Proceeds of Crime Bill 1987

Date Introduced: 30 April 1987
House: House of Representatives
Presented by: Hon. Lionel Bowen, M.P., Attorney-General

Digest of Bill

Purpose
To introduce confiscation, forfeiture and pecuniary penalty orders to deprive people from the benefits gained through more serious crimes and to create new offences relating to money laundering and organised fraud.

Background
One of the major aims of this Bill is to reduce the profits earned through crime, particularly organised crime. Organised crime is involved in a number of highly profitable areas such as drug trafficking, vice, SP book-making and other illegal gambling. It is impossible to assess accurately the amount of money involved in organised crime and the profits earned by the major operators in this area. However, some idea of the sums involved can be gauged by looking at the value of drug seizures, particularly those involving imported drugs such as heroin and cocaine. In 1985-86 Federal agencies seized 62.3kg of heroin and 12.2kg of cocaine. According to reports, police stop approximately 5-10% of the drug supply in Australia and the street value of a kilogram of heroin is $700,000 and $300,000 for cocaine. If it is accepted that 10% of the supply is stopped, approximately 620kg of heroin and 120kg of cocaine entered Australia in 1985-86. The total value of such imports, at the values quoted above, will be approximately $470 million.

A number of Royal Commissions have touched upon this area in recent years. The Royal Commission of Inquiry into Drug Trafficking was conducted by Mr Justice Stewart and reported in 1983. The Commission examined the activities of the Clark syndicate in Australia and examined, amongst other things, the use of financial institutions to disguise the flow of funds associated with the syndicate's drug operations. The report illustrated the complexities in tracing funds and the use of companies and foreign financial institutions in disguising the flow of funds.

The Royal Commission on the Activities of the Federated Ship Painters and Dockers Union also examined areas of crime in Australia. Regarding the punishment of offenders, the Report stated 'the next requirement is to punish the wrongdoer. He should be deprived of the fruits of his criminal venture and then be punished for having participated in it. Too often the punishment aspect is given pre-eminence with little thought to the profits that have been made'. This comment was made in 1984.

Legislation relating to the confiscation of the proceeds of more serious crime has been discussed by the Standing Committee of Attorneys-General. The first State to enact such legislation was N.S.W. which passed the Crimes (Confiscation of Profits)
Act in 1985 (Act no. 181 of 1985). South Australia soon followed with the Crimes (Confiscation of Profits) Act 1986 (Act no. 17 of 1986) while the Victorian Act of the same name was also passed in 1986 (Act no. 101 of 1986). The three Acts contain similar provisions, though the South Australian Act does not follow the same form as the others.

Outline

The provisions of the Bill dealing with confiscation and pecuniary penalty orders and restraining orders will apply only to convictions after the commencement of the Bill. Such provisions will apply to people who have absconded as well as those convicted although, before a confiscation order is made in relation to a person who has absconded, the court will have to be satisfied, on the balance of probabilities, that a jury could find the person guilty of the offence. In addition, application may be made for a restraining order in relation to a person who has yet to be charged although the court must be satisfied that there are reasonable grounds for believing that the person could be convicted of the offence. The Bill will also introduce offences of money laundering and organised fraud.

Main Provisions

Clause 3 contains the principal objects of the Bill which include to deprive persons of any benefit gained through a breach of Commonwealth or Territory laws, to enable the tracing of such proceeds, to facilitate the enforcement of forfeiture orders and assist foreign countries to trace the proceeds of crime.

Clause 4 contains the interpretation provisions. The more important being:

- financial institution - a bank, building society, credit union or a corporation that falls within the definition of a financial institution for the purposes of paragraph 51(XX) of the Constitution;
- narcotic substance - a narcotic substance under the Customs Act 1901 or a substance declared to be a narcotic substance by regulation;
- proceeds of crime - the proceeds of an indictable offence or property derived, directly or indirectly, from acts or omissions that occur outside Australia and are related to a narcotic substance and if the act or omission had occurred in Australia it would be an indictable offence;
- tainted property - in relation to an offence, property used in the commission of the offence or the proceeds of the offence; and
- unlawful activity - an act or omission that is an offence against Commonwealth, Territory, State or foreign law.

Conviction of an offence is defined in clause 5 to be a conviction, being found guilty although the person is discharged without a conviction, a court taking an offence into account in passing sentence for another offence or where a person absconds in connection with an offence. Absconding is defined in clause 6 to occur if an information is laid against a person, an arrest warrant is issued in relation to that offence and the person dies without the warrant being executed or, at the end of six months after the warrant is issued, (a) the person cannot be found or extradition proceedings have not commenced or (b) extradition proceedings have commenced and subsequently are terminated without an order being made.

Serious offence is defined in clause 7 to be a serious narcotics offence (i.e. a narcotics offence involving an amount equal or greater than the trafficable quantity),
an organised fraud offence or a money laundering offence in relation to one of the above types of offence.

Dealing with property is defined to include using the property to pay a debt, removing the property from Australia or receiving or making a gift of the property (clause 9).

Parts II and III of the Bill will only apply to convictions after the commencement of the Bill (clause 13).

Part II of the Bill (clause 14 to 34) deals with confiscation.

The Director of Public Prosecutions (DPP) will be able to apply, in respect of a person convicted of an indictable offence, for an order that tainted property in respect of the offence be forfeited and/or that a pecuniary penalty be imposed in respect of the benefits derived from the offence. Requests cannot be made after the end of the application period (generally six months after conviction - clause 4) and once an application has been made another can only be made with the court's leave which is only to be granted in restricted circumstances (clause 14).

Notice of an application is to be given to people who the DPP has reason to believe have an interest in the property (clause 15).

A court will be able to amend an application with the consent of the DPP or on the DPP’s application. An amended application is not to include additional property unless the property could not be identified at the time of the original application or the necessary evidence was not available at that time (clause 16).

Clause 17 deals with confiscation where a person is taken to have absconded. Such orders are not to be made unless the court is satisfied, on the balance of probabilities, that the person has absconded and (a) has been committed for trial or (b) that a reasonable jury could find the person guilty.

Where the DPP has made an application, the court may order that property be forfeited to the Commonwealth. In considering whether to make such an order, the court may consider any hardship that may arise if the order is made and the ordinary use of such property (clause 19). The effect of such an order will be to vest the property in the Commonwealth and the Commonwealth will be entitled to register any registerable property such as land (clause 20). However, where a third party claims an interest in the property, that person may apply for an order declaring their interest in the property and directing the Commonwealth to transfer the interest or pay the value of the interest. Such orders are to be made where the court is satisfied that the person was not involved in the offence and acquired the interest in the property for sufficient consideration and without knowledge that it was tainted property (clause 21).

If the conviction is quashed the forfeiture order will be discharged (clause 22).

Proposed Division 3 deals with pecuniary penalty orders which will apply to property that comes into a person’s possession or control, and benefits received, whether before or after the commencement of this Bill (clause 24).

If an application is made for a pecuniary penalty order and the court is satisfied that the person benefited from the offence, the court may assess the value of the benefit and order that the amount be paid to the Commonwealth. The amount of penalty is to be reduced by the value of any forfeited property and may be reduced
by the value of any tax paid (clause 26). The amount of the order is to be based on the benefit derived from the offence, including any money that came into the possession or control of the defendant in the case, another person at the request or direction of the defendant, the market value of the narcotic substances where the offence involves the doing of an act involving a narcotic substance, and the difference in the value of the defendants property and income and expenditure before and after the offence. In relation to a serious offence, all property at the time of the application will be treated as arising from the crime. A benefit will not be taken into account if a penalty has been imposed in respect of the benefit. In addition, the hearsay evidence rule will be overruled in certain circumstances (clause 27).

Clause 28 will allow the court to treat property that is under the effective control of the defendant as the defendant's property even though a company or trust has been interposed between the defendant and the company or trust.

Where, in relation to a serious offence, a restraining order has been imposed on property, that property will vest in the Commonwealth if the order remains in force six months after conviction. The Commonwealth is not to deal with the property until the end of any appeal period (clause 30). Clause 31 will allow an innocent third party to recover property subject to a restraining order.

Part III of the Bill (clauses 35 to 65) deals with the control of property liable to be confiscated.

Clause 36 provides for the issue of search warrants in respect of tainted property where a police officer has reasonable grounds to believe the tainted property is on a person or premise. Where necessary on the grounds of urgency, warrants may be issued by telephone (clause 37). In addition, clause 38 provides for search and entry powers without a warrant where the police officer believes, on reasonable grounds, that a delay would result in the concealment, loss or destruction of the tainted property.

Division 2 of this Part deals with restraining orders. Clause 43 provides for the issue, on the application of the DPP, of a restraining order that may cover all or some of a person's property where that person has been convicted of an indictable offence, has been charged with such an offence or is about to be charged with such an offence. The order is to specify the property involved and may be subject to conditions, including provisions relating to meeting living and defence costs. The grounds for the issue of such orders are contained in clause 44. An order is not to be issued in regard to a person who has not been convicted unless the application is supported by an affidavit by a police officer stating that the officer believes that the defendant committed the offence and the court is satisfied, having regard to the affidavit (which is to set out the grounds for the belief), that there are reasonable grounds for that belief. Where the application is in relation to a proposed charge, the order is not to be issued unless the court is satisfied that the person will be charged within 48 hours. The court may refuse to grant an order if the Commonwealth refuses to give such undertakings as the court considers appropriate.

The DPP is to give notice of an application for a restraining order to the owner of the property and anyone else whom the DPP has reason to believe may have an interest in the property though this requirement may be waived in cases of urgency or if it would be contrary to the public interest to give notice (clause 45).
The court may make further orders in relation to restrained property, such as orders to vary the property affected (clause 48).

If a pecuniary penalty order is made against a person and the Official Trustee has control of property relating to the person that is subject to a restraining order, the court may order the Official Trustee to pay the penalty amount to the Commonwealth. To achieve this the Official Trustee is to sell or otherwise dispose of the goods and, after the penalty is paid and costs met, pay the balance to the former owner of the property (clause 49).

It will be an offence to knowingly contravene a restraining order by disposing of or otherwise dealing with property subject to an order. The maximum penalty will be, for people, a $10,000 fine and/or 5 years imprisonment, and a $50,000 fine for corporations. In addition, the court may, on the DPP's application, set aside the dealing (clause 52).

A person whose property is subject to a restraining order may apply to the court for the revocation of the order and the court may revoke the order if the person gives satisfactory security to cover any likely penalty or gives satisfactory undertakings regarding the property (clause 56).

Clause 57 deals with the cessation of restraining orders. Where the order is based on a proposal to charge someone, the order will lapse after 48 hours if the person has not been charged by that time. Generally the order will lapse at the end of the relevant period (i.e. generally six months after it is made), though it may also lapse if the charge is withdrawn, the person is acquitted, a confiscation order is made and satisfied, a confiscation order is refused, the property subject to the order is forfeited or an application to extend the order is refused.

Division 1 of Part IV deals with information gathering powers. Police may apply for a production order to gain property tracking documents (clause 66) and it will be an offence, subject to maximum penalties of five years imprisonment and/or a $10,000 fine for people and a $50,000 fine for corporations, to fail to comply with an order (clause 68).

Search powers are dealt with in Division 2. Police are only to enter and search if they have the occupier's consent or a warrant (clause 70). To gain a warrant, police are to apply to a Supreme Court Judge and the application is to contain the grounds for believing that the person has committed an indictable offence and that there is a property tracking document on the premises. A warrant is not to be issued unless the Judge is satisfied that a production order has been made in respect of the document and has not been complied with, the document cannot be sufficiently identified for the purposes of obtaining a production order, there are reasonable grounds for believing that a production order would not be complied with or the investigation would be seriously prejudiced if immediate access without notice were denied. In addition, warrants are not to be issued unless sufficient information on the reasons for the warrant are given and the Judge is satisfied that there are reasonable grounds for the issuing of the warrant (clause 71).

Division 3 deals with monitoring orders. The police may apply for such an order which will direct a financial institution to give information to a law enforcement agency on transactions by a particular person. Such orders are not to be made unless the Judge is satisfied that there are reasonable grounds for believing that the person has committed or is about to commit a serious offence or has benefited from
the commission of a serious, indictable offence. It will be an offence, with a maxi­
mum fine of $100 000, for a financial institution to knowingly refuse to comply with
an order or give false or misleading information (clause 73). It will be an offence to
disclose the existence of such an order with maximum penalties of 10 years imprison­
ment and/or a $20 000 fine for people and a $100 000 fine for corporations (clause 74).

Where a financial institution has reasonable grounds for believing that informa­
tion may be relevant to an investigation or would assist in the enforcement of this
Bill, the institution may give the information to the National Crime Authority and no
action will lie because of such a disclosure (clause 79).

Part V deals with offences. Division 1 deals with money laundering, i.e. where a
person directly or indirectly engages in a transaction that involves the proceeds of
crime or possesses, receives, disposes of or brings into Australia the proceeds of
crime and the person knows or ought reasonably to know that the property was der­
ived from unlawful activity. The maximum penalties will be 20 years imprisonment
and/or a $200 000 fine for people and a $600 000 fine for corporations (clause 81).
The possession, disposal or bringing into Australia of property that the person had
reasonable grounds for believing was derived from an unlawful activity will be punish­
able by two years imprisonment and/or a $5000 fine for people and a $15 000 fine
for corporations (clause 82).

Division 2 deals with organised fraud. This will be taken to have occur when a
person engages in acts or omissions that constitute three or more public fraud
offences and the person derives substantial benefit. The maximum penalties will be
25 years imprisonment and/or a $250 000 fine for people and a $750 000 fine for
corporations (clause 83).

Part VI deals with the enforcement of interstate orders in the Territories. If such
an order is registered it will have force as if it were made by the Territory Supreme
Court (clause 87). Registered restraining orders will place a charge on the property
concerned (clause 90). Similarly, interstate forfeiture orders may be registered (clause
92) with the same effect (clause 93).

Part VII deals with miscellaneous matters. Clause 98 will confer jurisdiction on the
relevant State and Territory courts; clause 99 will provide that the standard of proof
is to be the balance of probabilities; clause 100 allows for appeals against forfeiture
and pecuniary penalty orders while clause 104 will allow regulations to be made to
carry out the Bill.

References

1. *The Sydney Morning Herald*, 1 April 1987, 'Drug squads have two
   fingers in dyke but the flood is building up'.
2. Royal Commission on the Activities of the Federated Ship Painters and

For further information, if required, contact the Law and Government Group.

Bills Digest Service
Legislative Research Service

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This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

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