

QUEENSLAND LAW SOCIETY SYMPOSIUM March 2016

Criminal Proceeds Legislation

Judge P.E. Smith¹

Introduction

- [1] I have been asked to present a paper on confiscation proceedings, as to the current law and future predictions.
- [2] I have been asked to specifically cover:
 - (a) the effect of confiscation proceedings on criminal proceedings;
 - (b) compulsory examination;
 - (c) relevant considerations in briefing counsel;
 - (d) recent developments.

Legislative scheme

State

- [3] The State may use 'Chapter 2 – Confiscation Without Conviction' or 'Chapter 3 – Confiscation After Conviction' in the *Criminal Proceeds Confiscation Act 2002* (Qld) ("CPCA").
- [4] The most common method used by the State of Queensland is under Chapter 2 as there is no requirement for a conviction.
- [5] Usually the State will apply for a restraining order under s 28 CPCA. This section permits the State to apply to the Supreme Court for an order restraining a prescribed respondent (namely, a person suspected of having engaged in one or more serious crime related activities²). The application will usually relate to stated property owned by the respondent.
- [6] The accompanying affidavit sworn by the authorised commission officer or police officer must allege that the person is suspected to have engaged in serious crime related activities and the reason for the suspicion.³ When the property is other than that of the prescribed respondent, the affidavit must state that it is suspected the property is serious crime derived property and set out the reasons for that suspicion.⁴
- [7] Section 31 CPCA provides that the court must make the restraining order if it is satisfied there are reasonable grounds for the suspicion. "Suspicion" is different to proof. It is a state of conjecture or surmise where proof is

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² "Serious crime related activity" is defined in s 16 CPCA as anything which is a serious criminal offence. "Serious criminal offence" is defined in s 17 CPCA as, *inter alia*, an indictable offence for which the maximum penalty is at least five years' imprisonment.

³ Section 29 (1) (a) CPCA.

⁴ Section 29 (1) (c) CPCA. "Serious crime derived property" is defined in s23 of CPCA as property if it is all or part of the proceeds of serious crime related activity or all or part of it was acquired using serious crime derived property.

lacking.⁵ The mere fact that a charge is laid of itself is not sufficient to establish reasonable grounds.⁶

- [8] The court may refuse to make the order if it considers it is not in the public interest to make the order or the State fails to give an undertaking as to damages and costs.⁷ The term “public interest” has been considered in *O’Sullivan v Farrer*⁸, where it was said at [13]:

“... the expression ‘in the public interest’, when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only ‘in so far as the subject matter and the scope and purpose of the statutory enactments may enable... given reasons to be (pronounced) definitely extraneous to any objects the legislature could have had in view’.”

- [9] Section 34 CPCA permits the court to provide for the person’s reasonable living and business expenses and those of any dependant, provided it is shown the person cannot meet the expenses or debts from property not restrained and the property is not illegally acquired⁹.
- [10] The restraining order lasts for 28 days but continues in force if a forfeiture application, a proceeds assessment order application or an unexplained wealth order application is made.¹⁰
- [11] Importantly, the court may also make a property particulars order or an examination order of the person or his or her spouse under s 38A CPCA at the time of the restraining order. I will deal with this issue later in the paper.
- [12] Under s 47 CPCA the prescribed respondent may apply to exclude property from the restraining order but this must occur before the application by the State for a forfeiture order.¹¹ But the application may not be heard until the DPP has had a reasonable opportunity to examine the applicant or a relevant person under an examination order.¹²
- [13] Section 48 permits the court to exclude this property provided it is proved that the property is not illegally acquired property¹³ and it is unlikely to be required to satisfy a proceeds assessment order or an unexplained wealth order. Also the Court may exclude property if it is in the public interest to amend the order.¹⁴

⁵ *George v Rockett* (1990) 170 CLR 104 at 115-5; *CDPP v Ngo* [2007] QDC 319.

⁶ *Elfar v New South Wales Crime Commission* [2009] NSWCA 348 at [35] per Spigelman CJ.

⁷ Section 31(2) CPCA.

⁸ (1989) 168 CLR 210.

⁹ “Illegally acquired property” is defined in s 22 CPCA as property if all or part of it is from the proceeds of illegal activity. “Illegal activity” is defined in s 15 CPCA as a serious crime related activity or an act or omission against the law of the state or the commonwealth.

¹⁰ Section 36 CPCA.

¹¹ Section 47(2) CPCA.

¹² Section 47(8) CPCA.

¹³ As defined in s 22 CPCA.

¹⁴ Section 48(2) CPCA.

- [14] A person other than the prescribed respondent may apply for an exclusion order under s 49 CPCA. Section 50 CPCA permits the court to exclude such property if it is proved that the applicant acquired the property in good faith, for sufficient consideration and without knowing or not having a reasonable suspicion it was illegally acquired property.
- [15] An application to revoke the restraining order may be made under s 50A CPCA if it is shown there was no basis to make the restraining order. This must be made within 28 days or with leave of a court within three months after the making of the restraining order.¹⁵
- [16] Section 56 CPCA permits the State to apply for forfeiture of restrained property. The court must make the forfeiture order under s 58 CPCA if it finds that the prescribed respondent engaged in serious crime related activity during the limitation period¹⁶ or finds that the property is serious crime derived property¹⁷ because of a serious crime related activity that happened during the limitation period.
- [17] There may be an application for relief from hardship by a dependant of the prescribed respondent under s 62 CPCA, but such an order cannot be made in favour of an adult dependant unless the court is satisfied the dependant had no knowledge of any serious crime related activities of the prescribed respondent.¹⁸
- [18] There also may be an application for exclusion of the property from the forfeiture order under s 65 CPCA or under s 66 CPCA. Section 68 CPCA provides that such an order will only be made where the property is not illegally acquired property.¹⁹
- [19] The onus is on the applicant in such an application.
- [20] In *Henderson v Queensland*²⁰ the High Court considered a situation where the Supreme Court had forfeited cash in the sum of \$598,325 found in the possession of Henderson. An application for exclusion was dismissed. It was common ground, the trial judge had found, that the appellant had engaged in serious crime related activity; the money was in the appellant's possession; the money was the proceeds of the sale of jewellery given to the appellant by his deceased father; the jewellery was said to have been a gift to the appellant's great grandfather by Russian Royalty; the account given as to the provenance of the jewellery was untrue; the jewellery had been made sometime after 1950 and it was not known how the appellant's father came into possession of the jewellery. The trial judge held that the court could not be satisfied on the balance of probabilities the jewellery was not illegally acquired property and therefore the application for exclusion was refused.

¹⁵ Section 50A(2) CPCA

¹⁶ The limitation period is six years before the application was made – s 58(9) CPCA.

¹⁷ Section 23 CPCA Op. Cit. 3.

¹⁸ Section 62(2) CPCA

¹⁹ Section 22 CPCA Op. Cit. 8.

²⁰ (2014) 315 ALR 188.

- [21] French CJ noted at [11] that “illegally acquired property” retains its character even if it is disposed of including by using it to acquire other property. His Honour held at [15] that for the applicant to succeed he needed to establish it was more probable than not that the jewellery was not illegally acquired in his father’s hands at the time he received it. There was no available hypothesis to explain how the appellant’s father acquired the jewellery.
- [22] Kiefel J held at [20] that the appellant could not discharge his burden of proof because he could not establish that the jewellery was lawfully acquired by his father.
- [23] Bell J held at [33] that it was necessary for the appellant to produce evidence of facts and circumstances pointing to the conclusion that the jewellery was not illegally acquired property.
- [24] Keane J noted at [170] that the rejection of the only account of the provenance of the jewellery meant that there was no evidence as to how the jewellery was acquired and therefore Mr Henderson did not meet the burden of proof that it was not illegally acquired.
- [25] This case highlights the importance of placing evidence before the court to meet the burden on an exclusion application.
- [26] Further, if an application has been made for a proceeds assessment or an unexplained wealth order then the court needs to be satisfied that the property is unlikely to be required to satisfy such an order.²¹
- [27] Part 5 deals with Proceeds Assessment Orders (“PAO”). Section 78 CPCA provides that the Supreme Court must make a PAO where it is more probable than not that at any time within the last six years the person was engaged in serious crime related activity.²² Again the court may refuse to make the order if it is not in the public interest to make the order.²³ Importantly it is not necessary for the applicant to prove the commission of a particular offence only that some offence that is a serious crime related activity was committed.²⁴
- [28] The PAO must specify the amount required to be paid to the State.²⁵
- [29] Section 82 CPCA sets out the matters the court must have regard to in making the order including:
- (a) the value of cash or other property that came into the possession or control of the respondent;
 - (b) the value of the benefit derived from the illegal activity;
 - (c) the market value of any illegal drug when the illegal activity happened;²⁶

²¹ Section 69(2) CPCA.

²² Defined in s16 as a serious criminal offence which is defined in s17.

²³ Section 78(2)

²⁴ Section 78(3)

²⁵ Section 79 CPCA.

²⁶ The opinion of a prescribed officer e.g. a police officer or an authorised commission officer may be received in this regard- see section 85 CPCA.

- (d) the value of the respondent's property; and
- (e) the respondent's income and expenditure.

[30] Outgoings are to be disregarded in the assessment.²⁷

[31] A recent example of a trial in such a matter is to be found in *State of Queensland v Cannon*²⁸. In this case Applegarth J assessed the PAO at \$4,200,000. At [163]-[170] his Honour explained how he conducted the assessment in that matter.

[32] If practitioners are to defend such a case, consideration will need to be given to:

- (a) obtaining expert evidence from a pharmacologist as to production rates of drugs (if that is what the matter concerns); and
- (b) obtaining evidence from a forensic accountant to examine the accounting evidence relied upon by the State.

[33] Part 5A of the CPCA deals with unexplained wealth orders. Section 89G of the CPCA provides that the Supreme Court must make such an order if it is satisfied that there is a reasonable suspicion that the respondent has engaged in one or more serious crime related activities or has acquired, without giving sufficient consideration, serious crime derived property²⁹ from the serious crime activity of someone else whether or not the person knew or suspected the property was derived from illegal activity and whether or not any of the person's current or previous wealth was acquired unlawfully. Again the court may refuse to make the order it is not in the public interest to do so.³⁰

[34] Chapter 2A of the CPCA deals with the serious drug offender confiscation order scheme. Section 93ZZB provides that the Supreme Court must make a serious drug offender confiscation order where the respondent has been convicted of a qualifying offence for which a serious drug offender's certificate has been issued. The order must list the property to be forfeited.³¹ A dependant of the respondent may apply for a hardship order.³²

[35] Chapter 3 deals with applications by the State for confiscation after conviction. Such applications may be brought after charge or conviction.³³ A similar regime applies to that under Chapter 2.³⁴

²⁷ Section 84 CPCA.

²⁸ [2011] QSC 75.

²⁹ Section 29 (1) (c) CPCA. "Serious crime derived property" is defined in s23 of CPCA as property if it is all or part of the proceeds of serious crime related activity or all or part of it was acquired using serious crime derived property

³⁰ Section 89G(2) CPCA

³¹ Section 93ZZB(5) CPCA.

³² Section 93ZZO CPCA.

³³ Section 94 CPCA.

³⁴ Restraining orders are under sections 116-122 CPCA. Exclusion applications are dealt with under ss 139-140 CPCA. Forfeiture orders are dealt with under sections 146-151 CPCA.

- [36] Practitioners should particularly note section 163 CPCA. This section provides that where a prescribed respondent is convicted of a serious criminal offence, then property subject to a restraining order acquired within six years of the commission of the offence is automatically forfeited to the State when the forfeiture period³⁵ ends.
- [37] This forfeiture period may be extended by three months provided the application is made within the six month period³⁶ and the court is satisfied it is in the interests of the administration of justice to extend the period in the “special circumstances” of the case.³⁷
- [38] A third party order may be made under s 167 if the applicant for such an order was not involved in the serious criminal offence, and acquired his or her interest in good faith and for sufficient consideration, and did not know or suspect the property was tainted property,³⁸ and the interest was not under the prescribed respondent’s effective control.³⁹

Commonwealth

- [39] The Commonwealth has a similar scheme to the State under the *Proceeds of Crimes Act 2002* (Cth) (“POCA”).
- [40] The District Court⁴⁰ has jurisdiction to make relevant orders if they are within the monetary jurisdiction.
- [41] Section 17 POCA relates to applications for restraining orders where the respondent has been convicted of or charged with an indictable offence.⁴¹
- [42] The most usual application is under section 18 POCA which relates to the making of restraining orders where the court reasonably suspects a person has committed a serious offence.⁴²

³⁵ Section 161 CPCA provides this is six months from the conviction or decided appeal.

³⁶ Section 163(4) CPCA.

³⁷ Section 163(5) CPCA.

³⁸ “Tainted property” is defined in section 104 CPCA as (1) Tainted property, for a confiscation offence, means— (a) property used, or intended to be used, by a person in, or in connection with, the commission of the offence; or (b) property or another benefit derived by a person from property mentioned in paragraph (a); or (c) property or another benefit derived by a person from the commission of the offence; or (d) if the offence is money laundering, property mentioned in section 250(2)(a); or (e) if the offence is against section 252(1), property mentioned in that subsection.

³⁹ Section 20 CPCA defines this.

⁴⁰ The Act refers to a “court with proceeds jurisdiction”. This is defined in s 335 POCA to be a court with jurisdiction to deal with criminal matters on indictment.

⁴¹ The term “indictable offence” is defined in section 338 POCA as an offence against the law of the Commonwealth which may be dealt with as an indictable offence even if dealt with summarily.

⁴² “Serious offence” is defined in section 338 POCA as an indictable offence punishable by imprisonment in excess of three years if the offence relates to a narcotic substance, serious drug offences, money laundering, unlawful conduct causing or intending to cause of benefit of at least \$10,000 or a loss of at least \$10,000; certain offences against the Migration Act; offences against the Financial transactions reports Act involving an amount of at least \$50,000 and offences contrary to the Anti-Money Laundering and Counter-Terrorism Financing Act involving at least \$50,000.

- [43] The supporting affidavit must state the authorised officer suspects the suspect has committed a serious offence and the property is under the effective control of the suspect.⁴³
- [44] Section 19 POCA provides for the making of a restraining order where there are reasonable grounds to suspect that property is the proceeds of a terrorism offence, any other indictable offence, a foreign indictable offence, or the instrument of a serious offence. Section 20 POCA relates to restraining orders for literary proceeds from indictable offences and section 20A POCA restraining orders relating to unexplained wealth.
- [45] Section 24 provides an allowance for reasonable living and business expenses of the prescribed respondent. For this purpose certain property may be excluded from the restraining order or the restraining order may be revoked.⁴⁴
- [46] Section 29 permits the court to exclude property from the restraining order. The grounds of the exclusion order are that the interest in the property is not the proceeds of unlawful activity⁴⁵ or an instrument of unlawful activity. But it also must be shown that a pecuniary penalty order or a literary proceeds order will not be made⁴⁶.
- [47] The exclusion order is not to be heard until the respondent authority has a reasonable opportunity to conduct an examination.⁴⁷
- [48] The court may also in a restraining order make a property particulars order.⁴⁸ Privilege against self-incrimination does not apply to this.⁴⁹
- [49] Unless a confiscation order or an application for a confiscation order is made, a restraining order ceases after 28 days if the offences relating to the restraining order are dismissed or charges are not brought against the respondent.⁵⁰
- [50] Section 47 POCA requires the court to make a forfeiture order if there has been a restraining order covering property in place for at least six months and the court is satisfied the respondent engaged in conduct constituting one or more serious offences.⁵¹ The court may refuse to make the order if the court is satisfied that it is not in the public interest to do so and the property is an instrument of a serious offence other than a terrorism offence and is not the proceeds of an offence.⁵² Further section 48 POCA provides that the court must make an order forfeiting property if satisfied that the

⁴³ Section 18(3) POCA.

⁴⁴ Section 24A POCA.

⁴⁵ “Unlawful activity” is defined in section 338 POCA as “*unlawful activity*” means an act or omission that constitutes: (a) an offence against a law of the Commonwealth; or (b) an offence against a law of a State or Territory; or (c) an offence against a law of a foreign country.

⁴⁶ Section 29(4) POCA.

⁴⁷ Section 32 POCA.

⁴⁸ Section 39(1) (d) POCA.

⁴⁹ Section 39A POCA.

⁵⁰ Section 45 POCA.

⁵¹ Section 338 POCA.

⁵² Section 47(4) POCA.

property the subject of the application is the proceeds of indictable offences and the respondent has been convicted. If the property is not the proceeds of an offence but an instrument of an offence then the court may make the order and may have regard to any hardship which may be caused.⁵³

- [51] Section 49 POCA provides that the court must order forfeiture if the court is satisfied the property is the proceeds or instrument of serious offences. The court may refuse to make the order if the court is satisfied the property is an instrument of a serious offence other than a terrorism offence and is not the proceeds of an offence if the court is satisfied it is not in the public interest to make the order.⁵⁴
- [52] When making a forfeiture order a court may order the Commonwealth to pay a specified amount to a dependent of the respondent if the order would cause hardship.⁵⁵
- [53] Further the respondent may apply for exclusion on the grounds that the interest in the property is not the proceeds nor the instrument of unlawful activity.⁵⁶ However, it is to be noted that an application for exclusion should not be heard until the responsible authority has had the opportunity to conduct examinations in relation to the application.⁵⁷
- [54] Like the State legislation where a person is convicted of a serious offence then property covered by a restraining order and not excluded is forfeited six months after the conviction.⁵⁸ An extension of the period may be sought provided it is made within the six month period, there has been an exclusion application and the applicant has not been guilty of undue delay.⁵⁹
- [55] Section 94 POCA allows for an exclusion application to be made on the grounds that the court is satisfied the applicant's interest in the property was neither the proceeds nor the instrument of unlawful activity and the property was lawfully acquired.
- [56] Part 2.4 POCA deals with pecuniary penalty orders; Part 2.5 POCA deals with Literary Proceeds Orders and Part 2.6 deals with Unexplained Wealth Orders.
- [57] Turning the issue of examinations, s 180 POCA permits the court to make an examination order or a spousal or de facto examination order at the time a restraining order is made or if exclusion applications have been made.

Effect on the criminal process

- [58] Having dealt with the schemes in general, I wish to deal with the effect on criminal proceedings because often a person is charged and proceedings

⁵³ Section 48(2) and (3) POCA.

⁵⁴ Section 49(4) POCA.

⁵⁵ Section 72 POCA

⁵⁶ Section 73 POCA.

⁵⁷ Section 76 POCA.

⁵⁸ Section 92 POCA.

⁵⁹ Section 93 POCA.

are brought under the relevant confiscation legislation at or about the same time.

[59] This brings into sharp focus the nature and effect of examinations.

[60] I had already mentioned that under the State legislation (s 38A CPCA⁶⁰), at the time of the making of the restraining order the court may also make an examination order of the person or his or her spouse.

[61] With regard to such an examination, s 40 CPCA⁶¹ provides:

“40 Privilege—examination order

- (1) A person examined under an examination order is not excused from answering a question, or from producing a document or other thing, on the ground that—
 - (a) answering the question or producing the document may tend to incriminate the person or make the person liable to a forfeiture or penalty; or
 - (b) producing the document would be in breach of an obligation, whether imposed by an enactment or otherwise, of the person not to disclose the existence or contents of the document; or
 - (c) answering the question or producing the document would disclose information that is the subject of legal professional privilege.
- (2) A statement or disclosure made by a person in answer to a question asked in an examination under an examination order, or a document or other thing produced in the examination, is not admissible against the person in any civil or criminal proceeding, other than—
 - (a) a proceeding about the false or misleading nature of the statement or disclosure; or
 - (b) a proceeding on an application under this Act; or
 - (c) a proceeding for the enforcement of a confiscation order; or
 - (d) for a document or other thing, a proceeding about a right or liability it confers or imposes.”

[62] It is to be noted that an affidavit prepared by a person in the proceedings is not covered by this.

[63] However section 41A CPCA provides that information obtained during such an examination may be used and disseminated⁶². The section provides:

⁶⁰ Section 130A CPCA applies to orders made under Chapter 3.

⁶¹ Section 132 CPCA applies to orders made under Chapter 3.

⁶² Section 133A CPCA applies to orders made under Chapter 3.

- “(1) This section applies to a statement, disclosure, document or other thing mentioned in section 40(2) (**examination information**).
- (2) The DPP or the commission may give the examination information to—
 - (a) a corresponding entity to help the entity to obtain other evidence or other information (**derived evidence**) that may be relevant to the enforcement of a corresponding law; or
 - (b) an entity of the State, another State or the Commonwealth that has a function of investigating or prosecuting offences to help the entity to obtain other evidence or other information (**derived evidence**) that may be relevant to the investigation or prosecution of an offence.
- (3) The giving of examination information under subsection (2), its use to obtain derived evidence or the admissibility of the derived evidence in a proceeding, including a prosecution for an offence, is unaffected by—
 - (a) the fact that the examination information was obtained because of section 40 and subject to section 39B; or
 - (b) any duty of confidentiality owed to the person from whom the examination information was obtained; or
 - (c) the objects of this Act or the particular purpose for which the examination information was obtained.
- (4) In this section—
entity of the State, another State or the Commonwealth includes a law enforcement agency established under a law of the State, another State or the Commonwealth.”

[64] It is further to be noted that privilege appears to be excluded concerning the property particulars order.⁶³

[65] Crucially section 93 CPCA provides:
“93 No stay of proceedings

The fact that a criminal proceeding has been started against a person, whether or not under this Act, is not a ground on which the Supreme Court may stay a proceeding against or in

⁶³ Section 42 CPCA.

relation to the person under this chapter that is not a criminal proceeding.”

[66] There are similar provisions in the Commonwealth legislation.

[67] Section 196 POCA provides:

“196 Offences relating to appearance at an examination

- (1) A person attending an examination to answer questions or produce documents must not:
 - (a) refuse or fail to be sworn or to make an affirmation; or
 - (b) refuse or fail to answer a question that the approved examiner requires the person to answer; or
 - (c) refuse or fail to produce at the examination a document specified in the examination notice that required the person’s attendance; or
 - (d) leave the examination before being excused by the approved examiner.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

- (2) Paragraph (1)(c) does not apply if the person complied with the notice in relation to production of the document to the extent that it was practicable to do so.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2): see subsection 13.3(3) of the *Criminal Code*.”

[68] Section 197 POCA provides:

“197 Privileged information

- (1) Paragraph 196(1)(b) or (c) does not apply if, under:
 - (a) a law of the Commonwealth; or
 - (b) a law of the State or Territory in which the examination takes place;

the person could not, in proceedings before a court, be compelled to answer the question or produce the document.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1): see subsection 13.3(3) of the *Criminal Code*.

- (2) However, paragraph 196(1)(b) or (c) applies if the only reason or reasons why the person could not be so compelled are one or more of the following:

- (a) answering the question or producing the document would tend to incriminate the person or to expose the person to a penalty;
 - (b) the answer would be privileged from being disclosed, or the document would be privileged from being produced, in legal proceedings on the ground of legal professional privilege;
 - (ba) the answer would be privileged from being disclosed, or the document would be privileged from being produced, in legal proceedings on the ground of professional confidential relationship privilege;
 - (c) the answer or document would, under a law of the Commonwealth, a State or a Territory relating to the law of evidence, be inadmissible in legal proceedings for a reason other than because:
 - (i) the answer would be privileged from being disclosed; or
 - (ii) the document would be privileged from being produced.
- (3) To avoid doubt, the following are not reasons why a person cannot, in proceedings before a court, be compelled to answer a question or produce a document:
- (a) the person is contractually obliged not to disclose information, and answering the question or producing the document would disclose that information;
 - (b) the person is obliged under a law of a foreign country not to disclose information, and answering the question or producing the document would disclose that information."

[69] Sections 198 POCA provides:

"198 Admissibility of answers and documents

An answer given or document produced in an *examination is not admissible in evidence in civil or criminal proceedings against the person who gave the answer or produced the document except:

- (a) in criminal proceedings for giving false or misleading information; or
- (b) in proceedings on an application under this Act; or
- (c) in proceedings ancillary to an application under this Act; or

- (d) in proceedings for enforcement of a confiscation order; or
- (e) in the case of a document—in civil proceedings for or in respect of a right or liability it confers or imposes.”

[70] Section 266A POCA has similar disclosure provisions to section 41A CPCA.

[71] Section 186(4) POCA provides:

“The fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) does not prevent the examination of a person.”

[72] Section 319 POCA provides:

“319 Stay of proceedings

The fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) is not a ground on which a court may stay proceedings under this Act that are not criminal proceedings.”

[73] Despite the provisions there is authority that civil proceedings may be stayed pending the disposition of associated criminal proceedings.

[74] This issue came before the High Court in *Commissioner of the Australian Federal Police v Zhao*.⁶⁴ In this case the trial judge had refused an application to stay the confiscation proceedings pending the resolution of the criminal proceedings.

[75] An appeal was allowed against this decision by the Victorian Court of Appeal which stayed the confiscation proceedings. The appeal by the Commissioner of the AFP to the High Court was dismissed.

[76] The respondent had put in an affidavit stating:

“I am concerned that if I have to make a detailed affidavit or be cross-examined regarding the purchase of the Restrained Property and source of any relevant funds that there is a real risk that any such evidence will prejudice my criminal case.

...

If the civil matters are not stayed I will have to make a decision as to whether to waiver [sic] my privilege and right to silence. This would be at the expense of the civil proceedings.”

[77] The High Court held that the risk of prejudice to the respondent was plain:

“[42] ... It is not necessary for the second respondent to say any more than he did on the application for a stay in order to identify that risk, given that the offences and

⁶⁴

(2015) 316 ALR 378.

the circumstances relevant to both proceedings are substantially identical.

[43] The Commissioner contends, as the primary judge had held, that it was necessary that the second respondent state the specific matters of prejudice before a stay could be contemplated. However, to require the second respondent to do so would be to make the risk of prejudice a reality by requiring him to reveal information about his defence, the very situation which an order for a stay seeks to avoid...

[47] The prospect that civil proceedings may prejudice a criminal trial and that such prejudice may require a stay of the civil proceedings is hardly novel. In some jurisdictions, procedures are provided for making an application for a stay in such circumstances. The risk of prejudice in a case such as this is real. The second respondent can point to a risk of prejudice; the Commissioner cannot.

[48] So far as concerns the first respondent, the Court of Appeal was correct to identify as relevant that to permit the forfeiture proceedings to proceed against her would produce two sets of proceedings, rather than one. The principle of the common law that seeks to prevent a multiplicity of actions has a long history and cannot be ignored. ...

[49] It may be accepted that criminal proceedings are not an impediment to civil proceedings under the POC Act, but it does not follow that it is intended that forfeiture proceedings brought under the POC Act will continue where to do so would put a respondent at risk of prejudice in his or her criminal trial.

[50] The interests of justice are not served by requiring the second respondent to defend the forfeiture proceedings or pursue the exclusion proceedings before his criminal proceedings are finalised, especially since the Commissioner will suffer no relevant prejudice from a delay in the continuation of the forfeiture proceedings."

[78] Other recent examples include *Jackson v Commissioner of Australian Federal Police*⁶⁵ and *Commissioner of the Australian Federal Police v Cacu*.⁶⁶

⁶⁵ [2014] VSCA 136.

⁶⁶ [2015] NSWSC 1232.

- [79] Practitioners need to give consideration to the stay of the civil proceedings pending the resolution of criminal proceedings.

Privilege

- [80] I now wish to deal with the issue of privilege. As noted earlier the State or the Commonwealth may apply for examination orders.
- [81] Under the State legislation the examination is to take place in private but the court or court officer conducting the examination may give directions as to whom may be present.⁶⁷ The examinee's lawyer may address the court about matters on which the person is being examined or examine the person.⁶⁸ Crucially, s 40(1) CPCA provides that a person being examined is not excused from answering a question or producing a document on the grounds of self-incrimination or legal professional privilege.
- [82] I have already mentioned that s 41A CPCA permits the examination information to be given to a prosecuting authority and s 41 CPCA purportedly abrogates privilege for a property particulars order.
- [83] POCA has similar provisions.
- [84] In *X7 v Australian Crime Commission*⁶⁹ the High Court considered a situation where X7 had been arrested and charged with three drug offences under the *Commonwealth Criminal Code*. Before his trial he was summoned to appear before the Australian Crime Commission. At the examination he declined to answer questions. Section 30(2) of the *ACC Act* requires a person to answer questions when directed. But if self-incrimination is claimed under s 30(5) the evidence is not admissible in criminal confiscation proceedings. Despite being directed to answer questions X7 refused to answer them. X7 sought declarations in the High Court that the examiner was not authorised to require him to answer the questions.
- [85] Hayne, Bell and Kiefel JJ held that the examiner was not authorised to require the answers. Their Honours held that the provisions of the *ACC Act* did not authorise this.

“[70] The relevant provisions of the *ACC Act* should not be construed as authorising the compulsory examination of a person charged with, but not yet tried for, an indictable Commonwealth offence about the subject matter of the pending charge. Permitting the Executive to ask, and requiring an accused person to answer, questions about the subject matter of a pending charge would alter the process of criminal justice to a marked degree, whether or not the answers given by the accused are admissible at trial or kept secret from those investigating or prosecuting the pending charge.”

⁶⁷ Section 39B(2) CPCA

⁶⁸ Section 39C CPCA

⁶⁹ (2013) 248 CLR 92.

- [86] However, the application of X7 was examined vis-à-vis confiscation proceedings in *Lee v New South Wales Crime Commission*.⁷⁰
- [87] In *Lee* the appellants were charged with drug trafficking. On the day after they were charged the New South Wales Crime Commission obtained restraining orders from the Supreme Court. Orders for examination were sought but refused by the trial judge. By the time the appeal came before the New South Wales Court of Appeal, the majority of the criminal charges had already been heard. Jason Lee had been convicted of a firearms offence and offences of supplying drugs while Seong Lee had been convicted of firearms offences and an offence of being knowingly concerned in the supply of drugs. The New South Wales Court of Appeal allowed the appeal by the New South Wales Crime Commission. By a four to three majority the appeal by the Lees was dismissed.
- [88] French CJ distinguished X7 insofar as it applied to the *New South Wales Criminal Assets Recovery Act* 1990 (NSW).⁷¹ His Honour considered if there was a real risk of prejudice to the Lees the Supreme Court could control its own processes in this regard.⁷² His Honour held there was a high degree of certainty as to the legislative intention and that the orders for the examination should have been made.⁷³ Crennan J held delay in examination until the conclusion of criminal proceedings could frustrate the purposes of the Act.⁷⁴ There was an express abrogation of the privilege against self-incrimination in the Act.⁷⁵ However, s 63 did not override the Supreme Court's power to order a stay.⁷⁶ Gageler and Keane JJ held that s 13R of the *Criminal Assets Recovery Act* abrogated privilege.⁷⁷
- [89] It may be seen therefore that the confiscation legislation is to be regarded differently to the ACC legislation. However, this does not mean a stay application cannot be brought pending disposition of criminal proceedings. The affidavit however, would need to be in terms like that in *Zhao's* case in order to succeed.

Briefing counsel

- [90] Gageler and Keane JJ noted at [323] in *Lee*:
- “However, we are unable to regard as the deprivation of a legitimate forensic choice a practical constraint on the legal representatives of the person leading evidence or cross-examining or making submissions in the criminal proceedings to suggest a version of the facts which contradicted that given by their client on oath in the examination. The legal representatives would, of course, be prevented from setting up an affirmative case inconsistent with the evidence but they

⁷⁰ (2013) 251 CLR 196.

⁷¹ (2013) 251 CLR 196 at [15]

⁷² (2013) 251 CLR 196 at [41]

⁷³ (2013) 251 CLR 196 at [56]

⁷⁴ (2013) 251 CLR 196 at [131]

⁷⁵ (2013) 251 CLR 196 at [132]

⁷⁶ (2013) 251 CLR 196 at [143]

⁷⁷ (2013) 251 CLR 196 at [285]

would not be prevented from ensuring that the prosecution is put to proof or from arguing that the evidence as a whole does not prove guilt.”

- [91] If a stay is not granted and an examination occurs it may be that different lawyers need to be engaged for the criminal proceedings as compared to the confiscation proceedings.
- [92] Assuming the same lawyers are involved, it will be important to recall that a falsehood cannot be put before the court. Therefore counsel in such circumstances would need to be briefed with the confiscation material as well as the criminal material.
- [93] Advice should be given early on, on whether an application for a stay is to be sought.
- [94] Also, close consideration needs to be given to exclusion applications and revocation applications in light of the time limits involved.
- [95] The time limits associated with automatic forfeiture need to be closely monitored.
- [96] It may be that separate representation needs to be arranged for dependents who seek hardship orders.
- [97] There is one recent decision I would also like to mention. In *State of Qld v Sephton*⁷⁸ Dalton J refused to make an ex parte restraining order. Her Honour found that even though \$226,000 cash was found hidden in various places as well as 10 mobile phones, digital scales, a heat sealing machine and what might be a tick sheet, only 1 oz of cannabis was found, the respondent was to be charged only with possession of the cannabis. There was no evidence as to whether a charge of trafficking would be laid. Here Honour considered it inappropriate to deal with the matter ex parte as the charge at that point was only possession and the restraining order would cover his home which had a mortgage on it. There was no basis for the deponent’s belief that there was a risk of dissipation if the order was not granted.

Conclusion

- [98] In conclusion I think it is fair to say that the confiscation legislation is full of traps and minefields for lawyers.
- [99] If the matters proceed, clients the subject of criminal charges may be forced to undergo examinations, provide particulars of their property (which may be used in the criminal proceedings) and may be forced to provide affidavits to support exclusion applications.
- [100] For this reason practitioners need to be across the confiscation legislation, even if they only practice in crime.

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