

## **Have Your Client's Assets Suddenly (and Unexpectedly) been Frozen/ Restrained under *Proceeds of Crime Act* orders?**

**By Christopher Catt<sup>1</sup>**

1. The *Proceeds of Crime Act 2002* (Cth) (**POCA**) is the Commonwealth civil law scheme<sup>2</sup> to trace, restrain and confiscate the proceeds of crimes against Commonwealth law. Proceedings under POCA start when an application for a restraining order of specified property and other orders, has been filed. The proceedings end when the time for applying for exclusion of property from restraint/forfeiture, or recovery from forfeiture, or compensation orders expires. Proceedings also end when any applications for revocation, exclusion, recovery, compensation, or for enforcement of confiscation orders, have been finally determined and confiscation orders made in the proceedings, including pecuniary penalty orders and unexplained wealth orders, have been satisfied.
2. The Criminal Asset Confiscation Taskforce<sup>3</sup> was launched in January 2011, and under amendments to POCA effective from 1 January 2012 the Commissioner of Australian Federal Police (**Comr AFP**) took over responsibility for administration of POCA from the Commonwealth Director of Public Prosecutions (**CDPP**).
3. A recent ANAO report "Proceeds of Crime"<sup>4</sup> explains that:

“2.1 Potential *Proceeds of Crime Act 2002* (POCA) cases are initially reviewed by the multi-entity Criminal Assets Confiscation Taskforce (CACT) through its regular case forum meetings. .... Case forum meetings are also used to identify appropriate treatment options, such as referral to the AFP Criminal Assets Litigation (CAL) area for commencement of

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<sup>1</sup> **Disclaimer** - the materials and opinions expressed in this paper and my presentation are intended for discussion and educational purposes only, and should not be used or treated as professional advice, readers should rely on their own enquiries and should not rely on the contents of this paper especially as to the time limitations

<sup>2</sup> This paper does not cover State schemes for confiscation. For a history of confiscation/forfeiture law, and the constitutionality of proceeds of crime legislation, see *Attorney-General (NT) v Emmerson* [2014] HCA 13; (2014) 307 ALR 174.

Also note that the Commissioner of Taxation's powers of debt recovery extend to obtaining freezing orders from the Federal Court against the property of taxpayers and related parties: see Ken Lord, "Freezing Orders: Debt Management and Enforcement", TIA 32<sup>nd</sup> National Convention in Adelaide on 17 March 2017, and recently, *Deputy Comr of Taxation v Citi Pty Ltd* [2018] FCA 103.

<sup>3</sup> which is led by the AFP and includes the ATO and the Australian Criminal Intelligence Commission

<sup>4</sup> <https://www.anao.gov.au/work/performance-audit/proceeds-of-crime>

litigation or referral to the Australian Taxation Office (ATO) for action, such as the raising of a tax liability.”

4. Civil based POCA litigation against a suspect may proceed in parallel with criminal prosecution (where AFP and CDPP have distinct responsibilities); although the courts retain some power to order a stay of the POCA litigation if the court considers it to be in the interests of justice to do so. There may also be substantial overlap between the facts/issues in the proceedings under Part IVC of the *Taxation Administration Act 1953* and those in the criminal prosecution and POCA litigation – where the Federal Court has the power to order a stay of the Part IVC proceedings<sup>5</sup>.
5. POCA also has a scheme whereby proceeds from disposal of forfeited property, initially transferred to the Confiscated Assets Account, are used to make funding grants to non-government and community organisations, local councils, as well as to the AFP, state police forces, CACT<sup>6</sup> and other Commonwealth criminal intelligence entities, in an endeavour to prevent and reduce the harmful effects of crime in Australia.
6. In *Comr AFP v Hart & Ors* [2018] HCA 1 at [32]-[33], Gordon J (with whom Kiefel CJ, Bell, Gageler and Edelman JJ agreed) said:

“... [POCA] is intended to, and does, prevent criminals from enjoying the fruits of their crimes, deprive them of the proceeds of and benefits derived from criminal conduct, prevent the reinvestment of those proceeds and benefits in further criminal activities, punish and deter breaches of laws, and enable law enforcement authorities to trace the fruits of offences ...

It achieves these objects through a confiscation scheme ... which provides for orders restraining persons from disposing of or otherwise dealing with particular property..., forfeiture orders..., automatic forfeiture of property following conviction of a serious offence ... and pecuniary penalty orders ...” (footnotes omitted)
7. It should be noted that the applicable version of the POCA for the purposes of the *Hart* appeals was the POCA as at 13 July 2006 when the restraining orders were made; and that POCA, relevantly including s.102, was significantly amended in 2010 (see *Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2) 2010* (Cth)). There were further significant amendments to POCA since 2011, and most recently the *Proceeds of Crime Amendment (Proceeds and Other Matters) Act 2018* (Cth) (**2018 Amending Act**) - effective from 28 March 2018 – has amended provisions of POCA in response to the decisions in *Comr AFP v Huang* [2016] WASC 5 and *Comr AFP v Hart & Ors* [2016] QCA 215.

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<sup>5</sup> see *Obeid v Commissioner of Taxation* [2017] FCA 1135

<sup>6</sup> see <https://www.smh.com.au/national/afp-delayed-seizing-about-300m-proceeds-of-crime-20150305-13w6v5.html>

8. In this paper I will refer to facts and outcomes arising from POCA proceedings involving suspected tax fraud offences, including Timothy Charles Pratten, Anthony Dickson, Steven Hart and Adam Cranston.
9. I will also address a hypothetical scenario where POCA restraining orders have just been made *ex parte* by a court with \*proceeds jurisdiction<sup>7</sup> on the application of a \*proceeds of crime authority – the Comr AFP – and where the orders, the application/summons and the supporting affidavit have now been served<sup>8</sup> on the suspect and the unsuspecting spouse. The property covered by the restraining orders includes bank accounts, a jointly owned residence, investment properties owned by the trustee company of a discretionary trust, and assets of a related private company. The restraining orders are now in force<sup>9</sup> and caveats have been registered<sup>10</sup> by a \*registration authority<sup>11</sup> - such as NSW Land Registry Services in relation to real property in NSW – and notice of the restraining orders has been emailed to the relevant financial institution(s).
10. This paper does consider some historic provisions of POCA, and will observe the retrospective operation of the 2018 amendments to POCA in considering the rights of the unsuspecting spouse and other persons under the “safeguards and protections”<sup>12</sup> contained in POCA – primarily being rights to apply for variation or revocation or exclusions.

### **Freezing orders and seizure of property under search warrants**

11. Under POCA the more important mechanisms leading to forfeiture of the suspect’s and spouse’s interest in property involve restraining orders (see further below).

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<sup>7</sup> whether a court has proceeds jurisdiction may depend upon the location of the assets sought to be restrained – see *Comr AFP v Fitzroy All Pty Ltd* [2015] WASC 320, transfer of proceedings to Supreme Court of Victoria where restraining orders related to funds deposited at various branches of NAB in Victoria

<sup>8</sup> s.33(1) and (2) POCA

<sup>9</sup> s.41 POCA

<sup>10</sup> upon the application of the Comr AFP: see s.34(1) and (2) POCA

<sup>11</sup> defined in s.338 POCA

<sup>12</sup> see paragraphs 38 to 40 of the Explanatory Memorandum to the *Proceeds of Crime Amendment (Proceeds and Other Matters) Act 2018* (Cth) (**2018 Amending Act**)

12. The confiscation scheme of POCA<sup>13</sup> also permits the making of freezing orders. Under s.15B POCA, a magistrate must order a financial institution not allow a withdrawal from a specified bank account (except in the manner and circumstances specified in the order) if an \*authorised officer (of the AFP) applies for the order (including urgently by telephone) and there are reasonable grounds to suspect the account balance reflects proceeds of, or an instrument of, certain offences; and where the magistrate is satisfied that unless the freezing order is made there is a risk that the balance of the account will be dissipated.
13. In the context of POCA, it has been held that the requirement of “reasonable grounds to suspect” is something less than a *prima facie* case, and that the requirement may be satisfied even where the evidence is less than compelling<sup>14</sup>; and that a “reasonable suspicion” does not require proof or admissible evidence<sup>15</sup>.
14. The authorised officer must then serve the freezing order and a written statement on the financial institution and on each account holder<sup>16</sup>. A freezing order is usually obtained as a precursor to a restraining order. The freezing order comes into force when it is served on the financial institution and ceases to have force after 3 working days, unless it is extended or a restraining order is made covering the account<sup>17</sup>.
15. The account holder may apply to the magistrate to vary the freezing order, so as to allow withdrawals from the account to meet reasonable living expenses, reasonable business expenses and specified debt incurred in good faith<sup>18</sup>. This requires the account holder to give notice to the authorised officer and also to lead supporting evidence of their inability to meet the expenses from their other property and that the expense/debt does not relate to legal costs in POCA proceedings or criminal proceedings. There is also a procedure to apply for the magistrate to revoke a freezing order<sup>19</sup>.

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<sup>13</sup> Part 2-1A in Chapter 2 POCA

<sup>14</sup> see *DPP v Chan* [2004] ACTSC 101,[13]-[15]; and in more detail, *Comr AFP v Tjongosutiono* [2018] NSWSC 48, [107] (and cases considered)

<sup>15</sup> *Ma v Comr AFP* [2016] VSC 553,[34] referring to *Ex parte Comr AFP* [2014] WASC 390, [19]-[21]; and also see *Comr AFP v Fitzroy All Pty Ltd* [2015] WASC 320, [23] to [24]

<sup>16</sup> s.15J POCA

<sup>17</sup> s.15N POCA

<sup>18</sup> s.15Q POCA

<sup>19</sup> s.15R POCA

16. Another basis for interim confiscation is seizure of suspected \*tainted property – or of things relevant to unexplained wealth proceedings – that was found on execution of a search warrant issued by a magistrate pursuant to Part 3-5 of POCA. Such property could well include cash, bullion, jewellery, and watches found at the suspect’s premises that was believed to be tainted property.
17. The seized property is then kept by the \*responsible custodian – ie the head of the AFP. A person claiming an interest in the seized property can apply to the court for orders that the responsible custodian return the property – but the applicant would need to satisfy the court of their entitlement; that the seized property was not tainted property; and that a person suspected of committing a criminal offence has no interest in the property<sup>20</sup>.
18. The seized property must be returned after 14 days unless an application for a restraining order or forfeiture order is made with respect to the property<sup>21</sup>. If a restraining order is made, the responsible custodian must deal with the property as required by the orders, including delivery to the Official Trustee to take custody and control<sup>22</sup>.

### **Other POCA orders**

19. The scope of this paper and time restraints on my presentation will only permit brief mention of two important types of POCA restraining orders.
20. Under s.20 POCA<sup>23</sup>, the Comr AFP may seek a literary proceeds restraining order that specified property – which may include property acquired after the order is made – must not be disposed of or dealt with, where there are reasonable grounds to suspect that a person has committed an \*indictable offence or a \*foreign indictable offence, and the person has derived \*literary proceeds<sup>24</sup> in relation to the offence: see *DPP (Cth) v Corby* [2007] QCA 58, relating to payments by publishers to Schapelle Corby, her sister and brother-in-law in respect of a book “My Story – SCHAPELLE CORBY with Kathryn Bonella”.

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<sup>20</sup> s.259 POCA

<sup>21</sup> s.260 POCA

<sup>22</sup> s.261 POCA

<sup>23</sup> and also Part 2-5 of Chapter 2 of POCA (ss151-179) regarding literary proceeds orders

<sup>24</sup> defined in s.153, generally being benefits derived from commercial exploitation of the person’s notoriety from committing the offence or their involvement in the commission of the offence

21. Under s.20A POCA<sup>25</sup>, the Comr AFP may seek an unexplained wealth restraining order on the basis that there are reasonable grounds, set out in an affidavit, to suspect that:
  - (1) a person has unexplained wealth (being where the person's \*total wealth exceeds the value of the person's \*wealth that was \*lawfully acquired), and
  - (2) the person committed an offence against *inter alia* a law of the Commonwealth, or the whole or part of the person's wealth was derived or "realised, directly or indirectly"<sup>26</sup> from such an offence.
22. The decision in *Re Application under sec 20A of POCA; ex parte Comr AFP* [2017] WASC 114 concerns unexplained wealth restraining orders covering cash with numerous banks (\$241,324), vehicles (\$307,730) and real property other than the primary residence (\$2,981,021) and future rental receipts, which was the \*property of two individuals (P and his de facto, N), and of 3 companies and a family trust which was suspected of being property under the \*effective control of P and N.
23. The AFP officer provided an affidavit supporting his suspicions that total wealth exceeded the value of lawfully acquired wealth – essentially, that the abovementioned property exceeded a value of \$3.5m and there had been net withdrawals from bank accounts of \$5m over 6 year period, when P's declared taxable income over the 6 years was \$232,173 and N's declared taxable income over the 6 years was \$206,000.
24. The AFP officer had a reasonable suspicion that P and N had committed offences contrary to s.135.1(3) of the *Criminal Code (Cth)* based on failing to declare their true income to the ATO; receiving government assistance when not entitled; and failing to declare true income received in cash; and that they had committed money laundering offences contrary to s 400.9(1) or s 400.9(1A) of the *Criminal Code (Cth)* based on using 'money laundering techniques' and integrating proceeds of crime by cashing in horse betting winnings, receiving winnings from third parties, the purchase of vehicles and properties and obtaining mortgages where loans were quickly reduced.

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<sup>25</sup> and also Part 2-6 of Chapter 2 of POCA (ss179A-179U) regarding unexplained wealth orders, which includes relevant definitions. There is a proposed *Unexplained Wealth Legislation Amendment Bill 2018 (Cth)* that will if enacted create a national cooperative scheme on unexplained wealth.

<sup>26</sup> this is an amendment made by the 2018 Amending Act

## Restraining orders

25. In respect of the 3 types of POCA restraining orders discussed below<sup>27</sup>, practitioners should be aware of the strict time limits for applications to be made by the suspect and spouse to vary orders and seek revocation orders; and the prospect that failure to comply with those time limits can result in restrained property being irretrievably forfeited to the Commonwealth without compensation.
26. Firstly, the Comr AFP may choose<sup>28</sup> to apply<sup>29</sup> to a court with proceeds jurisdiction (**court**) for restraining orders under s.17 POCA where a person has been convicted of, or has been charged with, an \*indictable offence<sup>30</sup>, or it is proposed that he or she be charged with an indictable offence.
27. The more common application by the Comr AFP is for restraining orders under s.18 POCA on the basis that there are reasonable grounds to suspect that a person has committed a \*serious offence<sup>31</sup> - which would cover offences contrary to s.135.4(3) of *Criminal Code* such as dishonestly causing loss to the Commonwealth by lodging income tax returns that understated assessable income or claimed deductions that the person was not entitled to; and dealing with proceeds of crime/money laundering type offences contrary to s.11.5(1) and s.400.3(1) of *Criminal Code*. The reasonable grounds

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<sup>27</sup> also applying to literary proceeds orders and unexplained wealth orders

<sup>28</sup> see s.27 POCA which permits Com AFP to choose under which section of POCA it applies for a restraining order where it could apply under different sections

<sup>29</sup> in the Supreme Court of NSW the application is by means of a summons for all types of restraining orders, where as a preliminary matter Comr AFP seeks the summons to be made returnable immediately, and the applications be heard in closed court in the absence of the public. Section 26(1) POCA requires Comr AFP to give written notice and a copy of the application and supporting affidavit to the owner of the property, and written notice and the application to any other person believed may have an interest in the property. However, s.26(4) POCA allows Comr AFP to request the court to consider the application without notice having been given. The application must then be heard *ex parte* and, here, prior to the suspect being charged. This serves to prevent the suspect (or associates) disposing of or otherwise encumbering the property sought to be brought to Australia and restrained; and also ensures ongoing confidentiality and integrity of the criminal investigation. Comr AFP may also seek temporary (or limited) suppression orders under *Court Suppression and Non-publication Orders Act 2010* – see for example, *Comr AFP v Dickson* (No 1) [2013] NSWSC 560 and *Comr AFP v Dickson* (No 2) [2013] NSWSC 749

<sup>30</sup> defined in s.338 POCA, relevantly “means an offence against a law of the Commonwealth ... that may be dealt with as an indictable offence (even if it may also be dealt with as a summary offence in some circumstances”

<sup>31</sup> defined in s.338 POCA, to include indictable offences punishable by imprisonment in excess of 3 years if the offences relates to *inter alia* money laundering or unlawful conduct by a person that causes, or is intended to cause, a loss to the Commonwealth or another person of at least \$10,000

of suspicion need not be based on a finding as to the commission of a particular serious offence. The property covered by s.18 POCA restraining orders may include all or specified property of the \*suspect and specified property of another person (whether or not that other person's identity is known) that is believed to be subject to the \*effective control<sup>32</sup> of the suspect, and to another person's property that is suspected to be \*proceeds of the offence or an \*instrument of the offence.

28. The third application by the Comr AFP relates to the property of a person or entity other than the suspect and spouse, and is made under s.19 POCA on the basis that there are reasonable grounds to suspect that property sought to be restrained is \*proceeds of certain indictable offences or is an \*instrument of a serious offence (but not requiring a person to be charged, nor requiring a finding as to the commission of a particular offence).
29. It is convenient now to consider when property **becomes** \*proceeds of an offence or an \*instrument of an offence under the provisions of s.330 POCA, which were repealed and replicated in part and expanded by the 2018 Amendments. Although the amendments apply after the date of royal assent on 28 March 2018, the effect of the expanded definitions is to cover actions (eg repayment of loans from proceeds) that may have occurred well before commencement.

The rules in s.330(1)(a) and (b) and in s.330(2)(a) and (b) POCA continue to provide that property becomes proceeds/instrument of an offence where the property is wholly or partly derived or realised from a disposal or other dealing with proceeds/instrument of the offence, and where the property is wholly or partly acquired using proceeds/instrument of the offence.

30. The expanded rules in s.330(1)(c) to (e) and s.330(2)(c) to (e) now cover circumstances where:
  - an \*encumbrance or a security on, or a liability incurred to acquire, retain, maintain or make \*improvements<sup>33</sup> to, the property is wholly or partly discharged using proceeds/instrument of the offence,
  - the costs of retaining, maintaining or making improvements to the property are wholly or partly met using proceeds/instrument of the offence, or
  - the property is improved using proceeds/instrument of the offence.

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<sup>32</sup> defined broadly in s.337 POCA, which permits the court to consider property without the Comr AFP needing to show that it is *in fact* under the effective control of the suspect: see *Comr AFP v Hart* [2018] HCA 1, Gordon J at [63]

<sup>33</sup> now defined in s.338 POCA to include additions to, altering, repairing, restoring, structuring, restructuring, or any other change to the whole or part of the property, whether or not it results in an increase in value of the property

The 2018 Amendments to s.336A(c) POCA also clarify that property will only be \*lawfully acquired in situations where the property is not proceeds or an instrument of an offence.

The Explanatory Memorandum to the 2018 Amending Act at para [8] to [10] notes that:

“Criminals regularly create a complex web of financial arrangements and asset protection structures to hide or disguise ‘proceeds’ or ‘instruments’ of crime, including using a range of mortgages, loans and other agreements to achieve this purpose.

‘Proceeds’ and ‘instruments’ of crime can also be used to retain, maintain improve, alter, repair, restore, structure and restructure a broad range of tangible and intangible property and wealth, including funding renovations to real property, ongoing maintenance or restoration costs associated with luxury products such as planes and vintage cars, upgrading the assets of a business, the costs associated with subdividing or building on land ...

The amendments at Schedule 1 of the Bill ensure that proceeds of crime authorities can appropriately restrain and confiscate property or wealth in these instances, ensuring that criminals are not able to deliberately structure their affairs to avoid the operation of the Act and retain their ill-gotten gains.”

31. The restraining orders sought will be to the effect that property or interests in property which is specified in the orders (for example funds in bank accounts, shares, bullion, diamond jewellery, luxury cars, planes, yachts and boats and real property) must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the orders. The court may specify that the restraining orders under s.17 or s.18 POCA also covers property that is acquired by the \*suspect after the court makes the order (for example rental income generated in respect of the restrained properties). The purpose of the restraining order is to preserve the status quo where the property may be subject to a forfeiture order and a pecuniary penalty order.
32. A restraining order must be made by the court on application of Comr AFP where there is a supporting affidavit of the authorised officer (meeting affidavit requirements<sup>34</sup>) that permits the court to be satisfied that the authorised officer holds the suspicion(s) stated in the affidavit on reasonable grounds. The application and affidavit will also describe the property sought to be restrained that is owned by the suspect, or owned by another person but is suspected to be subject to the effective control of the suspect, or that is proceeds of the offence or an instrument of the offence.
33. The court must make a restraining order even if there is no risk of the property being disposed of or otherwise dealt with. The court may refuse to make a restraining order under s.17 and s.19 POCA in relation to an \*indictable offence that is not a \*serious

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<sup>34</sup> s.17(3) POCA and s.18(3) POCA, and s.19(1)(e) POCA

offence if the court is satisfied that it is not in the public interest to make the order<sup>35</sup>.

The court does not have the power of refusal for applications for restraining orders under s.18 POCA. The court can also refuse to make a restraining order if the Commonwealth refuses or fails to give an undertaking<sup>36</sup>.

34. Attempting to contravene restraining orders is an offence under s.37 POCA. Following Pratten's arrest in 2010 for tax fraud offences, the CDPP obtained a restraining order under s 17 POCA over a number of assets, including a fishing boat. On 3 July 2012, Pratten was arrested for attempting to remove the boat from Australia, and was charged with offences under s 37(1) POCA and s 11.1(1) of the *Criminal Code*. On 22 July 2016, Pratten was convicted in the NSW District Court of the 'POCA offence' and ordered to pay a fine of \$10,000. The NSW Court of Criminal Appeal<sup>37</sup> upheld the CDPP appeal that this sentence was manifestly inadequate, and set aside the sentence imposed by Baly DCJ (and the NSWCCA ordered that if the fine had been paid, it could be remitted); and in place the NSWCCA imposed 6 months imprisonment (which was taken to have started on 20 January 2016 and expired on 19 July 2016). Pratten's terms of imprisonment for various tax fraud offences were increased by the NSWCCA and the single non-parole period was fixed at 3 years 9 months, so the time he would be first eligible for parole changed from 19 January 2018 to 19 October 2019.
35. The Comr AFP may also apply to the court for custody and control orders under s.38 POCA - that the Official Trustee in Bankruptcy takes custody and control of items of items of the specified property, such as rental properties and bank accounts<sup>38</sup>.
36. The application may ask the court to make ancillary orders under s.39(1)(e) POCA that regulate the manner in which the Official Trustee exercise its powers or perform its duties concerning the controlled property, and also relating to the liabilities of the owner. This can extend beyond securing and insuring the controlled property, and may permit the Official Trustee collect all the rent from the controlled property, and to sell the controlled property which secures loans where repayments are in arrears (perhaps because rental income is no longer available to meet loan payments), or to sell the controlled property to preserve equity.

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<sup>35</sup> s.17(4) POCA and s.19(3) POCA

<sup>36</sup> s.21 POCA

<sup>37</sup> *CDPP v Pratten* (No 2) [2017] NSWCCA 42, [122] to [150]

<sup>38</sup> see *Application of the Comr AFP; In the matter of Lami* [2017] NSWSC 1345, [33] where the custody and control order was "required to safeguard against any inadvertent access or dissipation of the funds contained within the bank accounts through administrative error, thereby ensuring that those funds are preserved pending the resolution of these proceedings"

37. Other common ancillary orders are for sworn statements, ie:
- under s.39(1)(ca) POCA, an order may be made directing the suspect to give a sworn statement setting out all of his or her \*interests in property (located worldwide), and his or her liabilities (worldwide), and
  - under s.39(1)(d) POCA, an order may be made that the owner or director of a company give a sworn statement setting out particulars of, or dealings with, specified property; and/or that another person give a sworn statement where the court is satisfied that there are reasonable grounds to suspect that another person has information relevant to identifying, locating or quantifying specified property, and
  - under s.39(1)(da) POCA an order may direct a person to give a sworn statement setting out particulars of, or dealings with, specified property.
38. A person required to provide a sworn statement under ss.39(1)(ca), (d) or (da) is not excused by any privilege against self-incrimination<sup>39</sup>, although the sworn statement may not be admissible in civil or criminal proceedings against a natural person. In *Comr AFP v Dickson* [2013] NSWSC 1584, the Comr AFP obtained additional ancillary orders under s.39(1)(ca) and (d) POCA (with greater specificity as to the obligations of Dickson and his spouse) on the basis that the sworn statements they had previously provided were inadequate and there was alleged insufficiency of compliance with the original ancillary orders.
39. The Comr AFP may also apply for ancillary orders generally under s.39 POCA (ie orders that the court considers appropriate) preventing the suspect and spouse from refinancing, or drawing down on facilities and credit accounts, or extending facilities with financial institutions without the leave of the court. And conditions in the restraining orders made over real property that is presently subject to registered mortgages may permit the financial institution/mortgagee to deal with the property in accordance with the terms of the mortgage.
40. In making the application for restraining orders, the Comr AFP's summons may also seek relief in the form of examination orders (s.180 POCA), and make an application for

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<sup>39</sup> s.39A POCA – raising the potential of prejudice to the suspect's defence in criminal proceedings. but such prejudice will not warrant a stay for the suspect (see *Comr AFP v Elzein* [2017] NSWCA 142, [105]), or for the spouse (see *Comr AFP v Dickson & Ors* [2012] NSWSC 1167, [79] to [85]; and *Comr AFP v Cacu* [2015] NSWSC 1232, [43]); also note that s.206 POCA that the privilege does not excuse a person from providing information with regard to a production order, and s.271 POCA provides that a person is not excused from providing information about controlled property to the Official Trustee if the information may tend to incriminate them

forfeiture orders<sup>40</sup> (s.47 or s.49 POCA) and for pecuniary penalty orders (s.116 POCA) - where the applications for the latter two types of orders is likely to be deferred.

41. The examination orders under s.180 POCA may require the suspect, spouse and other persons identified by Comr AFP to be examined about the \*affairs<sup>41</sup> of the suspect, of the spouse, and of another person whose property is subject to the restraining orders.
42. In *Comr AFP v Cranston and Ors (No 1)* [2017] NSWSC 624<sup>42</sup>, Fullerton J made orders under s.18, s.38 and s.180 POCA. The s.180 orders were for examination of the suspected offenders and some of their close associates (including Cranston's father, the former ATO deputy commissioner), where Fullerton J said at [17]:

“... In addition to the examination orders to be made forthwith potentially operating to defer or deflect any of the persons to be examined from the temptation to collaborate or to engage in structured dissembling (something I am satisfied has occurred in the recent past as evidenced by the product of some of the electronic surveillance exhibited before me), making examination orders at this time enhances the prospects of the examinations being effectively employed as part of the regime under the POCA designed as it is to meet the statutory objectives of the preservation and confiscation of the proceeds of crime.”
43. I do not propose to deal extensively with examination orders in this paper, other than to note that the examination is compulsory<sup>43</sup>; there are limits on privilege<sup>44</sup> (in particular there will be no privilege against self-incrimination) - but there may be restrictions on publication of the record of the examination<sup>45</sup> and the answers and documents are

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<sup>40</sup> under s.45(2) POCA a restraining order would cease to be in force if, within 28 days after the order is made, the suspect had not been convicted or charged with at least one of the offences to which the restraining order relates and there was no application for a confiscation order

<sup>41</sup> under s.338 POCA "affairs" of a person includes, but is not limited to: (a) the nature and location of property of the person or property in which the person has an interest; and (b) any activities of the person that are, or may be, relevant to whether or not the person has engaged in unlawful activity of a kind relevant to the making of an order under this Act

<sup>42</sup> where the suspected serious offence was an organised taxation fraud, later described as involving Cranston conspiring with others to dishonestly cause a loss to the ATO in the amount of \$83,735,535.28 contrary to s 135.4(3) of the *Criminal Code*; and there were further *ex parte* applications for restraining orders under s.18 and s.19 POCA concerning 'the blackmail funds' see *Comr AFP v Cranston & Ors (No 3)* [2017] NSWSC 674 and *Comr AFP v Cranston & Ors (No 4)* [2017] NSWSC 716

<sup>43</sup> refusal or failure to attend is an offence under s.195 POCA, and refusal or failure to answer a question or to produce a document specified in the \*examination notice are also offences under s.196(1)

<sup>44</sup> s.197 POCA

<sup>45</sup> s.193 POCA

inadmissible in civil or criminal proceedings<sup>46</sup>; and that giving false or misleading answers or documents is an offence<sup>47</sup>. The fact that criminal proceedings have been instituted or have commenced – raising the prospect that the compulsorily acquired answers could prejudice the defendant in the conduct of their defence in criminal proceedings - does not prevent the examination being conducted, and there a severe limitations on seeking stays and revocation of examination orders<sup>48</sup>, or to limit the scope of the examinations<sup>49</sup>.

### **The response of the suspect, the unsuspecting spouse, etc**

44. The service of notice of restraining orders (and other documents) on the suspect and spouse by the Comr AFP<sup>50</sup> will, most likely, be contemporaneous with:

- the execution of search warrants under s.3E of the *Crimes Act 1914* (Cth)<sup>51</sup> at the suspect’s home and place of work etc;
- the suspect being arrested and charged, or being served with a Court Attendance Notice (which details the alleged serious offences);
- adverse media coverage; and
- the possibility of suspension of the suspect’s employment, and then his or her employment being terminated,

all occurring when the suspect and spouse have become aware of their severely restricted access to funds<sup>52</sup>.

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<sup>46</sup> s.198 POCA – but not in relation to POCA proceedings or criminal prosecution for giving false or misleading information

<sup>47</sup> s.197A POCA

<sup>48</sup> see *Comr AFP v Elzein* [2017] NSWCA 142; and *Comr AFP v Cranston & Ors (No 5)* [2017] NSWSC 1850 (which canvased amongst other prejudice, the potential inadvertent leakage of compulsorily acquired information from Comr AFP to the ATO via their joint involvement in the CACT); and *Comr AFP v Cranston and 65 Ors (No 8)* [2018] NSWSC 365 (22 March 2018)

<sup>49</sup> *Comr AFP v Cranston and 65 Ors (No 10)* [2018] NSWSC 542 (27 April 2018)

<sup>50</sup> as required by s.33 POCA

<sup>51</sup> in the context of tax-related criminal offences and a challenge to the lawfulness of search warrants issued under s.3E of the *Crimes Act 1914* see *Caratti v Comr AFP* [2017] FCAFC 177

<sup>52</sup> given that my audience are likely to be those who might offer professional assistance to the suspect and spouse, I draw your attention to the **Obvious Fact #16** described in David Williams paper “*Being Involved In Tax Fraud Can Land You In Jail – Never a Participant Nor a Helper Be*” presented at TIA’s Tasmanian State Convention, October 2013 – namely that “it is a good idea to ensure that you

45. The “safeguards and protections” under POCA involve consideration of the steps that can be taken to seek to protect the spouse’s or another person’s interest in the property which was the subject of the restraining orders from being forfeited to the Commonwealth. In *Comr AFP v Hart* [2018] HCA 1, at [66], Gordon J said that “*the POCA contains procedures for property to be excluded from a restraining order and for a restraining order to be revoked. Consistent with the intended reach of the POCA, the circumstances are limited and the conditions strict ...*”.

#### Allowances and Variation of Restraining orders

46. Where his or her property is subject to the restraining order, the spouse may apply to the court for orders under s.24(1) POCA to make allowances for expenses to be met out of property covered by the restraining order. The expenses that can be met are the reasonable living expenses of the person whose property is restrained and of his/her dependents; that person’s reasonable business expenses; and a specified debt incurred in good faith by that person. There are procedural conditions in s.24(2) POCA, including that the applying spouse has disclosed all of his/her \*interests in property and liabilities in a statement on oath that has been filed in the court, and the spouse must lead evidence so that the court can be satisfied that the person cannot meet the expense or debt out of property that is not covered by the restraining order<sup>53</sup>. Additionally the court must be satisfied that the expense/debt does not, or will not, relate to legal costs that the person has incurred, or will incur, in connection with POCA proceedings or criminal proceedings.
47. Under s.39B POCA, if the spouse is affected by an ancillary order made by the court, he/she has 14 days<sup>54</sup> after notification of the orders to make an application that the ancillary order be revoked. The spouse must give written notice of the application and grounds on which the revocation is sought to Comr AFP; then the effect of the ancillary order is stayed until the court has determined the application; and the court may revoke the ancillary order if the court considers it appropriate to do so<sup>55</sup>. In *Comr AFP v Dickson* [2012] NSWSC 1167, Bellew J at [79] to [85] dismissed the applications of

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will not be out of pocket if you get involved in representing a person accused of tax fraud” and also to David William’s reasons

<sup>53</sup> s.24(2)(d) POCA. Under s.24(3) POCA property is taken not to be covered if it would not be reasonably practicable for the \*Official Trustee to take custody and control of the property. However, under s.24A(1) POCA, if the court must refuse to make allowance for reasonable expense, the applicant spouse may ask the court to exclude the property from the restraining order or, if the property is the only property covered by the restraining order, the court may revoke the restraining order

<sup>54</sup> s.39B(2) POCA; however note *Comr AFP v Cacu* [2017] NSWCA 5, [15]

<sup>55</sup> s.39B(3), (4) and (5) POCA

spouses for revocation of s.39(1) ancillary orders to provide sworn statements, on the basis that *inter alia* the spouses had not been accused of committing an offence and, as a result, the issue of the privilege against self-incrimination was not applicable.

48. The spouse may apply at any time for an ancillary order in relation to the restrained property under s.39(2) POCA. For example, the Daily Telegraph<sup>56</sup> on 2 February 2018 reported on a number of restrained properties – subject to caveats lodged by Comr AFP – being sold by Adam Cranston and his wife and related companies.
49. Some variations to the restraining orders – for example that the orders do not cover future personal exertion income of the suspect, or funds in certain joint bank accounts – might be agreed in advance with Comr AFP/CAL, and the court asked to make orders by consent<sup>57</sup>.

#### Exclusion of property from restraining orders

50. The spouse may at any time apply<sup>58</sup>, to the court for exclusion orders under s.29 POCA that specified property in which he/she claims to have an interest be excluded from the restraining order. The spouse must give written notice to Comr AFP of the application for exclusion orders and the grounds on which the exclusion is sought. The grounds (and the subsequently filed affidavit evidence) need – in relation to a restraining order made under s.18 POCA – to satisfy the court that the specified interest in property is neither the proceeds of unlawful activity nor an instrument of any serious offence<sup>59</sup>.
51. Effectively, the spouse must establish that her property was \*lawfully acquired (and never tainted property), or to prove, in accordance with s 330(4) POCA, that the property has **ceased** to be proceeds/instrument. One of the circumstances in which property ceases to be proceeds of an offence or unlawful activity involves acquisition of the property by an innocent third party for sufficient consideration: see s.330(4)(a) POCA. Under s.330(4)(c) POCA property ceases to be proceeds/instrument if the property was

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<sup>56</sup> <https://www.realestate.com.au/news/tax-scam-accused-adam-cranston-shedding-parts-of-property-empire/>

<sup>57</sup> s.316A POCA, and also under Practice Note No SC CL 10, para 5, “any order, by consent or otherwise, that varies or discharges an order concerning the proceeds of crime ... [under POCA 1987] shall only be made by a Judge of this Court”

<sup>58</sup> under s.31(1) and (1A)(b) POCA; also see s.30 POCA regarding seeking exclusion orders in respect of a person’s interest in property where an application has been made for restraining orders, but the restraining order is yet to be made

<sup>59</sup> s.29(1)(b) and (2)(c)(i) and(ii) POCA; for restraining orders under s.17 POCA, refer s.29(2)(a) and (b); and for restraining orders under s.19 POCA, refer s.29(2)(d) POCA; and for money laundering/terrorism offences, refer s.29(3) POCA

acquired by a person as payment for reasonable legal expenses incurred in connection with an application under this Act or defending a criminal charge.

52. Where the property of a former spouse or de facto is subject to the restraining orders, the provisions of s.330(4)(ba) POCA should be considered, ie:

- “(4) Property only ceases to be proceeds of an offence or an instrument of an offence:
- (ba) if the property has been distributed in accordance with:
  - (i) an order in proceedings under the *Family Law Act 1975* with respect to the property of the parties to a marriage or either of them; or
  - (ia) an order in proceedings under the *Family Law Act 1975* with respect to the property of the parties to a de facto relationship (within the meaning of that Act) or either of them; or
  - (ii) a financial agreement, or Part VIIIAB financial agreement, within the meaning of that Act;

and 6 years have elapsed since that distribution”

However, this is limited by s.330(5A) POCA, as the property does not cease to be proceeds/instrument under s.330(4)(ba) POCA where the property is still subject to the effective control of the suspect (or the person convicted of the offence).

53. No doubt there are many other complicated issues that arise in relation to matters in the Family Court before or concurrently with POCA litigation. For example, s.79B of the *Family Law Act* requires a party to the marriage seeking property orders or maintenance orders to disclose POCA orders or forfeiture application to the Family Court; then s.79C requires the Family Court to stay proceedings; and s.79E permits Comr AFP to intervene in the property settlement or spousal maintenance proceedings. Orders made by the Family Court may be varied or set aside under s.79A by reason that a POCA order has been made covering property of the parties to the marriage or either of them, or a POCA order has been made against a party to the marriage.

54. The court cannot hear the spouse’s application for exclusion until Comr AFP has had a reasonable opportunity to conduct an examination of the suspect and applicant spouse<sup>60</sup>; and the Comr AFP has decided whether to contest the application and adduce additional material to the court<sup>61</sup>. Under s.29(4) POCA, the court must not exclude an interest in property from a s.18 POCA restraining unless it is also satisfied that *inter alia* a \*pecuniary penalty order could not be made against the person who has the interest or the suspect (where the interest in property is not held by the suspect but is under the

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<sup>60</sup> s.32 POCA

<sup>61</sup> see s.31(4),(5) and (6) POCA

suspect's effective control). This is another instance where the spouse may consider seeking a stay of hearing of the application for exclusion before criminal charges are determined (and it is known whether the Comr AFP seeks a pecuniary penalty order) or pending the outcome of the criminal prosecution.

55. Where an application for exclusion is made under s.29 and the Comr AFP makes an application for forfeiture order relating to a particular property (discussed further below), s.315A POCA provides that the court may only hear the Comr AFP's forfeiture application after the application for the exclusion order has been determined<sup>62</sup>

#### Revocation of restraining orders

56. In usual circumstances, where the spouse was not notified of the Comr AFP's application for restraining orders, he/she may apply to the court to revoke the restraining orders. Under s.42(1A) POCA, the application for revocation must be made within 28 days after the service of notice of the restraining order. An extension of time (not exceeding 3 months) can be granted to make the application for revocation, but the extension must be applied for within that 28 day period. The restraining order will remain in force until the court revokes the order<sup>63</sup>.
57. Similarly to applications for exclusion, the applicant spouse has to give written notice to the Comr AFP (and Official Trustee) of the application and grounds on which revocation is sought<sup>64</sup>; and Comr AFP may contest the application and adduce additional material to the court<sup>65</sup>.
58. After hearing the applicant spouse's evidence (including cross examination) and submissions, and any additional materials adduced by Comr AFP and its' submissions, the court may revoke the restraining order if it is satisfied that: (a) there are no grounds on which to make the order at the time of considering the application to revoke the order; or (b) it is otherwise in the interests of justice to do so<sup>66</sup>.
59. In *Ma v Comr AFP* [2016] VSC 553, the spouse (Ma) applied for revocation of a s.19 POCA restraining order over a California property that she owned. The restraining order was obtained based on the suspicion of the AFP (and US Internal Revenue Service) that Ma's husband (Jin) was involved in large scale money laundering, including the transfer

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<sup>62</sup> see *Comr AFP v Zhang* [2016] VSCA 171

<sup>63</sup> s.42(3) POCA

<sup>64</sup> s.42(2) POCA

<sup>65</sup> s.42(4) POCA

<sup>66</sup> s.42(5) POCA

of A\$1,320,000 from Crown Casino Melbourne to USA (into Ma and Jin’s joint account with Bank of America); and where that money was contributed to their joint purchase of the California property for US\$1,700,000 as an investment; and the property was later transferred solely to Ma, who mortgaged the property to HSBC and lent moneys to Jin to support his gambling. Ma failed to satisfy the court that there was no ground for making the restraining order. John Dixon J explained at [11] that Ma had “a heavy onus” as the court must make restraining orders if statutory conditions are met, and at [33] to [34] and [42] to [43], his honour said:

“33. The power to revoke under s 42(5) is only to be exercised where there are ‘literally no grounds for the foundation of the order.’ Accordingly, if the respondent is able to show any reasonable ground for Federal Agent Prior’s relevant suspicions the application must fail. (footnote omitted)

34. The words ‘reasonable suspicion’ in s 19 do not require proof or admissible evidence ...”

“42. I am satisfied that there is a proper basis of reasoning in Federal Agent Prior’s suspicions. It is not necessary that I share her suspicion. All that is required is that the court be able to understand the authorised officer’s reasoning. In this context in the circumstances disclosed in the affidavits read on the application, I see no reason to doubt that Federal Agent Prior’s suspicions have been reasonably formed.

43. I am also not persuaded that it is otherwise in the interests of justice to revoke the restraining order. The applicant asserted that there was no evidence to suggest that she knew, believed or suspected anything untoward about the purchase and ultimate transfer to her of the California property. Even if I accepted that proposition, and I am not minded to do so, in the present circumstances the applicant has not done enough to dispel the apparently reasonable nature of the authorised officer’s suspicion that the funds used to purchase the California property were connected with money laundering.”

See also *Comr AFP v Tjongosutiono* [2018] NSWSC 48, from [106].

60. In *Application of Comr AFP* [2017] NSWSC 58, Comr AFP sought and obtained forfeiture orders under s.49 POCA against property covered by s.19 POCA restraining orders – being funds in a bank account opened by the suspect’s mother. Beech-Jones J at [29] said the Comr AFP “took the prudent step of placing before the Court [the mother’s] affidavit ... which was sworn in support of her application to revoke the restraining order, as well as material obtained from the examination of [the suspect]”.
61. Under s.44(2) POCA, the spouse can apply to the court to revoke a restraining order that covers “the property of a person who is not a \*suspect” or apply for an order excluding specified property from the restraining order, and the court may revoke/exclude where the spouse gives “an undertaking concerning the person’s property that is satisfactory to the court”. In the case of the suspect’s property, s.44(1) POCA provides that the court may, on the suspect’s application, revoke/exclude property where the suspect gives security that is satisfactory to the court to meet any liability that may be imposed on the suspect under POCA.

### **Forfeiture orders sought before the suspect is convicted – ss.47 and 49 POCA**

62. In relation to serious offences, the Comr AFP may apply to the court, under s.59 POCA, for an order that specified property is forfeited to the Commonwealth
- under s.47 POCA in relation to property subject to a s.18 POCA restraining order, or
  - under s.49 POCA, for property covered by a s.19 POCA restraining order.

However, the respective restraining order must have been in force for at least 6 months before the forfeiture application is made. The Comr AFP must give written notice of the forfeiture application to any person who claims an \*interest in property covered by the application<sup>67</sup>.

63. Under s.47(1)(c), (2) and (3) POCA, the court must make a forfeiture order where it is satisfied that a person whose conduct, or suspected conduct, formed the basis of the s.18 POCA restraining order did engage in conduct constituting one or more \*serious offences; however, this need not be based on a finding of the commission of a particular offence; and the raising of a doubt as to whether the suspect had engaged in conduct constituting a \*serious offence is not of itself sufficient to avoid a finding by the court. However, s.47(4) POCA provides that the court may refuse to make a forfeiture order if the court is satisfied that it is not in the public interest to do so, and the property is an instrument of a serious offence (other than a terrorism offence) and is not proceeds of an offence.
64. Under s.49 POCA, the court must make a forfeiture order if, relevantly, the court is satisfied that the property is the proceeds of one or more indictable offences<sup>68</sup> or the property is an instrument of one or more serious offences<sup>69</sup>; and the court must also be satisfied that Comr AFP has taken reasonable steps to identify and notify persons with an \*interest in the property<sup>70</sup>. Similarly, s.49(4) POCA provides that the court may refuse to make a forfeiture order if the court is satisfied that it is not in the public interest to do so,

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<sup>67</sup> s.61(1)(b) POCA

<sup>68</sup> s.49(1)(c)(i) POCA and see *Application by Comr AFP* [2017] NSWSC 588, [22] to [28]

<sup>69</sup> s.49(1)(c)(iv) POCA

<sup>70</sup> s.49(1)(e) POCA and also requirements of s.61 POCA, which includes provision for the court to direct Comr AFP to give or publish notice of the application to a specified person or class of persons, before the court finally determines the application

and the property is an instrument of a serious offence (other than a terrorism offence) and is not proceeds of an offence<sup>71</sup>.

65. On receiving that notice from Comr AFP, the person who claims an \*interest in property covered by either type of forfeiture application may appear and adduce evidence at the hearing of the application. Alternatively, the person may consent to forfeiture; or, having been given notice (or reasonable steps are taken to give notice), where the persons fails to appear in opposition of the relief sought by Comr AFP, the court could make the forfeiture orders<sup>72</sup>. As previously mentioned, s.315A(2) POCA provides that where the spouse has made an application under s.29 POCA for exclusion of his/her interest in property from restraining orders under s.18 POCA (and has not withdrawn that application) the court may only hear the Comr AFP's forfeiture application after the exclusion application has been determined.
66. Under s.56 POCA, the court must specify, when making a forfeiture order, the amount it considers to be the value, at the time the order is made, of the specified property. Sections 57 and 89 POCA provide the mechanism for a person with an interest in forfeited property to buy back their interest, and discharge the forfeiture order.

### **The response of the spouse, etc to a forfeiture application**

#### Application for exclusion from forfeiture or compensation under s.74 and s.78 POCA

67. A person whose property has been restrained and who receives notice of the Comr AFP's application for forfeiture orders under s.59 POCA, can make two types of applications to avoid the consequences of forfeiture. Under s.74 POCA the person can apply for orders excluding property from the forfeiture order; and under s.78 POCA the person can apply for compensation orders. The person may also apply for a stay of the forfeiture proceedings where they can show that a real risk of prejudice exists in contesting the forfeiture application and where a stay is the only means of addressing the prejudice<sup>73</sup>.

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<sup>71</sup> see *Comr AFP v Fernandez* [2017] NSWSC 1197, where the defendant's interest in a bank account used in 'cuckoo smurfing' was an instrument of a serious offence – but the defendant had not committed the offence, and the court decided that it was not in the public interest to make the forfeiture order; but on similar facts see *Comr AFP v Lordianto* [2017] NSWSC 1196 dismissing the defendant's s.29 exclusion application

<sup>72</sup> s.64(3) POCA, see *Comr AFP v Fung* [2017] NSWSC 122

<sup>73</sup> see *Comr of AFP v Zhao* [2015] HCA 5; (2015) 255 CLR 46, [42]-[50]; however, this is limited by amendments to s.319 POCA made in 2016, see *Comr AFP v Elzien*, [2017] NSWCA 142, [153]-[161]

68. The person applying for an exclusion order must give written notice to Comr AFP of the application and the grounds on which the exclusion order is sought<sup>74</sup>. The Comr AFP may appear and adduce evidence at the hearing of the application, and must give that person notice of any grounds on which it proposes to contest the application – however, the Comr AFP need not do so until it has had a reasonable opportunity to conduct examinations in relation to the application<sup>75</sup>. Further, the application for an exclusion order must not be heard until Comr AFP has had a reasonable opportunity to conduct examinations in relation to the application<sup>76</sup>.
69. Section 73(1) POCA provides that the court that is hearing the Comr AFP’s forfeiture application must make an order excluding a specified property (in which the person has an interest) from forfeiture orders under s.47 or s.49 POCA if the court is satisfied (i) that the person’s interest in the property is not the proceeds of unlawful activity, or (ii) if an offence on which the forfeiture order would be (or was) based is a serious offence – the person’s interest in the property is not an instrument of any serious offence. Here the effect of the 2018 amendments to POCA, expanding the circumstances where property becomes proceeds or an instrument<sup>77</sup> – for example to cover property loan mortgage repayments that were funded from proceeds of an offence, or using such proceeds to maintain or make improvements to property – would further limit the ability of the applicant for exclusion orders to show that their interest in property was never and did not *become* proceeds/instrument of an offence. Otherwise the person must prove in accordance with s 330(4) POCA that their interest in property has ceased to be proceeds/instrument.
70. In practice, a person applying for an exclusion order would also apply for a compensation order made under s.77(2) POCA – so that if their interest in property is not excluded from forfeiture orders made by the court, the person may be able to satisfy the court that a proportion of the value of their interest was not derived or realised, directly or indirectly, from the commission of any offence and their interest is not an instrument of any offence<sup>78</sup>. The compensation order must specify the relevant proportion, and then direct the Commonwealth that, once the forfeited property has vested absolutely<sup>79</sup> in it, to

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<sup>74</sup> s.75(1) POCA

<sup>75</sup> ss.75(2) and (3) POCA

<sup>76</sup> s.76 POCA, and see *Comr AFP v Dickson (No 2)* [2016] NSWSC 574 regarding the consequences of the applicant’s failure to attend and be examined

<sup>77</sup> respectively under ss.330(1) and (2) POCA

<sup>78</sup> s.77(1)(c) and (d) POCA

<sup>79</sup> s.66 POCA and exceptions in ss.67 and 68 POCA

dispose of the property (if this has not already occurred) and then pay the person that proportion of net proceeds from the disposal<sup>80</sup>.

71. When the court makes a forfeiture order under s.47 or s.49 POCA covering a person's property, s.72 POCA provides that the court must make 'hardship' orders directing the Commonwealth to pay a specified amount to the dependant(s) of the person, if the court is satisfied that the forfeiture order would cause hardship to the dependant(s); and the specified amount would relieve that hardship; and if the dependant is aged at least 18 years - the dependant had no knowledge of the person's unlawful conduct that was the subject of the forfeiture order<sup>81</sup>. Submissions and evidence supporting the exclusion and compensation applications should address those hardship matters.

### **Automatic forfeiture and the response of a person convicted of a serious offence/spouse**

72. Part 2-3 POCA sets out the consequences after a person has been convicted of a serious offence, including:
- when property that is subject to a restraining order relating to the offence is automatically forfeited to the Commonwealth, unless the property was excluded from forfeiture; and
  - when compensation is payable by the Commonwealth; and
  - when forfeited property can be recovered from the Commonwealth.
73. Under s.92 POCA, property subject to a restraining order made under s.17 or s.18 POCA that remains restrained 6 months after the date a person is convicted of a serious offence (or after any extended period specified in an extension order that must end no later than 15 months from the conviction day) is forfeited to the Commonwealth. The property that may be automatically forfeited also includes property excluded from restraining order, or where the restraining orders were revoked, because security or an undertaking was given under s.44 POCA.
74. The Comr AFP has obligations under s.92A POCA to take reasonable steps to give any person who has, or claims, or whom Comr AFP reasonably believes may have, an interest in the property, a written notice of the date on which the property will be forfeited unless it is excluded, and must inform that person that they may apply for extension orders under s.93 POCA; and may apply for orders under s.29 POCA (exclusion of property from restraining orders) and/or s.94 POCA (exclusion of property from forfeiture orders), and s.94A (compensation orders).

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<sup>80</sup> s.77(2) where the net proceeds arise after payment of the Official Trustee's remuneration and costs referred to in s.70(1)(b) POCA

<sup>81</sup> s.72(1)(b)(i), (ii) and (iii) POCA

75. The person claiming an interest in the property that would be forfeited must make the extension application within the six months period after the start of the conviction date – which is the date when the court sentences the person, rather than an earlier date when the jury makes its decision. Where the court is satisfied that an exclusion application has been made without undue delay and has been diligently followed up, the court may make an extension order – the effect of which is that the property will not be forfeited until the end of the extended period (not later than 15 months after the conviction date) unless the property is excluded.
76. The person applying for orders excluding property under s.94 POCA must satisfy the court that:
- he/she/it does have an interest in the property<sup>82</sup>, and
  - that their interest in the property is neither proceeds of an unlawful activity nor an instrument of unlawful activity<sup>83</sup>, and
  - that their interest in the property was lawfully acquired<sup>84</sup>.

However, the court cannot make an exclusion order after the property has been forfeited<sup>85</sup> nor can the court make an order staying the automatic forfeiture under s.92 POCA pending an appeal against conviction<sup>86</sup>.

77. Commonly, the person would make a concurrent application under s.94A POCA for compensation and adduce evidence and make submissions to satisfy the court that a proportion of the value of their interest that would be (or was) forfeited was not derived or realised, directly or indirectly, from the commission of any offence; and that their interest was not an instrument of any offence.
78. In such applications, the provisions in s.94(3) to (6) and s.94A(6) to (9) require the person to give written notice to Comr AFP of the applications and grounds on which the exclusion order and/or compensation is sought; the Comr AFP may appear and adduce evidence; the Comr AFP must give notice of any grounds on which it proposes to contest

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<sup>82</sup> s.94(1)(b) POCA

<sup>83</sup> s.94(1)(e) POCA, see *Comr AFP v Courtenay Investments Ltd* [2016] WASCA 194, where the Comr AFP did not establish that listed shares held by a company were instruments of its director's offence

<sup>84</sup> s.94(1)(f) POCA

<sup>85</sup> s.94(2) POCA, for example where an appeal made against dismissal of exclusion application comes for hearing more than 15 months after the conviction date: and see *Studman v Director of Public Prosecutions (Cth)* [2007] NSWCA 285, [15]-[21] and *Halac v Comr AFP* [2016] NSWSC 146; and also appeals made by Pratten and Dickson (discussed below)

<sup>86</sup> see *Comr AFP v Higgins* [2018] NSWSC 244, [16]; where [17] considers the consequences under POCA if the conviction was quashed on appeal

the applications, but need not do so until it has had a reasonable opportunity to conduct examination(s) in relation to the applications; and the court cannot hear the applications until Comr AFP has had that reasonable opportunity to examine.

79. In *Comr AFP v Pratten* [2017] NSWSC 927 the court considered Pratten's applications under s.29, s.94 and s.94A POCA concerning property restrained under s.17 POCA that was owned by Pratten (1 fully paid \$1.00 share in an insurance broker, RGIB, and 10 fully paid \$1.00 shares in Sonarpia Pty Ltd, which was the corporate trustee of Pratten's family trust) and specified property owned by 5 companies. Pratten was found to have committed seven offences of dishonestly obtaining a financial advantage by deception contrary to s 134.2(1) of the *Criminal Code* (by understating his income in his 2003 to 2009 income tax returns), and he was sentenced on 29 April 2016<sup>87</sup>. Automatic forfeiture pursuant to s 92 POCA would have occurred on 29 April 2016, however, an extension was made to 28 July 2017.
80. The problem with Pratten's s.29 POCA application was that the court must not exclude property from s.17 POCA restraining orders unless it is also satisfied that a pecuniary penalty could not be made – a question of whether a pecuniary penalty order will be made is irrelevant. Here there was evidence that the CDPP maintained its intention to move on the prayer in the original summons seeking the pecuniary penalty order.
81. In relation to Pratten's s.94 POCA application, he could not apply for exclusion of the specified property that was owned by 5 companies, as that property was not forfeited by the terms of s.92(1)(b) POCA. This left the shares Pratten held in 2 companies. The CDPP contended that both companies were involved in Pratten's offending – RGIB was an insurance broker that paid insurance premiums to Vanuatu entities, and Sonarpia was the corporate trustee of Pratten's family trust that received moneys from Vanuatu (and acquired a helicopter) that Pratten did not return as income. Pratten had the onus under s.317 POCA to establish on the balance of probabilities the matters in s.94(1)(e) and (f) POCA, ie that his interest in the respective shares was neither proceeds nor an instrument of unlawful activity, and his interest in the shares was lawfully acquired. Pratten had sufficient taxable income before his offending and could have lawfully acquired the \$1.00 RGIB share in 2002. Similarly, Pratten would not likely have needed to have recourse to illegitimately acquired funds to acquire the 10 \$1.00 Sonarpia shares in March 2003.

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<sup>87</sup> see *R v Pratten (No 25)* [2016] NSWSC 539); and that conviction was upheld on appeal, but where Pratten was resentenced: see *DPP (Cth) v Pratten (No 2)* [2017] NSWCCA 42

82. Under s.329(2) POCA, the respective shares would be an instrument of an offence or used to achieve an unlawful benefit where the company was used, or intended to be used, in, or in connection with, the commission of an offence. It was held<sup>88</sup> that rules in s.330(2) POCA do not purport to lay down all of the circumstances in which property, that might not be an instrument of crime at the point of acquisition, may *become* an instrument of crime. The use of RGIB as a vehicle for the transmission of funds to Vanuatu raised the issue whether Pratten's shareholding was an instrument of unlawful activity. Similarly for Sonarpia, where it was alleged that Pratten directed payment from Vanuatu to Sonarpia for the purchase of a helicopter. The bare assertions in Mr Pratten's affidavit that he had never used his vote that attached to his shareholding in the companies for any unlawful activity was inadequate to establish, and discharge his onus of proof on the balance of probabilities, that his interest in the RGIB share, and in the Sonarpia shares, was not an instrument used in, or in connection with, the commission of an offence. Pratten's application under s.94A POCA also failed for lack of proof that his interests in shares were not "an instrument of any offence" as required by s.94A(1)(e) POCA.
83. See also *Comr AFP v Pratten (No 2)* [2017] NSWSC 1172, where in August 2017, the court made a declaration under s.95 POCA that the RGIB share and 10 shares in Sonarpia were forfeited to the Commonwealth on 28 July 2017 (and, under s.96 POCA, that since 28 July 2017 the shares had vested absolutely in the Commonwealth); and refused Pratten's application for adjournment (made for the purpose of appealing the decision in [2017] NSWSC 927) on the basis that such appeal after the property has been statutorily forfeited would be futile.
84. In *Comr AFP v Dickson (No 3)* [2016] NSWSC 564, the court dismissed Dickson's notice of motion for exclusion of property (including a residence at Northbridge that was subject to s.18 POCA restraining orders) that would be automatically forfeited under s.92 after his conviction<sup>89</sup>. Other property not owned by Dickson that was subject to restraining orders had been automatically forfeited on 19 September 2015 where no persons who may have an interest in the restrained property (and where reasonable steps were taken by Comr AFP to give notice as required by s.92A POCA) appeared in

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<sup>88</sup> [2017] NSWSC 927, per RA Hulme J, [67] to [68] for RGIB, and [69] to [73] for Sonarpia

<sup>89</sup> on 22 December 2014, Dickson was found guilty by jury of offences contrary to s.134.4(5) of the *Criminal Code* (dishonestly causing a loss, or to dishonestly cause a risk of loss, to a third person, namely the Commonwealth, knowing or believing the loss would occur or where there was a substantial risk of the loss occurring) and money laundering contrary to s.440.3(1) of the *Criminal Code* -- both \*serious offences per s.338 POCA; and on 20 March 2015, Dickson was sentenced to 11 years imprisonment (*R v Dickson (No 18)* [2015] NSWSC 268); and, on appeal, he was resentenced to 14 years imprisonment (*Dickson v R* [2016] NSWCCA 105). The date of automatic forfeiture was extended from 19 September 2015 to 19 May 2016.

opposition of relief sought by Comr AFP<sup>90</sup>. Dickson's exclusion application also covered luxury cars, yacht, surplus sales proceeds of shopping centre, land at Ipswich owned by a company, funds on BNZ bank accounts in the name of Dickson's then spouse (Ms Maxianova), and funds formerly in the UAE Bank Accounts transferred to Official Trustee. In cross examination, Dickson conceded that all those items of property were acquired with the proceeds of his offence (ie from moneys distributed by trusts to Neumedix Health Australia Pty Ltd).

85. This left the Northbridge property that had been acquired by Ms Maxianova in February 2005 for \$4.6 million, and the interest under a registered mortgage granted by Ms Maxianova in 2010 (but where no funds were drawn down). The purchase price was partly paid by \$3.32 million remittance from Intrepid Finance International Ltd (Hong Kong) (**IFIL**) to Ms Maxianova. The acquisition of the Northbridge property was before the commencement time of the conspiracy (November 2005) and the first receipt of \$14.3 million trust distribution (in October 2006). Ms Maxianova's application for exclusion from forfeiture was dismissed on 2 May 2016<sup>91</sup> on the basis that the Comr AFP had not had a reasonable opportunity to conduct an examination in relation to her application. She was the sole registered proprietor.
86. Dickson's application for exclusion of the Northbridge property was dismissed, firstly<sup>92</sup> on the basis that he did not have an interest in the property owned by Ms Maxianova, as required by s.94(1)(b) POCA, neither under a *Family Law Act* property settlement nor under a constructive trust (that might have arisen if Dickson had made a contribution to the purchase price). Adamson J held that Dickson also failed<sup>93</sup> the onus of proving the elements in s.94(1)(e) and (f) POCA – this was in part because Dickson provided no documentary support for his evidence, and where Dickson's oral and affidavit evidence about his income etc was inconsistent with his evidence in the criminal proceedings, and with the answers given in his s.180 examination, and with his cross examination; and also because of the subsequent involvement of IFIL in Dickson's illegal activities. The registered mortgagee did not apply for exclusion, and very adverse finding were made about the mortgage/loan to the effect that the Northbridge property and the registered mortgage were probably instruments of an offence within the meaning of s 329(2) POCA.

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<sup>90</sup> declarations of forfeiture were made by Campbell J on 28 October 2015: *Australian Federal Police v AD* [2015] NSWSC 1655

<sup>91</sup> see *Comr AFP v Dickson (No. 2)* [2016] NSWSC 574

<sup>92</sup> see [2016] NSWSC 564, [85] to [86] referring to *Baumgartner v Baumgartner* [1987] HCA 59

<sup>93</sup> [2016] NSWSC 564, [87]

87. On 28 July 2016, Dickson appealed the decision to dismiss his application for exclusion of the Northbridge property. But on 4 August 2016, Bellew J made a declaration that all the still restrained property had been forfeited to the Commonwealth on 19 May 2016. In *AD v Comr AFP [2018] NSWCA 89* (30 April 2018), Beazley P (with whom Meagher and Gleeson JJA agreed) dismissed Dickson’s appeal including finding that there was no power for that court to make an exclusion order in respect of property that has been forfeited.
88. In *Comr AFP v Huang [2016] WASC 5*, Mr Ly acquired a property at Girrawheen (WA), funded by a bank loan of \$142,000 secured by mortgage and a gift of \$33,000 from his parents. In January 2013, Comr AFP obtained restraining order under s.17 and s.19 POCA, and Ly was arrested. Ly was examined about his affairs, including the nature and location of any property. Later the original charges were discontinued and new charges laid, and replacement restraining order were issued. On 3 July 2014, Ly was found guilty by jury of importation of methamphetamine in a commercial quantity contrary to s 11.2A(1) and s 307.1 *Criminal Code*, and Ly was sentenced to 14 years imprisonment on 17 October 2014. Ly received a s.92A POCA notice from Comr AFP, and an extension order was made to 16 January 2016. At the hearing of Ly’s exclusion application he relied on his affidavit (about his sources of income etc) and father’s affidavit (about the gift). Ly’s grounds for exclusion were that the Girrawheen property was neither the proceeds of unlawful activity, nor an instrument of unlawful activity; and was lawfully acquired.

Comr AFP contended that Ly had acted fraudulently in making false statement in the bank loan application, and he failed to adduce sufficient evidence to show that he had not used income which he failed to declare to the ATO to make loan repayments (ie he had lodged false tax returns and committed a further offence contrary to s 135.1(3) *Criminal Code*).

Kenneth Martin J was critical of Ly’s “very selective” evidence of his income and that there was no “mathematical verification or considered explanation” about his income and the source of bank deposits<sup>94</sup>. However, the court held that Ly could demonstrate that his interest as the registered fee simple proprietor of the property had been lawfully acquired in 2005 using the gift and bank loan, and “*how he met the monthly repayments does not bear upon the earlier temporal question concerning whether or not the Girrawheen land was lawfully acquired in 2005. Nor does it bear upon whether his interest as a registered proprietor in fee simple can be said to be the proceeds of unlawful activity*”<sup>95</sup>. Ly’s unlawful conduct relating to the drug charges did not relate to the acquisition, and he probably did not have the mental element of a fraud offence concerning the loan application (and the bank was not deceived and held a valid mortgage). Consequently, the court found that it must exclude the Girrawheen property from forfeiture.

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<sup>94</sup> see [2016] WASC 5, [134] to [136]

<sup>95</sup> [2016] WASC 5, [152]

89. Had the 2018 Amendments to s.330(1)(c) POCA applied, then in the absence of sufficient evidence to show that Ly had used income (salary and rent) which he did declare to the ATO to make loan repayments, Ly would likely have failed to demonstrate that the lawfully acquired Girrawheen property had not *become* the proceeds of his offending when moneys deposited into his bank account were used to partly discharge the bank loan. This will present significant evidentiary burdens on the suspect and spouse in future exclusion applications, more so if, like Dickson, the offender is preparing their case and evidence whilst imprisoned, or if the spouse needs to rely upon legal aid<sup>96</sup>.

### **Pecuniary penalty orders**

90. Asset confiscation is not an additional punishment for offending<sup>97</sup> - or at least not for tax related offences. Rather, under s.116 POCA, the Comr AFP<sup>98</sup> may apply for a pecuniary penalty order, being an order for a person to pay a penalty amount<sup>99</sup> to the Commonwealth which is based on the benefits derived by the offender from committing the offences. The court's power to make a pecuniary penalty order in relation to an offence is not affected by the existence of another confiscation order in relation to that offence<sup>100</sup>. Once made, the pecuniary penalty order becomes a debt to the Commonwealth, and s.140 to s.143 POCA provides for charging the debt against the property of the offender (or property under the offender's effective control) to secure payment. POCA provides for a court to make orders that enable the Official Trustee to dispose of the forfeitable property to satisfy the pecuniary penalty order. However, for this to occur, the property must be and remain the subject of a restraining order – see the operation of s.29(4) POCA in *Pratten* (at 80 above) whereby the court must not exclude specified property from a restraining order unless it is also satisfied that no pecuniary penalty order could be made.
91. Examples of pecuniary penalty orders made by courts usually concern the determination of the amount of the penalty where the quantum has not been agreed. This is because there is little room for doubt of the fact of conviction of a serious offence, but there may

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<sup>96</sup> see *Comr AFP v Zhang & Xing* [2015] NSWSC 61

<sup>97</sup> see, proposals in the *Criminal Asset Confiscation Prescribed Drug Offenders Amendment Bill 2015 (Cth)*

<sup>98</sup> the CDPP may take responsibility for obtaining a pecuniary penalty order where the offender consents and the pecuniary penalty order is to be made during sentencing

<sup>99</sup> determined in accordance with s.121 to s.133 POCA

<sup>100</sup> s.116(4) POCA

be some dispute about whether and how the offender has derived \*benefits from the commission of the offence, and if so, assessing the value of the benefits.

92. In *Comr AFP v Fysh* [2013] NSWSC 81 (15 January 2013), Fysh (who had been convicted of two insider trading offences) was ordered to pay to the Commonwealth a pecuniary penalty in the amount of \$640,857 - being the positive difference between the price he paid for the shares in December 2007 and the sales proceeds in November 2008<sup>101</sup>. It is noted that Fysh's conviction was quashed on appeal: see *Fysh v R* [2013] NSWCCA 284 (20 November 2013) – as to the consequences of convictions being quashed see Part 2-4 Division 5 of Chapter 2 POCA.
93. Another insider trading case was *R v Curtis (No 3)* [2016] NSWSC 866. Curtis's unlawful activity involved using a company, Encounter Investments Pty Ltd, where he was the sole director, to enter 45 trades in CFD's in particular shares made on the same day that Orion Asset Management Limited bought or sold a large volume of the same shares. In a period May 2007 to June 2008, a net profit of \$1,433,727.85 was made from the 45 CFD trades. Curtis was charged in 2014, and it appears that a later acquired family property was subject to a restraining order. Curtis was convicted of the offence of conspiracy to commit the offence of insider trading contrary to s.1311(1) and s.1043A(1)(d) of the *Corporations Act 2001 (Cth)*, and was sentenced to imprisonment for two years. McCallum J said at [25]:
- “... After the verdict was returned, [Curtis] promptly settled proceedings brought against him under the *Proceeds of Crime Act 2002 (Cth)* by agreeing to forfeit, from assets restrained by the Commonwealth after the sale of a family property, the whole of the profit of the 45 trades, being the sum of \$1,433,727.85. The evidence establishes beyond any doubt that that is the amount of profit the two men made from their 45 trades. It was noted on behalf of Mr Curtis that the sum forfeited is the full amount of that profit, even though he made substantial payments to Mr Hartman during the period of the conspiracy.” (emphasis added)
94. In *Comr AFP v Agius* [2016] NSWSC 894, Agius, who had been convicted<sup>102</sup> in relation to an ongoing conspiracy to defraud the Commonwealth which involved Australian companies receiving false invoices and concealing their true taxable income by claiming deductions for payments made to Vanuatu entities, was ordered to pay to the Commonwealth a pecuniary penalty in the amount of \$580,295 (based on funds retained in Vanuatu and the professional fees Agius's firm received). Agius owned a unit in the

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<sup>101</sup>resulting in a pre-tax profit, however see further below concerning potential tax adjustments that might have been made to the penalty amount. Also see *CDPP v Gay (No 2)* [2015] TASSC 58, where the court considered the calculation of a pecuniary penalty amount where the shares are sold for a loss

<sup>102</sup> see *R v Agius; R v Zerafa* [2012] NSWSC 978; *Agius v R* [2015] NSWCCA 200

Sydney CBD that was excluded from automatic forfeiture in 2013, but remained restrained, and the Comr AFP obtained custody and control orders (s.38 POCA), and orders that the Official Trustee dispose of the property (s.283 POCA) and use the proceeds to pay amongst an amount due to his lawyer secured by a registered mortgage and so much of the pecuniary penalty order as is possible<sup>103</sup>.

95. In May 2005 Steven Hart was convicted of nine offences of defrauding the Commonwealth in contravention of s 29D of the *Crimes Act 1914 (Cth)*, and he was sentenced to 7 years imprisonment. Certain restrained properties owned by 4 corporate trustees - alleged to be subject to Hart's effective control – had been forfeited to the Commonwealth on 18 April 2006, under s 92 POCA. Hart was unsuccessful in appealing the convictions. The recent High Court decision in *Comr AFP v Hart & Ors [2018] HCA 1* concerned a number of POCA applications, including by the CDPP seeking to enforce a pecuniary penalty order of \$14,757,287.35 made against Hart<sup>104</sup>. CDPP sought orders under s.141 POCA declaring that the forfeited property was available to satisfy the pecuniary penalty order – on the basis that the relevant property “is subject to the effective control” of Hart. The 4 corporate trustees applied for orders under s.102 POCA<sup>105</sup> directing that their interests in the forfeited property be transferred to them, or that they be paid an amount equal to the value of their interests. CDPP then

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<sup>103</sup> see *Comr AFP v Agius* [2016] NSWSC 1695 and [2017] NSWSC 1764

<sup>104</sup> see *CDPP v Hart* [2010] QDC 457 – the amount of the pecuniary penalty reflected the net value of benefits derived by Hart from his offences and from the unlawful activity of United Overseas Credit Ltd; and Hart was unsuccessful in his appeal: see *Hart v CDPP* [2011] QCA 351, and special leave was refused by High Court ([2012] HCATrans 140)

<sup>105</sup> the 2006 version of POCA required an applicant for an order under s 102(3), in relation to specific property that had been forfeited to the Commonwealth, to establish on the balance of probabilities that:

- (a) the property was not **used** in, or in connection with, any unlawful activity and was not **derived** or realised, directly or indirectly, by any person from any unlawful activity; and
- (b) the applicant **acquired** the property lawfully; and
- (c) the applicant is not the person convicted of the offence to which the forfeiture relates.

The *Hart* decisions refer to a “use condition” (the first part of s.102(3)(a)), a “derivation condition” (second part of s.102(3)(a)), and an “acquisition condition” (s.102(3)(b)).

From 2010, s.102(b) POCA provides that the court must make the order where the applicant satisfies the court that:

- (i) the applicant had an interest in the property before the forfeiture of the property; and
- (ii) the applicant's interest in the property is neither \*proceeds of unlawful activity nor an \*instrument of unlawful activity; and
- (iii) the applicant's interest in the property was lawfully acquired.

sought orders that if any of the 4 companies did recover an interest in any of the forfeited property, that it be applied to reduce the pecuniary penalty order.

96. I will not deal with the District Court decision<sup>106</sup>. On appeal, the majority decision in *Comr AFP v Hart & Ors* [2016] QCA 215 was that the companies had proved what were described as the “use condition”, the “derivation condition”, and the “acquisition condition” were satisfied in respect of each of the relevant forfeited properties, and that the s.102 POCA orders sought by the companies should be made. The majority's reasoning was that a property would only be “derived from unlawful activity” if it was wholly derived from the commission of a relevant offence – and that the source of funds used to meet the costs of restoration and repairs of assets, or to repay a mortgage acquired after the initial purchase of the property, would ordinarily be irrelevant to whether the property was “derived from unlawful activity”<sup>107</sup>. The majority (and the High Court on appeal) held that the date for determining whether Hart had effective control of property was the date when CDPP’s application was determined – rather than the earlier time when the offending occurred or at the time the restraining order was made – and CDPP’s application was dismissed because it could not be established that Hart had effective control at that later date.
97. The High Court held, regarding s.102 POCA:
- whether property was “*used in, or in connection with, unlawful activity*” is a broad conception involving practical considerations that will vary from case to case; but “use” does not require a causal link between the property and a relevant offence, or that the property was necessary for or made a unique contribution to the offence, and the degree of use does not need to be proportionate to the forfeiture of the property
  - property will be “*derived ... from any unlawful activity*” if it is wholly or partly derived from an act or omission constituting a relevant offence; however, for property to be partly derived from unlawful activity, the degree of derivation must be more than trivial, although there was no requirement that it must be substantial, nor that it must be proportionate to the forfeiture, and
  - the acquisition condition required the applicant to prove that each step in the process by which the applicant came to hold a relevant interest in the property was lawful, including that all of the consideration paid by the applicant for the interest was lawfully acquired.

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<sup>106</sup> *CDPP v Hart & Ors* [2013] QDC 60

<sup>107</sup> Parliament has made the 2018 Amendments to address this aspect of the QCA decision

98. As regard the manner by which the applicant proves those conditions, the High Court agreed that “*where an application for orders under s.102 proceeds on pleadings, an applicant need not negative possibilities which the Commonwealth does not raise in its defence*”<sup>108</sup>. The result on appeal was that only one company in respect of one item of real property obtained relief under s.102 POCA, and the proceeds (if any) were to be paid by the Commonwealth to the company following satisfaction of \$1.6 million secured by 2 security interests.
99. The fact that restrained property which was the proceeds of the offence may be automatically forfeited and that the offender may consent or be liable to pay a pecuniary penalty – potentially constituting further punishment of the offender - are not mitigating factors that the court can take into account when sentencing the offender<sup>109</sup>.

### **Conclusion - POCA and Taxation?**

100. Perhaps it is akin to a moth mistaking a naked flame for the light at the end of a tunnel, however, the last subject of this paper looks at the interaction of POCA and taxation. It is not controversial that illegal activities – such as insider trading<sup>110</sup>, money laundering<sup>111</sup>, drug dealing<sup>112</sup>, and promoting tax evasion<sup>113</sup> - may generate receipts or profits that are assessable income, giving rise to taxation liabilities (and on audit by the ATO, potential shortfall penalties and shortfall interest charges). Under s.26-5(1)(b) of the *Income Tax Assessment Act 1997 (ITAA 1997)*, a deduction is denied for “an amount ordered by a court to be paid on the conviction of an entity for an offence against an \*Australian law or a \*foreign law”.

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<sup>108</sup> [2018] HCA 1, [7]

<sup>109</sup> s.320(b) and (d) POCA, however s.320(c) POCA provides that the court must have regard to a forfeiture order to the extent that the order forfeits any other property (not being proceeds). Under s.320(a) POCA consenting to a pecuniary penalty is a fact that can be taken into account in assessing the offender’s contrition: see *McMahon v R* [2011] NSWCCA 147, [33] and [64]-[72], and *R v Jafari* [2017] NSWCCA 152, [11], [35]-[40] and [81]

<sup>110</sup> see TR 93/25, and where it might be expected that the offender would attempt to legitimize his/her illegal trading by recording the profitable results with the assessable income from his/her legal trading

<sup>111</sup> eg *Chen and Commissioner of Taxation* [2011] AATA 381

<sup>112</sup> eg *FCT v La Rosa* [2003] FCAFC 125; (2003) ATC 4510, however, note that the appeals to the Federal Court from the AAT concerned the deductibility of an amount that had been stolen from La Rosa, and lead to amendments to s.26-54 of the ITAA 1997 denying deductions for expenditure relating to illegal activities

<sup>113</sup> eg *Baker v FCT* (1989) ATC 4660 and *Agius v FCT* [2014] AATA 854 and [2015] FCA 707

101. La Rosa, a convicted drug dealer, had forfeited property to the value of \$264,610 under POCA 1987, was then audited by the ATO which issued 'T account' assessments. The AAT<sup>114</sup> rejected La Rosa's submission that as he had forfeited property to the value of \$264,610 to the Commonwealth, he should not be assessed for income tax to that extent. The AAT took the view that a seizure of property under POCA 1987 and a payment of income tax were quite distinct, and the seizure did not discharge any taxation liability. The forfeiture had no temporal connection to La Rosa's illegal business activity which gave rise to his assessable income - rather the forfeiture was a loss consequent on La Rosa's conviction.
102. Sections 131(1) and (1A) POCA do make adjustments in determining a pecuniary penalty amount (and also a literary proceed amount) for taxes that have been paid by the offender. The court must under s.131(1) reduce the penalty amount by the amount that, in the court's opinion, represents the extent to which tax that the offender paid before the application for the penalty order was made was attributable to the \*benefits of their offending. And the court may, under s.131(1A), if it considers that it is in the interests of justice to do so, reduce the penalty amount by an amount that, in the court's opinion, represents the extent to which tax that the offender has paid at or after the time the application for the penalty order was made was attributable to those benefits. Conversely, if an amount of tax is repaid or refunded to the offender, the Comr AFP may apply for the penalty amount to be increased pursuant to s.133(3) POCA. For example, if Fysh had paid income tax on his profit of \$640,857 (made in the 2009 year of income) then *prima facie* the penalty amount imposed in 2013 should have been reduced; but if Fysh later successfully objected to the assessment on the basis that the profit was not ordinary income but was a discounted capital gain (*as may have been available had Fysh held the shares for another month*) and received a tax refund, then the penalty amount should be increased.
103. The position of the Commissioner of Taxation on the interaction of, and avoiding of conflict between, tax collection and POCA proceedings involving tax fraud, and the operation of Division 342 of Schedule 1 of the *Taxation Administration Act 1953* (**Administration Act**) is set out in Practice Statement Law Administration PS LA 2011/10, in particular para 20 to 22.
104. The Commissioner's power under Division 342 to waive Commonwealth's right to payment of tax debts is discretionary not mandatory. Those advising an offender who is attempting to settle both his/her POCA and taxation liabilities should carefully consider *Deputy Comr of Taxation v Ly Tien Mac* [2015] FCCA 2522:

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<sup>114</sup> *Case 10/2000* (2000) ATC 189

- in criminal proceedings<sup>115</sup>, it was alleged that between October and November Mac conducted a business of supplying drugs, which led to his conviction of a number of serious offences, including the importing of heroin and dealing in the proceeds of crime
- after Mac was arrested in November 2011, his home and other properties were searched and over \$500,000 cash was seized, and, with his other property, was restrained under POCA
- the ATO also audited Mac and issued notices of assessment for 2007 and 2008 years requiring Mac to pay approx. \$1.1 million in income tax and penalties. Mac's objections, asserting that the relevant money was attributable to his gambling activities and was not assessable income, were disallowed and apparently the AAT upheld the objection decision.
- Mac was convicted on 4 April 2012
- on 1 May 2012, the Deputy Comr of Taxation (**DCT**) obtained by consent, judgment by the District Court NSW, in the amount of \$560,245.38, against Mac
- on 30 May 2012, Mac received notice under s.92A POCA of the forfeiture of the restrained property, and Mac applied for exclusion order and extension order
- in the course of negotiating a settlement of POCA proceedings<sup>116</sup> Mac and Comr AFP agreed to orders that certain properties be excluded from restraint (under s.29 POCA) and that a declaration under s.95 POCA be made that other property, including the cash, be forfeited. The court made those orders by consent and noted that the Comr AFP was released from the undertaking that was given under s.21 POCA; and Mac's undertaking not to make any further POCA applications; and that the orders and declarations to which the parties have agreed represented a full and final settlement of the proceedings
- on or before 24 July 2013, the DCT applied for a bankruptcy notice to be issued to Mac in respect of the judgment debt (\$560,245) and additional interest of \$40,345.17 due and payable under the Administration Act
- Mac's application to the Federal Circuit Court of Australia (**FCCA**) to set aside the bankruptcy notice as an abuse of process (because Mr Mac was in some way led to believe that the tax debt supporting the bankruptcy notice would be waived as part of the discussions which ultimately led to the settlement of the POCA proceedings), was dismissed on 2 July 2014<sup>117</sup>, and Mac committed an act of bankruptcy on that day by failing to comply with the bankruptcy notice
- the DCT filed a creditor's petition on 22 December 2014, that was served on Mac on 23 February 2015

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<sup>115</sup> see *Mac v R* [2014] NSWCCA 24

<sup>116</sup> see *Comr AFP v Mac (No 2)* [2013] NSWSC 978 (18 July 2013)

<sup>117</sup> *Mac v Deputy Comr of Taxation* [2014] FCCA 1426

- on 2 April 2015, Mac filed a notice of grounds of opposition to the creditor’s petition relying on s.52(2)(b) of the *Bankruptcy Act 1966 (Cth)* – asserting that he consented to the POCA settlement orders on the understanding that it included his tax-related liabilities because of the effect of s.342-10 in Schedule 1 of the Administration Act; and that he would not have consented if the tax-related debts were not included; and that if the POCA settlement orders did not include the judgment debt his solicitors would seek to have the Supreme Court set aside the POCA settlement orders
- Judge Smith did not accept Mac’s assertions as facts, and at [23]-[25] said in relation to s.342-10(1):

“Section 342-10(1) of Schedule 1 to the TAA provides:

- (1) The Commissioner may waive the Commonwealth’s right to payment of all or part of a \*tax-related liability if the Commissioner is satisfied that:
    - (a) the waiver will facilitate the starting, conduct or ending (by settlement or otherwise) of proceedings under the *Proceeds of Crime Act 2002*; and
    - (b) the liability is connected with circumstances associated with the proceedings.
- ...

The power under this provision was available to be used in connection with the settlement of the POCA proceedings against Mr Mac. The problem, however, is that there is no evidence at all to suggest that it was even considered at the time by either Mr Mac or by [Comr AFP]. There is nothing in evidence before me to suggest, for example, that Mr Mac applied to the DCT for the exercise of the power under s.342-1 or that there was any communication whatsoever between Mr Mac, the DCT or [Comr AFP] (as plaintiff in the POCA proceedings) concerning the possible use of the power.

However, even if the use of the power had been considered, or even if Mr Mac had asked that it be considered, there is no evidence to suggest that it was utilised in Mr Mac’s favour.”

- Mac’s counsel referred to parts of PS LA 2011/10 – Judge Smith at [29] said “*nothing in the policy document is of any assistance to the respondent. The difficulty, as I have said, is that he simply has not shown any basis for his understanding that the waiver power had been exercised*”, and at [30]-[31], Judge Smith discussed the lack of identity between the property forfeited under POCA for a crime committed in 2010 and tax due for income earned in the 2007 and 2008 years, together with a proposition that shortfall penalties were imposed for making a false or misleading statement rather than the earning of income
- Judge Smith was not satisfied that the sequestration order sought by the DCT ought not to be made based on s.52(2)(b) *Bankruptcy Act*.

**Christopher Catt**

**Barrister, 5 Selborne**