



## PROCEEDINGS UNDER THE *CONFISCATION OF CRIMINAL ASSETS ACT 2003* STATEMENT OF POLICY

### BACKGROUND

1. The *Confiscation of Criminal Assets Act 2003* (“the CoCA”, or “the Act”) creates a legislative regime for the confiscation of the profits and proceeds of an offence (“the proceeds of crime”), and property used to assist or facilitate the commission of an offence (“the ‘instruments of crime’”).
2. This Policy set out the factors to be taken into account in instituting proceedings under the Act.
3. Section 3 of the CoCA provides that the purposes of the Act include:
  - a) to encourage law-abiding behaviour by the community;
  - b) to give effect to the principle of public policy that a person should not be enriched because of the commission of an offence, whether or not anyone has been convicted of the offence;
  - c) to deprive a person of all material advantage derived from the commission of an offence, whatever the form into which property or benefits derived from the offence may have been changed;
  - d) to deprive a person of property used, or intended by an offender to be used, in relation to the commission of an offence, whatever the form into which it may have been changed, and to prevent the person from using the property to commit other offences;
  - e) to enable the effective tracing and seizure by law enforcement authorities of property used, or intended by an offender to be used, in relation to the commission of an offence and all material advantage derived from the offence;
  - f) to provide for the enforcement in the ACT of orders, notices or decisions (however described) made under corresponding laws.

### DEFINING CHARACTERISTICS OF CoCA PROCEEDINGS

4. Proceedings and orders made under the CoCA are *sui generis* (unique and in a category of their own). The following are some key characteristics that define orders and proceedings under the CoCA:
  - proceedings under the Act are civil proceedings, not criminal proceedings.<sup>1</sup>

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<sup>1</sup> Section 237(2), *Confiscation Criminal Assets Act*.

- applications and questions of fact are decided on either ‘the balance of probabilities’ or the ‘reasonable grounds to suspect or believe’ threshold;
- an application for conviction based forfeiture ‘forms part of the sentencing process’, but is not to be regarded as a punishment in and of itself;<sup>2</sup>
- when formulating a criminal sentence, a sentencing court is prohibited from taking into account the fact that CoCA proceedings have been or may be initiated, or any effect that such proceedings may have on an offender<sup>3</sup>;
- the initiation of conviction based forfeiture proceedings does not involve the bringing of a ‘criminal charge’ for the purpose of section 22 of the *Human Rights Act 2004*<sup>4</sup>;
- an order for forfeiture under the CoCA does not effect an acquisition of property.<sup>5</sup>

## THE IMPORTANCE OF PROSECUTORIAL DISCRETION

5. The CoCA limits the scope for the exercise of judicial discretion. Where the DPP has established that property is the proceeds of crime or an instrument of crime, the court must, subject to some qualifications, order the property to be forfeited or restrained.
6. Neither the DPP nor a respondent will be able to rely on the exercise of judicial discretion to mitigate or temper the effect of orders that might otherwise be seen as excessively ‘harsh’ or ‘draconian’. Accordingly, it is incumbent on prosecutors to ensure that applications under the CoCA are not pursued in circumstances which might cause injustice.

## EFFECT ON PERSONS OTHER THAN THE OFFENDER

7. In some circumstances, a proceeding under the Act may affect a person other than the offender.
8. A person other than an offender who has an interest in property to be restrained or forfeited is able to apply for an exclusion order under Part 6 of the Act. However, pursuant to sections 76(4) and 77(4), the court must not make the exclusion order unless it is satisfied that:
  - (a) the applicant has an interest<sup>6</sup> in the property; and
  - (b) the applicant was not a party to the relevant offence or any related offence; and
  - (c) the interest is not subject to the effective control of an offender; and
  - (d) the interest is not tainted property in relation to the relevant offence or any related offence; and
  - (e) if the interest was acquired completely or partly, or directly or indirectly, from the offender—the interest was acquired honestly and for sufficient consideration and the applicant took reasonable care to establish that the interest may be lawfully acquired by the applicant; and
  - (f) the property does not have evidentiary value in any criminal proceeding.

<sup>2</sup> *Briggs-Price v The Queen* [2009] UKHL 19; *Phillips v United Kingdom* [2001] ECHR 437; *Van Offeren v Netherlands* (2005) Application no. 19581/04; *Geerings v The Netherlands* (2008) 46 EHRR 49

<sup>3</sup> Section 35(4), *Crimes (Sentencing) Act 2005*

<sup>4</sup> *Geerings v The Netherlands* (2008) 46 EHRR 49

<sup>5</sup> See section 51(xxxi) of the *Australian Constitution* or section 23(1)(a) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth); *Re DPP ex parte Lawler & Anor* (1994) 179 CLR 270; *Mutual Pools and Staff Pty Ltd. V Commonwealth* (1994) 179 CLR 155; *Georgiadis v AOTC* (1994) 179 CLR 297.

<sup>6</sup> “Interest in relation to land or other property means (a) a legal or equitable estate in the land or other property; or (b) a right, power or privilege over, or in relation to, the land or other property - see *Legislation Act 2001*.”

9. Whether a third party has grounds for applying for an exclusion order under Part 6 of the Act, if known to the prosecutor, will be a relevant consideration in any decision to: initiate proceedings under the CoCA; to seek a restraining order; and to proceed ex parte.
10. There will be cases where a third party does not have an interest in the property to be restrained or forfeited, but will nonetheless be affected or caused hardship by the forfeiture.

#### **FACTORS TO TAKE INTO ACCOUNT IN INITIATING PROCEEDINGS UNDER THE ACT**

11. This part of the policy sets out factors to be taken into account in initiating proceedings under the CoCA. **Additional considerations** apply to pursuing CoCA matters where a person has been **acquitted or not proceeded against**, and in relation to **restraining orders**, and these are dealt with separately below.
12. As is the case with prosecutions, prosecutors should be mindful of the following questions in deciding whether to pursue CoCA proceedings:
  - is there a reasonable prospect that the action will succeed; and
  - is it in the public interest to pursue the action?
13. In determining whether it is appropriate to initiate or pursue CoCA proceedings, and in their conduct of such proceedings, prosecutors act as a model litigants.
14. Particular considerations may apply to the restraint or forfeiture of **proceeds of crime** on the one hand, and the restraint or forfeiture of **instruments of crime** on the other hand.

#### **Proceeds of Crime**

15. The CoCA was intended to give effect to the legal policy position advocated by the by the Australian Law Reform Commission, which concluded in its report into proceeds of crime legislation that:

*In the Commission's view, the retention by the courts of any discretion not to order forfeiture ... of property constituting the profits of an ordinary indictable offence... flies directly, and unacceptably, in the face of the principle underlying the principal objective enunciated in section 3(1)(a) of the POC Act, namely, that a person should not be entitled to be unjustly enriched as a result of unlawful conduct.*

*As the Commission's analysis in chapter 2 demonstrates, the nature of that principle is such that it does not admit of exceptions, particularly discretionary exceptions.*

*The Commission considers, therefore, that [the Act] should be amended to require mandatory forfeiture of such profits in the case of an ordinary indictable offence...<sup>7</sup>*

16. Accordingly, generally it will be appropriate and in the public interest to pursue the recovery of the **proceeds of crime**. This is in order to give effect to the express purposes of the CoCA, in particular paragraphs 3(b) and (c) of the CoCA.
17. However, even in relation to the restraint or forfeiture of proceeds of crime, any hardship that may be occasioned to a third party will be a relevant consideration, to be balanced against the strong public interest in depriving the offender of the proceeds of their crime.

#### **Instruments of crime**

18. In deciding whether it is in the public interest to pursue the restraint or forfeiture of **instruments of crime**, prosecutors should take into account:

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<sup>7</sup> Australian Law Reform Commission, "Confiscation that Counts: A review of the *Proceeds of Crime Act 1987* (Cth)", Report No. 87, March 1999, paragraphs 3.24-3.26.

- The public interest in depriving a person of property used, or intended by an offender to be used, in relation to the commission of an offence (as expressed in section 3(d) of the CoCA);
- The public interest in encouraging law-abiding behaviour by the community (as expressed in section 3(a) of the CoCA);
- The seriousness of the offence to which the tainted property relates;
- How pivotal or central the property was to the commission of the relevant offence;
- The value of the tainted property, the expense and time likely to be involved in litigating for the forfeiture of the property, and the resources likely to be used by police in conducting inquiries necessary to obtain evidence in support of the litigation;
- The degree of proportionality or symmetry between the value of the tainted property, and the likely profits or proceeds that would have been realised has the offence to which the property relates been undetected;
- Whether the potential respondent has a history of using or making available property for the commission of similar offences;
- Any hardship that the restraint or forfeiture of the property would cause to the respondent or any third party.

### **Hardship**

19. In considering the hardship that the restraint or forfeiture of instruments of crime might have, regard should be had to the following matters:

- If the hardship involves a third party –
  - whether the party knew, or ought reasonably have known, that the property was being used in relation to an offence;
  - the nature of the relationship between the third party and the defendant, and whether the party was in a position to influence the conduct of the respondent;
- if the property to be restrained or forfeited involves a house - the likelihood that persons, particularly children, will be left homeless or caused significant disruption;
- if the property to be restrained or forfeited is used, in a direct sense, for the generation of income (e.g. tradesman's tools) -
  - the expense or difficulty in obtaining replacement property;
  - the extent to which the restraint or forfeiture will prevent the generation of income;
  - the extent to which a loss in income might compromise the provision of the 'necessities of life' to a child.
- if a person is significantly afflicted by illness - the extent to which the restraint of forfeiture will compromise or limit their ability to obtain treatment.

20. Where prosecutors require further information so as to be able to make an informed assessment about whether proceedings will cause undue or excessive hardship, they should request that police make reasonable inquiries to ascertain the relevant information.

### **PURSUING CoCA MATTERS IN RELATION TO WHICH A PERSON HAS BEEN ACQUITTED OR NOT PROCEEDED AGAINST**

21. The CoCA contemplates that civil applications will be made for the forfeiture of property in circumstances where the person has been acquitted of, or not proceeded against to finality on, a criminal offence to which the property relates. Section 67(5) of the CoCA provides that:

(5) *Also, to remove any doubt, the relevant court must not refuse to make a civil forfeiture order in relation to a serious offence only because—*

(a) *an indictment has not been presented against the offender for the offence; or*

(b) *the offender has not been convicted of the offence; or*

(c) *the offender has been cleared of the offence, including being cleared after having been convicted of the offence; or*

(d) *a doubt is raised about whether the offender committed the offence.*

*Note*        **Indictment** is defined in the Legislation Act, dict, pt 1 as including an information.

22. Accordingly, prosecutors should not view an acquittal for a criminal offence, or the fact that a prosecution has not proceeded, as a bar to pursuing the recovery of the **proceeds of crime**, provided there are reasonable prospects for succeeding in the action. As discussed above, it will generally be in the public interest to seek to recover such property.

23. Similarly, prosecutors should not view an acquittal for a criminal offence, or the fact that a prosecution has not proceeded as a bar to pursuing the forfeiture of the **instruments of crime**. Care should be taken however to ensure that any such action is not oppressive when viewed in the context of all of the proceedings against the offender.

## RESTRAINING ORDERS

24. Part 4 of the CoCA allows for the making by the court of restraining orders that a person must not deal with the property. The purposes of restraining orders are set out in section 22 of the Act which states:

A restraining order may be made to preserve property so that the property will be available for 1 or more of the following purposes:

(a) for forfeiture under a conviction forfeiture order;

(b) for automatic forfeiture;

(c) for forfeiture under a civil forfeiture order;

(d) to satisfy a penalty order.

25. Restraint can take a number of forms:

- the property may remain in the custody of police; or
- a person may be able to retain possession and use of the property, but they prohibited from selling, transferring or otherwise dealing with the property.

26. Section 243(2) of the Act specifically provides that an application for a restraining order may be made to the court without notice (*ex parte*) to the person against whom the order is sought. Such an application can be made returnable before the court very shortly after it is made. A court does not have a discretion to refuse to grant a restraining order simply on the basis that it is made *ex parte*.<sup>8</sup> Nor is there a statutory power in the court to require the applicant for a restraining order to give notice to interested persons.<sup>9</sup>

27. If the court makes a restraining order, the DPP must give a copy of the order to interested persons under section 34 of the Act.

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<sup>8</sup> See sections 243(2) and (3), and sections 30, 31 of the *Confiscation of Criminal Assets Act 2003* which state that a court 'must' make an order when certain criteria are met.

<sup>9</sup> Cf *Navarolli v DPP* (2005) 159 A Crim R 347 where the Victorian Court of Appeal held that based on the presence of such provisions in the Victorian Act there was no "right" to an *ex parte* hearing.

28. A person with an interest in restrained property to whom the DPP did not give notice of the application for a restraining order may apply under section 43 for the revocation of the restraining order.
29. Particular considerations apply to whether a restraining order should be sought, and if so, whether it will be applied for *ex parte*.
30. All restraining order applications are to be decided by the Director or Deputy Director or person authorised by the Director on a case by case basis and should be made at the earliest possible opportunity to preserve property for the purposes set out in the Act.
31. In determining whether it is necessary to obtain a restraining order, prosecutors should have regard to the expressed purpose of the legislation of the preservation of property and accordingly should consider the likelihood that the property will be sold, transferred, disposed of, or in the case of money, spent, if a restraining order is not sought.
32. Where the property is already in the custody of police, prosecutors should consider whether the property can be lawfully held under another law, and hence whether a restraining order is necessary. For example, where property to be forfeited is to be used as evidence in relation to a pending criminal proceeding, section 244 of the *Crimes Act 1900* empowers police to retain possession of the property whilst the hearing or trial is pending.
33. As a general rule and consonant with the expressed purpose of the legislation of the preservation of property, restraining orders should be pursued on an *ex parte* basis where there are reasonable grounds to believe that the property to be restrained would be at risk of being sold, transferred, damaged, sold or otherwise disposed of if notice of the application were served on the respondent. Where the property to be restrained is already in the custody of police, notice of the application should ordinarily be served on the respondent.
34. It should be remembered that where a restraining order is made *ex parte*, any prejudice or potential loss to the respondent will likely be minimal given that they can make an application to have the order varied or revoked at short notice.<sup>10</sup> Prosecutors should ensure that the respondent is made aware of any order made *ex parte* as soon as possible, so that the respondent can exercise their right to be heard on the application at the earliest opportunity.

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<sup>10</sup> Sections 43 and 44, *Confiscation of Criminal Assets Act 2003*.