



# Confiscation of the proceeds of crime: federal overview

Confiscating the assets of criminals is one of the legal responses included in the Financial Action Task Force's (FATF-GAFI) recommendations to the international community for combating money laundering and financing of terrorism. Recommendation Three requires countries to adopt measures similar to those in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and the United Nations Convention against Transnational Organized Crime and its Protocols for confiscating the proceeds of a range of specified predicate crimes that may be used in money laundering activities.

Australia ratified the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in 1992, the United Nations Convention against Transnational Organized Crime and its Protocols in 2004, and the United Nations Convention against Corruption in 2005. Australia has continued developing a comprehensive system for seizing and confiscating assets generated by financially motivated crime including corruption and terrorism.

The aims of the assets confiscation regime in Australia are twofold. First, the removal of funds generated by criminal activities is intended to deprive criminals of the benefits of their financially motivated criminality, thus reducing the motivation for offending. Confiscation also entails punishment for wrongdoing, which may deter further offending by both the criminal and others in the community. Second, removing access to assets generated from criminal activities reduces the capital available to perpetrators of future criminal ventures. This approach to crime control was first implemented in Australia in 1977 when the *Customs Act 1901* (Cth) was amended to allow seizure and confiscation of the proceeds of drug-related crimes as well as the drugs themselves (ALRC 1999). Over time, the Australian confiscation regime expanded from its focus on drug-related crime to include other criminal activities including terrorism. This has been achieved by adding different avenues for asset seizure and confiscation, and through large-scale reforms of the confiscation mechanisms available to law enforcement.

## Approaches to confiscation

There are two means by which the proceeds of crime can be recovered in Australia. The first method involves conviction-based recovery, which enables the recovery of assets associated with a crime after a conviction for that crime has been secured. The second method involves civil recovery, which allows the restraint and recovery of assets suspected of criminal origins without the necessity of securing a criminal conviction. The burden of proof required for civil forfeiture is lower than that of conviction-based recovery, the latter of which requires proof beyond reasonable doubt.

The original Australian state and territory legislation for recovering assets adopted conviction-based recovery. States and territories have since reformed their laws and all Australian states and territories, with the exception of Tasmania, now have legislation allowing for both civil and conviction-based recovery (Sherman 2006).

The assets generated by crimes, and suspected crimes, committed against federal laws may be recovered through a variety of means using both conviction-based and civil recovery. The Commonwealth Director of Public Prosecutions (CDPP) is the agency responsible for applying for orders for seizure and confiscation under all of the federal avenues for recovering the proceeds of crime.

## Federal legislation

### *PROCEEDS OF CRIME ACT 2002 (Cth)*

The *Proceeds of Crime Act 2002* (Cth) (POCA 2002) came into force on 1 January 2003 and is the instrument used to recover the largest proportion of criminal assets associated with federal crimes. The Act was the result of a review, which found that the inclusion of civil forfeiture at a federal level would vastly extend the capacity to recover funds from breaches of federal law (ALRC 1999). Once confiscated, assets are paid into an account and can be shared with those jurisdictions and foreign countries that made a significant contribution to the recovery under the equitable sharing program.

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The total amount of money recovered using the *Proceeds of Crime Act 2002* (Cth), between January 2003 and 30 June 2007, was A\$41,377,790.

The Act has provisions for four types of recovery orders: forfeiture, automatic forfeiture, pecuniary penalty and literary proceeds. Forfeiture and automatic forfeiture orders are used to recover assets generated from, or used in, a crime. Pecuniary penalty orders are debts payable to the Commonwealth for amounts based on the benefits derived from an offence or other illegal activity. Literary proceeds orders allow the Commonwealth to recover any profits made through the commercial exploitation of the notoriety gained from committing an indictable offence or a foreign indictable offence. The Act also allows for the recovery of assets derived from the commission of certain foreign indictable offences as defined in s 337A.

#### PROCEEDS OF CRIME ACT 1987 (CTH)

The *Proceeds of Crime Act 1987* (Cth) (POCA 1987) was the precursor to the current POCA 2002 legislation. The primary difference between the 1987 and 2002 Acts was the absence of civil forfeiture provisions in the POCA 1987. The older Act allowed the restraint of assets while criminal proceedings were taking place to prevent individuals hiding assets that might be subject to confiscation. However, the final order for recovery could only be issued after a conviction was secured. The CDPP still uses the POCA 1987 in conviction-based confiscation proceedings that commenced prior to 1 January 2003.

#### CUSTOMS ACT 1901 (CTH)

The *Customs Act 1901* (Cth) (Customs Act) provided the first avenue for the confiscation of criminal assets in Australia prior to amendments in 1979, which allowed for civil pecuniary penalties for dealing in narcotics. The

Act only allows the confiscation of assets in relation to activities associated with prescribed narcotics that are in contravention to the Act. The Act has provisions for pecuniary penalty orders and civil confiscation that do not rely on convictions. However, the Act does not contain provisions for automatic forfeiture in the event of a conviction. As Table 1 shows, the amounts recovered under the *Customs Act 1901* (Cth) have represented a small proportion of the total proceeds of crime recovered federally and its provisions are now rarely used to recover the proceeds of crime.

#### CIVIL REMEDIES

The *Director of Public Prosecutions Act 1983* (Cth) granted the CDPP the ability to pursue civil proceedings to recover liabilities to the Commonwealth. The most common areas employing the civil remedies function are those of unpaid tax, Medicare fraud and social security fraud. Civil remedies can only be used in conjunction with a prosecution or a proposed prosecution. The civil remedies possible under the *Director of Public Prosecutions Act 1983* (Cth), like the *Customs Act 1901* (Cth), are now used rarely to recover assets and have not been employed since 2002–03.

#### THE VALUE OF CRIMINAL ASSETS RECOVERED AT A FEDERAL LEVEL

Table 1 presents the amounts of funds confiscated and paid to the Commonwealth using the spectrum of the federal proceeds of crime mechanisms described above. Table 1 does not include the value of assets restrained (frozen pending the outcome of an investigation or criminal matter), as restrained assets are not necessarily recovered by the Commonwealth for numerous reasons. The full value of the pecuniary penalties issued is also not included, as these may also include amounts that are not recovered.

**Table 1: Federally recovered proceeds of crime, 1995–96 to 2006–07 (A\$)**

Year	Proceeds of Crime Act 2002	Proceeds of Crime Act 1987	Customs Act 1901	Civil remedies	Total
1995–96	n.a.	4,353,855	1,597,962	1,546,313	7,498,130
1996–97	n.a.	4,043,566	174,526	1,489,903	5,707,995
1997–98	n.a.	4,600,487	137,250	2,310,855	7,048,592
1998–99	n.a.	8,713,747	147,250	1,952,527	10,813,524
1999–2000	n.a.	4,699,489	86,255	131,161	4,916,905
2000–01	n.a.	5,306,316	0	942,998	6,249,314
2001–02	n.a.	5,814,649	31,717	1,042,045	6,888,411
2002–03	162,826	3,124,789	60,851	83,498	3,431,964
2003–04	3,436,440	6,422,189	491,412	0	10,350,041
2004–05	6,544,935	1,371,363	4,970	0	7,921,268
2005–06	14,691,198	3,713,398	15,960	0	18,420,556
2006–07	16,542,391	2,604,721	0	0	19,147,112
Total	41,377,790	54,768,569	2,748,153	9,499,300	108,393,812

Note: n.a.= not available

Source: Commonwealth Director of Public Prosecutions (2007); CDPP annual reports, 1995–96 to 2006–07

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All URLs were correct at 14 April 2008

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