

CONFISCATION OF CRIMINAL ASSETS

RECENT DEVELOPMENTS IN NEW SOUTH WALES

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As a current issue in criminal justice the confiscation of criminal assets certainly qualifies. On 24 May the New South Wales Parliament passed the *Drug Trafficking Civil Proceedings Act* 1990 and it was proclaimed to come into force on 3 August. The *Confiscation of Proceeds of Crime Act* which was passed in 1989 is likely to be proclaimed later this year after minor amendment. These *Acts* represent the most recent attempts by Governments to recover the proceeds of crime, particularly drug related crime.

All of the modern legislative devices have given special emphasis to drug crime, some relate exclusively to drug crime. The reasons for this no doubt relate to the view that the so-called "war on drugs" has not succeeded in reducing drug trafficking to an acceptable level. There is a perceived need to remove the profit motive which characterises drug trafficking.

The drug trafficking addressed by the recent legislation is at the level of persons who are in it for profit, therefore the profit must be addressed. Some drug traffickers have been prepared to risk extremely high penalties including life imprisonment, because of the profits involved. There are instances of major traffickers expressing the view that they are more concerned with loss of their profits than loss of their liberty. It is also an important element of drug trafficking as it is with licit business enterprises that there be a good capital base. In the criminal area a good capital base also tends to insulate the promoters from the acts which are likely to be detectable by law enforcement agents.

In terms of public perception and therefore confidence in the criminal justice system, drug trafficking at the upper levels has made a mockery of the old adage "crime does not pay". As with the criminal law, where penalties have soared in response to an escalation in the drug problem there have been parallel developments in confiscation legislation.

HISTORY

To understand these developments it is necessary to put the most recent legislation in an historical context. Most papers on this subject seem to commence with a discussion on the

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ancient writs of attainder and the like. I do not propose to look at any law which has not applied in New South Wales this century. The current law applicable in New South Wales includes Commonwealth legislation.

The main pieces of legislation are the *Poisons Act* 1966 which was relevantly amended by the insertion of Section 45AC in 1981, the *Customs Act* 1901 (Cth) which has always contained confiscation provisions but was most relevantly amended in 1979, the *Crimes (Confiscation of Profits) Act* 1985, the *Proceeds of Crime Act* 1987 (Cth), the *Confiscation of Proceeds of Crime Act* 1989, and the *Drug Trafficking (Civil Proceedings) Act* 1990.

Before going to the details of these statutes it is necessary to consider some of the distinguishing features in this area of legislative endeavour. Table 1 contains a summary of those distinguishing features. The main concepts are:

- Conviction Based — This means that a person does not become liable to lose his/her property unless and until a conviction has been recorded. It can be observed from the table that only the *Customs Act* and the 1990 *Act* are not conviction based.
- Proceeds Assessments — This refers to the profits which can be attributed to the criminal activity. Where the State/Commonwealth seeks an order in relation to specified benefits of crime it is necessary for the State or Commonwealth to prove that a person profited from the activity. The Court then goes through a process whereby the amount of the profit is assessed. In drug cases this may involve expert evidence from police as to the price of drugs.
- Reverse Onus — This refers to a statutory presumption which operates against the defendant to prove that assets are not the proceeds of crime. This onus shifts to the defendant only after he has been shown to have engaged in the requisite conduct — usually by conviction, or proof on the civil standard. The defendant usually has to prove that the assets he or she has or has received over a period were lawfully acquired. In some cases this relates to the totality of the estate of the defendant and in others it is limited to assets acquired within a certain period.
- Effective Control — This refers to the process whereby certain assets are deemed to be part of the estate of the defendant either because they have been transferred in an attempt to avoid the operation of the legislation or, notwithstanding the actual title, the defendant has a beneficial interest.
- Tainted Property — This refers to property which may be forfeited because of it being used in connection with the offence. The forfeiture of tainted property usually occurs as part of the sentencing process. This is because the confiscation of tainted property may operate as a penalty in that the loss to the defendant may exceed his profits — e.g. the cultivator who is detected prior to harvest and forfeits his farm.

Basically there are three types of property liable to forfeiture:

- (a) property attached to meet a proceeds assessment order or pecuniary penalty
- (b) property which is presumed to be drug profits and the defendant cannot rebut the presumption
- (c) tainted property.

Table 1

ACT	CTH/STATE	CONVICTION REQUIRED	DRUGS ONLY	WHO TO PROVE PROFITS	TAINTED PROPERTY
Poisons Act 1966 (repealed)	NSW	Yes	Drugs	State to prove benefits	Yes
Customs Act 1901	Cth	No	Drugs	Cth to prove benefits	Yes
Crimes (Confiscation of Profits) Act 1985	NSW	Yes	Serious Crime	State to prove benefits	Yes
Proceeds of Crime Act 1987	Cth	Yes	Serious Crime	Cth to prove benefits and full reverse onus	Yes
Confiscation of Proceeds of Crime Act 1989	NSW	Yes	Serious crime special drug provisions	State to prove benefits and limited reverse onus	Yes
Drug Trafficking (Civil Proceedings) Act 1990	NSW	No	Drugs	State to prove benefits and full reverse onus	No

It is apparent from Table 1 that only the 1989 *Act* has all three elements but in relation to b) and c) it is not as extensive as others.

The following is a survey of the *Acts* indicating which concepts are employed and which types of confiscation apply. The provisions have been dealt with very briefly and often do not reflect the full extent of the operation of the *Act*.

CUSTOMS ACT 1901

It is not surprising that the *Commonwealth Customs Act* should have been the first of these to contain provisions for the confiscation of the proceeds of drug crime. Customs law in Australia and elsewhere has been based on a system whereby the penalty for evading revenue was forfeiture of imported goods. Part XIII of the *Act* which contains the penal provisions deals with the forfeiture of ships and the aircraft, installations, goods which are smuggled, prohibited imports and goods in respect of which false representations have been made, or goods in relation to which movement or sale etc. has occurred contrary to the *Act*. In 1910 the *Act* was amended to create specific narcotics offences. It was not until 1977 that section 229A was inserted in the *Act* providing for the forfeiture of the proceeds of drug trafficking. The section provides that monies and goods connected with drug trafficking are deemed to be forfeited goods for the purposes of the *Act*. In 1979 the pecuniary penalty provisions were introduced in relation to dealings in narcotic goods. Sections 243A-S provide for applications for the recovery by way of pecuniary penalty of the value of benefits derived from unlawful dealing in, importation or exportation of narcotic goods.

This division of the *Act* is not conviction based. The triggering mechanism is to "engage in a prescribed narcotic dealing". Those dealings are set out in Section 243A. Although they roughly follow the narcotics offence provisions contained in Section 233B they extend beyond them. Application may be made for a pecuniary penalty order in respect of a prescribed narcotic dealing engaged in by the defendant or prescribed narcotic dealings engaged in by the defendant during a particular period. Where the Federal Court is satisfied that this has occurred it is required to assess the value of the benefits derived by the person by reason of he/she engaging in the dealing and order payment of a pecuniary penalty to the Commonwealth to the value assessed.

There are detailed provisions dealing with assessment (243C), presumption of illegality of importation (243D), control of property by the official trustee (243E), ancillary orders (243F) and other machinery provisions.

POISONS ACT 1966

The next relevant piece of legislation applying in New South Wales was Section 45AC of the *Poisons Act* introduced in 1981. It authorised the sentencing court to confiscate tainted property (vehicles, vessels or equipment used in the commission of the offence) and to make a proceeds assessment order in respect of benefits derived from the offence. The order gave rise to a civil judgment debt due to the Crown which could be enforced

accordingly. There were provisions for restraining orders, applications by third parties and appeals. The provisions were contained within just two sections and had none of the complicated machinery which is now common in such legislation. There was little if any activity in the Courts as a consequence of these amendments. Sections 45AC and AD were repealed by the *Crimes (Confiscation of Profits) Act 1985*.

CRIMES (CONFISCATION OF PROFITS) ACT 1985

This Bill was introduced in the wake of a number of Royal Commissions relating to drug trafficking revealing the financial affairs of notable traffickers such as Mr Asia who died leaving a substantial estate in various parts of the world. There had been major moves on organised crime both by the Commonwealth and in New South Wales. The NCA was established in 1984 and the State Drug Crime Commission in 1985 and there had been a succession of calls by retired judges and others for effective confiscation legislation. The Bill was said to “create a major new weapon which will be an important part of the Government’s continuing assault on organised crime in New South Wales”. The opposition of the time supported the Bill but thought that it did not go far enough. It called for something along the lines of RICO style legislation.

Like the *Customs Act* the 1985 *Act* is still law in New South Wales. It will be repealed and largely re-enacted by the *Confiscation of Proceeds of Crime Act 1989* when that *Act* is proclaimed. The *Act* is applicable to serious offences not just drugs and is conviction based. It contains provisions for both forfeiture orders and pecuniary penalty orders.

Forfeiture Orders

Where a person has been convicted of a serious offence the State may seek a forfeiture order in respect of specified property which is tainted property. A serious offence is an indictable offence or a specified drug offence. Tainted property is defined as property used in or in connection with the commission of a serious offence or which was derived or realised directly or indirectly by any person as a result of the commission of a serious offence. A person will be taken to have been convicted of a serious offence where the person is dealt with pursuant to Section 556A of the *Crimes Act* or the offence has been taken into account on sentence or the person has absconded after being charged.

Pecuniary Penalty Orders

These are triggered in the same way as forfeiture orders. They involve the making of an order to pay to the State the assessed benefit derived by reason of committing the offence. The benefit is enforceable as a civil debt. There are provisions regarding the assessment process.

Part IV deals with restraining orders which may be obtained where a person has been or is about to be charged with a serious offence. Applications for restraining orders are made *ex parte* to the Supreme Court. There is also provision for ancillary orders including an examination of the defendant or other person and for control of the property

by the public trustee. Part V deals with search warrants in relation to tainted property and seizure of property.

PROCEEDS OF CRIME ACT 1987

This was the first attempt by the Commonwealth to make general provisions relating to the confiscation of proceeds of crime beyond the area of drugs. At the time of its introduction the Attorney General echoed his New South Wales counterpart when he said:

[the *Act*] 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 re-investment of that profit in further criminal activity.

The Bill was put forward as part of a package of legislation which included:

- the *Telecommunications (Interception) Amendment Act* which extended the power to intercept telecommunications
- the *Mutual Assistance in Criminal Matters Act* which was designed to put in place machinery which would enable Australian orders freezing and confiscating property to be enforced overseas and those of foreign countries to be enforced against assets in Australia
- revision and codification of extradition laws, and
- the *Cash Transaction Reports Agency Act*, which was designed to identify the proceeds of organised crime and revenue fraud.

The *Act* contains many of the components of the 1985 New South Wales *Act*. It is conviction based; it relates to serious offences in addition to drug trafficking; it has provision for forfeiture orders in relation to tainted property, and pecuniary penalty orders in relation to the benefits of crime. It also introduced some new concepts.

Deeming Provision

Where an application is made for a pecuniary penalty order against a person in relation to a serious offence then it is presumed that certain property of the defendant is property that came into the possession or under the control of the defendant by reason of the commission of the offence. This is a type of reverse onus provision.

Effective Control

The *Act* introduces the concept of effective control of property through the definition of “interest” which includes a right, power or privilege in connection with the property, whether present or future and whether vested or contingent. The process of assessment is assisted by a provision which permits the “lifting of the corporate veil” which is another method by which property under the effective control of a person is brought into the estate for this purpose.

Statutory Forfeiture — Reverse Onus

Where a person has been convicted of a serious offence (a serious narcotics offence, an organised fraud offence or a money laundering offence in relation to the proceeds of such an offence) other than by deemed conviction upon abscondment, and there is a restraining order in force in respect of the property of the defendant, and the property has not been excluded from the operation of that restraining order by declaration of the Court, then the property is automatically forfeited. This in effect requires the defendant to exclude the property from the operation of the statutory forfeiture provisions. To do this he must prove that the property was not acquired through any unlawful activity. It is noteworthy that unlawful activity includes an offence against a law applying in or outside Australia.

There are provisions protecting the interest of third parties and for payment of living, business and legal expenses. There are also extensive provisions regarding the control of property. The restraining order powers are extensive and there are comprehensive investigation powers including orders for the examination of persons on oath, search and seizure powers, provision for production orders and monitoring orders.

Offences

The *Act* also creates new offences. They are money laundering, organised fraud and a new type of goods in custody offence.

I now turn to the new laws recently introduced in New South Wales.

CONFISCATION OF PROCEEDS OF CRIME ACT 1989

As stated earlier this *Act* re-enacts substantial portions of the 1985 *Act*. There are a number of additional provisions dealing with:

- the identification, location and quantification of property associated with or derived from crime
- new penalty orders known as drug proceeds orders in relation to drug trafficking offences
- a new offence of money laundering
- new provisions dealing with the effectiveness of restraining orders
- facilitation of registration in New South Wales of orders for the freezing and confiscation of property made under corresponding laws in other jurisdictions.

In particular emphasis has been placed on the money trail and there is an extended definition of “tainted property” and the concept of “effective control of property”.

Definitions

The most significant new definitions are the definition of “serious drug offence” which basically follows the definition in the *State Drug Crime Commission Act*, being the more serious offences under the *Drugs Misuse and Trafficking Act 1985*. The concept of

“effective control of property” is clarified so the *Act* will operate against property whether or not the person has a legal or equitable estate or interest in the property or a right power or privilege in connection with the property. Determinations as to effective control may have regard to such matters as shareholdings, trusts, family, domestic and business relationships.

Confiscation

Applications may be made to the Court in which the person has been convicted or to the Supreme Court. The Court may have regard to the transcript of the criminal proceedings to avoid the need to rehear evidence.

Forfeiture Orders

Forfeiture orders apply to tainted property, the definition of which has been expanded. It is made clear that the Court must specify the value of the property other than money to which the order applies. Sentences imposed on a person independent of the forfeiture order are not to be taken into account in determining whether hardship would arise. The Local and District Courts are given power to restrain property pending the making of a forfeiture order.

Pecuniary Penalty Orders

These do not apply to drug trafficking offences which are specifically dealt with under Drug Proceeds Orders.

Drug Proceeds Orders

These are new provisions based on the *Drug Trafficking Offences Act* 1986 (UK). The division applies to property in the possession of the defendant before or after the commencement of the *Act*.

The sentencing Court is required to enquire into whether the person has benefited from drug trafficking. This enquiry involves the assessment of the value of the benefit derived and requires a Court to make an order in relation to that benefit. The Court may assume that property acquired by the defendant for a period commencing six years prior to the action was a payment or reward in connection with drug trafficking and that expenditure in that period was met out of the proceeds of drug trafficking.

Under Section 31 the prosecution may tender to the Court a statement relevant to the issue of benefit and the defendant may be required to accept or reject each allegation. Where the defendant does not accept the allegation he may be required to indicate the matters he proposes to rely on. These statements go to the value of the benefit received.

Under Section 32 the Court is required to determine the value of the proceeds derived. The amount of the order may not exceed the amount that may be realised less obligations. There is a relation back period applying to gifts made within a six year period.

It should be noted that whereas this part of the *Act* is triggered by a specific drug offence the Court, under Section 29 is required to determine whether the defendant has

received any payment or other reward in connection with “drug trafficking” (any Act constituting a drug trafficking offence). This extends the potential scope of the order beyond the profits of the offence the subject of the conviction. It is a type of reverse onus provision.

Restraining Orders

These provisions largely follow those of the 1985 *Act*. It is now clear that they are applicable to property acquired after the making of the order and to property of another which is under the effective control of the defendant. There are provisions relating to legal expenses (s 46), registration of restraining orders (s 49) and penalties for contravention (s 50).

Investigation Power

In addition to the power to search for tainted property there is provision for production orders, and search warrants as an alternative to production orders. There are also provisions relating to monitoring orders.

New Offence

Like the *Commonwealth Proceeds of Crime Act* this *Act* creates a new offence of money laundering. A person who engages, directly or indirectly, in a transaction that involves money, or other property, knowing that money or property is the proceeds of a serious offence; or receives, possesses, conceals, disposes of or brings into New South Wales any money, or other property, knowing that the money or property is the proceeds of a serious offence is liable to a maximum penalty of 2000 penalty units and 20 years imprisonment in the case of an individual. The prosecution must prove that the person knew the money or the property was the proceeds of unlawful activity which means an *Act* or omission that constitutes an offence against a law in force in Australia.

DRUG TRAFFICKING (CIVIL PROCEEDINGS) ACT

This *Act* came into force on 3 August 1990. Like the *Confiscation of Proceeds of Crime Act* it has not yet been proclaimed. The distinguishing features of this *Act* are that it is not conviction based, it relates only to serious drug crime, it has a reverse onus provision together with provisions for confiscating the proven benefits of the crime. It has no tainted property provision. When the Bill was introduced the Premier said:

This legislation, like the *Commonwealth Customs Act*, treats the question of confiscation as a separate issue from the imposition of a criminal penalty . . . no criminal consequences flow from this legislation . . . the consequences are that the person has to justify, account for, and explain where his or her assets came from . . . what this legislation does is analogous to giving the Crown a civil right of action to recover, on behalf of the community, assets and profits obtained illicitly by people who benefit from the drug trade.

Proceedings under this *Act* are to be commenced in the Supreme Court by the State Drug Crime Commission. It will have to prove that the defendant engaged in drug related activity. Essentially a drug related activity is an indictable offence under the *Drug*

Misuse and Trafficking Act 1985 or the *Poisons Act 1966*. The reference to the *Poisons Act* reflects the fact that the legislation relates to conduct occurring in the last six years.

Also included within the concept of drug related activity are certain indictable offences committed in connection with drug offences, such as bribery and money laundering. The standard of proof necessary to be established is on the balance of probabilities. The first step in the proceedings will usually be an application for a restraining order. A restraining order must be granted by the Supreme Court where it considers that there are reasonable grounds for suspecting that a person has engaged in a drug related activity and that certain property is drug derived property.

There is provision for the public trustee to take control of the property and for living and legal expenses to be met out of restrained property. There is also provision for undertakings as to damages and costs. Within 48 hours of the making of the restraining order the Commission must make an application for an assets forfeiture order or a proceeds assessment order. A proceeds assessment order need not be preceded by a restraining order. There is provision for ancillary orders such as examination of the defendant and other persons.

Assets Forfeiture Order

The Supreme Court must make an assets forfeiture order if it finds it more probable than not that the defendant is engaged in a drug related activity involving an indictable quantity. The effect of an assets forfeiture order is that the interests are forfeited to the Crown and the proceeds are paid into a special account to be applied to victims compensation, drug rehabilitation and law enforcement purposes.

After the application for an assets forfeiture order an application may be made to the Supreme Court for an exclusion order and the property will be excluded if it can be established that it was not illegally acquired.

Proceeds Assessment Orders

The Commission may apply to the Supreme Court for a proceeds assessment order. Similar conditions must be met to those applying to forfeiture orders. There are provisions dealing with the assessment process, enforcement and the role of the public trustee. A proceeds assessment order operates as a charge on all of the interests of the person in property.

Information Gathering Powers

There are provisions for production orders, search and seizure, and specific provisions relating to property tracking documents, and monitoring orders.

CONCLUSION

Apart from minor specific Acts, as from the proclamation of the latter two *Acts*, there will be four statutes applicable to the confiscation of criminal assets in New South Wales. One New South Wales and one Commonwealth statute are limited to drug trafficking. Each of

the others has specific provisions relating to drugs. One offence, such as possession of heroin, could activate all four statutes. Clearly there will need to be co-ordination between the three agencies responsible for administering the four statutes. There is already in place an arrangement for sharing the proceeds of Commonwealth confiscation action involving state investigation and some New South Wales authorities have suggested a common fund into which all proceeds are applied to minimise the risk of competition.