PART 2

MONEY LAUNDERING, CASH TRANSACTIONS REPORTING, AND CONFISCTION OF THE PROCEEDS OF CRIME

INTRODUCTION

On 6 June 1990 over 300 people attended a public seminar on money laundering, cash transaction reporting and confiscation of the proceeds of crime sponsored by the Institute of Criminology. This would seem to indicate that there is a strong degree of public interest in the subject. At the same time, however, this "interest" is not translated into the realm of discussion and open debate. While in the United States, the topic has "created a scholary and public uproar",[1] with a few notable exceptions,[2] Australians have quietly, and uncharacteristically, acquiesced to the introduction of legislation in the field.

In the absence of public debate and criticism, governments have proceeded with amazing alacrity to adopt measures to combat "drugs" and "organised crime" and, perhaps more importantly, to publicise these measures. Since the public seminar was held, for example, the Government of New South Wales has proclaimed the *Drug Trafficking (Civil Proceedings) Act* 1990 which allows *inter alia*, for pre-judgment restraining orders against property which is "drug-derived" or "illegally acquired" (s 9) and for an "assets forfeiture order" "vesting in the Crown all or any of the interests in property that are subject to the restraining order when the assets forfeiture order takes effect" (s 22(1)). The statute provides for a civil, rather than a criminal, burden of proof (s 22(2)) and creates a six year presumptive period which "taints" property (ss 22(2)(a) and (b)). Finally, it provides that forfeiture of "tainted" property,

> need not be based on a finding as to the commission of a particular offence that constitutes a drug-related activity or a finding as to any particular quantity involved;
>
> and can be based on a finding that some offence or other constituting a drug-related activity was committed involving some quantity or other that was an indictable quantity.[3]

Since the proclamation of these provisions, authorities have moved to obtain restraining orders in several cases,[4] and the media have joined in the hunt. On 17 September 1990, the *Daily Telegraph's* headline trumpeted "Crime Chief's Assets Seized"

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1 Fried, "Rationalizing Criminal Forfeiture" (1988) 79 *J of Criminal Law and Criminology* 328

2 For the most cogent criticism of Australian legislation see Fisse, "Confiscation of Proceeds of Crime: Funny Money, Serious Legislation" (1989) 13 *Criminal Law Journal* 369

3 *Drug Trafficking (Civil Proceedings) Act* (NSW) ss 22(3)(a) and (b)

4 See, for example, Synott, "Move to seize man's assets" *Sun-Herald* 12 August 1990

and the *Sydney Morning Herald* included a story entitled "$1m Seized From Drug Suspects Under New Laws".

In addition to this New South Wales legislation, the reporting provisions of the Federal *Cash Transactions Reports Act* came into effect on 1 July 1990. This development was accompanied by the following headlines;

CRACKDOWN ON CASH LAUNDERS

TWO MEN ARRESTED OVER NEW CASH LAWS

WIFE 'LAUNDERED' $300,000

WIFE 'HAD 23 FALSE ACCOUNTS'[5]

and one voice of concern.[6]

At the level of government and public (media) attention, at least, the issues surrounding asset forfeiture, cash transaction reporting and money laundering are high on the agenda. The papers included in this volume of *Current Issues in Criminal Justice* attempt to shed some more light on this burgeoning and important area of law. In keeping with the new practice of this journal, we include not only some of the papers from the June public seminar, but others written especially for this issue.

The papers themselves canvas a broad area and indicate that this field of legal practice extends well beyond the traditional borders of criminal law. Bill Coad offers useful insights into the practice of the Cash Transactions Reports Agency while Philip Bradley and John Thornton in their papers illustrate the broad scope of legislation covering asset seizure and forfeiture. Lee Burns demonstrates that there are serious and unresolved questions surrounding this area and that much can be learnt from those working in the revenue and taxation areas. Patricia Loughlan points out that the common law, or more precisely, equity, may well offer an alternative or complimentary route through the morass of legislative provisions now operating in the field of asset forfeiture. What these last two essays make clear is that the fields of asset forfeiture, cash transactions reporting and money laundering do indeed transcend the boundaries of what we normally consider criminal law. This new tool in the "war on drugs" raises very practical issues not only for criminal lawyers, but for those working in fields as diverse as equity and taxation. In addition, because of the complexity of dealings and the nature of transactions in this area, the law will affect bankers and their lawyers as well as government and diplomatic policymakers. The problems of effective enforcement of laws aimed at drug trafficking

5 *Sun-Herald* 3 June 1990; *Sunday Telegraph* 1 July 1990; *Sun-Herald* 15 July 1990; *Sunday Telegraph* 15 July 1990

6 "Privacy Committee Alarmed" *Sun Herald* 3 June 1990

and money laundering are clearly transnational in scope and demand international co-operation[7] at every level.

Not only does this legislation have an impact on criminal law, taxation, equity, international law and banking law, but it will also be of concern to others who deal in property, either as cash dealers under the CTRA (covering everyone from bookmakers to used car dealers to banks) or as holders of security interests. As proceeds are laundered, real estate and moveable property become not only attractive investments but potentially tainted property subject to seizure and forfeiture. In the United States, vast areas of farmland have been purchased by "reputed drug traffickers and money launderers",[8] and in the United Kingdom, solicitors have expressed concerns over the conveyancing implications of dealings in property which may be tainted.[9] Given the six year presumptive period in New South Wales, for example, the protection of third party or subsequent purchaser interests, will no doubt cause many problems in the not so distant future.

Moreover, there is no reason to think, especially in light of the American experience under RICO and related legislation, that forfeiture and seizure will be limited to "drug" or "organised crime" cases. As Philip Bradley and John Thornton point out, other offences are also likely to give rise to forfeiture under current Australian legislation. The recent rise in corporate failures and fraud has seen calls for increased powers of forfeiture in such cases by the United States Justice Department,[10] and, as Brent Fisse points out,[11] Australian legislation can clearly be used in the "white collar" crime area and:

> . . . governments that obtain convictions in the wake of recent company collapses in Australia stand to make a killing at the expense of banks and other lending institutions which have dealt in funds directly or indirectly connected with the commission of fraud, tax or other serious offences.

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7 See, for example, Gilmore, "Narcotic interdiction at sea: UK-US co-operation" (1989) 15 *Commonwealth Law Bulletin* 1480; Murphy, "Drug Diplomacy and the Supply-Side Strategy: A Survey of United States Practice" (1990) 43 *Vanderbilt Law Review* 1259; Corcoran and Carlson, "Criminal Prosecution of Drug Traffickers under the Continuing Criminal Enterprise Statute in Federal Courts of the United States of America" (1983) 35 *Bulletin on Narcotics* 77; "G-7 Nations Launch Global Laundering Assault" *Money Laundering Alert* No 8, May 1990, p 1

8 "Farmers: Traffickers buy US land" *Money Laundering Alert* No 7, April 1990, p 1

9 "Crime, Confiscation and the Conveyancer" (1990) 11 *Solicitor's Journal* 537. See also Jankowski, "Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases" (1990) 76 *Virginia Law Review* 165

10 Barrett, "Justice Agency Supports Bill Expanding US Ability to Seize Assets in Fraud Cases" *Wall Street Journal*, 16 May 1990

11 "Launderers of Cash Now Face the Wringers" *The Australian* 28 August 1990. See also Innes, "Costigan says NCA should be Abolished" *Sydney Morning Herald* 24 September 1990, where Frank Costigan QC is reported as having "accused the Federal Treasurer, Mr Keating of permitting international money laundering on a huge scale by failing to maintain proper monitoring mechanisms when financial deregulation occurred in 1984".

All of this shows, if further demonstration was necessary, that the current legislative vogue in the "war on drugs" will have a wide-ranging impact on the daily practice of all areas of business, finance and law. Virtually no-one will be left untouched in this battle and yet, as I stated earlier, the silence surrounding the area in Australia is deafening.

The Institute of Criminology, through its public seminars and the publication of *Current Issues in Criminal Justice*, wishes to encourage open and vigorous debate on this and other topics of interest to those affected by criminal justice legislation and enforcement practices.

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