

Background paper (Thursday 6 September, 09:00-10:15)

Tracing, freezing, confiscating the proceeds of corruption in Australia

Sylvia Grono

Assistant Director, Criminal Assets,
Commonwealth Director of Public Prosecutions, Australia

There are several different options available to investigators for tracing and then to the Director of Public Prosecutions (DPP) for freezing and recovering the proceeds of corruption. Whether the corruption offence was committed within Australia or overseas, proceeds of the offence located in Australia can be restrained and then forfeited under the Proceeds of Crime Act 2002 (POCA). If the offence was committed within Australia the person can be ordered to pay the amount of the benefits by way of pecuniary penalty and this can be satisfied out of lawfully acquired assets owned by that person or under their effective control. Lawfully acquired property can be restrained to satisfy a pecuniary penalty order. It is not necessary for the person to have been charged with the offence or convicted of the offence provided that the offence was committed within the preceding six years. If the offence was not committed within the preceding six years restraining orders can be obtained but will lapse if charges are not laid within 28 days and final orders will only be able to be obtained if the person is convicted of the offence.

Property located outside Australia can be restrained and forfeited under POCA although a formal request may need to be made to the central authority of the country where the property is located to enforce the orders.

Proceeds of foreign corruption offences can be traced and restrained at the request of the foreign country and then a foreign forfeiture order or pecuniary penalty order can be enforced under the provisions in the Mutual Assistance in Criminal Matters Act 1987 (MACMA).

Tracing

Notices to Financial Institutions

The Australian Federal Police (AFP) can issue notices to financial institutions to determine whether a person holds an account with the institution, obtain information about account balances, transactions on accounts over a specified six month period, details of related accounts and transactions conducted by a specified person where the information is required to determine whether to take action under POCA¹.

¹ S213 POCA

Search Warrants

POCA

A Magistrate may issue a search warrant under s225 POCA to search premises for tainted property², or evidential material³ on application by an authorised officer⁴. Documents obtained by search warrant can be provided to officers of other enforcement agencies for investigating or prosecuting an offence or recovering proceeds of an offence or an instrument of an offence.

MACMA

Search warrants can also be obtained at the request of a foreign country under MACMA. If a criminal proceeding or criminal investigation has commenced in the foreign country in respect of a foreign serious offence the foreign country may request the Attorney-General to obtain the issue of a search warrant relating to the proceeds or an instrument of the offence or a property-tracking document in relation to the offence.

Production Orders

POCA

A magistrate may make an order pursuant to s202 POCA requiring a person to produce property-tracking documents⁵ to an authorised officer or to make one or more property-tracking documents available for inspection for use in POCA proceedings or investigations. Legal professional privilege and the privilege against self-incrimination cannot be claimed. There is no provision expressly permitting the dissemination of documents obtained by production order to the investigators of a criminal offence or other law enforcement agencies. An order can be made prohibiting the disclosure of the existence of the order.

MACMA

A foreign country can make a formal request to Australia for a production order to be issued for a property tracking document pursuant to s34N MACMA. If a document is obtained pursuant to a request under the MACMA the Attorney-General may direct that the document be sent to an authority of the foreign country.

Monitoring Orders

POCA

A judge may issue a monitoring order pursuant to s219 POCA requiring a financial institution to provide information about future transactions conducted during a particular period through an account. This is a way of obtaining information about transactions within a short time after

² proceeds of an indictable offence or property used or intended to be used in the commission of an indictable offence

³ Evidence relating to property that can be restrained or forfeited, benefits derived from the commission of an indictable offence or literary proceeds

⁴ members of the AFP, Australian Crime Commission, an officer of Customs, member of the Australian Securities and Investments Commission, member of ACLEI (Australian Commission of Law Enforcement Integrity) and officers of the Australian Taxation Officer can be authorised

⁵ Document relevant to identifying, locating or quantifying property of a person charged with an indictable offence or suspected of committing a serious offence with the last 6 years or suspected of committing a terrorism offence, or a document relevant to the transfer of property of that person, or relevant to identifying, locating or quantifying proceeds or an instrument of an indictable offence a person is charged with or proceeds or an instrument of a serious offence committed within the last 6 years

the transaction occurs. This is limited to situations where a person has committed or is suspected to be about to commit a serious offence or to have benefited or be about to benefit from a serious offence. It is an offence to disclose the existence of a monitoring order.

MACMA

A foreign country can request that a monitoring order be obtained in relation to a foreign serious offence pursuant to s34X MACMA. The offence must be punishable by 3 or more years of imprisonment and involve a money laundering offence, a narcotics substance, a fraud of \$10,000 or more, smuggling of migrants or a failure to report financial transactions.

Examinations

If a restraining order is in force under POCA the court may also make an order that a person be examined about the affairs of the person suspected of committing the offence, or the person whose property is restrained or who claims an interest in the property and the affairs of that person's spouse. An examinee can't refuse to answer a question on the grounds that the answer may incriminate them or claim legal professional privilege. The answers can not be used against the person in criminal proceedings. The questions must be for the purposes of POCA. Although there is no derivative use immunity contained in POCA the court has held that the transcript can only be used for POCA purposes so cannot be provided to the prosecutor or investigators of the criminal offence⁶.

Freezing

POCA restraining orders

Person directed

Orders restraining any dealings with property can be obtained under POCA. These can be over all of a person's property or specified property of a person or property suspected on reasonable grounds of being under a person's effective control. The person must either have committed an indictable offence⁷ or have committed a serious offence⁸ within the last 6 years. If the offence is an indictable offence but not a serious offence the restraining order will lapse, if the person is not charged with the offence within 28 days. If the restraining order is obtained on the basis that the person is suspected of committing a serious offence the restraining order will lapse if the person is not either, charged with the offence or confiscation proceedings commenced within 28 days. Confiscations proceedings will either be an application for forfeiture of the restrained property or an application for a pecuniary penalty.

Asset directed

Property suspected on reasonable grounds of being the proceeds of an indictable offence or a foreign indictable offence committed within the last 6 years can be restrained. It is not necessary to identify who owns the property or show that the owner of the property

⁶ DPP v Hatfield [2006] NSWSC 195

⁷ Most offences punishable by 12 months imprisonment or more are indictable

⁸ A fraud involving a benefit of more than \$10,000 with a maximum penalty of 3 years imprisonment or more is a serious offence. A failure to report cash transactions of more than \$50,000 over a six month period, and transacting \$50,000 or more through a false name bank account over a six month period are also serious offences.

committed an offence. These are asset directed provisions. Within 28 days an application will need to be filed for forfeiture of the restrained property.

Information provided on a police to police basis may be sufficient for an authorised officer to suspect that property located in Australia is the proceeds of a foreign indictable offence which will enable an asset directed restraining order to be obtained. A formal request may then have to be sent to the foreign country to obtain the evidence in admissible form to prove on the balance of probabilities that the property is proceed of that offence or another foreign indictable offence. To be a foreign indictable offence, the conduct must constitute an offence in the foreign country and be conduct which if it had occurred in Australia would have constituted an indictable offence in Australia. It is not necessary for any court proceedings or criminal investigation to have commenced in the foreign country.

Enforcement of foreign restraining orders

A formal request can be sent to Australia requesting Australia to locate and restrain proceeds of a foreign offence or property of a person suspected of committing a foreign offence. The Attorney-General can authorise the DPP to apply for a restraining order if the a criminal proceeding has commenced or there are reasonable grounds to suspect that a criminal proceeding is about to commence in the foreign country in respect of a foreign serious offence and there are reasonable grounds to believe that property that may be made or is about to be made the subject of a foreign restraining order is in Australia. The restraining order will cease at the end of 30 days, although this period can be extended. It is expected that the foreign country will obtain a restraining order during this period which will then be registered in Australia.

Restraining orders can be obtained where a person has not been charged and is not about to be charged if confiscation proceedings have commenced if the country is specified in the regulations made for the purposes of s34(2) MACMA.

A formal request can be sent to Australia requesting the registration of a foreign restraining order. A faxed copy of a sealed order can be registered but the sealed or authenticated copy will have to be filed within 21 days.

Exclusion

POCA

A person with an interest in property restrained under POCA can apply to have that property excluded from the restraining order by showing that it is not proceeds of unlawful activity, not under the effective control of the person suspected of committing the offence and not needed to satisfy a pecuniary penalty order. If property has been restrained on the basis that the person has been charged with the commission of an offence the applicant for exclusion will also have to show that the property was not used in the commission of the offence and if the offence is a serious offence that the property was not used in the commission of any unlawful activity.

If the property is restrained on the basis that the property is proceeds of an offence or foreign indictable offence the applicant will have to show that the property is not proceeds of any indictable offence or foreign indictable offence.

Applicants can also exclude property from forfeiture under POCA by showing that the property was lawfully acquired.

MACMA

A third party can apply to exclude property from a restraining order obtained under MACMA⁹ by showing that they were not involved in the commission of the offence and that the property is not proceeds nor an instrument of the offence. The court can also exclude property from a restraining order under MACMA if it is in the public interest having regard to financial hardship or other consequences of the interest remaining subject to the order.

Confiscation

Statutory forfeiture

If a restraining order is obtained under POCA and the person is convicted of a serious offence that the restraining order relates to, all of the restrained property is forfeited six months after conviction. This six month period can be extended by court order to enable an application to exclude property from statutory forfeiture to be heard. If the owner is unable to show to the civil standard that the property was lawfully acquired and not used in the commission of an offence or intended to be used in the commission of an offence it is forfeited to the Commonwealth.

Civil person directed forfeiture

If a restraining order has been obtained on the basis that a person is suspected of committing a serious offence within the last six years the DPP will need to prove to the civil standard that the person committed the offence. If the offence is proven in the civil court the restrained property will be forfeited. Any person who claims an interest in the property will have to apply to have the interest excluded from restraint or forfeiture and show that the property was lawfully acquired. If the property was partially acquired with the proceeds of unlawful activity the property will be forfeited but a compensation order can be made ordering the Commonwealth to pay to the owner of the property an amount equivalent to the value of the proportion of the property which was lawfully acquired. A hardship order can also be made to compensate a spouse or children of the person who commit the offence for hardship they will suffer as a result of the forfeiture.

Civil asset directed forfeiture

If a restraining order was obtained on the basis that the property is suspected of being the proceeds of an indictable offence or a foreign indictable offence the DPP will be able to obtain a forfeiture order six months after the restraining order was obtained by proving that notice was given to anyone suspected of having an interest in the property and that no application has been made to exclude the property from the restraining order or that the application has been withdrawn.

Where an application is made to exclude property from the restraining order the applicant will have to show on the balance of probabilities that the property is not proceeds of unlawful

⁹ S34L MACMA

activity. To obtain forfeiture the DPP will need to prove on the balance of probabilities that the property is proceeds of one or more offences committed within the last six years. The offence will need to be an indictable offence, a foreign indictable offence, or an indictable offence of Commonwealth concern.

Property is proceeds if it is partially derived with proceeds of an offence. If the property was partly derived with proceeds of an offence a compensation order can be made. A hardship order can also be made if property is forfeited under the civil asset directed provisions.

Conviction based forfeiture of proceeds or instruments of indictable offence

Within six months of a person's conviction for an indictable offence an application can be made for forfeiture of the proceeds of that offence. If the court is satisfied on the balance of probabilities that the property is proceeds of the offence it is forfeited.

An application can also be made within the same period for forfeiture of an instrument of the offence¹⁰. If the court is satisfied that the property is an instrument of the offence the court has discretion to forfeit the property. This provision will normally only be used where the offence is indictable but not a serious offence.

Pecuniary penalty orders

Where a person is convicted of an indictable offence or has committed a serious offence within the last six years an order can be made for the person to pay an amount to the Commonwealth. If the offence is indictable but not a serious offence it will be limited to the benefits from that offence. If the offence is a serious offence it will include the benefit from all unlawful activity within the six years prior to the application or the application for a restraining order. In calculating the benefit the court can look at all assets acquired by the person during the period and the amount spent during the period and deduct from that an amount that the court is satisfied is unrelated to the illegal activity. Deductions are also made for tax paid on the benefit and the value of forfeited property. In calculating the pecuniary penalty the court can include property which is not in the person's name but under their effective control. This will include gifts made within the preceding six years.

If the person has not been convicted of the offence the DPP will have to prove the unlawful activity on the balance of probabilities.

A statutory charge is created over the restrained property and the court can also make directions for the sale of restrained property to satisfy the pecuniary penalty order.

Enforcement of foreign confiscation orders

A formal request can be sent to the Attorney-General for the enforcement of a foreign forfeiture order or foreign pecuniary penalty order. The Attorney-General can authorise the DPP to apply for registration of the order if he is satisfied that the person has been convicted of the offence that the orders relate to and that the conviction and order are not subject to further appeal¹¹. DPP can then apply to a court for registration of the order and give notice to

¹⁰ property used in the commission of the offence or intended to be used in the commission of the offence

¹¹ S34 MACMA. These requirements may be varied by regulations relating to particular countries.

anyone who has an interest in the forfeited property. A person who claims to have an interest in forfeited property can apply to have their interest declared and if they were not involved in the foreign serious offence, that the forfeiture order relates to, and the property was not proceeds nor an instrument of the offence, the court will make an order for the transfer of their interest or for the payment by the Commonwealth of an amount equivalent to their interest. Anyone who appeared at the hearing of the foreign forfeiture order needs leave to apply. Foreign forfeiture and pecuniary penalty orders once registered are enforced as if they were made under POCA.

Repatriation

Property forfeited under POCA is forfeited to the Commonwealth. Pecuniary penalty orders are payable to the Commonwealth. Proceeds are paid into the Confiscated Assets Account administered under POCA and payments can be made out of that account at the Attorney-General's discretion to foreign countries who have contributed to the recovery.

Funds recovered under the MACMA as a result of the enforcement of a foreign order after payment of the Official Trustee's costs are paid into the Confiscated Assets Account and payments can be made out of the account to the foreign country at the discretion of the Attorney-General.

Practice

It is often quicker and easier for the proceeds of foreign offences to be traced, restrained and forfeited under POCA and for these inquiries to be initiated either by police to police inquiries or a formal request for searches to be conducted to obtain evidence of the criminal offence for use in the foreign criminal proceedings. If the proceeds are traced to Australia the asset directed restraining and forfeiture provisions can be used provided the offence was committed within the preceding six years. Where the offence was outside the six year period restraining orders and forfeiture orders have been obtained based on the commission of Australian money-laundering offences committed when the property was brought into Australia or a subsequent dealing with the property. In either case it is necessary to show that the conduct, that the property was originally derived from, was an offence in the foreign country and that it would be an offence if it had occurred in Australia. Property is proceeds of an offence if it is wholly derived or realised, directly or indirectly from the commission of the offence. If the property which is proceeds of crime is sold the proceeds from the sale and any property bought partly with the proceeds are proceeds of crime for the purposes of POCA. Property ceases to be the proceeds of crime when it is acquired by a third party for sufficient consideration.

Some examples

Money alleged to be the proceeds of a fraud on an Indonesian bank was transferred to Australia. The money was invested in real estate in Australia which was later sold and the proceeds sent offshore. Extradition proceedings were commenced for the return of the alleged offender to Indonesia but he died in Australia while still contesting his extradition. A civil asset directed restraining order was obtained when POCA commenced, on the basis that money in Australian accounts was proceeds of Australian money-laundering offences being transactions with property derived from money that could be traced back to the

Indonesian offences. This money was forfeited and then paid to Indonesia in recognition of the significant contribution made by the Indonesian authorities to the successful outcome of the proceedings. Restraining orders were also obtained in Hong Kong at the request of Australia over money that was traced to Hong Kong. These proceedings were settled and consent orders made for the forfeiture of approximately \$500,000 in Hong Kong.

In another matter the AFP identified Australian bank accounts opened by a Chinese national in a false name. The DPP obtained a restraining order under POCA. A civil forfeiture order was obtained and the \$3.37 million which was forfeited was repatriated to the People's Republic of China on 7 June 2007.

Corruption offences committed by persons employed by the Commonwealth of Australia or by a Commonwealth authority

In addition to the provisions which will enable the proceeds of corruption to be traced and forfeited under POCA and for orders for repayment of any benefits received by way of a pecuniary penalty order under POCA referred to above, orders can be made after conviction for the forfeiture of the government funded component of the employee's superannuation. These provisions apply where an employee commits an offence that involved an abuse of his or her office or was committed for a purpose that involved corruption or for the purpose of perverting, or attempting to pervert the course of justice. The person must have been convicted of the offence and sentenced to a term of imprisonment longer than 12 months. Their own contributions to their superannuation fund are refunded to them.