

CONVICTED by CONFISCATION?

The proceeds of Crime Act 2002

By Richard Carew and Emily Ollenburg

An article in *The Australian* entitled 'Family Link to Heroin' (12 October 2005), yet again raised the issue of confiscating assets of 'suspected' criminals by the Commonwealth Government.

The article reported that the Commonwealth had taken steps to restrain the sum of \$350,000, found in two separate police raids, which was suspected to be the proceeds of drug trafficking.

However, at the time of the article's publication, the suspected persons had not been charged with an offence, despite a lengthy investigation over a number of years.

The Commonwealth *Proceeds of Crime Act 2002* (the Act) allows law enforcement authorities with a 'suspicion' only to commence proceedings in a civil court to restrain and then forfeit assets without conviction or charge.¹

The states have similar legislation in place and much of the analysis applied here to the Commonwealth legislation applies to the various state-based schemes.

HISTORY OF THE LEGISLATION

The legislation was preceded by the *Proceeds of Crime Act 1987* which, in the opinion of the Australian Law Reform Commission (ALRC), had become useless as it had 'fallen well short of depriving wrongdoers of their ill-gotten gains'.²

In the ALRC's report, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987*, the Commission recommended that the legislation needed to be intensified to 'increase the reach and impact of the legislation, while remaining sensitive to concerns about proper safeguards for civil liberties'.³ Therefore, the obvious question is, 'Has the new proceeds of crime legislation achieved this objective?'

Some of the major recommendations of the ALRC report were:

- A non-conviction-based, or civil, confiscation regime should be introduced to replace the conviction-based forfeiture regime contained in the *Proceeds of Crime Act 1987* (Cth). The incorporation of a non-conviction-based regime into the *Proceeds of Crime Act* would enable confiscation of the profits of prescribed unlawful conduct on the basis of proof to the civil standard of 'on the balance of probabilities';
- Recovery of profits of unlawful activity should not be limited to criminal conduct but extend to profits gained from unlawful civil activities;
- Existing judicial discretions under the current conviction-based regime should be reduced so that the confiscation of the profits of criminal activity generally becomes mandatory;
- Defendants should be required first to have access to unrestrained assets for the legal defence, rather than allowing them access – with court approval – to restrained assets that are suspected of being the proceeds of crime;
- Where such assets are insufficient for that purpose, defendants should then seek assistance from legal aid commissions.⁴

The recommendations of the ALRC were 'substantially implemented by the Act'.⁵

Previously, defendants to criminal charges could apply to a superior court for approval to allow the use of restrained assets for their legal defence. Not surprisingly, judges frequently permitted the use of restrained assets for this purpose. Invariably, the restraining orders were based upon allegations that were the essence of the criminal charges. The judicial discretion to permit the use of such assets in the defence of the criminal charges was therefore consistent with the presumption of innocence.

The Act removed this judicial discretion so that restrained assets could not be used to defend the criminal charges.

The driving force behind a confiscation regime is to ensure that those who have engaged in criminal conduct >>

cannot obtain a benefit from their activities. This is said to be in accordance with the equitable principle of 'unjust enrichment'.⁶

Few would argue with this principle. However, traditionally in our system of criminal justice, a person is entitled to the presumption of innocence. That is, a person is presumed innocent of a crime unless and until convicted by a jury. This legislation turns on its head this fundamental principle of our criminal justice system. Under the 1987 legislation, while assets could be restrained using the civil standard, an accused person could apply to a judge to allow these restrained assets, or part thereof, to be used to defend the criminal charges – which were usually the allegations used to restrain the assets in the first place. Yet, in the intervening 15 years or so, the balance struck between an accused's rights to vehemently defend criminal charges and society's right to prevent unjust enrichment has been radically altered by removing this discretion to allow use of restrained assets to fund a legal defence. What was wrong with permitting a superior court judge to strike a correct balance in an individual case? In cases where all of a person's assets have been restrained, removing this judicial discretion will in many instances mean that the person will be unable to fund a legal defence. Inevitably, this will lead to miscarriages of justice.

RESTRAINING AND FORFEITURE ORDERS

The Act creates a framework to enable the proceeds of crime to be confiscated by identifying the processes by which confiscation can occur. These processes include:

- Restraining orders prohibiting the disposal of or dealing with property;
- Forfeiture orders under which property is forfeited to the Commonwealth;
- Forfeiture of property to the Commonwealth on conviction of a serious offence;
- Pecuniary penalty orders requiring payment of amounts based on benefits derived from committing offences.⁷

In many cases, a restraining order can be made in relation to the property of a person, on grounds that relate to possible forfeiture or confiscation orders in respect of those offences. A person does not have to be convicted of the offence for a restraining order to issue.⁸

For a restraining order to be made, the court must be satisfied by evidence (in a sworn affidavit of an authorised officer, usually a police officer) confirming that the authorised officer 'suspects on reasonable grounds' that an offence has been committed within the six years proceeding the application or since the application has been made. If the property relates to a person other than the suspect, then the affidavit must state that the property is under the effective control of the suspect or that the property is the proceeds of an offence. The affidavit must include the grounds upon which the officer holds the suspicion.⁹

But these may be unproven allegations, and ultimately may be false or incapable of being proved to be true in accordance with the criminal standard – that is, beyond a reasonable doubt. The problem with the Act, however, is that restraining all of an accused person's assets can, in many

cases, significantly reduce their ability to establish that the allegations are indeed false or, more usually, their ability to persuade members of a jury that they should have a reasonable doubt.

The erosion of the fundamental principle that you are innocent until proven guilty does not end here. In certain circumstances, forfeiture orders (forfeiting a person's property to the Commonwealth) can be made without that person having been convicted of a criminal offence. A finding by the court on the civil standard of proof is sufficient and that finding need not be based on a finding as to the commission of a particular offence, but can be based on a finding that an offence 'or other' was committed. Further, raising a doubt as to whether a person engaged in such conduct is not sufficient to stop the court from making a forfeiture order.¹⁰

The court's power to make a forfeiture order based upon the civil standard of proof is also not affected by the fact that a person is acquitted of an offence with which they have been charged.¹¹

SAFEGUARDS

Some safeguards have been woven into the fabric of the legislation. One such safeguard is that 'the court may refuse to make a restraining order if the Commonwealth refuses or fails to give the Court an appropriate undertaking with respect to the payment of damages or costs, or both, for the making and operation of the order'.¹²

While perhaps not impossible, it would also be extremely difficult to successfully sue the Commonwealth in relation to damages flowing from a miscarriage of justice. To do so, the person would have to establish that the miscarriage resulted from the making of the relevant order rather than from an unrelated matter. No doubt such an action would be hotly contested and therefore very expensive to conduct in the absence of an unlikely 'no win, no fee' agreement.

The court can also make allowances for expenses out of property that has been restrained. These expenses relate to:

- reasonable living expenses of the person whose property is restrained;
- reasonable living expenses of any of the dependants of that person;
- reasonable business expenses of that person; and
- a specified debt incurred in good faith by that person.¹³

The court may only make such an order where the person whose property is restrained applies for the order. The person must also notify the Commonwealth Director of Public Prosecutions of the application and the grounds for it. Finally, the person must also have disclosed all of his or her interests in property (and his or her liabilities) in a statement on oath that has been filed with the court.¹⁴ The court must then be satisfied that the person is unable to meet the relevant expenses out of property that is not covered by a restraining order.¹⁵ However, if all of the person's property has been restrained, their ability to bring such an application is obviously impaired.

LEGAL EXPENSES

As previously indicated, the court will not grant an allowance

for expenses where the funds are to be used for legal costs that the person has incurred, or will incur, in connection with proceedings under the *Proceeds of Crime Act 2002* or for proceedings relating to an offence against a law of the Commonwealth, state or territory.¹⁶

Restraining all of a person's assets may prevent them from being able to engage a lawyer of their choice and severely constrain their ability to adequately and appropriately defend themselves against a charge or potential charge, or in relation to proceedings under the Act, unless they have very generous friends or relatives.

EXCLUSION

There are provisions in the legislation that may exclude property from a restraining order or from forfeiture. Orders can also be made for exclusion on grounds that there may be hardship to dependants.

To exclude property from a restraining order, the person must generally be able to show that the property is not the proceeds, nor an instrument, of unlawful activity.¹⁷ To exclude property from forfeiture, a person must generally show that the property specified in the application for exclusion is not the proceeds of an unlawful activity under ss47 or 49. For s48, the applicant must show that they were not in any way involved in the commission of any of the offences to which the forfeiture order or application relates, and that the property is not the proceeds, nor an instrument, of any of those offences.¹⁸ The onus of proof in each of these instances lies with the person seeking to exclude property from a restraining order or from forfeiture.

CONCLUSION

Proceedings in respect of this legislation are often lengthy, labour-intensive and complex. The onus of proof is reversed. Therefore, the defendant must show that their assets are not the proceeds of crime, or the instruments of unlawful activity.

Defending such proceedings usually involves engaging experts, such as forensic accountants, to help to prove that restrained assets are derived from a legitimate source. In short, professional legal expenses are generally hefty, disbursements such as photocopying can be enormous due to the mountains of documents that can typically be involved with such matters, and forensic experts are not cheap.

If your client is concurrently, or later, charged with a criminal offence, then there is the added expense of defending those proceedings. Costs can quickly escalate and a person caught up in such a proceeding must spend a significant amount of money (assuming that all of their assets have not been restrained) fighting a well-resourced government, trying to prove that their assets derive from a legitimate source. Showing that your assets are derived from a legitimate source may even come down to showing what your day-to-day living expenses are.

If all of a person's assets have been restrained, attempting to establish that those assets should be excluded becomes even more difficult. If attempts to exclude property are unsuccessful or delayed, defending associated criminal charges can prove equally difficult. Inevitably, miscarriages of

justice will result. Whatever happened to the fundamental principle of the presumption of innocence? ■

Notes: **1** See ss18-20 and 46 of the *Proceeds of Crime Act 2002*. There is also a conviction-based scheme but, for the purpose of this article, the primary focus will be on the non-conviction-based regime. **2** Australian Law Reform Commission Report, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987*, at 4.142. **3** ALRC Website, *Outline of the Report*, ALRC 87. **4** ALRC website, 'Main Recommendations', ALRC 87. **5** ALRC website, 'Implementation', ALRC 87. **6** Australian Law Reform Commission Report, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987*, at 4.146. **7** S7, *Proceeds of Crime Act 2002*. **8** S16, *Proceeds of Crime Act 2002*. **9** Ss18(4) and 19(4), *Proceeds of Crime Act 2002*. **10** Ss47 and 49, *Proceeds of Crime Act 2002*. **11** S51, *Proceeds of Crime Act 2002*. **12** S21, *Proceeds of Crime Act 2002*. **13** S24(1)(a) – (d). **14** S24(2)(a)-(c). **15** S24(2)(d). **16** S24(2)(ca). **17** S29, *Proceeds of Crime Act 2002*. **18** S73, *Proceeds of Crime Act 2002*.

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