

Asset Recovery

Contributing editors

Jonathan Tickner, Sarah Gabriel and Hannah Laming



2018

GETTING THE
DEAL THROUGH 

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Asset Recovery 2018

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Australia

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Civil asset recovery

1 Legislation

What are the key pieces of legislation in your jurisdiction to consider in a private investigation?

Australia has a federal system of government. Legislative power is divided between the Commonwealth, six states and two self-governing territories. Accordingly, the key pieces of legislation to consider in a private investigation vary, although similar legislation generally exists across the different states and territories.

For an investigation conducted in New South Wales (NSW), the key pieces of legislation include:

- Evidence Act 1995 (NSW), which sets out the rules of evidence that apply in NSW courts, including as to the admissibility of evidence and proof of matters in legal proceedings;
- Privacy Act 1988 (Cth) and Privacy and Personal Information Protection Act 1998 (NSW), which regulate the collection, use, disclosure and maintenance of a wide variety of personal information;
- Surveillance Devices Act 2007 (NSW) and Workplace Surveillance Act 2005 (NSW), which regulate the installation, use and maintenance of surveillance devices, including the surveillance of workplace email and computer usage;
- Telecommunications (Interception and Access) Act 1979 (Cth), which prohibits the unauthorised interception of telecommunications or access to stored communications;
- Fair Work Act 2009 (Cth), which requires procedural fairness in deciding whether to dismiss an employee;
- Freedom of Information Act 1982 (Cth) and Government Information (Public Access) Act 2009 (NSW), which govern access to information held by the Commonwealth and NSW governments respectively;
- Commercial Agents and Private Inquiry Agents Act 2004 (NSW), which provides for the licensing of persons for commercial and private inquiry activities, and regulates their conduct; and
- Crimes Act 1900 (NSW), in particular section 316, which makes it an offence for a person who knows or believes that another person has committed a serious indictable offence to fail, without reasonable excuse, to bring relevant information about the matter to the attention of the police. This is particularly relevant for companies investigating employee misconduct.

2 Parallel proceedings

Is there any restriction on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter?

There is no automatic restriction. The question is considered under the court's general discretion.

A stay of the civil proceedings may be granted if the court considers that there is a real danger of injustice in the criminal proceedings if the civil proceedings continue. The overriding principle is one of balancing the interests of justice between the parties.

Although each case will be considered on its merits, the courts have become increasingly mindful of giving sufficient weight to the practical legal prejudice to an accused, in light of the privilege against self-incrimination, the cost of multiple legal proceedings and the

accused's right in the accusatorial process of criminal proceedings not to disclose any aspect of his or her defence.

In an appropriate case, the court may make orders enabling the civil proceedings to progress to a certain point (eg, made ready for hearing), and then be stayed until the criminal proceedings have concluded.

3 Forum

In which court should proceedings be brought?

Each state or territory has a court system and there is also a federal court system. There is a hierarchy of courts within each system, with the Supreme Court being the highest court in each state or territory. The High Court of Australia is the final court of appeal in Australia.

The court in which civil proceedings for the recovery of assets should be brought will depend on a variety of factors, including the amount claimed, the nature of the causes of action and relief sought, connecting factors to the forum and the location of the defendant's known assets. Most claims in fraud matters of any significant size or complexity are brought in the relevant state or territory Supreme Court, all of which hear monetary claims above certain thresholds, as well as claims for equitable relief.

4 Limitation

What are the time limits for starting civil court proceedings?

Limitation periods are generally governed by state and territory legislation.

In most jurisdictions, causes of action for breach of contract or in tort have a six-year limitation period from the date the cause of action accrued.

As far as equitable claims are concerned, in most jurisdictions, the legislation only applies to a limited extent. However, where the legislation has no direct application to a cause of action founded in equity, the courts may nevertheless apply the statutory limitations periods by analogy.

In most jurisdictions, fraud postpones the running of the limitation period until after the claimant has discovered, or could with reasonable diligence have discovered, the fraud.

In limited circumstances, the courts also have the discretion to extend the time to commence proceedings.

5 Jurisdiction

In what circumstances does the civil court have jurisdiction? How can a defendant challenge jurisdiction?

The jurisdiction of Australian courts can be defined by reference to the common law and (partly) statute. The foundation of jurisdiction for actions in personam is service of originating process.

Service can be effected on any person who is physically present, no matter how briefly, within the geographic jurisdiction of the issuing court. Service outside Australia must be authorised under the rules of the issuing court. Those rules take into account the effect of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 (Service Convention) to which Australia is a signatory.

A foreign defendant may apply to set aside service or stay the proceedings on various grounds, including that service was not authorised

by the relevant court rules, that the forum chosen by the plaintiff was an inappropriate forum (*forum non conveniens*) or because the dispute falls within the scope of a foreign exclusive jurisdiction clause to which the plaintiff had agreed.

A defendant who has been sued in an inappropriate Australian superior court can apply for the proceedings to be transferred to another superior court under the Jurisdiction of Courts (Cross-Vesting) Act.

6 Admissibility of evidence

What rules apply to the admissibility of evidence in civil proceedings?

The applicable rules of evidence in federal, state and territory courts are established by legislation enacted in the relevant jurisdiction. In particular, each jurisdiction has its own Evidence Act. These acts are based largely upon the common law, but expand upon it in various ways.

Evidence is admissible where it is relevant to a fact in issue and is not otherwise excluded. Areas of potential exclusion include hearsay evidence, opinion evidence, tendency evidence, credibility evidence and privilege. Courts also have a general discretion to exclude or limit evidence.

Generally speaking, evidence is admitted primarily through documents and written statements, in the form of affidavits, witness statements or statutory declarations. The latter are usually 'read' onto the record in court and serve as evidence-in-chief for that witness. The witness is then usually cross-examined and re-examined. In some matters, however, witnesses may be required to give the entirety of the evidence orally.

7 Publicly available information

What sources of information about assets are publicly available?

Publicly available sources of information about assets include:

- the Australian Securities and Investment Commission, which maintains company and business name registers, containing information relating to companies such as registration status, officeholders and, in some cases, shareholders and financial statements;
- the Personal Property Securities Register, which is a national online register where details of security interests in personal property can be registered and searched, at least by a creditor; and
- state or territory based land and property information bodies, which maintain records of interests in real property.

8 Cooperation with law enforcement agencies

Can information and evidence be obtained from law enforcement and regulatory agencies for use in civil proceedings?

Information and evidence may be obtained through various means. For example, by:

- making a request to the relevant agency for consideration in accordance with the agency's guidelines or statutory obligations;
- making an application for access to documents held by government agencies under freedom of information legislation, subject to various exemptions; and
- (most commonly) a party to civil proceedings causing the civil court to issue a subpoena requiring the production of specific documents. Production will be subject to any claims for public interest immunity or legal professional privilege.

If material is obtained from foreign jurisdictions via mutual assistance channels for the purposes of a criminal investigation or proceeding, it is inadmissible in any civil proceeding unless the Commonwealth Attorney General approves of its use for the purposes of that other proceeding: section 43B of the Mutual Assistance in Criminal Matters Act 1987 (Cth) (MAA).

9 Third-party disclosure

How can information be obtained from third parties not suspected of wrongdoing?

In Australia, a claimant can apply for a *Norwich* order (named after *Norwich Pharmaceutical Co v Commissioners of Customs and Excise* [1974] AC 133) requiring a third party who has become relevantly involved in a transaction to disclose information that may be relevant to a potential claim, including the identity of the wrongdoer. It can be used for the purpose of tracing the disposition of monies obtained fraudulently (eg, by requiring a bank to disclose information).

In addition, court rules in Australia contain procedures for the obtaining of preliminary discovery to identify a prospective defendant or to decide whether to institute proceedings.

A party to proceedings may also cause subpoenas to be issued to third parties requiring them to attend court to give evidence or produce documents to the court, or both. A subpoena must be issued for a legitimate forensic purpose and, where documents are sought, identify those documents with reasonable particularity.

A party can also apply for an order for non-party discovery requiring a third party to disclose the existence of relevant documents.

10 Interim relief

What interim relief is available pre-judgment to prevent the dissipation of assets by, and to obtain information from, those suspected of involvement in the fraud?

The key interim relief in Australia is a freezing order (*Mareva* injunction) and a search order (*Anton Piller* order). Both are exceptional remedies that are ordinarily sought on an *ex parte* basis.

To obtain a freezing order, the plaintiff must show that it has a good arguable case against the defendant and there exists a real danger that the defendant will deal with their assets in such a way as to wholly or partly deprive it of the benefit of a final judgment. It will apply to the defendant's assets, typically whether located in or outside Australia, up to a specified sum. The operation of the freezing order must not be frustrated by any third party who has notice of it (eg, banks). In appropriate cases, the court may make a freezing order against a third party.

A freezing order will ordinarily be accompanied by an order compelling the defendant to file an affidavit disclosing the nature and value of their assets. Other, less common, ancillary orders may include an order requiring the delivery up of designated assets not specifically in issue in the proceedings or an order restraining the defendant from leaving the jurisdiction.

A search order compels the defendant to permit persons specified in the order to enter premises and to search for, identify and remove specified items. The key matters of which the court must be satisfied are that the plaintiff has a strong *prima facie* case against the defendant and that there is a real possibility that the defendant might destroy, or otherwise cause to be unavailable, important evidentiary material that is in the defendant's possession.

A plaintiff can also seek other forms of interim relief. These include orders for the detention, custody or preservation of property the subject of the proceedings. The usual methods of preservation are an interlocutory injunction, or appointment of a receiver.

11 Right to silence

Do defendants in civil proceedings have a right to silence?

Generally speaking, defendants in civil proceedings in Australia are afforded the privilege against self-incrimination. Consequently, they are not bound to answer any question or produce any document, if the answer or the document would have a tendency to expose that person to the imposition of a civil penalty or conviction for a crime. The privilege is not available to corporations.

A defendant will still be required to file a defence, although it will be relieved from complying with the rules of pleading if, and to the extent which, those rules would override the privilege.

Evidence legislation limits the privilege in various ways. In particular, there are specific rules governing objections to compliance with ancillary orders made in conjunction with the obtaining of freezing or search orders (eg, an assets disclosure order).

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

In Australia, courts have wide discretion to impose sanctions for a failure to comply with the court's orders, including making adverse cost orders against the defaulting party or its solicitor, or both, striking out a pleading, rejecting evidence, staying or dismissing the proceedings and giving judgment.

Breach of a court order can also give rise to a charge of contempt. The penalties for contempt include the imposition of a fine, the sequestration of assets or, in serious cases, imprisonment. It is usually left to the offended party to enforce contempt.

13 Obtaining evidence from other jurisdictions

How can information be obtained through courts in other jurisdictions to assist in the civil proceedings?

Australian superior courts have the power to make an order for the issue of a letter of request to the judicial authorities of a foreign country requesting the taking of evidence from a person in that country.

These requests are usually made pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 (Hague Convention) or a bilateral agreement with another country. If the foreign state is not a party to any such treaty, the request may still be made, but the receiving country is under no obligation to comply with the request.

An order for the sending of a letter of request is a discretionary one, and the party seeking the order must persuade the court that the discretion should be exercised because it 'appears in the interests of justice to do so'. Legislation in most Australian jurisdictions requires the court to consider various matters in this regard.

A letter of request may also request the production of documents, at least where those documents are ancillary to the oral testimony of the witness. However, it remains unclear whether Australian courts have jurisdiction to issue a letter of request to a foreign country solely for the production of documents pursuant to the Hague Convention. In NSW, one judge has recommended that consideration be given to adopting a rule for the express conferral of the requisite power (see *Gloucester (Sub-Holdings 1) Pty Ltd v Chief Commissioner of Stamp Duties* [2013] NSWSC 1419).

Court rules in all jurisdictions now allow subpoenas to be served overseas in accordance with the Service Convention; however, where leave is required to issue a subpoena abroad, an Australian court would be unlikely to grant leave if it would result in a clear breach of international law or international comity.

14 Assisting courts in other jurisdictions

What assistance will the civil court give in connection with civil asset recovery proceedings in other jurisdictions?

Australian courts will assist parties in enforcing foreign judgments. Such judgments may be enforced by either registering the judgment under the Foreign Judgments Act 1991 (Cth) or at common law.

The High Court of Australia recently confirmed that Australian superior courts may make a freestanding freezing order in aid of foreign proceedings in certain circumstances, including where there is a danger of an actual or prospective foreign judgment remaining unsatisfied if assets are removed from Australia (see *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2015] HCA 36).

State and territory Supreme Courts also have the power, following a request sent from a foreign court, to make orders requiring a person to give evidence or produce specified documents (but not give discovery) in aid of the foreign proceedings. If the foreign court is from a country that is not a signatory to the Hague Convention or a bilateral agreement with Australia, the request is to be sent via the diplomatic channel and will be considered and executed on the basis of comity.

15 Causes of action

What are the main causes of action in civil asset recovery cases, and do they include proprietary claims?

In Australia, the main causes of action in civil asset recovery cases include:

- in equity, breach of fiduciary duty or breach of trust;
- in tort, claims for deceit, detinue, conversion, conspiracy or inducing breach of contract;
- a restitutionary claim for monies had and received; and
- certain statutory actions under the Corporations Act 2001 (Cth) and the Competition and Consumer Act 2010 (Cth) (CCA).

In equity, third parties may also be pursued for 'knowing receipt' of trust property or 'knowing assistance' in a breach of fiduciary duty. Certain equitable claims may be proprietary in nature, such as where a beneficiary claim against a defaulting trustee for the recovery of trust property (or its traceable proceeds). In addition, it is well accepted in Australia that where property is acquired from another by theft, proprietary relief by way of imposition of a constructive trust will be granted where appropriate.

16 Remedies

What remedies are available in a civil recovery action?

In Australia, the main remedies available in a civil recovery action include:

- damages;
- equitable compensation;
- equitable lien or charge;
- account of profits;
- constructive trust;
- order for restitution;
- order for delivery of goods; and
- relief under the Corporations Act 2001 (Cth) or the CCA (eg, for declarations, damages, compensation orders, etc), or both.

A successful claimant will also be entitled to claim interest (both pre- and post-judgment) and legal costs, although usually only a proportion of its total legal costs can be recovered.

17 Judgment without full trial

Can a victim obtain a judgment without the need for a full trial?

A victim can obtain a judgment without the need for a full trial, typically by obtaining either default or summary judgment.

A plaintiff may seek default judgment where the defendant fails to file a defence. Such a judgment will typically be given in the absence of the defendant. If the claim is for unliquidated damages, judgment may be given on liability only with damages to be assessed.

A plaintiff may obtain a summary judgment without proceeding to a contested final hearing if it can satisfy the court that there is no real defence to the claim, or only a defence as to the amount of the claim. The court will not determine the proceedings summarily if there is a real question in dispute.

Under various statutory regimes, a victim (including a corporation) may also be able to make a claim for a victim's compensation order against a convicted person for losses caused by the relevant criminal offence (see section 97 of the Victims Rights and Support Act 2013 (NSW)).

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

A freezing order may be available against a judgment debtor if the court is satisfied that there is a danger that a judgment will be wholly or partly unsatisfied because the judgment debtor absconds, or the assets of the judgment debtor are dissipated or removed from the jurisdiction, before the plaintiff can apply for one of the traditional forms of execution.

The court may also make ancillary orders, such as an assets disclosure order, an order appointing a receiver to the defendant's assets or an order restraining a judgment debtor from departing the jurisdiction.

A judgment creditor may also obtain an order for examination of the judgment debtor requiring them to answer specific questions or produce documents to aid enforcement.

19 Enforcement

What methods of enforcement are available?

The principal means of enforcement are:

- writ of execution, granting the sheriff's office authority to seize and sell a judgment debtor's real or personal property, or both, and pay the net proceeds to the judgment creditor;
- garnishee order, which directs third parties owing money to the judgment debtor (eg, wages) to pay the judgment creditor directly;
- charging order, which operates to charge certain property in favour of the judgment creditor; and
- insolvency orders, (eg, winding up a company or making an individual bankrupt to effect a distribution of the judgment debtor's assets among creditors).

20 Funding and costs

What funding arrangements are available to parties contemplating or involved in litigation and do the courts have any powers to manage the overall cost of that litigation?

In Australia, various funding arrangements are available to parties contemplating or involved in litigation.

Generally speaking, lawyers can offer 'conditional' billing where the lawyer's ability to recover their fees depends on whether the legal action is successful. Typically, no fee is charged if the legal action is unsuccessful and an 'uplift' percentage is added to the lawyer's fees if the action is successful.

All jurisdictions currently prohibit damages-based fee arrangements where the lawyer's fee is calculated by reference to a percentage of any amount recovered by the client. The Productivity Commission in its 2014 report 'Access to Justice Arrangements' recommended that this prohibition be removed for most civil matters, subject to comprehensive disclosure requirements and percentage limits on a sliding scale. However, this recommendation has proved to be contentious and it is uncertain whether reform will occur. In July 2017, the Victorian Law Reform Commission (VRLC) released a consultation paper entitled 'Access to Justice – Litigation Funding and Group Proceedings'. After receiving submissions, the VRLC will report on various issues, including whether the removal of the prohibition on damages-based fee arrangements would assist mitigating issues presented by litigation funding.

Third-party litigation funding, whereby a party with no pre-existing interest in the proceedings funds the litigation in exchange for a share of the amount recovered, is permitted in Australia. The market for such funding is well established and active, but concerns exist about the lack of regulation in that market.

After-the-event insurance is available but rarely obtained in Australia.

Australian courts seek to manage the costs of litigation in various ways, including by the exercise of broad case management powers. Generally speaking, these powers must be exercised to facilitate the just, quick and cheap resolution of the real issues in the proceedings. In addition, courts have a wide discretion in relation to costs and can make interim costs orders against a party, including against parties in default.

Criminal asset recovery

21 Interim measures

Describe the legal framework in relation to interim measures in your jurisdiction.

This section focuses on the operation of the Proceeds of Crime Act 2002 (Cth) (POCA), which is the principal federal legislation for confiscation. Each state and territory jurisdiction also has its own legislation that governs confiscation of proceeds and instrumentalities of crime (collectively, the Confiscation Acts), including interim measures.

There are three main types of interim measures that can be obtained under POCA, all of which can be applied for on an ex parte basis from a court:

- restraining orders;
- freezing orders; and
- the seizure of property under a search warrant.

The most important type of interim measure is a restraining order under Part 2-1, because it is necessary in most cases to obtain such an

order over property before a forfeiture order can be obtained (see Parts 2-2 and 2-3). A restraining order prevents the disposal of or dealing with property, either absolutely or subject to conditions, pending the outcome of confiscation proceedings. It is usually made following an application to the court by the Australian Federal Police (AFP). The suspect need not have been convicted or even charged. The circumstances in which the order can be made include where there are reasonable grounds to suspect that the suspect committed a relevant offence, or that the property is the proceeds or an instrument of a relevant offence. The order can potentially cover all property of a suspect, including property owned by the suspect or subject to his or her effective control. The court may allow reasonable living and business expenses (excluding legal costs incurred in connection with POCA or criminal proceedings) to be met from the restrained property if certain conditions are met (section 24).

Second, a freezing order under Part 2-1A may be issued by a magistrate to a financial institution preventing the withdrawal of funds from a specified account. It may be issued where there are reasonable grounds to suspect that the account balance reflects proceeds or an instrument of certain offences, and there is a risk of dissipation. A freezing order is usually obtained as a precursor to a restraining order. Unless extended, it ceases to have force after three working days (section 15N).

Finally, suspected tainted property may be seized under a search warrant issued by a magistrate pursuant to Part 3-5. Such property must be returned after 14 days unless an application for a restraining order or forfeiture order is made with respect to it (section 26O).

22 Proceeds of serious crime

Is an investigation to identify, trace and freeze proceeds automatically initiated when certain serious crimes are detected? If not, what triggers an investigation?

Investigative bodies will consider, on a case-by-case basis, whether to take steps to identify, trace and freeze suspected proceeds of crime.

At the Commonwealth level, for example, the Criminal Assets Confiscation Taskforce (the Taskforce), which is led by the AFP and includes the Australian Tax Office (ATO) and Australian Criminal Intelligence Commission, works in partnership with other law enforcement and regulatory agencies in order to identify, investigate and litigate asset confiscation matters. The Taskforce describes its approach to investigation as 'proactive and intelligence-led'. It also takes referrals regarding potential confiscation matters from Commonwealth agencies, AFP criminal investigations and state, territory or foreign law enforcement agencies. The Taskforce will consider whether a particular matter is suitable for proceeds action or whether other remedies (eg, pursuit by ATO of taxation remedies) are more appropriate.

23 Confiscation – legal framework

Describe the legal framework in relation to confiscation of the proceeds of crime, including how the benefit figure is calculated.

POCA covers confiscation in relation to indictable offences against Commonwealth laws, foreign indictable offences and state and territory offences with a federal aspect. The Confiscation Acts govern confiscation in relation to offences against the respective state and territory laws.

POCA's regime contains a comprehensive range of confiscation orders. A number of jurisdictions (South Australia, Queensland, and to a lesser extent, Victoria and the Australian Capital Territory) are modelled on the Commonwealth confiscation regime. All proceedings under POCA are civil proceedings and the burden of proof is on the balance of probabilities (sections 315 and 317).

The fundamental premise of these laws is that where a person has profited from criminal activity, those profits should be returned to society. Further, lawfully acquired property used in the commission of an offence should also be forfeited.

All jurisdictions provide for both conviction and non-conviction based confiscation. In most jurisdictions, there are four types of confiscation orders that can be sought from a court by the relevant state agency:

- orders for the forfeiture of assets (see questions 24 and 33);

- pecuniary penalty orders (see question 29);
- literary proceeds orders (requiring that a person who has committed an offence disgorge literary proceeds derived in relation to that offence); and
- unexplained wealth orders (see question 24).

However, there are a number of significant differences between each jurisdiction regarding how confiscation orders are obtained and the operation of certain orders.

The manner in which the benefit figure is calculated will vary according to the nature of the order sought (see questions 24, 29 and 33).

24 Confiscation procedure

Describe how confiscation works in practice.

Overview

Confiscating the proceeds of crime is a complex process that usually involves the following steps:

- investigation by the relevant state agency, including to substantiate unlawful conduct and identify property;
- obtaining a court order restraining property;
- obtaining a subsequent court order confiscating property; and
- disposal of confiscated property.

Law enforcement agencies are given significant information-gathering powers to assist them with their investigations. Under POCA, these include:

- oral examinations;
- production orders;
- notices to financial institutions;
- monitoring orders; and
- search and seizure powers.

Forfeiture orders

Forfeiture orders may be either conviction or non-conviction based. Non-conviction based forfeiture orders are discussed in question 33.

There are two types of conviction-based forfeiture orders under POCA:

- forfeiture upon application by the Commissioner of the AFP or Commonwealth Director of Public Prosecutions (CDPP) (no restraining order required) (section 48). The application for forfeiture must be made within six months of the conviction of an indictable offence and the court must be satisfied that the property is either the proceeds or instrument of the offence; and
- automatic forfeiture, six months after conviction of a 'serious offence', of all property (unless otherwise excluded) that is subject to a restraining order relating to the offence (section 92). A 'serious offence' is defined under POCA to be an indictable offence punishable by imprisonment for three or more years of a certain nature, including money laundering offences.

Property may be excluded from forfeiture if, among other things, the court is satisfied that a person has an interest in the property which is neither the proceeds or an instrument of unlawful activity (section 94).

Once forfeited, the property vests in the Commonwealth.

Unexplained wealth orders

Almost every Australian jurisdiction now has unexplained wealth laws. The laws are controversial because they reverse the onus of proof and the longstanding legal tradition of the presumption of innocence. In essence, individuals who cannot lawfully account for the wealth they hold may be liable to pay that wealth to the state. However, there are differences between each jurisdiction, especially regarding whether some connection to criminal conduct is required.

Under POCA, where there are reasonable grounds to suspect that a person's wealth exceeds the value of his or her lawfully acquired wealth, the court may make an order requiring the person to attend court and prove, on the balance of probabilities, that their excess wealth was not derived from a relevant offence. If the court is not satisfied that part of the person's wealth was not derived from such offences, the court may make an unexplained wealth order requiring them to pay that part of their wealth to the Commonwealth (sections 179B and 179E).

25 Agencies

What agencies are responsible for tracing and confiscating the proceeds of crime in your jurisdiction?

Federally, since 2012, the AFP has had responsibility for most confiscation proceedings; both conviction and non-conviction-based. The CDPP only retains responsibility for conviction-based confiscation where no restraining order is necessary to preserve the property.

Generally speaking, in most states and territories, the police force is responsible for investigating assets, and the Director of Public Prosecutions is responsible for confiscation proceedings. However, the NSW Crime Commission and Queensland Crime and Corruption Commission are responsible for non-conviction-based confiscation in those states.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

Yes. Under POCA and in most other jurisdictions, the definition of proceeds of crime explicitly includes property that is wholly or partly derived or realised from a disposal or other dealing with the proceeds of crime.

27 Third-party ownership

Is it possible to confiscate property acquired by a third party or close relatives?

Yes. Under POCA, and in various other jurisdictions, confiscation of property that is the proceeds or instrumentality of crime and acquired by a third party is generally permitted unless it has been acquired:

- for sufficient consideration, which means for money, goods or services that reflect its commercial value; and
- without knowledge of any circumstances that would arouse reasonable suspicion that the property was the proceeds or instrumentality of crime.

Further, under POCA, and in various other jurisdictions, if an innocent third party has an interest in property that is the subject of a forfeiture order, the court may direct that interest be excluded from the operation of the relevant forfeiture order. Alternatively, a compensation order can be made in favour of that person following the disposal of the property.

28 Expenses

Can the costs of tracing and confiscating assets be recovered by a relevant state agency?

Confiscation proceedings under POCA, and most state and territory jurisdictions, are civil, not criminal, in nature. In most jurisdictions, therefore, subject to any specific legislative provisions, the ordinary rules regarding civil cost recovery apply to the costs of confiscation proceedings (ie, costs follow the event) (see Commissioner of the AFP *v Fysh* (No. 2) [2013] NSWSC 105 and *Bow Ye Investments Pty Ltd v DPP* (No. 2) [2009] VSCA 278).

29 Value-based confiscation

Is value-based confiscation allowed? If yes, how is the value assessment made?

In most jurisdictions, value-based confiscation is allowed. The mechanics for obtaining such an order differ significantly across the jurisdictions. The following focuses on POCA.

Under POCA, the Commissioner of the AFP or CDPP can apply to a court for a pecuniary penalty order. This is an order that requires a person to pay an amount of money to the Commonwealth. The basis for a pecuniary penalty order is that a person has been convicted of an indictable offence, or has committed a 'serious offence' (see question 24 for its definition).

The court must quantify a pecuniary penalty order in accordance with Division 2 of Part 2-4. Broadly speaking, this involves a determination of the value of the benefits derived from the commission of the offence. In assessing the value of those benefits, the court is to have regard to the evidence before concerning certain specified matters, but

Update and trends

The AFP and relevant state agencies continue to actively litigate proceeds of crime matters, although restraint activity during 2015/16 was down from the record of A\$246.6 million restrained in during 2014/15. In 2015/16, the Taskforce restrained A\$96.5 million in assets. The AFP's Annual Report of 2015/16 states that the complexity of pursued investigations, as well as the record amount restrained the previous year, meant that more resources were committed to matters currently before the courts. This had a direct impact on the Taskforce's capacity to pursue new restraint action.

The AFP continues to seek to disrupt the criminal economy by taking the profit out of crime. Key recent operations have focused on terrorism financing, drug importation, human trafficking and money laundering.

Under the 2017/18 Federal Budget, the AFP will receive an additional A\$321.4 million over the next four years to increase its investigative resources. These funds will support 'high priority AFP operations' in relation to counter-terrorism, drug importation, cyber-crime and serious financial crimes.

POCA has also recently been amended by the Law Enforcement Legislation Amendment (State Bodies and Other Measures) Act 2016 (Cth). The amendment was passed in response to the case of *Commissioner of the Australian Federal Police v Huang* [2016] WASC 5. In that case, the issue was whether certain property (a house subject to a mortgage) could be exempted from a forfeiture order on the basis that it had been 'lawfully acquired'. The Supreme Court of Western Australia held that where that property had been acquired by loaned funds secured by a mortgage, the Court could not take into account the source of the funds used to subsequently make the mortgage repayments, despite the possibility that unlawfully acquired funds had been used to make those repayments. This interpretation of 'lawfully acquired' exposed a potential loophole that could be exploited by asset protection structures, including using mortgages, loans and other such agreements, to disguise proceeds of crime. The amendment now clarifies that where illegitimate funds are used to discharge a legitimately obtained mortgage or other security, the property or wealth obtained using that security will not be considered to have been 'lawfully acquired'.

must not subtract expenses or outgoings incurred in relation to the illegal activity (section 126).

These (or analogous) provisions have been applied to achieve different results in different contexts. For example, in a number of cases concerning illicit drugs, the gross proceeds of the offence have been regarded as the value of the offender's benefit, with no account taken of the acquisition costs of the illegal drugs. Alternatively, in a recent insider trading case, it was held that determining the value of the benefit derived from the unlawful sale of shares purchased lawfully must involve bringing into account the cost price of the shares against the gross proceeds of their sale (see *Director of Public Prosecutions (Cth) v Gay* [2015] TASSC 15).

A pecuniary penalty order may be sought and made even if another confiscation order has been made in relation to the offence. However, the amount of the pecuniary penalty must be reduced by an amount equal to the value of any forfeited property (section 130).

The amount payable under a pecuniary penalty order is a civil debt due to the Commonwealth (section 140). However, it can be enforced by the creation of a charge over any restrained property (section 142).

30 Burden of proof

On whom is the burden of proof in a procedure to confiscate the proceeds of crime? Can the burden be reversed?

Generally speaking, under POCA and the Confiscation Acts, the state agency that is seeking a restraining or confiscation order from the court bears the onus of proof.

However, in those jurisdictions where an application can be made for an unexplained wealth order, the onus of proving that a person's wealth is not derived from an offence lies on that person (see question 24).

In addition, on an application to exclude property from a restraining or forfeiture order (or from automatic forfeiture) under POCA or relevant Confiscation Acts, the party seeking the exclusion order bears the burden of proving that it has an interest in the property that is neither the proceeds nor instrument of crime.

31 Using confiscated property to settle claims

May confiscated property be used in satisfaction of civil claims for damages or compensation from a claim arising from the conviction?

In most cases, confiscated property cannot be used to satisfy such claims (assuming the claimant does not have an interest in the property (see question 27). However, in a number of jurisdictions, the court may reduce the amount otherwise payable under a pecuniary penalty order by the amount payable by the person by way of restitution, compensation or damages in relation to an offence to which the order relates.

Further, in Victoria, a restraining order may be made to preserve property in order that it be available to satisfy an order for restitution or compensation under the Sentencing Act 1991 (Vic). Property that is forfeited must also be used to satisfy any such order.

32 Confiscation of profits

Is it possible to recover the financial advantage or profit obtained though the commission of criminal offences?

In short, yes. Profits obtained through commission of criminal offences can be confiscated in all Australian jurisdictions.

By way of example, in *Commissioner of the AFP v Fysh* [2013] NSWSC 81, a pecuniary penalty order was made under POCA requiring the defendant to pay to the Commonwealth the amount of the profit he made on the purchase and sale of shares for which he had been found guilty of insider trading offences under the Corporations Act 2001 (Cth). On those facts, the court held that the amount of the 'benefit' derived by the defendant was the net gain received (excluding brokerage fees) as a result of the transaction.

33 Non-conviction based forfeiture

Can the proceeds of crime be confiscated without a conviction? Describe how the system works and any legal challenges to in rem confiscation.

Non-conviction based forfeiture is allowed in all jurisdictions except Tasmania.

Under POCA, there are two types of non-conviction-based forfeiture order:

- person-directed forfeiture order: forfeiture of property where the court is satisfied that a person is engaged in conduct constituting one or more serious offences (section 47); or
- asset-directed forfeiture order: forfeiture of property where the court is satisfied that the property is the proceeds or instrument of certain offences, or no claim has been made in respect to the property (section 49).

In both cases, the property must first be subject to a restraining order for at least six months before the forfeiture order can be made.

Similar to conviction-based forfeiture, property may be excluded from forfeiture if, among other things, the court is satisfied that a person has an interest in the property that is neither the proceeds of unlawful activity nor the instrument of any serious offence (section 73).

34 Management of assets

After the seizure of the assets, how are they managed, and by whom? How does the managing authority deal with the hidden cost of management of the assets? Can the assets be utilised by the managing authority or a government agency as their own?

The regime for managing restrained and confiscated property is broadly consistent across all jurisdictions.

The Public Trustee (Trustee) (or an equivalent body) will take custody and control of the property, often once a restraining order has been made.

The Trustee is usually empowered to obtain information about the property, manage and otherwise deal with it. Once a forfeiture or other confiscation order has been made, the Trustee must dispose of the property (to the extent the property is not money). The Trustee is entitled to recover its costs incurred in connection with the exercise of its duties, including managing the property, as well as an amount of remuneration for the Trustee.

The balance of the proceeds must be credited to a dedicated fund. This fund is primarily used in each jurisdiction to support programmes for:

- crime prevention;
- intervention or diversionary measures;
- other law enforcement initiatives; and
- victims' compensation.

35 Making requests for foreign legal assistance

Describe your jurisdiction's legal framework and procedure to request international legal assistance concerning provisional measures in relation to the recovery of assets.

Mutual assistance to and from Australia is governed by the MAA.

Requests under the MAA are made by the Commonwealth Attorney General, usually on behalf of the AFP or CDPP, but also on behalf of state and territory investigative and prosecution agencies. Under the MAA, Australia can request assistance from foreign countries for, among other things, the issue of orders similar in nature to restraining orders, search warrants, monitoring orders and production orders under POCA, in aid of a criminal proceeding or criminal investigation commenced in Australia regarding a serious offence.

The process under the MAA is assisted by a number of bilateral mutual assistance treaties to which Australia is a party.

36 Complying with requests for foreign legal assistance

Describe your jurisdiction's legal framework and procedure to meet foreign requests for legal assistance concerning provisional measures in relation to the recovery of assets.

Australia can assist foreign countries to recover assets pursuant to the MAA or, in limited circumstances, via domestic proceeds of crime action. Requests under the MAA must be made to the Commonwealth Attorney General.

A range of provisional measures is available under the MAA to identify, locate and trace the proceeds of crime located in Australia. These include:

- production orders;
- monitoring orders;
- search warrants; and
- time-limited domestic restraining orders pending receipt of a foreign restraining order.

Australian authorities can also take action under the MAA to register a foreign restraining order, including a non-conviction based order, made in respect of a foreign serious offence. A foreign serious offence is an offence against the law of a foreign country, the maximum penalty for which is death, imprisonment for a period exceeding 12 months, or a fine exceeding A\$63,000.

In limited circumstances, Australia may also consider taking domestic action on behalf of a foreign country under POCA, including to obtain a freezing or restraining order. This action can take place without a foreign proceeds of crime order, and a mutual assistance request may not be required.

37 Treaties

To which international conventions with provisions on asset recovery is your state a signatory?

Australia is a signatory to a number of international conventions with provisions on asset recovery, including:

- United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988;
- United Nations Convention Against Transnational Organized Crime 2000;
- United Nations Convention Against Corruption 2003;
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997;
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990;
- International Convention for the Suppression of the Financing of Terrorism 1999; and
- Council of Europe Convention on Cybercrime 2001.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

No private prosecutor can bring a confiscation application to any Australian jurisdiction. Only the state agencies, as set out in POCA and the Confiscation Acts, can apply for confiscation orders under those respective Acts. Under POCA, for example, such applications must be brought by either the Commissioner of the AFP or the CDPP.

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