[144]

137.CCP Act (WA) s 20(2).

138.CCP Act (WA) s 10(4), (5) and 15(1) respectively.

139.CCP Act (WA) s 10(4), (5) and 15(1) respectively.

140.A relevant offence, for the purpose of the WA Act is called a 'serious offence', defined in s 3 as any indictable offence or any other offence or class of, offences prescribed as a serious offence for the purposes of this definition.

141.CCP Act (WA) s 3.

142.COPOC Act (NSW) s 43(2) and (3).

143.COPOC Act (NSW) s 43(1) and 43(4).

144.CAC Act (SA) s 5.

5.57 The restraining order provision is expressed in terms that are also succinct

> (1) If a court is satisfied, on application by the Director of Public Prosecutions, that there are reasonable grounds to suspect that property may be liable to forfeiture, the court may make a restraining order prohibiting, subject to the exceptions (if any) stated in the order, any dealings with the property.
>
> (2) An application for a restraining order may be made *ex parte* but, if the court makes a restraining order on an *ex parte* application, the court must allow the owner of the property a reasonable opportunity to be heard on the question whether the order should continue in force and, if after hearing the owner, the court is not satisfied that there is good reason for the order to continue in force, the order must be revoked.
>
> (3) A restraining order may be varied or revoked at any time.
>
> (4) A restraining order lapses if –
> (a) an interval of inactivity follows the making of the order; or
> (b) proceedings for the forfeiture offence in relation to which the restraining order was made result in an acquittal; or
> (c) an application for a forfeiture order is decided.[145]

5.58 The CAC Act (SA) defines 'interval of inactivity' to mean one month or a longer period, not exceeding two months, as is determined, on application by the Director of Public Prosecutions, by the court during the whole of which there are no relevant proceedings before a court. 'Relevant proceedings' is defined as

> (a) proceedings in which a person is charged with the relevant forfeiture offence or appellate proceedings arising out of such proceedings or
> (b) proceedings for a forfeiture order.[146]

5.59 Given the proposal of the Commission to introduce a non-conviction civil based forfeiture regime, and the shortcomings perceived by law enforcement bodies in relation to the current restraining order provisions, it is also necessary to consider the restraining order threshold provisions contained in the Customs Act Part XIII Division 3, the CAR Act (NSW) and the composite regime contained in the Confiscation Act (Vic).

5.60 Under Division 3 of Part XIII of the Customs Act, an *ex parte* application for a restraining order may be made once a proceeding for a civil pecuniary penalty order has been instituted. The application can, as under the POC Act, be made in respect of specified property of the defendant, all of the property of the defendant, all the property of the defendant other than specified property or against specified property of a third person.[147] The application must be supported by an affidavit of

---

[145].CAC Act (SA) s 15. There then follow provisions by which a restraining order may be converted into an automatic forfeiture order in cases involving a serious drug offence.

[146].CAC Act (SA) s 15(6).

[147].Customs Act s 243E(1).

a police or customs officer to the effect that he or she believes that the defendant has engaged in a prescribed narcotics dealing or dealings and that benefits were derived from that conduct, and must set out the grounds on which the beliefs are held. In addition, if the order is sought against specified property of the defendant, the grounds for the belief that the property belongs to the defendant must also be stated. The Court must be satisfied on the basis of the contents of the affidavit that the grounds for holding that belief are reasonable.[148] If the order is sought against specified property of a person other than the defendant, the affidavit must additionally set out the belief, and grounds therefor, that the property is subject to the effective control of the defendant and the court must again be satisfied as above.

5.61 Under the NSW civil forfeiture regime, restraining orders may be made by the Supreme Court only on application by the NSW Crime Commission.[149] The Court has no discretion but must make the order applied for if the application is supported by an affidavit of an authorised officer stating that

- in relation to property of the defendant, the officer *suspects* that the person has engaged in serious crime related activity or activities and
- in the case of property of another person, that the officer *suspects* that the interest in the property is derived from serious crime.[150]

5.62 The grounds for the suspicion must in both cases be set out and the court must be satisfied having regard to the contents of the affidavit that there are reasonable grounds for any such suspicion.

5.63 This may be compared with section 44(1) of the POC Act under which, in the case of a serious offence, the Court has no choice but to make a restraining order (although, as already commented, some courts have held that the court retains some discretion in relation to the property to be included in the order).

5.64 In contrast with the POC Act, however, it is noted that the NSW legislation has a lower threshold for the applicant, requiring suspicion rather than belief that the interest in the property is serious crime derived property.

5.65 The recently proclaimed Victorian Confiscation Act contains provisions that are more simply and comprehensively expressed than those in the CAR Act (NSW). Moreover, the Victorian Act applies to ordinary conviction based forfeiture, automatic forfeiture and civil forfeiture.

5.66 The Confiscation Act (Vic) provides that a restraining order may be made to preserve property so that it is available for any one or more of the following purposes, namely to satisfy

---

148.Customs Act s 243E(2).

149.CAR Act (NSW) s 10.

150.CAR Act (NSW) s 10(3); and in each case the affidavit must include the grounds on which the suspicion is based.

- any forfeiture order that may be made
- any automatic forfeiture that may occur
- any civil forfeiture order that may be made
- any pecuniary penalty that may be made or
- any order for restitution that may be made.[151]

5.67 The application must state the particular purpose or purposes for which it is sought, and the court must state in the order the purpose, or purposes, for which the property or interest is restrained.[152]

5.68 An application for a restraining order in Victoria must be supported by an affidavit of a police officer or other authorised person setting out the grounds for his or her belief that

- the defendant will be charged within the next 48 hours (if appropriate)
- the defendant has an interest in the property or the property is tainted property and
- where the order is sought to satisfy a potential conviction based forfeiture order, pecuniary penalty order or any restitution or compensation order, that such an order may be made.[153]

5.69 The Court must make the order if satisfied that the defendant will be charged within 48 hours and it considers that, having regard to the affidavit and any other sworn evidence, there are reasonable grounds for making the order.[154]

A simplified and consolidated restraining order process

Reduction of complexity

5.70 Throughout this Report the Commission expresses its concern at the high level of complexity of the legislation, and the difficulty which that poses for prosecutors, law enforcement officers, defendants and legal advisers, as well as for the courts.

5.71 That said, the Commission can well appreciate why, given the ground breaking and intrusive nature of the legislation when first drafted, a highly detailed and elaborative approach was taken.

5.72 Given that proceeds recovery legislation is now well accepted and that simplified legislative approaches are now emerging in other Australian

---

[151].Confiscation Act (Vic) s 15(1).

[152].Confiscation Act (Vic) s 15(2) and (3).

[153].Confiscation Act (Vic) s 16(4).

[154].Confiscation Act (Vic) s 18.

jurisdictions, the Commission considers that a simplified drafting approach is now called for, if not well overdue, in the Commonwealth arena.

5.73 The desirability of a more simplified legislative approach is no more evident than in relation to the provisions relating to the seeking and granting of restraining orders and the clawing back of property from such orders.

5.74 As pointed out earlier, there are also important new considerations that underscore the need for a more simplified approach to the restraining order provisions.

5.75 These are, firstly, the Commission's proposal for the introduction of a non-conviction based scheme related to prescribed unlawful conduct, and, secondly, the integration of the confiscation regime of Division 3 of Part XIII of the Customs Act into the POC Act.

5.76 As also observed, in view of the fact that many elements of the restraining order regimes under the POC Act and the non-conviction based Division 3 of Part XIII of the Customs Act are already similar, there would seem no reason, and none has been suggested to the Commission, why such commonality should not be maintained under the proposed new broadened and integrated regimes.

Point at which restraining order may be applied for

5.77 As earlier discussed, the Commission believes there is merit in suggestions from law enforcement agencies that the requirement for a charge to have been laid before a restraining order may be sought, or to be laid within 48 hours of such order, creates significant difficulties in interrupting the transmission of funds which, while clearly related to the commission of an offence, occur before evidence sufficient to lay a charge has been able to be assembled and assessed.

5.78 It would appear that the current provisions, when formulated, marked an apparent balancing of two key considerations. The first is the need to ensure that restraining action should be possible before the defendant could be alerted in a way that might lead to immediate dissipation. The second is the need to protect the interests of a person who had either not been charged or, if charged, was still presumed innocent pending trial of the charge.

5.79 In the Commission's view, some ten years later the same balance needs to be struck, but it needs to be struck in the light of the now prevailing realities surrounding law enforcement, especially having regard to the fast growing sophistication of organised crime and the capacity to move funds quickly across international boundaries.

5.80 The stark reality that needs to be addressed is that, given this level of sophistication and transnational capacity, a proceeds of crime regime is only as good as its capacity to ensure that property that may be required to satisfy forfeiture

and pecuniary penalty orders is able to be restrained. Moreover, such restraint must be able to occur not later than the earliest time at which a person suspected of engaging in unlawful conduct may become alerted to investigatory action and undertake rapid and immediate dissipation of assets.

5.81 In this regard the Commission shares the concerns of the law enforcement agencies that the point at which a person is, or is about to be, charged is likely to put unacceptably at risk the capacity of the authorities to restrain property that may later be needed to satisfy a confiscation order. It is for this reason that the Commission favours, firstly, removal of the requirement that the person be charged, or be charged within 48 hours, and secondly, reduction of the burden to be discharged by the deposing officer from belief that the defendant has committed an offence to reason to suspect that the defendant has committed an offence.

5.82 The Commission notes that it has been held in a number of cases that suspicion and belief are different states of mind, although both require that there exist facts which are sufficient to induce either state of mind in a reasonable person.[155] In the leading case of *George v Rockett and Anor*,[156] the High Court unanimously held that a suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust amounting to a slight opinion, but without sufficient evidence. This, in the view of the Commission, is the appropriate test to be discharged in relation to a restraining order since such orders are needed at a time when it is clear that some unlawful activity is being engaged in but where the evidentiary material may not yet be sufficiently specific to enable the exact nature of the offence to be identified.

5.83 The Commission considers that such a test would be equally appropriate to the circumstances of the proposed non-conviction based regime and notes that it would correspond with the suspicion test provided in the CAR Act (NSW) in relation to the seeking of a restraining order under the non-conviction based regime of that Act.

5.84 The need to balance against such powers the rights of alleged perpetrators would require, nevertheless, that the law enforcement authorities act to either charge the person or to institute non-conviction based forfeiture proceeding within a reasonable time. In this latter connection, the Commission considers that the approach of the new South Australian legislation has considerable merit in that its effect is to allow the authorities a period of one month[157] after the restraining order to institute proceedings.[158] Thus, *prima facie*, a restraining order would have a life of one month.

155.*TVW Ltd v Robinson* (1964) WAR 33, *R v Tillett; ex parte Newton* (1969) 14 FLR 101.

156.(1990) 93 ALR 483.

157.Or a greater period not exceeding two months if the court agrees.

158.CAC Act (SA) s 15(6).

5.85 However, given the complexity of major drug trafficking and associated money laundering activity, and the time needed to bring extremely difficult and often far reaching investigations to a maturity that will support the laying of charges or the institution of non-conviction based proceedings,the Commission would favour a court having a discretion to grant a longer period for the institution of proceedings than the maximum of two months permitted under the South Australian legislation. Thus, the Commission would favour a requirement that the relevant proceedings should be required to be instituted within one month of a restraining order or such greater period not exceeding three months as the court determines. It would be a matter for the applicant to place material before the court and to persuade the court that it should exercise its power to take the exceptional course of making an order for a period in excess of one month.

The application

5.86 Under the current provisions, the matters required to be addressed by the deposing officer, and the matters on which the court must be satisfied, differ depending upon whether

- the offence is a serious offence or an ordinary indictable offence
- the restraining order is sought against the property of a defendant or a third person and
- in the case of a defendant, it is sought against the whole or part only of the defendant's property.

5.87 In this regard the Commission is attracted by the synthesised and simplified approach provided by the Confiscation Act (Vic), although the Commonwealth legislation would, if non-conviction based forfeiture is to be predicated on the finding of prescribed unlawful conduct (as opposed merely to conduct amounting to a serious offence), have to take account of the need to identify, in the application, whether it related to conviction based or non-conviction based forfeiture.

5.88 The Commission has in mind that the simplified process would ordinarily involve only two variants, namely specification of the purpose or purposes for which the restraining order was sought and specification of the property sought to be restrained.

5.89 As regards purposes, if, for example, the offence was an ordinary indictable offence, the purposes for which a restraining order was sought would likely be both

- to satisfy any forfeiture order that may be made and
- to satisfy any pecuniary penalty order that may be made.

5.90 Likewise, if the offence was a serious offence, the purposes for which a restraining order was sought, would be likely to be both

- to satisfy any automatic forfeiture that may occur
- to satisfy any pecuniary penalty order that may be made.

5.91 If the Commission's recommendations in chapter 15 are adopted, an additional purpose, in the case of conviction based forfeiture proceedings, would be to satisfy any reparation or compensation order which may be made.

5.92 If the restraining order was being sought in respect of prescribed unlawful conduct (ie for the proposed new non-conviction based regime), the purposes for which a restraining order was sought would be likely to be

- to satisfy any civil forfeiture order that may be made
- to satisfy any pecuniary penalty order that may be made.

5.93 With regard to the property sought to be restrained, the application would, as currently under the POC Act and Division 3 of Part XIII of the Customs Act, seek restraint, as may be permitted or appropriate according to the nature of the offence or the prescribed unlawful conduct, as the case may be, of

(a) specified property of the defendant
(b) all property of the defendant
(c) all property of the defendant other than specified property
(d) specified property of a person other than the defendant.

5.94 The Commission contemplates that the provisions relating to the supporting affidavit of the relevant officer would, where the property sought to be restrained is property of the defendant, also be consolidated and simplified into two elements. Firstly, the officer would, as already discussed, depose to having reason to *suspect* that the defendant had committed a relevant predicate offence or had engaged in prescribed unlawful conduct, as the case requires. Secondly, the officer would depose to a *belief* that, having regard to the stated purpose or purposes for which the restraining order was being sought, the property may be required to satisfy those purposes.

5.95 Where, in the case of conviction based proceedings, the property sought to be restrained belonged to someone other than the defendant, the officer would also be required to depose to having reason to suspect that the property was proceeds of, or property used in or in connection with the commission of the offence or was property under the effective control of the defendant (see in this regard the discussion in chapter 13 of the need to expand and clarify the definition of 'effective control' and 'tainted property').

5.96 Likewise, in the case of non-conviction based proceedings, the officer would be required to depose to having reason to *suspect* that the property was the proceeds of the prescribed unlawful conduct including property under the effective control of the defendant.

5.97 The advantage of the above outlined simplified approach, particularly in respect of an application relating to property of the defendant, would be to provide flexibility for the applicant in the choice and presentation of evidence (ordinarily in the affidavit of the officer) necessary to satisfy the court, having regard to the class of offence alleged, the circumstances of the offence or prescribed unlawful conduct, and the kind or kinds of confiscatory outcomes contemplated and permitted by the relevant provisions of the Act, that the restraining order was justified. That said, the Commission considers it appropriate that, in the case of an alleged serious offence, in respect of which the whole of the property of a defendant could be subject to statutory forfeiture under the current conviction based regime or to court ordered forfeiture under the proposed non-conviction based regime, the legislation should mandate the granting of a restraining order over the whole of the property of the defendant where so sought.

5.98 The provisions would contain a general requirement, along the lines of current section 44, that the court must be satisfied that there are reasonable grounds for the defendant having the suspicion(s) and belief described above.

Ex parte applications

5.99 Currently, an *ex parte* restraining order may, by virtue of section 45(1), have effect for such period, not exceeding 14 days, as is specified by the court in the order.

5.100 While the Commission agrees that a person affected by an *ex parte* order should have the opportunity to have that order reviewed after they have received notice of it, the Commission is not convinced that a mandatory review is necessary, particularly where it is clear that the affected person has no desire to seek such review.

5.101 The Commission's sense is that the interests of justice would be adequately served by a provision along the lines of section 15 of the CAC Act (SA). The effect of that provision is to permit the owner of property an opportunity to be heard on whether the *ex parte* order should continue in force and to allow the court, after hearing the owner, to revoke the order if not satisfied that there is good reason for the order to continue in force.

Application to release property from restraining order

5.102 As in relation to the making of applications for restraining orders, the Commission favours the adoption of a simplified approach to applications to release property from restraining orders.

5.103 In chapter 12, the Commission discusses the complexity of the existing provisions relating to the release of third party property from restraining orders. There it proposes a new simplified test.

5.104 In the light of the comprehensive consideration of that matter in chapter 12, and the recommendations therein, it is not necessary to deal further with the release of third party property in this chapter.

5.105 It remains to consider whether a simplified approach can be achieved in relation to defendants in conviction based proceedings and whether a similar such approach is possible in respect of both conviction based and the proposed new non-conviction based regime.

5.106 In relation to the existing conviction based regime, the Commission considers that, consistent with the new simplified formula as proposed for applications for restraining orders, the two part test in section 48(3)(e) in relation to ordinary indictable offences should be replaced by a single test requiring the defendant to satisfy the court that the property would not be required to satisfy the purpose, or any of the purposes, for which the restraining order had been granted.

5.107 Such a single simplified test would not, however, be appropriate in relation to either serious offences under the conviction based regime or prescribed unlawful conduct under the proposed non-conviction based regime.

5.108 As statutory, or court ordered, forfeiture of the whole of the restrained assets would follow a conviction of the serious offence, or a finding of engagement in prescribed unlawful conduct, as the case may be, a test that required the defendant to satisfy the court that the property would not be required to meet any of the purposes for which the restraining order had been granted would be unduly difficult for the defendant to discharge ahead of the trial of the main issue.

5.109 To avoid the risk of such prejudice, the Commission would favour retention of the present test in section 48(4) in respect of conviction based proceeding for a serious offence.

5.110 As regards the proposed non-conviction based proceedings, any test for the release of restrained property of the defendant needs, for the reasons canvassed in chapter 4 in relation to the nature and content of the new regime, to take account of the fact that the focus of that regime is the recovery of profits. An appropriate test for the release of restrained assets of the defendant is proposed in the recommendations in that chapter.

Integrated proceedings

5.111 For the sake of simplicity and clarity of presentation, the foregoing discussion has proceeded on the basis that a restraining order will be sought in respect of either the commission of an indictable offence or engagement in prescribed unlawful conduct (non-conviction based).

5.112 That is not, however, to suggest that circumstances might not arise, and that provision should not be made in the legislation to deal with such circumstances, where a restraining order against the same defendant is simultaneously sought in respect of both an indictable offence and prescribed unlawful conduct.

5.113 In practical terms such circumstances are, in the Commission's view, likely to be rare, such that, given the very limited time available for this inquiry, the Commission should leave the formulation of procedures to deal with such circumstances to policy makers responsible for implementing the Commission's recommendations.

5.114 The reason why, in the Commission's view, simultaneous resort to orders on both bases is likely to be rare, is that the scope of property able to be restrained under non-conviction based proceedings relating to prescribed unlawful conduct to which an indictable offence also relates will ordinarily be as wide as, and often wider than, the property available in respect of the particular predicate offence.

5.115 The provisions required to deal with simultaneous, overlapping or sequential applications would, obviously, need to involve the conferment of appropriate discretionary powers on the courts, but not such as to result in the weakening of any of the fundamental underpinnings of either the conviction or non-conviction based regimes.

Recommendation 15

- In substitution for the requirement that a person be charged with a relevant predicate offence not later than 48 hours after the making of the restraining order, the legislation should allow a period of one month, or such longer period not exceeding three months, as the court determines, in which a charge is to be brought.
- Similarly, in relation to non-conviction based forfeiture, a period of one month, or such longer period not exceeding three months, as the court determines, should be allowed for the restraining order to remain in force.
- The defendant's interests should continue to be protected by the court requiring undertakings as to costs and damages and by the defendant having the right to apply for property to be released from the order.

Recommendation 16

- The requirement that the affidavit in support of an application for a restraining order depose to a belief that the defendant has committed a relevant predicate offence should be replaced by a lower threshold requirement that the officer have reason to suspect that the defendant has committed such an offence.

- Similarly, in relation to non-conviction based forfeiture proceedings, the officer should be required to depose to reason to suspect that the defendant has engaged in the relevant prescribed unlawful conduct.

Recommendation 17. The following simplified and consolidated process for making and considering applications for restraining orders should be adopted.

- The application should specify the purpose or purposes for which the order is being sought, being to satisfy one or more of the following
  - a forfeiture order under section 19 in respect of a conviction of an ordinary indictable offence
  - a pecuniary penalty order under section 26 in respect of conviction of an ordinary indictable offence
  - a statutory forfeiture under section 30 in respect of conviction of a serious offence
  - a pecuniary penalty order under section 26 in respect of a conviction of a serious offence
  - a forfeiture order under the proposed new non-conviction based regime
  - a pecuniary penalty order under the new non-conviction based regime
  - any compensation or reparation order.[159]

- The application would seek restraint (as permitted and appropriate according to the nature of the predicate offence or the prescribed unlawful conduct) of
  - specified property of the defendant
  - all property of the defendant
  - all property of the defendant other than specified property or
  - specified property of a person other than the defendant.

- In the affidavit in support of the application, the relevant officer should depose to
  - having reason to suspect that the defendant has committed a relevant predicate offence or engaged in the relevant prescribed unlawful conduct (Recommendation 16) and
  - a belief that, having regard to the stated purpose or purposes for which the restraining order is being sought, the property sought to be restrained may be required to satisfy that purpose or those purposes.

- Additionally, in the case where a restraining order is sought against the property of a person other than the defendant, the officer should depose to having reason to suspect that the property is
  - in the case of conviction based proceedings — proceeds of, or property used in or in connection with, the offence, or is property under the effective control of the defendant

[159] See ch 14.

— in the case of non-conviction based proceedings — proceeds of the prescribed unlawful conduct or property under the effective control of the defendant.

- The court would be required to be satisfied that there are reasonable grounds for the deponent having the suspicion(s) and belief referred to above.

Recommendation 18. The current limitation on an *ex parte* order operating for more than 14 days should be substituted with an entitlement for a person whose property is affected by such an order to be heard by the court, if they so wish, and a power in the court to revoke the order where it is not satisfied that there is good reason for the order to continue in force.

Recommendation 19. A simplified test should be established for a defendant charged with an ordinary indictable offence to have property excluded from a restraining order. The defendant in such cases should be required to satisfy the court that the property would not be required for the purpose, or purposes, for which the order had been made.[160]

[160] See rec 11 and 12 in ch 4 relating to the basis on which a defendant may seek release of restrained assets from a restraining order under the proposed non-conviction based regime. See also rec 53 in ch 12 relating to the basis on which third parties may seek release of restrained assets.

6. Priorities

Introduction

6.1 This chapter deals with the relationship between the POC Act and other areas of Commonwealth law. This question is adverted to in the first of the particular terms of reference in relation to bankruptcy law, but in its introductory pamphlet the Commission identified other areas of law, including family law, taxation law and customs law, which may impact on the effectiveness of the proceeds forfeiture regime.

6.2 While the various submissions did not identify significant conflict or priority difficulties, it became clear that this apparent lack of difficulty was due to a co-operative and pragmatic approach between agencies designed to overcome shortcomings in the POC Act. Thus, rights of defendants and others may, in practical terms, be determined by co-operative pragmatism as opposed to being spelt out in the law.

6.3 While diverse insofar as they regulate distinctly different areas of behaviour, Commonwealth laws relating to proceeds of crime, bankruptcy, family, taxation and customs share one important common characteristic. That is that each of those laws confers significant powers the exercise of which can result in the confiscation or other divestiture of property or the imposition of financial imposts and penalties. Also in issue in the inquiry is the relationship between the POC Act and the *Financial Transaction Reports Act 1988*. This relationship is addressed in chapter 7 dealing with money laundering.

6.4 In the light of what it perceived as the potential for such laws to give rise to conflicting claims on the money or property of individuals, the Commission invited submissions on

- the relationship that should exist between the POC Act and such other Commonwealth laws
- whether other laws could be availed of to defeat the operation of the POC Act and
- whether those other laws could create unseemly competition and asset grabbing between different Commonwealth agencies, particularly where successful action under the POC Act might be seen to be the most appropriate outcome.

What the POC Act says on the issue

6.5 Notwithstanding the extensive nature of the confiscatory powers conferred on courts by the POC Act, that Act, with very limited exceptions relating to bankruptcy and taxation, is silent on how it is intended to interface with the Commonwealth bankruptcy, family, taxation and customs laws.

6.6 The first of these limited exceptions relates to the extent to which forfeitures under other laws, and payments of amounts by way of tax, may be taken into account in assessing the amount of a pecuniary penalty order under section 26 of the Act. Subsections (3) and (4) of that section provide as follows

> (3) Where:
> (a) property that is proceeds of the offence has been forfeited, under this Act or another law of the Commonwealth or under a law of a Territory, in relation to the offence; or
> (b) a forfeiture order is proposed to be made against property that is proceeds of the offence;
> the penalty amount shall be taken to be reduced by an amount equal to the value of the property as at the time of the making of the pecuniary penalty order.
>
> (4) Where the court making a pecuniary penalty order is satisfied that an amount of tax (whether payable under a law of the Commonwealth, a State, a Territory or a foreign country) that has been paid by the person is attributable in whole or in part to the benefits in respect of which the order is being made, the court may determine that the penalty amount be reduced by the amount that, in the opinion of the court, represents the extent to which the amount of tax so paid is attributable to those benefits and where the court makes such a determination the penalty amount shall be taken to be reduced accordingly.

6.7 It will be noted that, while subsection (3) recognises that property that is the proceeds of an offence may have already been forfeited under another law, it does not attempt to resolve any issue of priority that might arise in the event of conflict arising between forfeiture regimes.

6.8 Likewise, subsection (4), while recognising that tax may have been paid that is attributable to benefits in respect of which an order may be made, does not deal with any issue of priority that might arise between confiscation under the taxation laws and confiscation under the POC Act.

6.9 The other exceptions relate to the implications of aspects of the Commonwealth Bankruptcy Act for the operation of the POC Act. There are four provisions in point.

6.10 The first of these is section 43(5) which provides as follows

> (5) Notwithstanding anything in the Bankruptcy Act, money that has come into the custody and control of the Official Trustee under a restraining order shall not be paid into the Common Investment Fund established under section 20B of that Act.

6.11 The intention of that provision would seem to be to put beyond doubt that, when the Official Trustee receives money under the POC Act, he is relieved, in

respect of those moneys, of his more general obligation under the Bankruptcy Act to pay money received into the Common Investment Fund established by that Act. Clearly, the provision is in no way intended to address priority issues of the kind to which this chapter is addressed.

6.12 Next is section 50 which, in subsection (1), creates a charge over restrained property in respect of amounts imposed under a penalty order. Subsection (2), so far as relevant for present purposes, provides

> Where a charge is created by subsection (1) on property of a person, the charge ceases to have effect in respect of the property ... upon the person becoming bankrupt ...

6.13 The effect of this provision would appear to be simply to reduce the standing of the Commonwealth, as creditor in respect of a proceeds order, to the status of unsecured creditor. No explanation or justification for this is offered in the Second Reading Speech or Explanatory Memorandum.

6.14 The major provisions of the POC Act dealing with the interface between the Act and the Bankruptcy Act are those contained in section 53. For convenience they are set out in full below

> Duties of Official Trustee
> 53.(1) Where, after the Official Trustee has been directed by an order under subsection 49(1), (2) or (2A) to pay an amount to the Commonwealth out of property of a person, the Official Trustee is given notice in writing of the presentation of a creditor's petition against the person, the Official Trustee:
> (a) shall refrain from taking action to sell the property under any direction to do so contained in an order under section 49; and
> (b) shall not pay any money pursuant to the direction to do so contained in the first-mentioned order;
> until the petition has been dealt with by a bankruptcy court, has been withdrawn or lapsed.
>
> (2) Where, after the Official Trustee has been directed by an order under subsection 49(1), (2) or (2A) to pay an amount to the Commonwealth out of property of a person, the Official Trustee is given notice in writing of the presentation of a creditor's petition against the person, the Official Trustee:
> (a) shall refrain from taking action to sell the property under any direction to do so contained in an order under section 49; and
> (b) shall not pay any money pursuant to the direction to do so contained in the first-mentioned order;
> until the petition has been dealt with by a bankruptcy court.
>
> (3) Where:
> (a) property of a person is in the custody and control of the Official Trustee in accordance with this Division;
> (b) the person becomes a bankrupt; and
> (c) by virtue of section 58 of the Bankruptcy Act, the property vests in the Official Trustee or a registered trustee;

> the property shall be deemed to be in the possession, or under the control, of the Official Trustee as, or on behalf of, the trustee of the estate of the bankrupt, and not otherwise.
>
> (4) In this section, "bankruptcy court" means a court having jurisdiction in bankruptcy under the Bankruptcy Act.

6.15 It will be noted that subsections (1) and (2) are confined in their operation to circumstances where, subsequent to the Official Trustee being directed under section 49 of the POC Act to pay an amount to the Commonwealth out of the property of a person towards satisfaction of a pecuniary penalty order, a creditor's or debtor's petition for bankruptcy is filed against the person.

6.16 The effect of the provisions is to suspend the execution of the court's directions under section 49 until the petition has been dealt with by a bankruptcy court or, in the case of a creditor's petition, until the petition has been withdrawn or lapsed.

6.17 It should also be noted that subsection (3), while providing that, upon bankruptcy, the restrained property of the bankrupt in the custody and control of the Official Trustee under the POC Act shall thereupon be deemed to be in the possession, or under the control, of the Official Trustee as, or on behalf of, the trustee of the estate of the bankrupt, and not otherwise, falls short of declaring whether the property thereupon also vests in the trustee of the estate in common with other property not the subject of a restraining order.

6.18 Reference needs to be made in this context to the only other provision of the POC Act dealing with bankruptcy, namely, section 27(9). Section 27 prescribes the way in which the benefits are to be assessed for the purposes of a pecuniary penalty order. In that limited context, subsection (9) provides that

> For the purposes of this section, where property of a person vests in an insolvency trustee, the property shall be taken to continue to be the property of the person.

6.19 The intention of the legislature in including subsection (9) would seem to have been no more than to ensure that property of a person which has vested at a relevant time in an insolvency trustee (as defined in section 27) shall not be excluded from the assessment process simply because it has at some later point ceased, by reason of such vesting, to have continued to be vested in that person.

What submissions say

Bankruptcy law

6.20 Only one submitter has, in any way, addressed the issue of the interface between the Bankruptcy Act and the POC Act. That is the submission from the

Office of the DPP which briefly indicates that the DPP has not experienced any great difficulty with the interaction between the two laws. The DPP submission says that, in the experience of his office, once assets have been restrained there is little scope for defendants to use the Bankruptcy Act for tactical purposes. Reasons are not offered in support of that conclusion.[161]

6.21 Another submission, that from the South Australia Police, addresses the interface between the bankruptcy laws and the State proceeds legislation.[162] That matter is addressed later in this chapter under the heading 'Interface between the POC Act and State Laws'.

6.22 As discussed in chapter 10, the Inspector-General in Bankruptcy[163] has made certain submissions in relation to the exercise of the powers of the Official Trustee under the POC Act.[164] His submission does not, however, address any of the matters addressed under the heading 'Priorities' in the Commission's May pamphlet. The Commission has, however, had valuable access to the Official Receiver New South Wales in his capacity as an honorary consultant to the Commission in respect of this reference, and his comments are dealt with under the heading 'Supplementary Information' later in this chapter.

Family law

6.23 Two submissions have discussed the interface between the POC Act and the Family Law Act.

6.24 According to the Office of the Director of Public Prosecutions, there have been a number of attempts to use the provisions of the Family Law Act to avoid the operation of the POC Act. The favoured method is to apply to the Family Court, after property has been restrained, seeking an order declaring that a spouse has an interest in the defendant's property or an order altering property rights so as to increase the rights of the spouse. According to his submission, the DPP has, to date, been successful in opposing actions of that kind and the Family Court has shown no interest in having its processes used to defeat the operation of the POC Act.[165]

6.25 The Family Court acknowledges that forfeiture provisions and their 'claw back' reach have the capacity to adversely impact on property settlements between both married and *de facto* partners and give rise to applications for the setting aside of property settlements under section 79A of the Family Law Act.[166] Given the current policy climate which encourages parties to reach private settlements, there is

---

161.DPP *Submission 8*.

162.SA Police *Submission 23*.

163.Head of the Insolvency and Trustee Service Australia.

164.DFA *Submission 25*.

165.DPP *Submission 8*.

166.See, eg, *Deputy Commissioner of Taxation v McCauley* (1997) FLC 92–780.

a possibility of settlements which may leave an innocent party to a relationship with tainted property which is subsequently the subject of a forfeiture application.[167]

6.26 The Family Court also acknowledges that questions can arise as to the treatment of property settlement applications in situations where all or part of the property is under restraint but amenable to an application for exclusion from restraint or forfeiture. As an example, the Court has provided the Commission with the judgment of Justice SR O'Ryan in *Adorjany and Adorjany; Commonwealth Director of Public Prosecutions (Intervening)*.[168] Briefly, the facts were that the husband was arrested on 17 February 1997 for the offence of attempting to obtain possession of prohibited imports, namely a quantity of narcotic goods (cocaine, 4 kilograms) being not less than the commercial quantity. This had been a 'controlled delivery' operation whereby the courier had delivered some of the cocaine to the husband, the transfer being recorded by police. The offence charged was a statutory forfeiture offence whereby all property remaining the subject of a restraining order six months after conviction, or such later time as an exclusion application is determined, would automatically be forfeited to the Commonwealth.

6.27 On 12 March 1997, the DPP sought, and obtained, a restraining order over all the husband's property, including property in Australia, Mexico and Idaho (USA). That order was extended and remained in force when, on 3 July 1997, the wife sought a property settlement order which, in effect, would vest in her the Australian property and leave the overseas property to her husband.

6.28 The DPP sought to intervene in the Family Court proceedings on 15-December 1997, namely one week after the husband pleaded guilty to the offence with which he was charged. He was subsequently sentenced on 17 February 1998.

6.29 Prior to the hearing of the wife's Family Law application on 25 May 1998, the husband, by then in gaol, on 9 May 1998 consented to the making of the orders sought by the wife.

6.30 The DPP was granted leave to intervene and argued that, as the property in respect of which the property settlement order was sought was the subject of a restraining order of the Supreme Court of New South Wales, pursuant to the POC Act, it would be inappropriate for the Family Court to make the order sought. The DPP submitted that the appropriate course of action would be for the wife to make an application pursuant to section 48(3) of the POC Act to exclude the Australian property from the restraining order. In order to succeed, the wife would have to satisfy the Supreme Court as to her non-involvement in the offence and her lack of knowledge that the property was 'tainted'. If she succeeded in that application, then the Family Court would be the appropriate forum to determine the issue of the

---

167.*Fowkes v DPP* (1997) 2 VR 506.

168.Unreported, No SY 6235 of 1997, 1 June 1998.

wife's contributions and entitlements relevant to the making of the property settlement.

6.31 In concluding his judgment, O'Ryan J said

> On the evidence before me the wife does have an entitlement to property settlement. The period of cohabitation was about 17 years. The wife did make a non financial contribution to the Pleasant Valley property. The wife did engage in gainful employment as a ski instructor. The wife also made a contribution to the welfare of the family in the capacity of homemaker and parent. There are also significant other factors such as the wife's responsibility for the care and accommodation of the child. However, in my opinion, the fact that the wife may be successful in her application for a property settlement is not determinative of what I have to consider.
>
> I am of the opinion that, in all of the circumstances, there are a number of factors to be taken into account. These factors include the following. The wife is not seeking a divorce, at least at this stage. The proceedings in this court were commenced after a restraining order was made in the Supreme Court pursuant to the Proceeds *of Crime Act*. The subsequent conviction of the husband of a serious offence. The fact that the evidence discloses, at least at this stage, that the parties have very little, if any, equity in their assets when regard is had to the extent of the unsecured creditors. Further even if I made the orders sought by the husband and the wife the wife would still have to make an application to the Supreme Court seeking an order that the Pleasant Valley property be removed from the restraint and not forfeited to the Commonwealth. Further, I take into account as an important element, that in the circumstances of this case, as a matter of public policy, this court should not make an order pursuant to s 79 in relation to an item of property of the parties which is the subject of a restraining order of a Supreme Court pursuant to the *Proceeds of Crime Act*. In all the circumstances I am of the opinion that I should not exercise the discretion conferred by s 79 and that the proceedings should be stayed pending the outcome of any proceedings in the Supreme Court pursuant to the *Proceeds of Crime Act*. So far as the prejudice to the wife is concerned in having to come back to this court if she is successful in her proposed application under the *Proceeds of Crime Act* I propose to transfer the property settlement proceedings in this court to the Supreme Court of New South Wales.[169]

6.32 The Commission notes that His Honour's decision was based on public policy, and not on an application of law.

Taxation law

6.33 Income tax is leviable on all income regardless of whether earned from lawful or unlawful activity, and the Commissioner of Taxation has traditionally taken the view that he or she is obliged by law to recover tax payable. It is axiomatic, therefore, that there will be an interface between the POC Act and taxation law.

---

[169] .id 16, 17.

6.34 While the Commissioner of Taxation has not made any formal submission to the Commission, the question was addressed in informal discussions held with officers of the Australian Taxation Office (ATO) in March 1998 and by the DPP in both its formal submission and in informal discussions.[170]

6.35 Both organisations agree that there is no legislative priority prescribed under the POC Act and acknowledge that there is a clear potential for conflicts, particularly given the Commissioner of Taxation's power under section 218 of the Income Tax Assessment Act and the capacity to make default assessments of tax due and payable when tax returns are not lodged. Section 218 is a garnishee-like power requiring any person (including financial institutions) who hold or may hold money on behalf of the taxpayer to pay that money, or so much of it as necessary to acquit the tax debt, to the Commissioner of Taxation. Any such payment is deemed to be made under the authority of the taxpayer, and the person making the payment is indemnified in respect of that payment.

6.36 Nothing in either the tax law or the POC Act provides guidance as to the use of a section 218 order in respect of money restrained under the POC Act. There are also issues concerning the interface between Commonwealth taxation laws and the State and Territory proceeds regimes. This is discussed later in this chapter under the heading 'Interface between POC Act and State Laws'.

6.37 The early discussions with the ATO and the submission from the DPP have revealed a common consciousness between the ATO and the office of the DPP of the need to adopt a cooperative and collaborative approach to minimise the scope for conflict and to formulate means of resolution short of seeking expensive and time consuming court rulings. The centrepiece of this cooperation is a document dated 7 February 1997 entitled *Australian Taxation Office/Commonwealth Director of Prosecutions Agreed Guidelines on the Recovery of Criminal Assets in Cases Where There is an Outstanding Tax Liability*.

6.38 The guidelines state that they

> are designed to ensure that there is an appropriate use of Commonwealth resources in cases where both the ATO and the DPP are taking, or considering taking, recovery action against the same person. The guidelines are also designed to ensure that there is a free flow of information to the ATO in criminal cases so that overall tax recoveries are improved. Note that these guidelines apply where the DPP is taking, or considering, action under the Proceeds of Crime Act, section 243B of the Customs Act, or the DPP's civil remedies power in cases where a debt is owed to an agency other than the ATO. The guidelines do not apply to cases where the DPP is exercising its civil remedies power to recover a tax debt due to the ATO. In such cases, the ATO and the DPP will be pursuing the same debt and there will be no need to determine which avenue of recovery should proceed first.

---

170. DPP *Submission 8*.

6.39 Consistent with the objectives referred to in the above passage, and the more detailed elaboration found in the guidelines, the Commission has been led to understand that in all cases of potential conflict between POC Act recovery and recovery under the Income Tax Assessment Act, discussions between the two agencies lead to an accommodation involving agreement to pursue a particular recovery route.

6.40 It would seem to be self-evident that the capacity to negotiate such outcomes is only possible because of the absence of any clear legislative prescription as to what priorities should be.

Customs law

6.41 The office of the Director of Public Prosecutions has confirmed in its submission the potential that exists for conflict between the non-conviction based civil forfeiture regime in relation to prescribed narcotic dealings that is contained in Division 3 of Part XIII of the Customs Act and the conviction based confiscation provisions that exist in respect of the same offences under the POC Act.[171]

6.42 The DPP advises, however, that it has not experienced difficulty from conflicts between the two Acts. This would seem attributable, firstly, to the fact that the power to initiate proceedings under both Acts is vested in the DPP or, in the case of the Customs Act in persons on whose behalf the DPP would act, and secondly, because of the policy of the DPP of seeking recourse to the Customs Act regime only where there is what the office describes as 'solid' reason for not proceeding under the POC Act.[172]

6.43 Australian Customs has not addressed the issue of conflict/priorities in its submission to the Commission.[173]

Supplementary information

6.44 In the absence of any reference to the conflict/priorities issue in the submission received by the Commission from ITSA, the Commission sought the informal advice of its honorary consultant, Mr George Caddy, who is the NSW Official Receiver in Bankruptcy, on two questions. Firstly, the Commission sought confirmation of its analysis that the provisions of the POC Act touching on the bankruptcy interface leave unanswered some key issues on which conflict could arise and for which no legislative solution is provided. Mr Caddy has expressed general agreement with the Commission's analysis. Secondly, the Commission has sought Mr Caddy's advice on how such conflicts are avoided. In response, Mr-Caddy has pointed to a cooperative and pragmatic approach to such problems both

---

171.DPP *Submission 8*.

172.DPP *Submission 8*.

173.Australian Customs Service *Submission 36*.

by the DPP and ITSA, such that potential conflicts seem generally to have been successfully avoided through negotiation and compromise. This sense is consistent with the view of the DPP referred to earlier in this chapter.

6.45 On the basis of the submissions thus far received, and the Commission's own analysis of the relevant legislative provisions, the following conclusions can be drawn

- with the very limited, incomplete, and in some senses ambiguous exception of the bankruptcy laws, the legislation has entirely ignored the issue of the interface between the potentially competing and conflicting confiscatory and property settlement regimes of the POC Act, the Bankruptcy Act, the Income Tax Assessment Act, the Family Law Act, and the Customs Act
- in practice, however, actual and potential conflicts have been avoided because of the willingness of the relevant authorities, and notably the DPP, to reach compromises and accommodations, as well as the sound judgment of the Family Court in taking the strong public policy position in relation to the exercise of its own discretionary powers of seeking to ensure that the objectives of the POC Act are not frustrated by property settlement proceedings.

The Commission's view

6.46 In chapter 18 the Commission proposes that Division 3 of Part XIII of the Customs Act be incorporated in the POC Act. That recommendation, when developed legislatively, can be expected to eliminate any potential for conflict.

6.47 That leaves to be considered the potential for conflict between the POC Act and bankruptcy law, family law and taxation law.

6.48 At the outset, the Commission reiterates its basic view that the POC Act regime's primary objective is to deny to a perpetrator any unjust enrichment attributable to his or her unlawful conduct by the confiscation of the enrichment by the state for its own benefit. In that context, it needs to be borne in mind that taxation law, under which the state is the beneficiary, is in a different category to bankruptcy law and family law, where the ultimate beneficiaries are creditors (possibly including the state) or spouses or other family members respectively.

6.49 Dealing first with the Bankruptcy Act and the Family Law Act, it appears clear to the Commission that, in the absence of a clear legislative priority in favour of POC Act confiscation, there is scope for competing parties to seek compromises the effect of which can be to reduce the amount that is actually recoverable under the POC Act. The effect is that parties competing successfully with the state under such compromises thereby enjoy profits of unlawful activity, a concept that is anathema to the confiscation regime.

6.50 On the basis also of administrative, legal, court and other costs involved, which also reduce the amount available to the state, there is no doubt in the Commission's view that the failure of the legislation to deal with the issue of priorities in these cases needs to be addressed and resolved as a matter of urgency.

6.51 Even more intolerable, in the Commission's view, is that a situation should be allowed to continue in which, because of the absence of legislative clarity, persons who have profited from crime could have a potential ability to benefit at the expense of the Commonwealth. Under bankruptcy law this could arise from a pragmatic compromise whereby part of the profits are applied to meeting the convicted person's debts, which money would not have been available if bankruptcy had not occurred until after forfeiture had taken effect. Under the Family Law Act, this could occur by an alteration in property rights which increased the rights of a spouse, correspondingly reducing the exposure to forfeiture of the accused or convicted person.

6.52 Bearing in mind the unequivocal objectives set out in section 3 of the POC Act, the statements of government resolve in the Second Reading Speech and, more recently, in the statement of Attorney-General Williams when referring the POC Act to the Commission for review, the Commission is firmly of the view that the POC Act should prevail over the Bankruptcy Act and the Family Law Act in all cases where proceedings under the POC Act have been commenced — usually by an application for a restraining order. Where third parties claim an interest, either as creditors or family members, then, in appropriate cases, they will be able to have the property excluded from the restraining order by application under the POC Act exclusion order regime.

6.53 In favouring the creation of such a legislative priority, the Commission is conscious of the fact that a detailed consideration of every facet of interface between the POC Act and the bankruptcy and family law legislation would need to be undertaken. This would be necessary both

- to ensure that all possible escape holes and mechanisms were closed and
- to avoid any unintended or anachronistic outcomes.

6.54 While vital in itself, the Commission sees such a task as being beyond the scope of this particular reference.

6.55 The remaining issue to be dealt with is the interface between the POC Act and income tax law.

6.56 As mentioned earlier, income tax is levied on all income — whether lawfully or unlawfully earned. The ultimate beneficiary under both regimes is the Commonwealth. Accordingly, there is no risk that the absence of a legislated priority in favour of POC Act forfeiture may result in a net loss to the Commonwealth through diversion to taxation recovery of proceeds that would, if the POC Act were to prevail, be paid into the Confiscated Assets Reserve.

6.57 Thus, the legislating of a POC Act priority would not seem essential. Moreover, the benefits that currently flow from the flexibility available to the DPP, and the law enforcement agencies, in reaching practical accommodations with the Australian Taxation Office to facilitate the most speedy and efficient recovery, suggest that a rigid legislated priority might be counterproductive.

6.58 In this regard, the Commission is aware that, in practice, law enforcement agencies sometimes regard the ATO as the enforcer of last resort, tending to sweep up through default assessments a percentage of criminal assets. As stated in comments received from the NCA

> ... where it may not be possible to produce admissible evidence of underlying criminality, it will be possible to prosecute for fraud those involved in such tax evasion. It is hardly surprising that law enforcement agencies would see that taxation recovery is an appropriate remedy when the only other option available to them would be the current Commonwealth Proceeds of Crime Act ...[174]

6.59 Clearly, advantages of the kind identified by the NCA should not be lost by the interposition of unnecessary legislative prescriptions. That said, the Commission recognises the risk, inherent in allowing the current flexibility to continue, that taxation recovery is too readily resorted to as the sole means of recovery in cases where greater or additional recovery might be available by use of POC Act provisions.

6.60 The various arrangements between the ATO and the DPP and law enforcement agencies should be periodically reviewed to eliminate such risks.

Interface between Commonwealth law and State proceeds of crime legislation

6.61 While neither the terms of reference nor the initial round of key stakeholder consultations preceding the May pamphlet identified the interface between the Commonwealth laws, including the POC Act, and State proceeds laws, the matter has been raised in one submission received in response to the pamphlet. That is the submission from the South Australia Police. The submission raises the effect on State forfeiture laws of the federal Bankruptcy Act. In the case raised by the South Australia Police, a married couple were arrested for manufacturing amphetamines. The property on which the manufacturing plant was located, valued at about $250000, was restrained. According to investigations, the property was purchased in a false name through bank accounts held in several States by a drug financier and given to the defendants as payment for their services. Guilty pleas were entered and the property forfeited by consent. However, it was subsequently discovered that, between the making of the restraining order and the forfeiture order, the husband had been made bankrupt and the entire property handed over to

---

[174].Letter dated 22 January 1999 from the Chairperson of the NCA.

the Official Trustee to satisfy creditors. So seen the defendant still received a benefit in that, to the extent of $250000, his debts had been paid.[175]

6.62 In the absence of a clear direction in its terms of reference, the Commission believes that this issue, and indeed the broader issue of the interface between the POC Act and State law (of which this issue is but one part) is beyond its terms of reference. That said, and bearing in mind particularly that the confiscation of proceeds of crime is a nationwide concern closely related to the need for coordinated multijurisdictional action against drug related and other organised crime, the Commission is of the view that the question whether State and Territory proceeds laws should be capable of frustration of the kind that occurred in the case cited by the South Australia Police merits close and serious consideration by the Government, perhaps in the context of the Standing Committee of Attorneys-General.

Recommendation 20. The POC Act should give priority to confiscatory action under that Act over sequestration action under the Bankruptcy Act and property settlement action under the Family Law Act in all cases in which proceedings have been commenced under the POC Act.

Recommendation 21. The various arrangements between the ATO and the DPP and law enforcement agencies should periodically be reviewed to eliminate the risk that taxation recovery of proceeds is too readily resorted to as the sole means of recovery in cases where greater or additional recovery might be available by use of POC Act provisions.

175 SA Police *Submission 23*.

7. Laundering of property and money

Introduction

7.1 Money laundering is undertaken for two principal purposes. Firstly, insofar as unlaundered property or money may have evidentiary value in relation to establishing the commission of a substantive offence, the laundering is aimed at reducing the likelihood of prosecution for that offence. Secondly, and usually more importantly, the process involves conversion processes, often intricate and elaborate, designed to make it appear that the property has a legitimate source and hence represents neither forfeitable tainted property nor proceeds. This latter point was vividly made in a comment attributed to Bruce (Snapper) Cornwall, who was sentenced to 23 years imprisonment and subsequently had significant property confiscated when he allegedly said 'I don't give a f... what they do to me as long as we keep safe all that we have worked for'.[176]

7.2 The size of the money laundering problem cannot be accurately quantified but, in a research project funded by AUSTRAC and drawing on a wide range of financial and other data relating to 1994, it was estimated that in that year 'a range of between $1000 million and $4500 million would appear to be a sensible interpretation of the information provided in these sets of estimates, with perhaps some confidence that the most likely figure is around $3500 million, since this figure lies within all three estimate ranges'.[177]

7.3 The importance of dealing with money laundering in achieving the principal objectives of the POC Act was succinctly stated by Mr Tom Sherman, then Chairperson of the National Crime Authority and President of the OECD Financial Action Task Force, when he said

> Confiscation of criminal assets and prevention of money laundering go hand in hand. If money laundering is allowed to continue unchecked, large amounts of criminal assets will be effectively protected from confiscation. Perhaps more importantly, those assets can be reinvested in future criminal activity.[178]

7.4 The definitions of money laundering most frequently used in domestic legislative provisions is derived from that used in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[179] which provides that money laundering is

---

176.Temby QC *The Proceeds of Crime Act: one year's experience*, 13 Crim LJ 24, 30.

177.J Walker *Estimates Of The Extent of Money Laundering In And Through Australia* AUSTRAC September 1995, 39.

178.National Crime Authority *Proceeds of Crime Conference Sydney 18–20 June 1993*, AGPS, 314.

179.Although that was restricted to narcotics related offences.

- the conversion or transfer of property, knowing that such property is derived from any indictable offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person, who is involved in the commission of such an offence or offences to evade the legal consequences of his or her actions or

- the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an indictable offence or offences or from an act of participation in such an offence or offences.[180]

7.5 Similarly, in the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, money laundering is defined as follows

> (a) the conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions;
>
> (b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is proceeds.[181]

7.6 'Property' and 'Proceeds' are also defined as follows

> (a) "proceeds"
> means any economic advantage from criminal offences. It may consist of any property as defined in sub-paragraph b of this article;
> (b) "property"
> includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to, or interest in such property.[182]

7.7 Australia has ratified both conventions and was obliged to criminalise money laundering in order to fulfil its international obligations.

7.8 Australia discharged this obligation with the passage of the POC Act in 1987 which included two 'money laundering' offences, namely section 81 (money laundering) and section 82 (possession etc of property suspected of being proceeds of crime). These sections are as follows

> Money laundering

180.*Australian Treaty Series 1993* No 4 UNTS art 3(1)(b).

181.ETS No 141 art 6.

182.id art 1.

81.(1) In this section:
"transaction" includes the receiving or making of a gift.
(2) A person who, after the commencement of this Act, engages in money laundering is guilty of an offence against this section punishable, upon conviction, by:

(a) if the offender is a natural person — a fine not exceeding $200,000 or imprisonment for a period not exceeding 20 years, or both; or
(b) if the offender is a body corporate — a fine not exceeding $600,000.

(3) A person shall be taken to engage in money laundering if, and only if:

(a) the person engages, directly or indirectly, in a transaction that involves money, or other property, that is proceeds of crime; or
(b) the person receives, possesses, conceals, disposes of or brings into Australia any money, or other property, that is proceeds of crime;

and the person knows, or ought reasonably to know, that the money or other property is derived or realised, directly or indirectly, from some form of unlawful activity.

Possession etc. of property suspected of being proceeds of crime

82. (1) A person who, after the commencement of this Act, receives, possesses, conceals, disposes of or brings into Australia any money, or other property, that may reasonably be suspected of being proceeds of crime is guilty of an offence against this section punishable, upon conviction, by:

(a) if the offender is a natural person — a fine not exceeding $5,000 or imprisonment for a period not exceeding 2 years, or both; or
(b) if the offender is a body corporate — a fine not exceeding $15,000.

(2) Where a person is charged with an offence against this section, it is a defence to the charge if the person satisfies the court that he or she had no reasonable grounds for suspecting that the property referred to in the charge was derived or realised, directly or indirectly, from some form of unlawful activity.

7.9 Money laundering provisions have since been enacted in New South Wales, Victoria and Queensland. The NSW provision requires proof of actual knowledge that the money or property was proceeds of unlawful activity,[183] and there is no equivalent to the Commonwealth section 82 offence.

7.10 The Victorian provisions are virtually identical to sections 81 and 82,[184] as are those of Queensland.[185] However, the Queensland provisions are wider in that

---

[183].COPOC Act (NSW) s 73.

[184].Confiscation Act (Vic) s 122 and 123.

[185].CC Act (Qld) s 90 and 92.

they relate to 'tainted property' as opposed to only 'proceeds of crime' as in the New South Wales, Victorian and Commonwealth legislation. Another novelty about the Queensland provision is that it explicitly permits an act or two or more acts committed at the same time or at different times, or tainted property relating to an offence or two or more offences committed by the same or different persons, to be included in a single charge.[186] Additionally, it provides that the person who committed the predicate offence may be convicted of money laundering in relation to tainted property which resulted from or was involved in the commission of the offence.[187]

7.11 Finally, both the NSW and Victorian provisions provide a defence where the defendant satisfies the court that the money laundering was engaged in to assist the enforcement of the law.[188] This subject will be adverted to again later in this chapter.

Reforms proposed in submissions

Section 81

7.12 Submissions to the Commission have raised two related concerns with the operation of section 81. The first relates to the fact that the offence of money laundering is only provable if the proscribed conduct has been engaged in with money or other property that is proceeds of crime; that is, the proceeds of a proven predicate offence. The second relates to the practical difficulty experienced by law enforcement bodies in obtaining evidence sufficient to connect money laundering activity with specific predicate offences.

7.13 One particular concern expressed to the Commission is that, especially in cases of suspected ongoing criminality, money laundering reasonably suspected to be related to prior offences or conduct in respect of which proceedings cannot be brought for want of evidence cannot itself be prosecuted since the establishment of that prior offence is an essential ingredient of the money laundering offence. Moreover, where evidence of conduct of a money laundering kind subsequently leads to the detection of the accused in the commission of a later offence in respect of which, due to the arrest, no proceeds were generated, there is no possibility of achieving a conviction for money laundering on the basis of that offence as the relevant predicate offence.

7.14 The following passage from the AFP submission describes these difficulties by reference to particular examples and argues for reform on the basis of the experience gained thereby

---

186.CC Act (Qld) s 91(4).

187.CC Act (Qld) s 91(5).

188.COPOC Act (NSW) s 73(5) and Confiscation Act (Vic) s 122(3) respectively.

In proceedings under s 81, the AFP are required by the POC Act to prove the original offence beyond reasonable doubt to ensure a conviction, and also to prove that the funds are indeed the proceeds of that offence. This direct connection between the funds and the original crime is often difficult, owing chiefly to the covert nature of the criminality, as to be operationally impossible; it is rare for the offenders in question to record or otherwise keep receipts for their activities.

Further, as mentioned earlier a large number of investigations conducted by the AFP are drug related. A successful drug operation will normally result in an offender being found in possession of the drugs which are subsequently seized. There are, in these cases, not proceeds of the crime for which the offender is charged (as the drugs were never delivered or sold) although the offender may have substantial assets and have remitted a great deal of money in payment for the current importation or in relation to other importations.

Further, the time frame in question often makes proving the original offence difficult. In cases that come to notice for the detection of potential proceeds of crime, it is almost impossible to identify a predicate offence. In circumstances where there is a provable serious offence, it is not necessarily appropriate to wait for the proceeds to be detected before taking action against the offenders, as the substantive offence has been committed. It would be a courageous operational commander who lets targets, having committed a serious importation of heroin and for which sufficient evidence exists to prove the case, continue with their activities in order that evidence of the disposal of proceeds may be obtained to prove a POC Act offence. It is truly the exceptional instance where sufficient proof of the original offence exists and where the link between identified proceeds and the original offence is so strong as to make the case clear.

In one case reported to the AFP, an accountant in Australia escaped prosecution for money laundering because the link between the funds he remitted overseas for heroin-trafficking clients was not sufficiently clear or provable. In this case, the accountant opened an account with a financial institution on behalf of the principals of a heroin importing syndicate in a registered company name. Over four months the accountant deposited cash of almost $100,000 into the account, using false names and addresses and keeping the deposits below the $10,000 cash reporting threshold. He then withdrew the funds and transferred them to a Hong Kong account, operated by a third party. A month later he withdrew a further $100,000 and also remitted it to Hong Kong.

Several months later his clients were arrested in relation to an importation of around 23 kilograms of heroin, and were also later charged with two previous importations. The accountant was interviewed and admitted he was paid to transfer the money overseas. However, the DPP were of the view that the funds being handled by the accountant were prior to the detection of the heroin importations, and that a link could not therefore be established that the money transferred was indeed the proceeds of the importation of the heroin. Inquiries revealed that in this matter over $3 million was remitted overseas to accounts in Hong Kong and Bangkok, none of which was recovered.

In another matter, the AFP identified a range of financial transactions that were of interest, involving the remittance of around $1.3 million to Canada and Hong Kong by Australian based Chinese. In the course of the investigation, the AFP detected an importation of around 55 kilograms of heroin. Inquiries also identified other importations related to the same principal offenders. The DPP were not satisfied that the link between the cash remitted and the importations was sufficiently direct to enable prosecution under s 81, and declined to lay money laundering charges.

The AFP in its 1997 National Heroin Project determined that there was no set protocol by which heroin was bought on the international market, in some cases payment preceding importation, in other cases payment following, and sometimes purchases being made on credit or other 'terms'. It is not appropriate in tackling such a flexible criminal enterprise, that money laundering offence provisions require the temporal consideration that the money must flow from — and thus after — the offence.

Money laundering, as constituted under s 81 of the POC Act should be sufficiently flexible to enable prosecution where money is laundered in order to commit the principal offence, for instance, making payment for a pending importation of heroin. Further, where such large amounts of money are remitted overseas, and the transactions relate to offenders in Australia for serious Commonwealth offences which generate and require payment of large amounts of money, there should be some 'presumption' that the funds are the proceeds of a crime rather than some direct and certain connection having to be established. Alternatively, consideration may be given to shifting the onus of proof onto the defendant as to the legitimate acquisition or possession of the property in question. This is especially the case in circumstances where through asset betterment these offenders could be shown to be living beyond their means and incapable of otherwise generating the amount of money being remitted.[189]

7.15 The National Crime Authority expresses similar concerns in its submission

Section 81 of the POC Act requires proof beyond reasonable doubt that the money in question was derived from a Commonwealth indictable offence. Investigations will enable strong inferences to be drawn about the source of funds but there will be insufficient evidence to establish the nexus between the criminal act and the proceeds of a Commonwealth offence. For example, investigations often show individuals living expensive lifestyles, with no discernible source of legitimate income and with known connections to individuals involved in drug trafficking. Further, investigations have shown that Australia is being used to launder funds from overseas criminal activity. However, it is not sufficient to show that the property is reasonably suspected of being the proceeds of crime — it must be proved beyond reasonable doubt. Accordingly, in the above scenarios there is an insufficient basis for money laundering charges or restraining orders.

189.AFP *Submission 7.*

> Case studies highlighting the difficulties with the standard of proof are attached — Operations E and F.
>
> Further issues arise where there is a continuing pattern of trafficking in a prohibited substance and money laundering by a syndicate and its principal(s). First, it is impossible for an investigator to determine whether overseas transfers of funds by the syndicate are related to the laundering of the proceeds of prior trafficking or to payment for new shipments. Secondly, the continuing pattern of trafficking may be terminated by the seizure of a shipment of drugs and the laying of drug related charges against those involved. However, as there are no proceeds from the sale of that shipment, it cannot be said that money laundering has taken place and the third party launderers of the proceeds of prior shipments are able to escape prosecution.[190]

7.16 The NCA has drawn to the attention of the Commission two cases that are illustrative of the difficulties described in its submission.

7.17 These cases are as follows

> ***Operation E***
> C is the head of a syndicate involved in heroin importation and distribution. There is insufficient evidence to charge him with specific offences.
>
> Z is the head of a syndicate that remits large amounts of money to off-shore bank accounts. The syndicate remits the money through accounts in names of persons whom Z has introduced as his relatives to a number of banks. Prior to the time when he began remitting large sums quite openly on the basis that it was related to his relatives' overseas business activities, Z and others had structured smaller amounts to several accounts overseas.
>
> There have been meetings between Z and C and between Z and others known to be associated with the heroin importation and distribution syndicate. At those meetings bags believed to contain large amounts of money were handed to Z and shortly afterwards Z was observed at banks carrying the same bags.
>
> There is evidence connecting at least one member of the heroin importation syndicate directly to the possession of heroin. However, there is no evidence to connect any specific drug transaction to money which is believed to have been provided to Z.
>
> There is substantial intelligence to indicate that Z is laundering money from the syndicate headed by C. Investigations conducted to date suggest that the transfer of funds from Z to his 'relatives' are a sham set up to facilitate money laundering. There is no apparent legitimate source for the large sums remitted overseas by Z. Family members and others associated with the syndicate have unexplained sources of wealth. There is insufficient evidence of the drug offences to enable charges for money laundering to be brought.
>
> Operation F

---

[190] NCA *Submission 16*.

> D was involved in remitting several million dollars to off-shore bank accounts. This was done by means of a thousand separate transactions to numerous accounts in different names. Although there was intelligence that D was associated with drug importers, there was insufficient evidence to establish predicate offences for money laundering. D was charged with conspiracy to structure — those charges carry a much lesser penalty than section 81 of the POC Act and will by no means reflect the seriousness of the offences.[191]

7.18 ***The Commission's view.*** While the Commission understands the considerable frustration experienced by law enforcement agencies in cases such as those described above where evidence points strongly to money or property being the proceeds of a particular offence and being dealt with in one of the proscribed ways, but where the evidence is not sufficient to prove the matter beyond reasonable doubt, it is not convinced that the case has been made for reforms as drastic, for example, as the removal, reduction or substitution by rebuttable presumptions or averments of the evidentiary requirements in the case of an offence which carries a penalty of up to 20 years imprisonment. Nor has any submitter proposed such reforms.

7.19 On the other hand, the Commission believes that the submissions referred to above make a significant case for reforms that would enable the offence of money laundering to be provable by reference to a wider range of activity, namely, proscribed activity relating to money or property that can be proved beyond reasonable doubt to be preparatory to, or associated with, the commission of the relevant predicate offence or a consequence of the commission of such an offence. This last mentioned formulation would encompass, but not be limited to, proceeds as defined.

7.20 The Commission would accordingly favour the replacement of section 81(3) with a new provision the effect of which would be that a person shall be taken to engage in money laundering if the person receives, possesses, conceals or disposes of any money or the property for the purpose of committing or facilitating the commission of an indictable offence or as a consequence of the commission of such offence. The resulting omission of any reference (as in the current section 81(3)) to importation into Australia would be made good by new offence provisions, paralleling sections 81 and 82, in respect of both importation and exportation that are proposed later in this chapter.

7.21 The Commission notes that its proposed new formulation of money laundering would have the same effect as the Queensland legislation already referred to, in that all tainted property — which can include property intended to be used in criminal activity — could be the subject of a money laundering charge.

Section 82

---

[191] .ibid.

7.22 When introducing the Proceeds of Crime Bill into the Federal Parliament, the then Attorney-General, the Hon Lionel Bowen MP, said of section 82 that the offence created by it

> is very similar to the offence of possession of goods reasonably suspected of being stolen, which exists in most jurisdictions and has proved to be an effective law enforcement tool against theft.[192]

7.23 According to the submissions from the AFP and the NCA, however, the section has not lived up to expectations.[193] In particular, they are concerned that the effect of the language of section 82(1) is to require proof that the money or property in question is reasonably suspected of being the proceeds of a particular identifiable predicate offence. By contrast, the analogous offence of possession referred to by the former Attorney-General does not require such proof.

7.24 The office of the DPP also refers to a need to prove a predicate offence and points to additional problems that can arise if a person possesses money or property

> that is clearly proceeds of crime but it cannot be said whether the relevant crime was committed against Commonwealth law or the law of a State. As the POC Act currently stands, there must be reasonable grounds to believe that the relevant property is the proceeds of a crime against a law of the Commonwealth, a territory or a foreign country. It can be difficult to satisfy that test if, for example, the evidence shows that the defendant was involved in both importing and distributing drugs but it is not possible to say which activity generated income.
>
> There may be Constitutional limits on what can be done under Commonwealth law. However, the present provisions may be more narrow than they need to be. There would seem to be no reason, for example, why the Commonwealth parliament could not pass a law that made it an offence for a person to send the proceeds of crime out of Australia, irrespective of whether the crime was committed against Commonwealth State or Territory law. There may be other ways in which the provisions could be given a wider operation without exceeding Constitutional limits.[194]

7.25 In order to overcome the difficulties which it and the AFP raise in connection with the need to identify a particular predicate offence, the NCA suggests that the section should apply to property reasonably suspected of being proceeds of any 'illegal activity'. According to its submission, such an amendment would bring the section closer to its intended operation of being similar to a goods in custody offence, such as that in section 527C of the *Crimes Act 1900* (NSW).[195]

---

192. *Hansard (H of R)* 30 April 1987, 2316.

193. AFP *Submission 7* and NCA *Submission 16*.

194. DPP *Submission 8*.

195. NCA *Submission 16*.

7.26 In its submission, the AFP also identifies the difficulties raised by the DPP in the above cited passage and likewise suggests the need for additional provisions rendering unlawful the remission out of Australia of money related to an offence, whether the offence be one under Commonwealth or State law and whether it be the proceeds of a specific offence or otherwise related to what it describes as serious criminality. Otherwise, the AFP supports the retention of section 82 but with a significantly increased maximum penalty.[196]

7.27 The relevant parts of the AFP submission are as follows

> Owing to the issues of jurisdiction and the Constitutional limitations of the Commonwealth to legislate on matters that are more properly State matters, there is a difficulty with pursuing s 82 offences where it is unclear if the predicate offence is against Commonwealth or State law. This issue arises when an offender possesses a large amount of unaccountable funds, probably the proceeds of crime, but where the original offence is not precisely or demonstrably known. Although there is a level of belief of 'reasonable suspicion' provided in this section, the knowledge that the offence was committed against the Commonwealth must be based on reasonable grounds to believe. This becomes an issue in matters of, for example, high level distributors of drugs who are also importers. Are funds detected in the control of the offender the proceeds of a State or a Commonwealth offence?
>
> The AFP would favour an offence provision which created the offence of laundering money, whether it be the proceeds or other money 'related' to an offence, such as payments for illicit produce. Such provision should count the act of remitting or otherwise sending money out of Australia as 'laundering'. Further the money sent out of Australia or otherwise laundered should not have to be the result of or related to a Commonwealth indictable offence. Presumably, once money is sent out of Australia it becomes Constitutionally irrelevant whether the offence to which the funds relate are State or Commonwealth. Alternatives to the present offence provision of s 82 must be explored if we are serious about pursuing those who launder money, whether it be the proceeds of specific offences or otherwise related to serious criminality.
>
> Apart from the jurisdictional issues concerning the predicate offence, s 82 should remain. However, the penalty for this offence should perhaps be reviewed. While the intention of the offence of possessing property suspected of being the proceeds of crime may be to create a Commonwealth version of a 'goods in custody' type offence, the reality is that the proceeds of crimes within the ambit of the Commonwealth are generally substantial, often involving millions of dollars, and often relating directly to illicit drug trafficking. It seems that a $5000 fine is unreasonably light in circumstances where millions of dollars are involved, and not sufficiently reflective of the probably serious and continuing nature of the criminality behind the activities of the offender.[197]

196.AFP *Submission 7*.

197.ibid.

7.28 ***The Commission's view.*** The Commission is persuaded by the submissions that section 82 is in need of reform to ensure that it is capable of its intended operation analogous to the offence of being in possession of goods reasonably suspected of being stolen. The Commission would favour the adoption of a formula that both removed the need to identify a particular predicate offence and enabled the provision to apply in respect of money as property reasonably suspected of being the subject of proscribed activity that is preparatory to, associated with, or flows from the commission of an indictable offence. More particularly, the Commission would envisage that section 82 be recast to render guilty of an offence under that section a person who receives, possesses, conceals or disposes of any money or other property that may reasonably be suspected of having been so received, possessed, concealed or disposed of, for the purpose of committing or facilitating the commission of an indictable offence against Commonwealth law or as a consequence of the commission of such an offence. Again, as in the case of the proposed revision of section 81, the omission of any reference to importation into Australia would be to take account of the relevant proposed new parallel offence for both importation and exportation discussed below.

Importing or exporting — new parallel offences

7.29 As recognised by both the NCA[198] and the AFP,[199] limitations on Commonwealth constitutional power necessarily circumscribe the extent to which the legislation can overcome problems associated with identifying whether the prescribed conduct under section 82 relates to a Commonwealth or a State offence.

7.30 The Commission agrees with both, however, that scope exists constitutionally for curtailing money laundering activity (by use of the external affairs and trade and commerce powers) to target certain conduct related to the importation and exportation of money or property in a manner that avoids the need to establish a nexus with an offence under Commonwealth law. The clear evidence from case examples of large scale transfer of funds both into and out of Australia without any apparent lawful explanation militates in favour of reinforcement of the existing provisions of sections 81 and 82 in this way. The same constitutional heads could also be used in relation to such conduct involving the importation into Australia of moneys suspected of being the proceeds of foreign criminal activity.

The Commission's view

7.31 Specifically, the Commission would see value in complementing revised sections81 and 82 with two new provisions paralleling sections 81 and 82 but relating exclusively to importation and exportation and applying to any proscribed activity that is related to the commission of an indictable offence under a law of the

198.NCA *Submission 16*.

199.AFP *Submission 7*.

Commonwealth, a State or Territory or of a foreign country provided that the conduct would also amount to an offence in Australia if engaged in here.

7.32 The first provision would render guilty of an offence, punishable in the same way as an offence under section 81, any person who imports into, or exports from, Australia any money, or other property, for the purpose of committing or facilitating the commission of any indictable offence against a law of the Commonwealth, a State or Territory, or against a law of a foreign country, which, if committed in Australia would be such an indictable offence, or as a consequence of such offence.

7.33 The second provision would render guilty of an offence, punishable in the same way as an offence under section 82, any person who imports into, or exports from, Australia any money, or other property, reasonably suspected of having been so imported or exported for the purpose of committing or facilitating the commission of an indictable offence against a law of the Commonwealth, a State or Territory, or against a law of a foreign country which, if committed in Australia would be such an indictable offence, or as a consequence of such offence.

7.34 The Commission would foresee the need for importation and exportation to be defined sufficiently widely to encompass all forms of telegraphic and electronic transmission. It would also see the need for 'money or other property' to be defined to include finance instruments, smart-cards and other objects which may have no intrinsic value but represent cash or can be exchanged for it.

Evidentiary aids

7.35 In the light of the obvious difficulties of proof evidenced by the case studies and submissions provided to the Commission, the question arises whether any evidentiary aids are either necessary or desirable in relation to section 82 offences and the proposed new parallel provisions dealing with importation and exportation. This question is rendered more important both by the fact that money laundering is usually conducted separately from the predicate offence and also because it is often conducted by persons other than the perpetrators of that offence, albeit on their behalf.

The Commission's view

7.36 The Commission has reached the view that, in order to make section 82 and the proposed new parallel provisions on exportation and importation more effective as a preventative and enforcement tool, there should be available, as evidentiary aids to establish the reasonableness of a suspicion of property being the proceeds of crime, rebuttable presumptions to the effect that where

- the importation or exportation involves 'structured transactions' designed to avoid the reporting requirements of the FTR Act or the use of bank accounts in false names
- the amount of the exportation or importation is grossly out of proportion to the defendant's income and expenditure
- the importation or exportation involves currency to the value of $A10000 and the defendant has failed to meet the disclosure obligations under the FTR Act, or has furnished false information in purported compliance with them

the court may be satisfied of that element of the offence requiring that the money or property be reasonably suspected of having been received, possessed, concealed or disposed of for the purpose of committing or facilitating the commission of an indictable offence against a law of the Commonwealth or as a consequence of such an offence.

7.37 The Commission notes that its recommendations would result in the section82 offences being more analogous to State and Territory 'goods in custody' offences. The Commission does not regard the mere fact that quite considerable amounts of money may be involved in such an offence as justifying an increase in penalty.

Sections 81 and 82 — proposed transaction suspension order

7.38 The NCA has given various case examples involving large scale transfers of funds overseas in the absence of any apparent lawful purpose or motive. Under the current regimes of both the POC Act and the FTR Act, authorities interested in the prevention of money laundering and the prosecution of money launderers ordinarily become aware of transactions only after the event. There is no current mechanism whereby law enforcement bodies are required to be alerted to the initiation or imminent initiation of a suspect transaction in a manner that enables them to prevent a transaction — particularly a transfer overseas — from taking place.

7.39 Even a monitoring order under the POC Act's Division 3 of Part IV, requiring a financial institution to provide information obtained by the institution about transactions conducted through an account held by a particular person, results in the provision of information regarding transactions which have already occurred. Such an order is available only in relation to 'serious offences'. Accordingly, such an order can only be sought in connection with money laundering where that activity relates to a serious narcotics offence or an organised fraud offence — something which is often not known at the early stages of an investigation.

7.40 Bearing in mind that one of the benefits of the POC Act is its effect in depriving criminals of proceeds which can be reinvested in criminal activity, the absence of any mechanisms to facilitate the interruption of suspect transactions presents itself to the Commission as a major shortcoming of the legislation.

7.41 Moreover, any sense of obligation that financial institutions might otherwise have to alert law enforcement authorities to the initiation of as yet incomplete suspect transactions is substantially reduced by the necessary protection of section17 of the FTR Act which, in relation to the obligation under section 16 to report suspect transactions, provides

> Where a cash dealer, or a person who is an officer, employee or agent of a cash dealer, communicates or gives information under section 16, the cash dealer or person shall be taken, for the purposes of sections 81 and 82 of the *Proceeds of Crimes Act 1987*, not to have been in possession of that information at any time.

7.42 The policy underlying that provision is to relieve dealers of any responsibility in relation to a suspicious transaction beyond fulfilling the formal reporting obligations under section 16. One effect of this provision, however, is that, even where the knowledge of the dealer is such that to facilitate that transaction would, in other circumstances, constitute complicity in money laundering, the dealer is immune from prosecution because the provision effectively deems the dealer not to have had the necessary *mens rea*. That said, the Commission recognises that a balance needs to be maintained between ensuring that cash dealers play their proper role in relation to the detection of suspect transactions and protecting them from assuming unreasonable risks by reason of knowledge acquired in discharging that function.

7.43 According to AUSTRAC, suspect transaction reports are made available to the AFP within 24 hours of the receipt of the report by AUSTRAC, and 24 hours later to all other police forces. The NCA also has access to them.[200] Under standing arrangements there is an obligation on whatever force or body decides to investigate such a report to notify AUSTRAC so that any subsequent reports are referred to that investigating body. However, as already noted, there is no statutory requirement or arrangement under which AUSTRAC or law enforcement agencies are to be informed of the initiation or imminent initiation of a suspect transaction.

7.44 Thus, even where an investigation has proceeded to an extent where there is *prima facie* evidence of money laundering, neither AUSTRAC, nor any other body, is alerted to the fact that a significant transaction is about to occur. Nor, as far as the Commission is aware, is there any other mechanism whereby a law enforcement agency could ensure that it became so aware.

7.45 The Commission notes, that since April 1998, a new anti money laundering law has been in force in Switzerland. Under that law, banks, foreign

---

[200].Meeting with AUSTRAC on 10 June 1998.

exchange outlets and other financial intermediaries are obliged to notify any suspicious transactions and to immediately block the questionable funds. The new law applies to anyone who professionally handles money or helps to place or transfer property or financial possessions, including money managers, notaries, foreign exchange outlets and insurance firms. Failure by banks to comply can result in revocation of bank licences.

7.46 At the request of the Commission, AUSTRAC, through its Belgian counterpart the Belgian Financial Intelligence Processing Unit (CTIF/CFI), obtained details of other European jurisdictions having similar or analogous laws.

7.47 According to CTIF/CFI, besides Switzerland, similar mechanisms exist under Belgian, German and French law.

7.48 In Belgium, pursuant to the Anti Money Laundering Act of 11 January 1993, financial institutions are generally obliged to disclose suspicious transactions before carrying them out. CTIF/CFI can then freeze the transaction for 24 hours. If a longer period is required, CTIF/CFI reports the matter to the Public Prosecutor who can, on his own authority under certain circumstances, or by order of an Investigating Judge, seize the money. If the reporting financial institution receives no advice 24 hours after reporting the transaction, it may proceed with it. According to CTIF/CFI the purpose of the law is twofold: to identify a possible predicate offence and to prevent suspicious assets disappearing with no chance of recovery.

7.49 In Germany, Article 11 of the Money Laundering Act of 25 October 1993 requires a financial institution or casino to report, by facsimile, telephone, telex, electronic data communication or orally, any facts suggesting that a financial transaction serves — or if accomplished would serve — the purpose of money laundering. The report must be made to the Office of Public Prosecutions. The transaction may only be proceeded with if the public prosecutor's office consents or, in the absence of such consent, two days after the report was made.

7.50 In France, pursuant to Act No 90–614 of 12 July 1990, suspicious transactions must be reported to TRACFIN, France's equivalent of AUSTRAC. TRACFIN acknowledges receipt of the report either with, or without, objection. If an objection is included, the transaction may be proceeded with 12 hours after receipt of the objection unless the Paris Upper Instance Court or an Investigating Magistrate extends the period or decrees the temporary seizure of the relevant capital, accounts or bonds covered by the suspicious transaction report.

The Commission's view

7.51 In the light of the above considerations and analysis, the Commission sees an urgent need for a legislative mechanism the effect of which would be to put law enforcement bodies on notice of suspect transactions relating to possible money laundering activity that have been foreshadowed or initiated, but not yet completed,

thus enabling restraining action to be taken, in particular to prevent money being sent out of Australia.

7.52 Specifically, the Commission's disposition is to favour a new procedure, analogous to a monitoring order under section 73, whereby a judge, being satisfied that a person

- had committed or was about to commit
- was involved in, or was about to be involved in or
- had benefitted directly or indirectly or was about to benefit directly or indirectly, from the commission of

an offence under section 81 or section 82, as proposed to be amended, or the proposed new parallel provisions, could make a suspension order in respect of an identified account, or identified accounts, operated, or controlled, by that person.

7.53 The order would, as in the case of a monitoring order, be directed to a financial institution. However, unlike a monitoring order it would direct the institution to notify the relevant law enforcement authority forthwith of any foreshadowed or initiated transaction in the relevant account and to refrain from effecting the transaction for 48 hours.

7.54 The period of 48 hours would provide sufficient time for the law enforcement body to seek a restraining order in respect of money the subject of the proposed transaction. The institution would be subject to disclosure restrictions similar to those applying to monitoring orders under the POC Act.[201]

7.55 Having regard to the potential impact of this proposal on the banking community, the ABA was given the opportunity to comment on it. The ABA has advised the Commission that

> The banking industry would be most concerned if any of these mooted changes resulted in their employees (who complete suspect transactions reports), having their personal safety put at risk. The industry had lobbied vigorously to ensure that the identity of employees be kept confidential. Thankfully, this problem was rectified in May 1997 when the Financial Transaction Reports Amendment Act was introduced. Legislative force was given for the following to be considered inadmissable in evidence in any legal proceedings:
>
> (a) a Suspect Transaction Report;
> (b) a copy of such a report; or
> (c) a document purporting to set out information contained in such a report.

---

[201].s 74, generally speaking, prevents disclosure of the existence or operation of a monitoring order other than to the investigating agency authorised to obtain the information under the order, or to a legal professional in the course of obtaining advice etc in respect of the order. These people are themselves also prevented from disclosing such information.

> Further, evidence is not admissible as to:
>
> (a) whether or not a Suspect Transaction Report, was prepared;
> (b) whether or not a copy of any report, or a document purporting to set out information contained in such a report, was given to, or received by, the Director (of Austrac); or
> (c) whether or not particular information was contained in a report.
>
> Consequently, the banking industry would need assurance that the changes, leading to transactions being interrupted or restrained, would not place bank staff at unnecessary risk or personal trauma.[202]

7.56 Given the analogous nature of this proposed new order to monitoring orders, the Commission regards the concerns expressed by the ABA as reasonable and accordingly recommends that the same safeguards applicable to monitoring orders be provided in relation to financial transaction suspension orders.

7.57 In chapter 4 the Commission has raised the issue whether the range of offences to which the statutory forfeiture regime should be broadened. Given the critical importance of the money laundering provisions to the integrity of the forfeiture regime as a whole, the Commission is of the view that the various money laundering offences, both existing and proposed, should be included in the category of 'serious offences'. Indeed, the availability of monitoring orders, and the proposed suspension order, in the investigation of these offences is premised on that basis.

Sections 81 and 82 — residual difficulties

Need for separate pleading of individual transactions — the Commission's view

7.58 The NCA has raised the question whether, when money laundering is being alleged, each transaction needs to be separately pleaded. According to the NCA

> A charge that an accused conducted a series of transactions between particular dates may be open to challenge as duplicitous and there is a danger that a conviction would be quashed on appeal. Accordingly, it may be necessary to file separate charges for each transaction.
>
> The ability to consolidate into a single charge a series of transactions that form part of a single enterprise has both practical and public interest advantages. From the practical standpoint, it provides a more streamlined and convenient means of bringing all elements of the single enterprise before the courts, compared with the alternative of preparing a myriad of separate charges. From the public interest perspective, it has the considerable advantage of allowing the whole of the picture of connected criminal conduct to be presented to the court — a picture that is essential for ensuring that the full dimension of the activity is seen and understood.

---

202. ABA *Submission 13*.

> Without such a capacity, and faced in some cases with the choice of dozens or even hundreds of separate charges or the selection of a manageable few, there is the risk that the court will not comprehend the extent and gravity of the criminal enterprise involved.[203]

7.59 For these reasons the Commission is disposed to support the view of the NCA that the POC Act should be amended to enable what are commonly described as 'between dates' charges to be brought for alleged offences under section 81 and 82 where the individual transactions to which a charge relates form part of a single enterprise.

7.60 In this connection, the Commission notes that the New South Wales Court of Criminal Appeal has held, in relation to the NSW provision corresponding with section 81,[204] that the inclusion of multiple counts in a single charge is already permissible under those provisions. That does not, however, diminish the desirability of putting beyond doubt the ability to do so under the Commonwealth provisions. Importantly, the court concluded in that case that the laying of a single charge did not prejudice the defendants in preparing their defence.

> No question of surprise or embarrassment was involved. The appellants had no difficulty in understanding the nature of the case they had to meet, or in proving their defence. We cannot accept that common sense dictated that the appellants should be dealt with as having committed separate offences every time they did anything, in relation to any of the banknotes ...[205]

Application of the 'controlled operation' immunity to money laundering offences — the Commission's view

7.61 The AFP has raised the issue of the need to provide protection to undercover police officers who become engaged in money laundering related activities for the purposes of securing evidence sufficient to enable charges to be brought against money launderers. The Commission notes in this regard that both the New South Wales[206] and Victorian[207] laws provide a defence to a prosecution for an offence under the relevant section for a defendant who satisfies the court that the defendant engaged in money laundering to assist the enforcement of a law of the Commonwealth, a State or a Territory. The AFP has drawn the Commission's attention to Operation Casablanca, an undercover operation mounted by officers of the US Customs Service against high level drug traffickers and money launderers which netted US$130 million and three tonnes of cocaine. In the course of this

---

203. Family Court of Australia *Submission 6*.

204. COPOC Act (NSW) s 73.

205. *R v Carl Moussa Trad, Peter Younan & Raymond Younan* (unreported) NSW Court of Criminal Appeal (Gleeson CJ, Badgery Parker J and Abadee J) 19 February 1996.

206. COPOC Act (NSW) s 73(5).

207. Confiscation Act (Vic) s 122(3).

operation, undercover agents were actively involved in money laundering activities, including the operation of 'shopfront' exchange bureaux. This was made possible by the US Undercover Authority Act.

7.62 According to the AFP, the High Court decision in *Ridgeway v R*,[208] which disallowed evidence obtained through a controlled delivery of drugs due to the unlawful conduct of police involved, would equally make it impossible for police to be involved in what may be described as 'controlled delivery of proceeds in crime'. The Commission notes that such controlled delivery is recommended in the OECD Financial Action Task Force recommendations designed to render it difficult for the financial sector to be used for money laundering purposes.[209]

7.63 While the Commission is satisfied that unique investigative powers may be necessary to effectively investigate money laundering, it notes that, in response to the *Ridgeway* decision, certain provisions permitting 'controlled deliveries' of narcotics with law enforcement involvement were enacted. These provisions, according to advice from the Attorney-General's Department, are currently being reviewed with a view to, *inter alia*, applying them to undercover operations generally. Accordingly, the Commission has given no further consideration to this issue which, by its very nature, is capable of giving rise to a multiplicity of further issues.

Location of money laundering provisions — the Commission's view

7.64 A further question that arises for consideration is the appropriateness of the money laundering provisions being located in the POC Act. Part V of the POC Act creates both the money laundering offences and the organised fraud offence attracting statutory forfeiture pursuant to section 30 of the Act.[210]

7.65 While these offences are important in relation to the proceeds regime, they do not form an integral part of it. Submissions by AUSTRAC, the NCA, AFP and AGD all recommend that these provisions be relocated into the Crimes Act, thereby giving added emphasis to the seriousness with which they are regarded. The Commission agrees with these suggestions.

> **Recommendation 22.** Section 81 should be broadened to render guilty of the offence of money laundering any person who receives, possesses, conceals or disposes of, any money, or other property, for the purpose of committing or facilitating the commission of an indictable offence against a law of the Commonwealth or as a consequence of the commission of such an offence.

---

208. *Ridgeway v R (1995)* 69 ALJR 484.

209. AFP *Submission 39* submitted as an addendum to *Submission 7*.

210. POC Act (NSW) s 81 and 82 (money laundering) and s 83.

Recommendation 23. Section 82 should be broadened to render guilty of an offence under that section a person who receives, possesses, conceals or disposes of, any money, or other property, that may reasonably be suspected of having been so received, possessed, concealed or disposed of, for the purpose of committing or facilitating the commission of an indictable offence against a law of the Commonwealth or as a consequence of the commission of such an offence.

Recommendation 24. Section 81 should be supplemented by a parallel provision in relation to the importation and exportation of money and other property which would render guilty of an offence, punishable in the same way as an offence under section 81, any person who imports into, or exports from Australia any money, or other property, for the purpose of committing or facilitating the commission of any indictable offence against a law of the Commonwealth, a State or Territory, or against a law of a foreign country which, if committed in Australia, would be such an indictable offence, or as a consequence of such an offence.

Recommendation 25. Section 82 should be supplemented by a parallel provision in relation to importation and exportation of money or other property which would render guilty of an offence, punishable in the same way as an offence under section 82, any person who imports into, or exports from, Australia any money, or other property, reasonably suspected of having been so imported or exported for the purpose of committing or facilitating the commission of an indictable offence against a law of the Commonwealth, a State, a Territory, or against a law of a foreign country which, if committed in Australia, would be such an indictable offence, or as a consequence of such an offence.

Recommendation 26. For the purposes of Division 1 of Part V, specific provision should be included to make clear that exportation and importation includes electronic and telegraphic transmissions of funds.

Recommendation 27. For the purposes of Division 1 of Part V, specific provision should be made to ensure that money or other property includes finance instruments, cards and other objects which may have no intrinsic value but which represent cash or can be exchanged for it.

Recommendation 28. In order to render section 82, and the recommended parallel provision relating to importation and exportation effective, it is desirable that their enforcement be assisted by statutory presumptions to the effect that where

- the importation and exportation involves 'structured transactions' designed to avoid the reporting requirements of the FTR Act or the use of bank accounts in false names

- the amount of the exportation or importation is grossly out of proportion to the defendant's income and expenditure
- the importation or exportation involves currency to the value of $10000 and the defendant has failed to meet disclosure obligations under the FTR Act or has furnished false or misleading information in purported compliance with them

the court may be satisfied of that element of the offence requiring that the money or property be reasonably suspected of having been received, possessed, concealed or disposed of for the purpose of committing or facilitating the commission of an indictable offence against a law of the Commonwealth, or as a consequence of the commission of such an offence.

Recommendation 29

- A new procedure, analogous to a monitoring order under section 73, should be introduced whereby a judge, being satisfied, on information provided by a law enforcement agency, that a person
  - has committed or was about to commit
  - was involved in or was about to be involved in or
  - had benefited directly, or indirectly, or was about to benefit directly or indirectly from the commission of

  an offence under section 81 or section 82, or the recommended new parallel provisions, could make a suspension order in respect of an identified account, or identified accounts, operated or controlled by that person with a financial institution.

- Such an order would direct the financial institution concerned to notify the relevant law enforcement agency forthwith of any foreshadowed or initiated transaction involving the relevant account and to refrain from effecting the transaction for 48 hours.

- The institution concerned would be subject to disclosure restrictions similar to those applicable to monitoring orders by virtue of section 74, and be entitled to similar safeguards as to the inadmissability of evidence of the existence and operation of the order.

Recommendation 30. The existing and recommended new money laundering offences should, for the purpose of the POC Act, be included in the definition of 'serious offences'.

Recommendation 31. Money laundering charges should be able to be pleaded in a single charge as a continuing criminal enterprise involving transactions over a specified period.

Recommendation 32. The money laundering provisions of Division 1 of Part V of the POC Act should be transferred to the Crimes Act.

8. Time constraints

Introduction

8.1 The POC Act contains a number of time constraints, all of which may have a bearing on the efficiency and effectiveness of operations under the Act and, indeed, on the broader issue of the effective administration of justice. It is convenient to bring these together in this chapter.

8.2 The time constraints relate to issues such as the duration of restraining orders, when automatic forfeiture occurs, when applications may be made for forfeiture and pecuniary penalty orders and the time within which applications must be made to exclude property from automatic forfeiture orders.

8.3 In its introductory pamphlet to this inquiry, the Commission specifically raised the issue of the duration of restraining orders and whether they should remain in force pending the completion of criminal proceedings and, if so, whether any party should have the right to re-open the issue of the restraining order or the scope of the property to which it relates.

8.4 The submissions received have raised only limited issues. They relate in the main, firstly, to the question whether automatic forfeiture should be permitted in cases of 'deemed conviction' (that is in matters where the defendant has rendered himself or herself unamenable to justice by absconding,) and, secondly, to the need to seek extensions to restraining orders. Some other issues, including the duration of *ex parte* restraining orders and the initial duration of a restraining order, have already been dealt with in chapter 5.

8.5 Finally, the NCA has questioned why a pecuniary penalty order should not be able to be made for a period of six months after the conviction since, in its view, it would be more efficient to do so immediately after conviction when the facts of the case are still fresh in the minds of counsel and the court.

Automatic forfeiture in cases of 'deemed conviction'

8.6 Under the provisions of section 30, automatic forfeiture of all property still the subject of a restraining order occurs six months after conviction for a serious offence or, if a section 48 application to exclude property is undetermined and the court has extended the period,[211] that extended period.

8.7 The policy underlying these provisions is that the defendant may make his or her application after conviction,[212] rather than be forced to do so in

[211].POC Act s 30A.

[212].s 48(4).

circumstances where he or she may, in seeking to justify such an application, jeopardise any available defences to the substantive charge, or might be forced to disclose material which may strengthen the prosecution case.

8.8 By virtue of section 30(1)(a), these automatic forfeiture provisions do not apply to a person who is deemed to be convicted by reason of having absconded in connection with a serious offence. The notion of absconding is dealt with in the Act in sections 6 and 17.

8.9 Section 6 provides

> 6. For the purposes of this Act (except section 17), a person shall be taken to abscond in connection with an offence if and only if
> (a) an information is laid alleging the commission of the offence by the person;
> (b) a warrant for the arrest of the period is issued in relation to that information; and
> (c) one of the following occurs:
> (I) the person dies without the warrant being executed;
> (ii) at the end of the period of 6 months commencing on the day on which the warrant is issued:
> (A) the person cannot be found; and
> (B) the person is, for any other reason, not amenable to justice and, if the person is outside Australia, extradition proceedings are not on foot;
> (iii) at the end of the period of 6 months commencing on the day on which the warrant is issued:
> (A) the person is, by reason of being outside Australia, not amenable to justice; and
> (B) extradition proceedings are on foot;
> and subsequently those proceedings terminate without an order for the person's extradition being made.

8.10 Section 17 provides

> Where a person is, by reason of paragraph 5(1)(d), to be taken to have been convicted of an indictable offence, a court shall not make a confiscation order in reliance on the person's conviction of the offence unless the court is satisfied, on the balance of probabilities that the person has absconded and:
> (a) the person has been committed for trial for the offence; or
> (b) the court is satisfied, having regard to all the evidence before the court, that a reasonable jury, properly instructed, could lawfully find the person guilty of the offence.

8.11 Section 5(1)(d) provides

> For the purposes of this Act, a person shall be taken to be convicted of an offence if:..
> the person absconds in connection with the offence.

8.12 In his submission, the DPP queries whether the current exception in section30(1)(a) relating to persons who abscond in connection with an offence is still appropriate.

8.13 The Office of the DPP states

> As the POC Act currently stands, a defendant who absconds after charges have been laid, and who is still at large six months after the issue of an arrest warrant, is deemed to have been convicted for the purpose of an application for a forfeiture order or a pecuniary penalty order. The court can make one of those orders if the criteria set out in section 17 are satisfied. However, the automatic forfeiture provisions in section 30 cannot apply against an absconder (by virtue of the last part of section 30(1)(a)). Section 30 can only come into operation if there is an actual conviction.
>
> It is likely that a distinction was originally drawn between confiscation under a court order and confiscation under automatic forfeiture because the legislation was new and the concept of automatic forfeiture was untested. That is no longer the case and there is a question whether it is still appropriate to have a position under which nothing can be done when a person who has been charged with a serious offence, and who has had property placed under restraint, flees the jurisdiction and cannot be found.
>
> If section 30 was amended, so that it could apply to an absconder, it would be necessary to make a consequential change to section 48(4). The current provisions, which places the burden on a convicted defendant to show the source of his or her pro1perty, may not make sense in a case where the defendant is not in the jurisdiction. However, it should be possible for a competent drafter to devise an alternate test which would make sense in such circumstances and which would properly protect the interests of the absconder.[213]

The Commission's view

8.14 In the view of the Commission, it would not be appropriate for an automatic forfeiture to occur without any assessment of the evidence against a defendant of the predicate offence. This is precisely what section 17 is designed to ensure.

8.15 That said, the Commission can see no good reason in principle why, provided that section 17 is complied with in every case, and the conditions specified in section 6 are fulfilled, the automatic forfeiture provisions of section 30 (excluding such of the provisions as are inappropriate to the circumstances of a deemed conviction), should not apply to restrained property of an absconder in respect of a serious offence.

8.16 In particular, the Commission is concerned that to not so provide may be an incentive to a person charged or apprehending being charged with a serious

---

213.DPP *Submission 8*.

offence, to abscond in the hope that court ordered forfeiture under section 19 might be significantly less extensive than would occur if the automatic forfeiture provisions of section 30 were to apply.

Duration of restraining orders after initial period

8.17 Under the Act as it currently stands, initial restraining orders issued before the laying of a charge cease within 48 hours unless the person has in the meantime been charged.[214] If the application is *ex parte*, it expires within such time as the court orders but not exceeding 14 days.[215]

8.18 In chapter 5, the Commission proposes that the period within which a foreshadowed charge should be laid and, in the case where civil non-conviction based proceedings are proposed to be instituted, the period within which such civil proceedings must be instituted, should be one month after the making of the restraining order or such greater period, not exceeding three months, as the court orders. It also proposes that the limitation in respect of an *ex parte* order be substituted by a new provision which would remove the current temporal limitation but entitle an affected person to move the court for review of the order.

8.19 Assuming the restraint regime recommended by the Commission in chapter5 is adopted, the further question which needs to be addressed is how long the initial order should remain in force once, in applicable cases, the person has been charged with the predicate offence or civil forfeiture proceedings have been instituted.

8.20 Section 57 of the POC Act sets out a complex series of formulae which determine when a restraining order ceases to be in force. In essence, an order remains in force where, pursuant to section 57(3), an extension has been applied for and granted for such time, or on the occurrence of such event, as is specified in the extension order or the last of such orders.

8.21 If no extension is sought for a restraining order, but an order has been made pursuant to section 48(1)(a),(b) or (e) to

- vary the property to which it relates
- vary any condition to which the order is subject or
- regulate the powers of the OT in cases where the OT has been ordered to take custody or control of property or to determine any question as to the subject property, or direct anyone to do things to enable the OT to take custody of the subject property

then the restraining order expires at the end of six months after the day when that order, or the last of such orders, was so made.

---

214 .s 57(1).

215 .s 45(2).

8.22 In any other case, the order ceases to be in effect at the end of six months after the date the restraining order was made.

8.23 The DPP submission made the following observations on the current provisions

> The DPP would support amendments to make the current provisions more flexible. Again, the current regime may have been appropriate when the POC Act was untested but has now outlived its usefulness.
>
> Under the current provisions, both an *ex parte* restraining order and an initial restraining order has a maximum life, after which it will lapse automatically unless it has been extended. Experience has shown that few defendants ever contest an application to extend a restraining order. The current regime forces people back to court when there are no issues to argue, and also runs the constant risk that a restraining order in a major case will lapse because the need to renew it is overlooked.
>
> If the provisions were made more flexible it should be open to either side to bring the matter back to court at short notice if circumstances change.[216]

8.24 It is noted that the principal aim of restraining orders is to preserve property which may ultimately be required to satisfy either a forfeiture — whether automatic or judicially ordered — or a pecuniary penalty order. A related aim is to ensure that, where restrained property may be released under the Act, there is supervision over the amount and reasonableness of the release, again to ensure that as much of the property as possible remains available for the principal purpose.

8.25 It is clear, and is conceded by virtually all contributors who have commented on this issue, that in all jurisdictions the completion of both committal and trial proceedings within six months is the exception rather than the rule. It is equally clear that in many jurisdictions there are serious backlogs in dealing with criminal matters, and that routine uncontested applications do nothing to assist in reducing such backlogs.

The Commission's view

8.26 In the light of the above considerations, it seems to the Commission that the general six month limitation period is more of an impediment than an aid to efficient and effective administration of justice unless it can be shown that its maintenance is essential to the preservation of the rights of defendants and other affected persons.

8.27 In this latter regard, the Commission notes that no submission has suggested that the removal of that limitation would have such an adverse effect.

---

216. DPP *Submission 8*.

Moreover, even if the limitation were to be removed, there would, as the DPP has observed, seem no impediment to a genuinely aggrieved party moving the court to exercise its wide ranging powers under section 48(1) to overcome a perceived injustice.

8.28 Accordingly, the Commission proposes that, where an initial restraining order has been made as recommended in chapter 5 and, in applicable cases, the person has been charged, or civil forfeiture proceedings have been instituted within the initial period of one to three months, the order should remain in force

- in the case of non-conviction based proceedings, until the proceedings to which the order relates have been concluded including the determination of any appeals
- in the case of conviction based proceedings, until acquittal or, where a conviction results, until the conclusion of any forfeiture or pecuniary penalty proceedings (including any appeals therefrom and the satisfaction of any order made)
- in the case of an automatic forfeiture offence, for six months after the date of conviction and any additional period (the waiting period referred to in section 30A) required to determine any exclusion applications made pursuant to section 48.

Time for seeking a pecuniary penalty order

8.29 The National Crime Authority has raised the question of the time limits in relation to the seeking of pecuniary penalty orders. Its submission is as follows

> The time limits are difficult to follow and should be reformed. For example, subsection 25(1) states a court cannot make a PPO within six months from the date of conviction; subsection 14(2) when read with the definition of 'relevant application period' provides that the DPP cannot make an application for a PPO after the end of six months from the date of conviction. This appears to mean (one cannot be certain about it) that the DPP must watch the clock to ensure that the application for the PPO is made within six months from the conviction but ensure that the court does not make the order on the application until six months after the conviction.
>
> Further, the optimum time to make a PPO is during sentencing proceedings when the facts of the case are fresh in the minds of counsel and the court — but the POC Act inhibits that process.

8.30 The first observation that needs to be made in relation to this matter is that section 25(1), which is headed 'Special provisions in relation to serious offences', is limited in its operation to an application for a pecuniary penalty order in reliance on a person's conviction for a serious offence. Given that limitation, there would appear to be little doubt that section 25(1) was designed to complement the automatic forfeiture provisions of section 30, which in turn delay such forfeiture until six months after conviction.

The Commission's view

8.31 In the Commission's view it would seem not inappropriate that, if one weapon in the confiscatory armoury, namely automatic forfeiture, is not to occur until after six months, the other weapon, namely a pecuniary penalty order, should similarly be so delayed, particularly as the requirement that account be taken of forfeiture in determining the amount of a pecuniary penalty order cannot be satisfied ahead of that forfeiture occurring and the proceeds of the sale of the property being realised.

8.32 For these reasons, the Commission is not convinced that change to section-25(1) is warranted.

8.33 The Commission notes that, if its proposal is accepted that automatic forfeiture under section 30 should be permitted in relation to the deemed conviction of an absconder for a serious offence, the exception provided in section25(2) from the operation of that subsection in relation to a deemed conviction of a serious offence by reason of section 5(1)(d) would need to be deleted.

8.34 The Commission does, however, consider that there is a case for extending beyond six months from conviction of a serious offence the period within which the DPP may apply for a pecuniary penalty order.

8.35 The justification for such an extension lies, in the Commission's view, not so much in the risk of overlooking the need to make an application ahead of the time when such an application may be granted, but rather on the fact that it will usually not be until the forfeiture has occurred and property sold that the DPP will be able to make an assessment whether a pecuniary penalty order is necessary, and if so, the quantum that should be sought.

8.36 Accordingly, the Commission would favour a three month extension in such cases.

Recommendation 33. The automatic forfeiture provisions of section 30 (excluding such of the provisions as are inapplicable to the circumstances of a deemed conviction) should apply to the restrained property of an absconder that has been restrained in respect of a serious offence, provided in every case that section 17 is complied with and the conditions specified in section 6 are fulfilled.

Recommendation 34. Where an initial restraining order has been made as recommended in chapter 5 and, in applicable cases, the person has been charged, or civil proceedings have been instituted, within the initial period determined by the court when making the order, the order should remain in force

- in the case of non-conviction based proceedings, until the proceedings to which the order relates have been concluded, including the determination of any appeals
- in the case of conviction based proceedings, until acquittal or until the conclusion of any forfeiture or pecuniary penalty proceedings, including any appeals therefrom, and the satisfaction of any order made
- in the case of an automatic forfeiture offence, for six months after the date of conviction and any additional period required to determine any exclusion application made pursuant to section 48.

Recommendation 35. An application for a pecuniary penalty order against a person in reliance on the person's conviction of a serious offence should be able to be made not later than three months after the expiration of the six months following the conviction, or the expiration of the extended waiting period in relation to the persons's conviction where such an extension has been granted under section 30A.

9. Jurisdiction

Introduction

9.1 With limited exceptions the Act is predicated on the basis that only Supreme Court judges should determine applications pursuant to it. While this caution may have been understandable when the POC Act was first developed in the mid 1980s, the Commission notes that since that date there has been continual devolution to lower courts without any decline in the quality of the administration of justice. This has occurred in both the civil and criminal arenas. The effect of conferring the power to issue restraining orders only on Supreme Court judges is such that even a minor matter such as the restraint of a motor vehicle that may already have been seized by the police necessitates such judicial involvement if the vehicle is to be restrained for forfeiture under the POC Act.

9.2 Under the POC Act, only search warrants for tainted property may be issued by a magistrate on the application of a police officer.[217]

9.3 Subject to certain jurisdictional limitations, magistrates courts, district courts and county courts may, where the defendant is convicted before such a court of the predicate indictable offence, make, upon application, final forfeiture and pecuniary penalty orders.[218] However, because there is no power in these courts to issue restraining orders, that property ordered forfeited by these courts will have previously been restrained by order of the relevant Supreme Court.

9.4 Other applications under the Act also can only be made to the Supreme Court of a State or Territory or to a judge of such a court.

9.5 These include applications for

- variations to restraining orders or a condition to which such an order is subject[219]
- revocation of a restraining order[220]
- production orders for property tracking documents and variations thereto[221]
- search warrants for property tracking documents[222] and

---

[217].POC Act s 36.

[218].POC Act s 98.

[219].POC Act s 48.

[220].POC Act s 56.

[221].POC Act s 66 and 67.

[222].POC Act s 71.

- monitoring orders.[223]

9.6 The latter three are investigative tools.

9.7 A 'property tracking document' is defined in section 4 to mean

> (a) a document relevant to:
> (i) identifying, locating or quantifying property of a person who committed the offence; or
> (ii) identifying or locating any document necessary for the transfer of property of a person who committed the offence; or
>
> (b) a document relevant to:
> (i) identifying, locating or quantifying tainted property in relation to the offence; or
> (ii) identifying or locating any document necessary for the transfer of tainted property in relation to the offence.

9.8 As noted in chapters 7, 19 and 21, monitoring orders are orders requiring financial institutions to provide information obtained by them about transactions conducted through accounts held by particular persons with those institutions.

9.9 Finally, only the Supreme Court has the power to order the examination on oath of the defendant, or any other person whose property is the subject of a restraining order and to make associated orders.[224]

Developments in State jurisdictions

Restraining orders

9.10 The power to issue restraining orders has been considerably devolved in Victoria.

9.11 Section 16(1) of the Confiscation Act (Vic) is as follows

> 16. Application for restraining order
>
> (1) If a person has been, or within the next 48 hours will be, charged with or has been convicted of —
>
> (a) a civil forfeiture offence, the DPP or a prescribed person, or a person belonging to a prescribed class of persons, may apply, without notice, to the Supreme Court;
> (b) an automatic forfeiture offence, the DPP may apply, without notice, to the Supreme Court or the County Court;
> (c) any other forfeiture offence —

---

223 .POC Act s 73.

224 .POC Act s 48(1)(c), (d), (da) and (e).

(i) the DPP may apply, without notice, to any court; or
(ii) an appropriate officer may apply, without notice, to the Magistrates' Court or the Children's Court —
for a restraining order in respect of property in which the defendant has an interest or which is tainted property.

9.12 In South Australia, an application for a restraining order may be made by a 'court'.[225] 'Court' is defined in section 3 as

- the Supreme Court or
- the District Court or
- if the proceedings involve property with a value of $300000 or less — the Magistrates Court.[226]

9.13 In Queensland, restraining orders may be made in any case by the Supreme Court, or the court before which the defendant appears charged with, or is convicted, of a serious offence.[227] This includes a magistrates court where a person is charged before that court, although, under section 41(1) of the *Magistrates Courts Act 1921* (Qld), this power is limited to property the value of which falls within the monetary jurisdiction of the court.

9.14 The remaining jurisdictions have, to date, remained with the model SCAG Bill provisions, under which only Supreme Courts may issue restraining orders.

9.15 Given the Commission's proposal in chapter 4 for the introduction of a non-conviction based civil forfeiture regime, it needs to be remembered that all jurisdictions that already have such regimes confine jurisdiction to entertain applications to superior courts — in the case of Victoria and New South Wales, their Supreme Courts, and, in the case of the Customs Act, Part XIII, Division 3, the Federal Court of Australia.

Search warrants

9.16 Under Victorian law, an application for a search warrant for tainted property may be made to a magistrate or a judge of the Supreme Court or County Court.[228] The same courts may also issue search warrants for property tracking documents.[229]

9.17 In South Australia, these two warrants have been combined into a single warrant which can be issued by a magistrate.[230] Queensland has adopted the same

---

225.CAC Act (SA) s 15.
226.CAC Act (SA) s 3.
227.CC Act (Qld) s 40.
228.Confiscation Act (Vic) s 79.
229.Confiscation Act (Vic) s 109.
230.CAC Act (SA) s 30.

approach; again the warrant can be issued by a magistrate.[231] Tasmania has retained the two separate warrants, both of which can be issued by magistrates.[232] In the remaining States, the same regime applies as in the POC Act, namely, magistrates may issue search warrants for tainted property, but only judges of Supreme Courts can issue search warrants for property tracking documents.

Production orders

9.18 In Tasmania, production orders may be made by a magistrate.[233] In Victoria, they may be made by any court.[234] In all other jurisdictions, production orders can be made only by a judge of the Supreme Court.

9.19 It is not immediately apparent why the power to issue a search warrant for a property tracking document has been devolved to magistrates by four jurisdictions, while the power to issue the seemingly less intrusive production order has been similarly devolved to magistrates in only two jurisdictions.

Monitoring orders

9.20 Only in Tasmania can a monitoring order be issued by a magistrate.[235] In all other jurisdictions such an order can only be issued by a Supreme Court judge. On the other hand, in a number of jurisdictions, a monitoring order can be sought in respect of any forfeiture offence, as opposed to only a 'serious offence' as defined in the POC Act.[236] These jurisdictions are Tasmania,[237] Victoria,[238] Queensland,[239] and South Australia.[240] The Northern Territory law does not provide for monitoring orders and the remaining jurisdictions use a test analogous to the POC Act. Other issues relating to monitoring orders are addressed in chapter 19 dealing with police powers.

Examination orders

9.21 In Victoria, the power to order the examination of a person concerning the affairs of a defendant, including the nature and location of any property in which the defendant has an interest or any property believed to be tainted, may be made

---

231.CC Act (Qld) s 57.

232.CCP Act (Tas) s 40 and 53.

233.CCP Act (Tas) s 49.

234.Confiscation Act (Vic) s 100.

235.CCP Act (Tas), s 56(1).

236.POC Act s 73(4).

237.ibid, s 56 and the definition of serious offence in s 4.

238.Confiscation Act (Vic), s 115(2).

239.CC Act (Qld), s 71(4) and definition of serious offence in s 4.

240.CAC Act (SA) s 35.

by any court.[241] This is subject to the qualification that, if the restraining order was made on the basis of the charging or conviction of the defendant,[242] the examination order must be issued by the court that issued the restraining order.[243] Since examination usually relates to an application for a variation of a restraining order this qualification is understandable.

9.22 Queensland has likewise devolved the power to issue an examination order to the court which issued the restraining order subject, however, to the Supreme Court, either on application or of its own initiative, being able to make, or authorise another court to make:

- an order setting aside the restraining order
- an order about the property to which the restraining order relates or
- an order about the operation of the restraining order.[244]

9.23 In the remaining jurisdictions examination orders can only be made by the Supreme Court. It is noted that, while South Australia has devolved to intermediate and lower courts the power to make restraining orders, it has not so devolved the power to order the examination of a person.

What submissions say

9.24 The principal submissions dealing with questions of jurisdiction are those made by the DPP and the AFP.[245] The submission from the office of the DPP's argues strongly for greater jurisdictional devolution under the POC Act. The relevant part of the submission reads as follows

> In the DPP's view, the current jurisdictional regime is outdated. It reflects a cautious approach which was appropriate when the POC Act was new and untested, but which now places unnecessary restrictions on the application of the Act and an undue burden on the resources of the State Supreme Courts.
>
> Magistrates and intermediate courts have power to make final orders when cases are prosecuted before them, but they have no power to issue search warrants (except under section 36) and have no power to make production orders, monitoring orders or restraining orders. They also have no power to conduct compulsory examinations under section 48(1)(c).
>
> The current regime directs a disproportionate amount of work to the Supreme Courts. That places a heavy burden on those courts and can also cause

---

241.Confiscation Act (Vic) s 98(2).

242.ie rather than if it were made within 48 hours before defendant was charged. Confiscation Act (Vic) s 16.

243.Confiscation Act (Vic) s 16(3).

244.CC Act (Qld) s 45(3).

245.DPP *Submission 8* and AFP *submission 7*.

> inefficiencies in operation. In particular it can be difficult to obtain search warrants or restraining orders quickly in cases dealt with outside the capital cities.
>
> In the DPP's view there is a strong case for a greater devolution of jurisdiction under the POC Act to magistrates and intermediate courts.[246]

9.25 In its submission, the AFP points to what it sees as an unnecessary burden, on both investigators and the Supreme Courts of the States and Territories, in relation to restraining orders in cases where it would seem entirely appropriate for the matter to be dealt with at a lower level. An example offered is where the property has already been seized by investigators as property believed to have been used in connection with the commission of an offence. The AFP suggests that consideration might be given to the development of a sliding scale of prescribed limits on the value that may be restrained by courts at various levels.[247] The submission does not, however, address the difficulties that might arise with such an approach such, for example, as where a magistrate's court has issued a restraining order at or near its jurisdictional limit and further property is subsequently discovered which would take the amount under a variation to the order to a level exceeding the competence of the court.

9.26 The submission does, however, address the issue of the granting of extensions to restraining orders granted in the first instance by Supreme Courts. Specifically, it proposes the devolution of such powers to intermediate and lower courts

> In the case of extensions to restraining orders granted under section 45A of the POC Act, consideration should also be given to amendment that enables such orders to be granted by lower and intermediate courts. The problem with deferral to Supreme Courts for interim orders relates to time and timing. In many cases interim orders are sought in matters where the restraint is a matter of urgency, often to preserve the integrity of the assets in question. There is a considerable amount of time involved in obtaining restraining orders from Supreme Court judges given their busy schedules both in and out of session, and the nature of criminal investigations which often involve working after court hours, including at night and on weekends. The AFP recommends that such interim orders should be granted by lower and intermediate courts.[248]

9.27 In common with the DPP, the AFP urges devolution to intermediate courts of the powers under the Act to conduct compulsory examinations, to make production and monitoring orders and to issue warrants.

> Compulsory examinations under section 48(1)(c) of the POC Act requires that a person can only be examined before a Supreme Court judge or Registrar. The AFP again concurs with the DPP observation that operational difficulties have

---

246.DPP *Submission 8*.

247.AFP *Submission 7*.

248.ibid.

> been experienced in getting before either a Supreme Court judge or the registrar.The AFP recommends a broadening of the class of people before whom an examination may be conducted.
>
> Presently all investigative tools under the POC Act, including production orders, search warrants and monitoring orders, require issuance by a Supreme Court Judge. Time constraints and geographic considerations are an issue in the granting of these orders, as it is often difficult to obtain time before a Supreme Court judge, especially after hours or at weekends, and problematic when operating in remote locations without ready access to a Supreme Court judge.
>
> The AFP would recommend the inclusion of provisions in this Act that enable the granting of such orders and warrants as are available under the Act by lower and intermediate courts.[249]

9.28 The AFP also supports specific statutory authorisation of the use of electronic and telephonic communications devices for seeking orders and warrants.

> Further the AFP recommends the enactment of provisions enabling orders and warrants to be obtained by electronic transmission, including telephone and facsimile. Such orders must also be executable in the form in which they are received, for instance in the case of warrants granted over facsimile device.[250]

The Commission's view

9.29 Given the ground breaking nature of the POC Act regime in 1987, the exercise of caution in limiting jurisdiction to issue restraining and production orders and warrants (other than under section 36) to Supreme Courts may have been appropriate. Such limitations are, in the Commission's view, no longer warranted or appropriate.

9.30 The Commission notes, in particular, that the last decade has witnessed a continuation of the Australia wide phenomenon of conferring broader general jurisdiction on intermediate and lower courts, yielding significant savings by way of lower costs, and simpler and speedier disposition of matters, while not adversely affecting the quality of justice.

9.31 Moreover, the novelty of criminal confiscation laws has passed, as have the reservations that may have been held about the need for them in Australian society. In short, such laws are now seen as essential and usual parts of the legal landscape and, as such, the exercise of individual classes of powers should now be dealt with at the levels that are appropriate for the exercise of similar such powers under other laws.

9.32 In view of the fact that the conduct of the bulk of criminal trials of indictable offences is now entrusted to intermediate courts, such as the District

---

[249] .ibid.

[250] .ibid.

Courts and County Courts of New South Wales and Victoria respectively, it would seem entirely appropriate that such courts also be given unlimited power to issue both restraining and confiscation orders in relation to any criminal offence the trial of which falls within their jurisdiction. They should also be empowered in such circumstances to exercise the full range of other powers with regard to the making of production and monitoring orders and the issuing of warrants. This proposal would not affect the ACT, NT and external territories which do not have intermediate courts.

9.33 Additionally if, as proposed in chapter 4, a non-conviction based civil confiscation regime were to be introduced into the POC Act, it would necessarily follow, in the Commission's view, that jurisdiction be conferred on the Federal Court of Australia. The Commission notes in this regard that the Federal Court currently exercises exclusive jurisdiction in analogous proceedings under Division3, Part XIII of the Customs Act. The Federal Court should, in relation to non-conviction based proceedings, have the same range of powers to entertain and make orders and conduct examinations as are currently conferred on State and Territory Supreme Court judges.

9.34 So far as concerns the State and Territory Supreme Courts, the Commission is of the view that, consistent with the existing position in relation to conviction based proceedings, such courts should likewise have full jurisdiction to entertain non-conviction based proceedings.

9.35 With respect to State intermediate courts, the Commission sees no reason why such courts should not also have jurisdiction to entertain non-conviction based proceedings within any local jurisdictional limitations applicable. While the Commission is proposing that such courts have unlimited power to issue restraining and confiscation orders in conviction based proceedings relating to any offence the trial of which falls within their respective jurisdictions, it does not see the same justification for conferring unlimited jurisdiction in non-conviction based proceedings, which are of a distinctly different order. In respect of such proceedings the established principle that Commonwealth law takes the State courts as they find them should be followed.

9.36 An exception in the case of restraining and confiscation orders in conviction based proceedings is seen by the Commission as clearly justifiable on the basis that the intermediate courts already have the jurisdiction to entertain the prerequisite criminal proceedings.

9.37 As regards State and Territory magistrates or local courts, the Commission considers that, as in the case of confiscation orders under the conviction based scheme, these courts should have jurisdiction to entertain non-conviction based proceedings within their ordinary civil jurisdictional limits.

9.38 So far as concerns the powers under sections 66 and 71 to issue production orders and warrants in respect of property tracking documents, the Commission

notes that no less intrusive warrants may be issued by magistrates pursuant to section 3E of the Crimes Act and under section 36 of the POC Act in relation to tainted property. The Commission can see no good reason why section 71 warrants similarly should not be able to be issued by a magistrate.

9.39 As regards monitoring orders under section 73, the Commission's sense is that, on balance, the power to issue such orders should continue to be closely circumscribed having regard to the significant ongoing obligations that are thereby imposed on financial institutions and the fact that such orders can be granted on the mere suspicion that an offence may be about to be committed. In the Commission's view, the power to grant such orders should be co-extensive with the power to grant restraining orders. Thus, the Commission would envisage such powers being exercisable only by Supreme Courts and intermediate courts.

9.40 The Commission has formed the same view in relation to the power to examine persons concerning property that is or may become the subject of a restraining order and the power to issue transaction suspension orders as proposed in chapter 7.

9.41 It remains to deal with the AFP suggestion that the various orders and warrants discussed above should be able to be obtained by means of electronic and telephonic communication devices.

9.42 In principle, the Commission is fully in favour of the employment of any sound and reliable means of seeking a warrant or order that is consistent with the technology of the court or person from whom the order is being sought, and is capable of immediate and reliable verification. The Commission notes in this regard that section 37 already contains provision for a warrant under section 36 to be sought by telephone in circumstances of urgency.

9.43 In relation to those orders and warrants that the Commission proposes be devolved to magistrates, this issue is subsumed under the discussion relating to warrants in chapter 19 dealing with law enforcement information gathering powers.

9.44 So far, however, as concerns monitoring orders and the proposed new transaction suspension orders (which the Commission suggests be able to be issued only by State Supreme and intermediate courts and by the Supreme Courts of the ACT and NT), the Commission is not convinced, having regard to the matters on which the relevant court would need to be satisfied, that telephonic or electronic application would always, or often, be appropriate.

Recommendation 36. Restraining and confiscation orders in conviction based confiscation proceedings should be able to be issued by judges of State intermediate courts in all cases in which the court has jurisdiction to entertain the trial of the relevant criminal offence. The power to issue should include the power to vary.

Recommendation 37

- The Federal Court and the State and Territory Supreme Courts should have unlimited jurisdiction to entertain non-conviction based proceedings under the POC Act.

- State intermediate courts, and State and Territory magistrates courts, should have jurisdiction to entertain such proceedings within their respective civil jurisdictional limits.

Recommendation 38. The power to conduct examinations of persons concerning property that is, or may become, the subject of a restraining order should be exercisable by judges of the Federal Court in non-conviction based proceedings, and by judges of State Supreme and intermediate courts and Territory Supreme Courts in both conviction and non-conviction based cases.

Recommendation 39. The power to issue production orders for property tracking documents and search warrants for the location of such documents should be devolved to magistrates.

Recommendation 40. The power to issue monitoring orders should be exercisable by Federal Court judges in non-conviction based cases and by State and Territory Supreme Court judges and State intermediate court judges in both conviction and non-conviction based cases.

Recommendation 41. Transaction suspension orders should be capable of being issued by the same courts as can issue monitoring orders.

10. Administration of restrained assets

Introduction

10.1 The adequacy of the apparatus provided for in the POC Act for the management and preservation of property the subject of restraint is crucial to the overall effectiveness of the confiscatory regime. Under the Act, the OT may be required to take custody and control of property to maintain or increase its value and ultimately satisfy any order made by the court. This chapter deals with those issues which have been raised by the OT as needing to be addressed to ensure that the administration of such assets is made more effective and efficient.

10.2 The Act confers a number of rights, functions and powers on the OT. These include

- at the direction of a Supreme Court, power to take custody and control of property or of part of property[251]
- to exercise certain enumerated powers over such property[252]
- an entitlement to receive payment for services[253]
- certain obligations and powers in relation to determinations concerning the Confiscated Assets Reserve[254] (these are not relevant for present purposes)
- power to seek variations to restraining orders where the OT has been directed to take custody and control of property[255]
- an entitlement to receive information that the court directs be given to the OT, including statements sworn on oath setting out particulars of property, or dealings with the property of the owner or defendant[256]
- obligations and powers in relation to the discharge of pecuniary penalty orders[257]
- power to cause charges against property to be registered where such charges are raised by pecuniary penalty orders[258]
- immunity from personal liability in certain cases,[259] and a right to be indemnified by the Commonwealth in respect of any personal liability, including as to costs, incurred in the exercise of its powers and duties.[260]

---

[251].POC Act s 43(2)(b).

[252].POC Act s 43(5) to (6B).

[253].POC Act s 55.

[254].POC Act s 34E.

[255].POC Act s 48(2).

[256].POC Act s 48(1).

[257].POC Act s 49.

[258].POC Act s 50.

What the submissions say

10.3 The only issues raised by the submissions relate to the powers of the OT in the administration of restrained assets, the sale of jointly owned property and the right of the OT to be paid remuneration for the performance of the OT's functions.

10.4 The provisions relating to powers and functions of the OT with respect to restrained assets are contained in sections 43 and 54 of the Act.

10.5 Section 43, provides for the administration of restrained assets as follows

> 43.(1) Where a person (in this section and section 44 called the "defendant"):
> (a) has been convicted of an indictable offence or
> (b) has been, or is about to be, charged with indictable offence
> the DPP may apply to the relevant Supreme Court for an order under subsection (2) against one or more of the following:
> (c) specified property of the defendant;
> (d) all the property of the defendant (including property acquired after the making of the order);
> (e) all the property of the defendant (including property acquired after the making of the order) other than specified property;
> (f) specified property of a person other than the defendant.
>
> (2) Where the DPP applies to a court for an order under this subsection against property, the court may, subject to section 44, by order:
>
> (a) direct that the property, or such part of the property as is specified in the order, is not to be disposed of, or otherwise dealt with, by any person, except in such manner and in such circumstances (if any) as are specified in the order; and
>
> (b) if the court is satisfied that the circumstances so require — direct the Official Trustee to take custody and control of the property, or of such part of the property as is specified in the order.
>
> (5) Notwithstanding anything in the Bankruptcy Act, money that has come into the custody and control of the Official Trustee under a restraining order shall not be paid into the Common Investment Fund established under section 20B of the Act.
>
> (6) Where the Official Trustee is given a direction under paragraph (2)(b) in relation to property, the Official Trustee may do anything that is reasonably necessary for the purpose of preserving the property including, without limiting the generality of this:
> (a) becoming a party to any civil proceedings affecting the property;
> (b) ensuring that the property is insured;

---

[259].POC Act s 54.

[260].POC Act s 102A.

(c) if the property consists, wholly or partly, of securities or investments — realising or otherwise dealing with the securities or investments; and
(d) if the property consists, wholly or partly, of a business:
  (i) employing, or terminating the employment of, persons in the business; and
  (ii) doing any other thing that is necessary or convenient for carrying on the business on a sound commercial basis.

(6A) Where the Official Trustee is given a direction under paragraph (2)(b) in relation to shares in a company, it is entitled:
(a) to exercise the rights attaching to the shares as if it were the registered holder of the shares; and
(b) to do so to the exclusion of the registered holder.

(6B) Neither of paragraph (6)(c) and subsection (6A) limits the generality of the other.

10.6 Section 54, so far as relevant, provides

(3) The Official Trustee is not personally liable for any rates, land tax or municipal or other statutory charges imposed by or under a law of the Commonwealth or of a State or Territory in respect of property of which it has been directed by a restraining order to take custody and control, being rates, land tax or municipal or other statutory charges that fall due on or after the date of the order, except to the extent, if any, of the rents and profits received by the Official Trustee in respect of that property on or after the date of the order.

(4) Where the Official Trustee, having been directed by a restraining order to take custody and control of a business carried on by a person, carries on that business, the Official Trustee is not personally liable for any payment in respect of long service leave or extended leave for which the person was liable or for any payment in respect of long service leave or extended leave to which a person employed by the Official Trustee in its capacity of custodian and controller of the business, or the legal personal representative of such a person, becomes entitled after the date of the order.

10.7 Each of the submissions that bears upon the powers of the OT in respect of restrained property advocates a wider range of powers for the OT so as to provide both greater flexibility to the OT in the management of such property and to minimise the need for the OT to seek directions from the court in relation to such management.

10.8 In his submission, the Office of the DPP makes the following observations

The DPP would support amendments to spell out in greater detail the things the Official Trustee can do under a custody and control order. That would reduce the need for the Official Trustee to seek directions from the courts, with a consequent reduction in cost for all parties.

It would also be useful if the Official Trustee had the option of selling property which is of declining value or is likely to cost more to keep than it is worth. The difficulty is that property may have value to its owner which goes beyond its

> monetary worth. One option would be to require the Official Trustee to give notice to the owner before selling any asset, so that the matter could be brought back before the court if the owner did not want to see it sold.
>
> It would also be useful if there was a mechanism in the PoC Act to overcome the problems which can arise when the property forfeited under the Act comprises one person's share in property which is jointly owned. At present all that can be sold under a final order is the undivided share that has been forfeited.
>
> It is hard to see any alternative to a provision which would give the Official Trustee the option of selling the entire property, and reimbursing the innocent owner.[261]

10.9 The joint submission of the Victorian Bar Council and Criminal Bar Association is in similar vein. It reads

> As to the administration of restrained assets, the powers of the Official Trustee should be set out with some particularity. In the more complicated cases the inevitable complaint is that the restrained assets diminish in value and are not effectively managed over the lengthy period they are restrained. The powers listed in the discussion paper ought to be given to the Official Trustee as well as powers incidental to those listed. There should be a right to be heard conferred on those affected by the order or by any action taken, or failure to act, by the trustee.[262]

10.10 In its submission, the ITSA also expresses the view that the powers as set out in the POC Act are not adequate to permit the OT to act in what it believes to be the best interests of administration, thus ensuring a maximum return to either the Commonwealth (where a forfeiture or pecuniary penalty order is made) or to the person whose property is being administered (where it is returned).

10.11 In its introductory pamphlet the Commission asked whether the Act adequately addresses the powers of the OT in respect of the following matters

- to ensure that all appropriate assets are under the OT's control
- to deal with property in cases where the cost of securing, protecting and maintaining an asset outweighs its realisable value
- to destroy, as opposed to sell, property in cases where the public interest or public safety so require
- where the income on the restrained assets is taxed in the hands of the person whose assets are restrained, to require provision of tax file numbers to ensure that the top marginal rate of tax (which may be recouped by the person when lodging a tax return) is not levied by the Australian Taxation Office

---

261. DPP *Submission 8*.

262. Victorian Bar Council and Criminal Bar Association *Submission 33*.

- to deal with unsaleable assets such as one joint tenant's interest in real property, for example should there be a power in such a case, with or without an order from the court, to sell the property and pay out the other joint tenant
- to recover the OT's costs of administration
- to make the necessary decisions in relation to the functioning of a business, eg in relation to a horse stud, what horses to run and when, and to be protected from the consequences of those decisions (factual example)
- to lease property.

10.12 With reference to their concerns about the adequacy of the powers of the OT, both the Victorian Bar Council/Criminal Bar Association and ITSA submissions suggest that each of these powers be explicitly conferred by the legislation.[263]

10.13 Accordingly, the need for each is considered in order below.

Ensuring that all appropriate assets are under control of Official Trustee

10.14 At present, even when a custody and control order is made, the OT has very limited powers of investigation to ensure that all appropriate assets are under the OT's control. Indeed, the OT's powers to seek such information are restricted to being able to make an application to a Supreme Court for the examination on oath before the court or a registrar of the court pursuant to section 48 about the affairs, including the nature and location of any property, of any person who is either the owner or the defendant, or both, of restrained property.[264] Additionally, the court can direct an owner or defendant to provide to the OT a statement on oath setting out particulars of the property, or dealings with the property of the owner or defendant.[265] No power is vested in the OT to further investigate such matters at the OT's own instance to ensure that full disclosures have been made or to determine whether there may be other property that is, within the meaning of the Act, subject to the effective control of the defendant. Such investigation, to be effective, could involve investigating corporate structures and trusts, as well as family, domestic and business relationships.

10.15 The Commission notes that, by contrast, when performing the OT's functions as the OT in the bankruptcy context, the OT may exercise specific investigative powers under the Bankruptcy Act in relation to a bankrupt's affairs, conduct, books and accounts.[266] Sections 77 to 77C of that Act set out the obligations of the bankrupt to provide necessary information and confer additional

---

263. Victorian Bar Council and Criminal Bar Association *Submission 33*; ITSA *Submission 26*.

264. POC Act s 48(1)(c).

265. POC Act s 48(da).

266. *Bankruptcy Act 1966* s 19AA.

powers on Official Receivers — who act as the OT — to have access to premises and books including those of 'associated entities'.[267]

The Commission's view

10.16 In the view of the Commission it would seem both desirable and appropriate that similar powers be conferred on the OT when administering property pursuant to a court order under the POC Act. In particular, the OT should, amongst other things, have a power to examine persons for the purpose of ascertaining whether property is under the effective control of the defendant. The conferment of such powers would, as observed by submitters, also obviate time consuming and costly applications for the examination of persons by the Supreme Court or a registrar thereof in circumstances where the conducting of examinations at that level would seem difficult to justify. The exercise of such investigative powers by the OT could, the Commission envisages, also assist the OT in making timely applications for any variations to restraining orders that disclosures under examination by the OT indicated were warranted.

Dealing with property in cases where the cost of securing, protecting and maintaining an asset outweighs its realisable value

10.17 According to ITSA, the OT is frequently called upon to deal with assets of little or indeterminate value in complex circumstances. For example, particular problems are presented in relation to the custody and control of motor vehicles, boats and aircraft, due to the lengthy periods for which these have to be stored and maintained pending the outcome of the criminal justice process and subsequent forfeiture or pecuniary penalty determinations. The expenses associated with insurance, mooring, garaging or other storage can be quite high, while the value of the property is likely to decrease during the period of restraint due to lack of use and depreciation.[268]

10.18 ITSA referred to a particular case example involving a motor vehicle then restrained pending the hearing of an appeal. The submission states

> Its storage is becoming costly against its realisable value. The defendant does not agree to disposing of the vehicle, and hence the OT is not able to dispose of it. There does not appear to be any power of the OT to determine a joint cost-sharing arrangement with the defendant or, alternatively, to determine that, if the defendant will not contribute to the costs of storage, the OT can dispose of the asset whilst it still holds some value, even if the cash received has to be retained until after the appeal. It has yet to be determined whether the

---

267 *Bankruptcy Act 1966* s 77AA and 77A.

268 ITSA *Submission 26*.

> defendant actually wants to retain the vehicle. This case well illustrates a deficiency in the law.[269]

10.19 Under section 48(1)(e), the OT may, in respect of property of which the OT is directed to take custody and control, apply to a Supreme Court for an order 'determining any question relating to property to which the restraining order relates'.[270] It may well be that, broadly construed, the Court would be able under that provision to authorise the disposal of an asset in respect of which the cost of maintenance and security exceeds the realisable value. However, the position is by no means free from doubt. It certainly should be in relation to a matter of such importance.

10.20 For these reasons, and because of the obvious benefit that would flow to the Commonwealth in terms of the value of property available for confiscation, the Commission supports the inclusion in the Act of an ability for the OT to dispose of property in such circumstances.

The Commission's view

10.21 While the Commission does not see the need for court approval to be sought as a general rule, particularly as the cost of such proceedings could well outweigh the value of the asset in question, it nevertheless considers that the owner of the property should be required to be given notice of intended sale and an opportunity to seek review of that decision by the court before sale is effected.

10.22 The Commission notes that the need to sell property in the above discussed circumstances is dealt with in the CAR Act (NSW), section 14 of which provides

> 14.(1) If an application is made for an assets forfeiture order, the Supreme Court may, when the application is made or at a later time, make an order directing the Public Trustee to sell an interest in property that is subject to the application for the assets forfeiture order if:
> (a) the property is subject to waste or substantial loss of value; or
> (b) in the opinion of the Public Trustee, the cost of controlling the interest would exceed the value of the interest if the assets forfeiture order were made.
> (2) Notice of an application for an order under this section must be given to the owner of the interest in property to which the application relates.
> (3) The proceeds of the sale under subsection (1) of an interest in property are subject to the restraining order to which the interest was subject.[271]

10.23 As mentioned above, the Commission does not, however, consider that the approval of the court should be required as a matter of course provided that the owner is given an opportunity to seek review.

---

[269].ibid.

[270].POC Act s 48(1)(e)(ii).

[271].CAR Act (NSW) s 14.

Destruction of property where the public interest or public safety so require

10.24 According to ITSA there are occasions when there should be a power to disclaim and destroy property in respect of which there would otherwise be an obligation to maintain and subsequently sell. There is no provision in the Act empowering the OT to disclaim and destroy. Moreover, it also seems very doubtful whether section 48(1)(e) would enable a court to authorise such a course.

10.25 An example provided by ITSA of a case in which a disclaimer would have been appropriate was the seizure and restraint of a worthless banana boat which had been used in the drug trade in the Torres Strait. The OT and Customs both agreed that, if the boat was sold, its only use would be a return to the drug trade. It was clearly not in the public interest for this to occur and, in ITSA's submission, the Act should have permitted destruction in such a case. Another example provided by ITSA also relates to a boat. The boat seized was worth approximately $200 on the market, but it would have cost over $10000 to take it to the nearest port and fumigate it as required by quarantine law prior to being offered for sale.[272] Other 'unsaleable' goods seized have included counterfeit designer label clothing.[273]

10.26 A public safety example provided by ITSA was the seizure and restraint of herbal drugs not approved for sale in Australia. Sale of the drugs pursuant to the POC Act would have placed the OT in breach of other Commonwealth legislation.[274]

The Commission's view

10.27 In the Commission's view, the above cases amply demonstrate the need for the OT to be able to disclaim or destroy restrained property where it would be contrary to the public interest to maintain that property for the purpose of later sale. Again, as in relation to property the preservation of which outweighs its realisable value, such power should be exercisable without the need for express court authorisation, subject, however, to adequate notice being given to the owner who should be entitled to seek judicial review of the OT's decision.

Requirement for owner of restrained property to provide the Official Trustee with his or her tax file number

10.28 ITSA has confirmed in its submission the Commission's sense that the inability to require a defendant to divulge his or her tax file number to banks where

---

272.ITSA *Submission 26*.

273.Letter from AGD of 15 December 1998.

274.ITSA *Submission 26*.

the OT invests restrained funds has created problems.[275] Unlike the situation that occurs in bankruptcy, where custody and control of property vests in the OT, the investment remains the property of the person while the OT manages it. Accordingly, a failure to disclose the tax file number means that the Australian Taxation Office collects from the bank the top marginal rate of tax on the interest earned on the investment. The effect is that a substantial credit refund may be obtained by the defendant when next he or she lodges a tax return, notwithstanding that the interest may itself be indirect proceeds of crime because the money on which it was earned was in turn from the proceeds of crime.

The Commission's view

10.29 Such an outcome flies so fiercely in the face of the objectives of the Act that, in the Commission's view, it should not be tolerated. It accordingly agrees with the OT that, where the OT has been directed to assume custody and control over restrained property, the owner of that property should be required to disclose his or her tax file number to the OT and, in case of failure to disclose it, the OT should be authorised by the legislation to obtain it from the Australian Taxation Office.

Dealing with unsaleable assets

10.30 A number of submissions have pointed to the difficulties encountered in realising a joint interest in property, such, for example, as an estate as joint tenant in a house or other real property. In cases where the interest of only one joint tenant is forfeited and the other joint tenant is an innocent third party, there is virtually no market for the forfeited share. If the share were to be auctioned, the only bidders would be likely to be the former owner or the remaining joint tenant, either of whom could acquire it at a 'fire sale' price. This would offend the basic objective of the Act.

10.31 The Attorney-General's Department suggests that a 'partition order', terminating the joint tenancy and converting it into a tenancy-in-common, should be able to be made.[276] This would not seem to the Commission to advance the situation as the market in which the tenancy-in-common might be sold is again likely to be limited to either or both of the former joint tenants.

The Commission's view

10.32 While sensitive to the impact that any remedial proposal would have on the innocent joint owner, the Commission considers that the joint nature of the interest should not be allowed to frustrate the purposes of the Act. Accordingly, the Act should provide a mechanism whereby the whole of the property may, where the joint interest is forfeited, or ordered to be forfeited or becomes subject to a

---

[275].ibid.

[276].Background material.

charge resulting from a pecuniary penalty order, be sold into a fair and viable market.

10.33 That said, the impact that such a sale would have on the interests of an innocent joint tenant is such that the sale should only be permitted where sanctioned by the court. In this regard, the court would need to be satisfied in all circumstances that no viable alternative was available. The court would need to be given wide powers of direction in relation to that part of the proceeds of realisation that were attributable to the innocent joint tenant, so as to minimise expense and hardship to that party. A statutory precedent might be section 16G of the *Conveyancing Act 1919 (NSW)* which permits the court to appoint a trustee for sale. The subsequent sale is of the entirety of the property and the proceeds of the sale are distributed appropriately in cases where only an interest in the property has been forfeited.

10.34 One further issue in relation to joint tenants needs to be addressed. The death of a joint tenant operates at law to vest the property in the surviving joint tenant or tenants. In the view of the Commission, this would not be appropriate if, at the date of death, the property was the subject of a restraining order pending the determination of proceedings under the Act.

10.35 The Commission notes that the CAR Act (NSW) deals with this situation. Section 58A of that Act is as follows

> Effect of death of joint owner of restrained property
> 58A(1) If a person has an interest in property as joint owner of the property, the person's death after a restraining order is made in respect of the interest does not (while the order is in force) operate to vest the interest in the surviving joint owner or owners and the restraining order continues to apply to the interest as if the person had not died.
> (2) An assets forfeiture order made in respect of that interest applies as if the order took effect in relation to the interest immediately before the person died.
> (3) If a restraining order ceases to apply to an interest in property without an assets forfeiture order being made in respect of that interest, subsection (1) is taken not to have applied to the interest.

10.36 The Commission is of the view that a similar provision should be incorporated into the POC Act.

Recovery of costs of administration

10.37 Section 55(1) enables regulations to be made making provision for or in relation to the costs, charges and expenses incurred in connection with the performance or exercise of functions under the Act and also for the remuneration of the OT in respect of them.

10.38 The regulations currently prescribe the levels of remuneration of the OT under regulation 8, and the costs, charges and expenses under regulation 9, of the

Proceeds of Crime Regulations. Under section 55(2) the OT is required to pay into Consolidated Revenue an amount equal to any remuneration received by the OT. Other amounts received, being costs, charges and expenses, are retained by the OT.

10.39 According to ITSA, on a number of occasions out-of-court settlements have been reached, and subsequently ratified by the court, between law enforcement agencies and defendants that have ignored both the costs, charges and expenses, and the remuneration payable to the OT under the regulations.

The Commission's view

10.40 In the view of the Commission, the answer to the issues raised by ITSA should be provided by a combination of means. First, where property administered by the OT is income generating, the legislation should permit the OT to draw the OT's remuneration, costs, charges and expenses from that income, subject to a refund in the event that the property is ultimately not confiscated but returned to its owner. Where no, or inadequate, income is generated, and in order to overcome avoidance, whether by oversight or otherwise, of such costs, charges, expenses and remuneration, ITSA proposes that the Act be further amended to provide for such amounts to be first charges on the property administered by the OT. The Commission considers this to be reasonable.

Decision making in relation to the functioning of a business, and leasing of property

10.41 As will have been noted, section 43(6)(d) confers powers on the OT in fairly general terms. Where the restrained property consists wholly or partly of a business, those powers include

- employing, or terminating the employment of, persons in the business and
- doing any other thing that is necessary or convenient for carrying on the business on a sound commercial basis.

10.42 Subsections 54(3) and (4) provide certain immunities for the OT in relation to rates, land tax or municipal or other statutory charges and, where the OT takes custody and control of a business, in respect of long service leave entitlements whether they accrued before or after the making of the custody and control order.

10.43 While none of the submissions has suggested that these broadly expressed powers are inadequate for the purpose of maintaining a business as a going concern, the ITSA submission brings to attention the difficulties involved in having to assume control at little or no notice of businesses that are geographically isolated or which involve specialist skills.[277]

---

[277] ITSA *Submission 26*.

10.44 For this reason ITSA emphasises the importance of cooperation between the AFP and the OT so as to enable the OT to react as quickly and effectively as possible in such circumstances

> Early consultation by the AFP with the OT may be useful to determine whether the OT is prepared to deal, or capable of dealing, with certain assets. The consultation would be for the purposes of seeking appropriate court orders to overcome perceived problems. In particular, administration of restrained assets such as geographically isolated properties or unusual classes of livestock, requires specialist treatment.[278]

10.45 While concurring with the sentiments expressed by ITSA, the Commission does not see those comments as suggesting that any legislative enhancement of the business management powers of the OT is necessary.

The Commission's view

10.46 The Commission's sense is that the current powers are already sufficiently widely expressed in section 43(6)(d).

Recommendation 42. Where a custody and control order is made requiring the OT to administer restrained assets, the OT should have investigative powers necessary to ensure that all appropriate assets, including those under the 'effective control' of the defendant, are under its administration.

Recommendation 43. The investigative powers of the OT should include

- requiring the production of information, including books of account and other records, both from the defendant and other persons having, or claiming to have, an interest in the relevant property
- having access to premises and books, making copies of, or taking extracts from books and accounts, and removing books, accounts and other records that the OT believes may be relevant to the administration of assets and
- examining associated persons such as company directors, trustees, business associates and family members to ascertain where there is property within the effective control or effective ownership of the defendant.

Recommendation 44

- The POC Act should expressly empower the OT to sell property under the OT's custody and control in cases where the costs of maintaining or managing those assets is likely to lead to a

[278] ibid.

reduction in value of those assets or where such assets are likely to deteriorate while the subject of restraint.

- The Act should require notice of such sale to be given to the owner of the property concerned and confer a right on such a person to seek an order preventing such a sale.

Recommendation 45

- The POC Act should expressly empower the OT to disclaim property and destroy it in cases where the public interest or public health or safety so require.

- Notice should be given to the owner of the property who should have a right to seek an order preventing destruction.

Recommendation 46

- The POC Act should require that, when requested by the OT, a person whose property is subject to the custody and control of the OT must provide his, her or its tax-file number to the OT.

- Failure to comply should entitle the OT to obtain the tax file number from the Australian Taxation Office.

Recommendation 47. Where no alternative means is available to recover at market value a defendant's joint interest in property, the POC Act should empower the OT to seek court authorisation to sell the jointly owned property and to pay out the innocent joint tenant.

Recommendation 48. The POC Act should provide that the death of a joint tenant should not operate to vest the property in the surviving joint tenant or tenants where the interest of the deceased is the subject of undetermined proceedings under the Act.

Recommendation 49

- The POC Act should provide that prescribed remuneration, costs, charges and expenses of the OT should be met from income generated by property under the OT's administration, subject to such amounts being refunded in the event of the return of the property to its owner as a result of its being released from restraint.

- If no such income is generated, or is inadequate for the purpose, these amounts, or the balance thereof, should be a first charge on the property where that property is ultimately forfeited or used to satisfy a pecuniary penalty order.

11. Uniformity

Introduction

11.1 Notwithstanding the Commission's recognition of the limited power of the Commonwealth to ensure uniformity or consistency between Commonwealth, State and Territory laws, the issue was identified as a threshold question in the pamphlet introducing this enquiry because it was repeatedly raised in initial discussions with stakeholders.

11.2 Although uniformity with other legislation is not specific in its terms of reference, the Commission is generally charged in respect of matters referred to it to consider proposals for uniformity between State and Territory laws.[279]

11.3 In submissions received, two main points were raised, namely the desirability of

- uniformity between Commonwealth, State and Territory proceeds laws and
- uniformity across Commonwealth forfeiture legislation.

11.4 The latter point is dealt with fully in chapter 16 dealing, *inter alia,* with the different policy underpinnings of administrative or *in rem* forfeitures as opposed to forfeitures under the POC Act.

Uniformity between Commonwealth, State and Territory laws

11.5 Nine submissions addressed the desirability of uniformity between forfeiture regimes across the country.[280] None expressed opposition, although some pointed to the obvious difficulties of achieving uniformity, particularly where jurisdictions have already developed their own models based on preferred options.[281] The Commission is fully aware of these difficulties.

11.6 As stated in the DPP's submission

---

279. *Australian Law Reform Commission Act 1996*, s 21(1)(d) and (e).

280. Victorian Bar Council and the Criminal Bar Association *Submission 33*; Northern Territory Law Reform Committee *Submission 30*; Australian Finance Conference *Submission 28*; South Australia Police *Submission 23*; National Crime Authority *Submission 16*; Australian Society of Certified Practising Accountants *Submission 14*; New South Wales Police Service *Submission 9*; Director of Public Prosecutions *Submission 8*; Victorian Legal Aid *Submission 4*.

281. Victorian Bar Council and the Criminal Bar Association *Submission 33;* Northern Territory Law Reform Committee *Submission 30*.

> There are obvious benefits to industry and individuals in having a single forfeiture regime applying in all jurisdictions. It would also simplify the task of the investigators and prosecutors who operate under the forfeiture laws and the courts which apply them, especially in cases where charges arise from a joint operation which involves offences against Commonwealth and State law.[282]

11.7 The Australian Society of Certified Practising Accountants expressed its view in the following terms

> Transactions and activities transcend state boundaries and therefore should be subject to the same legislation as is the case with the Corporations Law, Audit Act etc.[283]

11.8 South Australia Police told the Commission that

> On 10 November 1995, a resolution was made by the Senior Officers' Group of the Australasian Police Ministers' Council (APMC) to seek a uniform approach to confiscation legislation in five key areas:
>
> - administrative (automatic) forfeiture;
> - legislative restriction of defendants' access to restrained property for legal representation;
> - establishment of confiscated asset trust funds allowing for payments to police under certain circumstances;
> - a presumption in favour of forfeiture;
> - equitable sharing provisions.
>
> In South Australia the Criminal Assets Confiscation Act, 1996, was proclaimed on 7July 1997 totally replacing the original Crimes (Confiscation of Profits) Act. The new Act complies with the resolution of the APMC in all respects except allowing for payments to police from forfeited assets. It provides investigators with wider powers to seize property subject to forfeiture and has streamlined many of the administrative procedures.
>
> Most jurisdictions now have "second generation" confiscation legislation and some police services (including South Australia) are now considering the need for further review.[284]

11.9 South Australia Police accordingly expressed the view that

> in line with the tenor of the APMC resolution of 1995 consistent, if not uniform, confiscation legislation should be sought across jurisdictions.

282.DPP *Submission 8*; a similar view was expressed in the Victoria legal Aid *Submission 4*.

283.Australian Society of Certified Practising Accountants *Submission 14*.

284.*SA Police Submission 23*.

11.10 The NCA submission also emphasises the need for a 'national scheme' on the basis that both NSW and Victoria have now extended their proceeds of crime regimes to include non-conviction based schemes. In the context of the need for uniformity, and as the lead agency in joint task forces, the NCA points out that operational decisions risk being made on the basis of 'the workability' of the proceeds of crime legislation instead of on the basis of the most appropriate agency to conduct the investigation.[285]

11.11 The Commission also notes that concerns about the lack of uniformity between proceeds of crime jurisdictions have been expressed under a wide variety of circumstances. Prominent academic in this area, Professor Arie Freiberg has described in the following terms the early delays which led to States pursuing their own versions

> The drafting of the legislation was a long and difficult task and it was not until April of 1987, after exhaustive discussions had taken place both with the States and between agencies of the Commonwealth Government, that the legislation came into Federal Parliament. The original aim had been to introduce relatively uniform legislation across the country, but, frustrated by the Commonwealth's delay, a number of States introduced their own legislation well in advance of the Commonwealth. It is tragic that such a rare opportunity for uniformity has been squandered.[286]

11.12 In 1993, the need for uniformity was recognised by the National Proceeds of Crime Conference which concluded that

> Sufficient experience has now been had of the varying legislative schemes to warrant further combined consideration of the legislation by the Attorneys-General of the Commonwealth and each of the States and Territories, with a view to attaining a much greater degree of uniformity in legislation. Such uniformity will help the courts in each jurisdiction to interpret and apply the legislation by reference to guidance provided by the Supreme Court of each of the States and Territories.[287]

The Commission's view

11.13 It is clear to the Commission that the cost and inconvenience to third parties of having different rules in different jurisdictions cannot be understated. The advantages of greater consistency between confiscation regimes, if not uniformity, include

---

285.The NCA made no such comment relating to the Victorian scheme presumably because it came into force only in July 1998.

286.A Freiberg 'Criminal Confiscation, Profit and Liberty' (1992) 25 *Australian and New Zealand Journal of Criminology* 49.

287.National Crime Authority *National Proceeds of Crime Conference Sydney 18–20 June 1993*, AGPS Canberra 1995, Principal Conclusion 8.

- advantages to investigators and prosecutors particularly in dealing with multijurisdictional organised crime
- greater capacity to establish joint investigation teams
- the development of a common jurisprudence
- minimising costs
- more effective use of court time
- more effective protection of the rights of innocent third parties
- enhanced capacity by private enterprise to develop compliance programs and
- minimise the financial costs of compliance.

11.14 This review of the POC Act and related legislation by the Commission has been a comprehensive one done on a comparative basis. It may be that, once the Commonwealth government has taken its decisions on the Commission's recommendations and drafted a much simplified 'plain English' Bill, then that Bill might, again per the medium of SCAG, be considered as a basis for uniform legislation.

Recommendation 50. The Attorney-General should seek to place the question of uniformity of forfeiture laws on the agenda of SCAG in conjunction with the drafting of a new Act giving effect to the Commission's recommendations.

PART C

OTHER SPECIFIC REFORM ISSUES

12. Recognition of rights of third parties

Introduction

12.1 This chapter deals only with the recognition of the rights of innocent third parties under the POC Act and the Customs Act, Part XIII, Division 3. While it therefore focusses on forfeiture resultant upon conviction, whether statutory or judicially ordered, and exclusion from restraining orders either pending conviction or, under the Customs Act, pending a civil finding of engagement in a prescribed narcotics dealing or prescribed narcotics dealings, the implications of the recommended non-conviction based regime are also considered.

12.2 The recognition of the rights of third parties in administrative or *in rem* forfeitures under, for example, the remainder of the customs legislation and fisheries management legislation, is dealt with in the chapter dealing with those forfeitures, as they are posited on different policy considerations.[288]

12.3 It is clear from the various provisions dealing with the rights of third parties in both the POC Act and the Customs Act, Part XIII, Division 3 that it was not the intention of the legislature that there be any adverse impact on truly innocent third parties with *bona fide* interests in property. That said, the provisions providing relief for innocent third parties are extremely complex, although no more so than the confiscatory provisions from which they are intended to offer such relief.

12.4 Potential threats to third party interests exist at various stages of the process created by the POC Act. In particular they arise where property in which an innocent interest exists is

- restrained
- forfeited, whether automatically or by judicial order, and
- subject to a charge as a result of the making of a pecuniary penalty order.

12.5 The picture is further complicated by the fact that many interests, such as, for example, liens, are not capable of being registered, and hence their existence may not come to light at the appropriate times. Generally speaking, only encumbrances on land, motor vehicles and boats are capable of ready ascertainment through registers.

The legislative scheme: POC Act

Restraining orders

---

[288] See chapter 16.

12.6 As noted earlier in this Report, a proceeds action is frequently commenced by seeking a restraining order designed, *inter alia*, to ensure that no dealings are taken in relation to the restrained property which may affect its availability or value pending the making of an eventual forfeiture or pecuniary penalty order or a statutory forfeiture taking place. The restraining order is analogous to a Mareva injunction but, unlike a Mareva, it is not necessary for the applicant to demonstrate that the property or asset may be dissipated.[289]

12.7 Such a restraining order can relate not only to all or specified property of the defendant, but also to 'specified property of a person other than the defendant.'[290]

12.8 Applications may be made *ex parte*, as is usually the case where the order is sought in reliance on the proposed charging of the defendant with the predicate offence within 48 hours. An *ex parte* restraining order, however, remains in force for only such period not exceeding 14 days as is specified by the court,[291] although the court can extend this period. Where an extension is sought, the DPP must give notice of the application to the owner of the restrained property as well as to any other person whom the DPP has reason to believe may have an interest in the property.[292] Both categories of persons are entitled to appear and adduce evidence at the extension application[293] (in that sense the extension proceedings are similar to the normal restraint proceedings referred to below).

12.9 It follows that, from the time an *ex parte* restraining order is made, at least until the time of an application for an extension, property owned, or in which an interest is owned, by a third person may be the subject of restraint without the knowledge of the third person. The policy underlying this is to ensure that property which, although not owned by the defendant, appears to be under his or her effective control, or may be 'laundered' in order to avoid the forfeiture regime, remains available for forfeiture or to satisfy a pecuniary penalty order at least until the *bona fides* of the third party are established.

12.10 When a normal restraining order is sought, the Act again requires notice to be given to the owner of the property and any other person whom the DPP has reason to believe may have an interest in the property.[294] Any person claiming an interest in the property may appear and adduce evidence at the hearing of the application.[295]

---

289. POC Act s 44(9).
290. POC Act s 43(1)(f).
291. POC Act s 45(2).
292. POC Act s 45A(3).
293. POC Act s 46(2).
294. POC Act s 45(1).
295. POC Act s 46.

12.11 Before a restraining order can be made in relation to property of a person other than the defendant, certain conditions precedent must be satisfied depending on whether the predicate offence is an ordinary indictable offence or a 'serious offence'. These are set out in section 44(7) and (7A) as follows

> (7) Where the application seeks a restraining order against specified property of a person other than the defendant and the offence concerned is an ordinary indictable offence, the court shall not make a restraining order against the property unless:
>
> (a) the application is supported by an affidavit of a police offender stating that:
>
> (i) the officer believes that the property is tainted property in relation to the offence; or
> (ii) the officer believes that:
>
> (A) the property is subject to the effective control of the defendant; and
> (B) the defendant derived a benefit, directly or indirectly, from the commission of the offence; and
>
> (b) the court is satisfied, having regard to the matters contained in the affidavit, that there are reasonable grounds for holding that belief.
>
> (7A) Where the application seeks a restraining order against specified property of a person other than the defendant and the offence is a serious offence, the court shall not make a restraining order against a property unless:
>
> (a) the application is supported by an affidavit of a police officer stating that:
>
> (i) the officer believes that the property is tainted property in relation to the offence; or
> (ii) the officer believes that the property is subject to the effective control of the defendant; and
>
> (b) the court is satisfied, having regard to matters contained in the affidavit, that there are reasonable grounds for holding that belief.

12.12 Section 48(3) then sets out, amongst other things, a complex scheme of matters that a third party must establish to the satisfaction of the court in order to have his or her interests excluded from the restraining order. The matters may differ depending on whether the offence is an ordinary indictable offence or a serious offence and whether, in the case of the former, the order was made under section 44(7)(a)(ii) or otherwise or, in the case of the latter, the order was made under section 44(7A) or otherwise.

12.13 Insofar as relevant, section 48(3) provides as follows

> Where:

(a) a person (in this subsection called the "defendant") has been convicted of, or has been charged or is about to be charged with, an offence;
(b) a court, in reliance on the conviction, charging or proposed charging makes a restraining order against property; and
(c) a person having an interest in the property applies to the court for a variation of the order to exclude the person's interest from the order;

the court shall grant the application if:

(d) where the applicant is not the defendant and the offence is an ordinary indictable offence:

(i) if the restraining order was made against the property by virtue of subparagraph 44(7)(a)(ii) — the court is satisfied that the interest is not tainted property and that:

(A) a pecuniary penalty order cannot be made against the defendant; or
(B) the applicant's interest in the property is not subject to the effective control of the defendant; or

(ii) in any other case — the court is satisfied that the interest is not tainted property;

...
(f) where the applicant is not the defendant, the restraining order was not made by virtue of subsection 44(7A) and the offence is a serious offence — the court is satisfied that:

(i) the applicant was not, in any way, involved in the commission of the offence; and
(ii) where the applicant acquired the interest at the time of or after the commission, or alleged commission, of the offence — the applicant acquired the interest:

(A) for sufficient consideration; and
(B) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was tainted property;

(fa) where the applicant is not the defendant and the restraining order was made by virtue of subsection 44(7A) — the court is satisfied that:

(i) the applicant was not, in any way, involved in the commission of the offence;
(ii) the property is not tainted property in relation to the offence; and
(iii) the applicant's interest in the property is not subject of the effective control of the defendant; or

(g) in any case — the court is satisfied that it is in the public interest to do so having regard to all the circumstances, including:

(i) any financial hardship or other consequence of the interest remaining subject to the order;
(ii) the seriousness of the offence; and
(iii) the likelihood that the interest will be;

(A) subject of a forfeiture order;
(B) subject of section 30; or
(C) required to satisfy a pecuniary penalty order.

The need for reform — the Commission's view

12.14 When these provisions are subjected to detailed analysis, the objective of the legislature seems to have been to achieve with as great a precision as possible a reciprocal matching of the matters on which the deposing police officer will have been required to satisfy the court in obtaining a restraining order and the matters on which the third party must satisfy the court in order to secure release of the property in issue.

12.15 The Commission has several reservations about the correctness and appropriateness of this approach. Firstly, the Commission considers that, at least in respect of some matters, it is manifestly unfair for a third party to be required to discharge the burden of proving or disproving something in respect of which an innocent third party at arms length from the defendant cannot reasonably be expected to be in a position to offer evidence. For instance, an innocent third party who has obtained property in good faith and for value but who needs to rely on section 48(3)(d) to obtain relief from a restraining order may simply not be in a position to satisfy the court that the interest is not tainted property and, where the restraining order was made under section 44(7)(a)(ii), that a pecuniary order cannot be made against the defendant.

12.16 Secondly, it seems quite inappropriate that the burden required to be discharged by an innocent third party should differ, and in some cases differ quite significantly, by reason merely of the provisions under which the restraining order was sought.

12.17 From a civil liberties perspective such differentiation seems to the Commission to be highly undesirable as a matter of policy as well as operating (as demonstrated in relation to the first concern discussed) in a harshly discriminatory fashion in some cases — this notwithstanding that section 48(3)(g) arguably provides a broad public interest ground to which a court might seek to have recourse to redress any perceived hardship or anomaly.

12.18 For these reasons, and those discussed below in relation to protection of third parties from automatic and judicially order forfeiture, the Commission favours a single simplified universal test to be satisfied by innocent third parties seeking release of their interest from any kind of restraining and forfeiture order, under the Act. The nature of such a test is discussed and elaborated further in this chapter.

Statutory forfeiture

12.19 As noted earlier in this Report where, pursuant to section 30 of the Act, a person is convicted of a 'serious offence' as defined, all property which remains the subject of a restraining order six months after conviction is automatically forfeited to the Commonwealth. There is provision for the period to be extended in cases where an application for an exclusion order is on foot but is as yet undetermined.

12.20 The Act, in section 31, provides further possibilities for the recognition of the rights of third parties, even after forfeiture has occurred. Under certain circumstances a third party can apply for an order determining the nature, extent and value of the persons interest in the property and either a transfer of that interest from the Commonwealth or, where the Commonwealth has already divested itself of the property, for payment by the Commonwealth to the applicant of the value as determined by the court.[296]

12.21 However, an application may not be made, except with the leave of court, by a person who was given notice of the proceedings on the application for the relevant restraining order or of the making of that order.[297] The court may only grant such leave if it is satisfied that the person's failure to seek to have the property excluded from that restraining order was not due to any neglect on the part of the applicant.[298]

12.22 The application must be made before the end of a period of six months commencing on the date on which the property is forfeited to the Commonwealth,[299] which ordinarily means, given that forfeiture occurs at the earliest six months after conviction, within 12 months of the latter date. Again leave may be given to apply out of time where there is no neglect involved in the delay in making the application.[300]

12.23 These provisions are particularly valuable in relation to unregistered interests in property of which the DPP or court may at relevant times have been unaware.

12.24 Section 31(6) sets out the matters as to which the court must be satisfied and, if so satisfied, the order it may make. That subsection is as follows

> (6) Where a person applies for an order under this subsection in respect of an interest in property, the court may:
>
> (a) if satisfied that:

296.POC Act s 31(6).

297.POC Act s 31(4).

298.POC Act s 31(5).

299.POC Act s 31(2).

300.POC Act s 31(3).

(i) the applicant was not, in any way, involved in the commission of the relevant offence;

(ia) the applicant's interest in the property is not subject to the effective control of the defendant; and

(ii) if the applicant acquired the interest at the time of or after the commission of the offence — the applicant acquired the interest:

(A) for sufficient consideration; and

(B) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was tainted property; or

(b) if satisfied that:

(i) the property was not used in, or in connection with, any unlawful activity and was not derived or realised, directly or indirectly, by any person from any unlawful activity; and

(ii) the applicant's interest in the property was lawfully acquired;

make an order:

(c) declaring the nature, extent and value of the applicant's interest in the property; and

(d) either:

(i) if the interest is still vested in the Commonwealth — directing the Commonwealth to transfer the interest to the applicant; or

(ii) declaring that there is payable by the Commonwealth to the applicant an amount equal to the value declared under paragraph (c).

The need for reform — the Commission's view

12.25 While section 31(6) offers an advantage over section 48 insofar as there is a single provision covering all property 'claw back' claims in respect of automatically forfeited property, closer analysis discloses that, overall, it does more to compound than to alleviate the confusion created by the differential treatment of third party rights under section 48.

12.26 A major difficulty created by the provision is that, although both of the alternate grounds for the granting of relief as set out in paragraphs (a) and (b) are capable of applying to property of the defendant and a third party, the grounds set out in paragraph (a) seem as inappropriate to a claim for relief by a defendant as the grounds set out in (b) seem inappropriate to a claim for relief by a third party.

12.27 When a comparison of those paragraphs is made with section 48, it will be seen that the grounds set out in (a) are, in respect of restrained property, limited under section 48(3)(f) to third party claims for relief from a restraining order not made by virtue of section 44(7A) but relating to a serious offence, whereas the grounds set out in (b) are limited under section 48(4) to a claim for relief by a defendant in respect of a serious offence.

12.28 The different grounds set out in section 48(3)(fa) under which a third party may seek relief from a restraining order made by virtue of section 44(7A) in respect of a serious offence play no part in the scheme of section 31(6).

12.29 In the Commission's view, a greater sense of consistency in the treatment of third party rights would have been achieved if section 31(6)(a) had been confined in its operation to third parties and (b) correspondingly confined to defendants.

12.30 The above analysis and considerations strengthen the Commission's sense expressed above in relation to restraining orders that, in the interests of simplicity, uniformity, certainty and fairness of operation, it is highly desirable that a single universally applicable test be formulated in relation to the grounds on which third party interests may be relieved from the application of restraining and forfeiture orders.

12.31 The adoption of a single test would also have the advantage of eliminating the possibility of an unsuccessful applicant for third party relief under section 48 being able, in the case of a serious offence attracting automatic forfeiture, to have a second opportunity, under section 31(6), to litigate the same issue. In this connection the Commission recalls that in *DPP v Logan Park Investments Pty Ltd and Anor*, the Court allowed a third party who had made an unsuccessful application under section 48 to make a further application under section 31(6) on the ground, *inter alia*, that

> Nothing in the relevant statutory provisions gives rise to a necessary implication that failure to obtain a remedy under s 48(3) excluded the entitlement to make an application under s 31.[301]

12.32 The Court noted that

> the criteria mentioned in s 31(6)(b) are not exactly those mentioned in s 48(3)(fa).

12.33 In this regard the Court concluded that

> Had it been intended that an application under s 48 of the Act would exhaust the right to apply under s 31, it would have been expected that the drafter would have ensured an exact equivalence between the provisions of the two sections.

---

[301] *DPP v Logan Park Investments Pty Ltd and Anor* (1995) 37 NSWLR 118 at 127.

12.34 In the Commission's view, it would seem highly undesirable that a third party, having failed to 'claw back' property under section 48, should be entitled to a second chance under section 31. Such a possibility should be foreclosed both by express limitations and by prescription of common grounds for 'claw back' by third parties, under sections 48 and 31 as well as section 21.

Judicially ordered forfeiture

12.35 In relation to judicially ordered forfeiture under section 19, the Act also makes specific provision for third party 'claw back' in section 21.

12.36 Section 21, so far as relevant for present purposes provides as follows

> ...
>
> (6) If a person applies to a court for an order under this subsection in respect of the applicant's interest in property and the court is satisfied that:
>
> (a) the applicant was not, in any way, involved in the commission of an offence in respect of which forfeiture of the property is sought, or the forfeiture order against the property was made, as the case requires; and
> (b) if the applicant acquired the interest at the time of or after the commission of such an offence-the applicant acquired the interest:
>
> (i) for sufficient consideration; and
> (ii) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time of the acquisition, tainted property;
>
> the court shall make an order;
> (c) declaring the nature, extent and value (as at the time when the order is made) of the applicant's interest; and
> (d) either:
>
> (i) if the interest is still vested in the Commonwealth-directing the Commonwealth to transfer the interest to the applicant; or
> (ii) declaring that there is payable by the Commonwealth to the applicant an amount equal to the value declared under paragraph (c).

12.37 The grounds on which the third party must satisfy the court are, with one exception, similar to those prescribed in section 31(6)(a). The exception is that, unlike under section 31(6)(a), it is not necessary to satisfy the court that the applicant's interest in the property is not subject to the effective control of the defendant. The nature of the order the court may make under section 21(6) is identical to the order which may be made under section 31.

12.38 The provisions relating to the time within which applications must be brought are similar to those for applications under section 31.[302]

12.39 Leave is required to bring the application where the applicant was given notice of the application for the forfeiture order or appeared at the application.[303] Leave is to be granted if the court is satisfied that there are special grounds. Special grounds may include that there was a good reason for that applicant not appearing on the forfeiture application or that fresh evidence is available to the applicant which was unavailable earlier.[304]

The need for reform — the Commission's view

12.40 In relation to the test to be satisfied by a third party in order to obtain relief of a property interest from the operation of a judicially ordered forfeiture, the Commission notes that the lack of symmetry between this test in section 21(6) and those enunciated in section 31(6) and in some elements of section 48 further reinforces the Commission's sense of the urgent need for amendment to seek a desirable and appropriate level of simplicity and uniformity and certainty and fairness of operation.

Customs Act 1901, Part XIII, Division 3

12.41 As discussed earlier, a non-conviction based civil forfeiture regime is provided for in the Customs Act in relation to a proven (on the balance of probabilities) prescribed narcotic dealing or proven such dealings. The regime permits only the making of a pecuniary penalty order and has no property forfeiture provisions. It follows that the recognition of the rights of third parties is restricted to seeking the exclusion of property from property restrained in order to be available to satisfy a pecuniary penalty order once made.

12.42 As is the case of the POC Act, the Customs Act permits the making of restraining orders, including as to specified property of a person other than the defendant.[305]

12.43 All that an applicant needs to establish to have his or her property excluded from the restraining order is that the interest is not subject to the effective control of the defendant. Section 243F(2A) provides as follows

> Where:
>
> (a) the Court made the original order against the property in reliance on the engaging by a person (in this subsection called the defendant) in a

---

302. POC Act s 21(7) and (8); s 31(2) and (3).

303. POC Act s 21(3).

304. POC Act s 21(4) and (5).

305. Customs Act s 243E.

prescribed narcotics dealing or prescribed narcotics dealings during a particular period; and

(b) another person having an interest in the property applies to the Court for a variation of the order to exclude the interest from the order;

the Court shall grant the application if satisfied that the interest is not subject to the effective control of the defendant.

12.44 It should be noted that provisions in both Part XIII Division 3 of the Customs Act and the POC Act relating to third party relief from restraining orders, where such orders relate solely to the recovery of pecuniary penalty orders, need to be viewed separately from those relating to the seeking of such relief from actual or potential forfeiture.

12.45 This is because, under both regimes, only property that is under the effective control of the defendant may be subject to the statutory charge regimes under both Acts (see in particular sections 243C(2)(a) and (b), 243CA, 243E(2A), 243F(2A) and section 243J of the Customs Act and POC Act section 28(1), (3) and (5) and section 50(1)).

The submissions

12.46 In comparison with other matters raised in the introductory booklet, the number of submissions that addressed protection of third party rights was relatively high.

12.47 There were nine such submissions, these being from the DPP,[306] AFP,[307] Attorney-General's Department,[308] ITSA,[309] the Victorian Bar Council and Criminal Bar Association,[310] the Australian Finance Conference,[311] the Commonwealth Bank,[312] the Australian Society of Certified Practising Accountants (ASCPA)[313] and the Australian Bankers' Association.[314]

12.48 While, as elaborated below, the matters of concern raised by the submissions were divergent, the Commission notes that the need for the legislation to give due, proper and balanced consideration to the rights of third parties was universally reaffirmed or not called into question.

306.DPP *Submission 8*.

307.AFP *Submission 7*.

308.DPP *Submission 3*.

309.ITSA *Submission 26*.

310.Victorian Bar Council and Criminal Bar Association (joint submission) *Submission 33*.

311.AFC *Submission 28*.

312.Commonwealth Bank *Submission 17*.

313.ASCPA *Submission 14*.

314.ABA *Submission 13*.

12.49 The issue which attracted the greatest attention was the absence of express protection of rights of creditors whose interests are protected by encumbrances, in cases of automatic and judicially ordered forfeiture. Not surprisingly, this was the focus of attention in relation to third party protection in the submissions from the Australian Finance Conference,[315] the Commonwealth Bank,[316] the Australian Society of Certified Practising Accountants[317] and the Australian Bankers' Association.[318] This issue is dealt with below under the heading 'Interests subject to encumbrances in favour of third parties'.

12.50 Also prominent amongst the matters raised with the Commission is the concern of the DPP[319] and the AFP[320] in particular, with support also from ITSA, that the tests for third party relief should be such as to place an appropriate onus on the third parties to demonstrate the *bona fides* of their interests in question. Of particular concern is that third parties should not be able to 'claw back' interests pursuant to arrangements under which they became chargees of tainted property or property acquired out of proceeds. This issue is dealt with below under the heading 'Fashioning an appropriate test for third party relief'.

12.51 Other issues raised by submitters concerned

- the difficulties involved in disposing of jointly owned property where the interest of only one joint tenant is forfeited[321]
- the entitlement of innocent third parties to costs[322] and
- whether the third party protections apply to non-natural persons such as corporations and trusts.[323]

12.52 These matters are also dealt with below under separate headings.

12.53 The Commission notes that, while the complexity of the third party provisions is implicitly recognised in some submissions, the submissions as a whole do not echo the level of concern expressed earlier in this chapter by the Commission regarding the somewhat bewildering array of tests for third party relief found in sections 21, 31 and 48, and the unfairness and inappropriateness of aspects of some of those tests.

315.AFC *Submission 28*.

316.Commonwealth Bank *Submission 17*.

317.ASCPA *Submission 14*.

318.ABA *Submission 13*.

319.DPP *Submission 8*.

320.AFP *Submission 7*.

321.Attorney-General's Department *Submission 3*.

322.Victorian Bar Council and Criminal Bar Association *Submission 33*.

323.ibid.

12.54 The Commission does not, however, regard the lack of such comment as suggesting that these concerns are not shared. In the first place, the Commission notes that it did not itself seek comment on these particular aspects of the third party relief provisions and thus did not encourage the expression of views regarding them.

12.55 Secondly, the chief respondents regarding third party rights have been umbrella organisations for businesses, particularly banks and finance houses, that ordinarily have a greater understanding of complex statutes, and resources to seek advice in relation to them, than have ordinary individuals having only occasional need to address such provisions.

12.56 Thirdly, in any event, the submissions of both the DPP and the AFP lay stress on the considerable efforts that are apparently made by both prosecutors and police to fashion applications for restraining and forfeiture orders in a way that excludes, to the fullest extent, possible property that inquiry suggests is third party owned and would attract relief if application for such relief were made to the courts. That consideration, plus the fact that, despite its wide dissemination, the Commission's introductory booklet would be less likely to reach individuals with third party property experience under the POC Act than organisations, are likely to account for the absence of individual submissions on these issues.

12.57 It remains to deal with the specific issues identified above as raised by the submissions.

Recognising interests subject to encumbrances in favour of third parties

12.58 Except in relation to charges on property created by virtue of section 50 of the POC Act to secure payment of a penalty amount under a pecuniary penalty order, the Act does not accord any preference to third parties whose interests in restrained property are protected by an encumbrance over other interests that are not encumbered.

12.59 Under section 50(3), a charge created by section 50(1)

> (a) is subject to every encumbrance on the property that came into existence before the charge and that would, apart from this subsection, have priority over the charge.

12.60 The term 'encumbrance' is defined in section 4 to include any interest, mortgage, charge, right, claim or demand in respect of the property.

12.61 Thus, a person having the benefit of an encumbrance on property that is subject to a restraining order, and who wishes to obtain court ordered third party relief under sections 21, 31 and 48 from the restraining order, or from automatic or

judicially order forfeiture, must fulfil all of the requirements of the relevant provision in the same way as a third person seeking such relief in respect of an unsecured debt.

12.62 The AFC, as the industry body representing finance companies which, in 1997 alone, wrote $18 billion in equipment finance business, has pointed in its submission to the significant asset risk posed to its members by the various confiscation regimes including that under the POC Act.[324]

12.63 While conceding that the reported occasions on which assets have been so lost are few, when considered in the context of the number of transactions entered into, losses when they do occur can be significant. Moreover, even when finance companies successfully claim back their interest, the absence of recognition of the special status of debts that are ordinarily protected by encumbrances in favour of third party creditors can necessitate the incurring of very substantial costs that might be avoided or mitigated if appropriate recognition of security was accorded by the legislation.

12.64 The AFC has reinforced the point by reference to two case studies, one in relation to a completed matter, the other a matter still in train at the date of the AFC submission

> The first case involved the importation of some 700 kilograms of heroin. One of the assets restrained was a Mercedes-Benz vehicle leased from one of AFC's member companies. The AFP seized the vehicle. The defendant's wife used the vehicle and sought to establish a claim over it based on an argument that it formed part of the matrimonial property due to her. The finance company was joined in the proceedings. The wife's application failed and, with the consent of the AFP and DPP, the finance company applied to sell the vehicle at public auction. That application was successful as the company satisfied the court that it could obtain a better price than if it were sold otherwise. The court set a reserve price which was later obtained at auction. The car was sold, the finance company paid in full and the balance of the proceeds of sale were remitted to the DPP. The AFC notes that although successful, the process took some 4 months to complete and cost the finance company some $10,000 in legal fees. Notification of the finance company of the seizure was, according to the submission, a chance occurrence brought about by the unusual application of the defendant's wife. AFC expresses a fear that that result may not have been achieved but for the support provided to its member company by the AFP and DPP.
>
> In another, as yet unresolved case, a person is charged with tax fraud. One of the assets seized is a Lamborghini motor vehicle in which the AFC's member company has an interest of some $200,000. The finance company is seeking a similar result to that in the previous case, but does not as yet know whether the same co-operation will be forthcoming from the AFP and DPP.[325]

---

[324].AFC *Submission 28*.

[325].ibid.

12.65 The AFC submits that the answer to the problems illustrated by these cases lies in express statutory recognition of, and the according of priority to, encumbrances over forfeiture. In this regard, the AFC points to legislative provisions in Victoria, New South Wales and the Northern Territory that provide such recognition and protections. It considers that it is inappropriate that, in cases such as those described above, a favourable outcome for the finance company might be achieved only by reason of the goodwill of law enforcement agencies.[326]

12.66 Under the COPOC Act (NSW) — the conviction based regime that has its genesis in the original SCAG Model Bill — property that vests in the Crown under a forfeiture order

> so vests subject to every charge and encumbrance to which the property was subject immediately before the forfeiture order was made and, in the case of land under the provisions of the *Real Property Act 1900*, is subject to every mortgage, lease or other interest recorded in the Register kept under that Act.[327]

12.67 The Confiscation Act (Vic) is in a similar vein. It provides that forfeited property

> vests in the Minister subject to every mortgage, charge or encumbrance to which it was subject immediately before the order was made or the automatic forfeiture occurred (as the case may be) and to
>
> (c) in the case of land, every interest registered, notified or saved under the *Transfer of Land Act 1958* or the *Property Law Act 1958*; and
> (d) in the case of goods to which Part 3 of the *Chattel Securities Act 1987* applies, every security interest registered under that Act.[328]

12.68 The CFP Act (NT) provides for forfeited property to vest in the Territory

> subject to every charge or encumbrance to which the property was subject immediately before the order was made and, in respect of land under the Real Property Act, is subject to every mortgage lease or other interest recorded in the Register kept under that Act.[329]

12.69 Importantly, only Victoria makes any kind of provision for dealing with the circumstance where the charge or encumbrance was created specifically for the purpose of limiting the effect of a forfeiture order. The Confiscation Act (Vic) provides as follows

---

326.ibid.

327.COPOC Act (NSW) s 19.

328.Confiscation Act (Vic) s 41.

329.CFP Act (NT) s 6.

> If the Supreme Court or the County Court is satisfied, on application by —
>
> (a) in the case of property forfeited under a civil forfeiture order, a prescribed person or a person belonging to a prescribed class of persons; or
> (b) in any case, the DPP —
>
> that a mortgage or charge to which the property is subject was created to limit the effect of a forfeiture order or automatic forfeiture, it may discharge that mortgage or charge.[330]

12.70 It should be noted that the Victorian provision is limited to mortgages and charges and does not apply to other encumbrances, that term being defined as follows

> 'encumbrance', in relation to property, includes any interest, mortgage, charge, right, claim or demand which is or may be had, made or set up in, to, on or in respect of the property.[331]

12.71 It is also noted, in relation to section 50(3)(a) of the POC Act, that no provision is made permitting the discharging of any encumbrances entered into for the purpose of limiting the effect of a charge over property to satisfy a pecuniary penalty order.

12.72 Returning to the submissions relating to the protection of encumbrances, the Australian Bankers' Association (ABA)[332] and Commonwealth Bank[333] provide further support for express statutory recognition.

12.73 The Commonwealth Bank comments that, if such recognition were provided, the DPP would be relieved of the duty to notify secured creditors prior to the making of forfeiture orders and secured creditors would be relieved of the necessity to incur the cost and trouble in making applications to the court to protect their interests.[334]

12.74 Of significance to the discussion later in this chapter regarding the nature of the statutory protection that might be provided under the POC Act to third parties whose interests are protected by an encumbrance, the Commonwealth Bank recognises that notification of creditors sharing the protection of an encumbrance would remain necessary where the *bona fides* of the encumbrance was disputed by the DPP. The Commonwealth Bank submission also stresses the importance of ensuring that statutory recognition of encumbrances is not limited to interests that are capable of registration.[335]

330.Confiscation Act (Vic) s 42(1).

331.Confiscation Act (Vic) s 3.

332.ABA *Submission 13*.

333.Commonwealth Bank *Submission 17*.

334.ibid.

335.ibid.

12.75 Bankers liens and 'set off' rights are cited as examples of the kinds of non-registrable interests that should be accorded statutory recognition. The submission offers the view that statutory recognition of such interests is made all the more important because non registration may lead to the court and the Commonwealth authorities being unaware of them, and thus overlooking them, in forfeiture proceedings.[336]

12.76 In its submission, the ABA suggests that an encumbrance that is registered on a Commonwealth, State or Territory register should be so recognised and that the Commonwealth should be obliged under the legislation to search such registers and notify interest holders. Thus, in the view of the ABA, where a registered encumbrance exists, there should be no onus on the holder to notify that interest.[337]

12.77 The remaining submission that deals with the issue of protection of encumbrances is that of the ASCPA. While it also argues strongly for statutory recognition of encumbrances, in common with the Commonwealth Bank it recognises that the *bona fides* of such encumbrances needs to be factored into the equation. However, whereas the Commonwealth Bank goes no further than acknowledging the need for registered encumbrancees to be notified by the Commonwealth where the *bona fides* of the encumbrance is in issue, the ASCPA seems to go further than acknowledging a need for an encumbrancee to discharge an onus of establishing such *bona fides*. The ASCPA position is succinctly stated as follows

> Equity requires that the rights of innocent third parties need to be protected. The legislation should expressly protect the rights of *bona fide* holders of charges and other interests in restrained property. The onus of establishing the existence of a *bona fide* charge should rest with the chargeholder.[338]

The Commission's view

12.78 The Commission agrees generally with the views expressed by those submitters who consider that express statutory protection against forfeiture should be accorded to encumbrancees in respect of property subject to both statutory and judicial forfeiture. Moreover, it considers that such protection ought not be limited to such encumbrances as are registered under real property or personal property securities legislation but extend to all interests encompassed by the wide ranging definition of encumbrance in the POC Act and in the legislation of other jurisdictions such as New South Wales and Victoria.

12.79 The extent, if any, to which such recognition and protection ought to be qualified so as to exclude encumbrances that are not *bona fide*, and particularly,

---

336.ibid.

337.ABA *Submission 13*.

338.ASCPA *Submission 14*.

encumbrances entered into for the express purpose of frustrating the operation of proceeds legislation is, however, another matter. Intimately connected with this issue is the matter of where the burden of proof should lie in relation to encumbrances. These issues are dealt with in the section immediately following.

Fashioning an appropriate test for third party relief

12.80 In his submission, the DPP states that, in the experience of his office, the rights of innocent third parties are adequately protected under the current provisions. Specifically, the DPP is not aware of any case where an innocent third party has lost as a result of actions taken under the legislation, with the possible exception of the Commissioner of Taxation. While the submission does not specifically address the difficulties and expenses confronted by persons such as credit providers, it does recognise that a case for additional protection might be made. In that connection the submission says that

> ... the DPP would have no difficulty with additional provisions being enacted if that was considered necessary. However, any additional provisions will need to be carefully worded to ensure that they do not simply give defendant's, and their associates, additional opportunities to delay the operation of the Act.[339]

12.81 Similar sentiments are expressed by the AFP in its submission. According to it, operational reporting indicates that attempts by criminals to divest to family members and friends property that constitutes the profits of crime are commonplace. The AFP states that quite often such matters are not pursued due to the problems associated with establishing that the property in question remains under the effective control of the defendant. The AFP recommends therefore, that if the rights of third parties are to be further accommodated in the legislation, the onus should be placed on the third party to prove that the interest is not under the effective control of the defendant and that the asset or its value did not result from illegal activity.[340]

The Commission's view

12.82 These submissions, as reinforced in face to face discussions, add significant weight to the Commission's own analysis and concerns that, whether in respect of third party interests at large, or in relation to interests of creditor encumbrancees, it is imperative that the legislation be framed in such a way as to eliminate, or reduce to the extent practicable, the scope for third parties to obtain relief from restraining and forfeiture orders, and from the charging of property to satisfy pecuniary penalty orders, where the third party interest is acquired otherwise than from a *bona fide* and at arms length transaction.

339.DPP *Submission 8*.

340.AFP *Submission 7*.

12.83 Thus, notwithstanding the Commission's considerable sympathy for the concerns expressed by credit providers regarding the matter of proof, the Commission's sense is that in every case in which a third party claims an interest, whether as encumbrancee or otherwise, in property otherwise subject to forfeiture or to a charge to secure payment of a pecuniary penalty order (including such an order under Division 3 of Part XIII of the Customs Act), there should be an onus on the third party to establish that their interest is, in the case of an encumbrancee, not included in the forfeitable or chargeable property, or, in the case of other third party interests, that 'claw back' of the interest should be ordered.

12.84 That said, the Commission considers that a substantially lower burden should be placed on encumbrancees whose interest has been obtained in the ordinary course of business of the encumbrancee. In such cases, it should suffice for the third party (usually a credit provider) to demonstrate that the transaction to which the encumbrance relates was entered into by the encumbrancee *bona fide*, for valuable consideration and in the ordinary course of business.

12.85 Earlier in this chapter the Commission has expressed its preference, first, for a simplified test to be satisfied by third parties seeking to 'claw back' interests, and secondly, for the elimination of criteria that place unfair and unreasonable burdens upon such parties.

12.86 The Commission has also given consideration to the need for any refashioned test to take into account the needs of third parties under the non-conviction based scheme recommended in chapter 4.

12.87 Having regard to recommendations in that chapter, and in chapter 5 relating to the making of restraining orders in connection with the proposed scheme, the Commission is satisfied that a simplified test can be fashioned to cover both the existing and new regimes.

12.88 Taking all these considerations also into account the Commission's disposition is to favour a third party interest regime along the following lines[341]

1. (a) The legislation should expressly provide that —

   (i) where an encumbrance in respect of property

      (A) forfeited under sections 19 or 30 of the POC Act or the new non-conviction based regime
      (B) subject to a charge under section 50(1) of the POC Act, or the non-conviction based regime, in respect of a pecuniary penalty order

[341] It is assumed that the regime of Division 3 of Part XIII of the Customs Act will be subsumed, as recommended in chapter 18, within the new non-conviction based regime recommended in ch 4.

was entered into *bona fide* and for valuable consideration and in the ordinary course of the business of the encumbrancee, the forfeiture or charge, as the case may be, is subject to that encumbrance;

(ii) where such an encumbrance was entered into otherwise than in the ordinary course of business (if any) of the encumbrancee and

(A) the encumbrancee was not involved in the conduct to which the forfeiture or charge relates
(B) the encumbrancee's interest is not subject to the effective control of the defendant and
(C) where the encumbrancee's interest was acquired directly or indirectly from the defendant, the encumbrancee acquired the interest *bona fide* and for valuable consideration

the forfeiture or charge is subject to such encumbrance.

(b) In a case of dispute, the onus should be on the encumbrancee to satisfy the court on the balance of probabilities that the relevant requirements are fulfilled in relation to the encumbrancee's interest.

2. (a) The legislation should prescribe a uniform set of matters in respect of which a third party must satisfy the court when seeking exclusion of the third party's interest other than an encumbrance -

(i) under section 48 of the POC Act, from a restraining order made pursuant to section 43
(ii) under section 21, from a judicially ordered forfeiture made under section 19
(iii) under section 31, from an automatic forfeiture under section 30 or
(iv) from a restraining order on forfeiture under the new non-conviction based regime

(b) The matters on which the third party would be required to satisfy the court are that —

(i) the third party was not involved in the conduct to which the restraining order or forfeiture applies
(ii) that the third party's interest is not subject to the effective control of the defendant and
(iii) where the interest was acquired directly or indirectly from the defendant, the third party acquired the interest *bona fide* and for valuable consideration.

12.89 The Victorian Bar Council and Criminal Bar Association, in their joint submission, have argued that the burden of proof for a third party seeking to establish their interest in restrained or forfeited property should be the normal civil

standard of balance of probabilities.[342] The Commission's understanding is that this is the current standard. Moreover, the Commission would be opposed to any change in that regard.

12.90 In order further to mitigate the impact of restraining and forfeiture orders on *bona fide* business encumbrancees, the relevant Commonwealth authorities should have placed upon them the statutory obligation of searching such registers of encumbrances as are established in the Australian jurisdictions in which property the subject of a restraining order is understood to be located and to forthwith advise any encumbrancee so disclosed of the existence of the restraining order.

Forfeiture of joint interest

12.91 In the context of third parties' rights, the submission of the Attorney-General's Department raises for consideration the difficulties associated with selling a forfeited joint interest in circumstances where the interest of the other joint tenant or joint tenants is unaffected by the forfeiture order.[343]

12.92 The Commission has already dealt with this issue in the context of the powers that should be conferred on the Official Trustee. It will be noted that, in chapter 10, the Commission has proposed that in such cases the OT be empowered to apply to the court for authorisation to sell the whole estate, with the innocent joint tenant being paid their proper share.

Costs incurred by third parties in establishing entitlement to their interests in restrained or forfeited property

12.93 The joint submission of the Victorian Bar Council and Criminal Bar Association submits that the legislation should expressly provide that costs will be awarded in third party relief matters as in the case of any normal civil litigation and cites two county court decisions in which this has occurred.[344] As confiscation proceedings are civil litigation, one would have expected that the normal rules of 'costs follow the event' would apply. If there is any doubt, however, the Commission would have no difficulty with the legislation providing that costs should be awarded to an innocent third party who successfully seeks to exclude property from either a restraining order or from forfeiture, whether statutory or judicially ordered.

Availability of third party protections and relief to non-natural persons

---

342. Victorian Bar Council and Criminal Bar Association S*ubmission 33*.

343. AGD *Submission 3*.

344. Victorian Bar Council and Criminal Bar Association *Submission 33*.

12.94 The joint submission of the Victorian Bar Council and Criminal Bar Association also submits that the term 'person' should be defined to include corporations and unit trusts so that they could have access to the third party relief provisions.[345]

12.95 In the Commission's view, this is already the position by virtue of the *Acts Interpretation Act 1901* which, in section 22, provides that

> In any Act, unless the contrary intention appears:
>
> (a) expressions used to denote persons generally (such as "person", "party", "someone", "anyone", "no-one", "one", "another" and "whoever"), include a body politic or corporate as well as an individual.

Recommendation 51. The POC Act should expressly preclude a third party who has unsuccessfully sought an order under section 48 to exclude an interest from a restraining order from seeking an exclusion order under section 21 or section 31 in respect of the same interest.

Recommendation 52

- The POC Act should expressly provide that
  - where an encumbrance in respect of property
    (i) forfeited under section 19 or section 30 of the POC Act or the new non-conviction based regime or
    (ii) subject to a charge under section 50(1) of the POC Act, or the new non-conviction based regime in respect of a pecuniary penalty order,

    was entered into *bona fide* and for valuable consideration and in the ordinary course of business of the encumbrancee, the forfeiture or charge, as the case may be, is subject to that encumbrance
  - where such an encumbrance was entered into otherwise than in the ordinary course of business (if any) of the encumbrancee and
    (i) the encumbrancee was not involved in the conduct to which the forfeiture or charge relates

    (ii) the encumbrancee's interest is not subject to the effective control of the defendant and
    (iii) where the encumbrancee's interest was acquired directly or indirectly from the defendant, the encumbrancee acquired the interest *bona fide* and for valuable consideration

    the forfeiture or charge is subject to such encumbrance.

- In case of dispute, the onus should be on the encumbrancee to

[345] ibid.

satisfy the court on the balance of probabilities that the relevant requirements are fulfilled in relation to the encumbrancee's interest.

- The legislation should require Commonwealth authorities to search any relevant Australian register of encumbrances and to forthwith advise any encumbrancee so identified of the existence of the restraining order.

Recommendation 53

- The POC Act should prescribe a uniform set of matters in respect of which a third party must satisfy the court when seeking exclusion of the third party's interest other than an encumbrance
  - under section 48, from a restraining order made under section 43
  - under section 21, from a judicially ordered forfeiture ordered under section 19 or
  - under section 31, from an automatic forfeiture under section 30.
  - from a restraining order or forfeiture under the new non-conviction based regime

- The matters on which the third party should be required to satisfy the court are that
  - the third party was not involved in the conduct to which the restraining or forfeiture order applies
  - that the third party's interest is not subject to the effective control of the defendant and
  - where the interest was acquired directly or indirectly from the defendant, the third party acquired the interest *bona fide* and for valuable consideration.

Recommendation 54. The legislation should expressly provide that a third party who successfully applies for an order

- to the effect that forfeited property is subject to the third party's interest as encumbrancee in respect of the forfeited property or
- excluding the third party's interest from a forfeiture, charge, or restraining order

is entitled to be awarded costs on such basis as the court considers appropriate.

13. Scope of property capable of being restrained or forfeited

Introduction

13.1 While the recommendations in the preceding chapter propose simplification and consolidation of the provisions relating to removal and exclusion or 'claw back' of third party property from restraining orders and forfeiture, the concepts of 'effective control' and 'tainted property' remain as critical to the operation of the proposed new provisions as do the existing provisions.

13.2 They are important concepts in other areas also. For example, judicially ordered forfeiture pursuant to section 19 may be ordered only where the court is satisfied that the property is 'tainted property' in respect of the particular predicate offence. In assessing the value of benefits derived by a person under section 27 for the purposes of a pecuniary penalty order, the court is entitled to treat as property of the defendant such property as it finds to be subject to the effective control of that person. Additionally, the new restraining order regime proposed in chapter 5 would require courts, in assessing the scope of orders and claims by defendants for the release of property, to make judgments in relation to whether property is, or is likely to be, tainted property or under the control of a person.

13.3 The purpose of this chapter is to consider issues regarding the adequacy of the current definitions of 'effective control' and 'tainted property'.

'Effective control'

13.4 In the POC Act, the effective control of property is defined in section 9A as follows

> (1) Property, or an interest in property, may be subject to the effective control of a person within the meaning of this Act whether or not the person has:
> (a) a legal or equitable estate or interest in the property; or
> (b) a right, power or privilege in connection with the property.
>
> (2) Without limiting the generality of any other provisions of this Act, in determining:
> (a) whether or not property, or an interest in property, is subject to the effective control of a person; or
> (b) whether or not there are reasonable grounds to believe that property, or an interest in property, is subject to the effective control of a person
> regard may be had to:
> (c) shareholdings in, debentures over or directorships of a company that has an interest (whether direct or indirect) in the property;

(d) a trust that has a relationship to the property; and
(e) family, domestic and business relationships between persons having an interest in the property, or in companies of the kind referred to in paragraph (c) or trusts of the kind referred to in paragraph (d), and of other persons.

13.5 All other forfeiture Acts have provisions corresponding to section 9A of the POC Act, although Victoria and Western Australia have gone somewhat further. Western Australia further provides that any property held, in the opinion of the court, for the ultimate benefit of a person is to be treated as under the effective control of the person.[346]

13.6 Victoria has extended its effective control provision to include antecedent gifts by adding a definition of 'Property in which the defendant has an interest'. That definition is in the following terms

> For the purposes of an application under this Act in relation to an offence, property in which the defendant has an interest includes:
>
> (a) any property that is, on the day when the first application is made under this Act in respect of that offence, subject to the effective control of the defendant; and
> (b) any property that was the subject of a gift from the defendant to another person —
> (i) within the period of six years before the first application made under this Act in respect of that offence; and
> (ii) at any time if the application is made for the purposes of automatic forfeiture or civil forfeiture.[347]

13.7 'Gift' in turn is defined as follows

> ... in relation to property, includes a transfer for a consideration significantly less than the greater of —
> (a) the prevailing market value of the property; or
> (b) the consideration paid by the defendant.[348]

13.8 In relation to the definition of 'effective control' in the POC Act, the Director of Public Prosecutions is of the view that the Act should be amended to include a concept of 'effective ownership'. According to the DPP submission, there are cases where a defendant does not control property and has no legal or equitable interest in it, but is nonetheless the effective owner of it. In one case cited by the DPP, the defendant was actually in gaol. The evidence suggested, nevertheless, that the prisoner was the effective owner, although it was hard to show any legal or

---

[346].CCP Act (WA) s 52A(2).

[347].Confiscation Act (Vic) s 10.

[348].Confiscation Act (Vic) s 3.

equitable interest in the property.[349] Given his incarceration, there was no evidence to show that he was exercising control over it.

The Commission's view

13.9 The Commission's sense is that a provision akin to that in the West Australian legislation would address this concern. Thus, if the court was satisfied that the property was held by a third person for the ultimate benefit of the defendant, it would be deemed to be under the latter's effective control. The third person would have the usual rights to seek to have the property excluded from the restraining order.

Gifts

13.10 The question of gifts is more complex. On the basis of information placed before the Commission there can be no doubt that gifts may be used as a laundering device to divest a defendant of property which might subsequently be forfeitable or available to satisfy a pecuniary penalty order. In a recent NSW case, which gained significant publicity, a defendant was reported to have sold his $400000 home to his brother for $1 in order to avoid the possibility of the house being sold to satisfy potential compensation orders.

13.11 Several of the case studies submitted by the NCA are also relevant to this question. In one case a person living luxuriously was unemployed, had never lodged a tax return and apparently had no assets. In another case where millions of dollars were transferred overseas, the medium used was deposits to bank accounts ostensibly belonging to relatives, but exclusively controlled by the suspect. Various other examples were also given.[350]

13.12 While section 9 of the POC Act includes the receiving or making a gift of property in the definition of 'dealing with property', this definition appears to be relevant only to dealings in property (after restraint or forfeiture in breach of the relevant order) which may be set aside by a court under sections 52 or 97. With regard to judicially ordered forfeiture and the assessment of benefits for the purposes of a pecuniary penalty order in respect of an ordinary indictable offence, the Act makes no provision for any relation back in respect of gifts made by the defendant.

13.13 In relation to serious offences, however, relation back is provided for under section 27(6) for the purposes of assessment of a pecuniary penalty. Section 27(6) is as follows

> (a) all property of the person at the time the application is made; and

---

[349].DPP *Submission 8*.

[350].NCA *Submission 16*.

> (b) all property of the person at any time:
>
> — within the period between the day the offences, or the earliest offence, was committed and the day on which the application is made; or
>
> — within the period of 5 years immediately before the application is made;
>
> whichever is the shorter;
>
> shall be presumed, unless the contrary is proved, to be property that came into the possession or under the control of the person by reason of the commission of the offence or offences.[351]

13.14 It will be noted that, while that provision may be used to calculate profits and benefits for the purposes of the making of a pecuniary penalty order, it does not provide a basis for restraining such property in the hands of third parties unless it can be established that it is tainted property in relation to the offence.

13.15 Thus, the provision is considerably narrower than its Victorian counterpart, both in its scope and the circumstances in which it applies, the Victorian provision having a relation back period of six years prior to the making of the application or an infinite period in the case of automatic forfeiture or civil forfeiture offences.

The Commission's view

13.16 In the Commission's view, there is little doubt that appropriate steps need to be taken to ensure that the capacity of the POC Act to deny wrongdoers the benefits of unlawful activity is not frustrated by systematic planning that involves the divesting of property by way of antecedent gifts to place that property beyond the reach of proceeds orders. Clearly, the provision made in section 27(6) is far too limited in its scope and application.

13.17 The difficulty that confronts the law maker in this regard is in fashioning a legislative relation back system with respect to dispositions otherwise than for full consideration in a way that allows an order to achieve full effect, yet that does so in a way that does not intrude unreasonably into the rights of innocent third parties.

13.18 In this regard, the Commission's sense is that the comprehensive Victorian provisions referred to above are reasonable insofar as a six year relation back is provided. The Commission is not, however, convinced that the indefinite relation back in the cases involving automatic forfeiture and non-conviction based civil forfeiture is justified, notwithstanding that such cases are confined, by definition, to the more serious offences. A more balanced approach, in the Commission's view, would be to apply the six year relation back to all confiscatory circumstances.

Tainted property and proceeds of crime

---

[351].POC Act s 27(6).

13.19 A number of submissions have raised issues with respect to the concepts of 'tainted property' and 'proceeds'.

13.20 'Tainted property', in relation to an offence, is defined in section 4 of the POC Act as meaning

> (a) property used in, or in connection with, the commission of the offence; or
> (b) proceeds of the offence;
> and when used without reference to a particular offence means tainted property in relation to an indictable offence.

13.21 The term 'proceeds' in relation to an offence is defined in the same section as meaning

> any property derived or realised, directly or indirectly, by any person from the commission of the offence.

13.22 The same section then defines the expression 'proceeds of crime' so as to bring it within the legislative competence of the federal Parliament by restricting it to an indictable offence against Commonwealth law or to proceeds from an offence committed outside Australia which, if the conduct had been engaged in within Australia, would have constituted an indictable offence against either a law of the Commonwealth or of a State. The latter part of the definition would permit the restraint and forfeiture of proceeds from overseas offences once brought into Australia. Such action could result either from conviction in Australia for the offence, or the bringing into Australia of proceeds of a foreign crime, or pursuant to a mutual assistance request by the state in which the offence was committed.

13.23 The definitions in the POC Act, minus their federal components, were essentially those agreed to in the model SCAG Bill in the mid 1980s.

13.24 Since that date a number of jurisdictions have amended them. Victoria, in its Confiscation Act, defines 'tainted property' as property that

> (a) was used, or was intended by the defendant to be used in, or in connection with, the commission of the offence or
> (b) was derived or realised, or substantially derived or realised, directly or indirectly, from property referred to in paragraph (a) or
> (c) was derived or realised, or substantially derived or realised, directly or indirectly, by any person from the commission of the offence.[352]

13.25 Thus it is wider than the POC Act definition in that it applies also to property intended to be used in the commission of an offence or wholly or substantially derived from such tainted property. In relation to proceeds, it is again

---

[352].Confiscation Act (Vic) s 3.

sufficient that the property was substantially, as opposed to wholly, derived from the commission of the offence.

13.26 Queensland has also included property derived from property used in or in connection with the offence.[353]

13.27 Various submissions have addressed the question of the adequacy of the current definitions of 'tainted property' and 'proceeds of crime' in the POC Act.

13.28 The submission of the Director of Public Prosecutions, based on the current dichotomous definition of tainted property, is as follows

> The DPP's view is that the definition of 'tainted property' can be improved. The definition is clearly intended to have a wide operation but there is room for argument about just how widely it should be read. It would be useful if it was confirmed that
>
> - property that is purchased using tainted funds, or the proceeds from selling tainted property, is also tainted, as is anything purchased using that property
> - property intended to be used in the commission of a crime is tainted property
> - money standing to the credit of a person in a bank account which is tainted remains tainted even if the money is moved to another account
> - property that is purchased partly using tainted funds and partly using untainted funds is tainted property and
> - property is tainted if tainted funds are used to pay off a mortgage or similar debt.
>
> People often mix the proceeds of crime with other funds. The forfeiture provisions should be capable of applying in such cases. The court would still have a discretion about whether to make a forfeiture order and, if so, about how much of the property should be forfeited.
>
> The provisions should also be amended to overcome the uncertainty that exists about whether a forfeiture order can be made in respect of tainted cash if the cash is deposited into a bank account after seizure. There is an argument that, in the case of cash, the tainted property is the banknotes. If the notes are deposited in a bank account, and are no longer held *in specie*, there is an argument that a court cannot make a forfeiture order under s 19 of the PoC Act.
>
> The contrary view can be argued, but courts often take a conservative approach when construing legislation of this kind. It would be useful if the issue could be resolved by an amendment to the PoC Act. It is in no one's interest for large amounts of cash to be held *in specie*, and not deposited into an interest bearing account, simply because there is uncertainty about the legal status of the money if it is put into a bank account.

353.*Crimes (Confiscation) Act 1989* (Qld) s 13.

> Finally, it should be made clear that property which is involved in the commission of a possession offence is tainted property in respect of that offence. In *Chenery v Stegman* (Appeal No 9379 of 1996), a case arising under Queensland law, the Queensland Court of Appeal ruled that property which was the subject of a possession offence was not "used" in the commission of that offence and was not tainted property in respect of it. It is not clear whether a court would take the same approach in the case of a possession offence against s 81 or 82 of the PoC Act. However, the possibility exists and it should be excluded.[354]

13.29 The submission of the AFP also expresses the view that the current definition of 'tainted property' is inadequate, in that it does not address a number of operational realities. According to its submission, the definition should be amended to ensure that it includes

- property intended to be used in the commission of an offence
- property purchased with proceeds of crime
- property purchased using both proceeds and another source
- tainted money paid into a bank account
- tainted money paid into bank account and then transferred to another account
- other property into which tainted property is converted.[355]

13.30 Both the AFP and the NCA raise in particular the efficacy of the definition of 'tainted property' as it relates to the moneys related to offences under the FTR Act, being offences that are often committed to avoid the reporting requirements under that Act and hence to minimise the possibility of arrest or charge for money laundering offences.[356]

13.31 The AFP submission on this issue is as follows

> ... there is no certainty in the POC Act about the continuation of taint on cash, for example, that it is the subject of 'structuring' offences under the FTR Act. While cash deposited into accounts in a manner calculated to avoid cash transaction reporting thresholds is tainted, it is not clear that the cash remains tainted when transferred to another account or that the taint carries even where the cash is spent. Taint on property that is the proceeds of crime should continue to taint property acquired as a result of the original tainted property. The far-reaching nature of the provisions of s 229A of the Customs Act may be instructive, enabling the tracing of potentially forfeit property through subsequent transactions and transfers, including transfer from one form of asset to another. The AFP would recommend clarification in the appropriate law.[357]

---

354. DPP *Submission 8*.

355. AFP *Submission 7*.

356. AFP *Submission 7* and NCA *Submission 16*.

357. AFP *Submission 7*.

13.32 The NCA, which is the principal federal law enforcement body investigating large scale money laundering offences and one of the largest users of AUSTRAC information, addresses the issue in the following terms

> **Structuring**
>
> ... the POCA is less effective where money from criminal enterprises is quickly moved through the financial system and (usually) dispersed overseas. In illustrating the uneasy relationship between the POCA and the offence of structuring, it should be remembered that when the POCA was originally enacted there was no requirement for the reporting of cash transactions, the offence of operating bank accounts in false names did not exist and there was no requirement to produce evidence of identity when depositing large amounts of cash. Now we have the advantage of seeing how the POCA works in conjunction with the *Financial Transaction Reports Act 1988* (FTRA).
>
> Do the funds used in structuring fall within the definition of 'tainted property'?
>
> Section 31 of the FTRA provides that it is an offence for a person to conduct two or more cash transactions so as to avoid the reporting requirements of the FTRA. This is commonly referred to as 'structuring' and usually occurs where a person makes a series of cash deposits at banks of around $9,000 to avoid the reporting requirements in respect to cash deposits of $10,000 or more. The offence is punishable by a fine not exceeding $10,000 ($50,000 for a body corporate) or imprisonment for a period not exceeding 5 years or both.
>
> As structuring is an indictable offence (s 4G of the *Crimes Act 1914*), it can provide the basis for a restraining order against property of the accused. However, there are doubts whether a forfeiture order may be made in respect of the bank accounts. It is not clear that the funds standing in those accounts could be classified as 'tainted property' or 'proceeds' as defined in the POCA as the actual notes and coins used for the deposits have been commingled with other cash at the bank. For the purposes of pecuniary penalty orders, it is not clear that it could be said that a 'benefit' has been derived from the offence, or, if so, how that benefit is calculated - for example, is the benefit the tax avoided on the amount, or the amount itself? Can it be said that the service provided by the bank in permitting the opening and use of the accounts is a 'benefit'? Accordingly, a cautious approach has been adopted and on at least one occasion proceeds of crime action was not pursued following structuring offences - see Operation D below.
>
> The above situation can be contrasted with the question whether the money in an account opened in a false name contrary to s 24 of the FTRA is tainted property. The NCA has received advice that, though the question is not free from doubt, the better view is that such monies could be considered tainted property used in connection with the commission of the offence. However, the advice suggests that a court would exercise its discretion under subsection 19(1) of the POCA in favour of defendants and not forfeit the total amount of monies in such accounts.

> The POCA should be amended to make it clear that forfeiture orders may be made in respect of amounts used in structured deposits into bank accounts in appropriate circumstances.
>
> **Can a restraining order be obtained?**
>
> If it cannot be said that the funds used in structuring fall within the definition of 'tainted property' or a 'benefit' derived, then a restraining order cannot be obtained in respect of those accounts. In practice, the evidence is not sufficient in most cases to sustain charges as persons instigating large scale structuring use false name accounts and agents to make the deposits. Investigators often have strong suspicions about the identify of the depositors from the patterns of deposits and subsequent overseas remittances. But under the present statutory regime that is an insufficient basis on which to obtain restraining orders. Accordingly, those who engage in large scale structuring and money laundering are frequently beyond the reach of the criminal law and POCA ...[358]

13.33 Operation D, referred to in the NCA submission, is highly illustrative of the problems faced by law enforcement. The case, as provided by the NCA, is as follows

> ***Operation D***
>
> X's husband is suspected of high-level involvement in narcotics importation and trafficking. X transferred several million dollars in structured payments to another country. X made deposits to a number of bank accounts in the names of her relatives, accounts which she exclusively controls. X has divested herself of assets, presumably to avoid payment of her tax debt and any proceeds of crime action against her husband.
>
> X laundered substantial amounts of money with relative ease by several methods. For example, the identification requirements at the banks were insufficient to prevent her from opening bank accounts in relatives' names, even though none of the relatives were in Australia at the relevant time. Also, X and another person attended regularly at numerous bank branches in succession and used false names to transfer large sums of money overseas in structured amounts.
>
> After X had been charged with structuring offences, the NCA became aware of a large deposit in a bank account controlled by X. A restraining order could not be obtained under the POCA because the amount standing to the credit of the account did not clearly come within the definition of 'proceeds of crime' in the POCA. The view was taken that the account itself could not be said to be proceeds of the structuring offences or contain money which was "tainted" by virtue of it being used during the commission of the offences. Shortly after being charged with structuring offences X transferred the funds to off-shore accounts.[359]

358.NCA *Submission 16*.

359.ibid.

The Commission's view

13.34 There can be no doubt that the Parliament intended the Act to have far reaching effects. The definition of 'proceeds', for example, as any property that is derived or realised, directly or indirectly, by any person from the commission of an offence would appear to include not only the original property derived, but also any property into which it is converted. Thus, for example, it would appear to the Commission that, where tainted money is paid into a bank, the resulting chose in action, namely the right to draw on that money, should also be tainted. Similarly, the Commission's sense is that the Parliament intended that a taint, once attracted, would remain regardless of the number of conversions the property underwent save insofar as it was acquired by an innocent purchaser for value. If this is not being achieved, then in order to render the POC Act more effective, the Commission believes this should be explicitly stated.

13.35 The Commission accepts, therefore, the need for extending and amplifying the scope of the current definition of 'tainted property' to meet the various difficulties identified in the submissions of the DPP and the NCA.

13.36 The effect of these proposals would be as follows.

13.37 Firstly, 'tainted property' should be extended to encompass property *intended* to be used in the commission of an offence.

13.38 Secondly, the legislation should put beyond doubt that tainted property includes

- property purchased in whole or in part with tainted property and property derived in whole or in part from such property
- property acquired in whole or in part by the sale or conversion of tainted property and property derived in whole or in part from such property
- so much of the funds standing to the credit of an account with a financial institution as represent tainted property paid to the credit of that account or are derived, including through one or more other accounts, from such funds
- property in respect of which a mortgage or other debt is discharged in whole or in part using tainted property or property derived in whole or in part from tainted property
- property that is the subject of a possession offence.

13.39 Thirdly, the legislation should similarly put beyond doubt that 'proceeds' include

- property purchased in whole or in part with proceeds and property derived in whole or in part from such property
- property acquired in whole or in part by the sale or conversion of proceeds and property derived in whole or in part from such property

- so much of the funds standing to the credit of an account with a financial institution as represents proceeds paid to the credit of that account or are derived, including through one or more other accounts, from such funds
- property in respect of which a mortgage or other debt is discharged in whole or in part using proceeds or property derived in whole or in part from proceeds.

13.40 So far as concerns the particular difficulties related above in connection with structuring for the purposes of money laundering, the Commission notes that its proposals in chapter 7 relating to enlarging the scope of, and providing evidentiary aid for proof in relation to, money laundering, represents an important response to much of the concerns raised by law enforcement bodies and the DPP.

13.41 Additionally, and so as to further enhance the reach of the POC Act into money laundering and related activities, the Commission proposes that the legislation provide in relation to a structuring offence under the FTR Act that all moneys used in or in connection with a structuring transaction, including all moneys standing to the credit of any account with a financial institution used in or in connection with such transaction, shall be presumed to be proceeds of the structuring offence. The presumption would be rebuttable on the same basis as a defendant may seek to 'claw back' property from a restraining order or to exclude property from a forfeiture order.

Recommendation 55. The definition of 'effective control' in section 9A of the POC Act should be expanded to ensure that

- any property held by a person for the ultimate benefit of a defendant is to be deemed to be under the effective control of the defendant
- any gift made by the defendant within six years of the application for a restraining order is deemed to be under the effective control of the defendant.

Recommendation 56. The definition of 'tainted property' in the POC Act should be extended to include property intended to be used in the commission of the offence.

Recommendation 57. The POC Act should put beyond doubt that tainted property includes

- property purchased in whole or in part with tainted property and property derived in whole or in part from such property
- property acquired in whole or in part by the sale or conversion of tainted property and property derived in whole or in part from such property
- so much of the funds standing to the credit of an account with a

financial institution as represents tainted property paid to the credit of that account or as is derived, including through one or more other accounts, from such funds
- property in respect of which a mortgage or other debt is discharged in whole or in part using tainted property or property derived in whole or in part from tainted property
- property that is the subject of a possession offence.

Recommendation 58. The POC Act should put beyond doubt that 'proceeds' include
- property purchased in whole or in part with proceeds and property derived in whole or in part from such property
- property acquired in whole or in part by the sale or conversion of proceeds and property derived in whole or in part from such property
- so much of the funds standing to the credit of an account with a financial institution as represents proceeds paid to the credit of that account or as is derived, including through one or more other accounts, from such funds
- property in respect of which a mortgage or other debt is discharged in whole or in part using proceeds or property derived in whole or in part from proceeds.

Recommendation 59. The POC Act should provide that, in relation to a structuring offence under the FTR Act, all moneys used in or in connection with a structuring transaction, including all moneys standing to the credit of an account with a financial institution used in or in connection with such transaction, shall be presumed to be proceeds of the structuring offence.

14. Forfeiture versus reparation or compensation

Introduction

14.1 The Commission's terms of reference specify, amongst the matters it is to inquire into, the relationship of forfeiture of proceeds of crime to the possibility of compensation or restitution to a victim of crime and whether Commonwealth legislation should make provision for such compensation or restitution where forfeiture of proceeds is sought.

14.2 Reparation or compensation is intended to restore a victim of crime to his or her situation, or as near thereto as possible, as it existed prior to the crime. One of the most common criticisms of our adversarial system of criminal justice is that the victim is either ignored or sidelined. One way of addressing this issue has been the introduction in some jurisdictions of 'victim impact' statements, enabling a victim to draw to the attention of the sentencing judicial officer the effects of the crime upon him, her or it.

14.3 Another way of redressing the plight of the victim is by ordering the offender to pay compensation or reparation. There are also Criminal Injuries Compensation Schemes in all Australian jurisdictions enabling victims of crime involving offences against the person to receive some monetary compensation from the State or Territory in cases where the offender is impecunious.

14.4 The question of compensation recently received wide prominence in New South Wales where it was reported in the press that an alleged paedophile had sold his $400000 home to his brother for $1, so as to avoid having any assets against which possible compensation orders could be enforced. It has also been reported that the New South Wales Attorney-General is to introduce legislation to prevent a reoccurrence.

14.5 The possibility of a court ordering a person after conviction to make reparation to a victim has existed in the Commonwealth Crimes Act since 1926 and is provided in its current form as follows

> 21B. (1) Where:
>
> (a) a person is convicted of an offence against a law of the Commonwealth; or
> (b) an order is made under section 19B in relation to a federal offence committed by a person;
>
> the court may, in addition to the penalty, if any, imposed upon the person, order the offender:
>
> (c) to make reparation to the Commonwealth or to a public authority under the Commonwealth, by way of money payment or otherwise, in respect of any

loss suffered, or any expense incurred, by the Commonwealth or the authority, as the case may be, by reason of the offence; or

(d) to make reparation to any person, by way of money payment or otherwise, in respect of any loss suffered by the person as a direct result of the offence.

(2) A person is not to be imprisoned for a failure to pay an amount required to be paid under an order made under subsection (1).

(3) Where:

(a) the court orders a federal offender to make reparation to the Commonwealth, to a public authority of the Commonwealth or to any other person by way of payment of an amount of money; and

(b) the clerk, or other appropriate officer, of the court signs a certificate specifying:

(i) the amount of money to be paid by way of reparation; and

(ii) the identity of the person to whom the amount of money is to be paid; and

(iii) the identity of the person by whom the amount is to be paid; and

(c) the certificate is filed in a court (which may be the first-mentioned court) having civil jurisdiction to the extent of the amount to be paid;

the certificate is enforceable in all respects as a final judgment of the court in which it is filed in favour of the Commonwealth, of that public authority or of that person.

The relationship between forfeiture and compensation or reparation

14.6 The POC Act does not deal comprehensively with the interface between confiscation under the Act in respect of an indictable offence and the payment of any reparation or compensation order that may be made against the offender for the benefit of the victim of the offence.

14.7 While, under section 26(5), a discretion is conferred on the court in making a pecuniary penalty order to reduce the amount of that order by, *inter alia*, the amount payable by the defendant, by way of restitution, compensation or damages, it does not authorise the payment of such amount out of the proceeds of any confiscation order. Nor does the Act authorise the taking out of a proceeds order an amount required to recover any restitution or compensation ordered against a defendant.

14.8 Additionally, section 34C of the POC Act, dealing with the payments that may be made out of the Confiscated Assets Reserve, while making express provision for payments to innocent third parties who succeed in claiming back property and the recompensing of prescribed GBEs for financial loss occasioned by a 'relevant offence' as defined for the purposes of that section, does not authorise payment from the Reserve of any other amounts by way of reparation or

compensation. By necessary implication, such payments may not be made from the Reserve.

14.9 A key question for the Commission is whether this situation is, both from a public policy and justice perspective, defensible.

14.10 It may well be that this apparently non-sympathetic approach to the rights of victims to compensation, restitution and damages lies not so much in an indifference to victims, but rather in an assumption by the legislature that, at least in 1987, the victim of most Commonwealth offences would be the Commonwealth itself, including its departments and agencies.

14.11 However, as noted by the Commission in its introductory booklet, there is room to question whether this would be a valid assumption today in view of the increasing ambit of Commonwealth criminal law coverage of conduct in which individuals can be the victims. Examples include sex tourism and sexual servitude legislation. The Commission also notes that the POC Act has been expressly applied in relation to federalised Corporations Law offences — offences which can inflict substantial quantifiable harm to identifiable victims.

The unique position of GBEs

14.12 In 1991, section 34C was inserted into the POC Act.[360] It enables payment to be made to a prescribed GBE out of the Confiscated Assets Reserve in respect of certain offences that caused a financial loss to the GBE. Insofar as it is relevant, the section provides as follows

> (1) The purposes of the Reserve are:
> ...
> (b) to the extent to which it comprises distributable funds:
> (i) making payments to a GBE of any proceeds of confiscated assets that relate to a relevant offence that caused financial loss to the GBE; and
> ...
> (2) In this section:
> "relevant offence" means an offence under section 29A, 29B, 29C, 29D, 71, 86 or 86A of the *Crimes Act 1914* or a prescribed offence.

14.13 The 'relevant offence'(s) referred to in section 34C are false pretences, false representation, false statements in applications for grants, payments, allotments of money or allowances, fraud, theft and conspiracy. Section 86A of the Crimes Act was repealed in 1995.

14.14 In other words, they are all offences which can inflict a quantifiable economic loss on a GBE. The term GBE is defined in section 4 to mean 'a prescribed

---

[360].By the *Proceeds of Crime Legislation Amendment Act* 1991.

government business enterprise'. Under the current regulations the following enterprises are prescribed as GBEs.

> the Australian Industry Development Corporation, the Australian National Railways Commission, the Australian Postal Corporation, ANL Limited, the Civil Aviation Authority, the Federal Airports Corporation, the Health Insurance Commission, the Housing Loans Insurance Corporation and the Pipeline Authority.

14.15 The year 1991 was a period of corporatisation and privatisation of what had hitherto been budget dependent government institutions.

14.16 The Explanatory Memorandum in relation to section 34C describes the purpose of section 34C(1)(b)(i) in the following terms

> Apart from...payments [from 'suspended funds'], other money which is identified as distributable funds as defined will be available for payment under proposed section34D or for the reimbursement of a GBE under proposed sub-paragraph34C(1)(b)(i). It will be possible to reimburse a GBE where the recovery stems from certain criminal offences which caused financial loss to the GBE. For example, if an amount is recovered under the Principal Act as a result of fraud upon Australia Post, it will be possible to reimburse Australia Post to the extent of the amount recovered or the amount of the loss, whichever is the lesser. This will apply where the criminal offence from which the confiscation of property is derived is a 'relevant offence' as defined.

14.17 The policy reasoning behind the preferential treatment of GBEs is likely to have arisen from two considerations. The first is that, in the same way that the Commonwealth may receive recompense through the confiscation of proceeds of crimes of which it is the victim, GBEs should be similarly recompensed, as their losses might reduce dividend payments to the Commonwealth.

14.18 The second consideration is that access to the Confiscated Assets Reserve may have been intended to encourage GBEs to adopt appropriate prosecution policies with a view to obtaining recompense through proceeds of crime rather than taking the alternative civil debt recovery route, which does not have the law enforcement benefit for the Commonwealth that the prosecution of wrongdoers offers.

14.19 It should also be noted that this places prescribed GBEs in a significantly advantageous position *vis a vis* personal victims and corporate victims that are not prescribed GBEs. They recoup their losses, or at least are able to, from the proceeds of crime regime, which includes the restraining of property regime. Such restraint is not open to non Commonwealth victims. These victims, as in the NSW case adverted to earlier, cannot restrain assets and must rely on an offender not having disposed of his or her assets or not having had those assets confiscated under the POC Act by the time any compensation or reparation order is made.

14.20 In chapter 21 the issue is raised, in the context of the impact of costs of the POC Act on business, whether, on the basis of competition principles, the advantage provided to prescribed GBEs over other business victims is justifiable. Accordingly, competition aspects are not further addressed in this chapter.

14.21 GBEs, as opposed to other bodies or individuals, have the advantage of not needing to rely on section 21B of the Crimes Act — the section permitting courts to order payment by the defendant of reparation or compensation to the victim — but are able to obtain compensation through payment out of the Reserve.

The Victorian position

14.22 The new Confiscation Act (Vic) states that one of its purposes is 'to preserve assets for the purpose of restitution or compensation to victims of crime.'[361] Section 15 of that Act sets out the purposes for which restraining orders may be made. Paragraph (1)(e) provides that one of these purposes is 'to satisfy any order for restitution or compensation that may be made under the S*entencing Act 1991*'.

14.23 The court must make a restraining order if it is satisfied that a person has been, or within the next 48 hours will be, charged with, or has been convicted of, a relevant offence and, *inter alia*, if the restraining order is sought pursuant to section-15(1)(e), it is satisfied that

> (i) applications have been or are likely to be, made for restitution or compensation under the Sentencing Act 1991 in respect of the forfeiture offence, automatic forfeiture offence or civil forfeiture offence; and
> (ii) the order of the court under the Sentencing Act 1991 is likely to exceed $10-000.[362]

14.24 Similarly, in considering applications for exclusion orders seeking to remove property from a restraining order, the court must, *inter alia*, be satisfied, at least in relation to automatic forfeiture offences and civil forfeiture offences, that the property will not be required to satisfy any pecuniary penalty order or an order for restitution or compensation under the *Sentencing Act 1991*.[363]

14.25 Section 31 obliges the State to satisfy any restitution or compensation order out of forfeited property. The section is in the following terms:

> (1) If—
>
> ...

---

[361].Confiscation Act (Vic), s 1(h).

[362].Confiscation Act (Vic), s 18(d).

[363].Confiscation Act (Vic), s 22(a)(iii) and s 22 (c)(iv) in relation to automatic forfeiture offences and s-24(a)(iii) in relation to civil forfeiture offences.

(b) property is forfeited by or under this Act, or a pecuniary penalty order is made, in relation to the offence in reliance on which the restraining order is made; and

(c) an order for restitution or compensation is made under the Sentencing Act 1991 in relation to that offence or damages are awarded in relation to that offence-

the State must satisfy, subject to sub-section (2), to the value of the property forfeited or the amount of the penalty paid (less conversion costs), the order for restitution, compensation or damages.[364]

14.26 Subsection (2) goes on to provide a formula for payment in cases where forfeited property is inadequate to meet orders made under the Sentencing Act.

14.27 Furthermore, on an application for a forfeiture order, a court must give priority to an application for a restitution or compensation order in relation to the same conviction and can for that purpose defer the determination of the forfeiture application until the latter has been determined.[365] A similar obligation is placed on the Supreme Court of Victoria in determining a pecuniary penalty order for a civil forfeiture offence.[366]

14.28 Thus, victims of crime in Victoria are not only given priority, but also the protection of the restraint regime, to ensure that defendants cannot dispose of assets once there is the possibility of a restitution or compensation order being made.

14.29 Unlike the GBE provisions in section 34C of the POC Act, a formal compensation or restitution order is in fact made, which is then paid out of the Victorian equivalent of the Commonwealth Confiscated Assets Reserve. In the case of prescribed GBEs under the Commonwealth scheme no such order is made. The property is forfeited as proceeds of crime, or a pecuniary penalty is imposed, and the GBE can gain access to the Confiscated Assets Reserve to the extent that it can establish financial loss, up to the extent to which confiscated assets relate to the relevant loss causing offence.

The submissions

14.30 Submissions on this issue were received from the DPP, the AFP, the Attorney-General's Department, the Victorian Bar Council and Criminal Bar

---

364.s 31(1)(a) was repealed by No 43/1998 s 151(1)(a).

365.Confiscation Act (Vic) s 33(6).

366.Confiscation Act (Vic) s 64(4).

Association (joint submission), the ASCPA and the New South Wales Police Service.[367]

14.31 In its submission, the DPP states

> One of the problems that has arisen under the POC Act is that there is no way in fraud cases that money recovered under the POC Act can be refunded to a defrauded agency, unless it is one of the GBEs listed in the regulations. Many of the agencies we deal with would prefer to recover money by their own efforts, and dealt with under their normal accounting procedures, than to see recovery action under the POC Act.
>
> As a result, the DPP takes a conservative approach in fraud cases. As a general rule, we will not take action under the PoC Act unless there is reason to believe that the normal processes of debt recovery are not going to work. There may be cases where this means that assets that could have been recovered might not be recovered.
>
> The DPP would support amendments to the PoC Act that allowed money which represents the proceeds of fraud to be credited to a Commonwealth agency that was the victim of the fraud.[368]

14.32 The AFP has made a similar point. Its submission states

> The majority of investigative work conducted by the AFP using Commonwealth legislation is generally fraud or drug related. In drug related matters there is usually no identifiable victim. With most fraud matters there are identifiable victims. However, with respect to the operation of Commonwealth legislation, these victims are generally departmental. It is quite widely held that proceeds of crime action is a last resort for many departmental victims, perceived as time consuming, troublesome and with only a slim chance of success. Further, even when successful, the property recovered is forfeit to the Commonwealth generally not the department involved, with the exception of several government business enterprises.
>
> ...
>
> There is a range of offences which are in the Commonwealth sphere for which there may be human victims, including several extraterritorial jurisdiction offences such as child sex tourism offences and the new sexual servitude offences. In relation to offences having human victims, it is important from a recovery perspective for a victim to feel compensation for the pain and suffering derived from the offence. As a rule, the more directly responsible the offender is for this compensation or restitution the more meaningful is the compensation for the victim. The legislation should seek to ensure that such human victims of offences under Commonwealth law are represented adequately, and that

---

367.DPP *Submission 8*, AFP *Submission 7*; Attorney-General's Department *Submission 3*; Victoria Bar Council and Criminal Bar Association (joint submission) *Submission 33*; ASCPA *Submission 14*; NSW Police *Submission 9*.

368.DPP *Submission 8*.

> consideration be given to assessing the impact on the victim of the particular crime.
>
> ...
>
> The Commonwealth DPP note in their submission that the deferral of all forfeited funds into consolidated revenue constitutes a disincentive for victim departments to cooperate fully in investigations, indeed to seek prosecutorial action at all, as there is no direct financial benefit attributable to the department. Commonwealth departments and agencies will increasingly take civil action outside the *POC Act* where the result offers the potential for the agency to recover lost property or money rather than forfeiting that property or money to consolidated revenue if they pursue the property under the auspices of the *POC Act*. As it stands, automatic forfeiture to consolidated revenue denies the reality of financing in government at present; that is, departments working in an increasingly constrained resource environment. To that end, departmental victims generally take normal debt recovery action first, and proceeds of crime action as a course of last resort. We note the DPP submission also reflects this preference.
>
> Consideration should be given to enabling confiscated property or money being refunded to the victim agency or department when the recovery under the *POC Act* represents the proceeds of an offence perpetrated against that agency or department. The AFP would recommend consideration be given to enabling the value of confiscated assets be directed to the relevant Commonwealth department or agency in cases where a departmental victim is apparent.[369]

14.33 The Commission finds these submissions somewhat surprising given that a Commonwealth body, other than a prescribed GBE, which recovers moneys is not entitled to add them to its operating budget but must pay them into the Consolidated Revenue. This is also where the net proceeds from the Confiscated Assets Reserve ultimately go. So seen, it appears to the Commission that government bodies adopting this view are preventing a proper 'whole of government' approach to the confiscation scheme established by the POC Act, not because of any perceived economic gain but rather for the benefit of being able to claim to have effected the recovery. This would seem also to have important public interest implications where it results in persons who should be prosecuted escaping the criminal justice process.

14.34 The Attorney General's Department submission is as follows

> Other than fraud and Corporations Law offences there are few Commonwealth offences with private-person victims. However, it is anomalous that the only provision for recovered proceeds to be used to compensate a victim for loss is in relation to Government Business Enterprises.

---

[369].AFP *Submission 7*.

> Paragraph 34C(1)(b) makes provision for payment from the Confiscated Assets Trust Fund[370] of proceeds of confiscated assets that relate to a relevant offence that caused financial loss to a Government Business Enterprise.
>
> It seems obvious that in many cases the only assets that can satisfy reparation or compensation orders in favour of a victim represent the proceeds of the crime. Proceeds action would therefore effectively deny reparation or compensation to the victim.
>
> An issue for consideration is whether there should be provision for formal diversion of assets recovered as proceeds for the purpose of reparation or compensation to a victim. While this might seem fair, it would be at the expense of Commonwealth revenue. Also, it would be undesirable if the criminal trial process was complicated by victims seeking to use proceeds as the most direct available means to obtain restitution.[371]

14.35 The Victorian Bar Council and Criminal Bar Association assert that separate procedures for forfeiture and compensation should be maintained, and that compensation should not in any way be linked to the success or otherwise of forfeiture applications. It does not submit arguments for or against these propositions.[372]

14.36 The ASCPA expresses the view that

> *Victims* to which compensation may be paid should not be restricted to Government business enterprises. The question of *victims* should be revisited and extended.[373]

14.37 The remaining submission on this issue, from the NSW Police Service, is as follows

> There is a strong and logical argument for the proceeds of forfeiture or pecuniary penalty orders, extracted from the defendant through contribution or sale of property, to be applied to compensate the victim(s) to the extent of the loss. There are currently no guarantees that a compensation order by the court will realise a return of property to the victim, whereas, the creation of a civil debt will provide another avenue for victim restitution. Currently forfeited proceeds in this State are applied to the NSW Victims Compensation Fund and not to the specific victim of the crime. Confiscation proceedings are not usually initiated where compensation is sought by or on behalf of the victim, as an order may impinge on their rights to recover.[374]

The Commission's view

---

370. Since renamed the 'Confiscated Assets Reserve'.

371. DPP *Submission 3*.

372. Victorian Bar Council and Criminal Bar Association *Submission 33*.

373. ASCPA *Submission 14*.

374. NSW Police Service *Submission 9*.

14.38 After careful analysis of the issues and submissions, and having particular regard to the recent Victorian reforms, the Commission is of the view that, as a matter of justice and equity, the POC Act regime should be available for the recovery by *all* victims of crimes to which the Act applies of the amount of reparation orders made in respect of those crimes. Priority should be accorded by statute to meeting such orders ahead of any other claims to the proceeds of confiscated property. The preferred entitlement currently enjoyed by prescribed GBEs to access the Reserve to recover financial loss caused by offences to which the POC Act applies should be removed, placing such bodies in the same position as other victims in whose favour section 21B orders may be made under the Crimes Act.

14.39 The DPP has suggested that, if the proceeds regime is extended to include reparation orders, there should be no double recovery in any POC case, and that any forfeiture or pecuniary penalty order should be reduced by any amount ordered to be paid as compensation or restitution.[375] Needless to say, the Commission agrees with this view.

14.40 One final issue needs to be addressed. Persons whose property is forfeited or restrained, by virtue of their property being tainted property or property under the effective control of the defendant, should have to rely on the exclusion order regime. They should not be able to claim that they are an indirect victim entitled to a compensation order.

Recommendation 60. The scope of operation of the POC Act in respect of indictable offences should be extended to include the recovery of any reparation order made under section 21B of the Crimes Act, or equivalent provisions in other laws of the Commonwealth, in respect of the offence.

Recommendation 61. The restraining order regime should accordingly be broadened to include, amongst the purposes for which a restraining order may be made, the purpose of satisfying a reparation order made pursuant to section 21B of the Crimes Act, or under another law of the Commonwealth, in respect of the offence.

Recommendation 62

- The POC Act should expressly ensure that the payment of any amount outstanding under an order made pursuant to section 21B of the Crimes Act, or under an equivalent order, in respect of an offence to which the POC Act applies shall have priority in the distribution of the proceeds of property confiscated in respect of the offence.

[375].DPP *Submission 8*.

- The legislation should ensure that the court is required, before making any confiscation order, to consider the need for any section 21B or equivalent order.

Recommendation 63. The POC Act should make clear that a third party whose property is subject to a restraining order or a forfeiture order is not, by reason alone of such order, entitled to a reparation order.

Recommendation 64. The preferred position of prescribed GBEs under section 34C of the POC Act to access the Confiscated Assets Reserve should be abolished.

15. Restrained assets and legal expenses

Introduction

15.1 The third specific term of reference requires the Commission to inquire into and report on

> the control of restrained assets and the prevention of unreasonable dissipation of restrained assets on legal expenses.

15.2 Implicit in these terms is a sense that unreasonable dissipation has occurred. As demonstrated by discussion later in this chapter, that sense is clearly borne out in submissions received by the Commission.

15.3 Section 43(3) of the POC Act makes provision, *inter alia*, for the court, at its discretion, to

> make provision for meeting, out of the [restrained] property or a specified part of the property ... the person's reasonable expenses in defending a criminal charge.

15.4 Section 43(4) prohibits the court from making such provision

> unless it is satisfied that the defendant cannot meet the expense ... concerned out of property that is not subject to a restraining order.

15.5 The court referred to is the State or Territory Supreme Court by which the restraining order was made.

15.6 The analogous provision in the non-conviction based Customs Act regime, section 243E(4)(c), provides that the court, when making a restraining order, may make provision for meeting the reasonable living and business expenses of the defendant out of restrained property, again subject to such expenses not being capable of being met from unrestrained property. While section 243E(4)(c) is silent as to legal expenses, it was held in *Kirk & Ors v Australian Federal Police*[376] that the expression 'reasonable living expenses' includes legal expenses. Hence the position under both Acts is, for all practical purposes, identical.[377] By way of historical background, it is noted that all original SCAG Model Bill based Acts permitted the

---

[376].*Kirk & Ors v Australian Federal Police* (1988) 81 ALR 321.

[377].s 26(3) of the *Crimes (Confiscation of Profits) Act 1993* (Tas) and s 14(3) of the *Crimes Forfeiture of Proceeds Act 1988* (NT) do not specifically provide for the release of restrained assets to meet legal costs, but in providing for reasonable business and living expenses it is assumed that the decision in *Kirk and Ors v AFP* would apply in a manner similar to the Customs Act provisions.

release of restrained assets to meet the legal expenses associated with criminal proceedings.

15.7 According to the Director of Public Prosecutions, during the period from the commencement of the POC Act to May 1998, assets totalling $7.9 million were released to meet legal expenses. By contrast only $800000 was made available from property under the POC Act and Division 3 of Part XIII of the Customs Act to meet other expenses permitted to be met out of restrained assets. Under section43(3)(a) of the POC Act, these are

> the person's reasonable living expenses (including the reasonable living expenses of the person's dependants (if any)) and reasonable business expenses.

15.8 The Commission notes that the court is not given any particular statutory guidance or assistance in making an assessment of reasonable expenses. In the words of Badgery-Parker J of the Supreme Court of New South Wales

> [the Act] does not invite any enquiry as to the reasonableness of the defendant's conduct in defending the charge .... The Act does not refer to 'legal expenses to be incurred in reasonably defending a charge'.[378]

15.9 As noted by the Law Council of Australia, the range of matters held to fall within the meaning of the expression 'in defending a criminal charge' as used in section 43(3) has been widely interpreted to include, besides committal proceedings and trial

- bail applications
- proceedings under the POC Act including applications under subsection-43(3)
- interlocutory and collateral proceedings and
- defending contempt proceedings arising from confiscation proceedings but separate to any substantive charges.[379]

15.10 A number of submissions have raised concerns regarding the operation of section 43 of the POC Act. These submissions fall into two distinct classes: firstly those that suggest that the section 43 regime is antithetical to the attainment of the objectives of the Act and should be discontinued; and secondly, those that criticise aspects of the operation of section 43 but do so in a way that is predicated on the assumption that the scheme will continue in operation.

15.11 In some cases specific reforms of aspects of section 43 are suggested to overcome perceived problems.

---

[378].*Crime Commission of NSW v Musujka and Wai Mun Lam* (unreported), 20 December 1990.

[379].As noted by the Law Council of Australia *Submission 37*.

15.12 As the submissions in the first of those classes underscore, the first task that falls to the Commission in reviewing that scheme is the fundamental question of whether the granting of access to restrained assets for such a purpose is compatible with the objectives of the POC Act as a whole.

Whether current scheme offends the underlying principles

15.13 In chapter 2, the Commission has identified the following principles as underlying the principal objectives enunciated in section 3 of the POC Act

- a person should not be allowed to become unjustly enriched at the expense of other individuals and society in general as a result of criminal conduct
- property used in, or in connection with, the commission of a criminal offence, should be able to be confiscated to render it unavailable for similar future use in connection with such conduct
- confiscation of property used in, or in connection with, the commission of a criminal offence, should be available as a suitable punitive sanction (in addition to the traditional sanctions of fines and imprisonment) for engaging in such conduct and
- law enforcement agencies must be given the powers necessary to enable them to ensure that the principal objectives are able to be achieved.

15.14 The Commission has also identified as a further underlying principle the need to ensure (through the restraining order process) that property that may be liable to forfeiture is preserved for that purpose.

15.15 Submitters opposing access to restrained property for legal defence purposes fall into two categories; those who consider that such access should not be permitted to property that is clearly identifiable as likely to have been the profits of criminal activity, as opposed to property used in, or in connection with, such activity and those who consider that under no circumstances should such access be allowed regardless of whether the property is alleged to be profits as distinct from other tainted property.

15.16 The bulk of the submissions opposing access on an in principle basis fall within the first of these categories. These are the submissions from the Law Council of Australia, the New South Wales Police Service and the South Australia Police.[380]

---

[380] It should be noted in relation to this first category of submissions that the Queensland CC Act and New South Wales CAR Act provisions for the release of assets to fund a legal defence already prohibit access for that purpose to property which was acquired as a result of the particular criminal activity and, in the case of the latter Act, acquired as a result of any illegal activity. The Victorian *Confiscation Act*, on the other hand, precludes access to restrained funds altogether and establishes an alternative legal aid based scheme.

15.17 While opposing amendment of the Act to deny access totally to restrained funds for reasonable legal expenses, because to do so would be to give the prosecution too great an advantage, the Law Council nevertheless considers that

> where the source of funds clearly does not belong to the defendant and is clearly proceeds of crime, then these funds should not be released for expenses.[381]

15.18 On a similar note, the New South Wales Police Service expresses the view that the release of criminally derived assets to finance a legal defence is

> abhorrent where there is clear evidence that property is the direct proceeds of crime.[382]

15.19 The South Australia Police submission makes the point that, under the current law

> monies that are clearly proceeds of crime are made available to pay legal fees. The defendant thereby benefits from unlawful activity.[383]

15.20 Amongst submitters, the AFP alone is in the second of the abovementioned categories. It expresses the view that any funding of a defendant's legal costs out of criminally derived assets is 'repugnant' and that

> as a matter of principle we should restrict absolutely a defendant's access to tainted property — perhaps by stipulating that property deemed tainted may not be released for such purposes. If a defendant has no means other than tainted property with which to fund a legal defence, then he/she is indigent. Tainted property is not the defendant's to use ...[384]

15.21 In contrast with the views noted above, the submission of Legal Aid and Family Services is opposed to any distinction being made for section 43 purposes between property that appears to be profits and other tainted property. In its view

> the presumption of innocence implies that the 'tainted' assets are only 'tainted' if the defendant is found guilty.[385]

The Commission's view

15.22 As reflected throughout this report, the Commission takes the view that all elements of the POC Act scheme must be, and be seen to be, consistent with the

---

[381].Law Council of Australia *Submission 37*.

[382].NSW Police *Submission 9*.

[383].SA Police *Submission 23*.

[384].AFP *Submission 7*.

[385].Legal Aid & Family Services *Submission 18*.

attainment of the principal objectives enunciated in section 3. This, in turn, the Commission has argued, means that all elements of the scheme should be consistent with, and reinforce, the principles underlying or supporting those objectives, including the principle that property liable to forfeiture should be preserved intact for that purpose.

15.23 When considered against these principles, the proposition that restrained property should be able to be made available to fund a defence to the very proceedings that would, in the event of a finding against the defendant, lead to the forfeiture or possible forfeiture of that property cannot, in the view of the Commission, be sustained.

15.24 This conclusion is at its most compelling so far as concerns proceeds (*qua* profits), where any release of property for the beneficial purpose of providing a defence conflicts unreconcilably with the unjust enrichment and asset maintenance principles discussed in chapter 2.

15.25 The conclusion is marginally less compelling, but nonetheless strong, in respect of non-profit tainted property since it is arguable that the supporting principle of depriving a person of the capacity to reuse property for a criminal enterprise could be said to be achieved by its appropriation for defence purposes. However, the second principle underlying the principal objective in section 3(1)(b), namely, availability of property for punitive purposes, is clearly put at risk by any dissipation of restrained property otherwise available for that purpose. Moreover, it would, as in relation to profits, fly in the face of the important supporting principle relating to preservation of property to facilitate full and effective operation of confiscation laws.

15.26 The Commission's conclusion, that the section 43 regime is incompatible with the principles that form the essential foundations of the POC Act and therefore forms no logical or proper part of a proceeds regime, is consistent with the Commission's understanding, discussed below, of the rationale for including that regime in the legislation.

15.27 While there is a dearth of information on the public record indicating why the notion that finds expression in section 43 was included in the original SCAG Model Bill, it is the Commission's understanding that its genesis is to be found in the need to respond to legal aid funding concerns rather than to any perception that it somehow forms an essential part of any proceeds regime.

15.28 The legal aid funding concern was, as the Commission understands the matter, that the restraining of assets to satisfy anticipated forfeiture orders relating to both profits and other tainted property, would throw a new class of indigent persons upon already thinly stretched national legal aid resources.

15.29 While an analysis such as that undertaken by the Commission would have disclosed that the expedient was conceptually antithetical to the underlying

principles of the proceeds scheme as a whole, the policy makers no doubt anticipated that the section 43 scheme would be able to be administered in such a way as to do minimum violence to those principles.

15.30 Assuming such was the expectation, the overwhelming weight of submissions received by the Commission on this matter, being sharply critical of the operation of the scheme, suggest that such an expectation has been found to have been misplaced. Although some remedial options are suggested, none would overcome the Commission's fundamental objections discussed above.

15.31 For completeness of the record, these criticisms, and the suggested options for meeting some of them, are discussed in the next succeeding section. As will also become apparent later in the chapter that discussion is, in a number of respects, also relevant in considering the crucial policy question to which a rejection of the section 43 scheme gives rise.

15.32 In essence, that question is: how can persons rendered incapable of providing for their own defence by reason of their assets having been restrained, be assured the opportunity of a proper defence without imposing unduly on already fully stretched legal aid resources?

Criticisms of the operation of section 43 and some suggested reform options

15.33 The following is a summary of the main points of criticism offered in relation to the operation of the current section 43 regime as it relates to the release of restrained property to fund a legal defence to a criminal charge

- at least in relation to proceeds or profits of criminal activity, it is offensive and contrary to concepts of public morality that such property be available at all to fund a legal defence[386]
- while the same point may not be as strong in relation to lawfully acquired but tainted property, there is, in any event, an inherent difficulty in identifying the category within which property falls, until after the substantive proceedings[387]
- there are other bodies better qualified, and better placed, than courts to make such determinations in relation to both the extent to which the release of restrained assets is necessary, and the particular assets that should be released[388]

---

386. For example, submissions from the Law Council of Australia *Submission 37*; AFP *Submission 7*; NSW Police *Submission 9*; SA Police *Submission 23*.

387. Legal Aid & Family Services *Submission 18* and see *New South Wales Crime Commission v Younan & Anor* (1993) 31 NSWLR 44, *DPP v Colmer* (unreported) 25 November 1993, Allen J and *DPP (Cth) v Saxon* (1992) 28 NSWLR 263.

388. Legal Aid WA *Submission 5* and Legal Aid & Family Services *Submission 18* argued that Legal Aid Commissions were more appropriate than courts, as did NSW Legal Aid Commission *Submission 1*, particularly on the basis of the inappropriate involvement of the DPP in the conduct of the defence.

- the conferment of the determinative role on the courts necessarily draws the DPP into a role in relation to that determination that may be perceived as interfering with the conduct of the defence[389]
- funds are not infrequently dissipated on unmeritorious proceedings as there is no mechanism to limit the type of proceedings to be funded, and a defendant who is aware that his or her assets may be confiscated is not likely to exercise judgments exercised by ordinary prudent litigators[390]
- it leaves open the potential for persons with restrained assets to seek the most qualified and expensive legal advice available[391]
- after all available assets have been expended on committal and interlocutory litigation, defendants either
  - plead guilty or
  - apply for legal aid to fund the trial[392]
- the current scheme does not have any mechanism to ensure that restrained assets are not released while unrestrained assets are available, especially if the assets are outside the jurisdiction[393]
- while leaving the judiciary to determine what are 'reasonable' legal costs, there is no statutory or other mechanism for limiting quantum[394]
- nor is there any mechanisms to ensure that all legal expenses are monitored so as to ensure optimum value for money[395]
- the scheme provides no guarantee that legal service providers are in fact paid or paid within a reasonable length of time.[396]

15.34 The various criticisms, and suggested reforms, can be conveniently dealt with under the following headings

- appropriateness of courts as determinants of eligibility and quantum

---

The Victorian Bar Council and Criminal Bar Association (joint submission) *Submission 33* suggested that 'this difficult problem' could be resolved by establishing a tribunal under the chairmanship of a retired judge.

389.NSW Legal Aid Commission *Submission 1*; Commonwealth DPP *Submission 8*; The Victorian Bar Council and Criminal Bar Association *Submission 33*.

390.Legal Aid & Family Services *Submission 18*; National Legal Aid *Submission 21* (on behalf of several Legal Aid Commissions).

391.Paper by the Hon. Justice Scott and AFP *Submission 7*; NCA *Submission 16*; Legal Aid & Family Services *Submission 18*.

392.NSW Legal Aid Commission *Submission 1*; Legal Aid WA *Submission 5*; NCA *Submission 16*; SA Police *Submission 23*.

393.Commonwealth DPP *Submission 8*; Legal Aid & Family Services *Submission 18*; Attorney-General *Submission 31*; Victoria Bar Council and Criminal Bar Association *Submission 33*.

394.Law Council of Australia *Submission 37* (quoting Kirby P in *Fleming and Heal*); The Victorian Bar Council and Criminal Bar Association *Submission 33;* NSW Bar Association *Submission 24*; SA Police *Submission 23*; ABCI *Submission 20*; Legal Aid & Family Services *Submission 18*; Legal Aid WA *Submission 5*; AFP *Submission 7*; NCA *Submission 16*.

395.NSW Legal Aid Commission *Submission 1*; Legal Aid & Family Services *Submission 18*; ASPCA *Submission 14*; ABCI *Submission 20*; National Legal Aid *Submission 21* quoting Olsson J in *DPP (SA) v Vella* (1993) 61 SASR 379, 389.

396.Mr Greg James QC (as he then was) as a member of the defence bar.

- absence of criteria for determining fees
- absence of criteria for determining nature and length of proceedings
- absence of any monitoring mechanism.

Appropriateness of courts as determinants of eligibility and quantum

15.35 While no submission went so far as to assert that the courts should not have the role of determining whether restrained assets should be released to fund a legal defence, the Commission was left in no doubt from a range of submissions of a widely held view that effective control is not being exercised by the courts under the current scheme.

15.36 For example, the initial briefing provided to the Commission by the Attorney-General's Department commented that

> The legal costs issue has been the subject of lengthy discussions between the Department and various law enforcement agencies. It has been widely acknowledged that the courts have been unable to exercise appropriate control over the dissipation of restrained property in the past, and could not be expected to do so in the future.[397]

15.37 The Department has also told the inquiry that

> Trial judges perceive the judiciary as being placed in the invidious position of having to pre-determine the substantive issue, derogating from its impartiality.[398]

15.38 A similar sense that dissipation is not being able to be controlled by the courts runs through a number of other submissions, including several from legal aid agencies.[399]

15.39 While there is little judicial comment on record concerning the appropriateness of the court's role, comments by Kirby P of the New South Wales Court of Appeal in *NSW Crime Commission v Fleming and Heal* and by Carruthers J of the New South Wales Supreme Court in *Sharma* (referred to in an article by Michael Rozenes QC — see below) are illuminating and instructive. Kirby P commented that

> The prospect of judges of the court before (any more than of taxing officers, after) relevant proceedings resolving as issues of fact and opinion the

---

397.Correspondence dated 26 March 98.

398.ibid.

399.Legal Aid & Family Services *Submission 18*; NSW Legal Aid *Submission 1*; National Legal Aid *Submission 21*; Legal Aid WA *Submission 5*; Victoria Legal Aid *Submission 4*; Commonwealth DPP *Submission 8*; NSW Police *Submission 9*; NCA *Submission 16*; ABCI *Submission 20*; SA Police *Submission 23*; Victorian Bar Council and Criminal Bar Association *Submission 33*.

> reasonableness or otherwise of legal expenses where these are in contest is an unwelcome one.[400]

15.40 While the Law Council contends that Kirby P was merely 'lamenting the fact that the Act in question ... did not provide a scale of fees which could be used in determining the quantification of 'reasonable' legal fees',[401] the Commission is disposed to regard His Honour as having intended to reflect more broadly on the appropriateness of the role given to the courts.

15.41 In this regard the Commission notes, as pointed out by former Commonwealth DPP Michael Rozenes QC, that Kirby P also remarked that

> A court will be hesitant to determine, in advance, with precision, all the expenses to be incurred which will constitute reasonable legal expenses.[402]

15.42 Michael Rozenes also referred to dissatisfaction expressed by Carruthers J in *Sharma* at having to make orders which would effectively be sanctioning legal costs as reasonable when he was not in a position to make a judgment on the issue.[403]

15.43 Mr Rozenes went on to suggest that one of the reasons for the courts' discomfort was that

> The court releasing the funds is usually different from the court before which the hearing occurs — the court releasing the funds is unlikely to make any judgments about what might be reasonable costs of an action conducted in another forum.[404]

15.44 Conferment on the courts of the determinative role under section 43 has necessarily meant that the DPP is drawn into the issue. In the light of the DPP's role as prosecutor, this involvement in the section 43 proceedings has given rise to concerns on the part of the DPP regarding the compatibility of the two roles. This incompatibility, and its consequences, are amplified in the following passage from a submission from the NSW Legal Aid Commission

---

400.*NSW Crime Commission v Fleming and Heal* (1991) 24 NSWLR 116, 144.

401.Law Council of Australia *Submission 37*.

402.In *Fleming and Heal* (1991) 24 NSWLR 116 and quoted by Rozenes M, QC 'Reasonable Legal Expenses: Current Policy and Practice' *Current Issues in Criminal Justice*, 4(1) July 1992, 70. The Commission notes that Rozenes QC did not canvass the possibility that the courts should not have this role. Instead, he concluded his discussion by saying that 'it is important that far more guidance be given to the courts in determining what are reasonable legal costs and developing an appropriate scale would be a good start'.

403.Rozenes M, QC 'Reasonable Legal Expenses: Current Policy and Practice' (1992) 4(1) *Current Issues in Criminal Justice*, 71.

404.id 72.

> The Commission is aware of the difficulties that the Commonwealth DPP finds itself in when, on the one hand under the current regime, they can be prosecuting the client and at the same time are required to deal with defence lawyers regarding the release of funds to enable the defendant to be represented. Whereas the Legal Aid Commission can, and regularly does, engage in robust discussion with defence representatives about the appropriateness of defence tactics, and whether or not it is appropriate to fund to the extent requested matters sought by the defence, the DPP is not in a particularly good situation to do this. This is because, in order to properly understand the matter, this may require the disclosure of matters which go to the very heart of the client's defence. Understandably, there is some reluctance on the part of defence lawyers to do this notwithstanding the fact there may be assurances given by one DPP officer that any discussions that occur in relation to release of funds will not be passed on to those lawyers who are actually prosecuting the client.[405]

The Commission's view

15.45 For its part, the Commission has considerable sympathy with the concerns raised regarding the difficulties confronting both the court and the DPP in attempting to discharge in an effective and unimpeachable way their respective roles of adjudicator and prosecutor in respect of the release of funds and the trial of those issues.

15.46 Several alternatives to the courts have been suggested as more appropriate repositories of the determinative role under section 43. These are

- firstly, that the task be assigned to a Commonwealth agency
- secondly, that it be assigned to an independent board or tribunal or the Administrative Appeals Tribunal and
- thirdly, that the role be given to legal aid commissions.

15.47 The first option was flagged in original briefing materials from the Attorney-General's Department.[406] Such an option would have such benefits as avoiding any possible conflicts arising between determination of the issues for trial and the release of property under section 43, reducing the cost of determination of the section 43 issue by avoiding expensive court time, and providing the consistency inherent in centralised decision making. It would, however, pose the risk of enhancing the capacity of the defendant to delay the trial by seeking administrative and judicial review of decisions. It would also have the disadvantage of reposing the decision in a decision maker not steeped in the requisite understanding of the overarching judicial processes and a close day to day involvement in legal costs' assessment.

---

405. NSW Legal Aid *Submission 1*.

406. Correspondence dated 26 March 1998.

15.48 In the Commission's view the disadvantages would significantly outweigh the benefits.

15.49 The second option of an administrative tribunal was proposed by the Victorian Bar Council and Criminal Bar Association as a way of resolving what they appropriately described as 'this difficult problem'. Chairmanship under a retired judge was suggested.

15.50 Under the arrangements proposed by the Victorian Bar Council and Criminal Bar Association, the tribunal would make judgments about what is reasonable in the following manner

> The decision should be made after providing each party with the opportunity to make submissions. The Prosecution submissions regarding the nature of the case should be made in the presence of the Defendant or his representatives. The defence response, upon application, should be allowed to be made to the Judge/Tribunal *in camera* to ensure confidentiality as to the nature of the proposed defence(s).[407]

15.51 The submission also goes on to cover some other issues that may arise under this model. These are dealt with in the following terms

> If there is an issue as to the defendant's ability to pay legal costs from sources other than the restrained proceeds this should be resolved by the Judge/Tribunal in the manner followed by Seaman J in the matter of Lucas.[408]
>
> The Judge/Tribunal should make the decision in the interests of justice. The onus of persuading the Court to release funds should be on the applicant on the civil standard.
>
> There should be a scale of costs which is above the Legal Aid scales but less than the level of costs currently paid in the private sector.[409]

15.52 Another administrative model, suggested by the Attorney-General's Department, is that the Administrative Appeals Tribunal (AAT) be used as follows

> Members of the AAT could be nominated in similar fashion to the proposed nomination of AAT members for the issuing of warrants under the Telecommunications (Interception) and Listening Device Amendment Bill 1997.

---

407. Victorian Bar Council and Criminal Bar Association *Submission 33*.

408. Who held that 'indigent' did not mean that the defendant or his wife should reduce themselves 'to the bare necessities of life and of being needy and poor' in order to establish insufficient means for legal defence. Rather, Seaman J preferred that insufficient means should equate to the alternative dictionary meaning of indigent as 'lacking in what is requisite; wanting, deficient': *In the matter of Lucas* 78 A Crim R 480.

409. Victorian Bar Council and Criminal Bar Association *Submission 33*.

> The members would need to have experience in criminal litigation to determine the reasonableness of proposed actions and costs. It would be useful, if not essential, to have at least one judicial member sitting on the Tribunal.
>
> Applications which are not opposed by the DPP
>
> The defendant would apply to the Court for the release of restrained assets to meet legal costs in accordance with current procedure. If the DPP did not oppose the application, and the court were satisfied:
>
> > that the defendant was unable to meet his or her legal expenses out of property which was not subject to the restraining order; and
> >
> > that the restrained property was not reasonably suspected of being tainted,
>
> the Court would refer the matter to the AAT for consideration of the appropriate proportion of the restrained assets to meet the defendant's 'reasonable' legal costs. The AAT's role would essentially be to determine a reasonable quantum for legal expenses.
>
> Applications which are opposed by the DPP
>
> If the DPP opposed the application, the Court would refer the matter to the AAT for consideration and report. It is envisaged that the AAT would inquire into matters such as:

- whether the defendant had made full disclosure of material facts relating to the nature and location of all of his/her property
- whether the defendant had access to property outside the jurisdiction
- whether there were indications that certain of the restrained property was tainted.

> The AAT would make recommendations only, which would be reported to the Court. The Court would formally make a decision concerning the release of restrained property having regard to the report of the AAT. Although the Court would be free to consider the matter de novo and make its own findings, it is expected that it would accept the recommendations of the AAT in most cases. The AAT's report and recommendations to the Court should be excluded from the scope of the Administrative Decisions (Judicial Review) Act 1997. However, the decision of the Court would be open to appeal.[410]

15.53 While each of these models would offer the advantages of independent determination by a body having the necessary skills and with knowledge of associated processes, both would, in common with the existing scheme, necessitate the involvement of the DPP as a party to the proceedings. For reasons earlier adverted to, the Commission considers that any alternative to the current section 43

---

[410].Correspondence dated 25 March 1998.

scheme would need to be fashioned so as to avoid the continued responsibility by the DPP for both of what are incompatible and, therefore, potentially conflicting roles.

Absence of criteria for determining fees

15.54 Submissions in respect of this issue are concerned, in the main

- firstly, with whether there is a need to include some legislatively prescribed criteria the effect of which would be to place some limitation on the extent to which restrained property may be dissipated to meet legal fees; and
- secondly, assuming that some such limitation were deemed necessary, with whether the prescription of a scale of fees or, alternatively, the adoption of legal aid rates prevailing in the relevant jurisdiction, would be appropriate.

15.55 Both in submissions, and in the course of consultations, the Commission has been provided with information pointing overwhelmingly to the conclusion that the absence of any limiting or qualifying legislative prescription has led to excessive dissipation of restrained property for the purpose of funding legal defence.

15.56 The most often cited, and clearly the most conspicuous, case is that surrounding what is known as Operation Tableau, succinctly described as follows in the AFP submission.

> In one instance of note, AFP Operation Tableau, solicitors acting for a defendant successfully argued for the release from restraint of $1.2 million held in an overseas bank account. The defendant was later quoted in national media stating he had paid his solicitors $1.2 million to plead guilty. While the defendant pleaded guilty and was sentenced to 22 years imprisonment, the $1.2 million originally restrained by the Commonwealth was consumed by his legal team.[411]

15.57 Another of the cases brought to the Commission's notice involved Federal Court proceedings under Division 3 of Part XIII of the Customs Act. In that case, *Commissioner of AFP v Kirk and Others*,[412] more than $1.3 million was spent from the proceeds of restrained assets to fund committal proceedings and applications seeking the release of restrained assets. The defendants, who had been charged with serious offences arising out of the importation of large quantities of cannabis resin, subsequently pleaded guilty at the trial.

15.58 The absence of any legislative direction or qualification is seen by the Commission as having placed the courts in a quite invidious position.

411.AFP *Submission 7*.

412.*Commissioner of AFP v Kirk and Others* 24 FCR 528.

The Commission's view

15.59 It is, in the Commission's view, entirely predictable and understandable that, in the absence of any statutory guidance or limitations concerning how the section 43 discretion is to be exercised, judges may tend to err on the side of permitting a defendant a level of freedom of choice as to how the defendant manages their defence that is consistent with what they would be able to do in absence of any restraint over their property.

15.60 The absence of any direction or qualification in relation to levels, and aggregate amounts, of fees also poses significant difficulties for practitioners. One such difficulty was aptly described by J Azize in 1994 in an article in the (NSW) *Law Society Journal* in which he observed that

> As lawyers, we find ourselves in the difficult position of serving the competing public interests and attempting to make our living advancing our private interests and those of our clients.[413]

15.61 So far as concerns defendants themselves, the absence of any limitations or qualifications has the clear potential to lead them into significantly higher levels of legal representation than they might otherwise ordinarily contemplate with implications for the level of access to restrained property. In a paper recently delivered to the 12th International Conference of the Society for Reform of Criminal Law, Scott J of the Western Australian Supreme Court commented that

> ... the temptation for persons in that position to seek to obtain the most highly qualified and expensive legal advice would be expected.[414]

15.62 In the Commission's view, there is no doubt that excesses and uncertainties described above point conclusively to the negative implications for the current section 43 scheme of the absence of any formal guidance regarding fees levels and aggregate fees.

15.63 Several options for reform have been suggested in submissions.

15.64 Mr Trevor Nyman, on behalf of the Criminal Law Committee of the Law Society of New South Wales, has submitted that

> The principles [based on market rates] enunciated in NSW Crime Commission v Fleming & Heal whilst imperfect have nonetheless provided useful guidelines

---

413. Azize J 'Seeking Legal Expenses under the *Proceeds of Crime Act 1987*' *Law Society Journal* June 1994, 57.

414. The Hon. Justice Scott (of the WA Supreme Court) in a paper delivered to the 12th International Conference of the Society for Reform of Criminal Law (Barbados 9–12 August 1998).

> in the subsequent years and useful formulae have become settled in co-operative negotiations between DPP, Public Trustee and defence lawyers.[415]

15.65 The Commission notes in this regard the support expressed in that case by Gleeson CJ (with whose reasons Hope A-JA agreed) that 'reasonable expense' under the NSW CAR Act should be determined by reference to what, having regard to the current market for legal services, it would be necessary for a client to agree to in order to defend charges of the kind in issue.[416] His Honour referred in that regard to the need for expert evidence that

> charges of the kind in question are usual and not excessive.[417]

15.66 For his part, Kirby P commented that

> it is possible that substantive justice would be achieved if a scale of fees were provided by reference to which the discretion under 210(5)(b) of the [CAR] Act could be readily determined.[418]

15.67 Referring also to *Fleming and Heal*, the NSW Bar Association has expressed support for a scale of fees.[419]

15.68 Similar support has been forthcoming from the Victorian Bar Council and Criminal Bar Association who propose that

> There should be a scale of costs which is above the Legal Aid scales but less than the level of costs currently paid in the private sector.[420]

15.69 In its submission the NSW Legal Aid Commission has observed that

> Rates set by Courts in Fleming and Heal are more than double what would be paid if the legal representatives appearing for defendants were put on Legal Aid rates.[421]

15.70 A further alternative, suggested by Legal Aid and Family Services, is that the section 43 regime be amended to provide for the provision of an accused's defence through a grant of legal aid, thus bringing normal legal aid conditions relating to expenditure on fees directly into play.[422] Legal Aid Western Australia

---

415.Trevor Nyman & Co. *Submission 2*.

416.*NSW Crime Commission v Fleming and Heal* (1991) 24 NSWLR 116, 128: see also *DPP (SA) v Vella (1993)* 61 SASR 379 and *DPP (SA) v Duggan (1996)* 66 SASR 538.

417.*NSW Crime Commission v Fleming and Heal* (1991) 24 NSWLR 116, 128.

418.id 144.

419.NSW Bar Association *Submission 24*.

420.Victorian Bar Council and Criminal Bar Association *Submission 33*.

421.NSW Legal Aid *Submission 1*.

422.Legal Aid & Family Services *Submission 18*.

also sees legal aid bodies as an appropriate means of assessing, and therefore, containing costs.[423] Legal Aid New South Wales suggests that restrained property should be required to be disregarded for legal aid assets tests, thus providing a significant role for legal aid authorities to restrain excessive dissipation by application of their usual expenditure controls.[424]

15.71 In the Commission's view, the above submissions amply demonstrate the shortcomings of the current section 43 scheme in not prescribing to a greater or lesser degree the means by which fees, including aggregate fees where appropriate, should be determined and the need for any alternative scheme to take account of the lessons to be learned from the experiences relayed to the Commission.

Absence of criteria for determining nature and length of proceedings

15.72 A major area of criticism of the section 43 scheme relates to its failure to place limits on the nature and length of defence proceedings that may be funded out of restrained assets.

Nature of proceedings

15.73 The difficulties posed to the administration of justice by resort to excessive proceedings and the prolongation of proceedings is well documented. The former problem was considered (albeit not in the POC Act context) by Merkel J in 1997 in *Bollag and Bond v Attorney-General (Commonwealth)*

> The present application is audacious: not because it was brought, but by reason of when it was brought. All of the facts relied upon to establish the applicants' case have been known by them and their legal advisers since some time prior to mid 1995 at the latest. Numerous unsuccessful legal challenges have been brought by both applicants in Switzerland. Bond unsuccessfully challenged the validity of the requests in the Federal Court. There is no suggestion that the grounds for the present challenge were not known by the applicants or their legal advisers at the time of those challenges. On any view the applicants were required to bring forward the whole of their case in the earlier proceedings. As was said in Henderson v. Henderson (1843) 3 Hare 100 at 115; 67 ER 313 at 319, the Court:
>
> will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the [earlier] subject on contest ...
>
> Whilst the applicants have an undoubted right to challenge the use of coercive power in relation to them they do not have the right to do so as and when they choose by electing, reserving and preserving their points so they can be raised if

---

[423].Legal Aid Western Australia *Submission 5*.

[424].NSW Legal Aid *Submission 1*.

> and when it suits them or their litigation strategy. Yet that appears to be precisely what Bond and Bollag have done in the present case in order to delay the investigation into their dealings.
>
> Delay of itself has the propensity to cause prejudice to the investigation. However there is another harm caused by the applicants' conduct in the present case. It is harmful to the administration of justice for applicants to challenge the criminal investigation process in a manner that both fragments and dislocates it by raising grounds as and when it suits them without offering any explanation as to why the grounds were not raised in earlier proceedings for substantially the same relief. The special circumstances of the present case are such that some explanation was obviously called for as to why this proceeding and the claims in it were not brought earlier, but none was forthcoming. Absent any explanation to the contrary, I infer that the applicants elected not to raise these grounds in their earlier proceedings. In such circumstances it is a serious misuse and abuse of the litigation process to contest proceedings in that manner.[425]

15.74 The difficulties of the kind confronted by Merkel J are exacerbated when the funds used to finance those proceedings have their source in restrained property. The problems are further compounded when defendants turn to legal aid to fund the remainder of the proceedings after all restrained funds have been dissipated.[426] Legal Aid and Family Services noted its concerns in the following terms

> A recent matter in Western Australia is a case in point, where two defendants used restrained assets to argue, among other things, that they were indigent, and lodged an application for a *Dietrich* stay of proceedings. This is clearly an unacceptable use of the proceeds of crime. It also places an unacceptable strain on legal aid commission budgets which are considerably restricted.[427]

15.75 The need for review of the POC Act in this regard was recognised as early as 1992 by the then Commonwealth Director of Public Prosecutions, Michael Rozenes QC

> The present arrangements for the release of funds are very much in favour of the defendant. The scope for abuse means that the present arrangements may be exploited to the extent that they endanger the whole proceeds of crime initiative. More weight needs to be given to the community's interest. There is no easy answer or perfect solution. However the problem has reached the stage where it is imperative that changes be made.[428]

425.*Bollag and Bond v Attorney-General (Commonwealth)* (1997) 149 ALR 355, 374.

426.As argued in NSW Legal Aid *Submission 1*; National Legal Aid *Submission 21*; Legal Aid & Family Services *Submission 18*.

427.Legal Aid & Family Services *Submission 18*.

428.Rozenes M, QC 'Reasonable Legal Expenses: Current Policy as Practice' (1992) 4(1) *Current Issues in Criminal Justice* 4(1) July 1992, 74

15.76 On the issue of collateral proceedings in cases where proceeds restraining orders are in place, Mr Rozenes observed that

> 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 helpless of defences is great. The property would be lost in any event. Why not spend it on legal fees rather than leave it to be recovered?[429]

He also suggested that

> ... there needs to be an independent body to arbitrate on the reasonableness of proposed action ...[430]

15.77 As pointed out in the National Legal Aid submission, Olsson J in *DPP (SA) v Vella*, also recognised the need for reform when he proposed

> that a mechanism acceptable to the Court be established to monitor and approve actual expenditure and from time to time review the propriety of work done or proposed to be done.[431]

15.78 Three submissions representing the legal aid perspective on this issue[432] propose that, rather than statutorily limiting the type of proceedings which may be funded from restrained assets, the normal legal aid merit tests should apply. The NSW Legal Aid Commission, for example, will only fund appeal proceedings where that commission is satisfied there are reasonable prospects of success and where the expenditure of funds is on a costs benefit basis. The Commission was told that this applies particularly to interlocutory matters and that controls are also exercised on expenditure at trial in order to ensure that value for money is obtained.[433] The Legal Aid and Family Services submission proposes that the Commonwealth guidelines for legal assistance should be used because they have been designed to ensure the most cost-effective use of public funds for criminal defences.[434]

15.79 In contrast with the submissions supporting the need for some limits to be put on the extent to which restrained property should be made available for collateral proceedings is the view of the Law Council, which cautions that

---

[429].id 72.

[430].id 74.

[431].Quoted in National Legal Aid *Submission 21*.

[432].NSW Legal Aid *Submission 1*; Legal Aid and Family Services *Submission 18*; Law Council of Australia *Submission 37*.

[433].NSW Legal Aid *Submission 1*.

[434].Legal Aid & Family Services *Submission 18*.

> ... so called "collateral" proceedings can be vital to the defendant's trial proceedings, a point which has been judicially noted.[435]

Length of proceedings

15.80 In its submission to the Commission, the AFP argues strongly for the need for reform to prevent dissipation of restrained property by means of unwarranted prolongation of trial and committal proceedings. The AFP advocates the establishment of guidelines to ensure that

> ... defendants are not paying for a 'Rolls Royce' legal defence which, without the benefit of restrained or tainted property they would be unable to afford.[436]

15.81 Amongst examples of such 'Rolls Royce' defences provided to the Commission are those referred to by then Commonwealth Attorney-General, the Hon. Michael Lavarch MP, in his remarks at the opening of the NCA sponsored National Proceeds of Crime Conference, Sydney 1993. One concerned the application for release of restrained property for a committal hearing which the lawyer for the defendant had told the court would last only eight weeks and estimated would cost about $164000.

> The court made an order releasing the restrained property on the basis of an hourly rate for the solicitor and counsel. As events turned out, the examination of the first prosecution witness alone took 10 weeks and the committal ended up lasting 11months and consuming $1.2 million of restrained property.[437]

15.82 The second example cited by Mr Lavarch concerned the matters involved in Operation Tableau earlier referred to.[438] The dissipation of $1.3 million from restrained property is dealt with in some detail by Michael Rozenes in the 1992 article.[439]

15.83 The Commission is also aware of judicial comment noting the lack of a legislative mechanism to prevent dissipation or its consequences. The trial judge in *Saxon*, for example, noted the absence from the legislative scheme of a mechanism to prevent the wholesale dissipation of restrained assets in payment of legal expenses in that case.[440] In that case, costs incurred in legal representation for Mr Saxon at the committal stage amounted to $1.2 million.

435.Noted in *DPP (Cth) v Saxon* (1992) 28 NSWLR 263: Law Council of Australia *Submission 37*.

436.AFP *Submission 7*.

437.National Crime Authority *Submission 16*.

438.AFP *Submission 7*.

439.Extracted from Rozenes, M, QC 'Reasonable Legal Expenses: Current Policy as Practice' (1992) 4(1) *Current Issues in Criminal Justice* 4(1), 65.

440.(Unreported) NSW Supreme Court 3 August 1990, Studdert J.

15.84 In the case of *Commissioner of the AFP v Kirk and Ors*, after noting that 'over a million dollars' had been spent on legal costs out of restrained assets, Pincus J commented that

> ... I feel obliged to say that those who framed the legislation might not have contemplated the funds taken into control being so rapidly expended in litigation, as has happened in this case.[441]

15.85 In *Commissioner of AFP v Malkoun and others*[442] applications to vary restraining orders under the Customs Act to allow for the payment of legal fees were opposed. Although Ryan J was not prepared to leave the funding of the defence to the Legal Aid Commission, he was also not prepared to allow the defendants unrestricted access to the assets restrained '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 section 243B'. Justice Ryan's dissatisfaction with the way funds had been expended on the committal proceedings may be inferred from the fact that, having earlier made orders under section 43 which resulted in the dissipation of $250000 in legal costs, he then allowed each defendant a maximum of only $30000 for the cost of the trial.[443]

The Commission's view

15.86 The Commission is in no doubt about the validity of criticisms that the absence of any criteria for determining the nature and length of proceedings in respect of which restrained property may be released under section 43 has contributed significantly to the excessive dissipation of property.

15.87 In the Commission's view, the lesson to be learned from experiences recounted above is that any scheme for the funding of the defence of persons whose property is subject to a restraining order should contain appropriate safeguards to ensure that the net amount available to the state from proceeds recovery cannot unreasonably be dissipated on legal costs.

Absence of any monitoring mechanism

15.88 It is clearly implicit in submissions advocating the inclusion of legislative directions or qualifications in relation to the determination of fees and the nature and length of proceedings that may be funded under section 43, that the legislation should, as a necessary corollary, commit the monitoring of expenditure of funds to an appropriate authority. Such is clear from the fact that four submissions (see

---

441. *Commissioner of the AFP v Kirk and Ors* (1989) 24 FLR 528.

442. (Unreported) Federal Court of Australia 1 February 1989, Ryan J.

443. Extracted from Rozenes, M QC 'Reasonable Legal Expenses: Current Policy as Practice' (1992) 4(1) *Current Issues in Criminal Justice*, 65.

below) discuss whether that role should be given to the courts or some other authority.

15.89 Additionally, preliminary consultations with the then leading defence counsel Greg James QC point to the need for a monitoring authority to overcome deficiencies that have on occasions led to significant delays in the actual payment of fees following a section 43 order.

15.90 Both National Legal Aid and the Law Council of Australia argue in favour of the monitoring role being entrusted to the courts. National Legal Aid's view is based on the courts' experience in the taxation of costs.[444] The Law Council considers that, if the DPP has evidence that released assets are not being properly used for the payment of legal fees, then he should place that evidence before the court.[445]

15.91 NSW Legal Aid and Legal Aid and Family Services argue, on the other hand, that such a role is more appropriately undertaken by legal aid commissions.[446]

15.92 A further suggestion, from the Australian Society of Practicing Certified Accountants, is that the body responsible for administering the legislation might monitor the expenditure.[447]

The Commission's view

15.93 In the Commission's view, it is axiomatic that, if the legislation makes provision for funding of the defence of a person (whose property has been restrained) in such a way that the quantum of that expenditure impacts directly on the net amount of property ultimately available for forfeiture under the POC Act, the legislation should likewise ensure the appropriate monitoring of the expenditure of such funding.

Finding a solution — the Commission's view

15.94 As identified earlier in this chapter, the challenge for the Commission, having rejected the current section 43 scheme as incompatible with the principles underlying the POC Act, is to fashion an alternative scheme. In the Commission's view, any such alternative must seek to strike an appropriate balance between two imperatives.

444.National Legal Aid *Submission 21*.

445.Law Council of Australia *Submission 37*.

446.NSW Legal Aid *Submission 1*; Legal Aid & Family Services *Submission 18*.

447.ASPCA *Submission 14*.

15.95 The first, as already discussed, is that the property restrained to ensure availability for mandatory confiscation as the profits of crime, or for discretionary confiscation, as property used for or in connection with unlawful activity, ought not be put at risk of dissipation by being available at the discretion of a court for the legal defence of proceedings to which that unlawful activity relates.

15.96 The second is that, in the interests of justice, a separate and distinct obligation should be legislatively imposed on the state to ensure that a person deprived by the state of the opportunity to make their own arrangements for their defence by reason of such restraint of their property should nevertheless be provided with the capacity to offer a proper defence.

15.97 Additionally, as a matter of important public policy, it is essential that the capacity to offer such a defence should be provided in such a way as to not diminish the amount of funding generally available for the legal aid of indigent persons.

15.98 In the light of its above consideration of criticisms offered about relevant aspects of the operation of the current section 43 scheme, the Commission also considers that any solution should ensure that those criticisms that it has found to be sustained are fully taken account of in any proposed alternative.

15.99 Taking these matters into account, the Commission has concluded that any proposed alternative should meet the following requirements

1. Direct access to restrained assets for the purpose of funding a defence should no longer be allowed.

2. The state should be legislatively required to provide an adequate defence for any person rendered unable to provide such defence by reason of restraint of their property under proceeds legislation.

3. Such provision should, however, be provided in a way that does not impact adversely on the level of funding available under existing legal aid schemes.

4. The statutory obligation to provide such a defence should apply to both the defence of relevant criminal charges, and the defence of non-conviction based confiscation proceedings, to which the restraint of property relates.

5. The adequacy of the defence should be determined by reference to the kind of defence that an ordinary self funded person could be expected to provide as an adequate defence of the matters in issue.

6. The administration of the scheme should be entrusted to an authority independent of the courts and the DPP, and which has the necessary experience and expertise to determine the appropriate level of such defence including fees and, where appropriate, aggregate fees payable.

7. In the interests of justice (including compliance with the principles of *Dietrich*, where applicable) the defendant should be entitled to seek review by the court of the adequacy of the provision made by such authority for the defence of the issues for trial.

8. Appropriate limitations should be placed on the collateral proceedings to which such defence should be provided, but not such as to exclude any such proceedings as a self funded and adequately advised defendant might reasonably conclude as being essential to the defence of the issues; the defendant should be entitled to seek review by the court of any decision to exclude a collateral proceeding.

9. The body with responsibility for the administration of the scheme would need also to be given statutory authority for monitoring expenditure of defence funding and be appropriately skilled and experienced to discharge that role.

15.100 Considered together, these requirements logically present themselves to the Commission as a framework for a state based scheme of legal assistance, albeit a specifically targeted one with special characteristics related to the circumstances of persons rendered technically indigent by reason of restraining orders imposed over their property.

15.101 As such a state based scheme, and having regard to the existence of a national network of State and Territory legal aid commissions meeting legal aid needs under both Commonwealth and local laws, the Commission is in no doubt that the various legal aid commissions would be the most appropriate and best qualified bodies to administer an alternative scheme of the kind that it contemplates.

15.102 The use of the existing skills, experience and infrastructure of State and Territory legal aid commissions would, in the Commission's view, provide a far more cost effective solution than the alternatives of establishing a new Commonwealth body for the purpose or conferring such functions on other Commonwealth agencies such as Commonwealth departments and tribunals that would have to acquire considerable new expertise to even begin to have relevant experience and skills comparable with that already able to be offered by the legal aid commissions.

15.103 In particular, legal aid commissions would be equipped immediately to assume, and effectively discharge, all the various responsibilities identified above.

15.104 As regards the critical need to ensure that the scheme does not operate so as to impact on the already stretched resources available for traditional legal assistance, the Commission envisages that legal aid commissions would be entitled to draw down the costs of providing such assistance, together with their own administrative costs (which would need to be negotiated with the Commonwealth)

from the Confiscated Assets Reserve. In this way two important objectives would be met. Firstly, the diversion of general legal aid funding to meet the needs of the scheme would be avoided and, secondly, payments to those providing legal assistance would be able to be made promptly without the need either to await final disposition of the matters in issue or the availability of confiscated assets from which they might be met.

Outline of Commission's proposal

15.105 The following is a more detailed outline of how the Commission envisages that the scheme would operate. It should be taken as read that the scheme would be underpinned by legislation necessary to guarantee its operation.

1. A person ('defendant') whose assets, or part of them, were subject to a restraining order would have a primary obligation to fund their own defence from unrestrained assets.

2. Where, by reason of the restraining order, the defendant was unable to provide for a defence of the kind to which they would be entitled under this proposal (see point 5 below), they would be entitled to apply to the relevant legal aid commission for assistance in the provision of their defence.

3. Assistance would be able to be granted in respect of either the defence of a criminal charge in respect of which the restraining order had been made or the defence of the non-conviction based civil proceedings to which the order related.

4. Property the subject of the restraining order would be required to be disregarded for the purpose of assets testing of the defendant.

5. The legal aid commission would be charged by statute with providing the defendant with a defence of the kind that an ordinary self-funded person could be expected to provide for themselves as an adequate defence; that is to say, a defence determined by reference to the objective criterion of adequacy to meet the charges or issues with which the defendant is confronted.

6. The defendant would be entitled to seek review by the court of the adequacy of the defence, based on the nature and content of that defence.

7. Where such a review was requested the legal aid commission would be required to provide a certificate to the court certifying as to the nature and content of the defence and the reasons why the commission regarded the defence as meeting the requirement of adequacy.

8. In reviewing the nature and content of the defence proposed by the legal aid commission, the court would be required to have regard to

   (a) the nature and complexity of the issues to be tried
   (b) the level of representation ordinarily provided by the DPP for the prosecution of civil or criminal matters of a similar nature and complexity and the desirability of reasonable complementarity of representation
   (c) the need, in the case of criminal proceedings, for the defendant to be represented in reasonable bail applications and committal proceedings
   (d) the need for the defendant to be represented in any confiscation proceedings whether by way of civil or post-conviction proceedings
   (e) the need for expert evidence to be provided for the defence and
   (f) submissions put to it by the defendant and the legal aid commission's response thereto.

9. Assistance would not ordinarily be available for associated or collateral proceedings unless the legal aid commission was satisfied that such proceedings were such as a properly advised self-funded defendant might reasonably conclude were essential to the defence of the matters in issue in the criminal, or non-conviction based confiscation, proceedings.

10. The legal aid commission would be entitled to draw down from the Confiscated Assets Reserve on a regular basis all funds necessary to meet assistance provided under the scheme and its administrative costs.

11. In the event that application of the restraining order to the whole or any part of the defendant's property was reviewed, whether by reason of a successful application for release under the POC Act, acquittal of the relevant criminal charge, successful defence of non-conviction based confiscation proceedings, or otherwise, the legal aid commission would be required to provide a certificate regarding the extent to which, in its opinion, an adjustment should be made to level of assistance provided for the defence.

12. The assets so released from the application of the restraining order would stand statutorily charged in favour of the Commonwealth to the amount of any assistance that had already been granted in excess of the reviewed level of assistance. An amount equal to the amount of any previously granted assistance so recovered would be required to be credited from consolidated revenue to the Confiscated Assets Reserve.

15.106 The Commission notes that important reforms of a related nature have been made to the corresponding schemes under the CC Act (Qld), the CAR Act (NSW) and the Confiscation Act (Vic).

15.107 Under the Queensland legislation, the release of restrained assets to meet reasonable legal expenses is subject to the limitation that no property interest representing the proceeds of the relevant offence may be released.[448]

15.108 The CAR Act (NSW) goes further in providing that no illegally acquired property — not just property illegally acquired from the relevant offence — may be released by the court.[449]

15.109 The most sweeping reform in relation to the legal expenses issue has taken place in Victoria. Section 14(4) of the Confiscation Act expressly prohibits the court from making any provision out of restrained assets for the payment of legal expenses in respect of any proceedings, whether criminal or civil, and whether in respect of the charges or issues to which the restraining order relates or otherwise.

15.110 Section 143 of the Act goes on to provide that a court may order Legal Aid Victoria to provide legal assistance to any person in respect of any of the proceedings referred to in section 14(5) where the court is satisfied that a restraining order in respect of the property of the person remains in force and the person is therefore in need of legal assistance. Where the Court so orders, Legal Aid Victoria is obliged to provide legal assistance and the court may adjourn the proceedings until such assistance is provided.[450]

15.111 The section provides further that the court may order that the costs of the provision of legal assistance may be secured by a charge over any land or property in which the person has an interest, and requires the Victorian Government, where Legal Aid Victoria cannot itself recover the money, to pay for those costs up to the value of any property forfeited or the amount of any penalty paid to the State.[451]

15.112 In the Second Reading speech accompanying the introduction of the Bill, the Hon Jan Wade, Victorian Attorney-General, explained the need for the changes in the following terms

> The Act currently provides that a person whose property has been restrained may apply to the Supreme Court for permission to access restrained property to pay for their reasonable legal expenses. Such expenses may arise either in defending the criminal charge or in defending an application for a restraining order. In practice, the DPP is often a party to the determination of the expenses application, as he has applied for the restraining order. This can give rise to a conflict of interest and potentially involves the DPP in determining how much money the defendant needs to properly conduct a defence.
>
> The existing legislation also allows restrained property to be dissipated through legal expenses. There have been a number of cases where claims for legal expenses have resulted in protracted disputes in the courts. For example in a

---

448.CC Act (Qld) s 40(18)–(19).

449.CAR Act (NSW) s 16A(1)(c).

450.Confiscation Act (Vic) s 143(1) and (2).

451.Confiscation Act (Vic) s 143(3)(b) and (c).

> Queensland case known as "Operation Tableau" 12 defendants to drug charges used restrained assets for legal representation. $1.2 million was spent on legal fees during the committal and the assets were all but exhausted. Ultimately, all defendants pleaded guilty to the charges. The government believes that there is no reason why a defendant should receive a benefit from the crime in the form of a 'Rolls Royce' defence funded by illegally acquired property.
>
> Under the changes, defendants will no longer be allowed to access restrained property for legal expenses. However, if a person has insufficient unrestrained assets or income to pay for legal expenses, the court may order that they receive legal assistance. This ensures that they will be properly represented and will not be deprived of a fair trial.[452]

15.113 While there is some broad similarity between the new Victorian scheme and that now proposed by the Commission, there are important fundamental distinctions.

15.114 First, it is noted that the Victorian reforms seem, in the main, to represent a pragmatic response to criticisms similar to those made by submitters regarding the section 43 scheme. While the Commission's proposals may also be viewed as a pragmatic response, the fundamental driver of reform, in the Commission's view, is the incompatibility of the current scheme with the underlying principles of the POC Act.

15.115 A second important distinction is that, under the Commission's proposal, a defendant who considers himself or herself unable to provide an appropriate defence, would be required to approach the relevant legal aid commission directly and not require a court order that legal aid be provided. Nevertheless, a person dissatisfied with the assistance provided under the Commission's proposal would be entitled to seek court review of the adequacy of the defence provided by the legal aid commission.

15.116 Arguably, the most important distinction between the two schemes is the guarantee that the Commission's proposal would provide that the defence would be such as an ordinary self-funded defendant could be expected to regard as adequate for the purpose.

15.117 Although such matters as the fee basis on which the legal aid commission secures the services of solicitors, counsel and experts necessary to provide such defence would be for the legal aid commission to deal with in the ordinary course of its day to day operations, the adequacy of the defence effort as a whole would be measured against the benchmark of what an ordinary self funded defendant would reasonably regard as adequate.

---

452. Second reading speech, *Confiscation Bill 1997* attached to Victorian Department of Justice *Submission 27*.

15.118 Thus, for example, if a legal aid commission ordinarily retained relatively junior counsel to conduct the defence of charge X, that practice would not be relevant in determining the seniority of counsel to be engaged where that charge was brought against a person the whole of whose assets had been restrained under the Act.

15.119 If, ordinarily, such a charge would be prosecuted by a senior junior, senior counsel alone, or senior counsel with a junior, the legal aid commission would have no choice under the test proposed by the Commission but to endeavour to retain counsel of comparable and appropriate seniority and experience for the defence team. The proposed general test, together with the considerations (including complementarity) required to be taken into account by the court in reviewing the adequacy of the defence proposed by a legal aid commission, would guarantee that.

15.120 Likewise, the existence of particular practices within a legal aid commission regarding the payment, or non-payment, of fees for preparation, appeals and other associated work would be irrelevant to the commission's consideration of whether such services would ordinarily be sought by a self-funded person as part of making provision for an adequate defence.

15.121 The Commission's proposal would also ensure that the defence would be provided for reasonable bail applications, committal, confiscation proceedings and, exceptionally, any collateral proceedings that such a self-funded and properly advised defendant would reasonably conclude were essential to the defence of the issues in contest.

15.122 This crucial distinction is based on the Commission's sense that, in the interests of justice, the disadvantage experienced by the defendant in not being able to choose the nature and scope of his or her own defence, should be offset by the advantage (not ordinarily enjoyed by persons to whom assistance is provided by legal aid commissions) of a defence whose adequacy is measured against what an ordinary self funded defendant could reasonably regard as adequate for the purpose.

Recommendation 65. The current scheme in section 43(3)(a) of the POC Act relating to the making of provision out of restrained property for meeting a person's reasonable expenses in defending a criminal charge is in conflict with the principles underlying the Act and should be discontinued.

Recommendation 66. That scheme should be replaced by a scheme having the following elements and characteristics

- a person ('defendant') whose assets, or part of them, were subject to a restraining order would have a primary obligation to fund their own defence from unrestrained assets
- where, by reason of the restraining order, the defendant was

unable to provide a defence of the kind to which they would be entitled under the scheme (see below), they would be entitled to apply to the relevant legal aid commission for assistance in the provision of their defence
- assistance would be able to be granted in respect of the defence of a criminal charge in respect of which the restraining order had been made or the defence of the non-conviction based civil proceedings to which the order related
- property the subject of the restraining order would be required to be disregarded for the purpose of assets testing of the defendant
- the legal aid commission would be charged by statute with providing the defendant with a defence of the kind that an ordinary self-funded person could be expected to provide for themselves as an adequate defence, that is to say, a defence determined by reference to the objective criterion of adequacy to meet the charges or issues with which the defendant is confronted
- the defendant would be entitled to seek review by the court of the adequacy of the defence based on the nature and content of that defence
- where such a review was requested the legal aid commission would be required to provide a certificate to the court certifying as to the nature and content of the defence and the reasons why the commission regarded the defence as meeting the requirement of adequacy
- in reviewing the nature and content of the defence proposed by the legal aid commission, the court would be required to have regard to
  - the nature and complexity of the issues to be tried
  - the level of representation ordinarily provided by the DPP for the prosecution of civil or criminal matters of a similar nature and complexity and the desirability of reasonable complementarity of representation
  - the need, in the case of criminal proceedings, for the defendant to be represented in reasonable bail applications and committal proceedings
  - the need for the defendant to be represented in any confiscation proceedings whether by way of civil or post-conviction proceedings
  - the need for expert evidence to be provided for the defence and
  - submissions put to it by the defendant and the legal aid commission's response thereto
- assistance would not ordinarily be available for associated or collateral proceedings unless the legal aid commission was satisfied that such proceedings were such as a properly advised self-funded defendant might reasonably conclude were essential to the defence of the matters in issue in the criminal, or non-conviction based confiscation, proceedings
- the legal aid commission would be entitled to draw down from

the Confiscated Assets Reserve on a regular basis all funds necessary to meet assistance provided under the scheme and its administrative costs as and when incurred

- in the event that application of the restraining order to the whole or any part of the defendant's property was reviewed, whether by reason of a successful application for release under the POC Act, acquittal of the relevant criminal charge, successful defence of non-conviction based confiscation proceedings, or otherwise, the legal aid commission would be required to provide a certificate regarding the extent to which, in its opinion, an adjustment should be made to the level of assistance provided for the defence
- the assets so released from the application of the restraining order would stand statutorily charged in favour of the Commonwealth to the amount of any assistance that had already been granted in excess of the reviewed level of assistance; an amount equal to the amount of any previously granted assistance so recovered would be required to be credited from consolidated revenue to the Confiscated Assets Reserve.

16. Administrative (*in rem*) forfeiture

Introduction

16.1 In its specific terms of reference, the Commission has been asked, to enquire into and report on

> existing provisions in Commonwealth law for non-conviction-based (*in rem*) forfeiture, and whether Commonwealth law should be modified in that regard; and whether the civil forfeiture regime of Division 3 of Part XIII of the Customs Act 1901 should be integrated into the Proceeds of Crime Act.

16.2 At the outset it should be noted that the *in rem* forfeitures referred to in the terms of reference are quite different creatures from those under the POC Act, and Division 3 of Part XIII of the Customs Act. In the first place, their policy underpinnings are based on a concept of use, or consequences of use, of a chattel which has caused injurious effect. Generally, such forfeiture is not the result of judicial order, although sometimes a judicial order is required before forfeited goods may be disposed of. Rather, forfeiture attaches by operation of law on the occurrence of a prohibited event related to the use of the goods or chattels. Because the goods or chattels themselves acquire the status of being forfeited, there is normally no recourse for innocent third parties to protect any interest they may have in the property, all interests being extinguished by the *in rem* forfeiture. A key aim of this type of forfeiture is to take the goods or chattel out of circulation, thus preventing further use for unlawful purposes.

16.3 As pointed out in briefing material furnished by the Attorney-General's Department to the Commission, the scheme of *in rem* forfeitures, such as customs forfeiture, may have its genesis in the old law of deodand, a law that had no regard to the rights of owners or encumbrancees.

16.4 Although early forms of forfeiture, such as attainder and deodand, have long since been abolished, Professor Arie Freiberg pointed out, in the context of customs forfeiture, that

> there is a history of almost 400 years of customs law which made use of seizure and forfeiture under statute, rather than criminal prosecution and conviction, as its principal mode of enforcing laws designed to raise revenue for the state.[453]

16.5 Historically, these laws are said to have been developed from the early Imperial Navigation Acts and to have involved the concept of a 'guilty chattel',

---

[453].A Freiberg & R Fox "Forfeiture, Confiscation and Sentencing" in Fisse, Fraser & Coss *The Money Trail* The Law Book Co Ltd 1992, 108.

which was to be removed from circulation to ensure that it could not again be used for unlawful purposes.[454] Because of the difficulty of locating owners of ships, or of the goods on board, breaches of the Navigation Acts were dealt with by actions *in rem* against the goods or vessels. Under Admiralty law, forfeiture resulted if a party claiming ownership of the vessel or goods failed to prove that the vessel or goods had not been used in violation of the law.

16.6 There are numerous statutory provisions in Commonwealth law that declare items of property to be forfeited to the Crown in right of the Commonwealth purely on the basis of the commission of a criminal, or even quasi-criminal, act involving that property. For present purposes it should suffice to illustrate the effect of such laws by reference to key aspects of the *in rem* provisions of the Customs Act.

In rem forfeiture under the Customs Act

16.7 Prior to the enactment of the *Customs, Excise and Bounty Legislation Amendment Act 1995*, forfeited goods were seized without a warrant. While warrants are still not required where seizure takes place at a 'Customs place',[455] the effect of the 1995 amendments has been to require a warrant to authorise seizure otherwise than at such a place.[456]

16.8 Following seizure, the scheme is dependent for its further operation upon a system of notices served upon the owner, or person in possession, of the seized goods. Unless a person so served claims the goods within a statutory period, the goods are condemned as forfeited. It is only where a claim is lodged that the operation of the forfeiture provisions in relation to the seized goods arises for judicial consideration.

16.9 These processes do not, however, alter the fact that forfeiture still occurs by the operation of the Act itself upon the happening of the relevant event. Thus, for example, section 229(1)(j) provides that any carriage or animal used in smuggling or in the unlawful importation, exportation, or conveyance of any goods, shall be forfeited to the Crown. Section 229(2) goes on to make explicit that the section applies in relation to ships, boats and aircraft as well as other goods.[457]

16.10 Thus, for example, the moment a boat loaded with drugs, being prohibited imports, arrives in Australia that boat is, by operation of the Customs Act, forfeited to the Crown, ie the status of forfeited property attaches to it at that point, notwithstanding that the drugs may not be detected until a later time.

454.For their historical development see Harper *The English Navigation Laws* (1939).

455.As defined in s 183UA of the Customs Act.

456.Customs Act s 203(11).

457.For a complete range of items which might be forfeited see Customs Act s 228, 228A, 228B, 229, 229A and 230.

16.11 Where, pursuant to section 203(1), warrants are required for the seizure of forfeited goods, such warrants are normally issued to AFP officers. That section provides, in essence, that a judicial officer may issue a warrant to seize goods on or in particular premises if that officer is satisfied by information on oath that an authorized person

- has reasonable grounds for suspecting that the goods are forfeited goods and are, or within the next 72 hours will be, on or in the premises identified in the information and
- has demonstrated the necessity for seizure of the goods.

16.12 'Judicial officer' in relation to a search warrant or to a seizure warrant is defined to mean a magistrate or a justice of the peace or other person employed in a court of a State or Territory who is authorised to issue search warrants.[458]

16.13 Section 203(3) sets out a non-exhaustive list of criteria by which the judicial officer may decide whether the seizure is deemed to be necessary.

16.14 While, in contrast, forfeited goods in a 'Customs place', may be seized without warrant,[459] conveyances in which the goods are contained may not be detained for longer than necessary and reasonable for them, and any contents therein, to be searched.[460]

16.15 After seizure, section 205 requires that within 7 days a seizure notice be served on the owner of the goods or, if the owner cannot be identified after reasonable inquiry, on the person in whose possession or under whose control the goods were when they were seized. Pursuant to section 205A, the seizure notice must set out

- a statement identifying the goods
- the day on which they were seized
- the ground or grounds of seizure
- a statement that if a claim for the return of the goods is not made within 30 days after the date the notice is served, the goods will be taken to be condemned as forfeited to the Crown.

16.16 If no claim is made by the person served with a seizure notice, then the goods are condemned as forfeit to the Crown by virtue of section 205C, with no apparent right of appeal.

16.17 Section 205D sets out what is to occur if a claim for return of the goods is made. It is not strictly necessary to deal with those provisions here. Suffice it to say

---

458.Customs Act s 183UA(1).

459.Customs Act s 203B.

460.Customs Act s 203D.

that, within 60 days, proceedings for an offence must be commenced, an order for an extension of retention must be sought or proceedings must be instituted for a declaration that the goods are condemned.

16.18 Once condemned, the goods are dealt with in accordance with section 208DA and transferred to the Official Trustee in Bankruptcy, who, if the goods are money, must pay that money into the Confiscated Assets Reserve established pursuant to the POC Act.[461] If condemned goods are other than money, the goods must be sold or otherwise disposed of and the proceeds, after deducting the costs and remuneration of the Official Trustee, paid into the Confiscated Assets Reserve.

16.19 There is no statutory provision for the protection of the interests of innocent third parties. Thus, for example, forfeited property could include aircraft, vehicles or vessels which are jointly owned, stolen, borrowed, subject to a leasing or hire purchase agreement or merely hired from a rental company and then used in conveying prohibited imports. Of course, in such cases the innocent third party may have a civil right of action which he or she might pursue. For example, in *Forbes v Traders' Finance Corporation Limited*, Windeyer J observed that the remedy for the owner of the goods lies against the person who used the conveyance unlawfully

> ... If the owner is innocent of complicity in the unlawful use, his remedy lies in an action for damages against the user whose wrongful conduct deprived him of his property.[462]

16.20 Such rights might, however, be of little value if the person whose wrongful conduct caused the loss is incarcerated with his or her assets restrained or confiscated.

The case against *in rem* forfeiture

16.21 The case against *in rem* forfeiture focusses mainly on considerations of fairness and equity. Why, an aggrieved party might ask, should a genuinely innocent owner of an interest in property be exposed in this day and age to an extinguishment of that interest in favour of the state without receiving any compensation from that state?

16.22 This case for recognition of third party interests is well presented in the submission of the body representing the finance industry, namely the AFC.[463] In relation to *in rem* forfeiture that submission recognises that

> The main danger for AFC members ... is the potential for forfeiture [orders] to result in loss of a secured or unsecured interest in property ...

---

461. POC Act s 34A.

462. *Forbes v Traders' Finance Corporation Limited* (1971) 126 CLR 429, 439.

463. AFC *Submission 28*.

16.23 In putting the issue into its commercial context, the AFC submission states

> For the calendar year 1997, the volume of equipment finance business written in Australia amounted to $18 billion. Each piece of equipment financed is an asset to a financier. Eighteen billion dollars represents a considerable asset wealth held by financiers.
>
> As part of the equipment finance process, financiers assess both credit and equipment risks. These risks are largely quantifiable prior to the provision of finance. However, the asset risks associated with the operation of legislative schemes for the forfeiture of proceeds of crime are not usually identifiable at that time. Nor are they usually a consequence of matters within the control of the financier. Such risks can deny or restrict a financier access to an asset over which prior to restraint or forfeiture the financier had a legitimate interest.
>
> The potential for the forfeiture of assets as a result of the criminal activities of their customers or others poses a real risk for financiers. Financiers have lost interests in assets where the asset was used in the commission of a major crime — however, in perspective, the reported occasions on which this has occurred without the financier's interest being recognised are few (given the number of equipment financing transactions that take place). The difficulty for financiers is that little if anything can be done to avoid the forfeiture risk because it can occur without warning and in any number of circumstances.

16.24 In support of its position, the AFC has drawn the attention of the Commission to a case where, in its view, an inequitable result was arrived at.

16.25 The case involved a fishing vessel which was used in 1993 to import a large shipment of cannabis. The boat was mortgaged to an AFC member company and the mortgage registered under the Commonwealth Shipping Registration Act.[464] The AFP served the mortgagor with a notice of seizure under the Customs Act, and he was charged with the importation of the cannabis. The finance company mortgagee was subsequently also served with a seizure notice. As the law stands, forfeiture occurred automatically once the importation of the prohibited substance occurred. The boat was subsequently condemned and the interest of the finance company as mortgagee accordingly extinguished. This occurred notwithstanding the fact that the finance company had no involvement in the offence. According to the AFC, its member company suffered a loss of some $300000 as a result of the condemnation and the consequent inability to sell the boat to recover the moneys owing to it.

16.26 The submission goes on to state

> In the Customs Act, there is no statutory mechanism to protect parties innocent of wrongdoing, whose interests are affected and possibly extinguished by a seizure and condemnation of goods.

---

464 *Shipping Registration Act 1981*.

> As a result of the forfeiture, X's entire lending program associated with the fishing industry in Western Australia made a loss for 1992-1993 financial year and resulted in a review of the company's lending practices in respect of fishing vessels Australia wide culminating in a retraction from fishing vessel finance. The adverse affects of this incident were felt not only by the AFC member involved but also the entire fishing industry in Western Australia. It is simply not good business sense to lend large sums of money subject to the occurrence of uninsurable risks totally outside the realistic possibility of control of the lender.[465]

The case for *in rem* forfeiture

16.27 The case for *in rem* forfeiture is based on a number of considerations, including the difficulty of enforcing the particular legislation and the nature of the property involved. As recognised by the US Supreme Court in a case concerning innocent third parties, it

> ... may have the desirable effect of inducing them to exercise greater care in transferring possession of their property.[466]

16.28 The DPP, in a submission supporting current *in rem* forfeiture regimes, deals with forfeitures under both the fisheries and customs legislation in the following passage which, despite its length, warrants reproduction in full.

> There are a number of Commonwealth Acts which include provision for civil based forfeiture where property has been used to commit a breach of that Act. Examples include the Customs Act 1901 (the provisions of which also apply to the Excise Act 1901, the Distillation Act 1901 and the Spirits Act 1906), the Quarantine Act 1908 and the Protection of Moveable Cultural Heritage Act 1986. As a general rule the conduct that provides a basis for forfeiture is also a criminal or quasi-criminal offence.
>
> The provisions generally take the same form. The forfeiture process is triggered by seizure of the relevant property, either with or without warrant. The officer who seizes the property must serve a notice of seizure on the owner of the property. The owner has the option of commencing civil proceedings to contest forfeiture. If that is done, the court will decide whether there has been a breach of the legislation, and if so whether the property should be forfeited. If the owner does not commence proceedings, the property is forfeited by default.
>
> The argument against civil forfeiture is, presumably, that the confiscation of private property as a punishment is a significant action which should only follow where there has been a finding of guilt by a criminal court applying the criminal standard of proof. In the DPP's view that argument places undue weight on the difference between the civil and criminal standards of proof. Even

---

465.AFC *Submission 28*.

466.*Calero-Toledo v Pearson Yacht Leasing Co* (1974) 416 US 663, 686–687.

under a civil regime, if the forfeiture is contested there must be a court order before the property can be condemned. The reality is that any court which is asked to condemn private property on the basis that it was used to breach Commonwealth law is going to require more than a 51% probability of guilt before making that order. The courts traditionally apply a Briginshaw gloss to the normal civil standard and require clear evidence to show both that there has been a breach of Commonwealth law and that the property in question was used in connection with that breach.

Civil forfeiture can provide a quick and relatively inexpensive process for confiscating the instruments of crime. It is particularly suitable for use in high turnover areas where it would be impossible and inappropriate to prosecute all breaches of the legislation, or where there are health, safety or other reasons why forfeiture should not be delayed for the time required to conduct a prosecution.

Third party interests

Many of the existing civil based forfeiture regimes do not include provision to recognise third party rights. There are also some conviction based provisions which override third party rights.

If the property is forfeited under a regime of that kind, a third party will lose any rights they may have in the forfeited property. However, the third party will normally retain a right to sue the person or company whose actions resulted in forfeiture. In many cases, the third party will be able to cover its loss under the normal principles of civil law and the loss will, eventually, be sheeted home to the person or company who operated in breach of Australian law.

There are areas of Commonwealth law where there is good reason why Parliament has decided that forfeiture should override third party interests. Examples are provided by section 106 of the Fisheries Management Act 1991, particularly in its application to foreign vessels, and sections 229 and 229A of the Customs Act 1901.

- **Fisheries Management Act**

Section 106 of the Fisheries Management Act is a conviction based provision which give the courts power, where there has been a criminal conviction for an offence against specified provisions of the Act, to order the forfeiture of the vessel, the catch and fishing equipment used to commit the offence. There is no provision for third parties to make claims in respect of the forfeited property.

Section 106 of the Fisheries Management Act was held to be Constitutionally valid by the High Court in *Re DPP;ex parte Lawler (1993–94) 119 ALR 655*. The High Court found that the provisions do not involve an acquisition of property even if a forfeited fishing vessel was owned by a third party.

The DPP's experience in this area comes from prosecuting offences against the Fisheries Management Act and applying for forfeiture orders. The courts have accepted the following general propositions:

- It is important that Australia polices the fishing zone. The zone is a valuable economic resource. Illegal fishing plunders that resource to the cost of Australian fishermen and the Australian community in general. Illegal fishing also threatens the viability of some parts of the zone and the continued existence of some species of fish as illegal boats often take fish at levels which cannot be sustained.

- Illegal fishing can also affect other marine species. Unlicensed vessels often use fishing techniques which have been banned internationally because of the detrimental effects on bird and sea life.

- It is difficult for the Australian authorities to control illegal fishing by foreign vessels. The Australian Fishing Zone is large and parts of it are remote, especially in the waters around Australia's external territories. The remote areas are often those which are most attractive to foreign fishing vessels. If a vessel is detected fishing unlawfully in the zone, the only effective remedy is to send a warship to apprehend it and bring it to Australia. That can be a costly exercise.

When a foreign fishing vessel is brought to Australia there are limits to what can be done to punish the captain and the crew. Under international treaties foreign fishermen cannot be imprisoned for fishing offences. The only penalties that can be imposed against foreign fishermen under the Fisheries Management Act are monetary fines.

The same treaties provide that foreign fishermen cannot be kept in custody after they have posted bail, and they cannot be prevented from leaving Australia. If the defendants do leave Australia before the charges against them have been dealt with, there is no way they can be forced to return to Australia. It is not possible to seek the extradition of a person who has been charged with an offence which is only punishable by a monetary fine. There is no other mechanism available for forcing a criminal defendants to return to Australia.

The courts have recognised that, in many of these cases, the most effective sanction which can be imposed by an Australian court is an order for the forfeiture of the foreign vessel, its catch and equipment. Illegal fishing is a commercial crime. Forfeiture is a penalty directed at the owners of the vessel, who are the people who make the decisions about where the vessel will fish.

Forfeiture would be a less effective penalty if it did not override third party interests. It would be relatively easy for the owners of fishing vessels to defeat the provisions. An owner who wanted to fish illegally in Australian waters would be able to sidestep the provisions simply by ensuring that the vessel was subject to a mortgage in favour of a third party with the mortgage liability being as close as possible to the full value of the vessel. As long as the third party refrained from asking where the vessel was going to be used, the vessel would be protected from forfeiture.

If the vessel was subsequently seized in Australian waters, the owner would only lose the value, if any, of their equity in it. Once that amount was paid, the

Australian authorities would have to release the vessel to the financier, and there would be nothing to stop the vessel from returning to Australian waters.

...

International fishing is a commercial operation that is organised on a global basis. Illegal operators do not pay licence fees or taxes and they do not have to comply with safety laws or environment protection laws. They stand to make substantial profits from their operations.

In the DPP's view there is good reason why Parliament has decided that those who finance international fishing operations, and who share in the profits that are made, must also take their share of the risks involved if a vessel is used to fish unlawfully, and their share of the responsibility for ensuring that such use does not occur.

- **Customs Act**

The same basic arguments apply to the forfeiture provisions in sections 229 and 229A of the Customs Act.

Under section 229 goods are forfeited if they have been smuggled, have been unlawfully imported, exported or conveyed, or have otherwise been dealt with in breach of the Act. Any carriage or animal that has been used in the unlawful importation, exportation or conveyance of goods is also forfeited. Section 229 applies to unlawfully imported narcotics, and carriages and animals used to convey them, as well as to normal commercial goods. Section 229A provides that money and goods which are the proceeds of drug trafficking are liable to forfeiture.

There is no express provision in sections 229 or 229A, or in sections 203, 204 which deal with the mechanics of forfeiture and condemnation, to recognise third party rights in forfeited goods. However, as a result of amendments made in 1995, with some minor exceptions forfeited goods can only be seized under the authority of a seizure warrant that has been issued by a judicial officer, as defined in section 183UA(1). The issuing officer must be satisfied, among other things, that it is necessary in all the circumstances for the goods to be seized. The things the officer must take into account are set out in section 203(3). They include "the inconvenience or cost to any person having a legal or equitable interest in the goods if they were seized".

The result is that goods in which a third party has an interest can be forfeited, but a judicial officer who is called upon to issue a seizure warrant must take the potential effects on third parties into account as one of the factors in deciding whether to issue the warrant.

Offences against the Customs Act are usually committed by commercial operators as a result of a planned decision made on a commercial basis after the offenders have weighed the potential profits against the risk of detection. That is the case whether the product in question is narcotics or normal commercial goods. The nature of the goods may vary, but little else does. The underlying

> motive remains the same, namely to make a profit, and the operation must be properly planned and organised to evade detection.
>
> Offences against the Customs Act are often difficult to detect and can be difficult to penalise in an effective way. Commercial offenders tend to treat fines and penalties, and even the risk of imprisonment, as part of the cost of their operation.
>
> It has long been recognised by Parliament that the effective enforcement of the Customs Act requires that the instruments used to commit offences against that Act should be forfeited. When crime is driven by economic factors, there must be an economic penalty as part of the legislative response. There have been forfeiture provisions in the Act from when it was first enacted in 1901. Section 229 was held to be Constitutionally valid by the High Court in *Burton v Honan* (1952) 86 CLR 169.[467]

The case law

16.29 Courts 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.

16.30 As the AFC submission acknowledges

> The many Australian and English cases on this topic point out that parliament intended the legislation to have a harsh result. A good example is *Customs and Excise Commissioners v Air Canada* [1991] 1 All ER 570. In that case, a large commercial jet owned by Air Canada landed at Heathrow airport on an international flight. Cargo discharged from the aircraft at Heathrow included a container filled with cannabis. The aircraft departed Heathrow, and upon its return on a further scheduled flight, was seized by the English Customs and Excise Department on the grounds that the aircraft was liable to forfeiture. The aircraft was released on payment of a 50,000 pound bond. Proceedings were issued by Air Canada alleging that the aircraft was not liable to be forfeited, and that Air Canada was not liable to pay the bond.
>
> At first instance, when considering the equivalent provisions of the Act in the English legislation the Court came to the conclusion that the legislation was:
>
> "... so draconian that it was not conceivable that parliament intended that the forfeiture provision should operate upon owners and operators who are entirely innocent of any intention to transgress in any way."
>
> On appeal, the English Court of Appeal held that such a draconian result was indeed the intention of Parliament, noting that forfeiture is a proceeding *in rem*. It has nothing to do with the mental state of the parties involved. Accordingly, the Court of Appeal upheld the seizure of the Air Canada aeroplane.

---

[467] DPP *Submission 34*.

There are many examples of equally harsh results in Australian cases. For example, in *Burton v Honan* (1952) 86 CLR 169 the parties to proceedings were both *bona fide* purchasers of the forfeited chattel. Neither had been involved in the importation, which was in that case a Chevrolet motor car. There was no question that the car was forfeited to the Crown. The issue was which of the innocent parties should bear the loss.

Further, in *Little's Victory Cab Co Pty Ltd v Carroll* [1948] VLR 249 a taxicab was called to a wharf, where two American seamen with some cartons of illicit cigarettes boarded. They were stopped at the wharf, and the cigarettes and the taxi were seized. The charge against the driver of the taxicab was dismissed, and it was accepted that the taxicab company (the plaintiff) was innocent of any involvement in the unlawful importation.

Nevertheless, the taxicab was forfeited to the Crown. Barry J stated (at 255):

> "*The plaintiff ... Did not authorise that use, and it would not have derived any profit from his participation in the transaction, had it been successful. However, I think these circumstances are irrelevant. It was the use to which the car was put by the person in possession or control of it that attracted the drastic sanction of section 229. ... Under the Customs Act immediately a chattel is used or dealt with in a manner specified in section 229, it takes on the character of a thing forfeited to the Crown irrespective of ownership. This interpretation of section 229(j) produces, in the facts of this case a result that is so harsh that it is inevitable that there be a reluctance to adopt if. But if it is the only construction fairly possible it is the duty of the court to declare accordingly even though it may involve hardship in a particular case.*"

Of particular interest in the Little's Victory Cab Co case are the observations of Barry J. After making his finding that, on a proper construction of the Act, the taxi cab was forfeited. The Judge said:

> *"When Parliament creates and confers these administrative powers, it does so upon the assumption that they will not be exercised arbitrarily or capriciously but in the general interest of the community ... I have seen the departmental minute relating to the action taken in respect of this car, however, and I would consider that upon any standard it would be unjust to require the plaintiff to pay the value of the car as a condition of avoiding its forfeiture. ... The plaintiff has already suffered the hardship of being deprived of the profitable use of the vehicle for more than 2 months, and I can see no justification for adding to that hardship.*
>
> *I make these observations so that the plaintiff may have the advantage of them should it make representations to the Minister to remit the forfeiture under sections 264 or 265 or otherwise as it may be advised.*"[468]

16.31 In an early decision dealing with forfeiture under the Customs Act, namely *Burton v Honan*,[469] to which reference is made in the DPP and AFC submissions quoted above, Dixon CJ stated at 178–179

---

[468].AFC *Submission 28.*

> ... In the history of English and Australian Customs legislation, forfeiture provisions are common, drastic and far-reaching ... They have been considered a necessary measure to vindicate the rights of the Crown and to ensure the strict and complete observance of the Customs laws, which are notoriously difficult of complete enforcement in the absence of strong provisions supporting their administration.

16.32 A subsequent case in which the High Court of Australia considered forfeiture under the Customs Act was *Forbes v Traders' Finance Corporation Limited*,[470] a case which is authority for the proposition that forfeiture of a thing — in that case a motor vehicle subject to a hire purchase agreement — by virtue of section 229(j) results simply from its actual use by some person in an unlawful activity as there described, regardless of whether its owner knew of the use or not.

16.33 Of particular interest, in the light of what had previously been said by Barry J in the Little's Victory Cab Co case and was later said by the English Court of Appeal in the Air Canada case, is the following statement by Windeyer J, at page 445 that

> ... At the outset I may say that a vehicle is not forfeited as having been used in unlawful conveyance unless its use was in the control of a person engaged in the illegality. A smuggler who travels with his smuggled goods in a public vehicle, train or bus, does not thereby cause it to be forfeited; ...[471]

16.34 In that case, Menzies J stated at 432–433

> The provisions of the Customs Act regarding forfeiture are indeed drastic, but they are provisions with a long history and, except where it is provided, whether expressly or by necessary implication, that forfeiture is conditional upon knowledge of what has been done, proof of the act is sufficient and it is not for the court to import knowledge as an amelioration to mitigate the hardness of the statute.[472]

16.35 In *Cheatley v The Queen*,[473] the High Court considered the forfeiture provisions of section 13AA *Fisheries Act 1952*. Mason J made the following observations of relevance to the application of *in rem* forfeiture to third party property

> [I]t is not an essential element in the legal concept of forfeiture as a penalty that its imposition is confined to forfeiture of goods owned by a convicted offender. Forfeiture of goods may be prescribed as the penalty or consequence of offences

---

469.*Burton v Honan* (1952) 86 CLR 169, 178–179.

470.*Forbes v Traders' Finance Corporation Limited* (1971) 126 CLR 429.

471.*Little's Victory Cab Co Pty Ltd v Carroll* [1948] VLR 249.

472.ibid.

473.*Cheatley v The Queen* (1992) 127 CLR 291.

> or acts committed or done by persons other than the owner of the goods. There is a variety of circumstances such as the nature of the goods, the need for a deterrent penalty or the difficulty of enforcing provisions against foreign owners which may make it appropriate for forfeiture although the owner is not the offender.

16.36 And at 311

> The difficulty of enforcing compliance along the length of the Australian coastline called for a stern deterrent if observance of the provisions was to take place. There were obvious difficulties in laying obligations upon foreign owners and taking proceedings against them.

16.37 More recently, in a decision under the *Fisheries Management Act 1991*, *Re Director of Public Prosecutions; ex parte Lawler & Another*,[474] Brennan J observed that

> Forfeiture of property, especially in customs offences, is a penalty exacted simply because the property is used in committing a breach of the law.[475]

16.38 His Honour continued at p 279

> The forfeiture of things by which offences are committed goes back to the law of deodands, but 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.[476]

16.39 McHugh J also recognised the long standing policy considerations underpinning *in rem* forfeiture, even where the owner of the forfeited property was not involved in the unlawful activity. His Honour said at 294

> forfeiture 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.[477]

16.40 Brennan J, at p 280, and Dawson J, at p 290, quoted with approval the following passage from *Calero-Toledo v Pearson Yacht Leasing Co*[478]

> Forfeiture of conveyances that have been used — and may be used again — in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by

---

474.*Re Director of Public Prosecutions; ex parte Lawler & Another* (1994) 179 CLR 270, 278 per Brennan J.

475.id 278.

476.*Re Director of Public Prosecutions; ex parte Lawler & Another* (1994) 179 CLR 270, 278 per Brennan J.

477.ibid.

478.*Calero-Toledo v Pearson Yacht Leasing Co* (1974) 416 US 663, 686–687.

> imposing an economic penalty, thereby rendering illegal behaviour unprofitable. ... To the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property.

The Commission's view

16.41 There is no doubt, having regard to the historical background of *in rem* forfeiture regimes, that they have been crafted to meet special sets of policy demands including

- the difficulties in enforcing particular legislation
- the risk to society and the revenue if there is inadequate enforcement
- the recognition that where crime is economically driven, an economic sanction should be a part of the response
- the need to vindicate the rights of the Crown
- a judicially recognised need to punish persons other than the owner of goods for reasons including the nature of the goods or the difficulty of enforcing laws against foreign owners
- the need to enlist participation of owners, including lessors, bailors, and secured creditors, in ensuring the observance of the law and
- the need to preclude use of the forfeited goods in future breaches of the law.

16.42 The effect of various combinations of these considerations has been found by legislators in the light of hard practical experience to be such as to necessitate the extraordinary robustness and intrusiveness of such regimes, particularly in regard to their impact on the rights of persons — owners, encumbrancees and other interest holders alike — in the subject property.

16.43 By comparison, the POC Act, as amply demonstrated in earlier chapters, provides a significant level of protection to innocent third parties and, in certain circumstances, to defendants in regard to legitimately acquired property. Moreover, the Commission's analysis in those chapters, and its proposals, are strongly supportive of the need for such protections and, in some significant respects, the enhancement of some protections.

16.44 The issue that falls for determination is whether these same, or similar, considerations should lead the Commission to propose modification of the *in rem* forfeiture regimes, particularly to soften their impact on third parties.

16.45 Given the different underpinnings of *in rem* forfeiture, and the degree of judicial acceptance of their necessity, the Commission is not persuaded that these regimes, despite their plainly draconian nature, cannot be justified for the reasons canvassed and recognised in the submissions and judicial pronouncements. In short, the Commission sees the special policy considerations underpinning these regimes

as providing clear grounds for distinction between the need for them and the kinds of checks, balances and protections that are necessary and appropriate to be built into a confiscation regime intended to be of general across the board application.

16.46 At the same time, the Commission is very mindful of the difficulties such regimes can pose for third parties, not least commercial enterprises such as those whose interests and concerns have been very effectively represented in the AFC submission.

16.47 The Commission has concluded, albeit reluctantly, that, based on the information and submissions placed before it, the prospect or likelihood of a financier's interest being extinguished by an *in rem* forfeiture is properly a matter that needs to be responded to by appropriate risk management strategies and the adoption of pricing policies by service providers that factor risk appropriately into competitive pricing arrangements.

16.48 On the other hand, the Commission would like to see the assumption by governments and law enforcement agencies of an appropriate level of responsibility for ensuring that business sectors most at risk are kept abreast of information that may assist in developing effective risk management strategies and realistic competitive pricing policies. As a related issue, the Commission would also see merit, as in the POC Act situation, in the imposition of an obligation on Commonwealth authorities to search such registers of encumbrances as are established throughout Australia in which property the subject of *in rem* forfeiture is located and to forthwith advise any encumbrancee of matters giving rise to the forfeiture

16.49 There is, however, one discrete aspect in respect of which the Commission considers that legislative clarification of the Customs regime may be desirable. It relates to the issue, adverted to by Windeyer J in the *Forbes* case, concerning whether a smuggler who travels with his or her smuggled goods in a public vehicle, train or bus, thereby causes it to be forfeited. While Windeyer J answered this question in the negative, the decisions of Barry J in the *Little's Victory Cab Co* case and the English Court of Appeal in the *Air Canada* case suggests that a contrary view could be taken. The Commission's sense is that the public conveyance should not be put at risk, at least where (as would usually be the case) the operator has no means of knowing whether contraband is on board. In this context, the expression 'public conveyance' means a conveyance, whether publicly or privately owned, used to convey members of the public. While some might argue that the principle could be equally applicable to other forms of transport, such as sedans, trucks or cargo vessels, the Commission draws a distinction between conveying members of the public and conveying goods. The degree of control over the former is less than that over the latter.

16.50 Finally, one submission suggests that the *in rem* forfeiture provisions should be consolidated into the POC Act. Given the different policy considerations and characteristics of *in rem* forfeiture, the Commission does not regard it as

apposite for this to occur. The matters which should be covered by an *in rem* forfeiture regime should be left for determination as a matter of legislative policy in individual cases.

Recommendation 67. Legislation providing for *in rem* forfeiture should require government agencies to provide the financial business sector with such information available to them as would assist that sector to develop effective risk management strategies in respect of the financing or other securing of chattels which, by their nature, could be rendered forfeit as a result of their use in unlawful conduct.

Recommendation 68. Where, pursuant to such legislation, chattels may be subject to forfeiture, Commonwealth authorities should be obliged by the legislation to search any relevant Australian register of encumbrances and to forthwith advise any encumbrancee of such chattels so identified of the matters giving rise to the forfeiture.

Recommendation 69. The Customs Act should exclude from the scope of *in rem* forfeiture under that Act a public conveyance used by a person to convey contraband without the knowledge of the owner or operator in circumstances where the owner or operator would have no reasonable basis for knowing or suspecting that the conveyance was being used for that purpose

17. Non conviction based forfeiture; Customs Act, Part XIII, Division 3

Background

17.1 Sections 243A to 243S of the Customs Act, which comprise Division 3 of PartXIII, of that Act, were enacted in 1979. Though not conviction based, these provisions constituted the first substantial 'proceeds of crime' laws in Australia.

17.2 In its terms of reference, the Commission has been specifically asked to consider whether this civil forfeiture regime should be integrated into the POC Act. The Commission does not consider it to be within its remit to consider whether this regime should continue. It will nevertheless be clear from the general thrust of the Commission's proposals that it regards a non-conviction based regime as central to the future success of proceeds legislation.

17.3 At the outset it should be noted that there are many similarities between these Customs Act provisions and those contained in the POC Act. It is obvious that the Customs Act regime was influential in the development of the POC Act notwithstanding that the latter is, at present, entirely conviction based.

17.4 Thus, under both Acts

- benefits derived by another may be deemed to be derived by the defendant[479]
- the amount ordered to be paid pursuant to a pecuniary penalty order shall 'be deemed to be a civil debt due by the person to the Commonwealth'[480]
- an order 'may be enforced as if it were an order made by the court in civil proceedings instituted by the Commonwealth against a person to recover a debt due by the person to the Commonwealth'[481]
- the mechanisms and factors in assessing the quantum of a pecuniary penalty order are almost identical[482]
- the court may order the Official Trustee to take custody and control of property[483]

---

[479].Customs Act s 243A(4); POC Act s 4(3).

[480].Customs Act s 243B(4); POC Act s 26(8).

[481].Customs Act s 243B(5) and POC Act s 26(9) respectively, although s 26(a) goes on to provide 'and the debt arising from the order shall be taken to be a judgment debt'.

[482].Customs Act s 243C(4); POC Act s 27 respectively.

[483].Customs Act s 243E; POC Act s 43(2).

- the court may refuse to make a restraining order if the Commonwealth refuses or fails to give an undertaking with respect to damages or costs in relation to the making or operation of the order[484]
- where the court has ordered the Official Trustee to take custody and control of property it may make further orders, including directing a person to furnish statements of assets[485]
- where a restraining order is made, the court may order the examination of any person as to his or her affairs, including the nature and location of any property[486]
- the Official Trustee is to discharge a pecuniary penalty out of restrained property[487]
- a pecuniary penalty operates as a charge against restrained property, that charge being subject to pre-existing encumbrances[488] and
- the amount of a pecuniary penalty order is reduced by the value of any forfeited property.[489]

17.5 There are also some significant differences. Whereas actions under the POC Act are instituted in the Supreme Courts of the States and Territories, those under the Customs Act provisions are instituted in the Federal Court of Australia.

17.6 Unlike under the POC Act, where restraining orders can be sought up to 48hours before a person is charged with a criminal offence, restraining orders under the Customs Act can only be sought once the civil proceeding for a pecuniary penalty has been instituted.[490]

17.7 A further significant distinction is that, whereas under the POC Act it is possible to obtain both forfeiture of property and pecuniary penalties, the Customs Act regime provides only for pecuniary penalty orders.

Adequacy of the provisions

17.8 One submission, namely that of the Attorney-General's Department, addresses the adequacy of the provisions.[491] The submission states that the Department would see merit in the addition of asset forfeiture provisions in the Customs Act to complement the existing pecuniary penalty provisions

---

484.Customs Act s 243E(5); POC Act s 44(10).

485.Customs Act s 243F; POC Act s 48.

486.Customs Act s 243F; POC Act s 48.

487.Customs Act s 243G(4); POC Act s 49.

488.Customs Act s 343J; POC Act s 50.

489.Customs Act s 343R; POC Act s 26(3).

490.Customs Act s 243E(1).

491.AGC *Submission 3*.

We envisage that the proposed provision need not require a conviction and the determination that a person had engaged in narcotic dealing would be made on the civil standard. Such a provision seems justifiable in light of current Government policy in relation to drug-trafficking even if it is not extended to other Commonwealth offences.

17.9 The Department's submission continues

Division 3 of Part XIII already makes provision for the court to order a person to pay a pecuniary penalty in respect of that person's engaging in particular prescribed narcotics dealings, or prescribed narcotics dealings engaged in during a particular period. If proceedings are instituted for such an order, and the court is satisfied that the person has engaged in such dealing, then the court must assess the value of the benefits the person derived by reason of the dealing and order the person to pay a pecuniary penalty equal to that value.

That provision has not been much used. One reason...is that in the common case where a person is apprehended with narcotics at the Customs barrier the person has not had the opportunity to traffic with respect to those particular drugs, so no profits have been derived from the transaction for the purpose of s243C.

The Department would see advantage from a law enforcement perspective in the inclusion of a further provision in Division 3 of Part XIII of the Customs Act along similar lines to s 243B, but relating to property of the person, in a similar way to the non-conviction-based provisions in the NSW Criminal Assets Recovery Act 1990, section 22.

We see such a provision operating where the court is satisfied, on the civil standard, that the person has engaged in a prescribed narcotics dealing. The court could be required to order forfeited to the Commonwealth all property of that person (or other persons, as in s 243E) that remains restrained six months after the restraining order was made, or such later time as the court determines. This would not include property that the person could show to have been lawfully obtained and not used for the purpose of the transaction concerned.

Non-conviction-based, civil forfeiture provisions would be especially apt to target large scale traffickers, and would be intended to act as a strong deterrent, in particular preventing drug traffickers from re-investing their illegally gained wealth back into further criminal enterprises. While the proposed regime might be regarded as harsh, many in the community would support a tougher regime to deal with major traffickers, on the ground that it is not unreasonable to require those shown to have been involved in drug trafficking to establish the source of their property.

A conviction-based system is necessarily limited, in that recovery of proceeds and tainted property can be pursued only where there is a successful prosecution. That means that recovery action stands or falls with the prosecution case. We understand there have been several cases where a prosecution has failed, or the DPP has been forced to withdraw charges, for reasons that do not relate directly to the strength of the overall case. When a

> prosecution is lost then any related recovery of proceeds is also lost, and the profits are available for re-investment in further criminal activity.[492]

17.10 The Commission notes that the approach advocated by Attorney-General's Department is consistent with the Commission's proposals in chapter 4 for a broad based non-conviction based regime and is therefore supported.

Integration into the *Proceeds of Crime Act 1987*

17.11 Several submissions address the question whether the provisions of Division 3 of Part XIII of the Customs Act should be integrated into the POC Act, notably those of the Attorney-General's Department,[493] the AFP[494] and the NSW Police Service.[495]

17.12 The New South Wales Police Service notes in its submission that, in its jurisdiction, the police need to operate under both the conviction based COPOC Act and the non conviction based CAR Act (NSW). It states that it would be desirable to have the Customs Act provisions integrated into one specific piece of legislation which, hopefully, could be applicable in all jurisdictions.[496]

17.13 The AFP favours both the extension of non-conviction based forfeiture to other serious criminal activity and the incorporation of the Customs Act regime within the POC Act. The AFP thus argues that

> The spirit of the provisions in the Customs Act seem to be to levy considerable financial penalty on those involved in the narcotic aspects of what may be termed organised crime, based on reasonable suspicion that the proceeds are derived from organised crime. To that end the present distinction between Division 3 of the Customs Act, which does not require conviction prior to forfeiture, and the provisions of the POC Act which requires conviction prior to confiscation is anomalous.
>
> There seems no logical reason why this power exists in the Customs Act provisions for involvement in narcotic crime, however, under the more general powers in the POC Act no such pecuniary penalty regime exists for involvement in any other serious criminal activity. The AFP would recommend the pecuniary penalty powers embodied in sections 243A–243S of the Customs Act relating to narcotic activity, be incorporated through amendment to the POC Act so that such powers may apply in similar fashion to those involved in serious criminal activity which may not be narcotic crime. The Customs Act pecuniary penalty provisions in particular have the further advantage over the

---

492.ibid.

493.ibid.

494.AFP *Submission 7*.

495.NSW Police Service *Submission 9*.

496.ibid.

> POC Act pecuniary penalty order provisions by not requiring conviction for the offence from which the purported benefit may have been obtained.[497]

17.14 A similar line is taken by the Attorney-General's Department

> A possible legislative approach might involve the moving of Division 3 of Part XIII of the Customs Act to the Proceeds of Crime Act. All of the preliminary steps involving search warrants, monitoring orders and production orders would be common to both systems, and investigators and prosecutors could elect at an appropriate time which system to invoke.[498]

The Commission's view

17.15 As noted above, the Commission has proposed in chapter 4 the inclusion in the POC Act of a non-conviction based regime for the confiscation of the profits of prescribed unlawful conduct, including a common restraint regime. It also consistently takes the view in this Report that every practical opportunity should be taken to consolidate and simplify confiscation and restraint processes. It follows logically that the Commission favours the assimilation of the Customs Act regime, limited however, in the manner discussed in chapter 4, to the confiscation of profits,within the broader non-conviction based regime proposed in chapter 4, with the consequences, amongst others, that the conduct to which the Customs Act regime applies would attract both forfeiture and pecuniary penalty orders. It would also mean that the same courts as would deal with the broader non-conviction based civil forfeiture regime recommended by the Commission would deal with these matters. As concluded in chapter 9, the Federal Court of Australia and the Supreme Courts of the States and Territories should have unlimited jurisdiction to entertain these proceedings and State intermediate courts as well as State and Territory magistrates should have such jurisdiction subject to their respective civil jurisdictional limits.

> **Recommendation 70.** The regime established under Division 3 of Part-XIII of the Customs Act should be broadened to include a provision for asset forfeiture in addition to the imposition of pecuniary penalties.
>
> **Recommendation 71.** The broadened regime should be incorporated into the proposed non-conviction based regime proposed in chapter 4, although, as recommended in that chapter, that regime should be confined to the recovery of profits.

497.AFP *Submission 7*.

498.AGD *Submission 3*.

18. Literary proceeds

Background

18.1 One of the specific matters that the Commission has been asked by its terms of reference to address is the question of possible legislation to cover 'literary proceeds'. 'Literary proceeds' for the purpose of this chapter can be broadly defined as profits or benefits derived by a criminal or his or her assignees as a result of the publication in any form, of details or experiences related to that person's crime or life of criminal activity. In some countries these laws are called 'anti-profit' laws or 'literary profits laws'. For reasons which will become apparent, in the US these are often called 'Son-of-Sam' laws.

18.2 As far as the Commission can determine, the first literary proceeds laws were enacted in the early 1970s in the State of New York, USA, as a result of newspaper publicity of the criminal conduct of one David Berkowitz. Berkowitz had, within the city of New York, over a period of more than a year, randomly shot a number of young women and their friends. He left notes after the killings which he signed 'Son-of-Sam'. The killings, and the resultant law were referred to as the 'Son-of-Sam' killings and the 'Son-of-Sam' law respectively. When Berkowitz was arrested, the publicity relating to his alleged crimes nearly doubled the circulation of the *New York Post*. As a result, an agreement was entered into by Berkowitz with the *New York Post* with respect to the rights in his story and a book subsequently published. Berkowitz received $US75000 for his part in the publication and the ghost writer $US150000.[499] The public outrage resulting from the perception that the killer had profited in this way, albeit indirectly, from his criminal conduct resulted in the passage of the 'Son of Sam' law which permitted confiscation of moneys paid to criminals in such circumstances. According to the Attorney-General's Department, by 1988 some 34 States in the USA had passed analogous laws.[500]

18.3 In the UK, an attempt was made in 1990 under the general forfeiture provisions of the *Criminal Justice Act 1988* to recover literary proceeds relating to criminal conduct which had occurred in 1966. In that year, George Blake escaped from Wormwood Scrubs prison after serving less than five years of a 42 year sentence for espionage on behalf of the then Soviet Union. Three of the persons involved in arranging the escape wrote books on the subject in which they admitted

---

499. See SS Okuda '*Criminal Antiprofit Laws: Some Thoughts in Favour of their Constitutionality*' (1988) 76 Cal L Rev 1353, 1353–1354; J T Loss '*Criminals Selling their Stories: The First Amendment Requires Legislative Re-examination*' (1987) 72 Corn LR 1331.

500. Background briefing material.

their role.[501] A challenge was made to the restraining order over the houses of two of the authors on the basis that the benefits obtained from publication of the book did not amount to a 'benefit' within the meaning of the *Criminal Justice Act 1988*. This challenge was unsuccessful. In 1991, however, the authors were acquitted of the charges of complicity in the escape and the forfeiture proceedings were discontinued.

18.4 The province of Ontario in Canada also enacted legislation, namely the *Victim's Right to Proceeds of Crime Act 1994*, in response to a particularly notorious case. The legislation followed public outrage after one Clifford Olson received $100-000 from the police in exchange for information about the deaths of eleven children and the location of their bodies. He had proposed to assign the money to his wife.[502] During the debate in the Ontario legislature in relation to the Bill, a letter from the parents of one of the victims, quoted in debate, typified public reaction to this kind of profit

> The fact that people want to profit from someone else's tragedy is disgusting. But the fact that the criminals themselves can profit from crime is an outrage. It exploits victims and their families and in fact promotes crime.[503]

Developments in Australia

18.5 The POC Act does not currently contain any provision dealing expressly with literary proceeds. While the term 'proceeds' is broadly defined in section 4 to mean 'any property that is derived or realised, directly or indirectly, by any person from the commission of the offence', the Commission is by no means confident that an Australian court would hold that so called 'literary proceeds' would constitute such proceeds. This is notwithstanding the fact that, in the UK proceedings in relation to the Blake matter under the *Criminal Justice Act 1988 (UK)*, the benefits obtained by the authors Pottle and Randle were adjudged to be 'indirect proceeds'.

18.6 Four Australian jurisdictions now make specific provision in relation to literary or other commercial benefits.

18.7 The most comprehensive of these are those contained in the CC Act (Qld), which devotes the whole of Part 7, namely sections 85 to 89, to it.

18.8 In summary, the effect of these provisions is as follows

- application may be made at any time to the Supreme Court of Queensland in respect of a person who has been convicted of a serious offence[504]

501.Pat Pottle and Michael Randle, 'The Blake Escape: How We Freed George Blake and Why', Harrap Books Ltd: 1989 and Sean Bourke "The Springing of George Blake", Macmillan: New York, 1987.

502.See *Rosenfeldt v Olson* (1984) 16 DLR (4th) 103 BCSC.

503.S O 1994 C39 *Debates of the Legislative Assembly of Ontario* (3rd Sess., 35th Parl) No. 73 (21 October 1993), 3653.

- the court may order forfeit an amount equal to all or part of the benefits derived by the defendant, or by someone else for the defendant, from a contract about

  (a) a depiction of the serious offence or alleged serious offence in a movie, book, newspaper, magazine, radio or television production, or live or recorded entertainment of any kind; or
  (b) an expression of the defendant's thoughts, opinions or emotions about the serious offence or alleged offence.[505]

- notice of an application must be given to the defendant or other person said to have derived benefits[506] as these persons are each entitled to appear and be heard[507]
- the court may additionally order publication of notice of the application[508]
- the nature of the benefits is assessed by the Court having regard to evidence before it concerning such matters as
  - the money, or the nature of property, under the possession or control of a defendant or other person by reason of the contract
  - the value of any other benefits provided by reason of the contract
  - the value of the defendant's property before and after the making of the contract, and
  - the defendant's income and expenditure before and after the making of the contract[509]
- in quantifying benefits the court may have regard to any decline in purchasing power of money between the time the benefits were received and when the valuation is made[510]
- the court is entitled to treat as benefits, subject to certain qualifications, any increase in the value of the defendant's property after the making of the contract[511]
- certain property of the defendant is presumed to have come into his or her possession by reason of the contract[512]
- expenses and outgoings of the person in relation to the making of the contract are to be disregarded in assessing benefits[513]

---

[504].CC Act (Qld) s 86(1).
[505].CC Act (Qld) s 86(1).
[506].CC Act (Qld) s 86(4).
[507].CC Act (Qld) s 86(7).
[508].CC Act (Qld) s 86(5).
[509].CC Act (Qld) s 87(1).
[510].CC Act (Qld) s 87(2).
[511].CC Act (Qld) s 87(3).
[512].CC Act (Qld) s 87(4).
[513].CC Act (Qld) s 87(5).

- property vested in the trustee in bankruptcy by reason of the person's bankruptcy is, for the purpose of the assessment, to be taken to continue to belong to the person[514]
- the amount of any forfeiture is to be taken to be a debt due and owing to the Crown[515]
- moneys paid to the Treasurer under a literary proceeds forfeiture order, may, if so directed by the Governor-in-Council on the recommendation of the Attorney-General, be applied to satisfy
  - any compensation or restitution order
  - any order of a court that the defendant pay damages to a person for injury suffered by that person by reason of the commission of the offence to which the forfeiture order relates

  provided that access to the proceeds of the forfeiture order for these purposes becomes statute barred five years from the date of the making of the order.[516]

18.9 There is no limitation period within which the proceedings for a special forfeiture order may be sought after the person has been convicted and the Court has a discretion both as to whether to make the order and the quantum of any order so made; the legislation does not prescribe criteria that the Court is to take into account in making its decision; the types of contracts in respect of which an order can be made are broadly framed so as to include any depiction of the offence in every possible medium imaginable and encompasses also any expression of the convicted person's thoughts, opinions or emotions about the offence.

18.10 A complete assessment regime is included. As in the case of pecuniary penalty orders, expenses and outgoings are to be disregarded. Such expenses could include, for example, legal fees in drawing up and executing the contract. There is also provision for a five year 'relation back' period, raising a presumption that property which came into the person's possession during that period did so by reason of the contract. Finally, the Act provides that money received by the State pursuant to a special forfeiture order may be utilised to pay compensation, restitution or damages awarded by the court to the victim where such an order has been made and is not satisfied.

18.11 Victoria also has specific literary proceeds provisions. They apply in relation to pecuniary penalty orders made for any category of forfeiture offence ranging from non-conviction based civil forfeiture offences and automatic forfeiture offences to ordinary forfeiture offences.

18.12 Section 67, which deals with the assessment of benefits for the purpose of a pecuniary penalty order, insofar as relevant, provides

---

514.CC Act (Qld) s 87(6).

515.CC Act (Qld) s 88.

516.CC Act (Qld) s 89.

(1) For the purposes of this Part, the value of the benefits derived by a defendant in relation to an offence may include –

...

(d) subject to sub-section (3), any profits derived by the defendant, or by another person on the defendant's behalf or at the request or by the direction of the defendant, from a depiction of the offence or an expression of the defendant's thoughts, opinions or emotions regarding the offence in–

(i) a film, slide, video tape, video disc or any other form of recording from which a visual image can be produced; or
(ii) a record, tape, compact disc or any other form of recording from which words or sounds can be produced; or
(iii) a book, newspaper, magazine or other written or pictorial matter; or
(iv) a radio or television production; or
(v) a live entertainment of any kind;

(e) any other thing that the court thinks fit to treat as benefits–

but must not include any property forfeited to the Minister under this Act.

(3) In considering whether to treat profits of a kind referred to in sub-section (1)(d) as benefits derived in relation to the offence, the court may have regard to any matters that it thinks fit including–

(a) whether it is not in the public interest to treat them as benefits; and
(b) whether the depiction or expression has any general social or educational value; and
(c) the nature and purposes of the publication, production or entertainment including its use for research, educational or rehabilitation purposes.

18.13 As no specific time differentiation is prescribed for the making of a pecuniary penalty order relating to literary proceeds it would appear that the application must be made within the 'relevant period' of six months in the case of automatic forfeiture offences[517] and within six months of a civil forfeiture charge having been withdrawn or finally determined.[518] However, in all cases the court may give leave to apply out of time, *inter alia*, when the benefit to which the application relates was derived, realised or identified only after those periods or it is otherwise in the interests of justice to do so.[519]

---

[517].Confiscation Act (Vic) s 58(3).

[518].Confiscation Act (Vic) s 63 (3A).

[519].Confiscation Act (Vic) s 58(4) and 63(4).

18.14 It will be noted that, in contrast with the Queensland Act, the Victorian provisions specify broad criteria to which the court may have regard in determining whether or not to treat such profits as benefits for the purposes of section 67.[520]

18.15 South Australia deals with this matter in the context of its broad discretionary forfeiture provisions in section 9 of the CAC Act. Subsections 9(1) to (3) read as follows

> (1) If a person benefits from the commission of a forfeiture offence, a court may, on application by the Director of Public Prosecutions, order the forfeiture of property to the value of the benefit.
>
> (2) However, if a person who is not a party to the offence acquires a benefit in good faith and for valuable consideration, a forfeiture order cannot be made on the basis of the benefit.
>
> (3) A party to the commission of a forfeiture offence who-
>
> (a) obtains a benefit for the publication or prospective publication of material about the circumstances of the offence; or
> (b) obtains a benefit, attributable in whole or part to notoriety achieved through commission of the offence, for the publication or prospective publication of the opinions, exploits or life history of the party or another party to the commission of the offence; or
> (c) obtains a benefit by commercial exploitation in any other way of notoriety achieved through commission of the offence,
>
> is taken to have benefited from the commission of the offence and is liable to forfeit property to the value of the benefit.

18.16 'Party' to the commission of an offence is defined in section 3 as meaning a person who

> (a) commits or participates in the commission of the offence; or
> (b) is an accessory before or after the fact to the commission of an offence.

18.17 Subsection 9(3) must be read in conjunction with subsection 10(1) which is as follows

> A court must make an appropriate forfeiture order under this Part if the court is satisfied that forfeiture is necessary to prevent the defendant from retaining the profits of criminal activity.

18.18 In summary, where a person receives literary proceeds, then, insofar at least as those benefits represent profits, the court must make a forfeiture order. In

---

[520].Confiscation Act s 67(3).

relation to benefits other than profits — which would seem to include outgoings — the court has a discretion whether to order forfeiture or not.[521] There is no provision for the court not to order forfeiture, or to order partial forfeiture, based on any social utility or public benefit criteria, as is the case in Victoria and, it would appear, Queensland.

18.19 It will be noted that no time limitations are prescribed in relation to the application for, or making of, forfeiture orders. The Commission has been advised that this is treated as a discretionary question for the court. Thus, if in the opinion of the court, there has been undue delay, the court may stay the proceedings.

18.20 The subject matter which can give rise to forfeiture under the South Australian Act is wider. While the Queensland and Victorian provisions relate to media depictions or the criminal's thoughts, opinions or emotions regarding the offence, the South Australian provisions extend to benefits attributable in whole or part to notoriety achieved through the commission of the offence. This is readily explicable, as it is usually the notoriety of the person which makes him or her newsworthy and hence a commercially viable proposition.

18.21 Tasmania deals with the issue in the context of the benefits that may be taken into account in making a pecuniary penalty order. The operative provisions are contained in sections 11, 20 and 21 of the CCP Act which, insofar as they are relevant, are as follows

> 11.(1) If a person is convicted of a serious offence, an authorized officer may apply to an appropriate court for either or both of the following orders:
>
> (a) a forfeiture order against property that is tainted property in respect of the offence;
> (b) a pecuniary penalty order against the person in respect of benefits, including any commercial benefits, derived by the person from the commission of the offence.
>
> (2) Except as provided by subsection (3), an application under subsection (1) is to be made before the end of the relevant application period in relation to the conviction.
>
> (3) An application under subsection (1) may be made at any time after the end of the relevant application period in relation to the conviction if the application relates exclusively to commercial benefits.
>
> Division 3 — Pecuniary penalty orders
>
> Application of Division
>
> 20. This Division applies to –

[521].CAC Act (SA) s10(2).

(a) property that comes into the possession or under the control of a person, whether in Tasmania or elsewhere and whether before or after the commencement day; and

(b) benefits, including commercial benefits, that are provided to a person, whether in Tasmania or elsewhere and whether before or after the commencement day.

Pecuniary penalty orders

21.(1) If a person has been convicted of a serious offence and an application is made to a court under section 11(1)(b) for an order in respect of the offence, the court may–

(a) assess in accordance with section 22 the value of the benefits, including any commercial benefits derived by the person from the commission of the offence; and
(b) order the person to pay to the State a pecuniary penalty equal to the value so assessed.

18.22 'Commercial benefit' is defined in section 4 of the CCP Act as

(a) a benefit obtained from the publication or prospective publication of material in relation to the commission of an offence; or
(b) a benefit obtained from the commercial exploitation in any other way of notoriety gained by any person from the commission of an offence.

18.23 The effect of the Tasmanian provisions is to empower the court in making a pecuniary penalty order to include commercial benefits. No criteria are provided to guide the court in the exercise of the discretion.

18.24 The legislation expressly permits an application relating exclusively to commercial benefits to be made at any time after conviction.

The submissions

18.25 A number of submissions have addressed the question of 'literary proceeds'.

18.26 The Victorian Bar Association and Criminal Bar Association joint submission expresses the view that, if legislation is to be introduced, it should invest the widest discretion in the court. According to the submission, this is because there is room for a wide range of views and circumstances. The literary proceeds would, according to the submission, be obtained in most cases after conviction and hence after the criminal matter should normally be regarded as complete. If, for example, the writing can be viewed as part of the rehabilitative process, the submission suggests that it should be encouraged rather than discouraged. It agrees that, in the

case of some 'notorious' crimes, it may not be appropriate for the person to derive any benefit at all.[522]

18.27 The New South Wales Bar Association raises the further issue whether literary proceeds should be confiscated if, for example, they are paid to a charitable organisation rather than to the convicted person.[523]

18.28 The New South Wales Church and Nation Committee of the Presbyterian Church of Australia states that

> criminals should not be able to profit from their crimes in any way. This profit may come to them through such avenues as media interviews, magazine articles, books, or movie rights. If any such profits are made then they should be redirected to help the victims of the crime not the perpetrators of the crime.[524]

18.29 The submission thus raises the possibility, where there are identifiable victims, of such confiscated proceeds being applied to compensation.

18.30 The Australian Institute of Criminology expresses the view that it is entirely appropriate to regard literary proceeds as indirect proceeds of crime in cases where the literary or other work in question, or its marketability, is based on the predicate offence or offences. However, it goes on to say that it would be inappropriate to regard as literary proceeds benefits obtained in cases where there is no connection between the work and the offence, or the notoriety of the author to the extent that it derives from the offence. In other words, if a 'notorious' criminal discovers, for example, writing skills in gaol and writes successful novels unrelated to his or her criminal activities, it would be inapposite to treat any royalty payments as literary proceeds, even though the name of the author might be seen as a 'selling feature'.[525]

18.31 The AIC further suggests that confiscation of literary proceeds should not be regarded as an unreasonable inhibition on free speech, as it is not the speech which is sought to be controlled, but rather the profit. Both overseas and Australian legislation is based on this view. None, as far as the Commission is aware, prohibits the writing or other depictions *per se*, but rather seeks to recover the benefits derived by the criminal from the activity.[526]

18.32 The Victorian Legal Aid Commission is also of the view that literary proceeds should be regarded as indirect proceeds of crime, especially in circumstances such as those in the case of the Victorian prison warder referred to in

---

522.Victorian Bar Council and Criminal Bar Association *Submission 33*.

523.NSW Bar Association *Submission 24*.

524.NSW Church and Nation Committee *Submission 19*.

525.Australian Institute of Criminology *Submission 12*.

526.ibid.

the Commission's introductory booklet.[527] In that case, a warder helped her lover and another inmate escape from prison. There was a subsequent shoot-out with police which resulted in the death of the other inmate. The warder contracted to tell the story of her role for $42500, that sum subsequently being confiscated under the then Victorian legislation.

18.33 The submission favours the conferring of a wide discretion. It says that

> there should be both a discretion as proposed to enable the courts to determine the amount that is to be confiscated together with a cut off period beyond which literacy proceeds will not be regarded as indirect proceeds of crime. The latter could be determined by a sliding scale related to the seriousness of the offence having regard to the maximum penalty as is the case in relation to expunging of criminal records in some jurisdictions.[528]

18.34 The AFP submission also favours the introduction of legislative provisions relating to literary proceeds. It states

> While no functional area of the AFP raised this matter as an area for potential amendment, the concept of offenders profiting from their crimes is repugnant. In keeping with the principle that offenders should not be able to benefit from their crime, there is a need to enact a provision in the *POC Act* prohibiting profiting from a crime, that should include third parties profiting from that crime.
>
> ...
>
> Excluding third parties profiting from crimes may act as a deterrent to the media seeking stories or features, and sensationalizing criminal acts. This may also provide a criminal law remedy against malicious or irresponsible reporting of criminal acts, or reporting for the express purpose of turning profit from criminal acts.
>
> The AFP would recommend that the *POC Act* be amended to adopt the spirit of the Victorian legislation, including profiting from all forms of media in Australia, including books, magazines, newspapers, radio, television and the use of the range of forums accessible through the Internet. Given the globalisation of the print and electronic media, and the ubiquity of telecommunications and computing media, the amendment should express some sense of extraterritoriality, making offences under Australian law of profiting in Australia from a crime committed overseas, or profiting from a crime committed in Australia.[529]

18.35 The New South Wales Police Service submission agrees that there is a need to reinforce the spirit of the confiscation legislation by discouraging those who

---

527.Vic Legal Aid *Submission 4*.

528.ibid.

529.AFP *Submission 7*.

may see a legitimate avenue to profit from crime. In its view, this would also show consideration of the rights of victims and, in the case of crimes of violence, the concerns of family, friends and the community at large.[530]

18.36 The Attorney-General's Department identifies a number of the issues that it considers need to be addressed in this context as follows

> Background
> There is no specific provision in the Proceeds of Crime Act 1987 for the confiscation of profits derived from "literary proceeds" or media publicity of criminal activity.
>
> Australian courts have traditionally taken a restrictive approach to the interpretation of confiscation legislation. In the absence of express provision, it is almost certain that an Australian court would not be prepared to grant a confiscation order in respect of profits derived from literary proceeds related to criminal activity.
>
> Each State and Territory of Australia has its own legislation providing for the confiscation of proceeds of crime. The Crimes (Confiscation of Profits) Act 1989 (Qld), the Crimes (Confiscation of Profits) Act 1986 (SA), and the Crimes (Confiscation of Profits) Act 1986 (Vic) make specific provision for the confiscation of profits derived from media exploitation of criminal notoriety.
>
> Queensland was the first jurisdiction to introduce legislation providing for the confiscation of "literary proceeds of crime", as such profits are often described. In the Second Reading Speech for the Crimes (Confiscation of Profits) Bill 1989, the relevant provisions were described as a "unique" feature of the Bill, intended to facilitate action to prevent "spectacular criminals" from being "lionised by the powers of cheque-book journalism".
>
> Issue
> Profits derived from "literary proceeds of crime" or media publicity of criminal exploits cannot be said to be derived from unlawful activity in the same sense as property acquired with the proceeds of drug trafficking, or property acquired as a result of income tax evasion. It is arguable that "literary proceeds of crime", or profits from media publicity are derived as a result of the creative talent of the defendant, or his/her business acumen, or as a result of a contractual arrangement, rather than from the commission of the offence the focus of the publicity.
>
> Existing legislation providing for the confiscation of literary proceeds of crime in both the United States and Australia has been criticised on several bases. (In the United States, 34 States have enacted "anti-profit" or "literary profits" laws to prevent criminals from profiting from media exploitation of their crimes.)
>
> It has been argued that such legislation has the potential to stifle creative endeavour which may be of significant cultural or social value. However, this argument loses force if the court is given a wide discretion, as under the

---

530 NSW Police *Submission 9*.

Victorian Act, to determine whether profits derived from media publicity of criminal activity should be subject to a pecuniary penalty order. For instance, the nature and purpose of the publication would be relevant, as would the social, cultural or educational value of the work.

Secondly, it has been argued that such legislation inhibits freedom of speech. However, the effect of the legislation is not to deprive the offender of the right to recount his story. Moreover, in most cases it is unlikely to discourage the offender from publicising his story, particularly if the offender is in a position to retain some or all of the profits generated thereby, as under the Queensland legislation.

The United States legislation has also been challenged on the basis that it infringes copyright. However, such legislation effects the confiscation of the royalties payable to the copyright owner; it does not effect the extinguishment of copyright.

Perhaps the most cogent criticism which may be directed at legislation providing for confiscation of "literary proceeds of crime" or media profits is that it represents a departure from the underlying policy of confiscation legislation, namely, to combat major crime by removing the incentive to engage in criminal activity. It is arguable that the intended effect of media profits legislation is to deter convicted offenders from sensationalising criminal activity, or to deter cheque-book journalism, rather than to deter involvement in criminal activity itself.

The counter-argument is that deterrence is not the sole objective of confiscation legislation. Another, and arguably stronger, rationale for confiscation legislation is public policy. It is in the public interest, and consistent with public perceptions of justice, morality and ethics, to ensure that convicted offenders are not permitted to retain their ill-gotten gains, and to demonstrate that "crime doesn't pay". Such legislation effectively recognises the equitable concept of unjust enrichment in a criminal law context and helps to maintain public confidence in the criminal justice system.

Convicted offenders should not profit in any way from their crimes. It is a logical extension of this policy, and justifiable on the basis of the public policy rationale for confiscation legislation, that offenders should not profit from their infamy or criminal notoriety. It is both desirable and appropriate that action be taken to ensure that convicted criminals are deprived of profits derived from media exploitation of their notoriety, and that such profits are regarded as "ill-gotten gains" for the purposes of the Proceeds of Crime Act.[531]

Consideration of issues

18.37 At the outset, it is noted that no submission received by the Commission has argued against a provision which would enable the confiscation of 'literary proceeds'. A number did, however, advocate the putting in place of some

[531].Background briefing material.

limitations, including the conferral of wide discretion on courts to ensure measured application and to avoid injustice in particular cases.

Whether confiscation of literary proceeds should be included in a proceeds of crime regime

18.38 The first major question to be addressed is whether literary proceeds, using that term in its broadest sense, should be regarded as properly coming within the confiscatory reach of a proceeds of crime law.

18.39 The Attorney General's Department submission observes that literary benefits cannot be said to be indirectly derived from criminal activity in the same sense as a house acquired with the proceeds of drug trafficking. There are intervening activities, namely the writing of a book, making of a film, etc, all of which are in themselves lawful activities.[532]

18.40 So seen, the Attorney General's Department submission observes that confiscation of 'literary proceeds of crime' can be criticised as a departure from one of the principal policy underpinnings of confiscation legislation, namely, to combat crime by removing the incentive to engage in criminal activity. However, the submission points also to a counter argument that deterrence is not the sole objective and suggests that an arguably stronger rationale for confiscation legislation is public policy relating to unjust enrichment.[533]

18.41 ***The Commission's view.*** For its part, the Commission is firmly of the view that the derivation of literary (including notoriety) benefits from unlawful activity is clearly in conflict with the principle underlying the principal objective in section-3(1)(a) of the POC Act, namely, that a person should not be entitled to become unjustly enriched as the result of his or her unlawful conduct (see discussion in chapter 2 above). For that reason its inclusion in the scheme of the POC Act is entirely justifiable as a matter of principle. In this regard, the Commission notes its proposal in chapter 2 that the POC Act be renamed the Confiscation (Unlawful Proceeds) Act.

Does confiscation of literary proceeds unreasonably inhibit free speech?

18.42 The next major issue for consideration is whether a provision to confiscate the proceeds of commercial exploitation of unlawful criminal activity would amount to an unreasonable inhibition on free speech and should, on that basis, be rejected.

18.43 ***The Commission's view.*** On this question the Commission concurs with the analysis put by the AIC, that is to say that such confiscation should not be seen as an unreasonable inhibition on freedom of speech, as it is not the speech that is

---

532.AGD *Submission 3*.

533.ibid.

sought to be controlled but rather the profit it generates. In this regard mention has already been made of the fact that none of the overseas or Australian legislation considered by the Commission postulates that a contract or agreement, for example, to write a book, is either unlawful or unenforceable. The writing of the book or use of other communication medium is a lawful activity. What the various acts do is confiscate the benefits or profits accruing to the wrongdoer as the result of the unrestricted exercise of his or her right to free speech. The profits are, nonetheless, derived from the unlawful activity.

The nature and scope of a 'literary proceeds' regime

18.44 For the above reasons, the Commission favours the inclusion in the POC Act of provisions permitting the confiscation of benefits derived by the commercial exploitation of unlawful activity. Having regard to the need to take into account a wide range of considerations in assessing the value to the defendant of such benefits, the appropriate confiscation route is, in the Commission's view, that of pecuniary penalty orders such as occurs under the Queensland, Victorian and Tasmanian legislation.

18.45 Questions then arise as to the content of those provisions. In particular: to what behaviour should it apply, what persons it should cover, to what conduct should it apply and should it enable the confiscation of benefits including outgoings, or only profits?

18.46 Further issues are whether the court should have a discretion to make the confiscation order and, if so, whether the court should be able to order confiscation of the whole or any part.

18.47 Next, there is the question whether a limitation period should be prescribed within which proceedings must be brought?

18.48 Finally, should the provision cover commercial exploitation of unlawful activity within Australia of conduct engaged in overseas and vice versa?

Behaviour to which the provisions should apply

18.49 In dealing with the scope of the provision, the Commission is sensitive to the view of the AIC that the provision should not be so wide as to cover, for example, benefits or profits made by a notorious wrongdoer from activities unrelated to the offence or offences of which he or she was convicted. Thus it seems to the Commission that a 'notorious' criminal who becomes a successful writer or painter dealing with subject matters other than his or her unlawful activity should not be at risk of losing that income. Indeed, that would hinder the rehabilitation of the person. For this reason, the Commission believes that legislation, such as in Tasmania, which could lead to the confiscation of any 'benefit obtained from the commercial exploitation in any ... way of notoriety gained by any person from the

commission ...' of unlawful conduct may be too wide and capable of causing injustice, although it is noted in relation to the Tasmanian legislation that the court has a discretion which might in practice moderate the scope of the application of the provision.

18.50 ***The Commission's view.*** Accordingly, the Commission is of the view that any provision should be limited to money or other property derived from the commercial exploitation of unlawful activity in circumstances where the marketability of the product generating that money or property is related to the unlawful activity.

Activities and persons in respect of which confiscation of proceeds should apply

18.51 ***The Commission's view.*** Given that the purpose of the provision would be to further promote the principle underlying section 3(1)(a) that persons should be denied the opportunity to become unjustly enriched as the result of unlawful conduct, the Commission can see no warrant for limiting its applications to serious offences, or excluding prescribed unlawful conduct providing the basis for the non-conviction based regime proposed by the Commission in chapter 4.

18.52 In the Commission's view, therefore, the regime should be crafted so as to enable such benefits to be taken into account for the purpose of assessing the value of benefits in respect of pecuniary penalty orders arising both from convictions for ordinary indictable offences and serious offences and from findings of prescribed unlawful conduct under the new non-conviction based regime. As the Canadian case of *Olson* demonstrates, it would also be necessary for the provision to ensure that confiscation is not avoided by assignment of the benefits or payments to any third party in circumstances where the person could be seen to have effective control of them.

Should confiscation extend to outgoings and expenses?

18.53 The Commission notes that the Queensland legislation expressly provides in section 87(5) that any outgoings or expenses incurred by the person are to be disregarded in calculating the benefit. This is the same test as applies under the POC Act in relation to pecuniary penalty orders made directly as a result of a person's conviction. The latter is justifiable in policy terms because such outgoings and expenses are themselves 'tainted' by reason of being used in, or in connection with, the offence itself.

18.54 ***The Commission's view.*** Given the Commission's analysis that recovery of 'literary proceeds' finds its support, in principle, from the notion that a person should not be able to become unjustly enriched as a result of unlawful conduct, the Commission cannot see the justification for recovery of any such proceeds as are not characterisable as profits. Outgoings, such, for example, as legal expenses in drawing up a literary or film contract should not, therefore, be included in calculating benefits.

Should confiscation be mandatory or discretionary, and should the court be able to order confiscation in whole or in part?

18.55 The Commission notes that all existing State legislation, with the possible exception of 'profits' under the South Australian legislation,[534] confer on the courts a discretion as to whether or not to make the order.[535] Only the Queensland Act explicitly goes on to provide that the order can relate to all or part of the benefits.[536] The Victorian legislation sets out criteria to which the court is to have regard in exercising its discretion, but it is a non exhaustive list and the criteria are expressed in broad terms.[537]

18.56 ***The Commission's view.*** Based on its analysis in chapter 2, the Commission has consistently taken the view throughout this report that confiscation in relation to profits of an offence or prescribed unlawful conduct should be mandatory.

18.57 The Commission recognises, however, that in the case of literary proceeds,the determination of that part of the benefits that is properly characterisable as profits arising from the criminal or prescribed unlawful conduct will often be very difficult to determine. For instance, occasions may arise when the benefit gained by the person is property characterisable as attributable to the experience that the person has gained as a rehabilitatee and wishes to share with society. In such cases, it would seem inappropriate to mandatorily confiscate that part of the benefit, albeit that, ultimately, it is derived indirectly from the person's involvement in criminal, or prescribed unlawful, conduct.

18.58 For this reason, the Commission sees no alternative but to adopt the practical expedient of leaving the determination to the discretion of the court which alone will be in a position to assess what should properly be regarded as profit that ought to be confiscated in accordance with the principle of unjust enrichment discussed in chapter 2 and what should be disregarded and excluded from confiscation.

18.59 The Commission favours an approach, therefore, along the lines of the Victorian legislation which provides the court with a discretion as to what should be treated as profits having regard to the criteria of public interest, social and educational value, and the nature and purpose of the publication, production or entertainment, including its use for research, educational or rehabilitation purposes.

Time in which forfeiture application may be brought

534.CAC Act (SA) s 9(3).

535.Confiscation Act (Vic) s 67, CC Act (Qld) s 86, CCP Act (Tas) s 11 and 20.

536.CC Act (Qld) s 86(1).

537.Confiscation Act (Vic) s 67(3).

18.60 ***The Commission's view.*** The Commission does not favour a time limitation period for the bringing of an application for a pecuniary penalty order in respect of profits derived from commercial exploitation of unlawful activity. In the Commission's view, the very fact that a profit is still able to be gained from the exploitation in question *a fortiori* leads to the conclusion that the effluxion of time since the engagement in the unlawful activity is irrelevant to achievement of the policy objective of the proposed provisions.

Extraterritorial application

18.61 The final issue to be addressed is whether the provision should have extraterritorial application. The AFP goes so far in its submission as to suggest that, given the globalisation of the print and electronic media, and the ubiquity of telecommunications and computer media, the legislation should make it an offence for an Australian wrongdoer to commercially exploit his or her unlawful activity overseas and, conversely, make it an offence for a foreign wrongdoer to commercially exploit his or her unlawful activity within Australia.[538]

18.62 ***The Commission's view.*** The Commission notes that no other submitter has made a similarly radical suggestion. In the Commission's view, the course proposed by the AFP could only be justified on compelling public policy grounds supported by experience based needs. No such needs or grounds have been brought to the Commission's attention.

Recommendation 72

- The POC Act should provide for the confiscation by means of a pecuniary penalty order of any profits derived by a defendant, or by any other person on the defendant's behalf, or at the request or by the direction of the defendant, from any commercial exploitation of the defendant's criminal activities in circumstances where the marketability of the product generating those profits is related to an indictable offence or offences committed by the defendant.

- Such confiscation should equally apply to persons found on the civil burden of proof to have engaged in prescribed unlawful conduct to which the recommended new non-conviction based regime applies.

- For the purposes of such confiscation, 'product' should be widely defined as any publication whether written or electronic, including any media from which visual images or words or sounds can be produced, as well as any live entertainment or

538. AFP *Submission 7*.

representation.

- The power of the court to make such a pecuniary penalty order should be discretionary. However, in determining whether to make the order, or whether to apply the order to the whole, or part only, of the profits, the court should have regard to
  - whether it is in the public interest to confiscate the profits;
  - whether the product has any general social or educational value, and
  - the nature or purpose of the product including its use for research, education, rehabilitation or deterrence.

Recommendation 73. No time limitation should be prescribed in relation to applications for the making of pecuniary penalty orders in respect of profits derived from the commercial exploitation of unlawful activity

19. Law enforcement information gathering powers

Introduction

19.1 Under its terms of reference the Commission has been asked specifically to enquire into and report on the adequacy of, and any need and justification for expansion of, police powers to obtain information from financial institutions for the purposes of locating proceeds.

19.2 This chapter accordingly addresses both the existing information gathering powers contained in the POC Act as well as the possible need for additional powers consequent upon the repeal, in 1988, of then sections 79 and 80 of the Act.[539] Those latter two sections permitted a financial institution to make information available under certain circumstances to a law enforcement agency and protected the institution from any action for breach of confidentiality in respect of any such communication. For the purposes of the money laundering offences, section 80 negated any *mens rea* in relation to the information so made available by deeming the institution or its officer, employee or agent not to have been in possession of that information at any time.

19.3 The existing law enforcement powers can be exercised pursuant to

- search warrants in relation to tainted property, section 36
- production orders for documents relevant to identifying, locating or quantifying property relating to an offence, section 66
- search warrants in relation to such property tracking documents in cases where a production order would be ineffective or has not been not complied with, section 71 and
- monitoring orders requiring financial institutions to give information obtained about transactions conducted through an account held by a particular person, section 73.

19.4 The Commission has been advised that police also frequently rely on the general search warrant provision contained in section 3E of the Crimes Act.

Search warrants — sections 36 and 71

Background

---

[539].The chapter does not address the question of which court or courts should issue the orders or warrants that facilitate the exercise of those powers. Those questions are dealt with in ch 9 dealing with jurisdiction.

19.5 Warrants issued pursuant to section 36 authorise the seizure of 'tainted property' in cases where a charge has been laid, or where a charge will be laid within 48 hours. Warrants can be of two kinds, either to search a person or to search land and premises. Section 36, while lengthy, is worthy of reproduction in full, so as to highlight its cumbersome nature.

> Search warrants in relation to tainted property
> 36. (1) Where a police officer has reasonable grounds for suspecting that there is, or may be within the next following 72 hours, tainted property of a particular kind:
> (a) on a person;
> (b) in the clothing that is worn by a person; or
> (c) otherwise in a person's immediate control;
> the police officer may:
> (d) lay before a magistrate an information on oath setting out those grounds; and
> (e) apply for the issue of a warrant to search the person for tainted property of that kind.
> (2) Where an application is made under subsection (1) for a warrant to search a person, the magistrate may, subject to subsection (6), issue a warrant authorising a police officer (whether or not named in the warrant), with such assistance, and by such force, as is necessary and reasonable:
> (a) to search the person for tainted property of that kind: and
> (b) to seize property found in the course of the search that the police officer believes, on reasonable grounds, to be tainted property of that kind.
> (3) Where a police officer has reasonable grounds for suspecting that there is, or may be within the next 72 hours, upon any land, or upon or in any premises, tainted property of a particular kind, the police officer may:
> (a) lay before a magistrate an information on oath setting out those grounds; and
> (b) apply for the issue of a warrant to search the land or premises for tainted property of that kind.
> (4) Where an application is made under subsection (3) for a warrant to search land or premises, the magistrate may, subject to subsection (6), issue a warrant authorising a police officer (whether or not named in the warrant), with such assistance, and by such force, as is necessary and reasonable:
> (a) to enter upon the land, or upon or into the premises;
> (b) to search the land or premises for tainted property of that kind;
> (c) to seize property found in the course of the search that the police officer believes on reasonable grounds to be tainted property of that kind.
> (5) A warrant may be issued under subsection (2) or (4) in relation to tainted property whether or not an information has been laid in respect of the relevant offence.
> (6) A magistrate shall not issue a warrant under subsection (2) or (4) unless:
> (a) the informant or some other person has given to the magistrate, either orally or by affidavit, any further information that the magistrate requires concerning the grounds on which the issue of the warrant is sought;
> (b) where an information has not been laid in respect of the relevant offence at the time when the application for the warrant is made — the magistrate is satisfied:

(i) that the property is tainted property; and
(ii) that an information will be laid in respect of the relevant offence with 48 hours; and

(c) the magistrate is satisfied that there are reasonable grounds for issuing the warrant.

(7) There shall be included in a warrant issued under this section:

(a) a statement of the purpose for which the warrant is issued, including a reference to the nature of the relevant offence;
(b) a description of the kind of property authorised to be seized; and
(c) a time, not being later than the prescribed time, upon which the warrant ceases to have effect.

(8) There shall also be stated in a warrant issued under subsection (4) whether entry is authorised to be made at any time of the day or night or during specified hours of the day or night.

(9) If, in the course of searching, under a warrant issued under this section, for tainted property in relation to a particular offence, a police officer finds:

(a) property that the police officer believes, on reasonable grounds, to be:
(i) tainted property in relation to the offence, although not of a kind specified in the warrant; or
(ii) tainted property in relation to another indictable offence; or
(b) any thing that the police officer believes, on reasonable grounds, will afford evidence as to the commission of a criminal offence;

and the police officer believes, on reasonable grounds, that it is necessary to seize that property or thing in order to prevent its concealment, loss or destruction, or its use in committing, continuing or repeating the offence or the other offence, the warrant shall be deemed to authorise the police officer to seize that property or thing.

(10) A police officer acting in accordance with a warrant issued under subsection(2) may remove, or require a person to remove, any of the clothing that the person is wearing but only if the removal of the clothing is necessary and reasonable for an effective search of the person under the warrant.

(11) A person shall not be searched under this section except by a person of the same sex.

19.6 Section 37 permits, in cases of urgency, an application for a section 36 warrant by telephone and section 38 provides for a warrantless search in cases where a police officer believes, on reasonable grounds, that it is necessary to exercise that power in order to prevent the concealment, loss or destruction of the relevant property and that the circumstances are so serious and urgent that they require the immediate exercise of the power without an order of a court or a warrant. An information must have been laid in respect of the offence before this emergency power can be exercised.[540]

19.7 Section 35, sets out the powers that may be exercised pursuant to a section36 warrant, or without a warrant where the search is conducted with consent or under the section 38 emergency power. That section reads as follows

Powers to search for, and seize, tainted property

---

[540].POC Act s 38(2A).

35.(1) A police officer may:
(a) search a person for tainted property; and
(b) seize any property found in the course of the search that the police officer believes, on reasonable grounds, to be tainted property;
but only if the search or seizure, as the case requires, is made:
(c) with the consent of the person;
(d) under a warrant issued under section 36; or
(e) under section 38.
(2) A police officer may:
(a) enter upon land, or upon or into premises;
(b) search the land or premises for tainted property; and
(c) seize any property found in the course of the search that the police officer believes, on reasonable grounds, to be tainted property;
but only if the entry, search or seizure, as the case requires, is made:
(d) with the consent of the occupier of the land or premises;
(e) under a warrant issued under section 36; or
(f) under section 38.
(3) Where a police officer may search a person under this Division, the police officer may also search:
(a) the clothing that is being worn by the person; and
(b) any property in, or apparently in, the person's immediate control.
(4) Nothing in this Division shall be taken to authorise a police officer to carry out a search by way of an examination of a body cavity of a person.

19.8 Section 71 warrants, on the other hand, relate only to 'property tracking' documents in relation to an offence, that expression being defined in section 4 of the POC Act as

(a) a document relevant to:
  (i) identifying, locating or quantifying property of a person who committed the offence; or
  (ii) identifying or locating any document necessary for the transfer of property of a person who committed the offence; or
(b) a document relevant to:
  (i) identifying, locating or quantifying tainted property in relation to the offence; or
  (ii) identifying or locating any document necessary for the transfer of tainted property in relation to the offence.

19.9 Section 71 is as follows

Search warrant for location etc. of property
71 (1) Where:
(a) a person has been convicted of an indictable offence and a police officer has reasonable grounds for suspecting that there is, or may be within the next following 72 hours, upon any land, or upon any premises, in a State or Territory a property-tracking document in relation to the offence; or
(b) a police officer has reasonable grounds for suspecting that:
  (i) a person has committed an indictable offence; and

(ii) there is, or may be within the next following 72 hours, upon any land, or upon or in any premises, in a State or Territory a property-tracking document in relation to the offence;

the police officer may:

(c) lay before a Judge of the Supreme Court of:

(i) the State or Territory in which the person was convicted of the offence or in which the offence is believed to have been committed; or

(ii) the State or Territory referred to in paragraph (a) or (b);

an information on oath setting out those grounds; and

(d) apply to the Judge for a search warrant under subsection (4) in respect of the land or premises.

(2) Where a police officer applying for a warrant under this section in respect of an offence includes in the information under subsection (1) information on oath that the officer has reasonable grounds to believe that:

(a) if the offence is an ordinary indictable offence:

(i) the person who was convicted of the offence, or who is believed to have committed the offence, derived a benefit, directly or indirectly, from the commission of the offence; and

(ii) property specified in the information is subject to the effective control of the person; or

(b) if the offence is a serious offence-property specified in the information is subject to the effective control of the person;

the Judge may treat any document relevant to identifying, locating or quantifying that property as a property-tracking document in relation to the offence for the purposes of this section.

(3) In determining whether to treat a document, under subsection (2), as a property-tracking document in relation to an offence, the Judge may have regard to the matters referred to in subsection 9A(2).

(4) Where an application is made under subsection (1) for a search warrant in respect of land or premises, the Judge may, subject to subsections (5) and (6), issue a search warrant authorising a police officer (whether or not named in the warrant), with such assistance, and by such force, as is necessary and reasonable:

(a) to enter upon the land or upon or into the premises;

(b) to search the land or premises for documents of the kind referred to in subsection (1); and

(c) to seize any document found in the course of the search that the police officer believes, on reasonable grounds, to be a document of that kind.

(5) A Judge shall not issue a search warrant under subsection (4) unless the Judge is satisfied that:

(a) the document involved cannot be identified or described with sufficient particularity for the purpose of obtaining a production order in respect of the document;

(b) a production order has been given in respect of the document and has not been complied with;

(c) a production order in respect of the document would be unlikely to be effective because there are reasonable grounds to suspect that such a production order would not be complied with; or

(d) the investigation for the purposes of which the search warrant is being sought might be seriously prejudiced if the police officer does not gain immediate access to the document without notice to any person.

(6) A Judge shall not issue a search warrant under this section unless:

(a) the informant or some other person has given the Judge, either orally or by affidavit, any further information that the Judge requires concerning the grounds on which the search warrant is sought; and

(b) the Judge is satisfied that there are reasonable grounds for issuing the search warrant.

(7) There shall be stated in a search warrant issued under this section:

(a) a statement of the purpose for which the warrant is issued, including a reference to the nature of the indictable offence that has been or is believed to have been committed;

(b) whether entry is authorised to be made at any time of the day or night or during specified hours of the day or night;

(c) a description of the kind of documents authorised to be seized; and

(d) a date, not being later than one month after the day of issue of the warrant, upon which the warrant ceases to have effect.

(8) If, in the course of searching, under a warrant issued under this section, for a property-tracking document in relation to a particular offence, a police officer finds:

(a) any document that the police officer believes, on reasonable grounds, to be:

(i) a property-tracking document in relation to the offence, although not of a kind specified in the warrant; or

(ii) a property-tracking document in relation to another indictable offence; or

(b) any thing that the police officer believes, on reasonable grounds, will afford evidence as to the commission of a criminal offence;

and the police officer believes, on reasonable grounds, that it is necessary to seize that document or thing in order to prevent its concealment, loss or destruction, the warrant shall be deemed to authorise the police officer to seize that document or thing.

19.10 The reference to section 9A(2) in subsection (3) is to enable the warrant to relate to property tracking documents in respect of third party property under the effective control of the defendant.

19.11 Once the warrant is issued, the powers which may be exercised pursuant to it are set out in section 70

Powers to search for, and seize, documents relevant to locating etc. property

70. A police officer may:

(a) enter upon land, or upon or into premises;

(b) search the land or premises for any property-tracking document in relation to an indictable offence; and

(c) seize any document found in the course of the search that the police officer believes, on reasonable grounds, to be a property-tracking document in relation to an indictable offence;

but only if the entry, search or seizure, as the case may be, is made:

(d) with the consent of the occupier of the land or premises; or

(e) under a warrant issued under section 71.

The submissions

19.12 The NCA is highly critical of the law enforcement information gathering powers in the Act. Its submission, which also deals with monitoring orders and production orders considered later in this chapter, states

> The POCA sets out various intelligence gathering powers, such as provisions for the production of property-tracking documents (section 66), search and seizure (section70) and monitoring orders over bank accounts (section 73). Those powers are rarely used by NCA officers as there are better alternatives provided by the NCA Act. As a result, there is no NCA experience that would be of assistance to the ALRC.[541]

19.13 The NCA does, however, go on to comment that

> In general terms, the powers are too cumbersome, limited in scope and have too high a threshold ...[542]

19.14 The principal submission dealing with search warrants is that made by the AFP.

19.15 Its submission, insofar as it relates to this issue, begins as follows

> Search warrants granted under sections 36 and 71 of the POC Act do not presently operate with sufficient flexibility to cater for operational contingencies. It has become routine investigative practice for AFP members to carry s 3E *Crimes Act 1914* warrants whilst executing s 71 POC Act warrants, or to obtain s 3E warrants instead of seeking s 36 warrants at all.
>
> One factor contributing to this is the need to have a warrant that may be executed but which also allows some operational flexibility as to the officer responsible for executing the warrant. Although the POC Act presently allows unspecified members to be issued warrants, the DPP have advised strongly against this practice. As a consequence of such advice, the AFP would recommend that s 36 and s 71 search warrants be transferable to other members prior to, or in the course of, executing the warrant.[543]

19.16 There are a number of other specific difficulties raised by the AFP.

19.17 First, it notes that, while warrants under section 36 permit the seizure of certain things other than those specified in the warrant, there is some doubt as to the admissibility in evidence of such things seized. Those other things which may be

---

[541].NCA *Submission 16*.

[542].ibid.

[543].AFP *Submission 7*.

seized are set out in subsection (9) of section 36, namely, property found by the officer being

> (a) property that the police officer believes, on reasonable grounds, to be:
> (i) tainted property in relation to the offence, although not of a kind specified in the warrant; or
> (ii) tainted property in relation to another indictable offence; or
> (b) any thing that the police officer believes, on reasonable grounds, will afford evidence as to the commission of a criminal offence;
> and the police officer believes, on reasonable grounds, that it is necessary to seize that property or thing in order to prevent its concealment, loss or destruction, or its use in committing, continuing or repeating the offence or the other offence...

19.18 Given the abovementioned doubt, several AFP Regions report that they either do not use section 36 warrants, preferring to rely on the more general search warrants under section 3E of the Crimes Act, or obtain warrants under both provisions. The same criticism is made in relation to search warrants under section-71 in respect of property tracking documents. Subsection 71(8) contains a mirror provision to section 36(9).

19.19 The AFP suggests that the law should explicitly state that evidence of other criminal offences obtained pursuant to search warrants under sections 36 and 71 of the POC Act should be admissible in proceedings in respect of those other offences.

19.20 Another reason given for the AFP preference for seeking Crimes Act warrants, rather than a section 71 warrant, is that they are capable of being issued by magistrates, whereas the POC warrants under section 71 must be issued by a Supreme Court judge. This issue has already been dealt with in chapter 9.

19.21 Further, the AFP submission suggests that

> ... any more general power to seize in the course of the execution of search warrants should provide for circumstances where property may be seized even though it is not tainted property, but where it might otherwise be forfeit under section 30 of the POC Act. Such a power to seize or 'hold' should reasonably be granted to allow sufficient time for the DPP to seek restraining orders.
>
> For this purpose, perhaps provisions as to holding and embargo notices in Western Australia's *Misuse of Drugs Act 1981* provide a guide, section 16 of which provides:
>
> > s 16 Powers of police officers when property suspected of being connected property found or received.
> >
> > If there are reasonable grounds to suspect that any property found or received during the exercise of the powers conferred by section 13 or by a

search warrant or under any other circumstances is connected property, a police officer may:

(a) seize that property and detain it for a period not exceeding 72 hours from that seizure and shall, if he wishes to detain it for a longer period, apply within 72 hours from that seizure to a justice of the peace for a holding order; or

(b) in the case of property which cannot, or cannot readily, be seized and detained, apply for an embargo notice,

in respect of that property.[544]

19.22 The provision dealing with granting of holding orders and embargo notices under the Western Australian *Misuse of Drugs Act 1981* is section 17, which provides

A justice of the peace may, on the application of a police officer and if he is satisfied that there are reasonable grounds to suspect that the property to which that application relates is connected property, grant to the police officer —

(a) a holding order authorising the continued detention of property seized and detained under section 16 for a period of 21 days from the date of that holding order or, if an application in respect of that property is made to the District Court under section 19 within that period, until that application is finally disposed of; or

(b) in the case of property which cannot, or cannot readily, be seized and detained, an embargo notice in the prescribed form.

19.23 Additionally, it is proposed by the AFP

... that there be some provision in the POC Act similar in effect to those contained in sections 3J, 3K and 3L of the Crimes Act 1914, enabling investigating officers in the course of search warrants to take photographs, leave the premises temporarily (perhaps with applicable prescribed times as detailed in section 3J(2)), take equipment on the premises, and operate electrical equipment at the premises. Such provisions enable what are becoming essential acts in evidence gathering and property identification and recording and should apply to both s 36 and s 71 warrants. There is prudential value in allowing such a broadening of powers, better to protect the interests of all parties to search warrants.[545]

19.24 Finally, the AFP raises the issue of time constraints on the execution of search warrants on financial institutions and states that it would be helpful if search warrants, both under the Crimes Act and POC Act, could be executed but remain in force for a specified period of time, giving financial institutions sufficient time to

---

[544] ibid.

[545] ibid.

gather documents, search indices and collate documents for delivery to investigators. According to the AFP, further warrants are required where documents are located at different times by financial institutions after the original warrant has been executed and is therefore 'spent'. Seeking further warrants in these circumstances is very time consuming for both investigators and issuing officers.

19.25 The AFP also notes that obtaining information necessary to support the issuing of a search warrant can be very difficult. This issue will be dealt with separately later in this chapter when dealing with the repealed sections 79 and 80.

The Commission's view

19.26 The AFP has raised a series of perceived shortcomings in the search warrant provisions of the POC Act. Suggested remedies include making provisions to

- allow warrants to be assigned to other named constables or officers for execution
- ensure that material lawfully seized which is not directly covered by the warrant is admissible in proceedings for other offences
- enable officers to seize property that might be forfeitable under section 30 for a short period under a 'holding order' or 'embargo notice' so as to enable a restraining order to be sought in respect of that property
- enable investigating officers in the course of a search to take photographs, temporarily leave premises and operate electronic equipment at premises
- extend the life of a warrant in cases where, for example, financial institutions cannot provide all the necessary documentation at the time of execution of the warrant.

19.27 The Commission notes that, in 1994, a new Part 1AA was inserted into the Crimes Act dealing *inter alia* with search warrants and powers of arrest. Those provisions had their genesis in the proposals in ALRC 2 *Criminal Investigation* (1975), as subsequently reviewed and varied by various other bodies including the Gibbs Review of Commonwealth Criminal Law and the Model Criminal Code Officers Committee. Those provisions were seen in 1994 as representing the 'state of the art' in relation to search warrants and would solve a number of the problems identified above.

19.28 In the Commission's view, it would be logical to bring the POC Act search warrant provisions into line with those in the Crimes Act or, conversely, to repeal the POC Act provisions and to broaden those in the Crimes Act to cover 'tainted property' and 'property tracking documents'. The latter course would seem preferable, thereby avoiding a multiplicity of search warrant provisions which may be inconsistent.

19.29 There would also seem to be merit in the suggestion that, in cases where a warrant is executed and hence spent, the issue of a further warrant should not be

necessary simply because some documents were unavailable at the time of execution, for example because they were stored at other locations. While the Commission would not support the extension of the life of a search warrant in such cases, it believes that this problem could be addressed by providing that any documents already in existence at the time of execution of the warrant, but which were physically incapable of being furnished at that time, can be handed over once located and that the financial institution or other concerned person would have the same protection against actions for breach of confidentiality as if they were handed over at the time the warrant was executed.

19.30 The Commission is not, however, convinced of the need for a 'holding order' or an 'embargo notice' process to enable a restraining order to be sought where restrainable property is identified in the search but is beyond the scope of the warrant. Given that restraining orders can ordinarily be sought on reasonably short notice such a further imposition would need strong justification. It is also noted that the proposed 'holding order' or 'embargo notice' regime would not provide the same safeguards, including the undertaking as to damages, as the restraining order regime.

19.31 Some of the comments in the AFP submission seem to imply criticism of the fact that search warrants under sections 36 and 71 cannot be obtained at an early enough point in the investigative process. The Commission notes that the threshold test for the issue of both sections 36 and 71 warrants is that the police officer 'has reasonable grounds for suspecting' that relevant material is, or may be within the next 72 hours, at the premises to be searched.[546] However, when executing the warrant, the officer may only seize material which, in the case of a section 36 warrant, he believes on reasonable grounds to be tainted property.[547] This higher requirement of 'belief' as opposed to 'suspicion' is likewise required if the officer wishes to seize property other than that specified in the warrant.[548] By contrast, where a search warrant is issued pursuant to section 3E of the Crimes Act, the state of mind of the applying officer is the same as that required under sections36 and 71 of the POC Act.[549] No further state of mind is required, however, in respect of the seizure of material specified in the warrant.[550] It is only if things other than those specified in the warrant are to be seized that the officer must have the higher 'belief on reasonable grounds'.[551]

19.32 Such differences strengthen the Commission's view that the POC Act provisions should be repealed and a unified regime provided in the Crimes Act. Additionally, the Commission notes that this would overcome the admissibility

---

546.POC Act s 36(1) and (3), s 71(1).

547.POC Act s 36(4)(c).

548.POC Act s 36(9).

549.*Crimes Act 1914* s 3E(1).

550.*Crimes Act 1914* s 3F(1)(c).

551.*Crimes Act 1914* s 3F(1)(d) and (e).

problems in relation to material, other than that stipulated in the warrant, which is seized. It would also attract the powers set out in sections 3J, 3K and 3L of the Crimes Act enabling officers in the course of conducting searches to take photographs, to temporarily leave the premises and to take equipment on to the premises. Such powers, which are only available if authorised by statute, can be important in both preserving evidentiary material and ensuring that it is in an admissible form. The lack of these powers in the POC Act provisions has been identified as a weakness by the AFP.

Production orders and monitoring orders

19.33 There are two other significant provisions in the POC Act designed to enhance the capacity of law enforcement to track proceeds of crime. These are sections 66 and 73 relating to production orders and monitoring orders.

19.34 Section 66 of the POC Act makes provision for the obtaining of production orders for property tracking documents in relation to an offence.

19.35 Subsections 66(1) and (4) are in the following terms

> 66.(1) Where:
> (a) a person has been convicted of an indictable offence and a police officer has reasonable grounds for suspecting that a person has possession or control of a property-tracking document or property-tracking documents in relation to the offence; or
> (b) a police officer has reasonable grounds for suspecting that:
> (i) a person has committed an indictable offence; and
> (ii) a person has possession or control of a property-tracking document or property-tracking documents in relation to the offence;
> the police officer may:
> (c) lay before a Judge of the Supreme Court of:
> (i) the State or Territory in which the person was convicted of the offence or in which the offence is believed to have been committed; or
> (ii) a State or Territory in which the document is, or some or all of the documents are, believed to be located:
> an information on oath setting out those grounds; and
> (d) apply to the Judge for an order under subsection (4) against the person suspected of having possession or control of the document or documents.
> ...
>
> (4) Where an application is made under subsection (1) for an order against a person, the Judge may, subject to subsections (5) and (6), make an order that the person:
> (a) produce to a police officer any documents of the kind referred to in subsection(1) that are in the person's possession or control; or
> (b) make available to a police officer, for inspection, any documents of that kind that are in the person's possession or control.

19.36 The remaining subsections (there being 15 in total in the section) deal with various matters, including the additional material required if the offence is either an ordinary indictable offence or a serious offence, the matters in respect of which the issuing judge must be satisfied, the things that police officers may do with documents produced, abrogation of the privilege against self-incrimination and prohibiting the use of material furnished by that person against a person in criminal proceedings. These matters are not relevant to the present discussion.

19.37 Section 73 makes provision for monitoring orders requiring financial institutions to give information obtained by them about transactions conducted through accounts covered by the orders held by named persons with the institution. It is, insofar as relevant, in the following terms

> 73. (1) A police officer may apply to a Judge of the Supreme Court of a State or Territory for an order (in this section called a "monitoring order") directing a financial institution to give information to a law enforcement authority.
> (2) A monitoring order shall direct a financial institution to give information obtained by the institution about transactions conducted through an account held by a particular person with the institution.
> (3) A monitoring order shall apply in relation to transactions conducted during the period specified in the order (being a period commencing not earlier than the day on which notice of the order is given to the financial institution and ending not later than 3 months after the date of the order).
> (4) A Judge shall not make a monitoring order unless he or she is satisfied that there are reasonable grounds for suspecting that the person in respect of whose account the information is sought:
> (a) has committed, or is about to commit, an indictable offence that is a serious offence;
> (b) was involved in the commission, or is about to be involved in the commission, of an indictable offence that is a serious offence; or
> (c) has benefited directly or indirectly, or is about to benefit directly or indirectly, from the commission of an indictable offence that is a serious offence.
> (5) A monitoring order shall specify:
> (a) the name or names in which the account is believed to be held;
> (b) the class of information that the institution is required to give; and
> (c) the law enforcement authority to which the information is to be given, and the manner in which the information is to be given.
> ...
>
> (8) A reference in this section to a transaction conducted through an account includes a reference to:
> (a) the making of a fixed term deposit; and
> (b) in relation to a fixed term deposit — the transfer of the amount deposited, or any part of it, at the end of the term.

19.38 Section 74 goes on to provide that a financial institution or its officers may not disclose either the existence or the operation of the monitoring order to any person and that persons to whom such disclosures may lawfully be made pursuant

to the order, in turn, may not disclose that information otherwise than in accordance with the Act.

19.39 While the Commission has not received any criticism concerning the substantive operation of particular provisions of sections 66 and 73, the AFP in particular is highly critical of the fact that information essential to the forming of the reasonable suspicion that is a necessary condition precedent to the utilisation of sections 66 and 73 is frequently unavailable to it. The absence of such an ability means, according to the submission, that neither section is as effective a tool as it might otherwise be in investigating proceeds and other offences including money laundering.[552]

19.40 The answer, in the view of the AFP,[553] lies in the conferral of some new information gathering powers broader than those contained in the repealed sections 79 and 80. This issue is canvased immediately below.

Repealed sections 79 and 80

Background

19.41 As pointed out in the Commission's introductory pamphlet, the background to the term of reference relating to investigative powers is the repeal of the abovementioned sections from the POC Act upon proclamation of the *Cash Transaction Reports Act 1988* (since renamed the FTR Act).This latter Act contains its own reporting requirements in relation to 'suspect', 'significant' and other transactions. The basic policy underlying the repeal of sections 79 and 80 of the POC Act was that AUSTRAC was to be the appropriate interface between financial institutions and law enforcement agencies. For reasons which will become apparent, it was not intended that sections 16 and 17 of the FTR Act were to be exact substitutes for the repealed POC Act provisions.

19.42 Most law enforcement submissions received by the Commission argue that the scope of information which could be obtained under the repealed sections was wider than currently obtainable from AUSTRAC pursuant to the FTR Act.[554] For example, it is said that, under the repealed provisions, law enforcement agencies could, in the absence of suspect transaction reports, obtain information about whether a particular named person held an account or accounts at a particular bank and, if so, the account number. The inability to readily obtain this information, so the argument goes, has greatly reduced the utility of the POC Act search warrant, production order and monitoring order provisions, because basic account

---

552.AFP *Submission 7*.

553.ibid.

554.SA Police *Submission 23*; ABCI *Submission 20*; NCA *Submission 16*; AFP *Submission 7*; NSW Police *Submission 9*.

information is necessary to establish the 'reasonable suspicion' conditions precedent necessary to obtain those warrants or orders.

19.43 Sections 79 and 80 as originally included in the POC Act were as follows

> Communication of information by financial institutions to law enforcement agencies
> 79. (1) Where a financial institution has information about an account held with the institution and the institution has reasonable grounds for believing that:
> (a) the information may be relevant to an investigation of, or the prosecution of a person for, an offence against a law of the Commonwealth or of a Territory; or
> (b) the information would otherwise be of assistance in the enforcement of this Act or the regulations;
> the institution may give the information to a police officer or a member, or member of staff, of the National Crime Authority.
> (2) An action, suit or proceeding does not lie against:
> (a) a financial institution; or
> (b) an officer, employee or agent of the institution acting in the course of the person's employment or agency;
> in relation to any action taken by that institution or person pursuant to subsection(1).
>
> Protection for financial institution where information given pursuant to section 79
> 80. Where a financial institution, or a person who is an officer, employee or agent of the institution, gives information pursuant to subsection 79(1) as soon as practicable after forming the belief referred to in that subsection, the institution or person shall be taken, for the purposes of sections 81 and 82, not to have been in possession of that information at any time.

19.44 The sections were repealed and superseded by sections 16 and 17 of the FTR Act. Section 16, so far as relevant to the repealed section 79 of the POC Act, provides as follows

> Reports of suspect transactions
> 16. (1) Where:
> (a) a cash dealer is a party to a transaction; and
> (b) the cash dealer has reasonable grounds to suspect that information that the cash dealer has concerning the transaction:
> (i) may be relevant to investigation of an evasion, or attempted evasion, of a taxation law;
> (ii) may be relevant to investigation of, or prosecution of a person for, an offence against a law of the Commonwealth or of a Territory; or
> (iii) may be of assistance in the enforcement of the *Proceeds of Crimes Act 1987* or the regulations made under that Act:
> the cash dealer, whether or not required to report the transaction under Division 1 or 3, shall, as soon as practicable after forming that suspicion:
> (c) prepare a report of the transaction; and
> (d) communicate the information contained in the report to the Director.

...

(4) Where a cash dealer communicates information to the Director under subsection(1), the cash dealer shall, if requested to do so by:
(a) the Director;
(b) a relevant authority; or
(c) an investigating officer who is carrying out an investigation arising from or relating to the matters referred to in, the information contained in the report;
give such further information as is specified in the request to the extent to which the cash dealer has that information.

...

(6) In this section:
"investigating officer" means a taxation officer, an AFP member, a customs officer (other than the Chief Executive Officer of Customs) or a member, or member of staff, of the NCA;
"relevant authority" means:
(a) the Commissioner of the Australian Federal Police; or
(b) the Chairperson of the NCA; or
(c) the Commissioner of Taxation; or
(d) the Chief Executive Officer of Customs;
"reportable details', in relation to a transaction, means the details of the transaction that are referred to in Schedule 4.

19.45 Section 17 provides as follows

Protection for cash dealer etc. where information communicated under section 16
17. Where a cash dealer, or a person who is an officer, employee or agent of a cash dealer, communicates or gives information under section 16, the cash dealer or person shall be taken, for the purposes of sections 81 and 82 of the POC Act, not to have been in possession of that information at any time.

19.46 As these provisions address similar issues to those dealt with in repealed sections 79 and 80 of the POC ACT, there are a number of similarities. But there are important differences also.

19.47 The principal similarity is that, on the face of both sets of provisions, the formal initiative lies with the financial institutions to pass on information. As discussed below, in practice, however, action by financial institutions pursuant to section 79 of the POC Act was more likely than not taken as a result of the initiative of a law enforcement agency. The conditions precedent, or circumstances triggering the making of the report, are also almost identical, as is the protection against suit

by clients.[555] Similarly, the protections against prosecution for money laundering are identical.[556]

19.48 Significant differences are as follows

- under the POC Act, information could be communicated to law enforcement agencies in general; under the FTR Act it must in the first instance be communicated to the Director of AUSTRAC
- under the POC Act, the financial institution had to have reasonable grounds for believing certain matters before reporting, while, under the FTR Act the lower threshold of reasonable grounds to suspect suffices
- the information which could be communicated under the POC Act related to an account generally whilst under the FTR Act it relates to a specific transaction
- under the POC Act, the institution had a discretion to communicate while under the FTR Act it is required to communicate the information once the conditions precedent are met
- under the POC Act, there was no limitation on the information which could be communicated regarding an account; under the FTR Act section 16(4) it would appear that the information is limited to the transaction and the particular reasonable grounds for suspicion.

19.49 It is this last mentioned difference which, according to the AFP, is the most significant, because police methodology under section 79 of the POC Act was frequently to notify a bank of the nature of an investigation thereby 'triggering' reporting action by the institution under that section by reason of a reasonable ground of belief being provided by the police notification.[557] This option is not open under section 16 of the FTR Act.

19.50 On the other hand, one advantage of the transaction based FTR Act reporting requirement is that it includes non-account based transactions such as, for example, the purchase of bank cheques which, according to the NCA, is becoming a commonly used means for money laundering.

The submissions

19.51 The Attorney-General's Department view expressed in background briefing materials provided to the Commission is that the FTR Act

> now contains an appropriate, balanced suspect transaction disclosure provision, with the control that the information goes to the Director of AUSTRAC, but

---

555.Repealed s 79(2) POC Act, s 16(5) FTR Act.

556.Repealed s 80 POC Act, s 17 FTR Act.

557.AFP *Submission 7*.

> with the aid to law enforcement that agencies may then seek follow-up disclosures that are protected.[558]

19.52 The Department also notes that sections 79 and 80 had been used proactively by the AFP as a notice to disclose procedure in a manner never intended or envisaged.

19.53 Four law enforcement submissions are uniformly supportive of either the re-enactment of sections 79 and 80 or the enactment of some alternative mechanism the effect of which would be to permit law enforcement agencies to take the kind of information gathering initiatives formerly taken in purported reliance on sections79 and 80.[559]

19.54 The DPP submission states

> The DPP supports the re-enactment of sections 79 and 80 of the PoC Act or the enactment of equivalent provisions in the Financial Transaction Reports Act. It is becoming increasingly important for the AFP to have a way of getting basic information from financial institutions without needing to apply for a search warrant or production order. Search warrants and production orders can be used where there are reasonable grounds to suspect that a person holds an account at a specific bank. They cannot be used to make inquiries where there is a suspicion that a person holds money but there is nothing to indicate where that money is.
>
> Most Australian financial institutions will cooperate with law enforcement agencies up to a point. However, it appears that they are becoming increasingly concerned at the risk of litigation if they release information. AUSTRAC holds considerable information about Australian bank accounts, but that information is not complete.
>
> The simplest option would be for Parliament to re-enact sections 79 and 80 of the PoC Act. However, if that cannot be done, the DPP would have no difficulty with alternative provisions being put into the FTR Act, and would have no difficulty with a provision which required written notice to be given to the bank in question. If that is done, there could also be a provision which imposed a duty of secrecy on the bank, and overrode any obligation the bank may have to tell the customer that the police were making inquiries in relation to that customer.[560]

19.55 The NCA submission in relation to this matter is in the following terms

> A simple procedure for obtaining information, particularly from financial institutions, would be of great benefit to an investigator. The proposition has

---

558.Background briefing material.

559.SA Police *Submission 23*; NCA *Submission 16*; AFP *Submission 7*; ABCI *Submission 20*.

560.DPP *Submission 8*.

> been canvassed in the ALRC pamphlet whether the former section 79 should be reintroduced.
>
> ...
>
> Section 79(1) seems to have been deleted from the POCA for the wrong reasons. It did not permit police officers to obtain information as they wish. It was a discretionary power that amended the common rules of confidentiality by permitting a financial institution to disclose information where there were reasonable grounds for establishing the matters set out in the subsection. The POCA should be amended to contain a provision similar to the repealed section 79 as it would provide a way of obtaining information from financial institutions in a timely manner.[561]

19.56 The South Australia Police submission also offers the view that some provision for the disclosure of information to police should be enacted. Its submission states

> When searching for criminal assets, time is of the essence. Once arrested, defendants often quickly empty bank accounts. Unless investigators can identify accounts held, no warrants can be obtained to prevent this movement, often resulting in concealment of assets.
>
> ...
>
> In the furtherance of any investigation, police rely on information provided by the community. Difficulties arise when individuals or organisations are precluded from assisting police because of secrecy or privacy laws. Legislation which provides for the disclosure of information (including information held by banks) to police would substantially increase investigational efficiency, reduce investigation costs and raise the effectiveness of the legislation.[562]

19.57 The Australian Bureau of Criminal Intelligence is also in favour of the re-enactment of sections 79 and 80.[563]

19.58 While also supporting the re-enactment of provisions that would enhance its capacity to obtain information from financial institutions in the manner that it was accustomed to doing in purported reliance on the repealed sections 79 and 80, the AFP argues for a wider administratively based power to overcome difficulties it had encountered with these provisions. In particular, it is concerned that any proposed powers ensure that proceeds of crime be located in a more timely and efficient manner than has hitherto been possible.[564]

19.59 In the AFP view, the trigger should not be that the institution concerned has formed a belief or suspicion. One reason for this proposal is that, if the police are

---

[561].NCA *Submission 16*.

[562].SA Police *Submission 23*.

[563].ABCI *Submission 20*.

[564].AFP *Submission 7*.

to disclose the basis for such belief or suspicion, they may need to divulge operationally sensitive information which could be reported back to the client of the institution. Its submission cites examples of cases where this is alleged to have occurred, and where banks have argued that they are obliged to notify their customers of any requirement to provide customer information unless specifically prevented from doing so by law.[565]

19.60 In arguing for a more general administratively initiated power, the AFP seeks to draw analogies with provisions of the NCA and Australian Securities and Investment Commission legislation which authorise the issuing of a written notice requiring production of stipulated material.[566]

19.61 The AFP argues that the main need for this further power stems from the fact that banks have become more and more reluctant to provide information otherwise than as strictly required by law. In relation to suspect transactions, banks see these requirements as being strictly defined as a matter of law within the limits of subsections 16(1) and (4) of the FTR Act. The AFP concludes its submission on this aspect as follows

> Financial institutions are generally becoming less responsive to police inquiries, whether requesting information or assistance, because of this lack of indemnity. The ... bank recently refused to allow a bank employee to see a photo-board for the purpose of identifying a client. The bank commented that they had been sued before for similar assistance rendered to police. This situation has deteriorated, with the DPP having no choice but to summons every branch employee to appear in court for the purpose of identifying the client. This farcical situation is costly in terms of court time, the time and resources of both the DPP and AFP, and the bank in question as the branch has to close for a period of time to meet the demands of the summons.[567]

19.62 Submissions on this issue were also received from the ABA,[568] the AFC[569] and the ASCPA.[570]

19.63 The ABA's view is as follows

> The adequacy of police powers should be evaluated to ensure that they appropriately meet the needs of law enforcement bodies carrying out their duties. A serious concern for the banking industry is the frequent requests by law enforcement bodies for information on bank customers without those bodies having legislative or other proper authority to request and receive that information. If police powers were adequate then this would result in financial

---

565.ibid.

566.ibid.

567.ASCPA *Submission 14*.

568.ABA *Submission 13*.

569.AFC *Submission 28*.

570.ASCPA *Submission 14*.

> institutions not being put into situations where they risk breaching customer confidentiality, and leaving themselves open to civil suit, when providing information. The only way to obtain information at present is to subpoena bank officers to give oral evidence. This causes disruption to business and unnecessary stress to staff. It would be more satisfactory if law enforcement authorities investigating offences had power to require bank staff to give statements in defined circumstances. Any change to the legislation should not place onerous time frame constraints on financial institutions required to provide information.[571]

19.64 This submission would appear to acknowledge some of the key law enforcement concerns, including that voiced by the AFP concerning the need to subpoena bank staff, a time consuming practice for both law enforcement and the banks. At the same time it emphasises that any extension of power should involve associated protections for banks and other financial institutions and their employees from what would otherwise amount to breaches of customer confidentiality.[572]

19.65 The AFC states it does not support an extension of police powers which would see a return to the position prior to the commencement of the FTR Act . It goes on, however, to suggest that

> An expansion of police powers may be acceptable if financial institutions and their staff would be able to secure immunity from prosecution or other legal actions by their customers for the wrongful provision of information.[573]

19.66 The ASCPA is of the view that there should not be any deleterious effect in the re-enactment of sections 79 and 80, and that this should not impose unreasonable burdens on financial institutions. It goes on to caution, however, that these powers, if provided, should only be used in *bona fide* investigations.[574]

The Commission's view

19.67 Virtually all submissions received on this issue appear to regard, explicitly or implicitly, the adequacy of police investigative powers under the POC Act as an issue of major importance.

19.68 The various case studies furnished both by the NCA and the AFP which have been discussed in earlier chapters, particularly chapter 4 dealing with both conviction and non-conviction based forfeiture and chapter 7 dealing with money-laundering, are clearly suggestive of inadequate investigative powers and mechanisms.

571.ABA *Submission 13*.

572.ibid.

573.AFC *Submission 28*.

574.ASCPA *Submission 14*.

19.69 Having again reviewed the case studies in the context of the issues raised in this chapter, and having regard to the views and proposals put forward in submissions already referred to, the Commission has the clear sense that the effective use of the full range of statutory powers — including search warrants, production orders and monitoring orders — has been inhibited by the inability of law enforcement agencies to obtain by a simple, quick and effective process, information regarding the existence, nature and content of accounts kept by, or on behalf of, suspected persons and their associates with financial institutions. A similar shortcoming exists in relation to non-account based transactions, such as the purchase of bank cheques and bank drafts, conducted by such persons with financial institutions. There seems little doubt that the reports required to be furnished by such financial institutions (as 'cash dealers') to the Director of AUSTRAC pursuant to section 16 of the FTR Act fall short of fulfilling that investigative need in the context of POC Act proceedings.

19.70 That said, two points should be made. First, the mere re-enactment of sections 79 and 80 would not be an appropriate response. Secondly, the power to require financial institutions to supply information regarding accounts and transactions should be exercisable in strictly limited circumstances. For example, while the power should be such as to assist law enforcement agencies in obtaining one of the existing formal orders, it should not be so broad as to obviate their use.

19.71 On the first point, the Commission agrees with Attorney-General's Department that the use of the repealed section 79 as a notice to produce procedure in a pro-active manner was neither intended nor foreseen. There is no doubt, in the Commission's view, that if the initiative in obtaining account or transaction information is to be with law enforcement agencies, then this must be unequivocally spelt out in the new provisions. It is equally essential, in the Commission's view, that any new provision be capable of identifying with as much precision as possible in the circumstances of the particular case the kind of information that may be sought.

19.72 On the other hand, it would appear to the Commission that the information which might be obtained under section 16(4) of the FTR Act may offer too narrow a guide. The Commission notes in this regard that the AFP has provided case examples of large scale money laundering cases where no suspect transaction reports, which might have identified the relevant account, had in fact been lodged with AUSTRAC.[575]

19.73 On the second point it appears to the Commission that the most telling criticism of law enforcement agencies concerning the current provisions is that they preclude the furnishing, at least in a timely fashion, of the necessary material to obtain one of the investigative warrants or formal orders. It is the meeting of this shortcoming that should, in the Commission's view, be the focus of any new investigative power.

---

575. AFP *Submission 7*.

19.74 In its submission, the AFP draws attention to provisions in both the NCA Act and the Australian Securities and Investment Commission Act as exemplifying the kinds of power that it believes is needed by law enforcement agencies under the POC Act.[576]

19.75 Section 29 of the NCA Act is as follows

> s 29. Power to obtain documents
> (1) A member may, by notice in writing served on a person, require the person:
> (a) to attend, at a time and place specified in the notice, before a person specified in the notice, being a member of the Authority or a member of the staff of the Authority; and
> (b) to produce at that time and place to the person so specified a document or thing specified in the notice, being a document or thing that is relevant to a special investigation.

19.76 Section 33 of the *Australian Securities and Investment Commission Act 1989*, which provides authority for the issue of administrative notices for the production of documents in a person's possession, provides as follows

> The Commission may give to a person a written notice requiring the production to a specified member or staff member, at a specified place and time, of specified books that are in the first-mentioned person's possession and relate to:
> (a) affairs of a body corporate; or
> (b) a matter referred to in any of paragraphs 31(1)(g) to (m), inclusive, and 32(1)(j) to (p), inclusive.

19.77 The Commission notes, however, that the power conferred by section 29 of the NCA Act can only be exercised by a Member of the NCA, and then only in a 'special reference' inquiry which attracts Royal Commission type special powers and that the power under the Australian Securities and Investment Commission Act is vested in the Commission and, again, relates to a specified class of information.

19.78 Having regard to the above analysis and considerations, the Commission is persuaded that a new investigative power needs to be included to ensure that the police have the ability to obtain from financial institutions such information as is essential to their being able to make a timely decision whether a warrant or other investigative order under the POC Act or for the purposes of that Act should be sought for the purposes of a relevant investigation.

19.79 Bearing in mind the need for such a power to be exercised responsibly, and only after the consideration of its need at a very senior level, the Commission's view is that it should be exercisable only by an officer of not less than Assistant Commissioner level.

---

576 .ibid.

19.80 The Commission accordingly favours, for inclusion in the POC Act, a new provision under which an officer of the AFP of not less than the rank of Assistant Commissioner may, where he or she is satisfied that it is necessary to do so to enable a decision to be made whether to seek any warrant, or order, or for the purposes of proceedings, under the POC Act, to serve a notice on a financial institution requiring it to provide such information as is specified in the notice relating to an account with that institution (including the existence of an account) or to a non-account transaction conducted by or with that institution (including the existence of such a transaction).

19.81 Although such powers would not be required by the NCA where its section29 powers would be available, the Commission has noted that such powers are exercisable only in respect of a 'special investigation'. It considers that, in respect of other investigations, the NCA should have the same access to the proposed new powers under the POC Act as proposed for the AFP. Consistent with the proposal that the power should be exercisable by an AFP officer of not less than Assistant Commissioner rank it would be appropriate, in the Commission's view, that in respect of the NCA the exercise of the power be limited to members only.

19.82 It follows, as in the case of suspect transaction reports, that the banks and their employees would need to be protected from any action, suit or proceedings in relation to any disclosure made pursuant to such a notice.

19.83 Equally, financial institutions and their employees would need to be protected from prosecution for money laundering offences in respect of the information supplied pursuant to such a notice in terms of section 17 of the FTRA Act or in terms of the previous section 80 of the POC Act.

19.84 Finally, in order to preserve operational security, as in the case of monitoring orders, financial institutions and their employees should be precluded by law from disclosing to their customers the fact of the service of the notice and the terms of the response thereto. This is essential given the belief of some banks that, in the absence of a statutory prohibition, they have a duty to communicate law enforcement interest to their clients.

Recommendation 74. Sections 36 and 71 of the POC Act should be repealed and the search warrant provisions of the Crimes Act widened to include warrants in respect of tainted property and property tracking documents.

Recommendation 75. Notwithstanding that a search warrant has been executed for the purposes of the POC Act, any documents in existence at the time of execution which were physically incapable of being furnished at that time should be able to be furnished once located and the financial institution or other concerned person should have the same protections against proceedings for breach of confidentiality as it would

have had if the documents had been furnished at the time the warrant was executed.

Recommendation 76

- Where
  - an officer of the AFP of the rank of not less than Assistant Commissioner or
  - a member of the NCA otherwise than in the course of a special investigation,

  is satisfied that it is necessary to do so to enable a decision to be made whether to seek any warrant or order, or for the purposes of proceedings, under the POC Act, may serve a notice on a financial institution requiring it to provide such information as is specified in the notice relating to
  - an account with that institution (including the existence of the account) or
  - a non-account transaction conducted by or with that financial institution (including the existence of such a transaction).

- The new provisions should expressly provide that the financial institution and its employees, in responding to a notice, are
  - protected from any action, suit or proceedings in relation to its or their response to such a notice
  - protected from prosecution for money laundering in respect of the information provided and
  - precluded by law from disclosing to the institution's clients the fact of the existence of the notice and any response thereto.

20. Superannuation benefits

Introduction

20.1 The last of the original terms of reference on which the Commission is asked to report is the 'existing provisions for loss of Commonwealth superannuation entitlements and benefits following conviction for a 'corruption offence' and whether there is any need for change in the existing law'.

20.2 As stated in its introductory booklet to the inquiry, the Commission does not see it as its task to question the basic policy underlying these provisions. It did, however, identify in that booklet two issues which seemed to arise for its consideration. These relate to whether the court should have a discretion, firstly, as to whether a superannuation order should be made and, secondly, as to the quantum of that order. Several additional issues have been identified in submissions.

20.3 Two Commonwealth laws dealing with the extinguishment of government funded benefits are relevant to this term of reference. They are

- the *Crimes (Superannuation Benefits) Act 1989* (Cth) (Crimes (Super) Act) which relates to Commonwealth employees generally and
- Part VA of the *Australian Federal Police Act 1979* (Cth) (AFP Act) which relates to members and staff members of the AFP.

20.4 Broadly speaking, these two Acts operate in relation to Commonwealth employees and members of the AFP who are convicted of a corruption offence or offences in relation to their office and who are sentenced to more than 12 months imprisonment. In these cases, a 'superannuation order' may be sought and, when made, has the effect of depriving the convicted offender of all government funded rights and benefits that would otherwise be payable by virtue of the person's membership of the relevant superannuation scheme.

20.5 The Acts provide mechanisms to

- prevent the payment of Commonwealth funded superannuation benefits where a relevant employee has been convicted of a corruption offence[577]
- allow the recovery of such payments where the person has already received Commonwealth funded superannuation benefits and has

[577].Crimes (Super) Act Part 2 and AFP Act Part VA Div 2.

subsequently been convicted of a corruption offence which took place when the person was still in office[578] and

- restrain property of an employee convicted of a corruption offence or who may be convicted of a corruption offence, where that a person has already been paid a Commonwealth funded superannuation benefit.[579]

20.6 As in the case of both the POC Act and Division 3 of Part XIII of the Customs Act, property under the effective control of the person can also be restrained.[580]

20.7 The loss of all publicly funded superannuation benefits is in addition to any confiscation order that might be made under the POC Act or other legislation. Furthermore, both Acts direct courts not to take into account the possibility that a superannuation order might be made when sentencing a person convicted of a corruption offence.[581]

20.8 While modern day superannuation confiscation legislation is of very recent origin, being first enacted in Queensland in 1988 as a reaction to the findings of the Fitzgerald Royal Commission,[582] the concept dates back, in statutory form, to the very Act which abolished earlier forms of forfeiture. In lieu of earlier forms of forfeiture, section 2 of the *Abolition of Forfeitures for Treason and Felony Act* 1870 (UK) provided, in respect of the conviction, for treason or felony resulting in a death sentence or penal servitude or any term of imprisonment of over 12 months, of a person who held

> ... any military or naval office, or any civil office under the Crown or other public employment, or any ecclesiastical benefit, or any place, office or emolument in any university, college or other corporation, or be entitled to any pension or superannuation allowance payable by the public, or out of any public fund, [that] such office, benefice, employment or place shall forthwith become vacant, and [that] such pension or superannuation allowance or emolument shall forthwith determine and cease to be payable, unless such person shall receive a free pardon from Her Majesty, within two months after such conviction ...[583]

20.9 Similar provisions appeared in State legislation in Australia but apparently lay dormant.

578.Crimes (Super) Act s 21 and AFP Act s 47.

579.Crimes (Super) Act s 24 and 25 and AFP Act s 49A and 49B.

580.Crimes (Super) Act s 10 and AFP Act s 42F.

581.Crimes (Super) Act s 43 and AFP Act s 55.

582.*Public Officers Superannuation Benefits Recovery Act 1988*.

583.Freiberg & Pfeffer, 'The (Deferred) Wages of Sin: Confiscating Superannuation Benefits' (1993) *Criminal Law Journal* V l7, No 157, 1993, 159–160.

20.10 For example, these provisions were abolished in Victoria in 1991 with the passage of the Sentencing Act, which repealed the *Penalties and Sentencing Act 1985* (Vic), section 103 of which contained the equivalent of section 2 of the 1870 UK Act.[584]

Crimes (Superannuation Benefits) Act 1989

20.11 Pursuant to this Act, where a person who is, or was, an employee of the Commonwealth or of a Commonwealth authority is charged with an offence and the Commissioner of the relevant police force regards the offence as a 'corruption offence', that Commissioner may notify the Minister in writing of the laying of the charge.[585] The notification must contain particulars of the charge and set out the reasons why the police think it is or may be a corruption charge.[586] The Commissioner is also obliged, if notification has been so given, to advise the Minister of the outcome of the proceedings.[587]

20.12 The expressions 'employee' and 'corruption offence' are defined.

20.13 'Employee' is defined in section 7 to mean

> (1) In this Act, "employee" means a person (other than a member or staff member of the AFP) employed by the Commonwealth or by a Commonwealth authority, whether the person is so employed under a law of the Commonwealth or of a State or Territory, or under a contract of service of apprenticeship.
>
> (2) Without limiting subsection (1):
> (a) a member of the Parliament; or
> (b) a justice or judge of a federal court; or
> (c) a member of the Defence Force; or
> (d) a person (other than a person mentioned in subsection (3)) who is the holder of:
> (i) an office established by a law of the Commonwealth; or
> (ii) a prescribed office established by a law of a Territory;
> is to be taken, for the purposes of this Act, to be employed by the Commonwealth.
>
> (3) Without limiting subsection (1), a person is to be taken, for the purposes of this Act, to be employed by a Commonwealth authority if:
> (a) the person constitutes, or is a member of, the authority; or
> (b) where the authority is a body corporate — the person is a director of the body corporate.

584.id 160.

585.Crimes (Super) Act 1989 s 15.

586.Crimes (Super) Act s 15(2).

587.Crimes (Super) Act s 15.

'Corruption offence' is defined in section 2 as

> an offence by a person who was an employee at the time when it was committed, being an offence
> (a) whose commission involved an abuse by the person of his or her office as such an employee; or
> (b) that, having regard to the powers and duties of such an employee, was committed for a purpose that involved corruption; or
> (c) that was committed for the purpose of perverting, or attempting to pervert, the course of justice.

'Offence' is defined in section 2 to mean

> (a) a common law offence; or
> (b) an offence against a law of the Commonwealth or of a State or Territory, being an offence punishable by imprisonment for life or for a term longer than 12 months.

20.14 If the employee charged is convicted of the offence, and the Minister is of the opinion that the offence is a corruption offence, the Minister may authorise the DPP in writing to apply to the appropriate court for a superannuation order in respect of the employee.[588]

20.15 When so authorised, the DPP must apply for the order in respect of the convicted employee provided that that person has been sentenced to imprisonment in respect of the offence, or offences, for any period of more than 12 months.[589] Written notice of the making of the application must be given to the person in respect of whom the superannuation order is sought.[590]

20.16 Upon the making of the application for the superannuation order by the DPP the court has no discretion.[591] It must make the order if it is satisfied that the offence is a corruption offence, and must in that order declare that the person was convicted of a corruption offence and that the relevant part of the Crimes (Super) Act applies in relation to the rights of, and benefits paid or payable to or in respect of, the person under any superannuation scheme.[592] The section goes on to provide how the amount to be stipulated in the order is to be calculated.[593] In effect, the amount so calculated represents the entire employer funded benefit, including interest thereon, 'benefit' being defined in section 2 as 'a benefit payable under a superannuation scheme, including a lump sum payment and a pension'. There is no discretion to reduce this amount, other than to reflect any decline in purchasing

---

588.Crimes (Super) Act s 16.

589.Crimes (Super) Act s 17(1A).

590.Crimes (Super) Act s 17(3).

591.Crimes (Super) Act s 19(1).

592.Crimes (Super) Act s 19(1).

593.Crimes (Super) Act s 19(4).

power of money between the day on which contributions or benefits were made or paid, and the day on which the court must assess their value.[594]

20.17 The effects of the superannuation order are set out in section 21. The effects are the cessation of both the person's entitlements to the employer funded rights and benefits otherwise payable to the person or his or her dependants arising from the person's membership of the superannuation scheme as well as the person's membership of that scheme. Only his or her own contributions plus accrued interest remain payable to the person.[595] There is also a formula for calculating the amount still payable to a person in cases where the person had ceased to be an employee before being charged with a corruption offence whilst so employed. This is calculated by deducting from the employee contributions and interest any sum paid by way of benefits prior to the date on which the superannuation order takes effect that is attributable to the contributions, ie any employer funded benefits that have accrued by virtue of the employer contributions having already been paid.[596]

20.18 The Crimes (Super) Act also contains powers to vary orders, to revoke orders where convictions are quashed or a sentence is reduced to 12 months or less, and to make restraining orders.[597] These powers are not relevant for present purposes.

20.19 Finally, section 43 provides that a court, in sentencing a person, must not take into account the fact that a superannuation order may be made against the person.[598]

Australian Federal Police Act 1979 — Part VA

20.20 With four exceptions, the provisions of Part VA are identical to those of the Crimes (Super) Act. The first exception is that the AFP Act applies not only to 'corruption offences' in respect of which a criminal conviction is recorded and a minimum penalty imposed, but also to dismissal as a result of a 'relevant disciplinary offence'.[599] The expression, 'relevant disciplinary offence' is defined under the *Australian Federal Police (Disciplinary) Regulations* as an offence which relates to the misuse of office, or involves misconduct or corruption.[600] The finding

---

[594].Crimes (Super) Act s 19(5).

[595].Crimes (Super) Act s 21(4).

[596].Crimes (Super) Act s 21(5).

[597].Crimes (Super) Act s 22 and 23.

[598].Crimes (Super) Act s 43.

[599].AFP Act s 49.

[600].reg 18A.

from which forfeiture can flow in respect of such an 'offence' is not by a court but by the AFP Disciplinary Tribunal.[601]

20.21 The second difference is that, under the AFP Act, the Commissioner must notify the Minister where an officer is charged with what he or she regards as a corruption offence,[602] whereas in respect of a person charged in circumstances where the Crimes (Super) Act applies the relevant Commissioner has a discretion as to whether to notify the Minister.[603]

20.22 The third difference is that, unlike under the Crimes (Super Act), if the Minister is satisfied that the offence is a corruption offence and at least the minimum penalty has been imposed, the Minister has no discretion but must authorise the DPP to seek a superannuation order.[604] Finally, under the AFP Act, a person's rights and entitlements under a relevant superannuation scheme can be suspended by the Commissioner in circumstances where, before or after being charged, the person gives notice of intention to resign, resigns or is retired from the force and their resignation or retirement takes effect on or after the day on which they are charged, provided that the Commissioner believes on reasonable grounds that the offence is a corruption offence.[605]

20.23 These differences will be considered later in this chapter, after issues common to both Part VA and the Crimes (Super) Act matters have been dealt with.

The Queensland provisions

20.24 As noted in the introduction to this chapter, Queensland, in response to the findings of the Fitzgerald Royal Commission, enacted the *Public Officers Superannuation Benefits Recovery Act 1988*. Like the Crimes (Super) Act, it relates to entitlements to publicly funded superannuation or retirement benefits, of persons convicted of certain offences.

20.25 The key operative provision is section 6 which provides

> (1) A publicly funded superannuant who is convicted after the commencement of this Act of an offence that is a prescribed offence committed by the superannuant while the superannuant held a public office thereby incurs a liability to pay to the Crown a sum assessed in accordance with section 8.

---

601. AFP Act s 48. Note also that, under some circumstances, a person found by the Tribunal to have committed the offence can appeal on questions of fact and law, or both, to the Federal Court of Australia.

602. AFP Act s 21.

603. Crimes (Super) Act s 16.

604. AFP Act s 44.

605. AFP Act s 51.

(2) A liability incurred under subsection (1) no longer exists if, upon appeal, the conviction constituted or deemed to be constituted by the plea or finding of guilty of the offence is quashed but shall revive if the conviction is reinstated upon further appeal.

20.26 The terms 'publicly funded superannuant', 'prescribed offence' and 'public offence' are defined in section 4 as

'prescribed offence' means —
(a) an indictable offence consisting wholly or partly of conduct of the offender —
  (i) by which the offender —
    (A) asks for or receives or obtains any property or benefit of any kind for the offender or another person; or
    (B) agrees or attempts to engage in conduct mentioned in sub-paragraph (A); and
  (ii) that is engaged in on the understanding that the offender will be influenced or affected in the exercise of the functions or powers of a public office held by the offender; or
(b) an indictable offence consisting wholly or partly of conduct of the offender —
  (i) by which the offender pays or gives, or agrees or attempts to pay or give, to a person any property or benefit of any kind for the person or another person; and
  (ii) that is engaged in on the understanding that the person or other person will be influenced or affected in the exercise of the functions or powers of a public office held by the person or other person;
  and includes an offence against any of the following provisions of the Criminal Code —
(c) section 87 (Official Corruption);
(d) section 120 (Judicial Corruption);
(e) section 121 (Official Corruption not Judicial but relating to Offences).

'publicly funded superannuant' means a person whose superannuation or retirement benefits are funded to any extent from the consolidated fund.

'public office' means an office such that upon the holder thereof retiring therefrom or ceasing to hold the office the holder would become a publicly funded superannuant.

20.27 The amount the person is liable to pay after conviction is determined by a judge of the Supreme Court of Queensland on application made by the Minister.[606] The judge, once satisfied that the convicted person is a publicly funded superannuant, that the application relates to one or more prescribed offences and that the liability under section 6 subsists, must make an assessment of liability in terms as set out in section 8.[607]

606.*Public Officers Superannuation Benefits Recovery Act 1988* (Qld) s 7(1).

607.*Public Officers Superannuation Benefits Recovery Act 1988* (Qld) s 7(2).

20.28 In essence, the provisions of section 8(1)(a) of the Queensland Act are similar to those in the Crimes (Super) Act, in that, *prima facie*, the person remains entitled only to his or her contributions and the interest thereon. However, section 8(1)(b) confers a number of discretions on the judge as to the quantum of the assessment. That subsection reads

> (b) without limiting the matters that a judge may consider relevant to such assessment of liability, a judge may have regard to the following matters and to such evidence as is before the judge concerning those matters —
>
> (i) the proportion borne by the length of the convicted person's service in the public office before the person first committed an offence by reference to which the person has incurred the liability to the length of the person's total service in the public office;
>
> (ii) the nature of the offence or offences upon conviction of which the convicted person has incurred the liability and the degree of corruption evidenced by that offence or those offences;
>
> (iii) the value of the gain to any person from the offence or offences upon conviction of which the convicted person has incurred the liability;
>
> (iv) the degree of hardship likely to be occasioned by the convicted person's complying with an order made under section 7(2) to the convicted person's spouse or dependant (if any) who satisfies the judge that she or he was not aware of the conduct that has resulted in the convicted person's incurring the liability.
>
> 'hardship' includes —
>
> (a) hardship to the spouse or dependant of the convicted person during the convicted person's lifetime; and
>
> (b) hardship to the spouse or dependant of the convicted person consisting in the loss of entitlement to superannuation or retirement benefits to which the spouse or dependant would have been entitled on the convicted person's death if the convicted person had not been convicted of a prescribed offence.

20.29 These discretions have no equivalent in the Commonwealth legislation.

20.30 Pursuant to section 10 of the Queensland Act, notice of the making of the application and the hearing date thereof, must be given to the spouse or dependant and they, and other persons who, in the opinion of the judge, have a legitimate interest in the outcome of the application are entitled to appear and adduce evidence.

The submissions

20.31 Eight submissions deal with the superannuation question.[608] For the most part the submissions deal with the issue in broad public policy terms. None suggests the conferring of a discretion on the court as to whether to make a superannuation order after conviction for a corruption offence. However, three submissions argue in favour of conferring a discretion on a judge to determine the quantum of any superannuation order,[609] while two express the view that the current mandatory regime should be maintained.[610]

20.32 Arguing in favour of the existing provisions are the AIC and the AFP.[611]

20.33 The AIC submission states

> Given the importance of ensuring corruption-free government administration, it is preferable that all government benefits be deprived. It is highly desirable that public employees be regarded as servants, rather than exploiters of the public. Any concessions which a corrupt public servant might be granted could be perceived in such a manner as to contribute to the erosion of public sector legitimacy.[612]

20.34 The AFP submission is equally supportive of the status quo. It states

> On the issue of superannuation forfeiture for corruption and disciplinary offences, and while there was some difference of opinion within the AFP, having due regard to the spirit of the 1989 amendments to the Australian Federal Police Act 1979 (AFP Act), ie that forfeiture of superannuation was and remains an effective anti-corruption measure, the AFP would recommend that the provisions stand as they presently appear.
>
> An issue raised during internal consultation was that of proportionality between the seriousness or duration of disciplinary or corruption offences and the value of superannuation forfeited as a result. The AFP would contend that the degree of seriousness of corruption offences is implicity stipulated; the person must be sentenced to a period of imprisonment of more than twelve months.
>
> Further, some areas of the AFP raised the issue of inconsistency between the provisions of superannuation forfeiture under the CSB Act and the AFP Act. While both enable superannuation forfeiture upon conviction of a corruption offence, the latter goes further to enable superannuation forfeiture upon dismissal which results from the finding of the commission of a disciplinary

---

608.Department of Finance & Administration *Submission 25*; ComSuper *Submission 15*; AIC *Submission-12*; DPP *Submission 8*; NSW Police *Submission 9*; Victorian Legal Aid *Submission 4*; AFP *Submission 7*; Victorian Bar Council and Criminal Bar Association *Submission 33*.

609.NSW Police *Submission 9*; Victorian Bar Council and Criminal Bar Association *Submission 33*; Victorian Legal Aid *Submission 4*.

610.AFP *Submission 7*; AIC *Submission 12*.

611.ibid.

612.AIC *Submission 12*.

> offence. It is the AFP's contention that a higher standard is expected of law enforcement in order that integrity be maintained and be seen to be maintained. It is therefore appropriate that such a power be retained...The AFP recommends that the AFP Act retain its present provision in relation to enabling superannuation forfeiture for corruption and serious disciplinary offences.[613]

20.35 The NSW Police Service, whilst noting that superannuation forfeiture does not exist in NSW, points out that proceedings can be instituted under the COPOC Act and the CAR Act (NSW) against assets of NSW police convicted of corruption. It goes on to state that the spirit of confiscation legislation in that State is more inclined to the view that discretion must be given to the court to decide what amount of the assets should be forfeited.[614]

20.36 Similarly, the Victorian Bar Council and Criminal Law Association are of the view that, as in the Queensland model, there should be a discretion to determine the amount of employer contributions which should be forfeited and that the judge, in the exercise of that discretion, should have regard to the gravity of the conduct involved.[615]

20.37 The Victorian Legal Aid Commission's view is that

> There should be provision for the court to determine, according to a variety of circumstances, the proportion of the government-funded benefits to be lost. An obvious consideration is the extent of the gain from the criminal offence. There may also be in this regard innocent third parties who would be affected by such a decision (such as the offender's spouse or partner and children). They ought not be penalised for the wrong doing by one member of the family.[616]

20.38 Other submissions raise different issues. The DPP, for example, says that, in a recent case, a practical issue arose as to whether a superannuation order could be made after a person had died. In the case cited, the defendant was convicted of a corruption offence and sentenced to the required period of imprisonment, but died before the application for a superannuation order could be made. According to the DPP, the view was taken that a court could not make an order under such circumstances and the Attorney-General's Department declined to advise the Attorney-General to authorise the DPP to make the application.[617]

20.39 The Department of Finance and Administration (DOFA) has drawn the Commission's attention to the new superannuation environment which will result from, *inter alia*, the closure of the Public Sector Superannuation Scheme (PSS) to new

---

613.AFP *Submission 7*.

614.NSW Police *Submission 9*.

615.Victorian Bar Council and Criminal Bar Association *Submission 33*.

616.Vic Legal Aid *Submission 4*.

617.DPP *Submission 8*.

Commonwealth employees from 1 July 1999. In its submission, DOFA raises the following issues

> Given the significant and ongoing reform in the public sector it is opportune to review the legal framework governing the treatment of corruption offences and the proceeds of crime. In the Commonwealth sector, the devolution of Commonwealth employment powers to agencies has given agencies greater autonomy in determining remuneration for employees. This and other changes have resulted in agencies concentrating more on the total employment cost, including superannuation, for their employees rather than treating superannuation as separate from remuneration. Over time, it is quite likely that agencies will consistently talk in terms of total employment cost packages and superannuation will become an integral component of that package.
>
> Legislation is also in Parliament which, when passed, will provide for significantly greater choice and flexibility in superannuation arrangements for Commonwealth employees. Under this legislation, the Public Sector Superannuation Scheme (PSS) will be closed to new members and new employees from 1 July 1999 will be able to choose to have employer payments made to a complying superannuation fund or retirement savings account offered by their employer. From 1 July 2000 existing PSS and CSS members will be able to choose to cease active membership of their respective scheme and join another complying superannuation fund or retirement savings account offered by their employer.
>
> This new environment in the public sector and more specifically in superannuation may mean that existing legislation such as the *Proceeds of Crime Act 1987* (the POC Act), the *Crimes (Superannuation Benefits) Act 1989* (the CSB Act) and, in respect of members of the Australian Federal Police, the *Australian Federal Police Act 1979* (the AFP Act) should be revisited to ensure the adequacy of the existing framework.
>
> For example, the CSB Act and Part VA of the AFP Act provide for superannuation orders to be made against Commonwealth and Territory employees and former employees who have been convicted of corruption offences and sentenced to imprisonment for more than 12 months. Such an order results in a person losing all rights and entitlements to his or her employer superannuation benefits.
>
> When the existing framework for the forfeiture of superannuation entitlements was developed, it was decided that employees of Commonwealth owned or controlled commercial organisations were identifiable as representatives of the Commonwealth and should therefore be treated in the same manner as Commonwealth employees. The Commonwealth's increased focus on core business activities has meant an increase in commercial activity and outsourcing of other functions. As a result, many private sector organisations are performing tasks on behalf of the Commonwealth but without the necessary restraints the CSB and POC legislation offers. Therefore it may be appropriate to consider if the existing framework should be tightened (eg, to cater for employees of non Commonwealth organisations where those employees have been convicted of a corruption offence in relation to any work they have done on behalf of the Commonwealth).

Choice of superannuation funds will also add a new element to this framework. While superannuation entitlements forfeited extend only to those payments made by the Commonwealth or a Commonwealth authority this component will become more difficult to define and recover as employees constantly move between public and the private sector. In this respect issues that might need to be considered in the review include

- whether the existing framework will be robust enough to cater for the forfeiture and recovery of Commonwealth contributions to any private sector complying superannuation fund or retirement savings account (for example, if those contributions and interest are no longer easily defined because the employee has consolidated all superannuation entitlements into one fund);
- whether the framework should provide for recovery and forfeiture of superannuation entitlements where membership of a fund (eg, a public offer fund or a RSA) is no longer linked to Commonwealth employment. For example, while conviction of a corruption offence would lead to termination of Commonwealth employment, in the new superannuation environment, this may not necessarily result in the payment of superannuation benefits.

It has always been the intention of this legislation to focus on the forfeiture or restraint of the employer component of a person's superannuation entitlement. The employee component is not forfeited under this legislation (although other recovery mechanisms may exist in certain circumstances). However, in this era, it may be appropriate to reconsider whether the recovery or forfeiture of superannuation entitlements should be dealt with as an integral component of remuneration. For example, questions that you may wish to consider in this context are:

- whether the courts should be given the power to determine how much of a superannuation entitlement (which may be more or less than the employer component of this entitlement) should be forfeited or recovered;
- whether it is reasonable for the employee to be eligible to receive his or her member contributions and interest in the event that he or she is convicted of a corruption offence resulting in imprisonment for more than 12 months;
- whether other remuneration such as accrued leave, accrued long service leave and past salary payments should be dealt with in the same manner as superannuation.[618]

20.40 ComSuper administers both the Commonwealth Superannuation Scheme (CSS) established under the *Superannuation Act 1976* (Cth) and the Public Sector Superannuation Scheme (PSS) established under the *Superannuation Act 1990*, as well as the Defence Force Retirement and Death Benefits Scheme (MSBS) established under the *Military Superannuation Benefits Act 1991*. Members of the latter two schemes are covered by the Crimes (Super) Act by virtue of the definition of 'employee' contained in section 7 of that Act.

618.Department of Finance & Administration *Submission 25*.

20.41 According to ComSuper's submission

> ComSuper is integrally involved in the process under the CSB Act that results in the making of a superannuation order. It performs the following functions
>
> - when requested, it provides benefit information to the Attorney-General's Department to enable a decision to be made by the Minister for Justice under section 16 of the CSB Act whether to authorise the Director of Public Prosecutions to apply for a superannuation order;
> - in accordance with section 18 of the CSB Act, it provides the court with a superannuation certificate setting out benefit information of the person who is the subject of the proposed order; and
> - after the superannuation order is issued by the court, in the usual case where there are no complications (see below), it adjusts its computer records accordingly, transfers any employer-funded moneys held in the relevant superannuation fund to the Consolidated Revenue Fund and, as is required by section 21 of the CSB Act, pays the person a benefit that is equivalent to a refund of his or her own contributions and interest under the superannuation scheme.[619]

20.42 The submission then refers as follows to certain administrative difficulties faced by Comsuper

> One of the most frustrating experiences for ComSuper in relation to the CSB Act has been in preparing superannuation certificates. Under sections 18(3)–(6) of the CSB Act, a certificate must specify the value of the person's superannuation benefit at the date of the hearing of the application to the court for the superannuation order. This strict legislative requirement has meant that, whenever a hearing is adjourned ComSuper must prepare a new certificate for the next hearing date. Often a matter will be adjourned a number of times.
>
> ComSuper notes that, under the proposed Crimes (Superannuation Benefits) Amendment Bill 1997 presently before the Federal Parliament, sections 18(3)-(6) of the CSB Act will be repealed and new provisions will be inserted into the CSB Act to provide a scheme administrator with greater flexibility as to the component and manner of presenting benefit information to the court. However, ComSuper would submit that these proposed amendments would not appear to resolve its problem of being required to duplicate its preparation of benefit information for particular matters.
>
> It is submitted that, given that ComSuper provides benefit information at first instance to the Attorney-General's Department to enable the Minister for Justice to make a decision whether to authorise the Director of Public Prosecutions to apply for a superannuation order, further flexibility should be incorporated into what must be tendered to the court by allowing benefit information provided at first instance to the Attorney-General's Department to be tendered to the court without further involvement by ComSuper at a later date.

619.ComSuper *Submission 15*.

> The benefit information provided to the Attorney-General's Department at first instance inevitably concerns a person who has ceased contributory scheme membership either through resignation or dismissal. The person's benefit entitlement arises when employment ends and there is usually only a relative small growth in the benefit from that time until the date the court hears an application for a superannuation order.
>
> If the CSB Act were to be amended to allow a court to make a superannuation order in general terms, having regard to the accrued equity at the date contributory membership ended and noting the small growth in the value of the benefit after that date, ComSuper would be able to drop out of the picture once the initial benefit information was provided to the Attorney-General's Department.
>
> An alternative submission would be to amend the CSB Act so as to allow benefit information prepared by ComSuper for a court hearing to remain valid for a certain period of time thereafter (for example, for the next six months) for the purposes of any subsequent hearing.[620]

Discretion as to the seeking of the order and the quantum thereof

20.43 Before dealing with the question of discretion, a brief comparison between the Commonwealth and Queensland legislation[621] may be useful.

20.44 Under the Commonwealth legislation the employee must be convicted of a corruption offence or offences,[622] and sentenced to more than 12 months imprisonment for that offence or those offences.[623] There is then a discretion vested in the Minister under the Crimes (Super) Act as to whether or not to authorise the DPP to apply for the superannuation order.[624] If that Ministerial discretion is affirmatively exercised the DPP must apply for the order and the court must, if satisfied of the abovementioned conditions precedent, make the order in respect of all employer benefits.[625]

20.45 Under Part VA of the AFP Act, the Minister has no corresponding discretion. If the Minister forms the view that the offence is a corruption offence, he must authorise the DPP to apply for a superannuation order.[626]

620.ibid.

621.*Public Officers Superannuation Benefits Recovery Act 1988*.

622.Crimes (Super) Act s 16, AFP Act s 44.

623.Crimes (Super) Act s 17, AFP Act s 45.

624.Crimes (Super) Act s 16.

625.Crimes (Super) Act s 17(1).

626.AFP Act s 44.

20.46 Under the Queensland legislation, the employee must have been convicted of a 'prescribed offence'.[627] There is no need for the employee to be sentenced to a minimum term, but the Commission notes that the various 'prescribed offences' are all punishable by more than 12 months imprisonment. The Minister may apply for an order.[628] Once the order is sought the court must make an order as to liability to pay to the Crown a sum assessed in accordance with the Act but, unlike under the Commonwealth legislation, the court has a discretion as to the quantum of that order.[629] While certain criteria are set out in the legislation these are expressed to be 'without limiting the matters that a judge may consider relevant to such assessment of liability'.[630] In other words, the judge has an unfettered discretion but is given some legislative guidance as to relevant factors.

20.47 As noted in the Commission's introductory booklet, the rationale of both the Crimes (Super) Act and Part VA of the AFP Act is that superannuation orders are not penalties for an offence. This is supported by the provisions in both Acts that preclude a judge from taking into account the possibility of the making of a superannuation order when determining the sentence for the corruption offence.[631] Rather, the corruption of office is treated in public policy terms as a failure to fulfil a condition of employment so fundamental that it would be wrong for an offender to enjoy the benefit of employer funded benefits.

20.48 Some may argue that the effect of the legislation is punitive in that superannuation has come to be regarded as part of the total 'remuneration package', and hence that which is forfeited is part of salary. While that may be true under future superannuation arrangements where the employer contribution may, *inter alia*, be determined by reference to 'foregone salary' and is paid on an ongoing basis as the liability is incurred, this is not correct under the CSS and PSS schemes to which the current forfeiture regimes apply. Under the current schemes, the employer contribution is unfunded and is a contingent liability depending on conditions precedent being met. Those conditions include the employee meeting any minimum period of employment before entitlement to employer funded benefits arises, and retiring or otherwise leaving Commonwealth service under circumstances where the statutory right to receiving those benefits is transformed into a right to payment from public funds. The Crimes (Super) Act and Part VA of the AFP Act in essence provide that the right to receive benefits, or the receiving of benefits where they have already accrued, is extinguished if it is established that the conditions of employment have been breached in a significant, fundamental manner.

---

627 *Public Officers Superannuation Benefits Recovery Act 1988* s 6.

628 *Public Officers Superannuation Benefits Recovery Act 1988* s 7(1).

629 *Public Officers Superannuation Benefits Recovery Act 1988* s 7 and 8.

630 *Public Officers Superannuation Benefits Recovery Act 1988* s 8.

631 Crimes (Super) Act s 43 and AFP Act s 55.

20.49 The laws have been described as 'a disciplinary mulct, not a criminal sanction, designed to deter corruption in the public sector'.[632] Similarly, in material made available to the Commission, the Attorney-General's Department states that, rather than being regarded as a 'forfeiture' issue, the loss of employer funded benefits is a result of a breach of contract, the philosophy of both Acts being that publicly funded superannuation benefits should be paid only to persons who discharge their public duties in a non-corrupt manner.[633] This view is strengthened by the fact that it is only the employer funded benefit, or the right to receive such a benefit in the future, which is forfeit.[634] If the employee's own contributions were also to be forfeit then the legislation would be seen as having a punitive nature.

20.50 So seen, arguments based on concepts of unjust enrichment and punishment, which have been considered in the context of forfeiture orders and pecuniary penalty orders, are not applicable to superannuation orders, such orders being based on a failure to properly fulfil employment obligations having honesty and integrity at their centre.

20.51 In his second reading speech relating to the Bill for the Crimes (Super) Act, the then Attorney-General, the Hon Lionel Bowen MP, made the following comments in relation to the manner in which the Queensland Act and Commonwealth Bill, respectively, addressed the issue of discretion with regard to quantum

> The Government has rejected the approach taken by the Queensland Parliament in the Public Officers Superannuation Benefits Recovery Act 1988 whereby the courts are given the option of forfeiting only part of the person's superannuation entitlement where the offence is considered to be minor or where hardship may result from the order. Rather, minor offences are placed outside the scope of the Commonwealth Bill by the condition precedent that a sentence of more than 12months imprisonment be imposed for the offence.
>
> This Government is firmly of the view that there is no scope for watering down the forfeiture in such cases as superannuation benefits and they should only be paid from public moneys to persons who discharge their duties in a non-corrupt manner. The Government views corruption of office as a failure to fulfil a condition of employment which should result in the disentitlement to publicly funded superannuation benefits. While the consequence of conviction for a corruption offence under the Bill will be the loss of publicly funded superannuation benefits there may also be other remedies available under other legislation. For example, where a corruption offence involved the payment of a bribe to a public official, an amount equal to the bribe may be recoverable under the Proceeds of Crime Act 1987.

632.Freiberg & Pfeffer *'The Deferred Wages of Sin: Confiscating Superannuation Benefits' Criminal Law Journal* V 17 No 157, 1993, at 172.

633.Correspondence dated 11 August 1997.

634.Crimes (Super) Act s 21(4) and AFP Act s 46(3).

> This Government is determined to ensure that corruption does not infiltrate the Commonwealth or its instrumentalities and this Bill will provide a strong financial disincentive to any who may be tempted to engage in corruption now or in the future.[635]

20.52 This analysis is supported by the submission of the AIC when it asserts that

> It is highly desirable that public servants be regarded as servants, rather than exploiters of the public. Any concessions which a corrupt public servant might be granted could be perceived in such a manner as to contribute to the erosion of public sector legitimacy.[636]

20.53 The AFP also points to the deterrent aspect of the legislation, and notes that the requirement that a person must be sentenced to more than 12 months imprisonment ensures that the legislation is not used inappropriately.

The Commission's view

20.54 After carefully weighing all the above considerations and submissions, the Commission is not persuaded of a need to depart from the fundamental policy enunciated by Attorney-General Bowen in his second reading speech when introducing the Bill for the Crimes (Super) Act.

20.55 In the view of the Commission, three consequences should flow from corrupt criminal conduct engaged in by a public employee, each based on different policy underpinnings, namely

- sentence as punishment for the offence
- removal of unjust enrichment to which there was no entitlement *ab initio* and
- a superannuation order based on the breach of duty to the employer and hence leading to a removal of the employer's obligation to pay employer funded benefits.

20.56 Nothing placed before the Commission has persuaded it that the Minister ought to have any discretion whether to authorise the institution of proceedings once he or she is satisfied (following police notification of formation of the opinion that the offence is, or may be, a corruption offence) that the offence is a corruption offence. For this reason, the Commission considers that section 16 of the Crimes (Super) Act should be brought into line with section 44 of the AFP Act in requiring the Minister, in such circumstances, to authorise the DPP to institute proceedings for a superannuation order.

635.*Hansard (H of R)*, 17 August 1989, 389.

636.AIC *Submission 12*.

20.57 With regard to the question whether the court should have a discretion concerning quantum, with one exception referred to below, the Commission again is not persuaded that there should be a judicial discretion to entitle an employee who, with full knowledge of the existence of the Crimes (Super) Act regime, dishonestly commits a breach or breaches of his or her employment obligations of such a magnitude as to attract the operation of the regime, to retain or expect to receive any part of employer funded benefits the function of which is to reward honest fulfilment of those obligations.

20.58 The one exception that appears to the Commission to merit consideration concerns the effect of a superannuation order on innocent third parties. The Commission notes in this regard that the matters that a judge may take into account under the Queensland legislation in determining quantum include

> the degree of hardship likely to be occasioned by the convicted person's complying with an order made under section 7(2) to the convicted person's spouse or dependant (if any) who satisfies the judge that she or he was not aware of the conduct that has resulted in the convicted person's incurring the liability.[637]

20.59 Reference has already been made to the submission of the Victorian Legal Aid Commission pointing to the impact that an order may have on such persons.[638]

20.60 It is recognised that in most superannuation schemes there is what is termed a 'residual' or 'survival' benefit relating to the spouse or dependants of a superannuation fund contributor. While this benefit still stems from the employer - employee relationship which led to the obligation on the employer to fund certain benefits, it appears inequitable that dependants, including spouses, should automatically lose this benefit in situations where they are in no way involved in, or aware of, the conduct leading to the extinguishment of those benefits.

20.61 The Commission is of the view that the situation of genuinely innocent third parties should be alleviated. While it may not be possible to avoid some loss, it should be possible to vest in innocent spouses and dependants contingently upon the corrupt employee reaching pensionable age, or dying, those benefits to which they would have become entitled had the contributing spouse ceased being a member or a contributor on the day the superannuation order was made and the employee's benefit had been preserved. It would follow, if this were to be done, that such spouses and other dependants would need to be notified of the making, and hearing date, of an application for a superannuation order and be permitted to appear and adduce evidence to show that they were not aware of, or involved in, the commission of the corruption offence.

---

637 *Public Officers Superannuation Benefits Recovery Act 1998* s 8(1)(b)(iv).

638 Vic Legal Aid *Submission* 4.

Issues relating to differences between the AFP and Crimes (Super) Act regimes

20.62 Earlier in this chapter, the Commission identified four differences between Part VA of the AFP Act, and Crimes (Super) Act, regimes.

20.63 These are that the AFP regime

- extends beyond corruption offences to relevant disciplinary offences[639]
- obliges the Commissioner to notify the Minister of the laying of a corruption charge[640]
- denies the Minister any discretion but to authorise the DPP to seek a superannuation order once the conditions precedent are met[641] and
- permits the suspension of rights and entitlements under a superannuation scheme pending determination of the charge and the sentencing process.[642]

20.64 To the extent that they have not already been dealt with, these differences are considered below.

Disciplinary offences

20.65 As previously noted, under both Acts a superannuation order can be made after conviction for a corruption offence or offences resulting in the imposition of a period of more than 12 months imprisonment.[643] Such orders are made by courts which, provided the statutory preconditions are met, have no discretion but must make the order sought.[644]

20.66 However, the AFP Act, Part VA, goes further and provides for statutory forfeiture once an AFP member or staff member is found guilty of a relevant disciplinary offence and is dismissed from the AFP as a penalty for that offence.[645] The finding that the offence was committed and the imposition of the penalty — or the affirmation of such a finding on appeal from decisions of the Commissioner — is made not by a court but by the AFP Disciplinary Tribunal, although in some cases an appeal on a question of law, fact or mixed law and fact lies to the Federal Court.[646]

639.AFP Act s 49.

640.AFP Act s 43(3).

641.AFP Act s 5.

642.AFP Act s 51.

643.Crimes (Super) Act s 17(1A) and AFP Act s 45(1A).

644.Crimes (Super) Act s 19(1) and AFP Act s 46(1).

645.AFP Act s 49.

646.AFP Act s 48.

20.67 Under these circumstances, all superannuation rights of, and benefits payable to or in respect of, the person or a defendant of the person cease or cease to be payable on the day on which the person's dismissal takes effect.[647]

20.68 These provisions have no counterpart in the Crimes (Super) Act.

20.69 ***The Commission's view.*** The justification for these provisions would appear to be that the AFP is a disciplined force and that conduct sufficiently prejudicial to good order and discipline so as to warrant dismissal should attract the loss of employer funded superannuation benefits. This view is reinforced by the definition of 'relevant disciplinary offence' contained in the *Australian Federal Police (Disciplinary) Regulations*, namely an offence which relates to the misuse of office, or involves misconduct or corruption.[648] Given that the AFP's own submission expresses the view that a higher standard is expected of law enforcement in order that integrity is maintained and seen to be maintained and that it is appropriate that this power be maintained, the Commission, with one exception, would not recommend any change. Nor can the Commission see any basis which, given the different nature of the AFP to the remainder of the public service, would warrant the extension of this regime to the latter.

20.70 The one exception is again the situation of genuinely innocent spouses or defendants. As in the case of superannuation orders made by courts following conviction for a corruption offence, the Commission is of the view that it should be possible to vest in such innocent parties those benefits referable to the employer funded benefit to which they would have become entitled had the member or staff member ceased being a contributor on the day of the dismissal and those benefits had been preserved.

20.71 Such parties should be notified of the statutory cessation of the rights of, or benefits payable to, the dismissed member and be entitled to seek a court order restoring their residual benefit on satisfying the court that they were not aware of, or involved in, the conduct leading to the dismissal of the AFP member or staff member.

Discretion as to whether to notify the Minister of the laying of a corruption charge

20.72 Under the AFP Act, where a member or staff member is charged with what the Commissioner considers is, or may be, a corruption offence, the Commissioner 'shall' notify the Minister of the charge and of the outcome of the disposal of the charge.[649]

647.AFP Act s 47(1).

648.reg 18A.

649.AFP Act s 43(1) and (3).

20.73 Under the Crimes (Super) Act, on the other hand, where a Commonwealth employee is charged with an offence which the relevant police commissioner (AFP, State or Territory) considers is, or may be, a corruption offence he or she 'may' notify the Minister of the charge.[650]

20.74 ***The Commission's view.*** The reason for the making of such notification discretionary in the case of the Crimes (Super) Act is not clear. It may perhaps reflect a reluctance to impose such a mandatory obligation on State and Territory police heads.

20.75 Whatever may have been the reason, the Commission can see no justification for this distinction, notwithstanding the difference in nature between the AFP and Commonwealth employment generally. It believes that the Minister, as representative of the employer in respect of whom the person has allegedly failed to fulfil his or her employment obligations, is entitled to be advised in every case, of the laying of a relevant charge.

20.76 The Commission accordingly proposes that the Crimes (Super) Act be brought into line with the AFP Act in this regard.

Discretion of the Minister to authorise the seeking of a superannuation order

20.77 Pursuant to the AFP Act, where a member or staff member is convicted of what the Minister considers is, or may be, a corruption offence, the Minister 'shall', by notice in writing authorise the DPP to apply for a superannuation order.[651]

20.78 Under the Crimes (Super) Act under the same circumstances, the Minister 'may' so notify the DPP.[652]

20.79 ***The Commission's view.*** As earlier discussed in relation to the issue of discretionary powers generally, the Commission considers, consistent with the policy underlying the scheme, that the Minister's discretion under section 16 of the Crimes (Super) Act should be removed and, thus be brought into line with Part VA of the AFP Act.

Suspension of benefits pending determination of charge

20.80 In the case of a member or staff member of the AFP, the AFP Act permits a suspension of the rights and entitlements under the relevant superannuation scheme in cases where the person is charged with a corruption offence in circumstances where, before or after the day on which he or she is charged, that person gives notice of intention to resign, resigns or is retired from the AFP and that

---

650.Crimes (Super) Act s 15(1).

651.AFP Act s 44.

652.Crimes (Super) Act s 16.

resignation or retirement takes effect on or after the day the charge is laid. That suspension is only lifted if

- the person is acquitted
- the person is convicted but sentenced to 12 months imprisonment or less
- the Minister does not authorise the application for a superannuation order
- the court does not make an order or
- a superannuation order is taken to have been revoked.[653]

20.81 There are different, but analogous, provisions in relation to a person charged with a relevant disciplinary offence under similar circumstances which are not relevant for present purposes.[654]

20.82 No similar provision is contained in the Crimes (Super) Act in relation to other Commonwealth employees, although both Acts contain restraining order provisions enabling restraint of property to the extent necessary to ensure the recovery of any benefits already paid which are payable, or are reasonably likely to be payable, as a result of the making of a superannuation order.[655]

20.83 ***The Commission's view.*** Again, the Commission cannot see any justification for the differences between the two regimes. If benefits paid are to be subsequently recovered, there would appear to be eminent sense in appropriate cases in precluding their payment at the outset thereby obviating the need for subsequent recovery which could, under some circumstances, create greater hardship. Accordingly, the Commission is of the view that the Crimes (Super) Act should be amended to permit the suspension of a person's rights and entitlements, such suspension being lifted under the same circumstances as are presently provided for under Part VA of the AFP Act.[656]

Remaining issues

Post 30 June 1999 circumstances

20.84 The Department of Finance & Administration has, in the passage from its submission set out earlier in this chapter, raised a number of issues that will arise for consideration when, as foreshadowed by the Government, the PSS scheme is closed to public servants commencing their government employment after 30June 1999.[657] Thereafter, newly appointed public servants will receive from the Commonwealth only the amount of the statutory superannuation levy applicable to

---

653.AFP Act s 51.

654.AFP Act s 52, which makes provision for the resignation or retirement of the person, after they are charged with the offence.

655.AFP Act s 49A and 49B; Crimes (Super) Act s 24 and 25.

656.AFP Act s 51.

657.Department of Finance & Administration *Submission 25*.

the Commonwealth as employer in common with all other employers. Thus the current concept of 'employer funded benefit' which lies at the heart of the Crimes (Super) Act and AFP Act regimes will not be applicable to such employees.

20.85 The Department of Finance & Administration identifies as two questions that might arise in relation to the present legislation

- whether the existing framework will be robust enough to cater for the forfeiture and recovery of Commonwealth contributions to any private sector complying superannuation fund or retirement savings account (for example, if those contributions and interest are no longer easily defined because the employee has consolidated all superannuation entitlements into one fund)
- whether the framework should provide for recovery and forfeiture of superannuation entitlements where membership of a fund is no longer linked to Commonwealth employment. For example, while conviction of a corruption offence would lead to termination of Commonwealth employment, in the new superannuation environment, this may not necessarily result in the payment of superannuation entitlements.[658]

20.86 ***The Commission's view.*** The Commission's response is two-fold.

20.87 Firstly, as the existing regimes are fashioned exclusively to deal with what is, by today's standards, an unusual and generous position of Commonwealth employees under the current superannuation schemes where the Commonwealth pays a quite separate employer funded benefit upon retirement, or death, in addition to the retirement benefit accumulated from employees contributions and interest, and those schemes will continue to operate for some considerable time to come — albeit on a gradually diminishing basis — the existing forfeiture regimes would not, in the Commission's view, lend themselves to adaptation to the distinctly different foreshadowed post 30 June 1999 circumstances.

20.88 Secondly, in the event that a policy decision were taken that any part of a new employee's superannuation entitlements should be forfeitable by reason of corruption in the course of their Commonwealth employment, a whole new range of complex considerations, not relevant in the context of the much simpler current employer benefit scheme, would need to be taken into account.

20.89 Whether such a new regime should be constructed and what its content should be are matters that the Commission sees as falling beyond its present remit. That remit, as the Commission sees it, is to consider the adequacy and operation of the current regimes in the context of employer funded benefits as presently understood.

---

[658] .ibid.

20.90 Accordingly, the Commission regards it as inappropriate to respond to the invitation of the DOFA submission that it offer views, in the post June 1999 context, on

- whether the courts should be given the power to determine how much of a superannuation entitlement (which may be more or less than the employer component of this entitlement) should be forfeited or recovered;
- whether it is reasonable for the employee to be eligible to receive his or her member contributions and interest in the event that he or she is convicted of a corruption offence resulting in imprisonment for more than 12 months;
- whether other remuneration such as accrued leave, accrued long service leave and past salary payments should be dealt with in the same manner as superannuation.[659]

20.91 That said, the Commission notes the strength of the argument that an inequity might be seen to arise if persons appointed to the Australian Public Service after 30 June 1999 who are convicted of corruption offences were not to suffer a financial disadvantage by reason of a breach of their employment obligations corresponding to the loss of employer funded benefits that could be imposed on a continuing CSS or PSS member in identical circumstances. But, on the other hand, it accepts that the post 30 June 1999 position of the other Commonwealth employees is intended to be as near as possible to that of any other employee. The general Australian workforce is not, of course, subject to loss of employer funded benefits in such circumstances.

Outsourcing

20.92 Another related issue, raised by the DOFA, concerns the more frequent 'outsourcing' of Commonwealth work. It comments that many private sector organisations are performing tasks on behalf of the Commonwealth but without the restraints of the Crimes (Super) and POC Acts. It raises the question whether the existing framework should be tightened to cater for employees of non-Commonwealth organisations where those employees have been convicted of a corruption offence in relation to any work they have done on behalf of the Commonwealth.

20.93 ***The Commission's view.*** The POC Act would apply to such employees. Section 3(1) of the Crimes Act defines 'Commonwealth Officer' as, *inter alia*, for the purposes of sections 70, 72, 73, 74 and 75, a person who, although not holding office under, or employed by, the Commonwealth, a Territory or a public authority under the Commonwealth, performs services for or on behalf of the Commonwealth, a Territory or a public authority under the Commonwealth. Those offences are

- section 70: unauthorised disclosure of information
- section 72: falsification of books or records
- section 73: corruption and bribery

---

[659] ibid.

- section 74: false returns or statements in relation to remuneration or other matters required by law to be certified and
- section 75: impersonating public officers.

20.94 All of the above offences are indictable and would attract, on conviction, the operation of the POC Act. In any event, such persons could be convicted in respect of any conduct constituting an indictable offence against the law of the Commonwealth in the same way as any other person. What is clear, however, is that such persons would not be employees within the meaning of the Crimes (Super) Act.[660]

20.95 While, again, the Commission does not see this issue as coming strictly within its remit, it notes that the Commonwealth is not a party to the employment relationship between the outsourced contractor and its staff and has no statutory liability to pay employer superannuation levy in respect of such employees.

Death prior to application

20.96 Two other issues fall for consideration. The first is the suggestion by the DPP that the legislation put beyond doubt that proceedings for a superannuation order may be instituted under the Crimes (Super) Act notwithstanding that the person convicted of the corruption offence and sentenced to the minimum required period of imprisonment died before the application for the superannuation order could be made.

20.97 ***The Commission's view.*** The Commission does not see how this proposal is consistent with the policy underlying the Acts. It is axiomatic that upon death the person will no longer enjoy any benefits under any superannuation scheme. What does remain is the 'residual benefit' for spouses or dependants and the Commission cannot see any justification for further disadvantaging them after the death of a provider. Indeed, their position would be similar to that of other innocent dependants in respect of whom the Commission has recommended that their 'residual benefits' be preserved.

Information simplification

20.98 Secondly, it remains to consider the concerns of ComSuper, set out in detail in the extract from its submission reproduced earlier in this chapter, regarding the need for a simplified process for forwarding information to the Attorney-General and the courts for superannuation order proceedings. In order to avoid the need to update benefit advice during the course of proceedings, ComSuper proposes that the legislation be amended to provide flexibility for the court to make a superannuation order in more general terms, the specific particulars of which can then be determined on the basis of updated information then provided by ComSuper.

---

660. AFP *Submission 7*.

20.99 ***The Commission's view.*** The Commission is supportive of the practical solution proposed by ComSuper.

Recommendation 77. There should be no change to the provisions of the Crimes (Superannuation) Act and Part VA of the Australian Federal Police Act requiring a court, once the conditions precedent are met, to make a superannuation order.

Recommendation 78. There should be no change, subject to Recommendation 79, to the provisions of those Acts requiring a court to make a superannuation order in relation to the totality of the employer funded superannuation benefits in respect of the convicted employee.

Recommendation 79

- The schemes established by those Acts should be modified to confer on the court a discretion to order in respect of an innocent spouse and/or dependants that there shall remain vested in them, contingent upon the corrupt employee reaching the minimum retirement age, or dying, those benefits referable to the employer funded benefit to which they would have become entitled had the employee ceased being a contributor on the day of the making of the superannuation order and the employee's benefits had been preserved.

- This should apply equally where the loss of entitlements arises from dismissal from the AFP after a finding in relation to a relevant disciplinary offence, in which case a spouse and dependants should be permitted to apply to a court for an order that those benefits are payable.

Recommendation 80. The Crimes (Superannuation) Act should be amended to remove the discretion vested in the police authority under section 15(1) and thus require that authority to notify the Minister once a person to whom the Act applies has been charged with what the authority thinks is, or may be, a corruption offence.

Recommendation 81. The Crimes (Superannuation) Act should be amended to remove the discretion currently vested in the Minister under section 16 to authorise the DPP to seek a superannuation order and thus require the Minister to authorise the DPP to seek an order once the Minister has formed the opinion that the offence is a corruption offence.

Recommendation 82

- The Crimes (Superannuation) Act should be amended to permit a

suspension of superannuation benefits in cases where, before or after the person is charged with a corruption offence, that person gives notice of intention to resign, resigns or is retired and that resignation or retirement takes effect on or after the day the charge is laid.

- The suspension should be lifted if
  - the person is acquitted
  - the person is convicted but sentenced to a term of imprisonment for 12 months or less
  - the Minister does not authorise the application for a superannuation order
  - the court does not make the order or
  - a superannuation order is taken to have been revoked.

Recommendation 83. The Commission notes the strength of the argument that an inequity might arise if persons appointed to government or police service after 30June 1999 were not to suffer a financial disadvantage by reason of their breach of relevant employment obligations commensurate to the loss of employer funded benefits that could be imposed on a continuing CSS or PSS member by reason of the current regimes but considers it beyond its terms of reference to make a recommendation on the matter. It does recommend, however, that, in the event that such inequity arises, the current regimes should be revised immediately to ensure parity of treatment.

Recommendation 84. The Crimes (Superannuation) Act should be amended to empower a court to make a superannuation order in general terms based on the amount of benefit notified to the Attorney-General for the purpose of authorising the making of the application plus any additional amount that may have accrued between the date of notification and the date of the making of the order.

21. Impact of the law on business

Additional terms of reference

21.1 On 14 April 1998, the Attorney-General, in pursuance of section 20(2) of the *Australian Law Reform Commission Act 1996,* altered the terms of reference of the Commission's inquiry by directing that the Commission also inquire into and report on the additional matter of the impact of the POC Act on business.

21.2 The Attorney-General further directed that, in performing its functions in relation to that additional matter, the Commission have regard to

(i) the requirements for legislation reviews set out in the *Competition Principles Agreement* dated 11 April 1995 between the Governments of the Commonwealth, the States, the ACT and the Northern Territory, and
(ii) the requirements for regulation assessment as outlined in the statement by the Prime Minister on 24 March 1997 entitled *More Time for Business* and the October 1997 publication *Guide to Regulation*.[661]

Background

21.3 In June 1996, in accordance with cl 5(3) of the Council of Australian Governments (COAG) Competition Principles Agreement, and pursuant to Government business policy, the Government determined a *Commonwealth Legislation Review Schedule*[662] of legislation which restricts competition and legislation which may be costly to business. The legislative review is to include consideration of the compliance costs and paper burden on small business.

21.4 In this context, the Government decided that the POC Act should be reviewed in 1998/99.

21.5 Under the altered terms of reference, the task of conducting that review has been given to the Commission.

Identification of provisions affected by legislation review

21.6 As earlier discussed, the objectives of the POC Act are directed to the recovery of proceeds and benefits derived from the commission of offences, the forfeiture of property used for, or in connection with, the commission of such offences and the facilitation of effective tracing of such proceeds, benefits and property by law enforcement authorities.

661.Office of Regulation Review.

662.Office of Regulation Review, 1996.

21.7 The legislative regime makes no distinction between crimes committed by persons who are engaged in competitive business activities and other persons. Nor does it distinguish in its confiscatory reach between property owned or controlled by persons engaged in business activities and others.

21.8 To the extent that third party interests are recognised and protected, again no distinction is made between persons engaged in business and others.

21.9 In three respects, however, the Act does single out particular business sectors for special treatment.

Recompensatory payments to GBEs

21.10 In relation to the Confiscated Assets Reserve, into which the proceeds of confiscated assets are required to be paid, provision is made in section 34C for the use of the fund for, amongst other things, making payments to a prescribed Government Business Enterprise (GBE) of any proceeds of confiscated assets that relate to a relevant offence that caused financial loss to the GBE.[663] Currently nine GBEs are prescribed under the Proceeds of Crime Regulations.[664]

21.11 While provision is also made for payment out of the Reserve by way of restitution to innocent third parties with interests in confiscated property, no person other than a prescribed GBE is entitled to be recompensed under the Act for financial loss occasioned by the relevant offence.[665]

21.12 The Commonwealth Attorney-General's Department has advised that only two GBEs have been paid amounts as recompense for financial loss. The two GBEs are the Commonwealth Bank (when it was a GBE) and Australia Post.

Record retention obligations of financial institutions

21.13 Of much broader day to day significance are the record retention obligations imposed on financial institutions by Division 4 of Part IV of the POC Act.

21.14 The term 'financial institution' is defined in section 4 to mean

(a) a bank;
(b) a building society;
(c) a credit union; or

---

[663].POC Act s 34C(1)(b)(j).

[664].POC reg 3B.

[665].POC Act s 34C(1)(a)(v).

(d) a body corporate that is, or that, if it had been incorporated in Australia, would be, a financial corporation within the meaning of paragraph 51(xx) of the Constitution.[666]

21.15 The purpose of Division 4 of Part IV is to give effect to the third of the principal objects enunciated in section 3, namely

(c) to enable law enforcement authorities effectively to trace proceeds, benefits and property.

21.16 In summary, the effect of Division 4 (which consists of only three sections — sections 76–78) is as follows

- under section 77(1) each financial institution is required to retain, for what is defined as the 'minimum retention period', the original of every 'essential customer generated financial transaction document' of the institution, that is to say every document (other than a cheque or money order) given to the institution by or on behalf of a person relating to
  - the opening or closing of an account by that person
  - the opening or use of a deposit box by a person
  - the telegraphic or electronic transfer of funds on behalf of that person
  - the overseas or foreign transmission of funds on behalf of that person
  - an application by that person for a loan[667]
- in addition, each financial institution is also required under section 77(2) to keep for the minimum retention period the original *or* a copy of every 'customer generated financial transaction document' of the institution that is not an 'essential customer generated financial transaction document', or, in other words, every financial transaction document given to the institution by or on behalf of a person that relates to the operation of an account of that person with the institution
- under section 77(3) the record retention obligations of a financial institution extend also to any financial transaction document not generated by the customer the retention of which is necessary to preserve a record of the financial transaction concerned
- by virtue of section 77(4) the obligations under section 77(2) and (3) do not, however, apply to financial transaction documents that relate to a single deposit, credit, withdrawal, debit or transfer of an amount that does not exceed $200
- the minimum retention period in relation to the above obligations is 7 years after the day on which
  - an account opened with the institution is subsequently closed

---

666 .All other provisions referring to 'a bank' have been amended to refer to 'an authorised deposit-taking institution' by the *Financial Sector Reform (Consequential Amendments) Act 1998*, No 48, 1998. The failure to so amend para (a) of the definition of 'financial institution' in s 4 appears to have been a drafting oversight.

667 .See definitions of 'customer generated financial transaction document' and 'essential customer generated financial transaction document' in s 76.

  - a deposit box opened with the institution is subsequently closed or
  - in other cases – the transaction took place[668]
- under section 77(5) each financial institution required to retain documents or copies of documents in accordance with the above obligations must 'retain' and store them in a way that makes retrieval of the documents reasonably practicable
- under section 77(6) a financial institution which contravenes any of the obligations and requirements described above is guilty of an offence punishable by a fine not exceeding $10000
- by virtue of section 78(1), a financial institution is relieved of its obligation under section 77(1) to retain an original document where otherwise required by law to release it; however, the institution is obliged in such circumstances to retain a copy and to maintain a register of any such release of an original
- contravention of the provisions of section 78 also attracts a fine not exceeding $10000.

Monitoring obligations of financial institutions

21.17 Financial institutions are also singled out for special treatment in the immediately preceding division, Division 3 of Part IV.

21.18 In particular, section 73(1) makes provision for a police officer to apply to a judge of a Supreme Court for an order (monitoring order) directing a financial institution to give information to a law enforcement authority.

21.19 Under section 73(2), a monitoring order directs a financial institution to give information to the law enforcement authority about transactions conducted through an account, or accounts, held by a particular person with the institution.[669]

21.20 Section 73(4) requires that the judge be satisfied that there are reasonable grounds for suspecting that the person in respect of whose account the information is sought has committed, or is about to commit, a 'serious offence', was involved in the commission of, or is about to be involved in the commission of, such an offence, or has benefited directly or indirectly, or is about to benefit directly or indirectly, from the commission of such an offence.

21.21 Under section 73(7), a financial institution which knowingly contravenes a monitoring order or provides false or misleading information in purported compliance with such an order is guilty of an offence punishable by a fine not exceeding $100000.

668.See definition of 'minimum retention period' in s 76.

669.An order applies to relevant transactions conducted during the not more than three month period specified in the order commencing not earlier than the day on which notice of the order is given to the institution s 73(3).

Impact on competition

Recompensatory payments to GBEs

21.22 Section 34C is located in Part IIA of the POC Act, having been inserted in the Act by the *Proceeds of Crime Legislation Amendment Act 1991*.

21.23 Section 34C(1)(b) makes provision for 'distributable funds' in the Confiscated Assets Reserve to be used for one purpose, namely

> making payments to a GBE of any proceeds of confiscated assets that relate to a relevant offence that caused financial loss to the GBE.

21.24 The term 'relevant offence' is defined in section 34C(2) to mean

> an offence under section 29A, 29B, 29C, 29D, 71, 86, and 86A of the *Crimes Act 1914* or a prescribed offence.

21.25 No offences have been prescribed for the purposes of this definition.

21.26 No mention was made in the 'General Outline' of the policy reason for recompensing GBEs for losses.[670] However, that part of the Explanatory Memorandum which refers specifically to section 34C describes the purpose of the GBE recompense provision as follows

> Apart from ... payments [from 'suspended funds'], other money which is identified as distributable funds as defined will be available for payment under proposed section34D or for the reimbursement of a GBE under proposed sub-paragraph34C(1)(b)(i) [now 34c(1)(b)]. It will be possible to reimburse a GBE where the recovery stems from certain criminal offences which caused financial loss to the GBE. For example, if an amount is recovered under the Principal Act as a result of fraud upon Australia Post, it will be possible to reimburse Australia Post to the extent of the amount recovered or the amount of the loss, whichever is the lesser. This will apply where the criminal offence from which the confiscation of property is derived is a 'relevant offence' as defined.[671]

21.27 While the policy reasoning behind the preferential treatment of GBEs is not apparent from these sources, it is, as already observed in chapter 14[672] likely to have arisen from one, or a combination of both, of two considerations. The first is that, in the same way that the Commonwealth may receive recompense through the confiscation provisions of the proceeds of crimes of which it is the victim, GBEs should be similarly recompensed because their losses translate into Commonwealth

---

670.*Proceeds of Crime Legislation Amendment Act 1991* Explanatory Memorandum, 3.

671.*Proceeds of Crime Legislation Amendment Act 1991* Explanatory Memorandum s 34C.

672.ch 14, para 17 and 18.

losses in the sense that they may reduce the level of dividends payable to the Commonwealth.

21.28 The second possible consideration is that the availability of access to the Reserve might encourage GBEs to adopt aggressive prosecution policies with a view to obtaining recompense through proceeds rather than take the alternative civil debt recovery route which does not have the law enforcement benefit for the Commonwealth that prosecution of wrongdoers offers.

21.29 ***The Commission's view.*** On the basis of this analysis, the question arises whether the effect of section 34C(1)(b)(i) is to provide a competitive advantage to a GBE that is not enjoyed by its competitors. The fact that only two GBEs have received distributions suggests to the Commission that, in practice at least, any competitive impact is likely to be negligible, unless it could be demonstrated, for example, that the right of access itself to recompense from the Reserve has enabled any prescribed GBE to make lower provision for losses than competitors, with consequent competitive cost advantages.

21.30 On the other hand, some GBEs might perhaps argue that the right to such recompense offsets the disadvantages they suffer in being unable, because of general community service provider obligations, to have the same scope as their private competitors to discriminate between customers on the basis of their credit or character worthiness.

21.31 In chapter 14, the Commission recommends that recovered proceeds should be applied in satisfaction of all victim reparation orders in respect of the relevant offence and that the preferred position of GBEs should accordingly be abolished. If these recommendations are accepted, the effect would be to render the question of competitive advantage redundant.

Record retention obligations of financial institutions

21.32 The obligations imposed on financial institutions by Division 4 of Part IV apply without exception or discrimination to every 'financial institution' as defined in section 4 of the Act.

21.33 ***The Commission's view.*** Given that the term includes all authorised deposit-taking institutions ie banks, building societies, credit unions and financial corporations within the meaning of section 51(xx) of the Constitution and foreign corporations that, if incorporated in Australia, would be financial corporations, the obligations would not on their face appear to provide any competitive advantages to one such class as against another or to individual financial institutions as against other financial institutions whether in the same or another class.

21.34 This is not to deny that some competitive advantages may accrue in a manner that is not immediately apparent on the face of the legislation or has not yet been brought to the Commission's attention; such, for example, as if compliance

costs were able to be shown to be disproportionately higher for smaller/larger institutions.

21.35 The observation has been made by the ABA in its submission that a reduction from seven years to five years in the statutory document retention period prescribed by section 76

> will result in conformity with the requirements faced by most of the finance industry's overseas competitors.

21.36 In this connection, the Commission notes that the majority of countries represented on the OECD Financial Action Task Force (FATF) comply with the FATF recommendation that the retention period be five years. Exceptions are Italy and Portugal which have a 10 year period and Australia with seven.

21.37 While the seven year rule may place banks with a local business concentration at a cost disadvantage compared to banks with a lesser such concentration, this is unlikely to have a significant impact on international competitors.

21.38 The Commission notes that, if its recommendation later in this chapter that the appropriateness of the seven year retention period be one of the matters to be examined by a working party of experts and stakeholder representatives, any competition issues could be further considered in that context.[673]

Monitoring obligations of financial institutions

21.39 In contrast with the record keeping obligations imposed by Division 4 of Part IV, the monitoring order obligations of Division 3 apply to a financial institution only where a Supreme Court has so ordered in respect of a particular account and, then, only for the duration of the order (a maximum of three months).

21.40 In short, Division 3 obligations are *ad hoc*, limited to specific accounts and are relatively short in duration.

21.41 ***The Commission's view.*** Given these considerations, the Commission has difficulty in envisaging that the provisions could be said to operate so as to provide a competitive advantage as between individual financial institutions as defined or between classes of such financial institutions. None has been suggested to the Commission in the course of consultations.

Costs to business, including compliance costs and paper burden on small businesses

---

[673] .rec 90.

Recompensatory payments to GBEs

21.42 ***The Commission's view.*** While the effect of section 34C (1)(b)(i) is to allow prescribed GBEs access to 'distributable funds' in the Reserve that is not enjoyed by private enterprise businesses that may suffer loss as the result of one of the specified kinds of offences under the Crimes Act, the placing of GBEs in that special position would not seem, of itself, to be a cost to business.

21.43 In particular, it is difficult to envisage how it could be said to involve the imposition of any compliance costs and paper burdens on small businesses.

Identifying issues relating to record retention obligations of financial institutions

21.44 Subject to further advice and consultations, it is the Commission's understanding that the institutions upon which the obligations of Division 4 of Part-IV fall are generally large or medium sized businesses. They are in the main large businesses, such as banks, building societies, credit unions and finance companies.

21.45 The need for reform of the record retention provisions has been raised in three submissions received by the Commission.

21.46 These are submissions from

- ABA[674]
- AFC[675]
- AFP[676]

21.47 The particular issues raised for consideration are as follows

- whether the document retention obligations of the POC Act should be transferred to, and integrated and harmonised with, the record retention provisions of the FTR Act
- whether the definition of 'customer generated financial transactions document' in section 76 takes proper account of recent innovations in doing business and, in particular, doing business electronically
- whether
  - existing requirements of the POC Act for the retention of documents in original form are justifiable
  - copies of documents should be able to be maintained electronically
- whether
  - the minimum retention period for documents, the originals or copies of which are required to be retained under the POC Act, should be reduced, and, in particular, be reduced from seven years to five years

---

674.ABA *Submission 13*.

675.AFC *Submission 28*.

676.AFP *Submission 7*.

  - the minimum retention period for such of those documents as relate to the opening of an account should commence from the date of the opening of the account rather than the date on which the account is closed
- whether the exception in the POC Act relating to a financial transaction document that concerns a single deposit, credit, withdrawal, debit or transfer of an amount not exceeding $200 should be broadened.

21.48 The Commission notes that, while the submissions from each of the AFC[677] and the ABA[678] raise a number of concerns with the document retention provisions of Division 4 of Part IV of the POC Act, neither questions the need in principle for record retention measures. Indeed, the AFC has observed in the course of consultations that its member companies have a fundamental commercial interest in proper document (in the broadest sense) creation, transaction recording, storage and retrieval in support of efficient business operations. For its part, the AFP is firmly committed to such measures

> The AFP contends that documentation, electronic or otherwise, is essential as evidence of the laundering of proceeds of crime.[679]

Integration of record keeping obligations under POC Act with record keeping obligations under FTR Act

21.49 The issue for consideration is whether it is appropriate that two differently framed sets of related document retention and record keeping obligations, both of whose purpose is to facilitate the maintenance of a paper trail and intelligence information for law enforcement and proceeds recovery, should be contained in separate pieces of legislation.

21.50 In its submission to the Commission, the AFC suggests that

> There would appear to be value in having consistent rules for document retention across all legislation, regardless of jurisdiction. Not only would implementation be easier for financial institutions, but there may be consequent advantages for law enforcement authorities in terms of improved access to documents.[680]

21.51 More specifically, the AFC asks

> whether it may be appropriate to have matters of record retention dealt with in the *Financial Transaction Reports Act* given that AUSTRAC is the information

---

677.AFC *Submission 28*.

678.ABA *Submission 13*.

679.AFP *Submission 7*.

680.AFC *Submission 28*.

> interface and conduit between financial institutions and law enforcement agencies.[681]

21.52 The AFC goes on later in its submission to respond to this question in the following terms

> Issues of document retention for the purposes of criminal investigations and prosecutions are more appropriately dealt with in the context of financial transactions reporting and evidence laws. It is not necessary to deal with these issues within the proceeds of crime legislation as to do so increases the complexity of the law and confuses business as to their responsibilities in this area. This results in additional business administration and costs.[682]

21.53 In its submission, the ABA also places emphasis on the relationship between the POC Act and FTR Act. It observes that

> the Financial Transaction Reports Act 1988 and Proceeds of Crime Act 1987 constitute the regime for the monitoring and tracking the proceeds of serious crime.[683]

21.54 After noting the differences between the record retention requirements of the two Acts, the ABA continues

> The compliance inconsistencies between these two pieces of legislation, that are supposedly part of an anti-crime legislative package, forces financial institutions to maintain, at significant cost, a range of documents for varying periods of time. This Association considers that it would be useful for the Inquiry as part of its review to look at these significant cost impacts on the business community. There is a need to make the anti-crime legislative package both internally consistent and more effective. The present structure means financial institutions face compliance costs much higher than necessary. These compliance inconsistencies also mean that customers of financial institutions are also subjected to higher than necessary costs of conducting their banking business.[684]

21.55 The ABA accordingly recommends

> That the document retention requirements under the Proceeds of Crime Act 1987, should be consistent with the Financial Transaction Reports Act 1988 and related legislation.[685]

681.ibid.

682.ibid.

683.ABA *Submission 13*.

684.ibid.

685.ibid.

21.56 The Commission understands from consultations over the course of the reference that there is a range of opinions on this question within the AFP.

21.57 As already discussed, the document retention obligations of Division 4 of Part IV of the POC Act apply only to 'financial institutions' as defined. By contrast, the principal record retention provision of general application (s 23) of the FTR Act applies to 'cash dealers' as defined in that Act.[686]

21.58 The expression 'cash dealer', while defined to include each of the kinds of institutions included in the definition of 'financial institution' in the POC Act, extends well beyond such institutions to include persons such as insurers, securities dealers, unit trust managers and trustees, bullion dealers and currency dealers.[687]

21.59 The effect of section 23 of the FTR Act on cash dealers that are also financial institutions to which the obligations of Division 4 of Part IV of the POC Act apply is to require each such institution to retain, for seven years after the closure of each account opened with it, a record of 'any information' made or obtained by the institution

> in the course of obtaining account information or signatory information (section 23 (1))

21.60 The precise scope of the operation of the section 23(1) record retention obligations is ascertained by reference to detailed definitions of the terms 'account', 'account information' and 'signatory information' in section 3 of the FTR Act.

21.61 In its submission, the AFC has asserted that the POC Act

> in large measure duplicates the document retention requirements of the Financial Transactions Reports Act.[688]

21.62 Additionally, the AFC observes that

> Variation in the description of documents in the legislation (dealing with retention of records of financial transactions) is a constant cause for confusion for those seeking to implement the law.[689]

21.63 ***The Commission's view.*** The first matter that falls for consideration is whether the criticism that the document/record retention provisions of the POC Act and FTR Act are inconsistent is well founded.

686.FTR Act s 3.

687.FTR Act s 3.

688.AFC *Submission 28*.

689.ibid.

21.64 For this purpose it is necessary to consider the precise nature and purposes of the relevant obligations imposed on financial institutions by section 77 of the POC Act and section 23 of the FTR Act.

21.65 A comparative examination of the provisions reveals that, whereas section77 of the POC Act imposes obligations to retain the originals or copies (in the case of non 'essential' customer generated financial transaction documents) of *documents generated by customers*, the obligations imposed by section 23 of the FTR Act are to retain the originals or copies of *records made or obtained by the financial institutions*, being records of information made or obtained by them in the course of obtaining 'account information' or 'signatory information'.

21.66 This distinction suggests that the POC Act section 77 obligations are intended to ensure that customer generated documents are retained for *both* investigative *and* evidentiary purposes while FTR Act section 23 obligations are intended to achieve the former purpose only.

21.67 In the Commission's view, the above analysis demonstrates that, as a strict matter of law, no inconsistency exists between the two sets of obligations. However, whether there is 'inconsistency' in the broader sense that the requirements are to some extent duplicative is another matter.

21.68 In the latter connection, there seems little doubt that, while there is no duplication in relation to the documents/records that are required to be retained under each regime, the *information* contained in such documents/records relating, for example, to the establishment of particular accounts, will often involve duplication.

21.69 For instance: if customer A opens an account with financial institution B, documents generated by A in opening that account, and required by B to be retained under section 77 of the POC Act, will often contain a good deal of the same information that B 'makes or obtains a record of ... in the course of obtaining account information or signatory information', being a record that B is required to retain under section 23 of the FTR Act.

21.70 This duplication, and the resultant sense of inconsistency that it engenders, is compounded by the fact that in the one case the information is required to be kept in original document form whereas in the other it can be retained in convenient electronic form.

21.71 While it may be strictly open to financial institutions to ameliorate such duplication by eliminating from essential customer generated financial transaction documents, to the fullest extent possible, information that it is required to record and retain under the FTR Act, commercial reality dictates that many will maximise the opportunity provided by the generation of 'essential' documents to obtain information that will serve a range of needs including those under the FTR Act.

21.72 Not unnaturally, given the costs involved in document/record retention, financial institutions are concerned whether the cost of maintaining documents/records under both Acts recording substantial amounts of identical information is justified. It is apparent from submissions noted above that this concern is compounded by the complexity of, and differences between, the terminology and legislative contexts in which the two sets of obligations occur and the resultant implications for compliance costs.

21.73 For these reasons, and given that both sets of provisions are generally perceived as sharing a common objective of aiding law enforcement, it is entirely understandable that submitters should encourage the Commission to consider whether the two sets of provisions might be rationalised and brought together into a single integrated whole within the FTR Act.

21.74 While the Commission has considerable sympathy with those concerns, it is not convinced that the answer lies in seeking to incorporate the provisions of Division 4 of Part IV of the POC Act into Part III of the FTR Act. Bearing in mind in particular that one of the key purposes of Division 4 of Part IV of the POC Act is to ensure the preservation of documentation for evidentiary purposes, the Commission has considerable reservations whether such provisions would sit appropriately or comfortably with provisions (s 23 of the FTR Act) whose purpose is solely to ensure the preservation of a financial institution's own information for investigative/intelligence purposes.

21.75 That said, the Commission is nevertheless satisfied that there is scope for action on two fronts to seek to relieve financial institutions of some of the compliance costs and operational uncertainties associated with the need to comply with what are clearly related obligations under section 77 of the POC Act and section 23 of the FTR Act.

21.76 First, the Commission is of the opinion that the provisions of Divisions 4 of Part IV of the POC Act and Part III of the FTR Act should together be reviewed, in close consultation with relevant peak bodies representing financial institutions, to determine the extent to which their respective document/record retention obligations may be synthesised and harmonised so as to minimize their regulatory impact on those institutions, while doing so in a way that does not do violence to the purposes for which the two sets of obligations have come into being.

21.77 In November 1993, in a report entitled 'Checking the Cash', the Senate Standing Committee on Legal and Constitutional Affairs recommended that the FTR Act be further reviewed. It is the Commission's understanding that consideration is being given to the nature and timing of that review. The Commission suggests that the review it proposes might conveniently be undertaken in the context of that wider review of the FTR Act.

21.78 The second area in which the Commission sees scope for action relates to the difficulties and uncertainties that financial institutions face in seeking to comply

with their obligations under Division 4 of Part IV of the POC Act, and in particular, in determining which documentation falls within the definitions of 'essential customer generated financial transaction document' and 'customer generated financial transaction document'.

21.79 The Commission notes in this regard that, by virtue of section 38(1)(e) of the FTR Act, one of the functions of the Director of AUSTRAC is

> to issue guidelines to cash dealers about their obligations under this Act and the regulations.

21.80 By contrast, the POC Act makes no mention of the provision of such guidance to financial institutions in relation to compliance with Division 4 of PartIV of that Act.

21.81 There seems little doubt that, in the same way that cash dealers (including financial institutions) benefit from guidance provided by AUSTRAC pursuant to section 38(1)(e) of the FTR Act, financial institutions would benefit significantly from similar assistance in relation to their document retention obligations under Division 4 of Part IV of the POC Act. Thus the express conferment under the latter Act of an obligation on the Attorney-General, or an appropriate agency, to provide guidance similar to that provided under section 38(1)(e) of the FTR Act by AUSTRAC would seem highly desirable.

21.82 Moreover, if such a provision were to be included in the POC Act, it, and section 38(1)(e) of the FTR Act, might usefully be complemented by a statutory requirement that the guideline issuing authorities confer and collaborate for the purpose of minimising the regulatory impact, and associated compliance costs, on financial institutions of both sets of provisions.

21.83 In the course of discussions with stakeholders, the suggestion has also been offered to the Commission that the provisions of Division 4 of Part IV of the POC Act might more appropriately be located in the Crimes Act, particularly in view of their relevance to a much wider range of proceedings than those under the POC Act itself. The Commission commends this suggestion for consideration by the Government in the course of its ongoing review of the Commonwealth criminal law.

Recommendation 85

- Division 4 of Part IV of the POC Act and Part III of the FTR Act should be reviewed, in consultation with relevant peak bodies, to determine the extent to which their respective document and record retention obligations might be synthesised and harmonized so as to minimise their regulatory impact on financial institutions.

- Such review might conveniently be undertaken in the context of

the review of the FTR Act recommended in 1993 by the Senate Standing Committee on Legal and Constitutional Affairs in its report entitled 'Checking the Cash'.

Recommendation 86

- The POC Act should require the Attorney-General or an appropriate agency to provide guidance to financial institutions about their obligations under that Act analogous to that provided by AUSTRAC to cash dealers pursuant to section 38(1)(e) of the FTR Act in relation to their obligations under that Act.

- Such provisions might usefully be complemented by a statutory requirement that the guideline issuing authorities under each of those Acts confer and collaborate for the purpose of minimising the regulatory impact, and associated compliance costs, of both sets of provisions on financial institutions.

Recommendation 87. Consideration should be given by the Attorney-General in the course of the ongoing review of Commonwealth criminal law to the appropriateness of removing the provisions of Division 4 of Part IV of the POC Act to the *Crimes Act 1914* (Cth).

Whether definition of 'customer generated financial transaction document' takes proper account of business innovations

21.84 Several submissions question whether the pivotal definition of 'customer generated financial transaction document' in section 76 of the POC Act takes proper account of recent innovations in doing business and, in particular, doing business electronically.

21.85 The AFC, in its submission, comments that

> In the case of the Proceeds of Crime Act, there is ...concern that the primary definition of 'customer generated financial transaction document' is in fact wide enough to capture modern methods of doing business.[690]

21.86 In this regard, the AFC recommends that

> The storage of documents by electronic means should be permitted as an acceptable alternative to paper storage so long as the information and method of storage can be readily retrieved and identified.[691]

---

[690] .ibid.

[691] .ibid.

21.87 ***The Commission's view.*** When the POC Act was enacted in 1987, customer generated electronic transactions were, at the retail level at least, limited in the main to the use of automatic teller machines (ATMs) for routine account transactions.

21.88 Thus it is not unlikely that the legislature's mind, in enacting the provisions of Division 4 of Part IV, was focussed on the hard copy forms that characterised customer generated financial transaction documents of that time.

21.89 That is not to say, however, that the provisions are incapable of applying to more recently developed transactions generated by customers entirely in electronic form. In this regard, the Commission notes the definition of 'document' is defined in section 25 of the *Acts Interpretation Act 1901*. That definition is as follows

> In any Act, unless the contrary intention appears:
>
> "document" includes:
>
> (a) any paper or other material on which there is writing;
> (b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and
> (c) any article or material from which sounds, images or markings are capable of being reproduced with or without the aid of any other article or device.

21.90 Notwithstanding that the legislature may have had hard copy documents in mind when the POC Act was enacted, Division 4 of Part IV clearly falls well short of manifesting a legislative intention to exclude the wide definition of 'document' in section 25 of the Acts Interpretation Act. Applying that definition to financial transactions generated by customers exclusively by electronic means, the Commission's view is that Part 4 of Division IV does, as a matter of law, already apply to such customer generated transactions. Under that definition, the customer's electronic message when received within the financial institution's data base would form part of the institution's own 'document', that is the data base. It would also constitute a 'document' in itself since the customer's message would, in terms of section 25(c) of the Acts Interpretation Act, constitute a discrete aggregation of 'material' (eg digital information) 'from which sounds, images or writings' (ie the customer's instruction/authorization) are 'capable of being reproduced with ... the aid of any article or device' (ie by the institution's computer).

21.91 It follows, in the Commission's view, that financial institutions are already bound by section 77 to retain (ie file) all customer generated electronic instructions and authorizations that relate to matters described in paragraphs (a)(i) and (iii) to (vi) of the definition of 'customer generated financial transaction document' (iethose matters that render a document an 'essential customer generated financial transaction document') and maintain at least copies of those electronic instructions and messages that relate to the matter described in paragraph (a)(ii) of that definition (the operation by a person of an account with an institution), being

customer generated financial transaction documents that are not 'essential' and therefore able to be kept in copy form under section 77(2).

21.92 That said, the critical importance of the obligations imposed by Division 4 of Part IV, together with the need (already discussed above[692]) for institutions to be provided with further guidance regarding the impact of these obligations on them, points strongly, in the view of the Commission, to the need for the provisions to be further elaborated legislatively to make explicit their effect in relation to financial transactions generated by customers by electronic means. Moreover, the above cited concerns of AFC indicate that, at least amongst its membership, there are concerns about how Division 4 impacts in a practical sense on electronic transactions.

21.93 Having regard to the advantages that original and facsimile copy documents are said to provide in providing the true identities of the originators of customer generated financial transactions (see discussion later in this chapter in relation to the obligation to retain originals of 'essential' documents), the Commission notes that the legislative elaboration it proposes would have the added advantage of affording an opportunity to ensure that such data as electronic signatures are preserved as part of electronically generated documents.

21.94 Additionally, the provisions should be so framed as to ensure that the contents of financial transaction documents that are generated electronically by customers are capable of ready proof in proceedings to which the *Evidence Act 1995* (Cth) applies. These provisions are discussed in the next succeeding section of the chapter.

Recommendation 88

- The provisions of Division 4 of Part IV of the POC Act should be expanded and elaborated to make explicit their scope of operation and effect in relation to financial transaction documents generated electronically by customers.
- Consideration should be given in devising such provisions to ensuring that electronic data, such as electronic signatures, considered to have particular investigative or evidentiary significance is retained as part of the record.
- The expanded and elaborated provisions should be cast to ensure that the contents of financial transaction documents that are generated electronically by customers are capable of ready proof in proceedings to which the Evidence Act (Cth) applies.

---

692. Under the heading 'Integration of record keeping obligations under the POC Act with record keeping obligations under the FTR Act'.

Requirements relating to retention of original documents

21.95 The issue is whether, in the light of experience under the POC Act, advances in technology and reforms to evidence laws, the obligations under section 77(1) of the POC Act to retain in original form essential customer generated financial transaction documents is necessary or justified.

21.96 These matters are addressed by the ABA and FCA, respectively, in their submissions in the following terms

> **ABA**
>
> The banking industry questions whether the current retention requirements, particularly in relation to record media, are appropriate in this current rapidly changing environment. There is a need to clearly define 'original' and 'copy' documents. There is also an urgent need for greater recognition and acceptance by law enforcement agencies of electronic records. The creation, storage and retrieval of records electronically not only saves costs for financial institutions and information seeking bodies, it also results in the accurate and timely retrieval of records. Obviously, there is a need to achieve the appropriate balance between acceptability for evidentiary purposes and the reduction of cost impacts relating to document retention. At the end of the day these costs are borne by the whole community. Initially at least these costs fall heavily on financial institutions because of the central role played by these organisations. It is noted that various state Evidence Acts allow the use of electronic documentation but as mentioned earlier the Proceeds of Crime Act 1987 still requires in specific circumstances the retention and, where directed, the production of original documentation.
>
> The viewpoint of the banking industry is that the development in computer and other technology has resulted in the need for the regulatory bodies to adopt new approaches in tracking money trails. More than fifty per cent of transactions at the consumer end of the financial markets are paperless. A person's signature is frequently now a combination of a piece of plastic and a Personal Identification Number. Financial and other transactions at the corporate end of the market are increasingly moving to paperless transactions via the use of Electronic Data Interchange (EDI), the Internet and proprietary systems. The process of Electronic Commerce is supported by both the Commonwealth and State governments. Traditional forensic evidence using documents such as original vouchers related to a series of transactions that may be associated with fraudulent or other criminal activity, may no longer be available to the law enforcement agencies. These having been replaced by paperless electronic transactions. The word 'copy' itself is open to wide interpretation and it would be beneficial for the word to be legislatively clarified. Obviously these changes have significant impact on the ability of law enforcement bodies to identify and respond to criminal activity.[693]
>
> AFC

693.ABA *Submission 13*.

> Improvements in records management are being sought by financial institutions. The objective is to improve business efficiency and reduce business costs. Technological advances now allow large amounts of information to be stored in compressed form. However, the acceptance of electronically stored information for use as evidence in legal proceedings is now widely accepted. Financial institutions would like the flexibility to keep documents in a form that best suits their organisational needs. This could vary according to the size and structure of the organisation. Small financial institutions may wish to keep records in paper form. Larger organisations may consider digital imaging more appropriate. In any event consideration should be given to making allowance for the use of other forms of record retention to accommodate future technological advances in this area.[694]

21.97 At the time of introduction of the *Proceeds of Crime Bill 1987*, the then Attorney-General, the Hon Lionel Bowen, MP, in his Second Reading speech described the need for the record retention provisions of Division 4 of Part IV in the following terms

> As part of the process of enabling law enforcement agencies to follow the money trail and to assist in the investigation of tax evasion offences, the legislation places a statutory obligation on financial institutions to retain certain records. Records which relate to the opening of accounts must be retained in original form for 7 years after closure of the relevant account and all other documents necessary to reconstruct transactions in excess of $200 must be retained for a period of 7 years after the transaction in original or some other form, including micro-fiche. Consultation has taken place with financial institutions in relation to these matters.[695]

21.98 Clearly, the provisions were also intended to facilitate proof of the matters to which they relate in proceedings instituted as a result of such tracing and investigation.

21.99 The Explanatory Memorandum accompanying the Bill merely describes the effect of the provisions, not their policy underpinning. In particular it adds nothing to an understanding of the then government's intention in requiring, in section77(1), that 'essential customer generated financial transaction documents' be retained in original form while requiring, in section 77(2) and (3), that financial transaction documents relating to account transactions be retained in either original or copy form.

21.100 The specific terms of section 77(1), together with the above cited passage from the Second Reading speech, leave room, however, for only one conclusion: namely, that documents relating to the opening and closing of accounts and deposit boxes, the transmission of funds internationally and the making of loans (paras (i), (iii), (iv), (v) and (vi) of the definition of 'customer generated financial transaction

---

694.AFC *Submission 28*.

695.*Hansard (H of R)* 30 April 1987, 2316.

document') were considered to be of a significantly higher value for investigative and evidentiary purposes than account transaction documents.

21.101 Considerations such as handwriting, signature comparison and fingerprinting are understood to have accounted for the distinction.

21.102 The AFC and ABA in their submissions and, in the case of the ABA, post-submission consultations also, have challenged the need for essential customer generated financial transaction documents to be retained in original form on several interrelated bases.[696]

21.103 Firstly, they have asserted that the experience of their members is that in fact very few requests are ever made by law enforcement agencies for POC Act documents. In this regard the AFC submission refers to a brief questionnaire that it circulated to its members as part of an AUSTRAC review of the impact of the FTR Act in document retention and retrieval processes of cash dealers. Two of the points drawn from the responses of 16 members were that

1. Most AFC members have not been approached by law enforcement agencies to provide information under the Financial Transactions Reports Act or the Proceeds of Crime Act.

2. Original documents are requested occasionally, usually by State law enforcement agencies.[697]

21.104 In the course of discussions with the ABA, that organisation has indicated that, in common with the AFC, anecdotal evidence from its members suggests that only rarely are documents sought from its members. The point has also been made that it is incumbent upon those who assert that originals have some forensic advantages not enjoyed by copies to provide practical evidence to support their position.

21.105 Secondly, the ABA and AFC have suggested that, in cost benefit terms, the considerable cost of storing POC Act documents cannot, in any event, be justified for such low levels of use. The ABA has indicated in the course of consultations that storage and retrieval costs of the banking industry in relation to both its POC Act and FTR Act obligations exceed $30 million annually.

21.106 In its submission, the AFC has stated that

> Annual storage costs vary considerably from organisation to organisation depending on organisational size and cost anywhere from $25,000 to $250,000.[698]

696.AFC *Submission 28*; ABA *Submission 13*.

697.AFC *Submission 28*.

698.ibid.

21.107 These estimates are understood to relate to compliance with both POC Act and FTR Act retention requirements.

21.108 The AFC also makes the point that, where there is a need to keep the originals of some documents and copies only of others, businesses may opt to store all in original form. The relevant passage from the AFC submission reads

> It is our members' experience that few requests are actually made for original documents. There are also additional costs associated with the storage of original documents, primarily because they require more storage space and storage maintenance. Further, the ability to store some documents in copy form, but not others, does not improve business efficiency or create opportunities for cost savings. Different rules for different documents such as occurs under the *Proceeds of Crime Act* (Cth) actually reduces flexibility. It forces business, in the interests of reducing compliance risk, to take the line of least resistance and opt to store all documents in original form.[699]

21.109 Thirdly, these submitters place considerable emphasis on the strong, and increasing, trend towards replacement of previously hard copy transactions with paperless electronic transactions and the need for financial institutions to keep documents and records in a manner that suits this new environment and their organisational requirements. Reference is also made in this regard to the fact that, in conjunction with the movement towards electronic commerce, evidence laws, including the Evidence Act (Cth), enable proof of the contents of electronically filed or copied documents without the need for expensive hard copy duplication.

21.110 Given considerations such as these, the AFC and ABA question why the document retention requirements of the POC Act should not be able to be satisfied by the maintenance of electronic records, including electronic records of documents that may have been generated by customers in hard copy form.[700]

21.111 Positions contrary in one or more respects to those of the ABA and AFC have been put to the Commission by AUSTRAC, the DPP and the AFP in the course of submissions or post submission consultations.[701]

21.112 AUSTRAC's comments are limited to responding to the AFC member feedback that it is rare for requests to be made for information retained under the FTR Act. AUSTRAC has indicated that this is neither its experience nor that of law enforcement agencies and that requests are frequently made of cash dealers under section 16(4) of the FTR Act for information that may include information required to be retained under section 23 of that Act. AUSTRAC suggests that the secrecy requirements in sub-sections (5A) and following of section 16 in relation to

---

699.ibid.

700.AFC *Submission 28*; ABA *Submission 13*.

701.AFP *Submission 7* and DPP in the course of post-submission consultations.

information so provided may account for what it sees as an error on the part of AFC.[702]

21.113 The Commission notes, in this regard, that AUSTRAC's objections relate the AFC assertions about access to FTR Act retained information and not to POC Act retained documents.

21.114 During the course of consultations, the AFP has similarly questioned the accuracy of the AFC assertion as it may relate to requests under section 16 of the FTR Act.

21.115 The focus of the DPP's views, on the other hand, has been on the importance of original documents in proving matters of identity.[703] The DPP has emphasised, by way of example, that if the prosecution needs to show that a defendant owned or operated an account at a particular bank, it is not enough to show that the bank holds an account in the name of the defendant. In particular, the prosecution will need to be able to provide evidence that excludes the possibility that the account belongs to a person with the same name as the defendant or that it is operated by someone using the defendant's name for their own purposes. According to the DPP, the best, and often the only way, of showing a connection between a defendant and a relevant account is to produce banking documents which carry the signature or handwriting of the defendant.[704]

21.116 In support of his view the DPP has provided the following two illustrative case studies

- Prosecution of C

> This is a complex fraud prosecution currently at the committal stage in the ACT. The defendant is alleged to have improperly obtained approximately $4 million by misapplying money that his company held on trust. The case requires the proof of hundreds of separate transactions carried out over a three year period in Australia, the USA and other countries, and proving that the defendant conducted them. The defence strategy to date has been to put every fact in issue.
>
> Fortunately, the prosecution holds most of the original banking documents that are relevant to the case and a significant number of those documents bear the defendant's signature or handwriting. Even so, it is estimated that a trial will last for at least four months. It is not possible to say whether there would be a case without the original banking documents or, if so, how long it would take to present.

---

[702].Comments received in the course of consultations.

[703].It is noted that, in post-submission consultations, the DPP has expressed surprise at the ABA assertion that only rarely are financial transaction documents sought from its members. The DPP cites in response the significant number of mutual assistance requests from foreign countries that require access to such documents.

[704].Views expressed during the course of oral consultations.

> Our experience in this case illustrates that financial institutions in the US and New Zealand still preserve records, at least in the form of microfiche.
>
> • Extradition of Mr and Mrs M
>
> This case involved an extradition request from the UK. Mr and Mrs M ran up substantial debts, including credit card debts, in the UK in the months before they migrated to Australia. They used a false name and it was alleged that they had no intention of repaying the debts. Mr M made some admissions to police, although he claimed that he intended to repay the debts. Mrs M made no relevant admissions.
>
> The extradition brief included copies of numerous banking documents, including account statements, account application forms and cheques. Many of those documents showed Mrs M's assumed name and many bore her signature in that name. However, the extradition brief did not include any material admissible against Mrs M that identified her signature or handwriting. The DPP advised the Attorney-General's Department that the extradition brief did not satisfy the *prima facie* evidence test in respect of Mrs M.
>
> In the case involving Mr and Mrs M, the UK authorities were able to provide customer generated documents for most of the UK accounts. There may not have been a *prima facie* case against either fugitive if all they had was computer generated histories of the accounts.[705]

21.117 The DPP goes on to suggest that the problems in this area cannot be resolved by changing the laws of evidence because the issue illustrated by these studies does not turn on whether the records, if translated in electronic form, would be admissible but rather on the weight that could be given to such electronic records if admitted to evidence.[706]

21.118 At the same time, the DPP concedes the need to seek some kind of balanced accommodation with the concerns and needs of the banking and financial community and for such accommodation to recognise the significant advantages for financial institutions in being able to translate hard copy customer generated financial transaction documents of all kinds into digitally stored data capable of electronically reproducing the information in the documents. Implicit in this concession is an apparent recognition of concerns about the questionable proportionality between the cost of retaining originals of hard copy essential documents (where electronic storage and reproduction of the data by the institution would be possible) and the number of cases in which, as in the above case studies, access to original documents is pivotal in proving an association of a defendant with a series of transactions.[707]

---

[705].Correspondence dated 18/1/99 received pursuant to consultations.

[706].ibid.

[707].Correspondence dated 27/11/98 received pursuant to consultations.

21.119 The DPP suggests that a practical compromise solution might lie in amending the requirements of section 77(1) in relation to 'essential' transactions to permit financial institutions the alternative of retaining facsimile copies that would still provide evidence (albeit less than best evidence) of individual handwriting and signatures.[708] In this regard, the Commission notes that current day facsimile technology goes well beyond now outdated microfiche technology to include sophisticated document imaging.

21.120 In the course of post-submission consultations regarding the document retention requirements the AFP has suggested that further substantiation of the cost estimates of the AFC and ABA would be desirable. The AFP has also laid stress on the community expectation that financial institutions will play their role in assisting law enforcement by accepting the need to carry the costs of document retention essential to ensuring that money trails can be followed and investigations successfully undertaken. The AFP has asserted that forensic evidence, such as fingerprints and handwriting, obtained from financial transaction documents is considered an integral part of the investigative process and frequently the only means of connecting suspects to a particular financial or commercial transaction. Generally, therefore, the AFP is concerned that record retention obligations should not be diminished. It also notes, in relation to the proof of electronic records, that evidence laws differ in various Australian jurisdictions and that there is a need for law enforcers to ensure that evidence available to them is admissible in all jurisdictions.

21.121 In view of the distinctly different perspectives on the matter presented by the ABA and AFC on the one hand and the AFP and DPP on the other in the submissions and post-submission consultations referred to above, the Commission, in the latter part of its inquiry, invited both the AFP and the DPP to extract from their records statistics regarding the number of investigations/prosecutions in the last five years to the success of which access to original essential customer generated financial transaction documents had been regarded as of major importance.

21.122 In his response[709] the DPP has referred to difficulties in giving a precise figure. He points out that the information sought by the Commission is not normally recorded. He adds that, in any event, the fact that the DPP does not produce a document in evidence does not necessarily mean that it was not important to the DPP case. For instance, the defence may not press a point where it knows that the DPP could provide proof if so required.

21.123 The DPP does, however, provide estimates of approximately 50 cases a year where original customer generated financial transaction documents are used in evidence and approximately 250 cases a year where the existence of such documents

---

708.In oral consultations.

709.Letter dated 11 March 1999 from Acting First Assistant Director.

is significant even though they are not provided in evidence. The figures are said to apply across the range of the DPP's practice, including assets recovery cases.

21.124 The AFP has similarly advised the Commission that it does not record the information sought by the Commission.[710]

21.125 The AFP response provides, however, what are described as randomly selected cases where forensic evidence has been used to support the prosecution case. In each of these cases evidence would, according to the AFP, not have been available from electronic or facsimile copies. Original documents are said to have been required in all cases.

21.126 These selected cases are described by the AFP in the following terms

- In 1997–98 a successful drug related proceeds of crime action involving property to the value of $600000 relied upon evidence obtained from original bank records, such as deposit slips to counter claims by the suspects that the money was derived from other sources. In this case electronic records simply did not provide sufficient source material.
- In a recent murder investigation original bank deposit and withdrawal slips provided the prosecution with the evidence necessary to refute Defence evidence at trial. In this case only source documents provided the means of achieving this outcome.
- A recent drug related POCA investigation relied upon fingerprint evidence and handwriting analysis to prove money laundering offences against a number of offenders.
- In a recent fraud investigation the original signatures on bank deposit and withdrawal slips assisted in identifying both legal and illegal sources of funds, and a means of determining who controlled particular accounts.
- In another case a comparison of documents obtained by search warrant from a bank, with copies of those documents seized under search warrant linked the suspect directly to the offences being investigated. Handwriting examination proved this beyond doubt.
- In a major tax fraud handwriting comparisons were conducted to prove the author of original documents.
- In a major structuring investigation over 1200 original International Money Transfer documents were requested from an Australian bank for fingerprinting and handwriting comparison to prove the identities of the five suspects.

---

[710].Letter dated 24 February 1999 from Director, Intelligence and Operations Support.

21.127 The AFP also advises, more generally, that, as a conservative estimate, in excess of 1000 cases have involved the examination of original documents for finger printing and handwriting evidence during the last five years.

21.128 While the information provided by the DPP and the AFP in these recent responses is of some assistance, it falls well short of the information required by the Commission in order to form an anywhere near complete picture of the value of the original document retention requirements of section 77(1) of the POC Act.

21.129 ***The Commission's view.*** As the submissions and consultations have underscored, the question of the need and justification for the original document retention requirements of section 77(1) is one of major importance for both financial institutions and law enforcement agencies.

21.130 On the one hand it is clear from submissions from, and consultations with, the AFC and ABA that they and their membership have genuine reservations concerning the need for and cost effectiveness of original document retention, particularly compared with obvious storage cost savings that would accrue if such documents could be electronically copied and stored. While broad cost estimates have been provided, these are largely anecdotally based and some are interrelated with costs of complying with FTR Act obligations as well as the copy retention obligations of section 77(2) of the POC Act.

21.131 On the other hand, the DPP and the AFP have, particularly during the latter part of the Commission's inquiry, provided material that suggests, first, that the levels of access to originals of essential documents may be significantly higher than perceived by the ABA and AFC and that their evidentiary importance in forensic respects such as signature and handwriting recognition has likewise been more significant than had been put to the Commission in initial submissions.

21.132 Notwithstanding the receipt of some additional information from the AFP and DPP during the latter part of its inquiry, the Commission does not consider that it yet has a complete enough picture of the competing considerations to come to a final definitive position within the limited time frame of this inquiry. That said, the Commission's sense is that verified cost levels for financial institutions of document retention, when considered against the numbers and nature of verified cases in which availability of essential customer generated financial transaction documents can be shown to have been essential to the success of an investigation or prosecution, are likely to be such as to necessitate that the compromise suggested by the DPP, namely, of modifying the section 77(1) obligations to permit 'essential' documents to be kept in facsimile form, particularly by electronic means, be further explored.

21.133 While such modification of section 77(1) might not provide any immediate comfort in terms of cost for those financial institutions that do not currently have a capacity to make and reproduce digital facsimile copies of customer generated hard copy documents, the current environment of fast moving technological change, and

the associated need for frequent updating of equipment, suggests that such a capacity could be acquired in the short to medium term with subsequent significant cost advantages. Again, however, time limitations have meant that the Commission is not in a position to reach any authoritative conclusions on that matter.

21.134 Taking all the foregoing considerations into account using information so far provided to the Commission and the DPP's suggested compromise as a starting point, the Commission would see considerable merit in the establishment, as a matter of high priority, of a working group to consider this issue further and report to the Government. The Commission would envisage such a working group being convened by the Attorney-General's Department and as including relevant IT experts and representatives of the DPP, AFP, NCA, AFC and ABA.

21.135 The Commission notes that, if the path of modifying the section 77(1) obligations to allow facsimile copies of 'essential' documents were to be followed, the intended effect of sections 146 and 147 of the Evidence Act (see also sections 47 and 48 relating to the proof of contents of documents and the definition of 'document' in Part 1 of the Dictionary to that Act) would be to enable the contents of such documents to be proved in proceedings to which that Act applies. The Commission envisages, however, that the working group it suggests would, amongst other things, consider whether any enhancement or modification of those provisions is necessary or desirable particularly in relation to proof of matters such as signatures and handwriting.

21.136 Since Commonwealth criminal proceedings are conducted in State and Territory courts exercising federal jurisdiction, consideration would need to be given also to the desirability of extending the application of the above provisions of the Evidence Act to proceedings in State and Territory courts involving proof of the contents of documents required to be retained under Division 4 of Part IV of the POC Act.

Recommendation 89

- Using information and submissions provided to the Commission as a starting point, a working group, convened by the Attorney-General's Department, and including representatives of the ABA, AFC, DPP, AFP, NCA and IT experts, should explore the cost benefit and evidentiary implications of modifying section 77(1) of the POC Act to permit essential customer generated financial transaction documents to be retained in facsimile form, including by the use of digital facsimile technology.

- The working group should, in the course of its examination, consider
  - whether any enhancement or modification of sections 146 and 147 of the Evidence Act would be necessary or desirable in relation to proof of matters such as signatures and handwriting by use of facsimile

copies of essential customer generated financial transaction documents; and

- whether relevant provisions of the Evidence Act should be applied to the proof in State and Territory courts exercising federal jurisdiction of the contents of documents and copies required to be retained by financial institutions under Division 4 of Part IV of the POC Act.

Retention period for documents and copies required to be retained under Division4 of Part IV

21.137 In relation to the retention period requirements of Division 4 of Part IV, two issues have been raised in submissions.

21.138 The first is whether the prescribed retention period of seven years after a particular specified event is appropriate or necessary. The second is whether, in the case of a document relating to the opening of an account, it is appropriate for the period of seven years to run from the day on which the account is closed.

21.139 In relation to the first of these issues, both the ABA and the AFC have expressed a preference for the period to be shortened from seven to five years.[711]

21.140 The AFC notes that a questionnaire of members revealed that

> usually requests for information relate to documents 1–2 years old.

21.141 The AFC suggests that

> Consideration should be given to reducing the time requirements for storage of documents from seven years to a period of five years.[712]

21.142 In its submission, the ABA recommends

> that the document retention period for transaction and account opening documents be decreased from seven years to five years and that the retention time commence from the date of the transaction or account opening. This period decrease will result in conformity with the requirements faced by most of the finance industry's overseas competitors. It will also reduce the cost impact presently forced by financial institutions and the community generally.[713]

711.ABA *Submission 13*; AFC *Submission 28*.

712.AFC *Submission 28*.

713.ABA *Submission 13*.

21.143 In the course of post-submission consultations, the ABA has also commented that, when documents are requested, they are frequently under two years old.

21.144 In its submission, the AFP stresses the importance of document retention for an appropriate period.

> The AFP contends that documentation, electronic or otherwise, is essential as evidence of the laundering of proceeds of crime. Matters, criminal or proceeds of crime, may not come before the courts for several years, and any reduction in the mandatory record keeping period should take this fact into account.[714]

21.145 The Commission notes that the AFP submission, while arguing strongly for the retention of a significant period, does not, however, rule out some modification, provided that the period remains appropriate to investigative needs.[715] Subsequently, in post-submission consultations, the AFP has asserted that the retention period should not be reduced below a minimum of five years.

21.146 In the course of post-submission consultations, the ABA has commented, in relation to the observation by the AFP that documents might not be required for evidentiary purposes before the courts until several years after their creation, that such documents will, however, ordinarily have been identified as early as the pre-investigative stage and thus have been preserved for later use as evidence.

21.147 With further reference to the assertion in its submission that the seven year retention period is out of line with the five year international standard, the ABA has asserted in the course of later consultations that the seven year rule has not been shown to be more effective.

21.148 In the course of post-submission consultations, AUSTRAC has commented that, if reduction to five years would not be prejudicial to investigations, it ought to be considered.

21.149 ***The Commission's view.*** On the basis of its consideration and analysis of information forwarded to it in submissions and consultations, the Commission's disposition is to favour a reduction of the retention period from seven to five years. Clearly such a reduction would have significant cost benefits for financial institutions and bring the retention obligations into line with prevailing international practice. Additionally, no compelling evidence has been provided by any law enforcement agency to suggest that any significant investigatory or evidentiary disadvantage would flow from such a reduction.

21.150 That said, the Commission considers that, in relation to a matter that is so central to the effective investigation and prosecution of crime, further consideration

---

714.AFP *Submission 7*.

715.ibid.

of the issue by the working group whose establishment it has recommended above (Recommendation 89) would be desirable. In examining that issue, the working group would, by virtue of its constitution, be well placed to consider whether any reduction of the retention period would have implications for the seven year retention rule under section 23(1) of the FTR Act.

21.151 Turning to the related issue of the period from which the seven years should run, the Commission notes that the ABA suggestion for change would seem to relate only to the minimum retention period that relates to the opening of an account.[716] In this connection, the definition of 'minimum retention period' in section 76 of the POC Act provides as follows

> 'minimum retention period,' in relation to a financial transaction document of a financial institution, means:
>
> (a) if the document relates to the opening of an account with the institution — the period of 7 years after the day on which the account is closed.

21.152 The Commission notes in this regard that the broadly corresponding obligations in the FTR Act also require, in relation to accounts with cash dealers (which include financial institutions under POC Act), the retention of relevant data for a period of seven years from the date of closure of the account.

21.153 Section 23(1) of FTR Act provides as follows

> (1) If a cash dealer makes or obtains a record of any information in the course of obtaining account information or signatory information, the cash dealer must retain the record or a copy of it for 7 years after the day on which the relevant account is closed.

21.154 There is no doubt that, so far as concerns accounts that remain dormant for significant periods before their closure, the current requirement that account confirming documentation be retained for seven years after such closure involves a costly imposition on financial institutions. At the same time, the Commission is mindful of the cautionary note sounded by AUSTRAC in consultations where it warned of the possibility that alteration of the requirement to run from the date of opening of an account could lead to criminals operating only on older accounts, the opening documents of which are nearing the point at which they will be able to be destroyed.

21.155 Again, this is an issue of such importance to investigatory and prosecutorial success that it requires further evaluation than the current inquiry has permitted. Accordingly, the Commission would favour this issue also being remitted for further consideration by the working group it proposes under Recommendation 89 above.

716.ABA *Submission 13*.

Recommendation 90

- Subject to further consideration by the working group proposed to be established under Recommendation 89, the Commission is disposed to favour the reduction from seven to five years of the period during which account opening documents are to be retained under section 77 of the POC Act.
- The working group should also consider whether the requirement that the retention period run from the date of closure of the account might be modified to take account of the cost to the institutions involved in retaining documents relating to dormant accounts while avoiding the possibility of criminal abuse of any such modification

Minimum transaction level to which document retention requirements should apply

21.156 Section 77(4) of the POC Act provides that the record keeping obligations of section 77(2) and (3) (relating, respectively, to customer generated financial transaction documents that relate to the operation of an account and financial transaction documents that are not 'customer generated' but whose retention is necessary to preserve a record of the financial transaction concerned)

> do not apply to a financial transaction document that relates to a single deposit, credit, withdrawal, debit or transfer of an amount of money that does not exceed $200 or such higher amount as is prescribed by the regulations for the purposes of this subsection' (no such higher amount has been prescribed).

21.157 In its submission, the ABA expresses concern about whether the substantial costs associated with the $200 threshold can be justified.

> Section 77 of the *Proceeds of Crime Act 1987* requires that specified documents relating to transactions for an amount in excess of $200 be retained for set periods of time. Financial institutions face substantial costs for the retention and retrieval of these documents.
>
> Members of the ABA consider that the existing $200 threshold is inappropriate and places a heavy cost impost on the business community. Note also that apart from reports relating to suspect transactions the *Financial Transaction Reports Act 1988* only requires notification of cash transactions of $10,000 and over. Information received from member banks indicates that it is extremely rare for a document with a face value of under $2,000 to be requested by law enforcement agencies. Similarly it is rare for a document to be requested after three years has elapsed since the transaction date. The Association recommends that the threshold be changed to a more realistic level preferably $10,000 and above, which is in accord with the *Financial Transaction Reports Act 1988*. The implementation of this proposal will significantly reduce the number of

> documents presently required to be retained and the costs associated with retention.[717]

21.158 Later in its submission, the ABA reiterates its view that a $10000 threshold is preferable, while indicating that it should not be less than $2000. It recommends

> That the threshold dollar value of documents required to be retained in compliance with s 77 of the Proceeds of Crime Act 1987 be increased from $200 to a more realistic figure, preferably consistent with *Financial Transaction Reports Act 1988* requirements viz $10,000. In any event it should not be less than $2,000. This change means that a high percentage of documents would no longer need to be retained with resultant cost savings and quicker access to information for law enforcement bodies.[718]

21.159 AUSTRAC, on the other hand, has indicated in post-submission consultations that, if the threshold were lifted to $10000 as suggested by the ABA, the possibility would be opened up of 'structuring' by criminals to manipulate institutions into not keeping the records that they otherwise would be required to retain. Nevertheless, AUSTRAC has recognised that some revision upwards seems appropriate.

21.160 In post-submission consultations the ABA has added, first, that its members' experience is that only rarely is a document of a face value of less than $2-000 sought by a law enforcement agency and, secondly, that 80% of retained documents relate to amounts of less than $2000.

21.161 Although the AFC submission does not deal with this issue specifically, the general tenor of its submission, including in earlier cited passages, is strongly in favour of document retention requirements being pitched no higher than the level that is demonstrably necessary for essential tracing and law enforcement purposes.[719]

21.162 None of the submissions from law enforcement agencies addresses this specific issue, although an earlier cited passage from the AFP submission stresses the importance of document retention for investigative and law enforcement purposes.[720] However, in post-submission consultations the AFP has, on the basis of its concerns for the maintenance of its investigative capacity, asserted that the $200 threshold should be maintained.

21.163 ***The Commission's view.*** In the Commission's view the weight of material and argument put in submissions and consultations points irresistibly to the need for a revision upwards of the $200 threshold, but not to such a level as might give

---

717.ibid.

718.ibid.

719.AFC *Submission 28*.

720.AFP *Submission 7*.

rise to the kind of structuring risk to which AUSTRAC has drawn the Commission's attention.

21.164 The Commission is, however, less certain as to the precise level to which the threshold should be raised and, again in view of its critical importance to ensuring effective investigation and prosecution, would not feel confident in reaching a firm conclusion without the benefit of wide public consultation of the kind that is not now possible in the time permitted for the inquiry.

21.165 It considers that the determination of the precise level should be taken up by the working group proposed in Recommendation 89. The Commission's sense, however, is that a threshold of $2000 would seem to represent the low point of the permissible range. In this connection, it is worth recalling the ABA advice that some 80% of retained documents relate to transactions of less than $2000. Thus the raising of the threshold up to or beyond that amount would represent very substantial cost savings to financial institutions.

Recommendation 91

- The threshold of $200 prescribed by section 77(4) as the amount at or below which a financial transaction document relating to a single deposit, credit, withdrawal, debit or transfer is exempt from the retention requirements of section 77(2) and (3) should be revised upwards to not less than $2000.

- Determination of the precise threshold should be assigned to the working group the establishment of which is proposed in Recommendation 89.

Monitoring obligations of financial institutions

21.166 While the monitoring obligations that may be imposed *ad hoc* upon a financial institution by reason of an order under Division 3 of Part IV of the POC Act will obviously involve some cost to the business for so long as the order is in force, no submitter has suggested either that the power to make such orders should be modified or that any amendment should be made to minimise or eliminate such costs as are occasioned to businesses to whom such orders may be directed from time to time.

22. Operational adequacy

Introduction

22.1 Current operational adequacy is not a matter on which the Commission has been asked to report.

22.2 However, in view of the pivotal importance of the Commission's recommendation for the introduction of a non-conviction based scheme, the report would be incomplete if the Commission were not to say something about the supporting apparatus it envisages as being necessary to ensure the operational viability of the new scheme.

Responsibility for commencing non-conviction based proceedings

22.3 The first, and perhaps most fundamental issue, that arises for consideration in this context concerns identification of the person or persons whom the legislative scheme should authorise to institute the new non-conviction based proceedings — proceedings which, if the Commission's recommendations in chapter 17 are accepted, would assimilate within them the current non-conviction based regime in Division 3 of Part XIII of the Customs Act.

22.4 Under the conviction based scheme of the POC Act, decisions with regard to the initiation of restraining and confiscation action are entirely matters for the DPP — both as to whether proceedings should be commenced and the conduct and continuation of such proceedings.

22.5 This role of the DPP (Commonwealth, State or Territory, as the case requires) was a feature of the original SCAG Bill and continues today to be an essential element of all conviction based regimes throughout Australia.

22.6 The conferment of such a role on the DPP was doubtless seen as fitting comfortably and appropriately within the DPP's role in relation to the associated criminal proceedings. Moreover, it offers the advantages, in terms of efficiency of operation, firstly, that only one agency needs to manage and, secondly, assess the evidence and that the risk of the investigation and evidence necessary for the criminal proceedings being tainted inadvertently in the associated restraint and confiscation proceedings is reduced to a minimum.

22.7 The Commission notes that no suggestion has been made either in submissions or in consultations with stakeholders that the DPP should not continue to have this role.

22.8 By contrast, the non-conviction based regime in Division 3 of Part XIII of the Customs Act is one in which the DPP is but one of several persons who may initiate and prosecute restraint and confiscation proceedings.

22.9 Specifically, under sections 243B and 243E of the Customs Act, the Minister, the Commissioner of the AFP, the CEO of Australian Customs and the DPP each has the power to institute proceedings for a pecuniary penalty order and associated restraining order.

22.10 As regards other jurisdictions, it is noted that, while the NSW DPP retains exclusive power to institute and prosecute proceedings under the conviction based regime of the COPOC Act, the corresponding role under the CAR Act non-conviction based regime is conferred exclusively on the New South Wales Crime Commission.

22.11 In Victoria, although the DPP's exclusive powers in relation to conviction based forfeiture are preserved in the Confiscation Act enacted in 1997, the power to institute proceedings under the non-conviction based scheme introduced by that legislation is conferred on both the DPP and the Director of the Asset Confiscation Office (ACO).

22.12 The conferment of such power in the original *Customs Amendment Act 1979* on the Minister and Comptroller-General alone may have reflected the fact that, at the time, Customs had control of narcotics prosecutions. The Commissioner of the AFP was included by the *Customs Amendment Act 1981* following the movement of the narcotics function to the AFP. It was not until 1989 that the DPP (whose office was created in 1983 by the *Director of Public Prosecutions Act 1983*) was included.

22.13 The CEO of Customs was substituted for the Comptroller-General by the *Customs, Excise and Bounty Legislation Act 1995*.

22.14 While the Commission is unable to identify any clear statement of the current rationale for conferring power on the Minister, the CEO, the Commissioner and the DPP, it is likely to relate to a recognition of the civil nature of such proceedings and the need for them to be available both to the government and its Customs department as a civil recovery tool *per se*, as well as to the AFP and DPP as an adjunct to criminal investigation and prosecution.

22.15 The explanation for the conferment of exclusive power in NSW on the Crime Commission was provided in the Second Reading Speech accompanying the Bill as follows

> The power to institute proceedings under the proposed legislation is specifically confined to the State Drug Crime Commission. The Commission is headed by Judge Thorley, and the former chief magistrate, Mr Briese, is a member. The

> Commission has forensic experience, expertise and judgement that will ensure the responsible administration of the legislation.[721]

22.16 So far as concerns the Victorian position, it is not clear from the Parliamentary record why both the Director of the ACO and the DPP were given the initiating power.

22.17 It is understood, however, that agreement has been reached between the ACO and the DPP that only the ACO will prosecute civil forfeiture proceedings, in the light of the DPP's view that for the DPP to do so may give rise to a conflict of interest.

The Commission's view

22.18 Given that the Commission's proposed non-conviction based scheme would apply to a much broader range of unlawful conduct than the narrower criminal conduct specific regimes in New South Wales and Victoria, and thus involve a range of Commonwealth departments and agencies, the Commission considers that the focus of such authority should be on the person carrying responsibility for the effectuation of the government policy that is most directly affected by the unlawful conduct in question — that is to say, the head of the relevant department or agency.

22.19 Whether, as in the case of the Customs Act regime, it is appropriate for the Minister also to have that power is ultimately a matter of policy for the government. The Commission understands, however, that on no occasion has the Minister with portfolio responsibility for the Customs Act ever exercised his or her powers under Division 3 of Part XIII. Given the greatly increased public sector devolution of responsibility for operational matters that has occurred since those provisions were enacted in 1979, the Commission's sense is that there is no practical advantage to be gained in conferring power on the Minister.

22.20 Likewise, the Commission can see little point in conferring such power on the Commissioner of the AFP. In the first place, as already noted under the broader based scheme contemplated by the Commission, prescribed unlawful conduct, while doubtless including some conduct that is also criminal *per se*, will by no means be so limited. Moreover, the Commission is given to understand that on no occasion has the Commissioner of the AFP exercised his powers to seek a restraining, or pecuniary penalty, order under Division 3 of Part XIII.

22.21 It remains to consider whether the DPP should also have power to institute and conduct such proceedings.

22.22 The threshold question that arises in this regard is whether it would be compatible with the DPP's primary role and expertise in relation to criminal matters

---

721.NSW *Hansard* (LA) 8 May 1990, 2530

for him to undertake any role in respect of a civil regime that has as its focus unlawful conduct that often may not be, or be related to, conduct that is criminal *per se*.

22.23 This matter was raised by the Commission in discussions with the then DPP. The DPP, in response, pointed out that the DPP already undertakes a significant role in civil 'prosecutions' under the Customs and Income Tax Assessment Acts as well as, in practice, undertaking all non-conviction based proceedings instituted under Division 3 of Part XIII.

22.24 The DPP said that he has experienced no conflict in dealing with such matters in tandem with his criminal prosecutorial functions generally or those functions as they relate to criminal prosecutions associated with the same investigations that have given rise to the relevant civil proceedings.

22.25 The DPP added that, in any case in which the potential for conflict has been seen as a possibility, suitable working arrangements have been able quickly to be put in place to avoid such an occurrence.

22.26 The Commission's sense is that the obvious advantages of being able to use the services of the DPP for non-conviction based proceedings, particularly where they arise out of an investigation in respect of which the DPP already has an involvement, should not be lost.

22.27 It does not follow, however, in the Commission's view that the DPP should share with department and agency heads the authority to institute and conduct such proceedings. Indeed, in the Commission's view, the fact that prescribed unlawful conduct will extend well beyond conduct that is criminal *per se* points to the desirability of that authority reposing exclusively in the agency head.

22.28 That said, there will doubtless be occasions when the DPP is uniquely placed to assist the department or agency head in the discharge of their responsibilities. Accordingly, the Commission would see the proper role for the DPP as being similar to that of any private legal advisers, or the Australian Government Solicitor, who may be engaged under current arrangements to conduct civil litigation on behalf of Commonwealth departments and agencies. Of course, in so acting, the DPP would, in common with private legal advisers or the AGS engaged for the same purpose, be required to act in accordance with the client department's or agency's instructions.

22.29 The further advantage of this approach would be to provide a ready choice between private legal advisers and the AGS in any case in which the department or agency perceived any possibility of a conflict of interest arising because the DPP was also involved in criminal proceedings relating to the same matter.

Ensuring optimal operational efficiency

22.30 It remains to consider what processes (including accountability mechanisms), if any, might desirably be put in place to ensure that the new non-conviction based regime is fully and effectively resorted to by responsible departments and agencies and that appropriate liaison exists for that purpose between those departments and the DPP and law enforcement agencies.

The Commission's view

22.31 As it is not part of the Commission's task to review and evaluate the operational performance of those agencies that have current responsibility for the conviction based regime of the POC Act, the Commission has not sought to conduct detailed inquiries into the performance of the law enforcement agencies and the DPP under the POC Act.

22.32 However, such information as is readily available in relation to proceeds recovery at the federal level has left the Commission with the sense that, unless well tailored coordination and accountability processes are put in place at the same time as the new regime is enacted, both ongoing conviction based recovery and the proposed non-conviction based regime may fall short of realising their full potential.

22.33 That information includes the findings of a 1996 performance audit by the Australian National Audit Office of the efficiency, economy and administrative effectiveness of the management of the investigation and recovery of the proceeds of crime at the federal level.

22.34 While it is neither necessary nor appropriate to recite, or attempt to paraphrase, all of the conclusions and recommendations of that audit in this report, suffice it to say that the ANAO findings revealed significant shortcomings in key areas of activity such as

- consideration of the merits of proceeds recovery as part of NCA and AFP operational planning
- the timely commencement of financial investigations associated with criminal investigations
- the level of AFP financial analytical skills.

22.35 The key recommendations of the ANAO included recommendations

> 3. ... that the AFP, NCA, DPP, and CLEB collaborate to develop an effective Case Management System that provides, *inter alia*, for the efficient, effective and economical investigation and recovery of proceeds of crime.
>
> 5. ... that the AFP, consistent with its emerging organisational philosophy, give adequate consideration to the cost efficiency of maintaining and enhancing specialised groups with the necessary expertise and experience for the recovery of the proceeds of crime
>
> 6. ... that the AFP and the NCA accept prime responsibility, with assistance from DPP at a strategic level, for collection and analysis of financial data

involving the proceeds of crime and this be reflected in a revised protocol involving all parties.

22.36 Information extracted by the Commission from another relevant source of information, the DPP's last five Annual Reports, adds further to the sense that optimal resort to proceeds recovery may not be occurring under the current conviction based scheme.

22.37 While considerable caution needs to be exercised in drawing any firm conclusions from the data from those reports that is consolidated in the two tables below, it is noteworthy that

- the proportion of restraining orders to the total of indictable offences referred to the DPP in each year is extremely low; even after halving the total of such offences to take account of the DPP's estimate that 50% of all offences are fraud type offences that *prima facie* present as potential recovery matters, restraining orders over the period account for only 7% of offences in the latter class
- the number of confiscations made in each year, although significantly higher than the number of restraining orders, average only 66 per year
- the average amount recovered in each year is in the order of $7.5 million, and that figure is significantly affected by the recovery of in excess of $19-million in 1993–94 arising, in the main, out of two matters
- when the aggregate costs of resources applied by the AFP, NCA, DPP, AUSTRAC and the Official Trustee in the recovery of proceeds in those years (while not quantifiable without further detailed inquiries) are taken into consideration, it is likely that the net benefits of proceeds recovery would be found to be, at best, modest.

Table A

Number of defendants charged with indictable offences					
Referring agency	1993/94	1994/95	1995/96	1996/97	1997/98
Australian Customs Service	6	11	8	7	7
Australian Federal Police	337	384	355	345	358
Australian Fisheries Mgt Authority				10	
Australia Post	3	5	5	4	6
Australian Quarantine & Inspection Servic	2	2			
Australian Securities & Investments Comm'n	14	32	33	32	43
Australian Taxation Offic	6	4	4	10	7
Australian Telecommunications Authorit	3	2			
Centrelink (ex DSS)	89	75	72	29	51
Civil Aviation Authority	1	3	2	3	1
Dept of Defence					4
Dept of Employment Ed'n Training & Youth Affa	2				1
Dept of Immigration & Multicultural Affairs	3	14	11	6	2
Dept of Primary Industries & Energy					1
Dept of Veterans Affair			2	5	3
Health Insurance Commission	4			7	6
National Crime Authority	5	3	12	7	18
Non-Cth agencies (other than State Polic	7		4	19	2
State police	20	20	28	4	14
Other		9	9	8	
Total defendants dealt with on indictme	502	564	545	496	524
Approximate no of indictable offences dealt wi summarily each year - as estimated by DP Office	850	850	850	850	850
Approximate total indictable offences referred to Cth DPP	1352	1414	1395	1346	1374
	1993/94	1994/95	1995/96	1996/97	1997/98
Number of restraining orders made	66	52	37	60	28
Approximate number of indictable offences referred to DPP involving unlawful asset acquisition of some kind*	676	707	698	673	687
***Based on estimate by the Office of the DPP that approximately 50% of all indictable offences referred are fraud type offences**					

RESTRAINING ORDERS COMPARED WITH APPROXIMATE TOTAL POTENTIAL RECOVERY MATTER		
Total restraining orders	243	
Approx total matters with unlawful asset recovery potential	3441	
Restraining orders as percentage of tota potential recovery matters	7%	

Table B

Confiscations obtained by Commonwealth DPP under POC Act and by Customs PPO's combined					
	1993/94	1994/95	1995/96	1996/97	1997/98
Pecuniary penalty orders	29	29	29	21	12
S.19 forfeiture orders	13	17	24	29	32
S.13 forfeitures	6	15	10	10	7
Matters settled	6	16	12	9	3
Total no of confiscations mad	54	77	75	69	54
Total amount recovered (gross receipts before OT's costs deducted	$19,218,615	$4,237,631	$5,471,107	$4,063,249	$4,600,894
Ave amount recovered per confiscati	$355,900	$55,034	$72,948	$58,888	$85,202
Restraining orders	66	52	37	60	28

22.38 What the above tabulated information does not show is the number and value of pecuniary penalty orders that were made under Division 3 of Part XIII of the Customs Act as compared to such orders made under the POC Act. Inquiries made of the DPP in relation to the 1997–98 data reveal that in that year not one such penalty order was made. The amounts recovered in the years 1990–91 to 1996–97 under Part XIII of the Customs Act are set out in chapter 4.[722]

22.39 While the Commission is not in a position to undertake a comprehensive analysis of the data in the above tables, it is, as discussed in chapters 6 and 14, aware of some considerations that have led agencies to eschew POC Act recovery in favour of taxation assessment and civil debt recovery proceedings.

22.40 In chapter 6, the Commission recognises that there have been, and will continue to be, cases in which the judgment is properly made that recovery through taxation assessment will be significantly more efficient than POC Act recovery.[723] As the Commission notes in that chapter, there is a risk inherent in such resort to taxation recovery that it will be used as the sole means of recovery in circumstances where significant additional recovery may be available under the POC Act.[724] The Commission recommends in that chapter a course of action designed to avoid that risk.[725]

22.41 In chapter 15, the Commission refers to submissions from the DPP and the AFP which explain why some departments and agencies take the civil debt recovery route instead of POC Act proceedings because of the absence of any mechanism in the POC Act enabling them to secure restitution and be seen to take the credit for the proceeds of such restitution. The Commission notes in that chapter the serious risk that persons may thereby avoid being prosecuted for offences because of the

---

722.para 112.

723.para 58 and 59.

724.para 59.

725.rec 21.

failure of the department or agency concerned to refer the matter to the AFP or the DPP. This is sought to be addressed by bringing compensation or reparation orders within the reach of the POC Act regime.[726]

22.42 Although the above considerations undoubtedly account to some extent for the modest levels of proceeds recovery revealed by the tabulated data, the Commission considers it unlikely that they alone would account for those levels. Nor has the contrary been suggested to the Commission.

22.43 By comparison with the broad picture that emerges from the above tables, the costs and outcomes of the NSW non-conviction based scheme paint a markedly contrasting picture.

22.44 For example in 1997–98

- 166 restraining orders, 46 pecuniary orders and 128 forfeiture orders were obtained
- a total of $11025605 was recovered (although up to $1 million of this amount may be subject to applications for exclusion from forfeiture)
- the Commission devoted 22 staff solely to confiscation at a cost of $1613-330
- the cost of counsel added approximately another further $500000, resulting in total employment related expenses on criminal assets recovery of $2113330.

22.45 On the basis of these figures, the net benefit derived from such proceeds recovery was in the order of $9 million.

22.46 While, as the considerations discussed above underscore, there is a need for considerable caution in drawing any conclusions relating to efficiency from figures of the kind set out in the above table or from comparison of those figures with the NSW Crime Commission outcomes under the CAR Act scheme, that data nevertheless suggests, at the very least, that the efficiency and effectiveness of the current scheme should not be taken for granted. Nor, on that basis, should existing apparatus and arrangements be assumed to be capable of ensuring the success of the new non-conviction based regime.

22.47 When to that is added the findings and recommendations of the ANAO audit, there is, in the Commission's view, a sound basis for a review to be conducted, in tandem with a consideration of the Commission's recommendations for legislative change, of the adequacy of investigatory, operational, liaison and other arrangements to optimise recovery under both the existing conviction based regime and the proposed non-conviction based regime.

---

[726].rec 60

22.48 The Commission has in mind that the outcome of such a review would be to ensure that

- law enforcement agencies and departments and portfolio agencies are adequately resourced to undertake the financial investigations and analysis essential to successful proceeds recovery
- law enforcement agencies and departments and agencies factor proceeds recovery into the initial stages of all investigations into criminal, and prescribed unlawful, conduct
- arrangements are in place to ensure liaison from the earliest stage of any investigation, and at all relevant stages thereafter, between the relevant department or agency, law enforcement agencies and the DPP
- corporate and fraud plans of all departments and agencies take proper account of the first level importance of timely and appropriate resort to proceeds recovery in relation to criminal, and prescribed unlawful, conduct affecting the department or agency and its responsibilities
- audit plans for all departments and agencies include appropriate provision to ensure the full and regular auditing of the performance of the department or agency in relation to proceeds recovery.

Recommendation 92. Power to institute and conduct the proposed new non-conviction based proceedings should be exercisable exclusively by the head of the Commonwealth department or agency having portfolio responsibility in relation to the relevant prescribed unlawful conduct.

Recommendation 93. In conjunction with the implementation of the Commission's recommendations, a review should be conducted of the investigatory, operational, liaison and accountability arrangements necessary to ensure optimal operation of the existing conviction based scheme and the proposed non-conviction based regime.

Appendix A
Participants

The Commission

The Division of the Commission constituted under the *Australian Law Reform Commission Act 1996* (Cth) for the purposes of this reference comprises the following:

President
Alan Rose AO

Deputy President
David Edwards PSM

Members
Dr Kathryn Cronin (full-time Commissioner)
Justice John Von Doussa (part-time Commissioner)
Justice Ian Coleman (part-time Commissioner)
Justice Mark Weinberg (part-time Commissioner from 30 April 1998)

Officers

Team Leader
Herman Woltring

Research Officer
Nola Webb

Research Assistant
Kerrin Stewart

Project Assistants
Maureen Mitchell
Valerie Murray

Library
Joanna Longley (to 19 March 1999)
Sue Morris, *Librarian*

Typesetting
Anna Hayduk

Consultants

John Broome, National Crime Authority
Mark Buscombe, Barrister
George Caddy, Official Receiver's Office, New South Wales
Mike Cramsie, Legal Aid Commission of NSW
Grahame Delaney, Office of the Commonwealth Director of Public Prosecutions
Steve Edwards, Australian Finance Conference
Professor Arie Freiberg, University of Melbourne
Judge Megan Latham, District Court of NSW
Julian Mallett, Australian Customs Service
Elizabeth Montano, Australian Transaction Reports and Analysis Centre
Trevor Nyman, Solicitor
Stephen Odgers, Barrister, Law Council of Australia
Terry O'Gorman, Australian Council for Civil Liberties
Clive Scott, Barrister and Solicitor
Ed Tyrie APM, Australian Federal Police
Judith Wilson, Attorney-General's Department
Ian Woods, Australian Bankers' Association

Appendix B
List of submissions

Name	*Submission number*
Attorney-General's Department	3, 31
Australian Bankers Association	13
Australian Bureau of Criminal Intelligence	20
Australian Customs Service	36
Australian Federal Police	7, 39
Australian Finance Conference	28
Australian Institute of Criminology	12
Australian Society of Certified Practising Accountants	14
Commonwealth Bank of Australia	17
Commonwealth Director of Public Prosecutions	8, 34
ComSuper	15
Cox, The Hon Chief Justice of Tasmania	10
Criminal Law Committee of the Law Society of NSW	11
Department of Finance and Administration	25
Department of Justice Victoria	27, 32
Family Court of Australia	6
Insolvency and Trustee Service Australia (Attorney-General's Department)	26
Kiddle, Mr Jeffrey	38
Law Council of Australia	37
Legal Aid and Family Services (Attorney-General's Department)	18
Legal Aid New South Wales	1
Legal Aid Western Australia	5
Malcolm, The Hon Chief Justice of Western Australia	29
Miles, The Hon Chief Justice of the ACT	35
National Crime Authority	16
National Legal Aid	21
Northern Territory Law Reform Committee	30
NSW Bar Association	24
NSW Police Service	9
Presbyterian Church of Australia — NSW Church and Nation Committee	19
Scott, The Hon Justice, Supreme Court of Western Australia	22
South Australia Police	23
Trevor Nyman & Co	2
Victorian Bar Council and Criminal Bar Association	33
Victoria Legal Aid	4

Appendix C
List of recommendations

2. Proceeds of Crime Act: development, scope and underlying principles

1. That the legislation be renamed the 'Confiscation (Unlawful Proceeds) Act'.

2. That the principal objectives of the legislation enunciated in section 3(1)(a) and (b) be recast as follows
   - to deprive persons of the proceeds of, and the benefits derived from, unlawful conduct
   - to provide for forfeiture of property used in or in connection with the commission of offences against the laws of the Commonwealth or the Territories.

3. Scope of judicial discretion — confiscation and sentencing

3. Forfeiture under section 19 of the POC Act should be mandatory in respect of the profits of an ordinary indictable offence but continue to be discretionary in respect of property that is not such profits.

4. A pecuniary penalty order under section 26 of the POC Act should be mandatory in respect of the profits of an ordinary indictable offence or a serious offence but the existing discretion under that section should be retained in respect of confiscation of benefits other than profits.

The court should be required, in relation to a mandatory pecuniary penalty order in respect of the profits of an offence, to reduce the amount of the order by an amount equal to the value of
- any forfeiture of such profits that has already occurred under Commonwealth or Territory law and any proposed forfeiture in respect of those profits (cf section 26(3))
- any tax paid in respect of those profits (cf section 26(4))
- any amount payable in respect of those profits by way of restitution, compensation or damages (but not any such amounts paid by way of fine) (cf section 26(5))

5. The POC Act should expressly prohibit the court from taking into account in sentencing in respect of an offence any confiscation order made under the Act in respect of the profits of that offence.

6. The POC Act should expressly authorise the court to take into account in sentencing a person in respect of an offence any confiscation order made under the Act otherwise than in respect of profits of the offence.
7. The POC Act should expressly authorise the court, in making any confiscation order in respect of property other than profits of an offence, to take into account any sentence that may have been imposed in respect of that offence.

4. Conviction and non-conviction based recovery

8. The range of offences to which the statutory conviction based forfeiture regime contained in section 30 of the POC Act applies should be broadened to include other offences which have the characteristics of organised continuing criminal enterprise.

Identification of additional offences to which statutory forfeiture should apply should be the subject of a review to be conducted by a committee of officials chaired by the Attorney-General's Department and including officers from the DPP, NCA, AFP and other relevant departments.

9. A non-conviction based regime should be incorporated into the POC Act to enable confiscation, on the basis of proof to the civil standard, of profits derived from engagement in prescribed unlawful conduct.

   Prescribed unlawful conduct should include all conduct that presently constitutes a prescribed narcotics dealing for the purposes of Division 3 of Part XIII of the Customs Act.

   Prescribed unlawful conduct should include other conduct, related to conduct that is unlawful under criminal or civil law, that is of a kind ordinarily engaged in by a person continuously or serially for the purpose of profit.

   Identification of the range of such conduct that should be so prescribed as prescribed unlawful conduct should be the subject of consideration by the expert committee proposed in Recommendation 8.

10. Under the proposed non-conviction based civil forfeiture regime, the court should be required, upon a finding that a person has engaged in prescribed unlawful conduct, to
    - order the forfeiture of all property the subject of the restraining order
    - make any pecuniary penalty order sought in relation to profits from that conduct

11. In the assessment for the purpose of a pecuniary penalty order of the profits derived by the defendant from the prescribed unlawful conduct, it should be presumed, unless the contrary is proved, that such profits include all expenditure by the defendant in the period of six years preceding the date of the application for the order.

12. Upon the application of the defendant, the court should be empowered to stay the execution of a forfeiture order for a period of 14 days to enable the defendant to satisfy that court that property should be excluded from forfeiture on the grounds that the property
    - does not represent profits from that or any other prescribed unlawful conduct or any other unlawful activity
    - will not be required to satisfy any pecuniary penalty order and
    - was lawfully acquired by the defendant.

13. Upon the application of the defendant, the court should be empowered to stay the execution of a pecuniary penalty order for a period of 14 days to enable the defendant to seek to rebut, in whole or in part, the presumption that all expenditure of the defendant in the period of six years preceding the application for the pecuniary penalty order constitutes such profits.

14. The court should be required to deduct from any assessment of profits under a pecuniary penalty order
    - any forfeiture of such profits as has already occurred
    - any tax paid in respect of such profits.

5. Restraining orders and their scope

15. In substitution for the requirement that a person be charged with a relevant predicate offence not later than 48 hours after the making of the restraining order, the legislation should allow a period of one month, or such longer period not exceeding three months, as the court determines, in which a charge is to be brought.

    Similarly, in relation to non-conviction based forfeiture, a period of one month, or such longer period not exceeding three months, as the court determines, should be allowed for the restraining order to remain in force.

    The defendant's interests should continue to be protected by the court requiring undertakings as to costs and damages and by the defendant having the right to apply for property to be released from the order.

16. The requirement that the affidavit in support of an application for a restraining order depose to a belief that the defendant has committed a relevant predicate offence should be replaced by a lower threshold requirement that the officer have reason to suspect that the defendant has committed such an offence.

Similarly, in relation to non-conviction based forfeiture proceedings, the officer should be required to depose to reason to suspect that the defendant has engaged in the relevant prescribed unlawful conduct.

17. The following simplified and consolidated process for making and considering applications for restraining orders should be adopted.

- The application should specify the purpose or purposes for which the order is being sought, being to satisfy one or more of the following
  - a forfeiture order under section 19 in respect of a conviction of an ordinary indictable offence
  - a pecuniary penalty order under section 26 in respect of conviction of an ordinary indictable offence
  - a statutory forfeiture under section 30 in respect of conviction of a serious offence
  - a pecuniary penalty order under section 26 in respect of a conviction of a serious offence
  - a forfeiture order under the proposed new non-conviction based regime
  - a pecuniary penalty order under the new non-conviction based regime
  - any compensation or reparation order.

- The application would seek restraint (as permitted and appropriate according to the nature of the predicate offence or the prescribed unlawful conduct) of
  - specified property of the defendant
  - all property of the defendant
  - all property of the defendant other than specified property or
  - specified property of a person other than the defendant.

- In the affidavit in support of the application, the relevant officer should depose to
  - having reason to suspect that the defendant has committed a relevant predicate offence or engaged in the relevant prescribed unlawful conduct (Recommendation 16) and
  - a belief that, having regard to the stated purpose or purposes for which the restraining order is being sought, the property sought to be restrained may be required to satisfy that purpose or those purposes.

- Additionally, in the case where a restraining order is sought against the property of a person other than the defendant, the officer should depose to having reason to suspect that the property is
  - in the case of conviction based proceedings — proceeds of, or property used in or in connection with, the offence, or is property under the effective control of the defendant

- in the case of non-conviction based proceedings — proceeds of the prescribed unlawful conduct or property under the effective control of the defendant.

- The court would be required to be satisfied that there are reasonable grounds for the deponent having the suspicion(s) and belief referred to above.

18. The current limitation on an *ex parte* order operating for more than 14 days should be substituted with an entitlement for a person whose property is affected by such an order to be heard by the court, if they so wish, and a power in the court to revoke the order where it is not satisfied that there is good reason for the order to continue in force.

19. A simplified test should be established for a defendant charged with an ordinary indictable offence to have property excluded from a restraining order. The defendant in such cases should be required to satisfy the court that the property would not be required for the purpose, or purposes, for which the order had been made.

6. Priorities

20. The POC Act should give priority to confiscatory action under that Act over sequestration action under the Bankruptcy Act and property settlement action under the Family Law Act in all cases in which proceedings have been commenced under the POC Act.

21. The various arrangements between the ATO and the DPP and law enforcement agencies should periodically be reviewed to eliminate the risk that taxation recovery of proceeds is too readily resorted to as the sole means of recovery in cases where greater or additional recovery might be available by use of POC Act provisions.

7. Laundering of property and money

22. Section 81 should be broadened to render guilty of the offence of money laundering any person who receives, possesses, conceals or disposes of, any money, or other property, for the purpose of committing or facilitating the commission of an indictable offence against a law of the Commonwealth or as a consequence of the commission of such an offence.

23. Section 82 should be broadened to render guilty of an offence under that section a person who receives, possesses, conceals or disposes of, any money, or other property, that may reasonably be suspected of having been so received, possessed, concealed or disposed of, for the purpose of committing or facilitating the commission of an indictable offence against a law of the Commonwealth or as a consequence of the commission of such an offence.

24. Section 81 should be supplemented by a parallel provision in relation to the importation and exportation of money and other property which would render guilty of an offence, punishable in the same way as an offence under s81, any person who imports into, or exports from Australia any money, or other property, for the purpose of committing or facilitating the commission of any indictable offence against a law of the Commonwealth, a State or Territory, or against a law of a foreign country which, if committed in Australia, would be such an indictable offence, or as a consequence of such an offence.

25. Section 82 should be supplemented by a parallel provision in relation to importation and exportation of money or other property which would render guilty of an offence, punishable in the same way as an offence under section82, any person who imports into, or exports from, Australia any money, or other property, reasonably suspected of having been so imported or exported for the purpose of committing or facilitating the commission of an indictable offence against a law of the Commonwealth, a State, a Territory, or against a law of a foreign country which, if committed in Australia, would be such an indictable offence, or as a consequence of such an offence.

26. For the purposes of Division 1 of Part V, specific provision should be included to make clear that exportation and importation includes electronic and telegraphic transmissions of funds.

27. For the purposes of Division 1 of Part V, specific provision should be made to ensure that money or other property includes finance instruments, cards and other objects which may have no intrinsic value but which represent cash or can be exchanged for it.

28. In order to render section 82, and the recommended parallel provision relating to importation and exportation effective, it is desirable that their enforcement be assisted by statutory presumptions to the effect that where
    - the importation and exportation involves 'structured transactions' designed to avoid the reporting requirements of the FTR Act or the use of bank accounts in false names
    - the amount of the exportation or importation is grossly out of proportion to the defendant's income and expenditure
    - the importation or exportation involves currency to the value of $10000 and the defendant has failed to meet disclosure obligations under the FTR Act or has furnished false or misleading information in purported compliance with them

    the court may be satisfied of that element of the offence requiring that the money or property be reasonably suspected of having been received, possessed, concealed or disposed of for the purpose of committing or facilitating the commission of an indictable offence against a law of the Commonwealth, or as a consequence of the commission of such an offence.

29. A new procedure, analogous to a monitoring order under section 73, should be introduced whereby a judge, being satisfied, on information provided by a law enforcement agency, that a person
    - has committed or was about to commit
    - was involved in or was about to be involved in or
    - had benefited directly, or indirectly, or was about to benefit directly or indirectly from the commission of

    an offence under section 81 or section 82, or the recommended new parallel provisions, could make a suspension order in respect of an identified account, or identified accounts, operated or controlled by that person with a financial institution.

    Such an order would direct the financial institution concerned to notify the relevant law enforcement agency forthwith of any foreshadowed or initiated transaction involving the relevant account and to refrain from effecting the transaction for 48 hours.

    The institution concerned would be subject to disclosure restrictions similar to those applicable to monitoring orders by virtue of section 74, and be entitled to similar safeguards as to the inadmissability of evidence of the existence and operation of the order.

30. The existing and recommended new money laundering offences should, for the purpose of the POC Act, be included in the definition of 'serious offences'.

31. Money laundering charges should be able to be pleaded in a single charge as a continuing criminal enterprise involving transactions over a specified period.

32. The money laundering provisions of Division 1 of Part V of the POC Act should be transferred to the Crimes Act.

8. Time constraints

33. The automatic forfeiture provisions of section 30 (excluding such of the provisions as are inapplicable to the circumstances of a deemed conviction) should apply to the restrained property of an absconder that has been restrained in respect of a serious offence, provided in every case that section 17 is complied with and the conditions specified in section 6 are fulfilled.

34. Where an initial restraining order has been made as recommended in chapter5 and, in applicable cases, the person has been charged, or civil proceedings have been instituted, within the initial period determined by the court when making the order, the order should remain in force
    - in the case of non-conviction based proceedings, until the proceedings to which the order relates have been concluded, including the determination of any appeals

- in the case of conviction based proceedings, until acquittal or until the conclusion of any forfeiture or pecuniary penalty proceedings, including any appeals therefrom, and the satisfaction of any order made
- in the case of an automatic forfeiture offence, for six months after the date of conviction and any additional period required to determine any exclusion application made pursuant to section 48.

35. An application for a pecuniary penalty order against a person in reliance on the person's conviction of a serious offence should be able to be made not later than three months after the expiration of the six months following the conviction, or the expiration of the extended waiting period in relation to the persons's conviction where such an extension has been granted under section30A.

9. Jurisdiction

36. Restraining and confiscation orders in conviction based confiscation proceedings should be able to be issued by judges of State intermediate courts in all cases in which the court has jurisdiction to entertain the trial of the relevant criminal offence. The power to issue should include the power to vary.

37. The Federal Court and the State and Territory Supreme Courts should have unlimited jurisdiction to entertain non-conviction based proceedings under the POC Act.

    State intermediate courts, and State and Territory magistrates courts, should have jurisdiction to entertain such proceedings within their respective civil jurisdictional limits.

38. The power to conduct examinations of persons concerning property that is, or may become, the subject of a restraining order should be exercisable by judges of the Federal Court in non-conviction based proceedings, and by judges of State Supreme and intermediate courts and Territory Supreme Courts in both conviction and non-conviction based cases.

39. The power to issue production orders for property tracking documents and search warrants for the location of such documents should be devolved to magistrates.

40. The power to issue monitoring orders should be exercisable by Federal Court judges in non-conviction based cases and by State and Territory Supreme Court judges and State intermediate court judges in both conviction and non-conviction based cases.

41. Transaction suspension orders should be capable of being issued by the same courts as can issue monitoring orders.

10. Administration of restrained assets

42. Where a custody and control order is made requiring the OT to administer restrained assets, the OT should have investigative powers necessary to ensure that all appropriate assets, including those under the 'effective control' of the defendant, are under its administration.

43. The investigative powers of the OT should include
    - requiring the production of information, including books of account and other records, both from the defendant and other persons having, or claiming to have, an interest in the relevant property
    - having access to premises and books, making copies of, or taking extracts from books and accounts, and removing books, accounts and other records that the OT believes may be relevant to the administration of assets and
    - examining associated persons such as company directors, trustees, business associates and family members to ascertain where there is property within the effective control or effective ownership of the defendant.

44. The POC Act should expressly empower the OT to sell property under the OT's custody and control in cases where the costs of maintaining or managing those assets is likely to lead to a reduction in value of those assets or where such assets are likely to deteriorate while the subject of restraint.

    The Act should require notice of such sale to be given to the owner of the property concerned and confer a right on such a person to seek an order preventing such a sale.

45. The POC Act should expressly empower the OT to disclaim property and destroy it in cases where the public interest or public health or safety so require.

    Notice should be given to the owner of the property who should have a right to seek an order preventing destruction.

46. The POC Act should require that, when requested by the OT, a person whose property is subject to the custody and control of the OT must provide his,her or its tax-file number to the OT.

    Failure to comply should entitle the OT to obtain the tax file number from the Australian Taxation Office.

47. Where no alternative means is available to recover at market value a defendant's joint interest in property, the POC Act should empower the OT to seek court authorisation to sell the jointly owned property and to pay out the innocent joint tenant.

48. The POC Act should provide that the death of a joint tenant should not operate to vest the property in the surviving joint tenant or tenants where the interest of the deceased is the subject of undetermined proceedings under the Act.

49. The POC Act should provide that prescribed remuneration, costs, charges and expenses of the OT should be met from income generated by property under the OT's administration, subject to such amounts being refunded in the event of the return of the property to its owner as a result of its being released from restraint.

    If no such income is generated, or is inadequate for the purpose, these amounts, or the balance thereof, should be a first charge on the property where that property is ultimately forfeited or used to satisfy a pecuniary penalty order.

11. Uniformity

50. The Attorney-General should seek to place the question of uniformity of forfeiture laws on the agenda of SCAG in conjunction with the drafting of a new Act giving effect to the Commission's recommendations.

12. Recognition of rights of third parties

51. The POC Act should expressly preclude a third party who has unsuccessfully sought an order under section 48 to exclude an interest from a restraining order from seeking an exclusion order under section 21 or section 31 in respect of the same interest.

52. The POC Act should expressly provide that
    - where an encumbrance in respect of property
        (i) forfeited under section 19 or section 30 of the POC Act or the new non-conviction based regime or
        (ii) subject to a charge under section 50(1) of the POC Act, or the new non-conviction based regime in respect of a pecuniary penalty order, was entered into *bona fide* and for valuable consideration and in the ordinary course of business of the encumbrancee, the forfeiture or charge, as the case may be, is subject to that encumbrance
    - where such an encumbrance was entered into otherwise than in the ordinary course of business (if any) of the encumbrancee and
        (i) the encumbrancee was not involved in the conduct to which the forfeiture or charge relates
        (ii) the encumbrancee's interest is not subject to the effective control of the defendant and

(iii) where the encumbrancee's interest was acquired directly or indirectly from the defendant, the encumbrancee acquired the interest *bona fide* and for valuable consideration

the forfeiture or charge is subject to such encumbrance.

In case of dispute, the onus should be on the encumbrancee to satisfy the court on the balance of probabilities that the relevant requirements are fulfilled in relation to the encumbrancee's interest.

The legislation should require Commonwealth authorities to search any relevant Australian register of encumbrances and to forthwith advise any encumbrancee so identified of the existence of the restraining order.

53. The POC Act should prescribe a uniform set of matters in respect of which a third party must satisfy the court when seeking exclusion of the third party's interest other than an encumbrance
    - under section 48, from a restraining order made under section 43
    - under section 21, from a judicially ordered forfeiture ordered under section 19 or
    - under section 31, from an automatic forfeiture under section 30.
    - from a restraining order or forfeiture under the new non-conviction based regime

    The matters on which the third party should be required to satisfy the court are that
    - the third party was not involved in the conduct to which the restraining or forfeiture order applies
    - that the third party's interest is not subject to the effective control of the defendant and
    - where the interest was acquired directly or indirectly from the defendant, the third party acquired the interest *bona fide* and for valuable consideration.

54. The legislation should expressly provide that a third party who successfully applies for an order
    - to the effect that forfeited property is subject to the third party's interest as encumbrancee in respect of the forfeited property or
    - excluding the third party's interest from a forfeiture, charge or restraining order

    is entitled to be awarded costs on such basis as the court considers appropriate.

13. Scope of property capable of being restrained or forfeited

55. The definition of 'effective control' in section 9A of the POC Act should be expanded to ensure that

- any property held by a person for the ultimate benefit of a defendant is to be deemed to be under the effective control of the defendant
- any gift made by the defendant within six years of the application for a restraining order is deemed to be under the effective control of the defendant.

56. The definition of 'tainted property' in the POC Act should be extended to include property intended to be used in the commission of the offence.

57. The POC Act should put beyond doubt that tainted property includes
    - property purchased in whole or in part with tainted property and property derived in whole or in part from such property
    - property acquired in whole or in part by the sale or conversion of tainted property and property derived in whole or in part from such property
    - so much of the funds standing to the credit of an account with a financial institution as represents tainted property paid to the credit of that account or as is derived, including through one or more other accounts, from such funds
    - property in respect of which a mortgage or other debt is discharged in whole or in part using tainted property or property derived in whole or in part from tainted property
    - property that is the subject of a possession offence.

58. The POC Act should put beyond doubt that 'proceeds' include
    - property purchased in whole or in part with proceeds and property derived in whole or in part from such property
    - property acquired in whole or in part by the sale or conversion of proceeds and property derived in whole or in part from such property
    - so much of the funds standing to the credit of an account with a financial institution as represents proceeds paid to the credit of that account or as is derived, including through one or more other accounts, from such funds
    - property in respect of which a mortgage or other debt is discharged in whole or in part using proceeds or property derived in whole or in part from proceeds.

59. The POC Act should provide that, in relation to a structuring offence under the FTR Act, all moneys used in or in connection with a structuring transaction, including all moneys standing to the credit of an account with a financial institution used in or in connection with such transaction, shall be presumed to be proceeds of the structuring offence.

14. Forfeiture versus reparation or compensation

60. The scope of operation of the POC Act in respect of indictable offences should be extended to include the recovery of any reparation order made under section

21B of the Crimes Act, or equivalent provisions in other laws of the Commonwealth, in respect of the offence.

61. The restraining order regime should accordingly be broadened to include, amongst the purposes for which a restraining order may be made, the purpose of satisfying a reparation order made pursuant to section 21B of the Crimes Act, or under another law of the Commonwealth, in respect of the offence.

62 The POC Act should expressly ensure that the payment of any amount outstanding under an order made pursuant to section 21B of the Crimes Act, or under an equivalent order, in respect of an offence to which the POC Act applies shall have priority in the distribution of the proceeds of property confiscated in respect of the offence.

The legislation should ensure that the court is required, before making any confiscation order, to consider the need for any section 21B or equivalent order.

63. The POC Act should make clear that a third party whose property is subject to a restraining order or a forfeiture order is not, by reason alone of such order, entitled to a reparation order.

64. The preferred position of prescribed GBEs under section 34C of the POC Act to access the Confiscated Assets Reserve should be abolished.

15. Restrained assets and legal expenses

65. The current scheme in section 43(3)(a) of the POC Act relating to the making of provision out of restrained property for meeting a person's reasonable expenses in defending a criminal charge is in conflict with the principles underlying the Act and should be discontinued.

66. That scheme should be replaced by a scheme having the following elements and characteristics
    - a person ('defendant') whose assets, or part of them, were subject to a restraining order would have a primary obligation to fund their own defence from unrestrained assets
    - where, by reason of the restraining order, the defendant was unable to provide a defence of the kind to which they would be entitled under the scheme (see) below), they would be entitled to apply to the relevant legal aid commission for assistance in the provision of their defence
    - assistance would be able to be granted in respect of the defence of a criminal charge in respect of which the restraining order had been made or the defence of the non-conviction based civil proceedings to which the order related
    - property the subject of the restraining order would be required to be disregarded for the purpose of assets testing of the defendant

- the legal aid commission would be charged by statute with providing the defendant with a defence of the kind that an ordinary self-funded person could be expected to provide for themselves as an adequate defence, that is to say, a defence determined by reference to the objective criterion of adequacy to meet the charges or issues with which the defendant is confronted
- the defendant would be entitled to seek review by the court of the adequacy of the defence based on the nature and content of that defence
- where such a review was requested the legal aid commission would be required to provide a certificate to the court certifying as to the nature and content of the defence and the reasons why the commission regarded the defence as meeting the requirement of adequacy
- in reviewing the nature and content of the defence proposed by the legal aid commission, the court would be required to have regard to
  - the nature and complexity of the issues to be tried
  - the level of representation ordinarily provided by the DPP for the prosecution of civil or criminal matters of a similar nature and complexity and the desirability of reasonable complementarity of representation
  - the need, in the case of criminal proceedings, for the defendant to be represented in reasonable bail applications and committal proceedings
  - the need for the defendant to be represented in any confiscation proceedings whether by way of civil or post-conviction proceedings
  - the need for expert evidence to be provided for the defence and
  - submissions put to it by the defendant and the legal aid commission's response thereto
- assistance would not ordinarily be available for associated or collateral proceedings unless the legal aid commission was satisfied that such proceedings were such as a properly advised self-funded defendant might reasonably conclude were essential to the defence of the matters in issue in the criminal, or non-conviction based confiscation, proceedings
- the legal aid commission would be entitled to draw down from the Confiscated Assets Reserve on a regular basis all funds necessary to meet assistance provided under the scheme and its administrative costs as and when incurred
- in the event that application of the restraining order to the whole or any part of the defendant's property was reviewed, whether by reason of a successful application for release under the POC Act, acquittal of the relevant criminal charge, successful defence of non-conviction based confiscation proceedings, or otherwise, the legal aid commission would be required to provide a certificate regarding the extent to which, in its opinion, an adjustment should be made to the level of assistance provided for the defence
- the assets so released from the application of the restraining order would stand statutorily charged in favour of the Commonwealth to the amount of any assistance that had already been granted in excess of the reviewed

level of assistance; an amount equal to the amount of any previously granted assistance so recovered would be required to be credited from consolidated revenue to the Confiscated Assets Reserve.

16. Administrative (*in rem*) forfeiture

67. Legislation providing for *in rem* forfeiture should require government agencies to provide the financial business sector with such information available to them as would assist that sector to develop effective risk management strategies in respect of the financing or other securing of chattels which, by their nature, could be rendered forfeit as a result of their use in unlawful conduct.

68. Where, pursuant to such legislation, chattels may be subject to forfeiture, Commonwealth authorities should be obliged by the legislation to search any relevant Australian register of encumbrances and to forthwith advise any encumbrancee of such chattels so identified of the matters giving rise to the forfeiture.

69. The Customs Act should exclude from the scope of *in rem* forfeiture under that Act a public conveyance used by a person to convey contraband without the knowledge of the owner or operator in circumstances where the owner or operator would have no reasonable basis for knowing or suspecting that the conveyance was being used for that purpose.

17. Non conviction based forfeiture; Customs Act, Part-XIII, Division 3

70. The regime established under Division 3 of Part XIII of the Customs Act should be broadened to include a provision for asset forfeiture in addition to the imposition of pecuniary penalties.

71. The broadened regime should be incorporated into the proposed non-conviction based regime proposed in chapter 4, although, as recommended in that chapter, that regime should be confined to the recovery of profits.

18. Literary proceeds

72. The POC Act should provide for the confiscation by means of a pecuniary penalty order of any profits derived by a defendant, or by any other person on the defendant's behalf, or at the request or by the direction of the defendant, from any commercial exploitation of the defendant's criminal activities in circumstances where the marketability of the product generating those profits is related to an indictable offence or offences committed by the defendant. Such confiscation should equally apply to persons found on the civil burden of proof to have engaged in prescribed unlawful conduct to which the recommended new non-conviction based regime applies.

For the purposes of such confiscation, 'product' should be widely defined as any publication whether written or electronic, including any media from which visual images or words or sounds can be produced, as well as any live entertainment or representation.

The power of the court to make such a pecuniary penalty order should be discretionary. However, in determining whether to make the order, or whether to apply the order to the whole, or part only, of the profits, the court should have regard to

- whether it is in the public interest to confiscate the profits;
- whether the product has any general social or educational value, and
- the nature or purpose of the product including its use for research, education, rehabilitation or deterrence.

73. No time limitation should be prescribed in relation to applications for the making of pecuniary penalty orders in respect of profits derived from the commercial exploitation of unlawful activity.

19. Law enforcement information gathering powers

74. Sections 36 and 71 of the POC Act should be repealed and the search warrant provisions of the Crimes Act widened to include warrants in respect of tainted property and property tracking documents.

75. Notwithstanding that a search warrant has been executed for the purposes of the POC Act, any documents in existence at the time of execution which were physically incapable of being furnished at that time should be able to be furnished once located and the financial institution or other concerned person should have the same protections against proceedings for breach of confidentiality as it would have had if the documents had been furnished at the time the warrant was executed.

76. Where
    - an officer of the AFP of the rank of not less than Assistant Commissioner or
    - a member of the NCA otherwise than in the course of a special investigation,

    is satisfied that it is necessary to do so to enable a decision to be made whether to seek any warrant or order, or for the purposes of proceedings, under the POC Act, may serve a notice on a financial institution requiring it to provide such information as is specified in the notice relating to
    - an account with that institution (including the existence of the account) or
    - a non-account transaction conducted by or with that financial institution (including the existence of such a transaction).

The new provisions should expressly provide that the financial institution and its employees, in responding to a notice, are

- protected from any action, suit or proceedings in relation to its or their response to such a notice
- protected from prosecution for money laundering in respect of the information provided and
- precluded by law from disclosing to the institution's clients the fact of the existence of the notice and any response thereto.

20. Superannuation benefits

77. There should be no change to the provisions of the Crimes (Superannuation) Act and Part VA of the Australian Federal Police Act requiring a court, once the conditions precedent are met, to make a superannuation order.

78. There should be no change, subject to Recommendation 79, to the provisions of those Acts requiring a court to make a superannuation order in relation to the totality of the employer funded superannuation benefits in respect of the convicted employee.

79. The schemes established by those Acts should be modified to confer on the court a discretion to order in respect of an innocent spouse and/or dependants that there shall remain vested in them, contingent upon the corrupt employee reaching the minimum retirement age, or dying, those benefits referable to the employer funded benefit to which they would have become entitled had the employee ceased being a contributor on the day of the making of the superannuation order and the employee's benefits had been preserved.

    This should apply equally where the loss of entitlements arises from dismissal from the AFP after a finding in relation to a relevant disciplinary offence, in which case a spouse and dependants should be permitted to apply to a court for an order that those benefits are payable.

80. The Crimes (Superannuation) Act should be amended to remove the discretion vested in the police authority under section 15(1) and thus require that authority to notify the Minister once a person to whom the Act applies has been charged with what the authority thinks is, or may be, a corruption offence.

81. The Crimes (Superannuation) Act should be amended to remove the discretion currently vested in the Minister under section 16 to authorise the DPP to seek a superannuation order and thus require the Minister to authorise the DPP to seek an order once the Minister has formed the opinion that the offence is a corruption offence.

82. The Crimes (Superannuation) Act should be amended to permit a suspension of superannuation benefits in cases where, before or after the person is charged

with a corruption offence, that person gives notice of intention to resign, resigns or is retired and that resignation or retirement takes effect on or after the day the charge is laid.

The suspension should be lifted if
- the person is acquitted
- the person is convicted but sentenced to a term of imprisonment for 12-months or less
- the Minister does not authorise the application for a superannuation order
- the court does not make the order or
- a superannuation order is taken to have been revoked.

83. The Commission notes the strength of the argument that an inequity might arise if persons appointed to government or police service after 30June 1999 were not to suffer a financial disadvantage by reason of their breach of relevant employment obligations commensurate to the loss of employer funded benefits that could be imposed on a continuing CSS or PSS member by reason of the current regimes but considers it beyond its terms of reference to make a recommendation on the matter. It does recommend, however, that, in the event that such inequity arises, the current regimes should be reviewed immediately to ensure parity of treatment.

84. The Crimes (Superannuation) Act should be amended to empower a court to make a superannuation order in general terms based on the amount of benefit notified to the Attorney-General for the purpose of authorising the making of the application plus any additional amount that may have accrued between the date of notification and the date of the making of the order.

21. Impact of the law on business

85. Division 4 of Part IV of the POC Act and Part III of the FTR Act should be reviewed, in consultation with relevant peak bodies, to determine the extent to which their respective document and record retention obligations might be synthesised and harmonized so as to minimise their regulatory impact on financial institutions.

Such review might conveniently be undertaken in the context of the review of the FTR Act recommended in 1993 by the Senate Standing Committee on Legal and Constitutional Affairs in its report entitled 'Checking the Cash'.

86. The POC Act should require the Attorney-General or an appropriate agency to provide guidance to financial institutions about their obligations under that Act analogous to that provided by AUSTRAC to cash dealers pursuant to section 38(1)(e) of the FTR Act in relation to their obligations under that Act.

Such provisions might usefully be complemented by a statutory requirement that the guideline issuing authorities under each of those Acts confer and collaborate for the purpose of minimising the regulatory impact, and associated compliance costs, of both sets of provisions on financial institutions.

87. Consideration should be given by the Attorney-General in the course of the ongoing review of Commonwealth criminal law to the appropriateness of removing the provisions of Division 4 of Part IV of the POC Act to the Crimes Act 1914 (Cth).

88. The provisions of Division 4 of Part IV of the POC Act should be expanded and elaborated to make explicit their scope of operation and effect in relation to financial transaction documents generated electronically by customers.

    Consideration should be given in devising such provisions to ensuring that electronic data, such as electronic signatures, considered to have particular investigative or evidentiary significance is retained as part of the record.

    The expanded and elaborated provisions should be cast so to ensure that the contents of financial transaction documents that are generated electronically by customers are capable of ready proof in proceedings to which the Evidence Act (Cth) applies.

89. Using information and submissions provided to the Commission as a starting point, a working group, convened by the Attorney-General's Department, and including representatives of the ABA, AFC, DPP, AFP, NCA and IT experts, should explore the cost benefit and evidentiary implications of modifying section 77(1) of the POC Act to permit essential customer generated financial transaction documents to be retained in facsimile form, including by the use of digital facsimile technology.

    The working group should, in the course of its examination, consider
    - whether any enhancement or modification of sections 146 and 147 of the Evidence Act would be necessary or desirable in relation to proof of matters such as signatures and handwriting by use of facsimile copies of essential customer generated financial transaction documents; and
    - whether relevant provisions of the Evidence Act should be applied to the proof in State and Territory courts exercising federal jurisdiction of the contents of documents and copies required to be retained by financial institutions under Division 4 of Part IV of the POC Act.

90. Subject to further consideration by the working group proposed to be established under Recommendation 89, the Commission is disposed to favour the reduction from seven to five years of the period during which account opening documents are to be retained under section 77 of the POC Act.

The working group should also consider whether the requirement that the retention period run from the date of closure of the account might be modified to take account of the cost to the institutions involved in retaining documents relating to dormant accounts while avoiding the possibility of criminal abuse of any such modification.

91. The threshold of $200 prescribed by section 77(4) as the amount at or below which a financial transaction document relating to a single deposit, credit, withdrawal, debit or transfer is exempt from the retention requirements of section 77(2) and (3) should be revised upwards to not less than $2000.

    Determination of the precise threshold should be assigned to the working group the establishment of which is proposed in Recommendation 89.

22. Operational adequacy

92. Power to institute and conduct the proposed new non-conviction based proceedings should be exercisable exclusively by the head of the Commonwealth department or agency having portfolio responsibility in relation to the relevant prescribed unlawful conduct.

93. In conjunction with the implementation of the Commission's recommendations, a review should be conducted of the investigatory, operational, liaison and accountability arrangements necessary to ensure optimal operation of the existing conviction based scheme and the proposed non-conviction based regime.

Select bibliography

ADAMOLI, SABRINA, DI NICOLA, ANDREA, U SAVONA, ERNESTO AND ZOFFI, PAOLA
_____ *Organised Crime Around the World* European Institute for Crime Prevention and Control affiliated with the United Nations (HEUNI) Helsinki 1998

AUSTRALIA. ATTORNEY-GENERAL'S DEPARTMENT
_____ *Cash Transaction Reports — Legislation and Materials* Canberra 1988
_____ *Mutual Assistance in Criminal Matters — Legislation and Materials* Canberra 1987
_____ *Proceeds of Crime (Unofficial Reprint) Legislation and Materials* Canberra 1988
_____ *Review of Commonwealth Criminal Law Final Report* AGPS Canberra December 1991

AUSTRALIAN LAW REFORM COMMISSION
_____ *Criminal Investigation* ALRC 2 Sydney 1975

AUSTRALIAN NATIONAL AUDIT OFFICE
_____ *Recovery of the Proceeds of Crime* The Auditor General Performance Audit Audit Report No 23 AGPS Canberra 1996–97

AZIZE, JOSEPH
_____ 'Seeking legal expenses under the Proceeds of Crime Act 1987' (June 1994) *Law Society Journal* 57

BAGARIC, MIRKO
_____ 'The Disunity of Sentencing and Confiscation' 21 *Crim L Jnl* 191

BIRKS, P
_____ *An introduction to the Law of Restitution* Clarendon Press Oxford 1985

BUTT, PETER
_____ 'The forfeiture rule' (1993) 67*ALJ* 923

COMMONWEALTH SECRETARIAT
_____ *Combating Money Laundering — Guide to National Laws* Marlborough House London UK
_____ *International Co-operation in the Administration of Criminal Justice* Marlborough House London UK

_____ *Mutual Assistance in Criminal Matters — A Guide to National Practice and Procedure* Marlborough House London UK
_____ *Report of the Oxford Conference on Mutual Legal Assistance 5–9-September 1994 Christ Church* Oxford Marlborough House London 1995

COUNCIL OF EUROPE
_____ Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, done at Strasbourg on 8 November 1990, ETS No 141

DIETRICH, JOACHIM
_____ *Restitution A New Perspective* The Federation Press 1998

DIRECTOR OF PUBLIC PROSECUTIONS (CTH)
_____ Guidelines For Dealings Between Commonwealth Investigators and the Commonwealth Director of Public Prosecutions Canberra 1996

FELDMAN, DAVID
_____ 'Individual Rights and Legal Values in Proceeds of Crime Legislation: a Comparative Approach' 18 *Anglo-American Law Review* 261 (1989)

FINANCIAL ACTION TASK FORCE
_____ *1997–98 Report on Money Laundering Typologies* FATF/GAFI Paris 1998

_____ *Evaluation of Laws and Systems in FATF Members dealing with Asset Confiscation and Provisional Measures* FATF/GAFI Paris

FINKELSTEIN, JJ
_____ 'The Goring Ox' (Vol 46 1973) *Temple Law Quarterly* 169

FISSE, BRENT
_____ 'The Proceeds of Crime Act — The Rise of Money Laundering Offences and the Fall of Principle' (1989) 13 *Crim LJ* 5
_____ 'Confiscation of the proceeds of crime: discretionary forfeiture or proportionate punishment?' (1992) 16 *Crim LJ* 138
_____ 'Confiscation of Proceeds of Crime: funny, money, serious legislation' (1989) 13 *Crim LJ* 368

FISSE, BRENT, FRASER, DAVID & COSS, GRAEME
_____ *The Money Trail Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting* The Law Book Company Limited 1992

FREIBERG, ARIE
_____ '"Civilising" crime: parallel proceedings and the civil remedies function of the Director of Public Prosecutions' (1988) 21 *ANZJ Crim* 129
_____ 'Criminal Confiscation, Profit and Liberty' (1992) 25 *ANZJ Crim* 14

_____ 'Social Security Prosecutions and Overpayment Recovery' (1989) 22 *ANZJ Crim* 213

_____ 'Confiscating the literary proceeds of crime' (1992) *Crim L Rev* 96

FREIBERG, ARIE & PFEFFER, MONICA

_____ 'The (Deferred) Wages of Sin: Confiscating Superannuation Benefits' (1993) 17 *Crim LJ* 157

GILMORE, WILLIAM C

_____ *Dirty money The evolution of money laundering counter measures* European Issues Council of Europe Press Luxembourg 1995

GOFF OF CHIEVELEY, LORD & JONES, GARETH

_____ *The Law of Restitution* Fifth Edition, Sweet and Maxwell London 1998

GRAYCAR, ADAM & GRABOSKY, PETER

_____ *Money Laundering* Australian Institute of Criminology Research and Public Policy Series Canberra 1996

KURISKY, GEORGE A

_____ 'Civil Forfeiture of Assets: A Final Solution to Drug Trafficking?' (Vol 10:293 1988) *Houston Journal of International Law*

LEVI, MICHAEL

_____ 'Taking the Profit Out of Crime: The UK Experience' *European Journal of Crime, Criminal Law and Criminal Justice*, Vol 5/3, 228–239 Kluwer Law International 1997

_____ 'Evaluating the 'New Policing': Attacking the Money Trail of Organized Crime' (1997) 30 *The Australian and New Zealand Journal of Criminology* 1

LEVI, MICHAEL & OSOFSKY, LISA

_____ *Investigating, Seizing and Confiscating the Proceeds of Crime* Police Research Group Crime Detection and Prevention Series Paper No161 Home Office Police Department London 1995

LOSS, JT

_____ 'Criminals Selling their Stories: The First Amendment Requires Legislative Re-examination' (1987) 72 *Corn L Rev* 1331

MASON, KEITH & CARTER JW

_____ *Restitution Law in Australia* Butterworths Sydney 1995

MILLS, BRIAN

_____ 'Screws tighten on Money Laundering' April 1996, 34 *Law Society Journal* 37

MITCHELL, ANDREW R, TAYLOR, SUSAN ME & TALBOT, KENNEDY V
_____ *Mitchell, Taylor and Talbot on Confiscation and the Proceeds of Crime* Second Edition, Sweet and Maxwell London UK 1997

NATIONAL CRIME AUTHORITY
_____ *Proceeds of Crime Conference Sydney 18–20 June 1993* AGPS Canberra
_____ *Taken to the Cleaners* 1992 AGPS Canberra

NEW SOUTH WALES CRIME COMMISSION
_____ *Drug Trafficking (Civil Proceedings) Act 1990 Issues Paper* 5 April 1993 (unpublished)

NICOL, ANDREW
_____ 'Confiscation of the Profits of Crime' (1987) 57 *Journal of Criminal Law* 75

OKUDA, SS
_____ 'Criminal Antiprofit Laws: Some Thoughts in Favour or their Constitutionality' (1988) 76 *Cal L Rev* 1353

Queensland. Department of Justice and Attorney-General (Qld)
_____ *Report of the Attorney-General's Confiscation Legislation and Education Review Committee* 3 February 1992

Rozenes, Michael & Thornton, John
_____ 'Reasonable Legal Expenses: Current Policy and Practice' (1992) 4*Current Issues in Criminal Justice* 64

SCOTT, CLIVE
_____ *Asset Forfeiture Legislation and Methodology in the USA, Canada, the UK and Hong Kong* (unpublished)
_____ *Criminal Law: Asset Confiscation: The New Act* Leo Cussen Institute Melbourne P98/3

STAFFORD, DIANNE
_____ 'Mutual Legal Assistance in Criminal Matters: The Australian Experience' *Commonwealth Law Bulletin* October 1991

TEMBY, IAN
_____ 'The Proceeds of Crime Act One Year's Experience' (1989) 13 *Crim LJ* 24

TUCKER, GREG
_____ 'Money Laundering, banks and the duties of inquiry and disclosure' (1995) 6 *Journal of Banking and Finance Law and Practice*181

TURNER, JW CECIL
_____ *Kenny's Outlines of Criminal Law* Eighteenth Edition Cambridge University Press UK 1964

UNITED KINGDOM. HOME OFFICE
_____ *Working Group on Confiscation, Third Report: Criminal Assets* London November 1998

UNITED NATIONS
_____ *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* UN New York Sales No E 92 IV 1
_____ UN Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances adopted in Vienna on 19 December 1988, Australian Treaty Series 1993 No 4 UNTS

UNITED STATES. DEPARTMENT OF JUSTICE
_____ *Quick Reference to Federal Forfeiture Procedures, Statutes, Regulations, Policy, Memoranda of Understanding, and Advisory Materials Governing the Seizure and Forfeiture of Property Second Edition Criminal Division* Washington 20530

WALKER, JOHN
_____ *Estimates of the Extent of Money Laundering in and through Australia* AUSTRAC Sydney 1995

WEINBERG, MARK
_____ 'The Proceeds of Crime Act 1987 — New Despotism or Measured Response?' (Vol 15, Nos 3 and 4 '89) *Monash University Law Review*

WESTERN AUSTRALIA LEGISLATIVE ASSEMBLY
_____ *Taking the Profit Out of Drug Trafficking: An agenda for Legal and Administrative Reforms in Western Australia To Protect the Community from Illicit Drugs* Select Committee into the Misuse of Drugs Act 1981 Interim Report — November 1997, State Law Publisher Perth 1997

Table of legislation

Commonwealth

State jurisdictions

Other jurisdictions

Table of cases