

Editorial

Proceeds of Crime: Instrument of Injustice?

Proceeds of crime legislation serves an important function - stripping offenders of the proceeds of their crimes. However, just as with sentencing, inflexible rules that do not permit the exercise of judicial discretion are a recipe for injustice.

The *Proceeds of Crime Act 1987* (Cth) was introduced with the object of stripping convicted offenders of both the proceeds of their crimes and any property they used to commit their crimes. It only applied where there had been a conviction, determined to the criminal standard of proof. Further, judges were given a discretion to ensure that the legislation did not produce injustice. Section 19(1) provided that, where a court was satisfied that property was “tainted property”

the court may, if it considers it appropriate, order that the property, or such of the property as is specified by the court in the order, is forfeited to the Commonwealth.

Plainly enough, this provision conferred a discretion on the court to determine whether, in the particular circumstances of the case, it was appropriate to order forfeiture, complete or partial. Under s 19(3), the court was specifically required to have regard to:

any hardship that may reasonably be expected to be caused to any person by the operation of such an order.

However, this Act was replaced in 2002 by the *Proceeds of Crime Act 2002* (Cth). The new legislation is much more draconian in operation. There is no need for a conviction – under a “civil forfeiture regime”, if a court is satisfied to the civil standard of proof that property is “proceeds” of an indictable offence, it must be forfeited to the Commonwealth. Where there is a conviction, the burden of proof will be on the convicted person to prove that property was neither “proceeds of unlawful activity” nor “an instrument of unlawful activity”.

Putting to one side issues about burden of proof and adoption of civil standards of proof, the primary concern about this legislation is the fact that it removes judicial discretion. If property is “proceeds of unlawful activity” or “an instrument of unlawful activity” (or the owner of the property fails to prove that it is not) then it must be forfeited to the Commonwealth.

The potentially unjust consequences of such legislation derive partly from the very broad definitions given in the legislation for “proceeds of unlawful activity” and “an instrument of unlawful activity”. Under s 329(1), property is proceeds of an offence if:

(a) it is wholly derived or realised, whether directly or indirectly, from the commission of the offence; or

(b) it is partly derived or realised, whether directly or indirectly, from the commission of the offence ...

Under s 329(2) property is an instrument of an offence if:

(a) the property is used in, or in connection with, the commission of an offence; or

(b) the property is intended to be used in, or in connection with, the commission of an offence ...

The term “derived” in s 329(1) is not defined. The NSW Court of Appeal held in *Jeffrey v DPP (Cth)* (1995) 79 A Crim R 514 (a case applying the 1987 Act) that, where the appellant had used his own money to purchase United States currency in excess of \$10,000 but did so in a way that avoided reporting the purchase, contrary to the *Cash Transaction Reports Act 1988* (Cth), the US currency was derived by him in consequence of his illegal activity. It would not have been so derived if he had reported it. All of it was “proceeds” of crime.

A similar outcome occurred in the recent judgment of the NSW Court of Appeal in *Studman v Commonwealth DPP* [2007] NSWCA 285.¹ The appellant opened and operated a bank account in a false name, apparently for the purpose of avoiding tax on the interest on the account. He placed his lawfully acquired money into the account. Section 24(1) of the *Financial Transaction Reports Act* makes it an offence to open or operate an account with a cash dealer in a false name. McClellan CJ at CL (Spigelman CJ and Handley JA agreeing) held at [41]:

“In the present case the relevant property was the chose in action obtained when the relevant account was opened. Pursuant to the arrangement with the bank ... the appellant could deposit and withdraw monies or direct that a payment be made to a third party. The fact that the money which the appellant deposited may have been lawfully acquired by him is not to the point. Once deposited the monies become the property of the receiving party.”

He concluded at [43] that “the right to the monies in the accounts was derived directly from the commission of the offence”, regardless of the fact that the money deposited was lawfully acquired.

Indeed, McClellan CJ at CL held that all the money in the bank account was also “an instrument of an offence”:

“The chose in action vested in the appellant was the direct result of the offence committed by the appellant when each account was opened. That chose in action was the vehicle by which he operated the relevant accounts under a false name. The property was both used in and in connection with the offences, making the bank accounts ... instruments of unlawful activity”.

¹ It should be disclosed that the author appeared for the unsuccessful appellant in the Court of Appeal.

That is, all the money in the bank account was “used in, or in connection with, the commission of” the offences of opening, and operating, a bank account in a false name. Even though the tax law the appellant was attempting to evade would only have meant the loss of a part of the interest received from the bank, and none of the money he put into the bank, every last cent in the account was forfeited under this legislation.

Similar reasoning has led to the conclusion that money transferred into or out of Australia in breach of reporting requirements is property that is “used in, or in connection with, the commission of an offence” and thus an instrument of an offence and subject to forfeiture on that basis – regardless of the fact that money was lawfully acquired and regardless of the motive (if any) behind the failure to report.

Since the 2002 Act gives no discretion to the court once it is concluded that property is “proceeds of unlawful activity” or “an instrument of unlawful activity” (or the owner of the property fails to prove that it is not) then all of it must be forfeited to the Commonwealth.

Regardless of the source of the funds, and regardless of any hardship that may be expected to be caused to any person by the operation of a forfeiture order, it all must be forfeited.

Furthermore, the definition of “proceeds of an offence” to include property that is “partly derived or realised, whether directly or indirectly, from the commission of the offence” means that, if only part of a house or car is bought with unlawfully acquired money, the house or car must be forfeited to the Commonwealth – with no mechanism available to a court to order that funds from the sale of the property be divided to ensure that there is no forfeiture of the lawfully acquired funds used to purchase the property.

One of the pillars on which modern sentencing policy is based is that a sentence should be decided by an independent and experienced judicial officer, taking into account all the relevant circumstances, calmly and rationally balancing the sometimes competing public interests. Mandatory sentencing is the antithesis of justice and, when introduced in the Northern Territory and Western Australia for minor offences, was ultimately scrapped. Conservative Oppositions in NSW and Victoria that have contested elections on a policy of introducing mandatory sentencing have never been successful.

The Commonwealth *Proceeds of Crime Act 2002* is directly analogous to mandatory sentencing – although it does not even require a criminal conviction before its arbitrary provisions come into operation. While none of the members of the NSW Court of Appeal in *Studman* saw fit to observe that the legislation is capable of causing injustice, the potential for injustice is manifest. It is truly Draconian legislation. Whatever the political complexion of the Federal Government, this Act should be amended as a matter of urgency in order to reintroduce judicial discretion.

Stephen Odgers