INTRODUCTION TO THE C*ONFISCATION ACT* 1997 (VIC), CIVIL FORFEITURE & UNEXPLAINED WEALTH

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Introduction

Civil forfeiture and unexplained wealth forfeiture are two of the various known species through which criminally derived assets are confiscated. The principal object of such confiscation is to deter serious crime (s.3A(b) of the *Confiscation Act* 1997 (Vic) (**Act**)).

Forfeiture under the Act is but one form of asset confiscation that may lead to the confiscation of property without just compensation. Other forms include property seizure and confiscation powers found, for example, in customs, migration and fisheries legislation.

Many attending this conference will be familiar with other species of crime proceeds confiscation, with the original and most basic form being conviction based, court ordered, forfeiture of property.

Property definitions

The concept of "property" is central to the Act. It is property which the DPP may seek to restrain and which may be forfeited to the state. The term "property" enjoys a broad definition in s.3 of the Act, where the term includes both tangible and intangible property as well as any interest in property. "Interest" in relation to property is defined in s.3 of the Act not only to include legal and equitable interests, but also a right, power or privilege over or in connection with property.

The concept of "interest" in "property" is critical to the Act since, under the conviction based confiscation regime, the DPP may seek to restrain, amongst other things, property in which an accused has an interest. In that regard, the concept of interest is broadened further by s.10 of the Act, which provides that a person will have an interest in property (which is thereby able to be restrained) if it:-

- is subject to an accused's effective control; or
- was gifted away within the last six years for some offences and at any time for more serious offences.

Section 9 expands on the term "effective control of property" in that it does not matter whether the accused has an interest in it and regard may be had to indirect control via companies and trusts. Even family, domestic, business or other relationships with the person having an interest in the property may be taken into account in this context.

These expansive definitions of property are obviously designed to facilitate asset confiscation in circumstances where criminals are motivated to organise the acquisition of ill-gotten assets into the names of trusted associates or family members. Those with overseas connections sometimes transfer ill-gotten funds out of Australia for investment in offshore assets, making it hard for the authorities to track, let alone restrain and ultimately confiscate them. In this regard, Australia has enacted mutual co-operation legislation[1] in conjunction with many countries for the purpose of facilitating forfeiture of such overseas held property, all underpinned by relevant international treaties. Unfortunately, this can be a fairly protracted and cumbersome process to engage due to the need to liaise with an overseas bureaucracy[2], through one in Canberra[3], as well as to register court orders in a foreign court to aid realising the property in favour of the state.

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1 *Mutual Assistance in Criminal Matters Act 1987 (Cth.)*

2 Usually through a Crown or State Law Department.

3 A-G's department.

We note in passing that there is yet to emerge from our Supreme Court a considered decision on the degree of extra-territorial reach of the Act. In that regard, whilst some Victorian Supreme Court judges have, in recent years, made a handful of restraining orders over real and personal property situated in other countries, several of them have, in more recent times, demonstrated a reluctance to make declarations of forfeiture without notice, despite s.36 of the Act providing for that. Judges have also queried their jurisdiction to do so despite the s.3 definition of property including "property" situated within or outside Victoria.[4]

When the right case comes along to fully test the issue[5], we anticipate our Supreme Court will confirm that the Act has general operation beyond the shores of Australia, including over real property. Alternatively, it would be an easy redrafting exercise for Parliament to make that intention crystal clear by adding to that s.3 definition "including outside Australia".

Conviction based forfeitures

So far we have mentioned ordinary forfeiture, being the first of three kinds of what might be described as conviction based forfeiture and which requires a formal application and

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[4] Local court orders directed at foreign property are problematic in Anglo - Australian law on account of what is known as the "Mozambique Rule", based on a decision of the House of Lords called *British South Africa Co v Companhia De Mozambique* [1893] AC 602 to the effect that superior courts will normally decline to exercise jurisdiction with extra-territorial effect over property, especially real property, situated in another country due to potential conflict with local property laws. Nevertheless, this is a common law rule which cannot override contrary legislative intention (with Parliaments having the power to legislate extraterritorially, including overseas, subject to any constitutional limitations).

[5] The DPP had one lined up for hearing in the Supreme Court this month called *DPP v Yen Bui and others* which had to be abandoned due to difficulties across the Tasman where the properties were located. In summary, there is somewhat of a disconformity between most Australian legislation, providing for automatic forfeiture, and New Zealand's, which does not, in that New Zealand will only aid confiscation of real property situated there upon proof that the property is in fact tainted (whereas here, automatic forfeiture can occur without evidence, let alone proof, of tainting as defined in the Act).

court order to make good the forfeiture of tainted property[6] (ss.32-34). The second is "automatic forfeiture", which applies to the more serious (otherwise known as Schedule 2) offences and where forfeiture of all property restrained for automatic forfeiture (s.35)[7] occurs after 60 days from conviction (absent a successful exclusion application, the filing of which application, if done in time, will stop that 60 day clock running[8]).

The third form of what might loosely be regarded as confiscation is the power of courts under Part 8 of the Act to make a pecuniary penalty order, or "PPO" as they are commonly called, against a convicted defendant. The amount of a PPO normally represents the financial proceeds of the crime in respect of which an offender has been convicted. In this context, restrained property can be ordered to be forfeited to satisfy a PPO (s.70), whilst forfeited property must be taken into account in the calculation of a PPO (ss.67(1) and 68(3)).

Summarising then the main steps provided for in the Act in relation to ordinary and automatic forfeiture, the first is the making of the restraining order over property a defendant has an interest in or which is tainted (s.16) for purposes that may include one or more kinds of forfeiture (s.15). The next involves the right of a defendant or third party with an interest in the property to seek, before conviction, exclusion of the property, or that interest, from restraint (ss.20-23). Next is either the hearing of a forfeiture application in the case of Schedule 1 offences (ss.32-34) or the occurrence of automatic forfeiture in the case of Schedule 2 offences (ss.35-36). Following forfeiture, exclusion applications by persons other than a convicted defendant are possible (ss.49-52).

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6 A wide definition of "tainted property" is contained in s.3 of the Act (largely in terms of property used in connection with, or derived from, crime).

7 Being property which a defendant has an interest in and/or is tainted (s16(2)(b)-(d) and 16(4)).

8 In two recent County Court decisions, *DPP v Lemmousu* and *DPP v Taha*, currently both on appeal, it was held that an out-of-time (per s.20(1A)) application made within 60 days of conviction does not stop the clock.

Civil forfeiture

Moving on from conviction based forfeiture, we now turn to the more recently enacted species of forfeiture, added to the Act in 2004 and applicable to suspected Schedule 2 offences, called "civil forfeiture". This is a suspicion based mode of forfeiture. It enables the DPP to apply for a restraining order despite the fact that no charges have been laid. The DPP must demonstrate that a police officer has reasonable grounds to suspect that certain property is tainted property in relation to a Schedule 2 offence and that there are reasonable grounds for that suspicion.

In order to exclude such restrained property, the property owner must prove, on the civil standard of proof, that the restrained property is not tainted property or that they were not involved in or on notice of the alleged offending.[9]

We understand from OPP confiscation branch personnel that, to date, only a small number of civil forfeiture applications have been brought before Victorian courts because most suspected criminals with an interest in property end up getting charged with the relevant Schedule 2 offence.

Our Court of Appeal's decision in *DPP v Ali* [2009] 23 VR 203 is significant in this area of proceeds of crime law as it held that the DPP can have another bite at the cherry in the sense that, should a conviction based restraining order be brought to an end by reason of an acquittal of the charge on which it was based (s.27) - which is what happened in the case of Mr Ali - it is nevertheless open to the DPP to apply for a fresh one for the purpose of a civil forfeiture application (per Part 4). Incidentally, Mr Ali was lucky to be acquitted as he was covertly filmed eagerly assisting a group of methylamphetamine manufacturers operating out of his farm shed, however not so lucky when his farm property was subsequently confiscated under a civil forfeiture order.

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[9] See ss.16(2)(a), 16(2A) and 16(5) addressing the restraining order phase, ss.20 and 24 restraint exclusion applications, ss.37-41 civil forfeiture orders and ss.53-54 forfeiture exclusion applications.

Unexplained Wealth Legislation in Australia

There has been a move throughout Australia to further improve the weaponry of the law enforcement authorities in the area of forfeiture. As we have seen, in Victoria forfeiture is presently limited to conviction based discretionary forfeiture, conviction based automatic forfeiture and civil forfeiture. Further, property may be lost through pecuniary penalty orders, both under the conviction based regime and the civil regime. However, Victoria has not, to date, implemented a further basis for forfeiture, namely unexplained wealth forfeiture.

In short, the Commonwealth and some states and territories have introduced legislation which enables courts to make forfeiture orders in respect of a person's wealth that is unexplained (i.e. it exceeds the source of legitimately acquired wealth).

Although the mechanics of the various unexplained wealth regimes operating throughout Australia differ, the basic thrust of them is as follows. The law enforcement agency (commonly the DPP) applies to the court for an unexplained wealth declaration against a person.

The court must declare that the person has unexplained wealth if it is more likely than not that the total value of the person's wealth is greater than the value of the person's lawfully acquired wealth. The unexplained wealth is assessed as the difference between the total value of the person's wealth and the value of the person's lawfully acquired wealth. The burden is upon the relevant person to establish that the wealth was lawfully acquired.

In essence, a person has unexplained wealth if the value of the person's wealth (being the amount equal to the sum of the values of all of the items of property, and all of the services, advantages and benefits, that together constitute the person's wealth) is greater than the value of the person's lawfully acquired wealth (being the sum of the values of each item of property, and each service, advantage and benefit, that both is a constituent of the person's wealth and was lawfully acquired).

In making an assessment of an unexplained wealth order, the court must not take into account any property confiscated or in respect of which a criminal benefit's declaration has been made.

The respondent is liable to pay to the state or territory an amount equal to the amount specified in the unexplained wealth declaration.

Unexplained wealth forfeiture has been enacted by the Commonwealth (*Proceeds of Crime Act* 2002), Western Australia (*Criminal Property Confiscation Act* 2000), Northern Territory (*Criminal Property Forfeiture Act* 2002), New South Wales (*Criminal Assets Recovery Act* 1990) and South Australia (*Serious and Organised Crime (Unexplained Wealth) Act* 2009). A more detailed explanation of these various unexplained wealth regimes is contained in the Annexure.

Victoria and Unexplained Wealth

The above overview of unexplained wealth legislation shows that Victoria, Queensland and Tasmania form a minority of states without legislation specifically targeting unexplained wealth. However, we consider that a respectable argument can be made that there are aspects of the Act which go some way towards serving the purpose of confiscation of unexplained wealth.

Our first example in this regard relates to the power of the courts to make a Schedule 2 charge or conviction based restraining order over the whole of a person's property, with the potential to lead to forfeiture regardless of whether any of it is in fact tainted by or derived from crime, unless that person discharges an onus to prove that some or all of those assets are not so tainted or derived.

The burden of having to explain and prove how one came into ownership of, or to have an interest in, property lest it be forfeited upon conviction, strikes us as a form of legislation targeting unexplained wealth.

An even better example, triggered by conviction of a Schedule 2 offence, arises in the context of powers given to the courts to make what the DPP's personnel call "Super-

PPO's" (s.68). Like our first example, where all property can be restrained for the purpose of forfeiture, s.68(3)(a) requires courts to treat as benefits from crime all property in which the defendant had an interest at the time application[10] is first made under the Act in respect of the relevant Schedule 2 offence. The equivalent of an exclusion application for a Super-PPO is found within s.68(4) and requires proof not only that all property of a defendant is neither derived nor tainted, but that it was "lawfully acquired" by the defendant (s.68(4)(a)(i)(A)).

The term "lawfully acquired", is undefined in the Act. Logically, you would think it would be satisfied if the property is proven not to be "derived" or "tainted" property (as defined in s.3 of the Act). That is not, however, a certainty bearing in mind the presumption that statutory language is not to be regarded as superfluous. What more the term adds in a practical sense is not clear and will need to await judicial exegesis in this State.

[10] Which term we take to include (although it is not entirely clear) an application for a restraining order should that precede the DPP's application for a PPO.

Annexure

Proceeds of Crime Act 2002 (Cth)

Under the Commonwealth legislation, there is a specific power to make orders to restrain unexplained wealth. A restraining order can be sought where there are reasonable grounds to suspect that a person's total wealth exceeds the value of the person's wealth that was lawfully acquired and there are reasonable grounds to suspect either or both of the following:

- that the person has committed an offence against the law of the Commonwealth, a foreign indictable offence or a state offence that has a federal aspect;

- that the whole or any part of the person's wealth was derived from an offence against the law of the Commonwealth, a foreign indictable offence or a state offence that has a federal aspect (s.20A(1)).

Obtaining an unexplained wealth order occurs in two stages. First, the DPP must apply for a preliminary unexplained wealth order (s.179B), which requires a person to appear before the court for the purpose of enabling the court to decide whether or not to make an unexplained wealth order. A preliminary unexplained wealth order will only be made where the court is satisfied that an authorised officer has reasonable grounds to suspect that the person's total wealth exceeds the value of the person's wealth that was lawfully acquired.

As for the unexplained wealth order, a court can make such order if it is not satisfied that the whole or any part of the person's wealth was not derived from an offence against the law of the Commonwealth, a foreign indictable offence and/or a state offence that has a federal aspect (s.179E).

An unexplained wealth order specifies the amount that, in the opinion of the court, is the difference between the person's total wealth and the sum of the values of property that the court is satisfied was not derived from an offence against the law of the

Commonwealth, a foreign indictable offence and/or a state offence that has a federal aspect. The burden of proof rests with the person seeking to explain their wealth (s.179E).

In determining the unexplained wealth amount, the court must deduct an amount equal to the value of forfeited property and any pecuniary penalty or literary proceeds orders (s.179J).

The court must direct the Commonwealth, once the unexplained wealth order is satisfied, to pay a specified amount to a dependant of the person who paid the unexplained wealth order if it is satisfied that:

- the unexplained wealth order would cause hardship to the defendant;

- the specified amount would relieve that hardship; and

- (if aged at least 18 years), the dependant had no knowledge of the person's conduct that is the subject of the unexplained wealth order (s.179L).

Criminal Property Confiscation Act 2000 (WA)[11]

The DPP may apply to the court for an unexplained wealth declaration against a person (s.11). The court must declare that the person has unexplained wealth if it is more likely than not that the total value of the person's wealth is greater than the value of the person's lawfully acquired wealth. The unexplained wealth is assessed as the difference between the total value of the person's wealth and the value of the person's lawfully acquired wealth. The burden is upon the relevant person to establish that the wealth was lawfully acquired (s.12).

[11] Relevant Cases: *DPP v Morris (No. 2)* [2010] WADC 148; *DPP v Bridge & Ors* [2005] WASC 36; *DPP for WA* [2002] WASC 91.

A person has unexplained wealth if the value of the person's wealth (being the amount equal to the sum of the values of all of the items of property, and all of the services, advantages and benefits, that together constitute the person's wealth) is greater than the value of the person's lawfully acquired wealth (being the sum of the values of each item of property, and each service, advantage and benefit, that both is a constituent of the person's wealth and was lawfully acquired) (s.144).

The court must not take into account any property confiscated or in respect of which a criminal benefit's declaration has been made (s.13).

The respondent is liable to pay to the state an amount equal to the amount specified in the unexplained wealth declaration (s.14).

Criminal Property Forfeiture Act 2002 (NT)

The DPP may apply to the Supreme Court for an unexplained wealth declaration against a person (s.67(1)). The application may be made at any time, including in conjunction with an application for a restraining order (s.67(2)).

A person has unexplained wealth if the value of the person's total wealth (being the value of all items of property, and all other services, advantages and benefits, that together constitute the person's wealth) is greater than the value of a person's lawfully acquired wealth (being the total value of all items of property, and all the services, advantages and benefits, that constitute the person's wealth and were lawfully acquired) (s.68).

The respondent's unexplained wealth is the difference between the respondent's wealth and the respondent's lawfully acquired wealth (s.69(1)) but does not include any property that has been forfeited under this or any other act or any property, service or advantage or benefit that was taken into account for the purposes of making an earlier unexplained wealth declaration against the respondent or any property, service,

advantage or benefit in relation to which a criminal benefit's declaration has been made (s.69(2)(c)).

A person's wealth comprises all property that the person owns, all property that the person effectively controls, all property that the person has given away at any time, all property acquired by the person at any time, all services, advantages and benefits that the person has acquired at any time, all property, services, advantages and benefits acquired, at the request or direction of the person, by another person at any time and anything of monetary value acquired by the person or any other person, in Australia or elsewhere, from the commercial exploitation of any product or any broadcast, telecast or other publication, where the commercial value of such thing is derived from the person's involvement in the commission of a forfeiture offence (in each case regardless of whether the relevant property was acquired before or after the commencement of the Act) (s.70).

The court hearing an application for an unexplained wealth declaration must declare that the respondent has unexplained wealth if it is more likely than not that the respondent's total wealth is greater than his lawfully acquired wealth (s.71(1)). The burden of proof rests on the relevant respondent (s.71(2)).

An amount specified in an unexplained wealth declaration must be paid to the Territory (s.72).

Criminal Assets Recovery Act 1990 (NSW)

The Crime Commission can apply to the Supreme Court for an unexplained wealth order (ss.26A and 28A), which may make an unexplained wealth order if satisfied there is a reasonable suspicion that the person against whom the order is sought has, at any time before the making of the application for the order either:

- engaged in serious crime relativity; or

- acquired serious crime derived property from any serious crime related activity of another person.

Serious crime related activity means anything done by the relevant person that was a serious criminal offence, whether or not the person has been charged or, if charged, tried, tried and acquitted or tried and convicted (s.6(1)). Various offences are specifically defined to constitute serious criminal offences (s.6(2)).

The unexplained wealth of a person is the whole or any part of the current or previous wealth of the person that the Supreme Court is not satisfied on the balance of probabilities is not or was not illegally acquired property or the proceeds of an illegal activity (s.28B(2)). The burden of proof rests with the respondent (s.28B(3)).

The current or previous wealth of a person is the amount that is the sum of the values of all interests in property of the person, all interests in property that are subject to the effective control of the person, all interests in property that the person has, at any time, expended, consumed or otherwise disposed of (by gift, sale or any other means) and any service, advantage or benefit provided at any time for the person or, at the person's request or direction, to another person (s.28B(4)). The Commission must put on evidence as to the extent of the unexplained wealth, failing which the Supreme Court is not required to consider it (s.28B(5)).

In assessing the amount payable under an unexplained wealth order, the value of property forfeited or paid under proceeds assessment orders are to be deducted (s.28C(1)).

Serious and Organised Crime (Unexplained Wealth) Act 2009 (SA)

Upon the application by the Commissioner of Police, the Court can make a restraining order over property if it is satisfied that an order is reasonably necessary to ensure

payment of an amount that is, or may become, payable under an unexplained wealth order (s.20(2)).

If the DPP reasonably suspects that a person has wealth that has not been lawfully acquired, the DPP may authorise the Crown Solicitor to make an application to the District Court for an unexplained wealth order (s.9(1)). If, on such an application, the Court finds that any components of a person's wealth specified in the application has not been lawfully acquired, the Court may make an unexplained wealth order that the person pay the Crown a specified amount (s.9(2)).

If the Court finds that any component of a person's wealth has not been lawfully acquired, the Court should make an unexplained wealth order specifying an amount equal to the value of those components of the person's wealth that have not been lawfully acquired unless the Court determines that it would be manifestly unjust to make such an order (in which case the Court may reduce the amount payable or decline to make the order, as the Court thinks fit) (s.9(3)).

If, in determining an application for an unexplained wealth order, the Court is satisfied that it is not reasonably possible for the person to establish that a component of his or her wealth was lawfully acquired (due to the effluxion of time, the circumstances in which that component was acquired or any other reason) and the person has acted in good faith, the Court may determine that that component should be excluded from the application (s.9(11)).

The Court must not take into account property that has been forfeited or any pecuniary penalty orders, literary proceeds orders or other unexplained wealth orders that have been made (s.9(12)).