



DPP

Commonwealth Director of Public Prosecutions

SUBMISSION BY THE COMMONWEALTH DPP

THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO THE *CRIMES LEGISLATION AMENDMENT (No. 2) BILL 2011*

INTRODUCTION

The functions of the Commonwealth Director of Public Prosecutions (CDPP) are to prosecute criminal offences against the laws of the Commonwealth and to confiscate the proceeds of Commonwealth crime. The CDPP can only prosecute or take confiscation action when there has been an investigation by an investigation agency. The CDPP does not have an investigative function. The CDPP prosecutes or takes confiscation action in matters investigated by the Australian Federal Police or other investigative agencies, such as the Australian Crime Commission, the Australian Securities and Investment Commission and the Australian Taxation Office. The CDPP regularly provides advice to these agencies during the investigative stage in large and complex matters.

SCOPE OF SUBMISSION

This submission addresses the proposed amendments contained in Schedule 2 of the *Crimes Legislation Amendment Bill (No. 2) 2011* ("the Bill") and outlines the manner in which the CDPP has performed his statutory functions in relation to confiscation of the proceeds and instruments of Commonwealth crime.

SCHEDULE 2 - PROCEEDS OF CRIME AMENDMENTS

Schedule 2 of the Bill proposes various amendments to the *Proceeds of Crime Act 2002* ("POC Act 2002").

Background

Proceeds of Crime Act 2002

The principal legislation under which the CDPP operates in this area is the POC Act 2002, which came into effect on 1 January 2003. The POC Act 2002 provides a comprehensive scheme to trace, restrain and confiscate the proceeds and instruments of crime against Commonwealth law. In some cases it may also be used to confiscate the proceeds of crime against foreign law. On 19 February 2010, amendments to the POC Act 2002 provided a regime for the restraint and confiscation of unexplained wealth.

HEAD OFFICE

4 Marcus Clarke Street Canberra City 2601
GPO Box 3104 Canberra ACT 2601
Telephone (02) 6206 5666 Facsimile

Conviction based and non-conviction based action

Under the POC Act 2002, confiscation action may be taken either in conjunction with the prosecution process ("conviction based action"), or independently from that process ("non-conviction based action").

Conviction based action depends upon a person being convicted by a court of a Commonwealth indictable offence, which in turn involves proof of all elements of the offence beyond reasonable doubt. Non-conviction based action may be taken whether or not a person has been charged with or convicted of an offence, and involves proof of the offence to the civil standard, "the balance of probabilities". Non-conviction based action is available in relation to a limited range of Commonwealth criminality.

In order to preserve property pending the outcome of confiscation proceedings, the POC Act 2002 provides for restraining orders over property to be made early on in an investigation. There are four different types of restraining orders which may be made under the POC Act 2002 in different circumstances.

There are three types of "final" orders which may be made under the POC Act 2002:

- Forfeiture orders – where the court orders that property which is the proceeds or an instrument of crime be forfeited to the Commonwealth;
- Pecuniary penalty orders – where the court orders an offender to pay to the Commonwealth an amount equal to the benefit derived by the person from the commission of crime; and
- Literary proceeds orders – where the court orders an offender to pay to the Commonwealth an amount calculated by reference to benefits the person has derived through commercial exploitation of his or her notoriety resulting from the commission of an offence.

In addition to the above orders, in certain circumstances the POC Act 2002 provides for "automatic" forfeiture of property. This can occur where a person has been convicted of a "serious offence" within the meaning of the POC Act 2002, and involves the forfeiture of restrained property, after a prescribed period, without further order of the court.

The POC Act 2002 contains a range of provisions which protect the rights of owners of restrained property and also third parties. These provisions facilitate for example access to restrained property for the purpose of paying reasonable living expenses or reasonable business expenses; exclusion of property from restraint or from forfeiture; and payment of compensation or hardship amounts out of the proceeds of forfeited property. In addition, a Court can require an undertaking on behalf of the Commonwealth as to costs and damages as a condition for the making a restraining order. In practice this undertaking has been provided in the past by the CDPP.

Unexplained wealth action

The unexplained wealth regime contained in the POC Act 2002 enables a court to order that a person pay an amount equal to the difference between the value of the person's total wealth and the sum of the values of all the property the court is satisfied is not derived from a Commonwealth offence, a foreign indictable offence or a State offence with a federal aspect.

There is a three step process for obtaining an unexplained wealth order:

1. CDPP applies for an unexplained wealth order with a supporting affidavit;

2. Based on the unexplained wealth order application and supporting affidavit, the court may make a preliminary unexplained wealth order (an order for a person to appear before court so a court can consider making an unexplained wealth order); and
3. If and only if a preliminary unexplained wealth order is made, the court may then make an unexplained wealth order, if it is not satisfied that the whole or any part of the person's wealth was not derived from one or more of the three types of offences referred to above (the onus of negating the above proposition rests on the person against whom the order is sought). Even if the abovementioned requirements are satisfied, a court may refuse to make an unexplained wealth order if the court is satisfied that it is not in the public interest to make the order.

There is provision for the CDPP to seek an unexplained wealth restraining order, supported by affidavit evidence. The restraining order can be made over any or all property owned or effectively controlled by the person.

Confiscations

Confiscated money and money derived from the realisation of other types of confiscated assets are paid into the Confiscated Assets Account, established under Part 4-3 of the POC Act 2002.

All of the CDPP's work under the POC Act 2002 is based on investigations by and referrals from relevant Commonwealth law enforcement agencies. Key investigative responsibility rests with the Australian Federal Police (AFP), the Australian Crime Commission (ACC), the Australian Customs and Border Protection Service, the Australian Securities and Investments Commission (ASIC), and the Australian Taxation Office (ATO), each of which is an "enforcement agency" under the POC Act 2002 and exercises specific investigative and other powers under the Act.

Proposed change

In 2010, the Government announced it would establish a Criminal Assets Confiscation Taskforce led by the AFP which would strike at the very heart of organised crime - its financial motivation. The task force brings 'together expertise in intelligence, operations, forensic accounting litigation and specialist law enforcement to ensure a highly integrated approach to criminal asset confiscation. Its main objective is to enhance the identification of potential criminal assets confiscation matters and strengthen their pursuit'.¹ Minister for Home Affairs, Brendan O'Connor stated in the second reading speech for the Bill "The task force is aimed at attacking the architecture of organised crime groups by taking the profit out of crime".

The interim task force was launched in March 2011. The task force consists of the AFP, CDPP, ATO and ACC. Each agency in the taskforce exercises its own roles and functions in accordance with its legislative mandate. No change in statutory function is involved.

The Bill proposes that the Commissioner of the AFP be empowered to commence and litigate proceedings under the POC Act 2002. It bestows on the Commissioner of the AFP the same powers and functions currently exercised solely by the CDPP. It also permits the Commissioner and the CDPP to transfer current proceedings to the other, with the consent of the receiving party. Under the proposed amendments the Commissioner of the AFP would be responsible for the investigation and have power to conduct the litigation of confiscation matters while the CDPP would retain the power to litigate confiscation matters.

¹ Second reading speech of the Crimes Legislation Amendment Bill (No.2) 2011, Wednesday 23 March 2011.

The future conduct of proceedings under the POC Act 2002

The Explanatory Memorandum states “it is envisaged that the AFP will take responsibility for litigating all proceeds of crime matters relevant to the investigations undertaken by the Taskforce, and all non-conviction based proceeds of crime matters” and “it is expected the DPP will continue with a limited number of matters that are closely connected with criminal prosecutions”.

It is the experience of the CDDP that to take the most effective and efficient action in an individual case may involve a combination of non-conviction and conviction based action. In practice proceedings may be commenced on a non-conviction basis but ultimately be resolved on a conviction basis and vice versa.

Not all POC Act 2002 matters have involved the AFP at either the investigative or litigation stages. Insider trading matters are usually investigated by ASIC whose officers are authorised officers for the purpose the POC Act 2002 (i.e. providing evidence by way of affidavit in support of restraining order applications and using information gathering tools). Consideration may need to be given to whether such matters will be dealt with by the task force.

The Bill does not provide arrangements for determining the matters for which authority will be responsible. The Explanatory Memorandum states “The division of responsibilities between the two authorities will be subject to administration arrangements outlined in a Memorandum of Understanding”.

The CDDP's experience of POC Act 2002

Recoveries to date

Since the POC Act 2002 came into effect, the average level of recoveries under the POCA 2002 is substantially higher than was the case under the *Proceeds of Crime Act 1987*. Recoveries reached approximately \$34.8 million in the 2009-10 financial year.

Between 1 January 2003 and 30 June 2011 approximately \$120 million worth of property has been recovered using the POC Act 2002.

Resources

In the CDDP's view the main factor determining the amount of confiscation activity at Commonwealth level is the number of qualified specialist staff specifically dedicated towards pursuing confiscation work.

Clearly, forensic accountants, financial analysts and other specialist financial investigators, as well as specialist confiscation lawyers, play a key role in the confiscation process. Such staff are essential both in terms of identifying cases in which confiscation action may be appropriate, and in terms of then commencing and progressing action in those cases through to a satisfactory conclusion whether by settlement or final orders. In many cases, the scope of confiscation action able to be taken (and indeed, whether confiscation action is available at all) will depend directly on the extent to which the relevant agencies are willing and able to invest resources to support the function.

An important factor determining levels of activity is the amount of resources which the Commonwealth as a whole is able to dedicate to confiscation work. It is also important that where resources are devoted to this work there be both coordination of effort and proper communication between the agencies involved.

Another important aspect of the resources is the legal expertise available. The POC Act 2002 regime is structured to encourage early restraint of assets, before the investigation (whether criminal or POC Act 2002 only) is complete. Defendants and third parties are provided with several opportunities to seek relief from restraint and/or forfeiture. For example a defendant or third party may apply to the court to revoke a restraining order, to exclude property from restraint, to exclude property from automatic forfeiture and to exclude property from forfeiture. Property claims are often complicated and technical. Accordingly there will need to be sufficient legal expertise and resources to litigate these matters where appropriate.

Although a focus on financial staff may lead to an increase in matters being commenced, if not balanced by adequate legal resources, it may create undue pressure to resolve matters by way of settlement. While settlement of proceedings may be an appropriate outcome in some matters, in other matters it is necessary to have adequate legal resources and resolve to litigate the proceedings to achieve a satisfactory outcome. An approach which is perceived to be too willing to settle may be a far lesser deterrent.

The role of the CDPP

The POC Act 2002 provides the CDPP with responsibility for deciding whether proceedings should be commenced and, based on the evidence provided by the investigation agency, the nature of those proceedings. The CDPP brings his independence, objectivity and legal expertise in assessing the prospects of the case as well as preparing a strategy for the successful conduct of the proceedings.

It will be important for any authority conducting POC Act 2002 proceedings to have appropriate internal safeguards in place governing decisions whether to commence POC Act 2002 proceedings and how those proceedings are conducted.

Particular amendments made by Schedule 2

Part 1 – Division 1- Responsible authorities for the proceeds of crime: the DPP and the AFP.

The amendments in Part 1 designate the Commissioner of the AFP and the CDPP each as a 'proceeds of crime authority'. The amendments provide for a proceeds of crime authority to transfer responsibility for the POC Act 2002 proceedings, with the consent of the receiving proceeds of crime authority. The provisions provide a regime for giving effect to the transfer, including notification of the court and parties to the proceedings.

Part 1 – Divisions 2 – 4 - Substituted references

The amendments replace the references to the CDPP with 'proceeds of crime authority' wherever occurring in the POC Act 2002. These amendments will enable Commissioner of the AFP to exercise the powers and functions under the POC Act 2002 currently exercised only by the CDPP. Part 2 makes consequential amendments to other legislation to facilitate the exercise by the Commissioner of the AFP of the full suite of powers currently vested in the CDPP in the same circumstances as the CDPP. For example, a decision by a proceeds of crime authority under Part 3-1 of the POC Act 2002 will not be a decision to which the *Administrative Decisions (Judicial Review) Act 1977* applies.

Part 1 also provides for the Commissioner of the AFP to be authorised by the Attorney-General to apply for the registration of foreign restraining, forfeiture or pecuniary penalty orders pursuant to the *Mutual Assistance in Criminal Matters Act 1987*.

Part 2 – Other amendments

Clauses 243 to 246 – tax amendments.

The proposed amendments to section 131 provide the court with discretion to reduce a pecuniary order by the amount of tax paid at the time or after the pecuniary penalty order was applied for. The relevant amount of tax is that which is attributable to the benefits of offences (and where appropriate, other unlawful activity) which are also the basis of the pecuniary penalty order.

The court will be required to reduce the pecuniary penalty order by the amount of relevant tax paid before the pecuniary penalty order was applied for.

These amendments complement the recent amendments to the *Taxation Administration Act 1953* which enabled the Commissioner of Taxation to waive all or part of a person's tax liability where the waiver would contribute to the commencement, conduct or ending of the POC Act 2002 proceedings. Accordingly the proposed provisions encourage early payment of tax liabilities and enable the court to take into account that payment of tax may only have been made to avoid part or all of the pecuniary penalty order. The CDPP supports the tax amendments.