

A case of rotten tomatoes

The successful settlement against Californian tomato baron Scott Salyer and his US company SK Foods is a landmark case under Australia's *Proceeds of Crime Act*.

As far as rotten tomatoes go, Californian tomato entrepreneur Scott Salyer was pretty much the pick of the bunch. Salyer was the third generation of a Californian family dynasty of cotton growers and later tomato producers. Between the Salyer family and other family companies operating from the rich Central Valley area of California they controlled about 5 per cent of the tomato product sales in North America.

But for some people enough is never enough. Salyer and SK Foods appeared on the US Department of Justice and FBI radar for serious criminal activity such



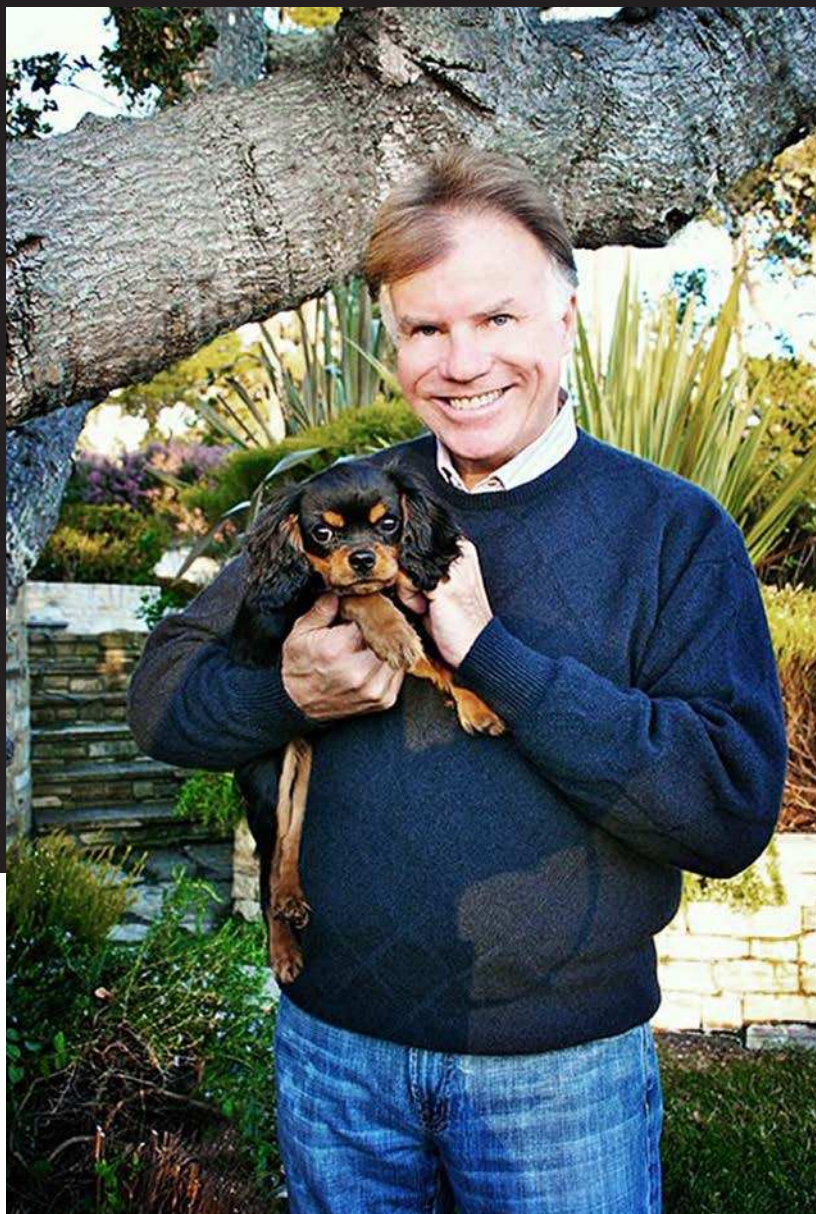
SK Foods demonstrated that targeting wealth created from crime was not just an issue for drug dealers.

as racketeering, bribery and price fixing to get an edge on his competitors. The FBI launched an investigation in 2009, appropriately called Operation Rotten Tomato.

The FBI alleged that bribes were paid to key purchasing managers in US companies to award contracts to SK Foods at inflated prices. To meet expanded demand, substandard produce was used in processed tomato products. Products were also incorrectly labelled as organic products. Moreover, tomatoes with higher-than-permitted mold content were used to fill orders for tomato paste. According to court documents, Salyer was quoted as saying "You can solve all your problems with a label printer".

Salyer was subsequently arrested in 2010 and charged with tax fraud and US racketeering offences dating back to 1998. The US companies that Salyer controlled were then placed into bankruptcy. Scott Salyer was sentenced to six years in a Californian minimum security prison.

It was at this point that the fall of the Californian tomato baron would present Australian law enforcement with a landmark case under Australia's *Proceeds of Crime Act* (POCA). The Australian POCA was passed into law on 11 October 2002 and came into operation on 1 January 2003. The Act provides a scheme to trace, restrain and confiscate the proceeds of crime against Commonwealth law.



In some circumstances, the Act also can be used to confiscate the proceeds of crime against foreign law. It can also confiscate the proceeds of crime against Australian state law if those proceeds have been used in a way that contravenes Commonwealth law.

Such was the case when tainted money from Salyer's US operations was used to commence two businesses in Australia in 2002. There was no doubt that SK Foods Australia and SS Farms Australia Pty Ltd were profitable and legitimately run companies. But Australian liquidators Sheahan Lock Partners discovered that at least some of the \$12 million used by Salyer to purchase the Australian companies was likely the proceeds of crimes committed by Salyer.

In 2010, the assets of the Australian companies were sold for a combined figure of \$91 million dollars. After the sale and disbursement of funds to creditors there was a surplus amount of about \$50 million.

It was this money that the AFP would litigate to restrain under Section 19 of the POCA. A sworn affidavit setting out the circumstances of the action was filed in the Victorian Supreme Court by the AFP in May 2013.

Californian tomato entrepreneur Scott Salyer in happier times.

"I think in years to come people will refer to the SK Foods' case as being a watershed case, specifically in relation to the interpretation and application of the POCA," says Sheahan Lock partner John Sheahan.

Mr Sheahan says the potential of criminality in the Australian context was apparent quite early in these administrations. He says the Australian bank that financed the Australian and New Zealand operations was monitoring the FBI investigation. In fact, Mr Sheahan says as the POCA process unfolded it was a learning curve for all parties involved, including the liquidators, the AFP and their respective legal advisors.

"This case alerted those involved to the reach of the POCA and the implications and the importance of practitioners, liquidators, receivers, administrators, traders, bankers – lawyers and barristers even – and their obligations to report suspicious transactions. So I think we will hear a lot more about SK Foods in the future."



Both Sheahan and Lock made several trips to the US to meet with the principal stakeholders based in California. They met early with Department of Justice US officials in Sacramento, California.

They learned that US authorities intended to file against Salyer's Australian interests under their own version of proceeds-of-crime litigation. US trustee of SK Foods Bradley Sharp had already commenced civil proceedings in the Federal Court of Australia and the United States Bankruptcy Court to recover the surplus from the sale of Salyer's Australian companies.

When the US Department of Justice decided against pursuing Salyer's Australian and New Zealand interests, Sheahan Lock Partners sought legal advice on whether the surplus funds should be restrained in Australia under POCA legislation. Sheahan Lock Partners approached the Criminal Assets Confiscation Taskforce in Melbourne in September 2012. As liquidators, they were concerned that the \$50 million surplus may represent proceeds of crime under the terms of the POCA.

Landmark

AFP Deputy Commissioner Close Operations Support Andrew Colvin says it was important that the AFP demonstrate it could successfully prosecute a case such as SK Foods. He says the AFP model is unique where law enforcement is responsible for investigating and litigating POCA cases. He adds that it wasn't without "some consternation" that the AFP decided to take on this responsibility. SK Foods was, therefore, the perfect opportunity to assess and confirm the AFP model.

Top left: Deputy Commissioner Close Operations Support Andrew Colvin addresses participants at an SK Foods debrief in Canberra. Middle left and below: A key message from SK Foods is that white collar assets built on crime will be targeted under the *Proceeds of Crime Act*.



“In some ways we have put a target on our back,” Deputy Commissioner Colvin says. He says there is a community consensus that people do not profit from crime. There was also agreement within Government and agencies that the finite resources could be better used to prosecute POCA cases. “So we embarked on something that is unique and is not without significant challenges,” he says. “And then, we are still very early on in the process and we get this matter called SK Foods.”

SK Foods also heralded an important message that POCA was as much an issue for corporate crime and white-collar crime as it is for those people you generally see profiting from crime in the community. As Deputy Commissioner Colvin says it is the drug trade that most people think about when you think about organised crime. In the matter of SK Foods, the AFP faced a heavily resourced and hostile opposition. “We made a conscious decision to say ‘this is the type of matter that we believe Parliament intended the legislation to be used for’. We wanted to make sure that we were sending strong messages that criminal proceeds or profiting from crime wasn’t just an issue for drug dealers – it was an issue for all walks of life and it was an issue for all levels of crime.”

AFP Manager and Chief Counsel Proceeds of Crime Litigation David Gray says the SK Foods case provided a “huge challenge and an important test for Proceeds of Crime Litigation of our mettle as robust and professional litigators”.

“We were seriously outgunned in resources by the combined legal forces employed by the US trustee, the receivers and the bank – but we held our own, and successfully demonstrated that we have the skills, knowledge and determination necessary to take on cases of this magnitude,” Mr Gray said. He also said that the case demonstrated the value of litigators working closely with CACT investigators, without whose support would have made the case much more difficult.

Barrister representing the AFP Norman O’Byrne, Senior Counsel (SC), says that SK Foods has been “important for a number of reasons” in delivering several messages throughout the Australian community.

“Most significant is that it was the first occasion in which the Commonwealth had pursued the recovery of proceeds of crime in the context of a large corporate insolvency matter involving undoubted proceeds of crime,” SC O’Byrne says.

AFP members restrain goods and cash deemed the proceeds of crime during operations.





An alleged offender is arrested under the *Proceeds of Crime Act*.

“It took a while for the respondents to accept they were undoubted proceeds of crime. Certainly, I’m not aware of an earlier occasion where the Commonwealth had taken action in that way.”

SC O’Bryan says it is also important because it was successful. “A very large amount of money was restrained so that from a financial outcome point of view it was a highly successful large piece of litigation.”

Even so, SC O’Bryan says it is particularly important for creating that awareness in the community about the reach of the POCA. In this, he includes even the liquidator, Sheahan Lock Partners.

“I don’t think many people in the legal community and very few in the commercial community have any real understanding of how widely applicable the POCA legislation is and how immediate its impact can be in circumstances like the SK Foods case. My suspicions



AFP members restrain a luxury vehicle deemed the proceeds of crime.



A Federal Agent processes items restrained under the Proceeds of Crime legislation.

are being borne out by comments that have been made to me by lots of very experienced people in the business world. People eyes, like John Sheehan's, for example, were opened up to this only quite recently. "The potential scope of application of the Act is much broader than I think most lawyers understand it to be and certainly much broader than anyone in the business community understands it to be. I include amongst these people banks and other financiers that mix their monies with the monies of commercial people, who may have committed crimes, and thereby put themselves at risk."

Bad apples

Ironically, given the vast sums of money involved in the Salyer fortune – Scott Salyer pleaded guilty to knowledge of wrongdoing on just two of eight relatively minor charges in the United States.

John Sheahan says one count involved a cheque for US\$2000 and the other involved persuading a competitor to withdraw a more competitive 1 cent per pound on 2.5 million pounds of tomatoes – a profit of just US\$25,000. Yet, in the liquidation process that would follow, it would effectively cost Salyer his fortune and ultimately his freedom.

"I think it also sends a big message to professional practitioners, liquidators, receivers, administrators, lawyers, barristers and bankers that the AFP is serious," Mr Sheahan says. "Having got this successful result, the AFP will be looking much more closely at these sorts of transactions in the future. I think it will force practitioners to be far more aware of their obligations under the Act."



A luxury yacht is restrained under Proceeds of Crime legislation.