THE PROCEEDS OF CRIME ACT 1987 — NEW DESPOTISM OR MEASURED RESPONSE?

MARK WEINBERG*

The *Proceeds of Crime Act* 1987 (Cth) (*POC Act*) came into operation on 5 June 1987. It has already begun to have far reaching and profound effects upon the operation of the criminal justice system in this country. It will undoubtedly produce a large amount of revenue in years to come. It will generate a large body of case law. It has also attracted strong criticism from a number of commentators, who see it as representing a gross violation of civil liberties, and as impinging upon the traditional values of our liberal democratic society.

The purpose of this article is to provide a broad conspectus of the operation of the Act, and, in particular, to draw attention to some of the difficulties to which it may give rise. Of course, it is still "early days" so far as this legislation is concerned, and much of what I have to say must be regarded as tentative, and somewhat speculative. The Act covers a wide range of discrete topics, and an overview of the kind attempted here can do no more than touch upon some of them.

It is useful to set out the principal objects of the Act. These are contained in s. 3. They are:

(a) to deprive persons of the proceeds of, and benefits derived from, the commission of offences against the law 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.

Whether, and to what extent the Act is succeeding in achieving these objects, and at what cost, will be the subject of the balance of this article.

CONFISCATION OF ASSETS IN AUSTRALIA — SOME HISTORICAL AND LEGISLATIVE BACKGROUND

In 1982 Special Prosecutors were appointed to assume responsibility for the handling of the prosecutions for the taxation frauds referred to as the

* Q.C. BA, LLB (Hons) (Monash), BCL (Oxon). Commonwealth Director of Public Prosecutions. Formerly Dean, Faculty of Law, University of Melbourne.
The author wishes to express his gratitude to John Thornton, Bronwyn Scheelbeek and Clive Scott for helpful advice and criticism during the course of preparation of this article. The views expressed herein are his own, however, and no-one else need feel any responsibility for those that are regarded as untenable.

"bottom of the harbour" schemes. Their task was also to co-ordinate the recovery by civil remedies under existing law of the amounts thereby lost to the Commonwealth.[1]

When the Office of the Director of Public Prosecutions came into being in 1984,[2] it took over these prosecutions from the Special Prosecutors. It was also given a limited civil remedies function[3] which was later considerably expanded.[4] This function involved no new powers of recovery or forfeiture. The DPP was simply given a role in the recovery of civil remedies connected to or arising out of prosecutions, or potential prosecutions. In practice, the function is exercised by way of co-ordination and supervision, the DPP being in a unique position to provide necessary guidance in this area. The litigation is conducted as ordinary civil litigation by the Australian Government Solicitor. The civil remedies function has been exercised mainly in the taxation area, and to date has led to the recovery of some 67.5 million dollars in unpaid tax.[5] In the areas of social security fraud, medifraud and nursing home fraud, amounts recovered total 2.5 million dollars.[6]

Apart from the civil remedies function, prior to the enactment of the *POC Act* 1987, the only significant avenue available to the Commonwealth so far as confiscation of criminal assets was concerned was to be found in Division 3 of Part XIII of the *Customs Act* 1901 (Cth). These provisions were introduced into that Act in 1979, but were rarely used for the first few years thereafter. They permit an application to be made to a judge of the Federal Court for the imposition of pecuniary penalties against persons who have engaged in prescribed narcotics dealings.[7] Pecuniary penalties are not conviction based, but it is rare for such proceedings to be brought in the absence of criminal charges being laid. Under s. 243E, the court may freeze the assets of a defendant, pending the hearing and determination of the application for a pecuniary penalty.[8] Provision is made for compulsory examination of suspected drug offenders with a view to ascertaining what property is owned by them, and how it happened to be acquired.[9] The *Customs Act* was formerly silent as to whether funds should be released to persons whose assets have been frozen in order to enable those persons to be represented by lawyers of their choice,[10]

[1] The *Special Prosecutors Act* 1982 (Cth) provided for the first time, in conjunction with the function of prosecuting offences, an ancillary function to take on or co-ordinate or supervise the taking of civil remedies on behalf of the Commonwealth.

[2] *Director of Public Prosecutions Act* 1983 (Cth). The Act came into force on 5 March 1984.

[3] Section 6(3) confined the function to cases where an instrument in writing had been signed by the Attorney-General.

[4] Section 6(1)(fa) introduced in 1985.

[5] As at 31 January 1990.

[6] As at 31 January 1990.

[7] Section 243B.

[8] Application may be made to the court for an order directing the Official Trustee in Bankruptcy to take control of the property of the defendant, whether situated in Australia or elsewhere.

[9] Section 243F. This section abrogates the privilege against self-incrimination — see *Commissioner of Australian Federal Police* v. *McMillan* (1987) 70 A.L.R. 203; *Kirk* v. *Commissioner of Australian Federal Police* (1988) 81 A.L.R. 321.

[10] Section 243E(4)(c) was restricted to permitting the court to order that provision be made to meet the reasonable living and business expenses of the defendant out of any property

but has been amended to make it clear that the Federal Court has this power. This is a matter which will be addressed later in this article in the context of the *POC Act.*

The pecuniary penalty provisions of the *Customs Act* continue to be used, though less frequently perhaps, since the enactment of the *POC Act.* The *Customs Act* confiscation provisions are wider in scope in some ways than the *POC Act* in that they are not conviction based, and do not depend upon it being shown that a Commonwealth offence involving narcotics has been committed. Prescribed narcotics offences extend to offences contrary to State law.[11] But the *Customs Act* has no application outside the field of narcotics, and lacks the range and sophistication of ancillary techniques for discovery and monitoring proceeds of crime which are available under the *POC Act.*[12] Pecuniary penalty orders under the *Customs Act* amount to 11.3 million dollars, recoveries 1.7 million dollars, and assets restrained 8.7 million dollars.[13]

It can be seen, therefore, that there was a respectable statutory pedigree for the introduction of general assets recovery prior to the enactment of the *POC Act.* Indeed, the concept of asset forfeiture is of ancient derivation, and modern legislation is nothing more than a somewhat refined re-emergence of what our ancestors took for granted. Chapter 21 of Exodus makes it clear that there was provision for the stoning of an ox that gored a man to death. The concept was familiar to the Greeks and Romans as well. Penal forfeiture seems to have had its common law origins in the old doctrines of attainder, and corruption of the blood.[14] The first Act of Attainder involved the Duke of Clarence in 1477,[15] and the procedure was revived from time to time. It was abolished in 1870 in the United Kingdom, and shortly thereafter in the Australian Colonies. A separate stream of assets forfeiture may be discerned through early Germanic and Anglo-Saxon law. A man whose act caused the death or injury of another through mere accident without negligence had to answer for the result as if it were intended. This produced the law of deodand, which survived the Norman Conquest for several centuries. Any instrument which killed a man was forfeited to the Crown, irrespective of who its owner might happen to be.[16]

frozen by the order of the court. In *Kirk* v. *Commissioner of Australian Federal Police* (1988) 81 A.L.R. 321 Davies J held that this sub-section should be read widely, and encompassed expenses such as legal costs of defending criminal charges brought. The matter has now been clarified by an amendment to the *Customs Act* which came into force on 28 July 1989.

[11] *Customs Act* 1901 (Cth) s. 243A(3).

[12] Monitoring orders are not available under the *Customs Act,* to take but one example.

[13] As at 31 January 1990.

[14] See generally *Saffron* v. *DPP* (1989) 39 A.Crim.R. 353, *Dugan* v. *Mirror Newspapers Ltd* (1978) 142 C.L.R. 583.

[15] See generally H. Potter, *Outlines of English Legal History* (3rd ed., London, Sweet and Maxwell, 1933) 109.

[16] Ibid.

AIMS AND OBJECTIVES

I propose to examine several important aspects of the *POC Act* from a thematic perspective. My analysis of the Act will necessarily be incomplete and somewhat selective. The provisions I focus upon are not necessarily those which are of greatest practical importance. Rather, I propose to acknowledge the fact that the new legislation has been regarded by many as being controversial in nature, and by some as being both draconic, and badly drafted.[17] I shall highlight their concerns, and endeavour to evaluate them. I do not speak as an apologist for the legislation. My Office has, of course, been given the responsibility for taking proceedings under the *POC Act*, and we have established teams of highly dedicated and skilled lawyers and financial analysts in all regional offices in order to enable us to perform this task. I admire and respect the high quality of their work. They do a difficult job well, working with provisions which are not always as clear or easy to comprehend as they might be. My contribution to the debate about this legislation will reflect what I hope is seen to be a balanced attitude. It is time, after all, that there is some rational debate about the Act. It was, after all, it is said, enacted in haste, and with little opportunity for such debate.[18]

My assessment of the *POC Act* accepts the concept that convicted criminals should, as a general proposition, be deprived of the benefits of their criminal behaviour. This seems to me to be axiomatic.[19] Punishment, whether by fine, or imprisonment, will seldom of itself, without a proper system of asset recovery, constitute a sufficient deterrent to the kind of criminal behaviour with which the Commonwealth is typically concerned. Revenue fraud in all its various forms, and large scale narcotics offences, are committed usually in order to satisfy greed. Knowledge that the profits of criminal behaviour will ultimately be lost is a valuable adjunct to the principal goals of the criminal justice system.

This is made manifest by the fact that Australia has not acted in isolation in enacting the *POC Act*. The United States, the United Kingdom and Canada (all signatories with Australia to the 1987 Vienna Convention dealing with organised crime, and money laundering) have all recognised the need for confiscation of assets legislation to be enacted into law. Indeed, the U.S.A. and the U.K. had legislation of this type on their books prior to the Conven-

[17] See for example B. Fisse, "The Proceeds of Crime Act — the Rise of Money-Laundering Offences and the Fall of Principle" (1989) 13 *Crim. L. J.* 5–6; B. Fisse, "Confiscation of Proceeds of Crime" (1989) 13 *Crim. L.J.* 369–370. See also the judgment of Kirby P. in *Saffron* v. *DPP* (1989) 39 A. Crim. R 353 at 357. A much more sympathetic approach to the legislation is to be found in I. Temby, "The Proceeds of Crime Act — One Year's Experience" (1989) 13 *Crim. L. J.* 24.

[18] See generally the observations of Kirby P. in *Saffron* v. *DPP* (*supra*) regarding the circumstances under which this legislation came to be passed.

[19] One must, of course, distinguish between the kind of forfeiture which is used to protect the public from harmful objects, such as adulterated foods, and dangerous weapons, and the kind of forfeiture designed to strip criminals of the benefit they have derived from their offences.

tion coming into existence, in the case of the U.S.A. for almost two decades.[20]

It cannot be denied that there is in existence today an international trade in drugs. One does not need to be an exponent of "organised crime" theories to accept that fact.[21] Equally, it cannot be denied that in recent years revenue fraud on a massive scale has been perpetrated upon the Commonwealth.[22] There has been a domestic impetus for legislation such as the *POC Act* from the recommendations of various Royal Commissions which have investigated aspects of "organised crime" in this country. It would be difficult to justify disregarding the considered views of each of the Royal Commissioners who have urged that legislation of this kind be enacted. Even allowing for the tenable proposition that in some cases their views and recommendations can be regarded as somewhat extreme (and as providing for a cure which may be worse than the disease), the basic fact remains that there have been, and are, significant criminal enterprises operating in this country. These enterprises have generated large profits, and those profits should not be allowed to remain in the hands of those behind them.

With the accumulation of large sums of illegal profits comes power and institutional corruption. Such corruption is no longer a matter which this society can afford to take lightly, if ever it could. It calls for urgent action to be taken if it is not to destroy the capacity of our institutions to function in a proper and democratic manner.[23]

As in so many areas of the criminal justice system, the question seems to me to be one of achieving an appropriate balance between, on the one hand, the rights of the individual, and on the other, the justification for the intrusion of coercive State powers. Once again, the twin models of "due process" and "crime control"[24] agitate with each other, creating a tension, and in the case of the *POC Act*, a turbulent mix.

[20] Modern forfeiture law began in 1970 in the United States. A number of statutes were passed in that year designed to seize ill-gotten gains of organised crime figures, the so-called RICO laws. These laws are conviction based, and permit *in personam* actions to be brought against defendants who have been convicted of relevant offences. A forfeiture action can be brought upon "probable cause". Hearsay can be used to establish such cause. Once "probable cause" is shown, the burden shifts to the defendant to show that the property should not be forfeited. The laws can operate in a most extraordinary and oppressive manner — see *Calero-Toledo* v. *Pearson Yacht Leasing Co* 94 S Ct 2080 (1974).

[21] A body of so-called "investigative journalists" has arguably distorted and exaggerated the levels of "organised crime" in this country. United States experience cannot readily be transposed to Australia. The search for a "Mr Big" or several "Mr Bigs" who control crime in this country has so far proved to be largely illusory, possibly because in Australia, crime, even serious crime, tends to be more disorganised than organised. That is not to say that there is not a number of disparate groups who coalesce together from time to time to carry out particular crimes, or to engage in patterns of criminal activity, sometimes effectively.

[22] See A. Freiberg, "Ripples from the Bottom of the Harbour: Some Social Ramifications of Taxation Fraud" (1988) 12 *Crim. L. J.* 136.

[23] *Report of a Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* ("The Fitzgerald Report") 29 June 1989.

[24] H. Packer, *The Limits of the Criminal Sanction* (Stanford, Stanford University Press, 1968) Ch 8.

THE BROAD SCHEME OF THE PROCEEDS OF CRIME ACT

The heart of the *POC Act* is contained in s. 14(1) of the Act:

"Where a person is convicted of an indictable offence, the DPP[25] may . . . apply to an appropriate court for one 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 derived by the person from the commission of the offence."

"Tainted property" is defined in s. 4 as meaning:
(a) property used in, or in connection with, the commission of the offence; or
(b) proceeds of the offence.

"Benefit derived" by a person is said to include:
(a) a benefit derived, directly or indirectly, by the person; and
(b) a benefit derived, directly or indirectly, by another person at the request or direction of the first person.

It should be noted that both forfeiture orders and pecuniary penalty orders are predicated upon there being a conviction for an indictable offence (which may, of course, have been dealt with summarily). Conviction is defined in s. 5 as including a person who absconds in connection with the offence. Restraining orders can, of course, be obtained prior to conviction, indeed, prior to arrest.

The *POC Act* empowers the Australian Federal Police (AFP) to seek information gathering orders — search warrants, monitoring orders, and production orders. The DPP acts as solicitor to the AFP in making application for such orders. The position of the DPP as applicant for restraining and confiscation orders, solicitor for information gathering orders, and prosecuting authority for both the primary offence and offences under the Act, is a complex one, and has an in-built potential for conflict of interest. I shall return to this aspect later in this article.

FORFEITURE ORDERS

So far as forfeiture orders are concerned, the court is, in s. 19, given a discretion[26] as to whether any such order should be made, and is permitted to have regard to factors such as any hardship that may reasonably be expected

[25] Note that the DPP is the applicant for forfeiture orders or pecuniary penalty orders under the *POC Act*. Under the *Customs Act*, confining ourselves to the narcotics provisions, the DPP is the prosecuting authority in respect of Commonwealth offences, but the Commissioner of the Australian Federal Police is usually the applicant for the pecuniary penalty and any attendant restraining order. The DPP may act as solicitor to the Commissioner in such proceedings, or may act in its own right.

[26] See *Re an Application Pursuant to the Drugs Misuse Act 1986* [1988] 2 Qd. R. 506 per Carter J. at 509 where, in the context of somewhat analogous provisions, his Honour spoke of the weight to be accorded to the presumption of innocence before making a restraining order.

to be caused to any person by the operation of such an order, and the gravity of the offence concerned. Sub-section (6) creates the first of several reversals of the onus of proof contained in the *POC Act* by stipulating that where the property was in the person's possession at the time of, or immediately after, the commission of the offence then absent evidence to the contrary, "the court shall presume that the property was used in, or in connection with, the commission of the offence".

The effect of such a presumption, when coupled with the great width courts occasionally give to words such as "in connection with",[27] places a significant burden of responsibility upon the shoulders of the DPP to ensure that forfeiture orders are sought only where it is manifestly appropriate that this be done. Read literally, a person's house could be the subject of a forfeiture order when he has done no more than store narcotic goods there temporarily (the house being used in, or in connection with the offence of possession of a prohibited import). This would seem to be both inappropriate, and an overreaction.[28] If, on the other hand, the house was used as a base from which to conduct drug trafficking, there seems no reason in principle why, subject to the discretion of the court, and the legitimate rights of third parties, it should not be forfeited.[29]

More difficult cases can be envisaged. Assume that the accused has used a yacht for the purpose of keeping watch during an importation effected by a different yacht. Is the first yacht subject to forfeiture?[29a] If an accused uses a car to take him from his home to a branch of the Commonwealth Bank where he presents a stolen bankcard, is the car subject to forfeiture? Problems of this kind will have to be addressed on a case by case basis[30] but a sensible and responsible attitude by those charged with the responsibility for making forfeiture applications will assist in the development of sound principles.

[27] *Murdoch* v. *Simmonds* [1971] V.R. 887 at 889; *Re an Application Pursuant to the Drugs Misuse Act 1986* [1988] 2 Qd. R. 506 at 511.

[28] The words "in connection with" should require "a substantial connection" between the use of the house, and the offence in question. The gravamen of the offence is mere possession, and it can be argued that the place where possession is had is somewhat irrelevant to the commission of the offence.

[29] The presence of the drugs in the house would be a *sine qua non* to the commission of the particular offence or offences, and intimately associated with such offence or offences. See generally *In the Matter of Applications by the Director of Public Prosecutions against Peter John Allen* (unreported, 12 December 1988, per McGarvie J.) where his Honour declared forfeit a house said to be headquarters from which the respondent ran his drug dealing business. A large number of weapons were also forfeited, his Honour holding that these had been used "in connection with" the drug trafficking which had formed the basis of the charges brought.

[29a] The answer seems to be yes. See *Brauer* v *DPP* (unreported, Full Court of the Supreme Court of Queensland, 15 December 1989).

[30] See generally *R* v. *Ward, Marles and Graham* (1987) 33 A. Crim. R. 60 where the Queensland Court of Criminal Appeal observed that merely because property had been used "in connection with" the commission of an offence did not mean that, as a matter of discretion, it should be forfeited to the Crown. To use a vehicle to drive to a particular place in order to purchase cannabis did not, in the circumstances, justify forfeiting the vehicle in question. *Cf Rochow* v. *Pupavac* [1989] V.R. 73, per Nathan J. for a very different view.

PECUNIARY PENALTY ORDERS

Pecuniary penalty orders are dealt with in Division 3 of Part II. It should be noted that such orders can be obtained in respect of property that comes into the possession or under the control of a person either within or outside Australia, and either before or after the commencement of the Act, or benefits provided to a person in similar circumstances.[31]

When dealing with pecuniary penalty orders, the *POC Act* draws a distinction between what are called "serious offences", and "ordinary indictable offences". Serious offences are defined in s. 7 as meaning serious narcotic offences (generally offences involving dealings in narcotics of greater than traffickable quantity), organised fraud offences (contrary to s. 83 of the *POC Act*), and money laundering offences in relation to the proceeds of a serious narcotics offence or an organised fraud offence. The consequence of being convicted of a "serious offence" (rather than an "ordinary indictable offence") is that any property which was the subject of a restraining order prior to conviction, and which restraining order is in force at the end of the period of six months after the day of the conviction, will be automatically forfeited to the Commonwealth at the end of that period.[32] In other words, there will be no need to prove that the property or benefits in question were derived from the commission of the offence, and the court will not need to undertake any assessment of the value of the benefits so derived in accordance with the procedure laid down in s. 27. The failure of the person convicted of the offence to have the restraining order lifted or varied will lead to automatic forfeiture. There is no "right to silence" when it comes to confiscation of assets, after conviction for a "serious offence". And conviction for that offence will, in effect, trigger loss of assets which may have been gained by the commission of *other* offences which have not been the subject of any criminal charges, the onus of disproving which rests upon the defendant, (the trier of fact being a judge, not a jury). All this may have some utilitarian justification, but does not sit well with ordinary principles of fairness, and the presumption of innocence.

Section 48(4) permits an application to be made to the court by the defendant for a declaration in relation to his interest in the property restrained but the defendant must satisfy the court that the property was not used in, or in connection with, *any unlawful activity* (note — not necessarily the unlawful activity with which he has been charged or in relation to which he has been convicted) and was not derived, directly or indirectly *by any person from any unlawful activity*, and the defendant's interest in the property was lawfully acquired.

These may be immensely difficult hurdles for a defendant to overcome, particularly when one has regard to the mode of assessment provided for in s. 27(6). That sub-section provides that where an application is made for a pecuniary penalty order against a person in relation to a "serious offence", all property of the person at the time the application is made, and all property of

[31] *POC Act* s. 24.
[32] *POC Act* s. 30.

the person at any time prior to the date on which the application was made and the time when the offence was committed (or five years, 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."

The person convicted of an ordinary indictable offence does not face the risk of automatic forfeiture by virtue of the expiration of any period of time after the obtaining of a restraining order. Sections 27(6), 30 and 48(4) have no application to ordinary indictable offences. In such cases, the DPP must satisfy a court that there are benefits derived by a person from the commission of an offence, and that it is appropriate to assess in accordance with s. 27 the value of the benefits so derived, and order the person to pay to the Commonwealth a pecuniary penalty equal to the penalty amount so assessed.

Section 27 provides a number of ways in which an assessment of pecuniary penalty can be made. The court is required to have regard to a range of matters including the money (or value of property other than money) that came into the possession or under the control of the defendant by reason of the commission of the offence. It seems that a court can treat the value of a narcotic substance as "property other than money" for these purposes.[33] Thus a joint participant in a narcotic enterprise who takes possession of a large quantity of drugs (albeit temporarily, and on behalf of others as well as himself) may find himself being assessed to pay a pecuniary penalty which equals the value of the drugs.[34] It is arguable that each member of the enterprise can be similarly and separately assessed, (though there is a respectable view to the contrary).

In a sense merely the *POC Act* is designed to inflict additional punishment rather than to restore the *status quo ante*. This "punishment" is not taken into account at the point of sentencing, however, and represents a significant departure from general sentencing policy. Sub-section (8) provides that any expenses or outgoings of the person in connection with the offence shall be disregarded when the court comes to make its assessment. A bribe paid to a corrupt police officer is not to be deducted from the value of the benefits derived.[35] The Act plainly focuses upon proceeds (or gross receipts), not upon net profits. Assessment can, however, be made on a "betterment" basis, if the court prefers to have regard to that as an alternative method of determining the value of the benefits derived.

[33] *Lahood* v. *The Commissioner of the Australian Federal Police* (unreported, Full Federal Court, 9 June 1989). This case dealt with section 243C(2)(a) of the *Customs Act* 1901 (Cth), which is in all relevant respects identical to section 27(2)(a) of the *POC Act*.

[34] Ibid.

[35] See *Lahood* v. *Commissioner of the Australian Federal Police* (*supra*). Note that in *Saffron* v. *DPP* (1989) 39 A. Crim. R. 353 the court construed the precursor to s. 27(7) as precluding recovery of pecuniary penalties arising from use and benefit of monies which came from tax which had been evaded. Penalty taxes were deemed to have been "pecuniary penalties" levied under another Commonwealth Act, and therefore no further penalty could be ordered.

Section 28 provides for a lifting of the corporate veil by utilising an "effective control" test in place of the more traditional requirement that there be a legal or equitable interest in the property, or at least a right, power or privilege in connection with it. This provides enormous scope for reaching assets which have been placed in the names of others in an effort to put them beyond the reach of confiscation.[36]

The net effect of these pecuniary penalty provisions is to offer those engaged in assets forfeiture powers far wider than any hitherto available to ordinary litigants engaged in civil disputes. Many of these powers are plainly necessary if the legislation is to be more than just a "toothless tiger". Persons who commit indictable offences (whether "ordinary" or "serious") are scarcely likely to approach the question of assets seizure in a gentlemanly and co-operative fashion. It can be anticipated that in many cases lies will be told, records falsified, and property hidden in an effort to avoid the drastic consequence of forfeiture, or the imposition of a pecuniary penalty. This is of course reality, and it is a reality which it is easy to overlook when considering the "fairness" of the *POC Act* in isolation.

At the same time, it is legitimate to ask whether some of the powers capable of being invoked in pecuniary penalty orders go too far. To take an example, it is surely difficult for anyone to prove that any specific item of property acquired by him during the previous five years was acquired lawfully, and purchased using lawful means. A serious offender may be required to do so, if he is to avoid having his assets confiscated. How many law abiding members of the community would be in a position to satisfy a court affirmatively of these matters? It would be a daunting task for even the most scrupulous record-keeper and honest citizen. To say that the Office of the DPP will endeavour to exercise such powers as are vested in it responsibly is at best a palliative — the real question is whether the powers themselves go beyond what is legitimately required to enable the otherwise laudatory objects of the Act to be achieved.

RESTRAINING ORDERS

One area of concern regarding the *POC Act* is the width of the power given to the DPP to obtain restraining orders, pursuant to ss. 43 and 44. Although the *POC Act* is conviction based, and no final order can be made leading to confiscation of assets unless, and until, there has been a conviction for an indictable offence, the legislation would indeed be toothless if no steps could be taken to recover pecuniary penalties, or to seize tainted property, until there had been a conviction. Upon being charged with indictable offences, accused persons would take steps to remove their assets from the reach of the DPP in order to render it impossible to satisfy pecuniary penalty orders. Assets would be dissipated, either by transfer to associates (or others) or by

[36] *DPP* v. *Walsh* (unreported, Supreme Court of Western Australia, per Seaman J., 5 May 1989).

conversion to cash which would be expended whilst awaiting trial. Persons facing conviction for serious offences do not, as a rule, fear bankruptcy.

To meet this problem, s. 43 permits the DPP to apply to the relevant Supreme Court for a restraining order prior to the defendant being charged with an indictable offence. The order may be sought *ex parte*, and, if sought prior to any charges having been laid, the court will decline to grant it unless satisfied that the defendant is to be charged with the offence in question, or a related offence within 48 hours. The property restrained may be specified in the order, or may be designated as all the property of the defendant, or a person other than the defendant, wherever it might be situated, including property acquired after the making of the order. In some cases the existence of a restraining order preventing disposal of the property in question will be sufficient. It operates *in personam* upon the defendant once he receives notice of the order, and may bind third parties with notice as well. Breach of the order may well constitute both a contempt, and an offence under s. 52. Dispositions made in contravention of restraining orders may be set aside.

Alternatively, where it is thought appropriate to do so, the court may direct the Official Trustee in Bankruptcy to take custody and control of the relevant property. In the case of an ongoing business, this would be run by a manager installed for this purpose by the Trustee.[37] Normally the Official Trustee will be thought to be a more appropriate mechanism for preserving assets than a restraining order where there is a perceived risk that a restraining order will not sufficiently safeguard the assets in question.

To restrain a person's property without there having been any determination of his guilt is a major incursion into both that person's right to property, and the presumption of innocence.[38] Some balance is introduced into the process by the requirement that the Commonwealth give appropriate undertakings with respect to payment of damages and costs, as a virtual precondition to the grant of a restraining order.[39] This requirement generally ensures that wherever possible, assets restrained are of a kind which do not lead to loss if temporarily controlled by the Official Trustee. The DPP generally avoids restraining ongoing businesses, and prefers to seek orders in relation to private residences, and the like. It is usually made clear to the defendant that no steps will be taken to impede the process of any sale of the particular asset provided that it is a *bona fide* sale, and the proceeds are themselves safeguarded. The decision to seek a restraining order is a highly responsible one. Approval for restraining orders involving property valued in excess of $100,000 can generally only be given at the highest levels within the DPP.

[37] In the case of a licensed brothel, restrained because of evasion of income tax, the Official Trustee may find himself engaged in a somewhat unusual enterprise.

[38] See the observations of Carter J. in *Re An Application Pursuant to the Drugs Misuse Act 1986* [1988] 2 Qd. R. 506 at 510.

[39] *POC Act* s. 44(10).

RELEASE OF FUNDS FROM FROZEN ASSETS

One question which has proved to be extraordinarily difficult is whether, and to what extent, the DPP should play a role in seeking to ensure that any funds released to the defendant by the court out of the property restrained are genuinely required to meet that person's reasonable living and business expenses, and his reasonable expenses in defending the very criminal charges brought against him by the DPP. Section 43(3) permits a court to make provision for these sorts of expenses. Section 43(4) provides that a court shall not make provision of this kind unless it is satisfied that the defendant cannot meet the expense concerned out of property that is not subject to a restraining order.

Plainly the DPP is obliged to test any assertion that there are no other sources of funds available if it has any basis at all for suspecting that there might be.[40] There is provision in s. 48 for an ancillary order to be sought from the court requiring an examination on oath of the person whose property is subject to the restraining order. Properly, such an examination is restricted to "the affairs of the owner, including the nature and location of any property of the owner". It would be both wrong and beyond the power of the court, to permit such an examination to stray from its avowed purpose. The privilege against self-incrimination is expressly abrogated (as it is in many modern statutes authorising investigative procedures to be undertaken) but a use indemnity is provided to ensure that any answers given, or information, document or thing obtained as a direct or indirect consequence of any statement or disclosure is not admissible in the course of subsequent criminal proceedings.[41]

What is the position where it is clear that the defendant has no assets other than those which have been restrained, and seeks to have money released in order to be able to pay his legal costs in defending the charges brought against him? Section 43(3)(b) permits a court to order provision to be made for the person's "reasonable expenses in defending a criminal charge". The decision whether to release funds for this purpose is plainly one for the court, and for no-one else. A judge may decline to release any funds for this purpose, holding that legal aid will be available to the defendant in the event that no moneys are released. Such an approach would, in my opinion, be both misconceived and unfair. Legal Aid Commissions and similar bodies have been known to treat persons whose assets are restrained as being ineligible for aid, playing a game of bluff with the court by pressuring it to release restrained funds. Regrettably, such games of bluff can lead to defendants being unrepresented at their committals or trials, a situation which the DPP deplores. Any fair-minded prosecutor would agree that it is inappropriate and undesirable to prosecute people for serious offences when they are unrepresented. Such trials have the

[40] *Commissioner of the Australian Federal Police* v. *Butler and Anderson* (unreported, Federal Court, per Lockhart J., 2 November 1987).
[41] *POC Act* s. 48(6).

potential to be unfair,[42] and often drag on for much longer than cases where there is competent legal representation for the accused.

More fundamentally, a person who is, as a matter of law, presumed to be innocent, should not ordinarily be denied access to a *lawyer of his choice* for the purpose of conducting his defence. Legal aid may not cover the cost of the barrister or solicitor sought by the defendant. Somewhat invidiously, the DPP is put in the position of being the accuser who brings the prosecution, the party which restrains the defendant's assets, and, on occasion, the party which is required to argue for a restriction upon the defendant's right to expend money in defending the charges brought. It is as though the plaintiff in a civil action were to have some say in how much money the defendant is entitled to expend in defending that action, a proposition which seems bizarre, but which may have some foundation through the use of Mareva injunctions and the practices surrounding release of assets frozen thereunder.[43]

On the other hand, a restraining order is obtained because it is said that the assets in question are either tainted, or are the proceeds of crime. Assuming that to be true (for the purpose of the argument), what justification is there for permitting the defendant to secure a "Rolls Royce" defence out of assets to which he has, or may have, no moral entitlement, and which ought to be confiscated from him? On this analysis, the DPP has a role to play in securing for the Commonwealth as much of the restrained property as it can, in order to ensure that any pecuniary penalty eventually ordered can be met.[44]

There are accused persons who, recognising the virtual certainty of conviction, and almost certain loss of their property, would rather see it spent in a wholly dissipatory manner by engaging the services of the most expensive solicitors and counsel, and extravagant investigators, in the hope that something may turn up to save them. The money is as good as gone anyway, so why not try for a miracle?

[42] *McInnes* v. *R* (1979) 143 C.L.R. 575. The position is different, however, when the defendant has made full admissions, indicated an intention to plead guilty, and then seeks payment of significant sums to cover "reasonable legal expenses". The Act authorises only the meeting of the "reasonable expenses in defending a criminal charge". A plea of guilty has been held not to fit this description — *DPP* v. *Ward* (unreported, Supreme Court of Western Australia, per Kennedy J., 23 December 1988).

[43] *Commissioner of Taxation* v. *Manners and Terrule Pty Ltd* (1985) 81 F.L.R. 131; *Commonwealth of Australia* v. *Jansenberger* (unreported, Supreme Court of Victoria, per Southwell J., 3 October 1985). Risk that assets will be dissipated is a precondition to the grant of a Mareva Injunction. No such proof is required for a *POC Act* restraining order. See generally N. R. Burns, *Injunctions: A Practical Handbook* (Sydney, Law Book Company, 1988) at 66–69.

[44] The difficulty with the argument lies in the words "or may have". The case for preventing a defendant from expending funds which have been restrained as he sees fit depends upon prejudgment of his guilt — but the same is true of the case for obtaining the restraining order itself. See generally *Commissioner of the Australian Federal Police* v. *Malkoun* (unreported, Federal Court, per Ryan J., 1 February 1989) where his Honour extended orders previously made granting payment of legal costs for committal hearings to cover the costs of the trial. The argument that the defendants had failed to discharge the onus of showing that they had no other assets out of which to meet legal expenses, and that they should look to Legal Aid was rejected, the evidence failing to establish other assets. However, his Honour declined to order unrestricted access to the funds restrained in order to avoid hopeless or extravagant defences being mounted. A limit of $30,000 was placed upon the legal costs of each defendant at trial, with liberty to apply.

How does the court know whether legal expenses sought to be incurred are "reasonable"? How does the DPP legitimately have any role to play in this process? It is not difficult to incur legal costs which significantly, if not totally, erode all of the assets seized by restraining order, even where those assets are very substantial. In an age of mega committals and super trials, millions of dollars can be lost to the Commonwealth through lavish spending in preparation for a trial in circumstances where, in practical terms, the outcome is hopeless for the accused. Yet, in one sense, in principle, the money belongs to the accused, to do with as he pleases, prior to any final order as to confiscation.

The conflict between these competing considerations is both clear, and inexorable. There is no obvious solution to the dilemma posed by such cases. In an ideal world someone other than the DPP might be asked to play the role of safeguarding potential Commonwealth revenue. It is somewhat "unseemly" for the prosecution to have to play a role in assisting the court in its delicate task of balancing the rights of the accused to use "his money" as he sees fit against the interests of the community in having assets preserved for future confiscation. For better or for worse, Parliament has thrust that role upon my Office. I can only say that it will be exercised in what I hope will be a responsible and professional manner, with restraint, and with due regard for the rights of the accused in this, as in all other areas.[45]

THE OFFENCE PROVISIONS

Thus far I have focused attention upon the mainstream provisions of the *POC Act*, and I have endeavoured to shed some light upon a number of the complex dilemmas presented to the DPP by this legislation. In so far as I have criticised the Act, it has generally been for inelegant drafting, and imprecision of thought, rather than for the content of what was sought to be addressed. One can quibble with some of the provisions in the *POC Act* which deal with confiscation of assets. On occasion, arguably, they go too far in the direction of making life easy for the prosecutor, and difficult for the defendant. In my assessment, however, the Act in so far as it deals with confiscation should be regarded as a sensible and appropriate mechanism for dealing with an urgent and difficult problem.

It is, however, more difficult to find any real justification for a number of the provisions of the Act which have come under strong criticism by commentators[46] — namely the provisions contained in Part V, which is headed

[45] See I. Temby, "The Proceeds of Crime Act — One Year's Experience" (1989) 13 *Crim. L. J.* 24. See also the remarks of the former Commonwealth Director of Public Prosecutions reported in *Australian Law News*, volume 23, number 3 April 1988 at p 10: "As a general rule, if the only funds available to an accused person are those which have been subjected to freezing orders, we will consent to sufficient funds being released to enable proper legal representation." Experience in the *Malkoun* matter, and in Operation Tableau in Queensland, is causing the DPP to reconsider the approach set out by Mr Temby.

[46] See B. Fisse, "The Proceeds of Crime Act — The Rise of Money Laundering Offences and the Fall of Principle" (1989) 13 *Crim. L. J.* 5. The drafting of the *Crimes (Confiscation of*

"Offences". A number of these provisions are, in my view, draconian, unnecessary, poorly drafted, and in violation of fundamental precepts of the criminal law. It is unfortunate for the *POC Act* that it was thought fit to include them in the Act. Criticism properly levelled at these few sections, has tended to colour, and bring discredit upon the balance of what is, on the whole, a worthwhile and valuable piece of legislation.

Let us commence with the offence of "money laundering", as set out in s. 81. The penalty for money laundering is, in the case of a natural person, imprisonment for a term of up to 20 years, and a fine not exceeding $200,000. A body corporate can be fined $600,000 if convicted of this offence. Plainly, it is one of the most serious offences in the criminal calendar and, of course, it qualifies in some instances to be a "serious offence" for *POC Act* purposes.

What are the elements of this offence? Sub-section (3) provides:

> "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."

"Transaction" includes the receiving or making of a gift.

"Proceeds of crime" is defined in s. 4 as meaning:

> (a) proceeds of an indictable offence; or
> (b) any property derived or realised, directly or indirectly, by any person from acts or omissions that occurred outside Australia, related to a narcotic substance, and would if they had occurred in Australia have constituted an indictable offence, or a State indictable offence.

"Unlawful activity" is defined as an act or omission that constitutes an offence against a law of the Commonwealth, a State, or a foreign country.

There is also a "watered down" version of the money laundering offence provided for in s. 82, the difference being that the conduct in question is directed to money or other property "reasonably suspected of being proceeds of crime" rather than being proved to be so. This offence carries far lighter penalties, and the reverse onus of proof typically found in "goods in custody" provisions.[47] The dichotomy between s. 81 and s. 82 is somewhat akin to that between receiving stolen goods, and the summary offence of unlawful possession.

Profits) Act 1985 (NSW) (which was, in some ways not dissimilar to the *POC Act*) has been criticised as "lamentable" by Allen J. in *R* v. *Bolger* (unreported, NSW Court of Criminal Appeal, 27 April 1989). These criticisms are echoed in the judgment of Kirby P. in *Saffron* v. *DPP* (1989) 39 A. Crim. R. 353. Similar legislation in England has been similarly criticised — see A. Nicol, "Confiscation of the Profits of Crime" (1987) *Journal of Criminal Law* 75.

[47] See generally J. Stratton, "The Offence of Goods in Custody in NSW" (1987) 12 *Legal Service Bulletin* 214.

What are the elements of the offence of money laundering? The *actus reus* is doing any one of a number of acts involving the *proceeds of crime* — engaging in a *transaction* involving those proceeds, or *receiving, possessing, concealing, disposing* or *bringing* those proceeds into Australia.

Is a person who merely retains possession of the proceeds of his own indictable offence engaged in money laundering? In ordinary parlance, such a conclusion would be regarded as absurd. Yet, on its face, s. 81 countenances precisely such a conclusion. If he deposits the proceeds of his indictable offence into a bank he commits a second and separate offence of money laundering. If he withdraws a sum of money equivalent to what he deposited, and spends it, he commits a third and separate offence.

Consider a person who has committed an offence involving narcotics in another country. Assume he has sold some cannabis, plainly an indictable offence if it had occurred in this country. He uses the proceeds to buy some clothing, which he brings with him in his luggage when he comes to Australia. The mere possession of that luggage in this country renders him guilty of money laundering.

These are extreme examples, but they illustrate the problem. Plainly, s. 81 should not have been drafted in a manner which permits the primary offender to be dealt with separately for the offence of money laundering when he alone has dealt with the proceeds of his crime. The section should have been drafted to make it clear that what is being attacked is the class of person who provides money laundering services for primary offenders by assisting them to conceal the fact of their criminality — by "washing" their money for them. After all, a thief does not become a receiver merely because he retains possession of the property he has stolen, or conceals or disposes of it.[48] Alternatively, if it had been intended to render the primary offender guilty of a separate offence of money laundering by virtue of his conduct utilizing the proceeds of his own crime, surely the offence should require an intent to "launder" (i.e. conceal) those proceeds specifically as an element of the offence. The word "engage" does not, in my opinion, carry this connotation.

Even more objectionable than the failure to address the *actus reus* of the offence of money laundering in an adequate fashion, is the treatment of the *mens rea* of this offence. It is sad that the lessons of *DPP* v. *Smith*,[49] and its total denunciation by the High Court in *Parker* v. *The Queen*,[50] have still to be learned by legislators. There is no place in our criminal law for objective tests (such as "ought reasonably to know") to be used when enacting offences involving serious criminality, and up to 20 years' imprisonment. No-one should be exposed to the risk of prosecution and conviction for an offence of this magnitude upon the basis that he ought reasonably to have known that the property in question was the proceeds of crime. Negligence should not be a sufficient basis for criminal culpability at this level.

[48] C.R. Williams and M. Weinberg, *Property Offences* (2nd ed., Sydney, Law Book Company, 1986) Ch 8.
[49] [1961] A.C. 290.
[50] (1962) 111 C.L.R. 610.

To make matters worse, the knowledge, or reasonable suspicion required is only that the property is derived from some form of unlawful activity — it need not even be the unlawful activity which renders the property "proceeds of crime". The finding that the accused "ought reasonably to have known" that there was *something* unlawful about the original source of the property he received or possessed will be sufficient to render him guilty of this offence — a result which ought to be seen as unacceptable.

Still worse is to come. Section 85 of the Act deals with conduct by directors, servants or agents. One can see the justification for provisions of the kind contained in sub-ss. (1) and (2). After all, bodies corporate do not have minds of their own, other than what can be attributed to them through the conduct of those who represent the "mind and will" of the company itself.

Where is the justification for any such principle to operate when one is dealing not with companies (or even unincorporated associations in so far as they are thought to have some form of corporate status) but with individuals? Sub-sections (3) and (4) of s. 85 should be set out in full to demonstrate the poverty of thought and principle behind them:

"85(3) Where it is necessary, for the purposes of this Act, to establish the state of mind of a person in relation to conduct deemed by sub-section (4) to have been engaged in by the person, it is sufficient to show that a servant or agent of the person, being a servant or agent by whom the conduct was engaged in within the scope of his or her actual or apparent authority, had that state of mind.

85(4) Conduct engaged in or on behalf of a person other than a body corporate:

(a) by a servant or agent of the person within the scope of his or her actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a servant or agent of the first-mentioned person, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the servant or agent;

shall be deemed, for the purposes of this Act, to have been engaged in by the first-mentioned person."

The effect of these provisions is far-reaching. A person can be convicted of money laundering on the basis that his servant or agent, within the scope of his or her actual or apparent authority, or some other person at the direction or by agreement with the servant or agent within the same scope of the servant or agent's authority, had the guilty state of mind. Arguably, this extends even to the objective state of mind set out as one alternative basis for the offence of money laundering itself. Vicarious liability of this kind has no place in serious criminal offences, less so when it is both vicarious, and may involve an objective mental state. Sub-sections (3) and (4) are simply unacceptable.[51]

Section 83 creates an offence of organised fraud. The justification for this offence wholly escapes me. The maximum penalty for an individual is imprisonment for 25 years, and a fine of $250,000 or both. A body corporate can be

[51] Cf section 84 of the *Trade Practices Act* 1974 (Cth) from which these provisions seem to have been taken.

fined $750,000. Organised fraud is defined as acts or omissions that constitute three or more public fraud offences and from which the person derives "substantial" benefit (a concept which is undefined). "Public fraud" offences are those which involve ss. 29D and 86A of the *Crimes Act*, and ss. 5, 6, 7 and 8 of the *Crimes (Taxation Offences) Act* 1980. It should be noted that each offence under s. 29D carries a maximum of 10 years' imprisonment and a $100,000 fine while each offence under s. 86A carries a maximum of 20 years' imprisonment and a $200,000 fine. Each offence under the *Crimes (Taxation Offences) Act* 1981 carries a maximum of 10 years' imprisonment and a $100,000 fine. It follows that the offence of organised fraud which consists of any three of the above-mentioned offences carries a lesser penalty than could be imposed if cumulative sentences were handed down in respect of those multiple offences. While wholly cumulative sentences are rare, it cannot be said that a sentencing judge faced with a number of public fraud offences lacks the sentencing power required to deal with those offences adequately.

There is uncertainty as to whether the three or more public fraud offences should be pleaded as alternatives to the s. 83 offence. There is uncertainty as to what would occur if more than three such offences were pleaded, and the jury were unanimously of the view that the accused had committed three or more such offences, but did not agree as to which three offences had been committed. There is uncertainty as to whether a special verdict would be required in relation to a s. 83 offence which alleged more than three public fraud offences, so that a sentencing judge could properly weigh the gravity of the offence. The whole exercise seems rather pointless and ill-conceived, plainly being designed in order to enable some fraudsters to be dealt with pursuant to the more onerous "serious offence" regime of the *POC Act*. The tail seems to wag the dog.

CONCLUSION

This survey has necessarily been restricted to just a few of the more difficult problems which arise from the operation of the *POC Act*. In some ways the Act may be seen as having been a noble experiment involving a vast leap into uncharted waters. It has been said that it may have been conceived in haste. It was certainly the subject of inadequate debate when implemented.[52] Despite this, on the whole, it is working tolerably well. Some of its provisions, however, are in need of significant modification, while others should simply be repealed. This should be the product of reasoned deliberation rather than hysterical and uninformed reaction. One thing is certain, however, and that is that one does not sensibly throw out the baby with the bathwater. This particular infant should be nurtured, and developed. It should not be permitted to go down the drain.

[52] *Commonwealth Parliamentary Debates* (House of Representatives) 28 May 1987 3576, (as cited by Kirby P. in *Saffron* v. *DPP supra*).