



Law Council
OF AUSTRALIA

Office of the President

14 December 2017

Tim Watling
Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Mr Watling,

Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017

1. Thank you for the opportunity to comment on the Senate Legal and Constitutional Affairs Legislation Committee's (**the Committee**) consultation on the Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017 (**the Bill**).
2. The Law Council offers the following comments on some significant aspects of the consultation for your consideration. The Law Council is grateful for the assistance of its National Criminal Law Committee and the ACT Bar Association in the preparation of this submission.

Background

3. In two recent cases, Australian courts determined that it may not be appropriate under the *Proceeds of Crime Act 2002* (Cth) (**the POCA**) to forfeit property which had been originally lawfully acquired, but in respect of which a mortgage loan may have been paid off using alleged proceeds of crime, or alternatively other improvements to the property were made using alleged proceeds of crime.¹
4. The amendments in the Bill will allow proceeds authorities, such as the Australian Federal Police, to restrain and forfeit property where illicit funds are used to make payments on that property. The Bill does this by amending key terms in the POCA, including 'lawfully acquired', 'proceeds', 'instruments', 'improvements' and 'derived from an offence'.²
5. The Minister for Justice has stated that these amendments are necessary as recent developments in case law have indicated that a person's interest in property is fixed at the moment of initial acquisition, and that any subsequent payments on the

¹ *Commissioner of the Australian Federal Police v Huang* [2016] WASC 5; *Commissioner of the Australian Federal Police v Hart & Ors* [2016] QCA 215.

² The Honourable Michael Keenan MP, *Second Reading Speech* (18 October 2017) <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2Fa923c04b-f8ae-47fa-a4b3-94f3cba5886d%2F0020%22>>.

property are irrelevant to determining if the property is lawfully acquired or derived from crime.³

6. He has noted that this is a loophole that could allow organised crime groups to use a web of financial arrangements and asset protection structures to avoid forfeiture of property. For example: criminals may be able to avoid the current proceeds of crime regime by funnelling money into ongoing property maintenance and restoration costs, mortgage repayments and improvements.⁴
7. Further, he has noted that the existence of this loophole is contrary to the central purpose of the POCA, which is to undermine the profitability of criminal enterprise.⁵
8. The amendments in the Bill aim to support this central purpose by allowing proceeds authorities to restrain and forfeit property where illicitly obtained money is used to service repayments on loans taken out on the property or fund improvements to the property.⁶
9. The Minister for Justice has stated that these amendments are designed to function alongside existing provisions in the POCA which protect individuals who unknowingly acquire proceeds of crime or do so lawfully. It is claimed that these individuals can continue to draw on robust protections which allow them to: exclude their property from forfeiture or restraint, transfer forfeited property back to themselves or obtain compensation for the proportion of the value of the property they obtained lawfully.⁷

Preliminary comments

10. The POCA already provides for the forfeiture of property in an extremely wide range of circumstances. The definition of 'proceeds' is already broad, including as it does property which is, wholly *or partly*, 'derived or realised, whether *directly or indirectly*, from the commission of the offence', and/or property wholly or partly derived from a disposal or other dealing with such 'proceeds' (section 329 of the POCA – emphasis added).
11. Likewise, 'instrument' of crime is widely defined, and includes property used 'in *or in connection with*' the commission of an offence, or 'intended' to be so used, and/or property wholly or partly derived from a disposal or other dealing with such an 'instrument' (section 329 of the POCA – emphasis added).
12. In addition to forfeiture, POCA allows for the obtaining and enforcement of pecuniary penalty orders against any property of an offender, whether tainted or otherwise (Part 2-4).
13. In these circumstances, the POCA already has very broad application. The fact that courts, on several occasions, have found that it may not apply to property which was originally lawfully acquired is indicative of a proportionate and balanced application of the Act, not legislative oversight.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

14. Finally, even if there were justification for amending the definition of 'proceeds' of crime in the manner indicated, it is difficult to see why the alleged concern makes it necessary or appropriate also to amend the definition of 'instrument' in the same manner (as the Bill seeks to do). The identified concern expressly relates to 'proceeds' of crime, not 'instruments', and there are specific policy reasons why the test for forfeiture of mere instruments of crime should be different. This aspect appears to represent an unnecessary over-reach which has the potential to erode the property rights of respondents.

Lack of proportionality

15. Before turning to the specific amendments proposed by the Bill, it is important to raise a concern arising from the use of the expression 'partly derived or realised' within both sections 329 and 330 of the POCA. The use of the expression 'partly derived or realised' pays no regard to a materiality threshold and may have unintended consequences.
16. This can readily be demonstrated by reference to an example. If \$100 of stolen funds are contributed towards the acquisition of \$1 million property, that property will constitute 'proceeds' notwithstanding the fact that only 0.01% of the purchase price was derived from unlawful activity. The breadth of the use of the word 'partly' was recently noted by P Lyons JA in *Commissioner of the Australian Federal Police v Hart and Others* (2016) 336 ALR 492 at [921].
17. By way of contrast, the *Confiscation Act 1997* (Vic) (**Confiscation Act**) defines 'tainted property' (the analogue to 'proceeds' under the POCA) as property that 'was derived or realised, or *substantially* derived or realised, directly or indirectly, from the commission of' a relevant offence. By using the expression 'substantially' rather than 'partly', the Confiscation Act seeks to create some proportionality between the financial contribution and its impact on the relevant property.
18. The need for proportionality is critical having regard to the low threshold in obtaining restraining orders, the strict exclusion tests, the very limited judicial discretion under the POCA to prevent forfeiture, and the operation of the forfeiture provisions.
19. Presently, a restraining order may be obtained under section 17 over all of the property of a suspect charged with indictable offences without the need to establish reasonable grounds to suspect that such property is 'proceeds' or an 'instrument'. In other words, there need not be any nexus between the restrained property and the alleged offending at the restraining order stage. If the suspect is later convicted of a 'serious offence', the property will be liable to automatic forfeiture under section 92 of the POCA unless an exclusion order is made under section 94 of the POCA. To obtain an exclusion order, the applicant must demonstrate that, on the balance of probabilities, the interest in property sought to be excluded is neither 'proceeds' of 'unlawful activity', nor an 'instrument' of 'unlawful activity' and that the interest was 'lawfully acquired'. However, having regard to the breadth of the definition of 'proceeds', which imports no concept of proportionality, the test is extremely onerous. It commonly requires an applicant for an exclusion order to engage in a substantial forensic exercise, often tracing property acquisitions over many years, to demonstrate each and every source of funds used in the acquisition of property. The amendments proposed by the Bill will, for the reasons explained below, cause an even greater burden.

20. One 'protection' for such an applicant exists in section 94A of the POCA, which provides that a court can make a compensation order where it is 'satisfied that a proportion of the value of the applicant's interest was not derived or realised, directly or indirectly, from the commission of any offence'. However, a Court is precluded from ordering compensation where the applicant's interest in the property is an 'instrument'. By reason of that prohibition, the 'protection' is almost always rendered illusory. That is primarily so because the very act of using illegally obtained funds (relevantly 'proceeds') renders such funds an 'instrument' through provisions which prohibit dealings in proceeds of crime.
21. This is again best illustrated by an example. If a person traffics drugs and, as a result, obtains \$1,000, that \$1,000 constitutes 'proceeds' under the POCA. However, in obtaining that \$1,000 the person also contravenes section 400.7 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**), which prohibits dealing in proceeds of crime to the value of \$1,000 or more. The money will also constitute an 'instrument': see *DPP (Cth) v Mylecharene* [2007] NSWSC 1174, [49]-[59]. If some part of that \$1,000, however immaterial, is then put towards the acquisition of a property, the property will be both 'proceeds' and, by the operation of section 300(2) of the POCA, an 'instrument'. The result is that such applicant will lose his or her property and not be entitled to a compensation order, notwithstanding that the financial contribution to such property from unlawful sources may be negligible. Almost every offence which results in some monetary gain will result in the gain constituting 'proceeds' and an 'instrument', thereby preventing the 'protection' in section 94A of the POCA from operating.
22. In short, even before the amendments proposed by the Bill take effect, there is a significant problem arising from the use of the expression 'partly derived or realised' in sections 329 and 330 of the POCA, which does not take into account proportionality.

The proposed amendments compound the present deficiencies

23. The amendments proposed to section 330 of the POCA will only serve to compound the existing difficulties.
24. That is so because under the proposed amendments property will become 'proceeds' if, inter alia:
 - a. an encumbrance or a security on, or a liability incurred to acquire, retain, maintain or make improvements to, the property is wholly or **partly** discharged using proceeds of the offence; or
 - b. the costs of retaining, maintaining or making improvements to the property are wholly or **partly** met using proceeds of the offence.
25. Further, under the proposed amendments property will become an 'instrument' if, *inter alia*:
 - a. an encumbrance or a security on, or a liability incurred to acquire, retain, maintain or make improvements to, the property is wholly or **partly** discharged using an instrument of the offence; or
 - b. the costs of retaining, maintaining or making improvements to the property are wholly or **partly** met using an instrument of the offence.

26. Hence, if an immaterial amount of money derived from unlawful activity is used towards a loan repayment or towards a home renovation, the property would be rendered 'proceeds' and, most likely, also an 'instrument', making it impossible to exclude it or to obtain a compensation order arising from its forfeiture.
27. The amendments will place a significant additional evidentiary burden on an applicant for an exclusion order, who must satisfy a Court that the relevant interest in property is neither 'proceeds' nor an 'instrument'. If, for example, some improvements were carried out to a home an applicant for an exclusion order would be forced to put on evidence showing the origin of the funds used to make such improvements, however far back they may have been carried out and whatever their value.
28. It can be readily accepted that where a property's finance is wholly or substantially discharged with ill-gotten gains or where renovations are funded wholly or substantially with ill-gotten gains, property ought to be at risk of forfeiture. However, the fundamental problem arises from the lack of proportionality and the absence of any judicial discretion to ameliorate disproportionate consequences. The proposed amendments merely compound these difficulties. They do not only impact organised crime groups and the alleged 'protections' are inadequate.
29. In the Law Council's view, the difficulties identified can be overcome by amending the expression 'partly derived or realised' with 'substantially derived or realised', being the language used by the Confiscation Act.

Reasonable legal expenses

30. The Law Council notes that judicial approval of reasonable legal expenses is not provided for by the POCA.
31. The Law Council favours a system that allows for courts to permit respondents to use restrained assets to meet a person's reasonable legal expenses arising from confiscation proceedings.
32. In the Law Council's view, the Legal Aid provisions under the legislation are impractical and in most cases inoperable. The inability to access legal aid raises difficulties in circumstances where, quite frequently, the defendants to POCA proceedings have had all their property and cash restrained, including future property orders, and are unable to defend applications often made at short notice and on multiple fronts.
33. In such circumstances, the Law Council considers that permitting respondents to use restrained assets to meet their reasonable legal expenses arising from confiscation proceedings is appropriate.

34. The Law Council trusts that these comments are of assistance.
35. Please contact Dr Natasha Molt, Deputy Director of Policy, Policy Division (natasha.molt@lawcouncil.asn.au or on (02) 6246 3754) in the first instance with any questions.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Fiona McLeod', written in a cursive style.

Fiona McLeod SC
President