Recovering the proceeds of transnational crime through civil proceedings

The new Proceeds of Crime Bill should present the Australian Federal Police with one of the essential tools that any modern law enforcement agency requires to effectively disrupt organised crime activities in their jurisdiction.

On March 21, **Commissioner Mick Keelty,** told an international conference in Hong Kong that attacking the proceeds of organised crime was one of the most effective ways of stemming transnational criminal activity such as drug trafficking and people smuggling, but he called for urgent attention to mutual assistance arrangements to give effect to enhanced proceeds legislation.

Commissioner Mick Keelty

The field of proceeds of crime and money laundering is not new, however, international efforts to criminalise these issues are. It is only a short 15 years ago that the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) also known as the Vienna Convention attempted to criminalise internationally the proceeds of drug trafficking.

I am pleased to say that Australia back then took a leading role in signing and ratifying the convention. The Commonwealth Government passed its first proceeds of crime legislation in 1987. This legislation was part of a larger package of legislation passed at the time and consisted of a major policy response to the growing influence of organised crime in Australia at the time. This included legislation such as the Cash Transactions Reporting Act (now the Financial Transactions Reports Act) and the Mutual Assistance in Criminal Matters Act.

The current Proceeds Of Crime Act 1987

The *Proceeds of Crime Act 1987* was a conviction-based scheme that evolved out of a decision by the Australian Police Ministers Council meeting in 1983 that recommended all Australian jurisdictions develop legislation to combat the accumulation of criminal wealth. The subsequent Act provided Commonwealth law enforcement agencies through the office of the Commonwealth Director of Public Prosecutions the power to trace assets, obtain orders freezing assets and orders to confiscate assets in association with the prosecution of a Commonwealth indictable offence.

As the Act was conviction-based, no final order in respect of property could be made unless and until a person had been convicted, or at least a case had been found proven against them in respect of a Commonwealth indictable offence. A distinction was also made between a serious indictable offence and ordinary indictable offence. A serious offence was defined as a serious narcotic offence, an organised fraud or money laundering offence that relates to the proceeds of a serious narcotic offence or an organised fraud offence. An ordinary indictable offence was by definition an indictable offence that was not a serious offence.

Essentially speaking, two remedies were open to the courts for forfeiture. The first occurs when a person is convicted of a serious offence, any property that remains restrained after a period of six months after the date of conviction is automatically forfeited to the Commonwealth. To avoid automatic forfeiture, a person must lift

the court restraining order prior to the end of six months. This is achieved if the court is satisfied that the property was not tainted and that the person's interest in the property was lawfully acquired.

When a person is convicted of an ordinary offence, the court has two options. First, the court may order that the tainted property may be forfeited to the Commonwealth. Tainted property is that property that is used in connection with the offence, typically cars and boats. It also includes property derived from the commission of the offence charged – typically the proceeds of the crime.

Alternatively, the court may make a pecuniary penalty order against any property of the person whether or not the property is connected with the offence. A pecuniary penalty order is an order of the court directing a person convicted of an offence to pay the Commonwealth an equal amount to the value of the gross benefits derived from the offence.

In addition, a range of information gathering powers are available to investigators and prosecutors. Restraining orders were normally granted after a person had been charged, however, they could be granted up to 48 hours before a person was to be charged. In addition powers exist to obtain production orders, search warrants and monitoring orders. All of these orders had to be obtained from the courts using the Commonwealth Director of Public Prosecutions.

In 1999, the Commonwealth Attorney-General directed the Australian Law Reform Commission ('the Commission') to undertake a review of the effectiveness of the Commonwealth Proceeds of Crime Act. In a comprehensive and far reaching review the Commission, not unsurprisingly, concluded that the existing conviction-based scheme had fallen well short of the goal in depriving criminals of the proceeds of their crime.

The Commission recommended that a non-conviction-based regime be incorporated into the Proceeds of Crime Act to enable confiscation on the basis of proof to a civil standard. In addition the Commission also recommended the overhaul of procedures in relation to restraining property, money-laundering offences and other relevant ancillary issues.

The new Proceeds of Crime Bill

The new Proceeds of Crime Bill will present the AFP with one of the essential tools that any modern law enforcement agency requires to effectively disrupt organised crime activities in their jurisdiction. Importantly though, several features of the bill will also be a benefit to its partner agencies in the region, and will assist in some small way to help bridge the gap.

The main point to emphasise is that Australia is not abandoning the conviction-based confiscation scheme that has been in existence for the past 15 years. The new bill provides for the introduction of a civil forfeiture scheme which will operate in addition to the existing conviction-based scheme. The other issue worth highlighting is that the legislation is neither novel nor radical. Similar schemes have been in existence in the United States, Ireland, the United Kingdom and many other countries for several years now.

The backbone of the legislation is the onus of proof in confiscation matters moving to the common law civil standard – that is the 'balance of probabilities'. The court will be equipped to order the forfeiture of assets on the balance of probabilities that the person has engaged in relevant criminal conduct. There will be essentially two types of recoveries envisaged, person directed recoveries and asset directed recoveries.

Commissioner Keelty is greeted by Tung Chee Hwa, Chief Executive, Hong Kong SAR in the presence of Tsang Yam-pui, Commissioner of Hong Kong Police and Sir Keith Povey, Her Majesty's Chief Inspector of Constabulary.

Under the proposed bill, if reasonable grounds exist to suspect that person has committed a serious offence within the past six years then authorities can seek a restraining order. A serious offence has been defined as an offence against the Commonwealth law that involves a punishment of three years imprisonment and involves drug trafficking, people smuggling, money laundering or fraud involving at least $10,000. It also includes some Financial Transaction Reports Act offences with a value of $50,000 or more, and other offences as prescribed under regulation. The application for

a restraining order should demonstrate that there are reasonable grounds to suspect that a person committed a serious offence in the previous six years before the application was made.

There are a number of variances to restraining orders that the courts will be able to make in relation to the categories of property that are to be restrained. However, the court will have no discretion concerning whether to make the restraining order if the property specified in the order and the grounds for obtaining the order have been made out.

The alternative method for pursuing the proceeds of crime under the proposed bill concerns asset directed recovery. Under this mode a restraining order, once obtained, will enable a civil forfeiture action to be taken against the proceeds of an indictable offence even where the identity of the person is unknown. The relevant provisions will apply if there are reasonable grounds to suspect that the property is the proceeds of an indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concern that occurred six years before the restraining order was made.

More than 400 delegates attended the Organised Crime Conference in Hong Kong to hear a distinguished platform of both local and international speakers.

The point to be highlighted is that the definition of a foreign indictable offence under the proposed bill will be defined as to mean an offence that would be punishable by 12 months imprisonment if it had occurred in Australia. I will return to the potential impact of this feature later.

The bill also contains important new information gathering powers. This includes a capacity to serve notices on financial institutions to assist the AFP and the Director of Public Prosecutions in obtaining preliminary information to confirm the existence of accounts, basic account information and information concerning transactions. This provision will not replace the use of search warrants as the main coercive means for obtaining information from financial institutions.

Literary proceeds of crime will also be covered for the first time under Commonwealth law. This will prevent those who engage in serious criminal activity from benefiting as a consequence of that notoriety indirectly by book and film royalties and contracts.

Drivers of change in Australia

It is worth attempting to identify the drivers of this change that have encouraged the shift form a pure conviction-based model to include the addition of a civil recovery model. These have included a better understanding of the evolving criminal environment, the development of civil legislation elsewhere in Australia, new models of organised crime, international influences and internal realisations.

No-one could have envisaged in 1983 when the Australian Police Ministers Council agreed to recommend the introduction of proceeds of crime laws that the characteristics and dimension of organised crime in Australia would change so dramatically. Since this time dynamic forces whether they be economic, social and/or political have shaped the domestic Australian and regional criminal environment significantly.

Where organised crime syndicates were largely home grown and domestically focused, the past 20 years has seen a shift to internationally based and operating syndicates who rarely leave the proceeds of their crime in the jurisdiction where the acts were originally committed. The proliferation of narcotics trafficking has led the way. The use of professionals to advise and participate in complex money-laundering schemes is often observed.

While the Commonwealth legislation has remained largely untouched in regards to proceeds of crime, many of the Australian State legislatures took alternative approaches. The NSW Government in particular distinguished itself with aggressive proceeds of crime legislation. This was followed with similar civil forfeiture legislation in Victoria, Western Australia and the Northern Territory.

As a result of these developments, and the restraints of the current system, many assets that were identified and investigated by Commonwealth agencies such as the AFP were referred to State agencies, like the NSW Crime Commission, for confiscation. It was clear from

comparison that the conviction-based schemes were nowhere near as effective as the more advanced state models in aggressively pursuing the proceeds of crime.

The Australian Law Reform Commission concluded:

> " . . . that the very modest returns achieved under the existing Commonwealth regimes, the Commission is in no doubt that the Proceeds of Crime and Customs Act regimes have fallen well short of depriving the wrong doers of their ill-gotten gains."

The evolution and development of our understanding of transnational organised crime has also had a powerful influence on driving change in money laundering and proceeds of crime issues. Many countries initially viewed organised crime in strict hierarchical structures headed by an unknown 'Mr Big'. We know better now as one Royal Commission into Organised Crime in Australia noted there is no 'Mr Big', but rather plenty of 'Mr Big Enoughs.'

Our knowledge of organised crime has developed further from this point. Many academics and practitioners now subscribe to an economic or business model of organised crime. This approach has contributed to focusing the attack on the financial base of crime. It has also influenced law enforcement strategies and tactics that have manifested themselves in such investigations as the United States Drug Enforcement Administration's Operation Green Ice and the United States Customs Service's Operation Casablanca.

The influence of the OECD's Financial Action Task Force (FATF) cannot be understated. Since 1989, by using the 40 recommendations as its bedrock for an international anti-money-laundering standard, the FATF through revision, refinement and by conducting mutual evaluations of member countries, has assisted in making financial institutions in participating jurisdictions more hostile to money laundering and hence proceeds of crime activities.

This model has placed pressure on both cooperating and non-cooperating jurisdictions to adopt the minimum standard of anti-money laundering control. Their analysis and inspection is more than a checklist of legislation as mutual evaluation teams seek evidence of robust law enforcement and prosecutorial action in the relevant fields. Any jurisdiction that seeks to position itself as a financial services centre of repute takes notice of the FATF mutual evaluation process.

An important source of change within the Australian context was an audit conducted by the Australian National Audit Office into the efficiency, economy and administrative effectiveness of the management of the investigation and recovery of the proceeds of crime. This report concluded that on average only AUD$6 million was actually recovered each year in proceeds of crime – a modest amount in any terms.

Some academics also took interest in the proceeds of crime issue, publishing papers that evaluated performance against the stated goals of the legislation. They reached a similar conclusion to the Australian National Audit Office.

The proliferation of Financial Intelligence Units has also had an impact on money laundering and proceeds of crime issues. By providing legitimate channels for financial institutions to report suspicious activity to relevant law enforcement agencies, a new avenue of intelligence has been opened to investigators.

Literary proceeds of crime will also be covered for the first time under Commonwealth law

To further exacerbate the issue, Australia's financial reporting agency AUSTRAC was feeding 'useful real' time intelligence into agencies such as the AFP, however, there was no legal basis to pursue much of this information. Significant victories were made during this time, however, this intelligence usually led to the activities of significant drug trafficking operations that were then successfully targeted. Little if any proceeds of crime were recovered from these investigations, largely due to the fact that the funds AUSTRAC initially detected were the catalyst to the investigation and had long been dissipated in an overseas jurisdiction.

Similarly, the AFP was provided with intelligence by one of our overseas law enforcement partners to play a critical role in transnational organised crime investigations involving money laundering. Once again, legislative requirements prevented the AFP from entering into these important global investigations.

In response, the Australian Government launched in 1997, under the auspices of the National Illicit Drug Program, a series of measures to counter transnational organised crime, particularly drug trafficking. As a result,

the AFP has significantly increased its capacity to work with our international partners in countering organised crime.

These initiatives have included 10 mobile strike teams to target high-level drug traffickers, the establishment of the law Enforcement Cooperation Program – a program to increase the capacity of our partners to counter drug trafficking and organised crime, new overseas liaison posts in key transit locations around the globe and the enhancement of existing posts within South East Asia, increased funding for informant handling, witness protection and enhanced telephone intercept capability and the establishment o a National Heroin Signature Program.

While I will not delve into the events of September 11, 2001, too deeply, the subsequent investigations highlight the fact that financial investigation plays into effectively collecting critical evidence, identifying money launderers and tracing the proceeds of crime in any criminal group including terrorists.

What does the future hold?

There is little doubt that the international dimension of law enforcement is becoming increasingly important. Any law enforcement agency that believes that it is capable of containing the domestic manifestations of transnational organised crime without embracing meaningful international cooperation is at a substantial disadvantage. Those who do not at least pay reference to the international and regional factors risk losing control of their anti-crime agendas.

Money laundering is a special case in point. Without money laundering and its associated launderers there would be no proceeds of crime perpetuated. Often crimes committed in one jurisdiction have the proceeds of that crime laundered in several off shore jurisdictions. Transnational organised crime groups count on the dysfunction between jurisdictions regionally and internationally in the hope that their specific misdeeds will not be pursued either because of complexity or time.

As money and the proceeds of crime move rapidly from one jurisdiction to another the ability of law enforcement to identify and restrain the suspected proceeds of crime becomes more difficult. One jurisdiction may well be depending upon the laws and the law enforcement capacity of a neighbour to enforce those laws effectively to prevent the proceeds of crime from disappearing completely. If I can return momentarily to William Baity's previously cited comments about how one jurisdiction's efforts can impact on the region then money laundering and proceeds of crime is an excellent case in point.

Since 1987, Australia has prosecuted for money laundering offenders who knowingly bring the proceeds of crime into Australia in an attempt to conceal the proceeds of crime. I am glad to see that under the proposed Australian legislation that proceeds of crime brought into Australia that originate in a third country will, if that offence had occurred in Australia and attracted a penalty of 12 months imprisonment or more, also be liable to restraint and forfeiture. This is a small example of how Australia can support its neighbours and our law enforcement partners in making the region hostile to organised crime.

Australia also recently passed legislation to allow Commonwealth law enforcement agencies to target the highest echelons of organised crime. This legislation will enhance our ability to conduct controlled deliveries, provide immunity from civil and criminal liability during undercover operations, allow the use of assumed identities by undercover officers and extend our financial reporting provisions to include 'underground bankers'.

In recognition of the importance that seizing the proceeds of crime and targeting money laundering has on disrupting organised crime, the AFP has initiated financial investigation teams across Australia. These officers will have responsibility for working with operational teams on investigation providing another dimension to their investigations. They will also initiate proceeds of crime investigations and develop intelligence provided from AUSTRAC into money-laundering investigations.

The AFP has demonstrated its commitment to regional and international cooperation through maintaining an overseas liaison officer network. This network consists of 39 officers in 23 countries, in particular focusing on regional issues. I am confident this network will expand in the future.

Besides collecting criminal intelligence that is relevant to the Australian criminal environment, these officers also ensure that critical intelligence is also passed in a timely and precise manner into the relevant areas of the host country law enforcement agencies. The AFP experience has demonstrated to us that there is no substitute for representation with our host countries and our partnership law enforcement agencies.

Police to police intelligence exchange remains indisputably the most effective and efficient

method of quickly moving information from country to country. With modern encrypted international communication, digital photographs of offenders boarding a plane are in the hands of surveillance officers in another country within minutes ensuring that the chances of success are that little bit higher.

One area of international cooperation that could be improved dramatically is the use of mutual legal assistance. While it was first initiated under the United Nations Vienna Convention in 1988, the international system of criminal legal assistance is in dire need of reform and overhaul. Too many countries complain of inordinate delays and lack of responses – and that's when dealing with their own legal systems! While the principles that underpin the concept of mutual legal assistance are correct, and there are many dedicated practitioners who work long hours to professionally keep the current system afloat, it is my suspicion that we have over complicated what could be a simple and ultimately effective system.

I mention mutual legal assistance in this context because international money laundering and proceeds of crime investigations often lead to requests for documents held by bank and non-bank financial institutions. The reality is that these documents normally have to be obtained through the use of a mutual legal assistance request. There is little point embarking on one of these investigations if you know before you start that either investigators will have to wait two or three years for an answer, maybe not receive a reply, or worse still,l the jurisdiction has no legal basis to act on a request.

Enormous challenges

The challenges that confront law enforcement agencies from organised transnational crime are enormous. The issues are as diverse as they are sometimes complicated. None more so than in the issue of proceeds of crime and money laundering. These issues necessitate the compliance and the constructive contribution of many fields to ensure success. These include bank and non-bank financial institutions, insurance companies, gold dealers, remittance agents, casinos in addition to professional groups such as accountant and lawyers.

Similarly, to effectively counter the threats of money laundering and to prevent the proceeds of crime is not solely the responsibility of one law enforcement agency. Financial Intelligence Units exist to provide this information; prosecuting agencies often have ultimate say as to what legal instruments will be used and how they will be used. These factors contribute to a complex environment that must be well coordinated, resourced and focused.

The largest influence is, of course the criminal networks themselves. Unfortunately we currently have limited influence over the shape they take and the courses they embark upon. We know from our experience that international cooperation does occur and is very effective. I suspect, however, that these occurrences must increase in frequency and scope to be truly effective.

Delegates, speakers and VIPs outside the former Governor's residence – now the Chief Executives' Residence.

Few in the Australian Police Ministers Council who sat down in 1983 would have envisaged that investigators travelling overseas to obtain critical evidence, interview witnesses and obtain financial records would become the norm in transnational organised crime investigations in 2002. Asset sharing, joint intelligence groups and investigations all occur frequently. The shape of our law enforcement agencies is very different from when we embarked upon our mission to counter transnational organised crime. The challenge now is to attempt to visualise what transnational organised crime will look like in the year 2020 to truly bridge the gap.