Great expectations – Australia's new Proceeds of Crime Bill

By Federal Agent Tim Morris, former AFP liaison officer to AUSTRAC

As Australia is poised to introduce new proceeds of crime legislation it is worth reflecting on the development and effectiveness of proceeds of crime initiatives in Australia.

It is also an opportunity to consider additional measures that may be taken to assist in reducing the attractiveness of Australia as a place for organised crime 'to do business'.

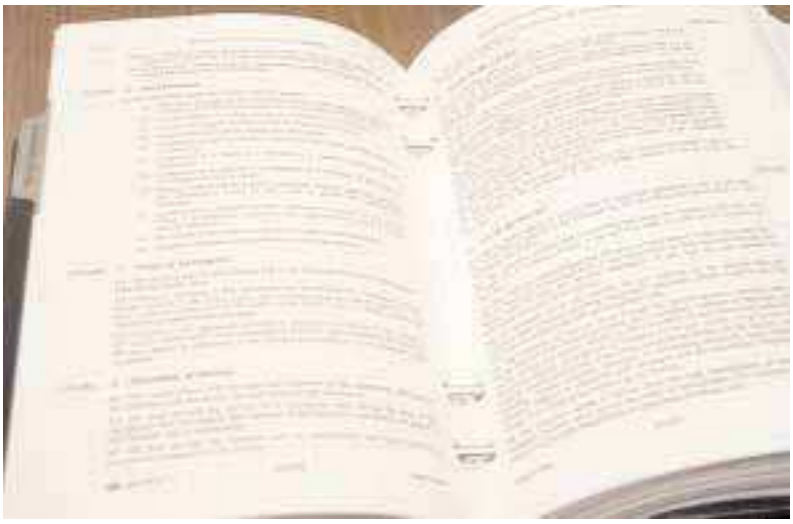
Federal Agent Tim Morris

The Commonwealth Attorney-General's Department recently released an 'exposure draft' of the Proceeds of Crime Bill 2001 for comment. The bill, which constitutes a major legislative undertaking, will, if passed, transform the Commonwealth's confiscation regime into what is often referred to as 'second generation' proceeds of crime legislation – that is the move from a conviction based model to a civil recovery model.

Proceeds of crime legislation in Australia has not existed over the past 14 years without its share of controversy or detractors. Regarded by some "civil libertarians as evidence of 'new despotism' in the criminal law (Fisse, 1989:5). The zealousness with which the laws appeared to override fundamental values and liberties (has been) condemned (Freidburg, 1992; Levy, 1996)" (Freidburg and Fox 1997 p.2).

Civil libertarians have not been the only group to comment on the regime. In addition, the Australian National Audit Office (ANAO) reviewed the "efficiency, economy and administrative effectiveness of the management of the investigation and recovery of the proceeds of crime" in 1996 (ANAO p.2).

In addition, in December 1997, the Australian Law Reform Commission (ALRC) received a reference from the Attorney-General to inquire into effectiveness of the Commonwealth Proceeds of Crime Act.



This scrutiny has invariably, along with a number of domestic developments, led to a reconsideration of Commonwealth confiscation legislation that aims to deprive wrongdoers of their ill-gotten gains. The question that must be asked, however, is whether this legislative reform alone can reduce the shortcomings identified by various parties. Alternatively, should consideration be given to viewing the draft *Proceeds of Crime Bill 2001* as representing only one part in a new generation of alternative remedies that in total will make Australia an unattractive location for organised crime groups and serious offenders to do business?

Background

Australia was one of the first countries in the world to introduce legislation to criminalise money laundering, track cash transactions and confiscate the proceeds of crime. The Commonwealth Attorney-General at the time announced in his second reading speech introducing the *Proceeds of Crime Act 1987* to the Australian parliament that …

> "the 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 in the profits and instruments of their crimes. By doing so, it will suppress criminal activity by attacking the primary motive, profit and reinvestment of that profit in further criminal activity." (Hansard (H of R) April 30, 1987, 2314)

However, over the past 12 years of operation, the legislation, its application and administration have attracted criticism from a number of parties. In March 1999 it was remarked …

> "that the very modest returns achieved under existing Commonwealth regimes, the Commission is in no doubt that the Proceeds of Crime and Customs Act regimes have fallen well short of depriving wrongdoers of their ill-gotten gains: (ALRC report para 4.142).

So how could one of the "most effective pieces of weaponry against major crime" be considered so inadequate just 12 years later?

Development of the Act

In 1983, the Australian Police Ministers' Council invited the Standing Committee of Attorneys-General to develop legislation allowing for the forfeiture of criminally derived assets. During this period Australia was emerging from a series of royal commissions into drug trafficking and organised crime in various industries. These revealed the extent and nature that organised crime had penetrated Australian society.

Subsequently, in 1987 a package of legislation was announced by the Commonwealth Attorney-General to increase the effectiveness of Australia's law enforcement agencies capacity to combat organised crime. This package introduced a number of measures considered appropriate at the time including the creation of a cash transactions monitoring agency, telephone interception legislation, an international mutual legal assistance capacity and the ability to seize the proceeds of ill-gotten gains in the form of the Commonwealth *Proceeds of Crime Act 1987*.

The current Proceeds of Crime Act

The Proceeds of Crime Act provides a clear statement of the objects of the legislation, which include: To deprive persons of the proceeds of and benefits derived from, the commission of offences. To provide for the

forfeiture of property used in or in connection with the commission of such offences. To enable law enforcement authorities to trace such proceeds, benefits and property.

The Act is conviction based so that no final order in respect of property can be made unless and until a person has been convicted, or at least a case has been found proven against them in respect of an indictable offence against a Commonwealth or Territory law.

Most confiscation laws have three core elements. These include restraining orders – the power to prevent disposal of an asset before determination by a court. Second, a forfeiture order – which permits the court to forfeit tainted property, and third, a pecuniary penalty order – an order to repay an equivalent of any benefit received from the commission of an offence. (NCA 1991, p.117).

The Commonwealth Proceeds of Crime Act also carries a number of important information gathering powers. These include production orders – which enable investigators to gain access to property tracking documents. Monitoring orders to gain access to records for up to a three-month continuous period, search warrants and the power to compel examinations of persons on oath (defendant or otherwise) into the affairs of that person including the nature and location of their property.

Shortcomings?

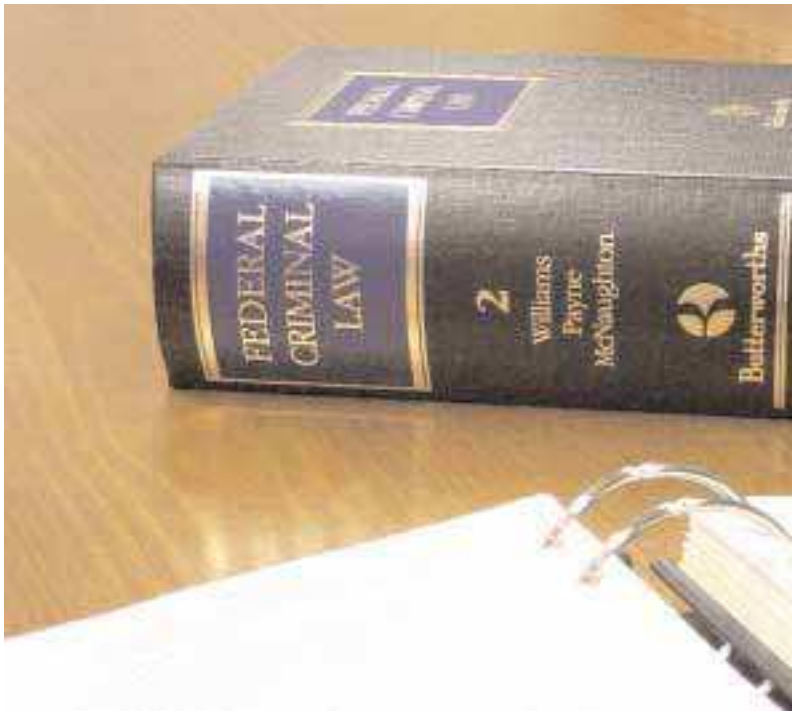
Perhaps it was a perception of poor performance that led to the ANAO to conduct an audit on the "efficiency, economy and administrative effectiveness of the management of the investigation and recovery of the proceeds of crime in 1996 (Goodchild, K. 2001 p.9).

While ignoring any apparent shortcoming in the legislation, the ANAO focused upon the various Commonwealth law enforcement and prosecution agencies efforts over the previous six years. It concluded that only AUD$36 million had been recovered under the confiscation regime in that time.

In response, the three agencies involved, the Australian Federal Police, National Crime Authority and the Director of Public Prosecutions noted that:

- only a small proportion of the available proceeds of crime (approximately 10 per cent) fails within the Commonwealth's sphere of responsibility;
- most proceeds of crime were dissipated by criminals or rapidly transferred offshore before they could be restrained, and
- recovery of the proceeds of crime was not the primary responsibility of these law enforcement agencies and successful prosecutions were required before confiscation could be achieved under the legislation. (ANAO, 1997, para 3.2, 3.22 and 3.23)

A more thorough scrutiny of Australia's confiscation laws and effectiveness was undertaken in 1997. Freidburg and Fox noted and questioned that the effectiveness of confiscation legislation had never been properly evaluated in Australia despite the fact that 'this type of legislation has become progressively more severe' (Freidburg and Fox 1997, p.1).



What are the 'impediments' to more effective use of the legislation?

A number of 'impediments' to more effective asset confiscation have been identified over the years by various reviews and individuals and have included the following observations.

- Asset confiscation has not been identified as a core responsibility of Commonwealth agencies (ANAO).
- The legislation is viewed as an impediment rather than a deterrent (ABCI).
- There exists a lack of clear responsibility

for commencing proceedings (ALRC);
- The requirement for improved corporate planning including performance indicators (ANAO);
- Improved case management practices should include methodologies to better monitor proceeds of crime recoveries (ANAO).
- The requirement for better coordination between the law enforcement agencies and the Director of Public Prosecutions (ANAO).
- The existence of 'judicial hostility' exercised through strict interpretation by the courts (Freidburg and Fox).
- The lack of national statistics restricts coordinated development of legislation (ABCI).

What has made the operation of the Proceeds of Crime Act even more frustrating is the tantalising window into potential money laundering the proceeds of crime investigations that has been provided by the information collected by the Commonwealth agency – AUSTRAC.

Created in 1987, the then Cash Transaction Reporting Agency as it was then known, has been collecting a variety of information. More particularly, since 1992 AUSTRAC, as it is now called, has been collecting reports from Australia's 'cash dealers' labelled as "international funds transfer instruction" reports. In reality the majority of these reports are a reformatted version of instructions sent internationally via SWIFT to and from Australian-based financial institutions and their overseas counterparts.

When combined with criminal intelligence, this information provides Australian law enforcement and taxation agencies with a unique window into the movement of money into and out of Australia – often by well known members and their proxies of groups involved in serious crimes. However, under the existing proceeds of crime legislation comparatively little action can be contemplated to fully exploit this intelligence further in terms of asset confiscation or money laundering prosecution.

Similarly, the current system of mutual legal assistance administration ensures that the chances of interdicting laundered funds and other flexible mediums of exchange is almost impossible. This regime, however, has proved useful on occasions when conducting 'historical' proceeds of crime and money laundering investigations. In fact, the critical role that mutual legal assistance requests could play in an effective proceeds of crime regime is highlighted by the Commonwealth Attorney-General's annual report where it was reported that half of the outgoing requests made by Australia were categorised as pertaining to 'bank/business records'.

Will the new regime fix this?

As previously mentioned the Commonwealth Attorney-General's Department recently released the exposure draft of the *Proceeds of Crime Bill 2001*. This long awaited proposal attempts to provide a legislative framework to deprive persons of the proceeds of crime, the instruments of offences and benefits derived from offences against State and Territory laws in Australia.

While a regime of 'person directed' forfeiture will remain in place – with the conviction of an indictable offence as the necessary threshold, the proposed bill will also include two new features. These include 'person directed forfeitures' based on the balance of probabilities test and 'asset directed forfeiture' also based upon the balance of probabilities test. The existing features of person directed forfeiture based on absconding and statutory forfeiture for serious offences would continue in the proposed bill.

Under the proposal, a forfeiture order can be granted if the court is satisfied on the balance of probabilities that a person who has engaged in conduct that constitutes a 'serious offence' in the past six years. Serious offences include indictable offences punishable with a minimum three-year penalty and that include narcotics offences, Migration Act offences, money laundering offences, a loss to a person or the Commonwealth of $10,000 or more, some Financial Transaction Reports Act offences and some Criminal Code offences.

Restraining orders can be obtained where there are reasonable grounds to suspect that the property is the proceeds of crime or tainted property. Other features of the proposed Proceeds of Crime Bill include a 'Notice to Financial Institutions' to provide information concerning relevant accounts and transactions. This provision will finally dispense with the antiquated and inappropriate search warrant method currently used to extract relevant bank records.

Answer: New POC is part of the response

If passed in an unamended form, will the proposed *Proceeds of Crime Bill 2001*, 'suppress criminal activity by attacking the primary motive, profit and reinvestment of that profit in further criminal activity?'

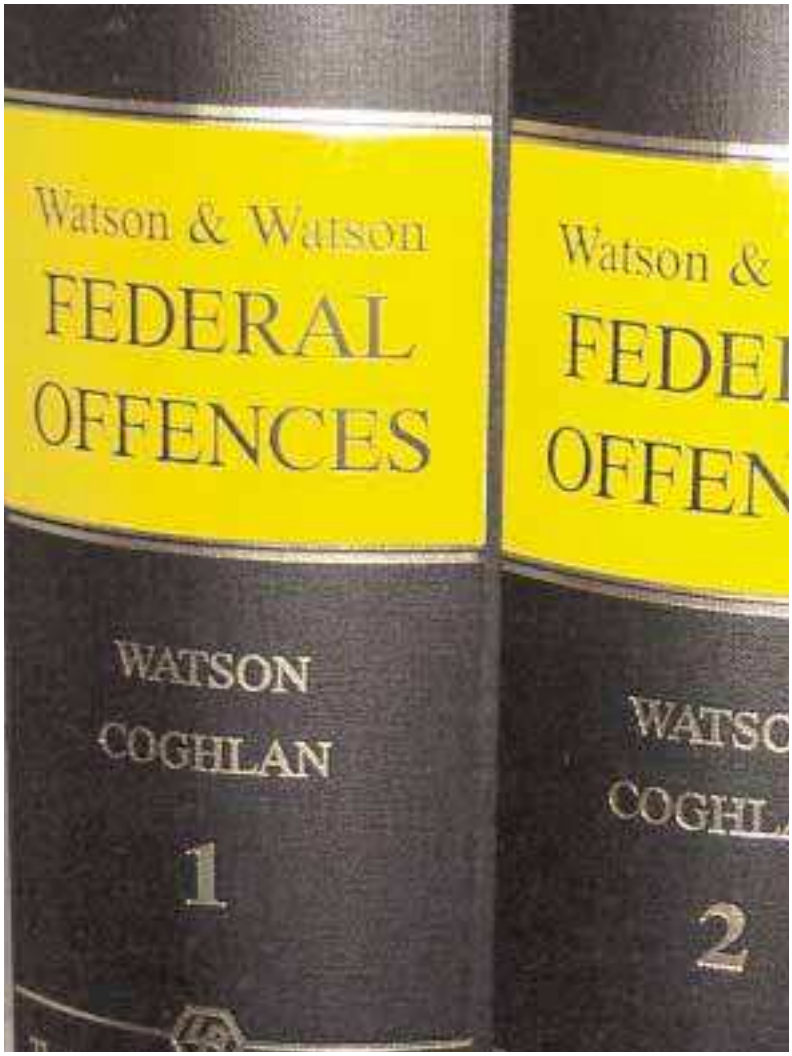
Some critics contend that …

> "Confiscation laws are useful in the crime fighting armoury as one of the means by which unjust enrichment can be prevented and crime made to pay less. But because they come at a price in terms of civil liberties and due process, that price cannot be inflated by unjustified claims about their capacity to reduce the general incidence of profit driven crime." (Freidburg and Fox 1997, p.30)

Perhaps more optimistically a new appraisal of the affect of any revised proceeds of crime regime should be made. This is not a case of lowering expectations but rather viewing proceeds of crime legislation within the context of a number of strategies. Some of these strategies could be regarded as 'traditional law enforcement' responses such as criminal charge and prosecution, while others – a new breed of strategies, could also be considered. Strategies that have the objective of deterring organised crime and the perpetrators of serious offences from considering Australia as an attractive place to do business. This is a challenging goal in a globalised society.

The Minister for Justice and Customs recently announced that the "*Measures to Combat Serious and Organised Crime Bill 2001*" has passed through the Australian Senate. This bill incorporates amendments to a number of pieces of legislation that will in effect, extend controlled delivery operations, provide immunity from prosecution for officers involved in undercover operations, extend electronic surveillance capability and improve effectiveness of coverage to include 'underground bankers' under Australia's financial reporting regime. These are all welcome additions to the current legal situation.

However, new tactics and strategies also have to be considered to make Australia as unattractive a place to do illicit business as possible. These strategies should counter the essential ingredients that organised crime and serious offenders require to successfully conduct their business operations. Nominally



these strategies could centre on communications, transport, commodities and finance.

Unfortunately you will have probably noticed that these are some of the areas most recently affected by globalisation. In Australia's case and in many other countries, these are the areas that are being liberalised, deregulated and less closely controlled by governments than in any other period in history. It was recently noted in Australia "organised crime has been quick to recognise the opportunities presented by the deregulated financial sector and the growth of international electronic banking systems" (NCA 2001, p.26).

Nevertheless, listed below are a series of measures that could be considered as leading to a reduction in the attractiveness of the Australian illicit business environment by increasing the difficulty for organised and serious offenders to operate:

- More discretion in visa issue. Many countries still have visa requirements for

travel. Improved coordination between countries of intelligence can result in creating an environment that is more difficult for organised crime and serious offenders to travel within.

- Increased use of immigration laws to remove the 'support staff'. Typically a complex and international investigation will identify members of crime groups that supply 'support services'. These can include drivers, debt collectors, message and document carriers 'smurfs' and the like. These people provide an essential layer that presents serious offenders from implicating themselves in overt acts. By removing this layer of support staff – the principals will be further exposed to prosecution.
- Better interdiction or disruption of communications. Organised crime and serious offenders already exploit weaknesses in communication access, especially between national jurisdictions. Improvements in this area are required.
- Passports – a right or a privilege? At least one country routinely removes passports from serious drug offenders as they arrive back into their country for periods of up to 10 years. This inability to travel seriously disrupts the potential for these offenders to continue their activities.
- Taxation recovery and penalties. Countries like Australia have no hesitation in recovering from criminal offenders unpaid tax. This has proved an effective method of removing the ill-gotten gains from serious offenders.
- Obtaining more efficiencies from international mutual legal assistance procedures.

Conclusion

While the above is by no means an exhaustive or comprehensive list of proposals, it is an attempt to provoke ideas and further discussion that will in future assist law enforcement agencies in discouraging organised crime and serious offenders. Naturally, all of this is an enormous challenge in a globalised world. However, the question must be asked in the context of an increasingly complex and technologically driven society that despite the most valiant efforts, whether any legal system will ever keep pace with the requests of their law enforcers and the expectations of society?

Perhaps the future may lie in exploring alternative strategies that discourage on economic rationalist grounds alone the perpetuation of organised crime and serious offences. Hence this would be reflected by agencies such as my own, the Australian Federal Police, from being referred to in future as 'law enforcement agencies' but rather reflecting the use of a variety of strategies and then being referred to as 'anti or counter crime agencies'.