

The Money Trail Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting

Brent Fisse, David Fraser and
Graeme Coss (eds); Law Book
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\$90.00.

The so-called 'war on drugs' dominated the rhetoric and activity of legislators throughout the 1980s. Drug-related crime, particularly the more insidious organised species became a scapegoat for manifold social ills. It remains a legitimate target of increasingly well resourced and empowered enforcement agencies. Yet conventional enforcement methods demonstrably failed to contain, let alone eliminate, a business in which the abundant demand guarantees enormous rewards. In 1987 and 1988 this drove the Commonwealth to enact a legislative package which signalled a significant shifting focus away from the anti-drug offensive towards the *raison d'être* of the drug trade – profit.

Money trail legislation allows the state to confiscate the proceeds of crime, criminalises the actions of those who deal with those proceeds, and requires financial institutions to report customer dealings which they suspect may involve those proceeds. It has far reaching implications for criminals and crimebusters; and also for lawyers, bankers, government advisers, and students of jurisprudence and public policy. In this collection of 19 essays the legislation is subjected to critical and technical analysis from those diverse perspectives.

Three essays form the cornerstone of this work. In the first two contributions, Brent Fisse suggests that the breadth of proceeds of crime legislation may make it an inappropriate and unjustifiable response to organised crime. He identifies a number of specific concerns: that the legislation purports to involve *confiscation* but its reach is not limited to the amount of unjust enrichment from offences; that the legislation involves imposing a penalty without referring to

the traditional sentencing principle of proportionality; that to the extent the legislation's objective is incapacitating offenders, less drastic means are available; that traditional principles of criminal liability have been compromised to aid the making of orders; and that the legislation limits the right to legal representation and can severely affect the rights of innocent third parties. Fisse concludes that while the legislation is an extreme response to an insidious crime, it should not be scrapped but rather pared back to fit within more tightly defined goals and restraints.

Richard Fox and Arie Freiberg examine the complicated webs of relationships between sentencing and the various types of forfeiture. They start by tracing modern forfeiture statutes back to the mediaeval concepts of *attainder* (that the right to hold property was enjoyed by the grace of a superior lord and was extinguished automatically upon conviction of felony), and of *deodand* (that an instrument of crime or damage should 'be given up to God' and applied to pious or charitable uses). They also survey some forfeiture regimens outside the proceeds of crime legislation, such as customs and wildlife legislation. This places the new system in its context and highlights its inevitable shortcoming: that as a political and pragmatic response to a problem, its objectives are confused and out of step with contemporary sentencing practice.

In his essay titled 'Lawyers, Guns and Money: Economics and Ideology on the Money Trail', David Fraser confronts the conventional view that the war on drugs is a struggle for the moral fibre of our society, a battle of good versus evil. Instead he characterises it as a struggle between capitalist and capitalist; with those aiming to maintain an open and competitive market place locked in battle with the drug industry cartels. The cartels service a market where demand is not affected by monopolistic pricing, where exorbitant profits lead to gross inefficiency, and where little economic incentive exists to abandon the cartels. This challenging economic analysis of an edifice created by lawyers, law makers and law enforcers leads to the disturbing conclusion that the new asset forfeiture legislation is not only a half-baked response to organised crime,

it is a half-hearted one as well. Fraser's sardonic observation that 'organised crime and the police have a symbiotic relationship not only through the exchange mechanism of corruption, but because at a basic ideological level, they ensure each other's existence' may be the key to understanding the money trail phenomenon.

It is apparent from these analyses that fundamental threshold questions should have been resolved before the legislation saw the light of day. These include: what should be the relationship of criminal confiscation to sentencing and other forfeiture regimens; should it operate as a civil remedy or part of the criminal process; at precisely what conduct is the remedy targeted; how far should the banking and financial sector be co-opted into the law enforcement business? Failure to address these issues has left a legacy of conflicts and uncertainties – these may undermine the ability of the legislation to achieve its trumpeted objective – to win the war on drugs.

The critical and theoretical approach is tempered by the contributions from the enforcement agencies, the banking industry, and the legal profession. They can identify strengths and weaknesses of the legislation in practice and in operation. The collection is completed by an analysis and evaluation of some overseas systems on which the Australian legislation was, or perhaps should have been, modelled.

This is not the definitive legal textbook. Indeed the issues in this collection suggest why such a book may never be written. The legislative landscape is too diverse and too rapidly changing to make this an easy subject. The Australian jurisdictions which entered the assets forfeiture business with the intention of maintaining uniformity have ventured off on their own frolics. Developments internationally, many of which Australian legislatures will probably be minded to emulate, are moving at a breathtaking pace. While the excellent bibliography in *The Money Trail* is dominated by material published in the last five years, it is likely to date fairly quickly.

The Money Trail makes a substantial contribution to understanding the context of the Australian money trail legisla-

tion, and of the complexities and controversies it has created. Its achievement is not diminished by its one shortcoming – that a number of the essays have been published previously as conference papers and in journals, and a few could have been updated. While serious followers of the money trail may find some material familiar, the value of bringing it together is that it shows just how abundant a source of legal, ethical, and political complexities the pursuit of the money trail is.

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Women Social Security Offenders Experiences of the criminal justice system in Western Australia

by Meredith Wilkie; University of Western Australia Crime Research Centre, Research Report No. 8, June 1993; 131 pp; \$15.00

This recently released report on women and social security fraud is important and significant in the area of women and the criminal justice system. Other research has shown that women's offending is different from men's and that courts may treat women offenders quite differently. To understand the reasons for women's offending and whether they are sentenced according to how they are perceived by the courts as well as their life situations, more research is required. Press reports have demonstrated that fundamental problems such as discriminatory sentencing and treatment in the courts do exist. This report by the Western Australian Crime Research Centre provides statistical evidence of such discriminatory treatment of women in the justice system. The author, Meredith Wilkie, concludes that women are more likely to be imprisoned for social security fraud than men – or indeed for any other offence – and that they are more likely to receive community service orders and bonds for this behaviour, while men are more likely to receive fines.

The report demonstrates that the reason for women's higher imprisonment

rate is in part because their offences are more likely to involve significantly higher amounts and to have occurred over longer time periods than men's offences. This is a significant finding. While the courts must have some measure of sorts to fix sentences, it is clear here that an economic measure is not adequate. The report points out that one reason larger amounts are more likely to be involved is because women are more likely to have children to support, so making the overall benefit paid higher. This report shows that the courts' economic measure cannot take women's life situations into account, and therefore produces unfair results.

While I agree with the thrust of the report's argument, some aspects of its methodology concern me. The report documents discriminatory practices by the methods of assessing statistical data and interviewing women social security offenders. There are problems with both.

The report examines the statistical data on the number of men and women prosecuted, convicted and imprisoned for social security fraud in Western Australia over four years. However, the analysis and conclusions only look at the total number of women social security offenders compared to men. This approach misses many relevant differences between different social security benefit categories among women themselves and also between men and women. Such differences may be significant when assessing the reasons for women's offending. For example, if women with children to support are more likely to defraud the department for reasons of need, then this aspect could be examined. The report's analysis would be adequate if all social security beneficiary cases were examined and reviewed in the same way. But this is not so. By simply comparing men to women, only part of the story is told. The numbers involved include women on age pensions (the largest proportion of women welfare recipients), women on unemployment benefit, and those on sickness benefit, many of whom have no dependent children. It also includes men on unemployment benefits – who may have dependent children.

A more interesting and possibly fruitful way of analysing women's situations would be to look at the different social security categories of benefits of men and women and compare them, for

example comparing male sole parent pensioners with female sole parent pensioners. These in fact show almost identical imprisonment rates. Not only would this sort of analysis demonstrate whether women with children (whose needs are greater) are dealt with more severely, it would also take account of the different life circumstances, different review times, and different opportunities that prevail for different benefit recipients – as well as examining the different offending rates of men and women. It would also answer such questions as: are unemployed females just as likely to defraud the department as unemployed males; are women who are in the same benefit category as men prosecuted at similar rates; are certain categories of social security recipients more likely to offend than others?

The report also shows that women are sentenced quite differently from men. Women are more likely to receive community service orders and bonds for offences, and men are more likely to receive fines. This may be because the majority of women who offend are sole parent pensioners relying entirely on welfare for their income. These women may find it difficult to pay a fine and more practical to do community service. The majority of men, on the other hand, may be more likely to be on unemployment benefit – for them a fine seems a more logical sentencing option. The report concedes this point but still finds it interesting that the courts' sentencing approach is so distinct in relation to men and women. Unfortunately, the report does not pursue this sentencing anomaly further. It does not, for example, look at the issue of any or different legal representation, it does not investigate the degree to which women themselves or their legal representatives influence their sentencing choice, and it does not investigate when such things as community service orders are given to women – it may be for fine default. Such an investigation would further illuminate the reasons for the courts' sentencing approach.

The report also discusses women's lives on state welfare and concludes that women offend for different reasons from men, because they are more likely to have children to support. Although I do not disagree with this, it is demonstrated by only 20 personal, informal interviews with a self-selected group of women. The women relate their experiences of the Department of Social Security and