

**ADDRESS BY THE HONOURABLE T F BATHURST
CHIEF JUSTICE OF NEW SOUTH WALES
COMMONWEALTH SECRETARIAT PACIFIC JUDGES
REGIONAL FORUM ON
“CORRUPTION AND OTHER FINANCIAL CRIMES”: USING ASSET
CONFISCATION AND ANTI MONEY LAUNDERING TO FIGHT
CORRUPTION AND OTHER ECONOMIC CRIMES
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It is my great honour to address so distinguished a gathering as this, and to have the opportunity to contribute a few remarks on the important topic of corruption and other financial crime.

I know that it is unnecessary for me to stress the grave consequences of corruption and other forms of financial crime to you today. The Asia-Pacific region continues to face significant challenges in this area, and most of us have first hand experience of the effects of such crimes, through our roles administering relevant laws or providing policy and expert advice.

While Australia is fortunate in having relatively low public corruption levels, the extent of financial crime generally is often

underestimated in the public consciousness. It is estimated that fraud cost the Australian community around \$8.5 billion annually. This is a quarter of the total cost of crime in our society. In any given year, thirty-five per cent of our population will be exposed to a scam, and one in 30 will be the victim of identity fraud¹. Up to 6 billion criminally acquired dollars will be laundered². The majority of this activity is conducted by organised criminal groups who, along with drug and firearm trafficking, engage in financial crimes on an enormous scale.

These figures represent loss of legitimate business income, crowding out of legal businesses by laundering fronts, loss of tax revenue, and the costs of law enforcement. What the figures cannot account for are the human impacts of financial crimes; the financial and emotional toll on people taken in by market and identity fraud, and the myriad social ills created by organised criminal activity.

It must also be remembered that public corruption and other forms of financial crimes are interrelated; organised criminal groups pay bribes and other forms of financial benefit to corrupt officials, and these must be laundered in turn. Such crimes not only impact the economic system,

¹ Australian Institute of Criminology, "Consumer Fraud in Australia: costs, rates and awareness of the risks in 2008" *Trends & Issues in Crime and Criminal Justice*, No 382 (September 2009).

² Australian Crime Commission, "Financial Crime Fact Sheet" (April 2011) available at <http://www.crimecommission.gov.au/publications/crime-profile-series-fact-sheet/financial-crimes>.

they undermine good governance, weaken confidence in public institutions and ultimately threaten the rule of law.

With this in mind, I would like to say a few words about Australia's legal response to corruption and financial crime, and about two aspects of our legislative regime in particular: our anti-money laundering legislation, and our criminal asset confiscation laws.

First, the Commonwealth *Anti-Money Laundering and Counter Terrorism Financing Act* has governed financial transaction monitoring and reporting in Australia since 2006. The Act brings Australia into line with global standards by implementing the forty recommendations of the International Financial Action Task Force on Money Laundering. The recommendations, and therefore the Act, are based on the understanding that the institutions and businesses most at risk of being instruments of money laundering, such as those in the financial and gambling sectors, are also best placed to detect and prevent it. Accordingly, these entities are legally obliged to maintain high levels of oversight and knowledge of their customers' financial activities in order to be able to detect suspicious behaviour.

Financial and gambling institutions, as well as lawyers, accountants, real estate agents, jewellers, and bullion and remittance dealers are required to monitor clients' identities, supervise their transactions on an ongoing basis, and keep extensive records. If a relevant entity suspects that a client is not disclosing their true identity, or is involved in criminal activity such as money laundering, they are obliged to report it to AUSTRAC, Australia's financial intelligence unit and anti-money laundering regulator. At a more structural level, entities with reporting obligations are also required to establish internal systems that identify and address the particular money laundering risks they face. Failure to comply with the Act can attract penalties of up to \$11 million dollars³.

This approach, enshrined in the forty recommendations, has been endorsed by more than 130 countries, and is recognised as a best practice guide for anti-money laundering legislation. The benefits of these types of legislative obligations are self-evident; the only actors with sufficient access to private financial information to detect money-laundering will often be those directly affected by it. Nevertheless, the legislation is not without problems or critics.

³ This applies to corporate entities. Transparency International Australia, 'Money Laundering' (May 2007) available at http://www.transparency.org.au/documents/Money_Laundering.pdf.

A prominent concern regarding the *Anti-Money Laundering Act* is that it requires the disclosure and collection of significant amounts of personal information, including sensitive financial information. Such measures are, by definition, an intrusion on personal privacy. This is by no means a trivial concern. The right to privacy has evolved as a fundamental protection from unjustified interference by the State. At the same time, privacy has never been an absolute right. It is therefore up to legislative drafter to strike the appropriate balance between these conflicting interests, to ensure that any rights to privacy that may subsist in a jurisdiction are intruded on to the minimum degree necessary.

In Australia this process has been largely achieved. The 2006 Act was drafted in close consultation with relevant stakeholders, including the Privacy Commissioner. As a result of amendments negotiated through the consultation process, monitoring entities are bound by the Privacy Act. This imposes certain obligations on such entities including for example, to keep records securely, and to inform customers to the greatest extent possible that their personal information is being collected and, where relevant, reported to third parties.

While specific requirements will vary from country to country, in my view these types of considerations are essential to ensuring that

individual privacy remains protected under anti money laundering legislation.

I would like to use the remainder of my time to address the second aspect of Australia's financial crimes legislative regime: our asset confiscation laws.

Proceeds of crime laws are based on the fundamental principle that individuals should not be unjustly enriched from criminal activity. Indeed, forfeiture laws have existed since at least Anglo-Saxon times. However, modern proceeds of crime legislation differs from traditional common law in a significant way. Traditionally, assets could only be confiscated after an individual had been convicted of a related crime such as theft or fraud. Modern proceeds of crime legislation however, which has been in place in Australia and jurisdictions like the United Kingdom for at least ten years, provides that the State may confiscate property in circumstance where the owner has not been criminally convicted. Civil confiscation can take place where the court is satisfied on the balance of probabilities that assets are the proceeds of crime.

In recent years, asset confiscation powers have expanded even further under new "unexplained wealth" laws. Under such laws if there is

a “reasonable suspicion” that an individual has property or money that exceeds their lawfully acquired assets, the state may confiscate that property. No connection between the property and a specific crime is required, and the onus is on the individual to show that the property was legitimately acquired.

The rationale behind these provisions is that they are necessary to target those at the head of criminal organisations, as the individuals who coordinate and facilitate organised crime are rarely directly involved in committing detectable criminal acts. Similar approaches have been adopted in the United Kingdom and Italy, and have been favourably received in those jurisdictions.

Asset confiscation regimes are cited by law enforcement organisations as one of the most effective responses to corruption and other financial crime. There are several good reasons for this.

First, financial crimes are often extremely complex. The individuals and networks that commit them can be sophisticated, well resourced, fluidly organised and able to respond quickly to technological advancements aimed at curtailing their activities. In these circumstances, traditional methods of investigation often prove

inadequate, and asset confiscation can be the best way to disrupt criminal activity.

Second, asset confiscation is a proactive method of preventing future crime. Financial crime, unlike many other forms of criminal activity, is largely based on rational economic calculus. Effective proceeds of crime legislation therefore has the potential to be a significant deterrent. Confiscating the proceeds of crime also deprives individuals and networks of funds to re-invest in criminal activity.

However, and particularly given the role that many of you here today are likely to play in drafting, implementing and applying legislation in this area, I believe it is important to stress the potential dangers posed by proceeds of crime legislation. Of particular concern to me are provisions which give prosecuting authorities coercive powers over persons of interest, and provisions which limit or exclude judicial discretion and oversight. I propose to examine these particular dangers by comparing the experiences of different Australian jurisdictions.

In this country, Western Australia has had the most experience with unexplained wealth laws. It was the first Australian State to enact them, with the *Criminal Property Confiscation Act* in 2000. Most helpfully

for our purposes, the succeeding twelve years have provided a wealth of public criticism from which we can assess its effectiveness and pitfalls.

The Western Australian legislative scheme gives courts (and so judges) minimal discretion. It requires the court to make a confiscation order if the court is satisfied that a person's total wealth is greater than their lawful wealth. In certain circumstances, the confiscation order can also extend to property that is no longer under that person's control.

The Western Australian Act also gives police broad seizure powers, which are not dependent upon a court order for their operation. The police may seize assets on the grounds of reasonable suspicion for up to 72 hours, and a Justice of the Peace can extend this to 21 days by issuing a freezing notice. At no point in this process need a judge be involved.

Critically, the legislation also reverses the onus of proof in favour of the Crown, such that "any property, service, advantage or benefit that is constituent of the respondent's wealth is presumed *not* to have been lawfully acquired unless the respondent establishes the contrary".

As a result, the Western Australian Act has come under significant public criticism. It has also been used very sparingly, and many argue this is no coincidence. In the first ten years of its enactment it was used only 24 times, and was not used at all between 2005 and 2007 when public criticism was at its highest.

By contrast, legislation enacted in the Northern Territory in 2002 has been used more widely, and arguably, more successfully. Relevant differences between the two regimes are, first, in the Northern Territory an offender's cooperation with unexplained wealth proceedings can be taken into account as a mitigating factor during sentencing. It therefore has the potential to act coercively, as both carrot and stick, to the criminally accused. Second, a court order is required before confiscation takes place. Judicial supervision is therefore integral to the confiscation process. Nevertheless, judicial discretion remains limited, and the onus of proof remains reversed.

The experiences of Western Australia and the Northern Territory were taken into account when unexplained wealth provisions were introduced into the Commonwealth Proceeds of Crime Act and the corresponding New South Wales legislation in 2010.

While the provisions were largely modelled the Northern Territory legislation, consultation with civil liberties organisations in the drafting stages resulted in the introduction of the following protective measures: First, information obtained in examinations relating to a restraining order for an unexplained wealth declaration cannot be used as evidence in criminal proceedings against the person. Second, notice of unexplained wealth proceedings must be given to the affected individual, and the individual's right to appear and adduce evidence is guaranteed. Third, the court retains discretion to revoke a preliminary order or to refuse to make an order if "it is in the public interest to do so." Fourth, the information supporting the application for an order must include the grounds on which the officer holds a reasonable suspicion that a person's total wealth exceeds their lawfully acquired wealth. The latter two provisions were intended to retain judicial discretion, and to relieve some of the burden put on an affected person by the reversal of onus.

These protective measures are important and their inclusion is to be commended. However, valid concerns remain.

Depriving citizens of privately owned property through unexplained wealth laws, or indeed asset confiscation more generally, is a highly intrusive act at odds with the common law respect for property rights. By

reversing the onus of proof such provisions also effectively remove any right to silence, and infringe the privacy of individuals who have not been criminally convicted. Asset confiscation laws give prosecuting authorities highly coercive powers, which must be approached with great caution.

In these circumstances, it is concerning that while NSW and Commonwealth proceeds of crime legislation maintains judicial discretion in relation to unexplained wealth provisions, the court has no discretion to refuse confiscation if the assets are shown to be proceeds of crime to a civil standard of proof. This is not to say that Parliament cannot pass such a law if it considers it appropriate, but that in deciding whether to do so the potential infringement on the rights of individuals should be considered.

Indeed concerns about the potential dangers of asset confiscation powers extend beyond unexplained wealth provisions, to all proceeds of crime and anti-money laundering schemes. The potential for coercing false confessions or pleadings is real. It should also not be forgotten that assets seized and later released by a court order are effectively “laundered” – forgive the expression – by the court process. They become payments to an individual under a court order. In most cases, this will be because an individual has satisfied the court that their assets

were legitimately acquired, and it is therefore entirely appropriate for the court to return the assets so verified.

However, circumstances in which seized assets are sought to be released by prosecuting authorities as the result of a plea bargain with an offender, or else in exchange for information, must be closely monitored to ensure that corruption and laundering practices do not creep into the very processes which seeks to eliminate them. Retaining judicial oversight and discretion is therefore essential to ensuring the success and valid implementation of these laws.

The respective state and Commonwealth legislatures have deemed that the benefits of robust anti-money laundering and proceeds of crime legislation outweigh the imposition on the rights and freedoms of individuals affected by the schemes. No doubt similar choices have been made, or will be made in the future, in many of your jurisdictions. Nevertheless, the potential for rights infringement as well as abuse of these schemes is real. When dealing with such provisions vigilant attention is required to balance conflicting interests, restrain the risks of abuse and minimise the imposition on personal freedoms.

In my administrative capacity as Chief Justice of the Supreme Court, I have limited powers to set the procedure in the Supreme Court. Last year, I used this power to establish that any application to vary or discharge an order concerning the proceeds of crime must be made by a judge. This is one of the small ways that I can exercise my authority to ensure that judicial oversight remains part of the asset confiscation process.

For those of you who may be involved in drafting, implementing or enforcing such legislation in your home jurisdictions, I ask that you bear these impositions and potential abuses sharply in mind. The transnational nature of organised crime means that robust domestic anti-money laundering and proceeds of crime legislation in each of our countries is of mutual benefit; but so too is a region that upholds the best of the Commonwealth's common law respect for individual rights and freedoms.

On that note, I wish you what I have no doubt will be constructive, productive and valuable discussions over the coming days. Thank you once again for the chance to address you on this important topic and good morning.