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THE COMMONWEALTH RESPONSE TO ORGANISED CRIME

SUB-THESIS SUBMITTED IN ACCORDANCE WITH THE
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I confirm that this sub-thesis is my own work and
all sources used have been acknowledged.

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21 Jan'y 1991.

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INTRODUCTION AND OVERVIEW

Australia is a federation where the Commonwealth has no direct power over crime. What power the Commonwealth has in the area of crime derives mainly from the operation of the implied incidental power adhering to the express powers in section 51 of the Australian Constitution and from the express incidental power, placitum 51(xxxix). Other constitutional powers, such as subsection 52(1), exclusive, plenary power in relation to Commonwealth places, section 119. protection of the states against domestic violence and section 122, plenary power in relation to territories, may be called into play in appropriate situations. There is also some role for the inherent national power.

The enactment of the Crimes Act 1914 gave an early indication to the States that the Commonwealth did not intend to encroach into the criminal law area but rather to take a limited and selective role in law enforcement.

It was not until the 1970's and 1980's that the Commonwealth embarked on an increasingly active legislation program in response to concerns over the Commonwealth's role in the control of organised crime which had been exposed as operating in Australia by a

succession of inquiries and Royal Commissions commencing in 1970 with an Attorney-General's Department Committee inquiry into the functions of the Commonwealth Police. In 1974 came the Royal Commission into allegations of organised crime in licensed clubs in New South Wales, with Justice Moffat as Commissioner, followed by the 1980 Royal Commissions into Drugs (Justices Woodward and Williams). The Commonwealth/New South Wales Joint Task Force on Drug Trafficking reported in 1983 and from 1983-1984 Mr Frank Costigan QC led the Royal Commission into the Ship Painters and Dockers Union. Other Commissions and Inquiries followed, but the Costigan Royal Commission, and the activities of the Special Prosecutors Office that grew out of the Commission, provided the impetus for the Commonwealth's concerted legislative onslaught on organised crime.

In the year following the Costigan Report the then Commonwealth Attorney-General, Mr Lionel Bowen, at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Milan, moved a resolution, adopted by the Congress, on organised crime. The resolution called upon member states to intensify their efforts to combat organised crime more effectively at the national level. Specific recommendations were measures to:

- (i) introduce new offences directed at novel and sophisticated forms of criminal activity;

- (ii) provide for the forfeiture of illegally acquired assets;
- (iii) facilitate the obtaining abroad of evidence for use in criminal proceedings in National courts;
- (iv) modernise laws relating to extradition

Other recommendations included national drug campaigns; strengthening of and increased powers for law enforcement authorities; the establishment of a National Crime Authority with appropriate powers; review or adoption of laws relating to taxation, abuse of bank secrecy, and the money laundering potential of gaming houses with a view to combating the transfer of funds for, or the proceeds of, crime across national boundaries; and the development of multilateral and bilateral treaties on extradition and mutual legal assistance.

By the end of the next four years there was very little, if anything, of that program which the Commonwealth had not put into legislative effect.

Organised Crime Issues

Costigan, confronting the issues which he saw arising out of the Royal Commission into the Ship Painters and Dockers Union, and which continue to raise

strong emotions on both sides of the argument, asked, 'Can a free Society cope efficiently with the impact of organised crime and still remain free?'¹. He states the problem graphically and succinctly:

What this debate is all about is an attempt to define the acceptable balance which this country, as a civilised community, is prepared to strike. Neither extreme is acceptable. On the other hand, if nothing is done about the current problem, within five years this country will have become a jungle. The wild animals will not bite everybody, but their presence will be known and feared. At the other extreme, Draconian powers could be given to such a body, such as search and seizure without warrant and arrest and confinement without charge.

Costigan and his Counsel Assisting in the Painters and Dockers Royal Commission, Mr Douglas Meagher, QC, have been called "the moral entrepreneurs of organized crime"². To justify the kinds of powers to be vested in an investigatory body, which both recommended³, it was necessary for people to believe that organised crime existed and that it posed a real threat. Costigan described a common reaction in the community to the idea of organised crime in 1984 as a reaction of disbelief

¹. Costigan, F QC. "Organised Crime and a Free Society" (1984) 17 Australian and New Zealand Journal of Criminology 7, 8.

². Freiberg, A. "Ripples from the Bottom of the Harbour: Some social Ramifications of Taxation Fraud" (1988) 12 Criminal Law Journal 136, at 52.

³. Costigan, F QC. "Organised Crime and a Free Society" (1984) 17 Australian and New Zealand Journal of Criminology 7, at 13-14. Meagher, D QC. "Organised Crime" Papers presented to the 53rd ANZAAS Congress, Perth, WA 16-20 May 1983, Part IV.

that the problem existed or was serious, and he, too, confessed that in spite of 25 years at the Bar he, himself, had had no idea of what he was to find.⁴

Much has been written on the definition, or lack of definition, of organised crime.⁵ The commonly held view is that it involves a centrally organised, hierarchical, power seeking entity having reasonably stable structures with continuing activities, and involving corruption and violence or the fear of violence.

In Australia no rigid, stable, hierarchical organisational structure appears to have emerged in any of the Royal Commissions previously mentioned⁶. However, when confronted with the failure of the Commonwealth Police to find any "Mr Big" in 1979, Williams J, Drugs Royal Commissioner, is credited with saying that there were "plenty of Mr Big Enoughs"⁷, and that appears to

4. Ibid, 7-8.

5. Bynum, T S. (ed). "Organised Crime in America: concepts and controversies" Crim. Justice Press NY 1987; Bersten, M. "Defining Organised Crime in Australia and the USA" (1990) 23 Australian and New Zealand Journal of Criminology 39.

6. See Meagher, D QC. "Organised Crime" Papers presented to the 53rd ANZAAS Congress, Perth, WA 16-20 May 1983, at 20; Wardlaw, G. "Organised Crime and Drug Enforcement" 16 at 18.

7. Bersten, M. "Defining Organised Crime in Australia and the USA" (1990) 23 Australian and New Zealand Journal of Criminology 39, 52; cf "The National Crime Authority - An Initial Evaluation" Report of the Parliamentary Joint Committee on the National Crime Authority 1988. paragraphs 2.19-2.20..

have been a common experience of investigators. All are firmly of the view that a significant proportion of commercial crime, tax fraud, and corruption of government officials, law enforcement agencies, politicians and financial institutions is perpetrated by organised crime groups.⁸

The Commonwealth Response

Taxation Aspects

The Commonwealth's initial response to disclosures of large-scale and organised tax evasion by the Costigan and McCabe/La Franchi Inquiries, such as the "bottom-of-the-harbour" schemes, was to embark on a campaign of recovery. Estimates of the cost of tax evasion to the revenue during the 70s vary from \$3,000 million to \$7,000 million per year⁹, with a large tax-avoidance industry gaining assistance from the decisions of the Barwick High Court, such as Mullens v The Federal Commissioner of Taxation¹⁰, Slutzkin v The Federal Commissioner of

⁸. Costigan, F QC. "Organised Crime and a Free Society" (1984) 17 Australian and New Zealand Journal of Criminology 7, at 11.

⁹. Grbich, Y F R. "Problems of Tax Avoidance in Australia" in Head, J G (ed) Taxation Issues of the 80s (1983) at 413.

¹⁰ (1976) 76 Australian Tax Cases 4288.

Taxation¹¹ and Cridland v The Federal Commissioner of Taxation¹².

The McCabe/La Franchi Inquiry had been highly critical of the Taxation Department, the banking system and the Government. It criticised the failure of the Taxation Office to take action when it clearly had the grounds to do so, the failure of the Government to curtail the freedom of dealers to offer discount rates on the purchase of companies and to pay commissions to accountants and solicitors who referred vendors, and the general willingness of the whole community to participate in tax avoidance¹³.

The Crimes (Taxation Offences) Act 1980 was the commonwealth's first significant legislative attempt to make tax evasion a serious criminal offence.

Section 6 of that Act, together with sections 5 and 6 of the Crimes Act 1914 and section 8Y of the Taxation Administration Act 1953, operates to bring the criminal law to bear on professional advisers who were directly or indirectly involved in the planning or implementation of any scheme. According to Arie Freiberg, the Act is credited with the sudden halt of the bottom-of-the-

¹¹ (1977) 77 Australian Tax Cases 4076.

¹² (1977) 77 Australian Tax Cases 4538.

¹³. Freiberg, A. "Ripples from the Bottom of the Harbour: Some Social Ramifications of Taxation Fraud" (1988) 12 Criminal Law Journal 136, 143.

harbour schemes, though there have been few convictions under the Act¹⁴

In 1982 the 'TUCT legislation' (Taxation (Unpaid Company Tax) Assessment Act 1982 and associated legislation directed at vendors and promoters) was enacted to recover the unpaid company tax and undistributed profits tax from the vendor shareholders of companies stripped in bottom-of-the-harbour schemes. The legislation imposed a tax liability on the vendors of a company's assets so as to render it unable to meet its current or future tax liabilities. It was explicitly retroactive, authorising recovery of tax from schemes that were entered into prior to the 1980 enactment.

In McCormick v Federal Commissioner of Taxation¹⁵ it was argued that the legislation was not a law imposing taxation within placitum 51(ii) of the constitution, since it purported to impose a liability, amounting to an acquisition of property other than on just terms within placitum 51(xxxi), on persons having no relevant connection with the legal person, the company, having the unpaid tax liability.

The High Court upheld the law as a law with respect to taxation, characterising the tax as 'a tax upon a transaction which resulted in a company being stripped of

¹⁴. Ibid, 160.

¹⁵. (1984) 84 ATC 4230.

its assets so as to be unable to pay company tax,¹⁶ and held that the plaintiffs' 'sufficient connection' was their status as persons who benefited directly or indirectly from the transaction.

As regards the placitum 51(xxxi) submission, the High Court dismissed the argument by reference to The Federal Commissioner of Taxation v Clyne¹⁷ where it was said that once a tax is authorised by placitum 51(ii) it is an absurdity to claim that the relevant amount constitutes property acquired under placitum 51(xxxi).

Organised Crime

Assuming a belief in the existence of organised crime in Australia, the question arises of whether the Commonwealth has a legitimate role in the control of organised crime and the extent to which it can and should respond to that threat.

The framers of the Constitution left general crime control as the province of the states. The Commonwealth role was seen as relating to the enforcement of its own laws in the specified areas conferred on it by the Constitution, often by means of investigative units within Departments of State.

¹⁶. Ibid, 4235.

¹⁷. (1958-1959) 100 CLR 246, 263.

The Development of Commonwealth Law Enforcement

From the time of Federation the Commonwealth adopted an ad hoc and piecemeal approach to law enforcement, and the various early attempts to create a Commonwealth police force failed for want of a clear role; their activities were restricted to minor investigations and guarding. The impetus towards the development of a police force with a particular role in enforcing Commonwealth law and protecting Commonwealth interests resulted from tensions and difficulties in Commonwealth/State relations concerning priorities and even enforcement.

The Commonwealth Police Act was proclaimed in 1960 following five years of dissension, fears that the new force would encroach on the duties of State police, and opposition from Departments with investigative staff fighting strongly to preserve their independence. The new force still suffered from a lack of consensus concerning its desirable role. It was excluded from narcotics law enforcement and the establishment of the Narcotics Bureau in 1968 as a separate agency within Customs suggests that the Commonwealth saw no need at that time to consolidate its investigative forces in one organisation.

The lack of a clear conception of the force's role meant a failure to provide an adequate foundation for its development, with the consequence that the Commonwealth

law enforcement system was poorly equipped to meet the challenges of the 1970s.

Efforts to define a clearer and more positive role for the Commonwealth police had always fallen foul of entrenched interests, either in the states or in investigatory units within Departments. Finally, its development rested on the identification of previously undeveloped areas of law enforcement, free from challenging competitors.

In 1967 the National Committee on Drugs of Dependence resolved that the Central Crime Intelligence Bureau of the Commonwealth Police should be extended to include the gathering of national drug intelligence. From 1970 to 1972 a committee within the Attorney-General's department examined the functions of the police. It identified organised crime as an emerging and major threat to the national interest and recommended that the Commonwealth Police be given the authority to collect intelligence not only on narcotics and crimes which were specifically the responsibility of the Commonwealth, but on the general activities of overseas criminal groups in Australia.

Following the election of the new Labor Government in 1973, Mr Kerry Milte, a former member of the Commonwealth Police, was asked to evaluate the efficiency and functions of the force. He endorsed its further expansion into the organised crime area on the ground

that there was almost no aspect of organised crime that did not involve a breach of Commonwealth law. He recommended the establishment of overseas liaison posts as sources of criminal intelligence in countries having direct criminal links with Australia, and the assumption of the operation of the liaison bureau with Interpol from the Victoria Police.

By 1975 the States were protesting to the Commonwealth Government that these activities, although they were only intelligence gathering, were encroaching upon areas (such as the operation of massage parlours) which, in their view, involved state offences only. Later revelations of police corruption in Queensland and New South Wales may have some bearing on this discouragement of Commonwealth involvement. At this time the Commonwealth police did not have a charter to investigate to prosecution stage organised criminal activities and could do little if the intelligence they collected and disseminated to the States was not pursued in the appropriate jurisdiction.

The real shock of the findings of the Royal Commissions and Inquiries in the 70s and 80s was the extent to which organised crime had achieved superiority over a fragmented, uncoordinated and unco-operative law enforcement machinery.

In 1979 the Australian Federal Police Act came into operation, amalgamating the Commonwealth Police and the

Australian Capital Territory Police, giving the new force a co-ordinating role in the efforts of all police forces against interstate crime, and conferring on it the functions of the now disbanded Narcotics Bureau. From the beginning the investigative role of the new force was stretched by the demands of the operations of the Royal Commissions, the Special Prosecutors that rose out of them, and the joint task forces working to reduce the level of comfort in the environment for organised and white collar criminals and drug traffickers¹⁸.

The Commonwealth had acquired a police force with a clearer and developing role, but many of the problems resulting from the federal system and competing interests within the Commonwealth itself remained. In 1981 Justice Woodward still wrote scathingly of the effects of rivalry and competition on effective law enforcement:

There is lacking throughout Australia adequately organised cooperation between State and Federal agencies. Such cooperation should be extended to include intelligence, objectives directed at individuals, field investigations and prosecutions

In the past there has been wasteful competitiveness between law enforcement agencies who are supposed to be working in the same cause. Citizens of this country should not be required to bear the cost of counter-productive rivalries.¹⁹

18. Historical information from Law Enforcement Policy and Resources Committee Officers' Report 1988, Appendix A.

19. Woodward, P M. "Organisational Crime and the difficulties of Law Enforcement" (1981) ACPC Forum vol 4 No 2 16, 25.

The Legislative Initiative against Organised Crime

When, in 1965, the Australian delegation to the 3rd UN Congress on the Prevention of Crime and the Treatment of Offenders was asked to report on the need to establish an Institute of Criminology, a threshold question for Cabinet was whether this was a proper area for the Commonwealth to enter. The affirmative conclusion was based on the increasing incidence of crime, creating a national problem that required examination at a national level; organised crime extending beyond the boundaries of individual States; the international aspects of organised crime, and the Commonwealth interest in customs, immigration, alien control and deportation, taxation and currency.

However it was not until the mid-80s that the Commonwealth began to work on a legislative package specifically geared towards the suppression of organised crime.

The package was preceded by the establishment of the Commonwealth Office of the Director of Public Prosecutions in 1980 and the National Crime Authority in 1984. The former eliminated the problem of competing with State priorities for prosecution of Commonwealth offences, provided for the development of a specialist corps of lawyers expert in Commonwealth criminal law, provided the machinery for civil remedies which were to become an integral part of the Commonwealth's armoury in

combating organised crime, and removed the decision to prosecute from the political arena. Although section 8 of the Director of Public Prosecutions Act 1980 gives the Attorney-General power to issue directives and guidelines to the Director, only one such direction has been issued since the establishment of the Office, and this, with the agreement of the Director, was to the effect that the Office should provide material to a Parliamentary Commission of Inquiry and had no bearing on the prosecution process.

The National Crime Authority Act 1984 with its underpinning State legislation embodies the recognition that major organised crime requires a qualitatively and quantitatively different response to that traditionally provided by the police forces, and that such a response must involve close co-operation between the Commonwealth and the States at both policy and operational levels. It reflected the need for multi-disciplinary expertise and special systems, including computers, to analyse complex material, the need for Royal Commission types of powers and for access to taxation information.

In 1987 a process of legislation commenced aimed at facilitating the investigation and prosecution of organised crime and at reducing its profitability and increasing its risks. In broad overview the package comprises:

(a) the Telecommunications (Interception) Amendment Act 1987, which assists law enforcement agencies in dealing with specific areas of criminal activity and with organised crime by providing wider avenues of telecommunications interception. Provision is made for two classes of offences:

- (i) murder, kidnapping, serious narcotics offences and offences in relation to which the National Crime Authority is conducting a special investigation. Before a warrant can be issued in these cases, a judge must be satisfied on a number of issues, including the extent to which other investigatory measures have been taken, and their efficacy;
- (ii) offences punishable by imprisonment for life or a maximum period of seven years or longer which involve loss of life or serious personal injury or risk of such loss or injury, serious damage to property in circumstances endangering a person's safety, trafficking in narcotic drugs, serious fraud or serious revenue offences. In considering whether to issue a warrant in these cases a judge must be satisfied on issues including other investigative measures taken and their efficacy, the extent of interference with personal privacy and the gravity of the conduct being investigated.

Interception is undertaken by the Australian Federal Police and the legislation includes a number of provisions designed to ensure adequate oversight of the operations of the Australian Federal Police and the National Crime Authority. Copies of all warrants must be furnished to the Minister; reports must be provided to the Minister in relation to the use of information obtained under warrants and an annual Report is provided to Parliament by the Minister. The legislation provides for inspection by the Ombudsman of the records of the Australian Federal Police and the National Crime Authority to ascertain compliance with the legislation. Controls are provided in relation to the use and communication of information obtained by means of telecommunications interception. It is an offence to possess, communicate or record unlawfully intercepted information and unlawfully intercepted information may be admissible only for the purposes of establishing a contravention of the legislation, which also sets out the specific purposes for which lawfully intercepted information may be used in evidence.

- (b) the Proceeds of Crime Act 1987 strikes at major organised crime by depriving those involved in it of the profits and instruments of their crime. The objective is to suppress criminal activity by

attacking the primary motive, profit, and by preventing the reinvestment of profit in further criminal activity. The Act supplements earlier provisions introduced in the Customs Act 1901 empowering a court to make an order for a pecuniary penalty based on the value of the benefits derived from narcotics dealings.

Freezing and confiscation orders permit a court to grant orders for the freezing and confiscation of property used in, or derived directly or indirectly from, the commission of an indictable offence against Commonwealth law. In addition the legislation provides for the enforcement of foreign freezing and confiscation orders which relate to property in Australia where relevant procedures under the Mutual Assistance in Criminal Matters Act 1987 have been complied with.

Confiscation orders may take the form of either forfeiture orders or orders for pecuniary penalties, or, if appropriate, a combination of both. Third parties having an interest in the property who can establish that they were not in any way involved in the commission of the offence may seek exemption from the forfeiture orders. The process laid down for pecuniary penalties involves an assessment of the benefit which the offender derived, directly or indirectly from the commission of the offence, the assignment of a monetary value to that benefit and

the making of a pecuniary penalty order to the value of that amount. The order is enforceable as a civil debt and is provable in bankruptcy; the courts are empowered to look behind the legal ownership of property to determine whether it is subject to the effective control of the defendant.

The legislation provides for statutory forfeiture in the case of a serious offence (defined to include a narcotics offence involving a trafficable quantity of drugs, an organised fraud offence or an offence of money-laundering the proceeds of either of those offences). In such a case the offender is liable to have all property which is the subject of a restraining order under the legislation forfeited by force of statute, unless the person can establish that the property was lawfully acquired.

Restraining orders are available where persons may seek to move property out of the jurisdiction on becoming aware that charges may be laid and powers are conferred on police to seize property reasonably believed to be tainted pending the making of a restraining order.

Wide powers directed at following the money trail and the transferring of tainted property are conferred on law enforcement officers by the legislation: the court may make orders for the production of property tracking documents to a law

enforcement officer, issue search warrants authorising the seizure of such documents, make monitoring orders in relation to serious offences which require financial institutions to provide information over specified periods of time concerning transactions conducted through the accounts of a particular person. Financial institutions are subject to a statutory obligation to retain certain records to assist the following of the money trail.

Two new offences are created: money laundering, where a person knows or ought reasonably to have known that property is the proceeds of crime, being an indictable offence against a federal law or a drug trafficking offence committed overseas which would have constituted an offence if committed in Australia, and organised fraud constituted by acts and omissions constituting three or more public fraud offences from which the person has derived substantial benefit.

- (c) The Cash Transaction Reports Act 1988 complements the proceeds of crime legislation, and is directed at facilitating the following of the money trail for proceeds of all criminal activity, including tax evasion, and the detection of financiers of criminal activity such as drug trafficking.

The legislation enables law enforcement agencies to monitor the movements of large amounts of cash, and to identify tax evaders and the recipients of proceeds of crime. Transactions reportable to the Cash Transaction Reports Agency include large-scale cash transactions, any suspect transactions, the export of foreign currency and the import of foreign and Australian currency over a prescribed level. Cash dealers, including financial institutions and others, such as bookmakers and casinos, are required to report details of any transactions which the dealer suspects may be relevant to offences against federal laws, and cash transactions to which they are a party, other than transactions exempt in the manner prescribed by the legislation, which involve currency in excess of \$10,000.

These provisions are supplemented by a requirement for the verification of the identity of account holders who open new accounts or whose accounts exceed a prescribed limit. It is an offence to open an account in a false name, the proliferation of such accounts having been identified by the National Crime Authority as a major impediment to the detection and prosecution of organised crime.

- (d) The Extradition Act 1988 consists of an exhaustive review and consolidation of previous extradition laws and introduces improvements which enable Australia to enter into extradition treaties on a

wider basis, the provisions of most relevance to organised crime, and incorporate a number of human rights safeguards. The legislation allows Australia to prosecute Australian citizens for offences committed in another country in cases where extradition from that country of its nationals would be refused on the basis of citizenship, remedying an unequal application of treaty obligations as far as Australia is concerned. The law is also simplified in relation to the determination of dual criminality and the satisfaction of the committal to trial test. Major drug rings can be handled more efficiently by the provisions for temporary surrender, enabling a prisoner to stand trial in another country and then be returned to serve his or her sentence, since cases involving more than one accused are often better conducted concurrently.

The legislation also attempts to impose limits on the political offence exception by excluding from the exception crimes recognised by the international community in multilateral treaties as extremely serious, such as those relating to hijacking, safety of aircraft, taking of hostages and so on.

- (e) The Mutual Assistance in Criminal Matters Act 1987 is important in combating organised crime, providing the basis for Australia to enter into arrangements

with other countries to request and grant assistance relating to the investigation and prosecution of crime and to the forfeiture of the proceeds of crime in areas such as: the obtaining (and provision) of documents, records and other articles of evidence, the execution of requests for search and seizure, the making of arrangements for persons to give evidence or assist in investigation, the location and identification of witnesses or suspects, the forfeiture or confiscation of property in relation to offences, the recovery of pecuniary penalties, the restraining of dealings in property and the freezing of assets that may be forfeited or needed to satisfy pecuniary penalty orders, the location of property and the service of documents.

It provides machinery for the taking of evidence and the production of documents for transmission to a foreign country for use in court proceedings, for search and seizure at the request of foreign countries where the penalty for the relevant offence is at least twelve months, mutual arrangements for travel between Australia and foreign countries for persons to give evidence or assist in investigations. Safeguards against injustice or oppression to individuals are included. The legislation also provides the machinery for making the provisions of the Proceeds of Crime Act available to foreign applicants.

- (f) The Crimes (Superannuation Benefits) Act 1989 is a response to the finding of all the relevant Royal Commissions and inquiries that official corruption is an inevitable component of organised crime. The legislation is designed to prevent the payment of Commonwealth funded superannuation benefits where a Commonwealth employee has been convicted of a corruption offence; to allow the recovery of such payments where the person has already received Commonwealth funded superannuation benefits and has subsequently been convicted of a corruption offence which occurred when the person was a Commonwealth employee; and to restrain property of a Commonwealth employee convicted, or who may be convicted, of a corruption offence where that person has been paid a Commonwealth funded superannuation benefit. Where an order is made making a person's property available to satisfy a recovery order the court may look behind legal ownership to determine whether the person has effective control of the property, and may lift the corporate veil.
- The employee's contribution, including interest on that sum, is not forfeitable and is to be refunded under the legislation.

A corruption offence is an offence committed by a Commonwealth employee involving abuse of office, committed for a purpose that involved corruption or committed for the purpose of perverting or

attempting to pervert the course of justice. Applications for superannuation orders are confined to cases where the actual sentence on conviction exceeds twelve months, so that benefits are not forfeited for minor infringements, (special provision is made for the case of the absconder).

The legislation directs the court to take no account at the time of sentencing of the possibility that a superannuation order may be made in relation to a person. The principle involved is that corruption is viewed as a failure to fulfil a condition of Commonwealth employment, that is, that duties be discharged in a non-corrupt way, and it is that failure which leads to the disentitlement to superannuation benefits. The legislation does not seek to create an additional penalty for the conduct constituting the offence and the courts are precluded from taking the legislation into account when imposing a penalty or sentence for an offence.²⁰

Similar provisions in relation to the Australian Federal Police were effected by amendments to the Australian Federal Police Act 1979 in the Autumn Sittings of 1989.

20. Explanatory Memorandum.

Having taken an overview of the Commonwealth's legislative response to organised crime, the question arises of whether Costigan's question "Can a free society cope effectively with organised crime and still remain free?"²¹ may be answered in the affirmative, or has the Commonwealth engaged in what Brent Fisse has called "Draconian overreach"²²? An attempt to answer these questions will be made after a closer consideration of the legislation and measures taken by the Commonwealth to safeguard civil liberties.

There are, however, two dangers of which policy-makers need to be aware in seeking a legislative solution to crime:

- . the legislation may have unintended consequences (see section on the proposed Australia Card at p xxx) which result in adverse effects that may outweigh the intended benefits; and
- . the legislation may create more criminals than it disposes of, in the sense that newly created offences related to the prevention or regulatory control of crime result in more convictions than the original criminal behaviour.

21. Costigan, F QC. "Organised Crime and a Free Society" (1984) 17 Australian and New Zealand Journal of Criminology 7, 8.

22. Fisse, B. "Draconian Overreach in Organised Crime Control: The Real dirt in Money-Laundering" (1987) 25 Law Society Journal of New south Wales 60.

The Parliamentary Joint Committee on the National Crime Authority considered that the policy of prohibition in relation to drugs has been responsible for an erosion of generally accepted civil liberties, for example, police raids by heavily armed police in search of non-existent drugs, road-block for random search of passing vehicles, intrusive search of persons on suspicion, damage to reputation on the basis of suspicion, reversal of onus of proof regarding quantities deemed evidence of intent to traffic, and also that enforcement discriminates against the young and the poor²³.

The over-criminalisation of drug use, apart from possessing and trafficking offences, generates other criminal activity which would not exist in the absence of the prohibition, for example, murders, assaults, robberies associated with drug transactions, bribery and corruption, contravention of financial regulations and currency laws, and tax evasion²⁴.

²³. "The National Crime Authority - An Initial Evaluation" Report of the Parliamentary Joint Committee on the National Crime Authority 1988, Paragraphs 5.23-5.24.

²⁴. Wardlaw, G. "Organised Crime and Drug Enforcement" Reporter 7 (2) June 1986 11 at p 21.

THE CONSTITUTIONAL FRAMEWORK AS A DETERMINANT OF THE COMMONWEALTH RESPONSE

The fact that the Commonwealth had little substantive power to legislate on the subject matter of crime, coupled with the indifference of organised crime to state or national jurisdictional boundaries, meant that the Commonwealth needed to be creative in its approach to legislative control of the phenomenon of organised crime.

Following the discovery from the findings of the various Royal Commissions that Australia provided a very comfortable operating environment for organised crime, policies developed aimed not at the substantive crimes themselves so much as at reducing the level of comfort of the environment by making organised criminal activity "more difficult, more costly and more risky"²⁵ and by deterring new players from entering the field.

The methods which the Commonwealth decided to use to bring this about were inspired by those developed by Costigan QC in the Royal commission into the Ship Painters and Dockers Union, employing the special powers provided by the Royal Commissions Act 1902 and making extensive use of computer analysis. Costigan followed the money trail to trace criminal networks and to identify the directing mind and will behind criminal

²⁵. "The National Crime Authority - An Initial Evaluation" Report of the Parliamentary Joint Committee on the National Crime Authority 1988, at paragraph 4.26.

operations, people sufficiently removed from the level of street crime to escape detection by the normal methods and expertise available to police. This involved following traceable transactions recorded in public or private documents or on computer tape. He made use of the existing facilities of the community, the banking system, solicitors' trust accounts, building societies and merchant banks, to trace moneys transmitted overseas, property bought and sold, shares acquired, investments made, credit cards used, joint ventures entered into, passports applied for, immigration cards filled out at every point of entry and exit, telephone calls made, and hotel bills paid²⁶.

With the means to identify the people involved in and enriched by organised crime there came the need to find means to prosecute, convict and punish them and to deprive them of the accrued benefits of their involvement in organised crime.

Many major crimes likely to be committed by members of criminal organisations are already Commonwealth offences: importing, or trafficking in imported, proscribed substances, many major fraud and revenue offences, offences relating to the administration of justice in the Commonwealth sphere, bribery and corruption of Commonwealth officers, conspiracy and

²⁶. Costigan, F QC. "Organised Crime and a Free Society" (1984) 17 Australian and New Zealand Journal of Criminology 7, 12-13.

inchoate and secondary offences associated with substantive offences. Many offences having national or international ramifications also frequently have aspects which bring them within Commonwealth jurisdiction.

The Commonwealth has not yet tested how far it can extend the express incidental power of placitum 51(xxxix) of the Constitution, the main source of power for general Commonwealth law enforcement legislation.

Placitum 51(xxxix) confers power on the Commonwealth to make laws with respect to matters incidental to the execution of any power vested by the Constitution in the Parliament, or either House of the Parliament, or in the Government of the Commonwealth, or in the Federal Judicature or in any department or officer of the Commonwealth.

It has not been clear how this express incidental power differs from the implied incidental power which adheres to each of the express powers and gives authority to legislate in relation to anything the control of which is found necessary to effectuate its main purpose²⁷.

The accepted view is that the implied incidental power goes to matters incidental to the subject matter of each express power, while the express incidental power goes to matters incidental to particular exercises of

²⁷. Grannall v Marrickville Margarine Pty Ltd (1955) 93 CLR 55, 77.

legislative power²⁸. Gibbs CJ in Gazzo v Comptroller of Stamps (Vic): ex parte Attorney-General for Victoria²⁹ commented that it was not at all clear what s 51(xxxix) added in its application to matters incidental to the execution of legislative power to the implied incidental content of each power. In the same case Aickin J said that s 51(xxxix) "cannot be used to expand the subject-matter of any of the enumerated legislative powers"³⁰.

Gary Rumble³¹ takes issue with the statement of Aickin J and suggests "a line of reasoning based on the distinction between section 51(xxxix) and the implied incidental power which would find in section 51(xxxix) a large potential for Commonwealth action".

Rumble gives as an example of laws relevant to a particular execution of a legislative power which would not also be characterisable as relevant to the *subject matter* of the legislative power the general provisions in Part 1A of the Crimes Act 1914 which, on their face, have no connection with any particular subject matter of Commonwealth power and are valid because of, and only

28. Le Mesurier v Connor (1929) 42 CLR 481, 497-498.

29. (1981) 38 ALR 25, 31.

30. Ibid, 56.

31. "Section 51(xxxix) of the Constitution and the Federal Distribution of Power" (1982) 13 Federal Law Review 182, 183.

because of, their relevance to *exercises* of Commonwealth power³².

Having drawn attention to this distinction between the express and implied incidental powers, Rumble proceeds to examine the possible interaction of section 51(xxxix) with the principle established by Herald & Weekly Times Ltd v Commonwealth³³ and Murphyores Incorporated Pty Ltd v Commonwealth³⁴. The former case established that the Commonwealth could prohibit an activity at the centre of a power absolutely and any relaxation of the prohibition was similarly a law with respect to the subject matter of the prohibition, with no requirement that either the prohibition or the relaxation of the prohibition be further connected with Commonwealth power by being conditioned on criteria within Commonwealth power³⁵. In the Murphyores Case it was held that it was within the Commonwealth's power under section 51(i) to prohibit (and allow) export by reference to non-Commonwealth considerations³⁶.

³². Ibid, 184.

³³. (1966) 115 CLR 418.

³⁴. (1976) 136 CLR 1.

³⁵. (1966) 115 CLR 418, 433-434, per Kitto J; Taylor, Windeyer and Owen JJ concurring, 439-440, per Menzies J

³⁶. (1976) 136 CLR 1, 8 per McTiernan J, 11-12 per Stephen J, 22-23 per Mason J. Barwick CJ endorsed the judgment of Stephen J, at 5; Gibbs J, at 9, and Jacobs J, at 26, endorsed the judgments of Stephen and Mason JJ.

On the assumption that these principles apply equally to the placita in section 51, section 51(xxxix) would support action to enforce valid Commonwealth laws which utilised them. In Rumbles's example:

Thus should the Commonwealth, in reliance on its powers under s 51(i) or s 51(v) or s 51(xiii) or s 51(xiv), prohibit export or broadcasting or banking or insurance by reference to employment conditions or intrastate trade or environmental impact or attitude to women, then it may generate through s 51(xxxix) a power to legislate directly to control the exporter's or broadcaster's or banker's or insurer's behaviour in relation to those non-Commonwealth subject matters. According to the established distinction between the implied and express incidental power, a measure based on s 51(xxxix) need only have reference to the execution of a Commonwealth power and need not have any relevance to the subject matter of a Commonwealth power.³⁷

Rumble identifies one category of condition which would always justify Commonwealth legislation directly requiring performance of the condition, although it may have no relation to a Commonwealth head of power. This is the situation where the Commonwealth provides that a prohibition on engaging in an activity should be relaxed on a condition relating to the behaviour of the person admitted to the Commonwealth controlled activity *after* he had completed his participation in the activity. Commonwealth enforcement of the condition would

³⁷. Rumble, G A. "Section 51(xxxix) of the Constitution and the Federal Distribution of Power" (1982) 13 Federal Law Review 182, 185-186.

necessarily involve control of the subject matter of the condition³⁸.

Although Rumble has identified a source of power which the Commonwealth has not yet exploited, it is nevertheless not possible, due to the constitutional limitations, for the Commonwealth to cover the field in respect of offences relevant to the control of organised crime.

Woodward J³⁹ advocated a unitary, cooperative approach to the organised crime problem, and so, too, did Costigan, who enumerated the characteristics of organised crime which required such an approach: that it is widespread and organised, separate from street crime but having links with it, that it is impossible to investigate in one state or territory, that it has links with overseas organisations and facilities, that it is a major industry with a turnover in billions of dollars per year, that it employs sophisticated techniques involving breaches of many laws relating to companies, taxation, foreign exchange, immigration and so on, designed to keep secret the identities and procedures involved and that it

38. Ibid, 186.

39. Woodward, P M. "Organisational Crime and the difficulties of Law Enforcement" (1981) ACPC Forum vol 4 No 2 16, 25.

involves incredibly complex chains of transactions to frustrate attempts at investigation⁴⁰.

The National Crime Authority: An Exercise in Cooperative Federalism

The best solution to the constitutional and jurisdictional difficulties inherent in the federal system was considered to be the establishment of a co-operative scheme. Therefore, while the revelations of the Costigan Report on the Royal Commission into the Ship Painters and Dockers Union were still a strong motivating factor, an exercise in State/Commonwealth co-operation created in 1984, not without difficulty, the National Crime authority to inherit the databases and methods of operation of the Royal Commission and to carry on its efforts in combating complex organised crime. Its first Chairman was Mr Justice Stewart with recent significant experience in the area of organised crime as Royal Commissioner inquiring into Drugs (Mr Asia) in 1983 and the Nugan Hand Bank (1983-1984).

Controversy surrounded the creation of the National Crime Authority, with civil libertarians opposed to the extensive powers provided by the legislation, which were perceived as a threat to the rights of individuals when vested in a permanent body rather than a temporary, special purpose Royal Commission. Accordingly a "sunset

⁴⁰. Costigan, F QC. "Organised Crime and a Free Society" (1984) 17 Australian and New Zealand Journal of Criminology 7, 10.

clause" was included in the National Crime Authority Act. That clause was repealed in 1988 as an element in the Government's 1987-1989 organised crime package.

The National Crime Authority was specifically designed to overcome the deficiencies of traditional police forces operating in discrete jurisdictions in the investigation of 'relevant' offences (defined so as to encompass the characteristics of organised criminal activity). Its State underpinning legislation allows it to investigate relevant offences against State as well as Commonwealth law; it can conduct general investigations into relevant criminal activity on its own motion; it can use coercive powers in special investigations undertaken under references granted by Governments, and has access to multi-disciplinary expertise.

A number of accountability mechanisms operate in relation to the National Crime Authority: the responsible Minister, the Parliamentary Joint Committee and an Inter-Governmental Committee which monitors the general investigations of the Authority, approves special references to it after considering whether ordinary police methods are likely to be effective in the particular case, and seeks to avoid duplication of effort and resources.

Witness Protection

The establishment of the National Crime Authority and the increase in prosecutions relating to organised

crime raised for the Commonwealth the issue of its capacity to guarantee witness protection to maximise chances of successful prosecutions.

The Director of Public Prosecutions may grant protection to witnesses appearing before the National Crime Authority who might otherwise incriminate themselves by answering questions.

Section 30 of the National Crime Authority Act empowers the Commonwealth Director of Public Prosecutions, upon the recommendation of the Authority, to give an undertaking to witnesses appearing before it that evidence given by the witness at a hearing of the authority will not be used in evidence in any proceedings against the witness for an offence against the laws of the Commonwealth (other than proceedings in respect of the falsity of the evidence). Similar provisions exist in the State underpinning legislation in relation to State laws (eg section 19 of the Victorian, New South Wales and South Australian Acts).

Protection against self-incrimination is not the only form of protection relevant to witnesses in the context of organised crime. Protection against measures to prevent the giving of the evidence, or retaliation or punishment for having given it may be of as great, or even greater importance to the witness.

The Parliamentary Joint Committee on the National Crime Authority reported in 1988 on the issues raised by

witness protection, especially accomplice witnesses who represent the majority of those requiring protection. The Committee expressed concern at the inconsistencies and lack of uniform policy between State and Federal bodies regarding the granting of indemnities, and also showed some distaste for the doing of deals at all with criminals. The Committee concluded, however, that without the evidence of participants, who were unlikely to be available without protection, it would frequently be impossible to obtain convictions of principals⁴¹.

In the United States a common method of protecting witnesses is relocation under the Victim/Witness Protection Program, which can extend to the removal of whole families and the provision of complete new identities with adjustments to official records to prevent back-tracking.

The Parliamentary Joint Committee questioned the desirability of relying on this method of protection on the ground that the disadvantages outweigh the advantages. Although the criminal witness may welcome a complete new start in life, most non-criminal witnesses would find it an unattractive proposition to leave a settled home, profitable work, a good credit-rating, friends and family, and would consider it a high price to pay for performing his or her civic duty of giving

⁴¹. "Witness Protection" Report of the Parliamentary Joint Committee on the National Crime Authority 1988, paragraphs 5.6-5.7.

evidence. Other problems include delays in provision of new documentation (a limited, or undeveloped, capacity in Australia in any case), which prevents application for new jobs and social security, problems with professional qualifications and references, educational records and forfeiture of credit histories. Problems for the community, as opposed to the witness, include the enforcement of a non-custodial parents rights of access to children, enforcement of civil debts and problems for investigating authorities in tracing past criminal records of protected witnesses who commit offences in the place of relocation⁴².

The Australian practice has been variable from jurisdiction to jurisdiction. Victoria's practice of using 24-hour guarding at safe locations until testimony has been given is expensive and unpleasant both for witness, and family, and guards. After testifying, fares for relocation are provided, together with a small sum for re-establishment. New South Wales and the Australian Federal Police employ relocation, but have a very limited capacity to provide documentation for a new identity⁴³.

The Parliamentary Joint Committee recommended that the Australian Federal Police Protection Branch should assume an expanded national witness protection role, extending the service to other agencies on a user pays

⁴². Ibid, paragraphs 3.13-3.18.

⁴³. Ibid, paragraphs 4.4-4.8.

principle. Funding was recommended to be by means of an initial increase in Commonwealth appropriations, but that this should decrease through the operation of the user pays principle and by the application of revenue generated by forfeiture of assets and the raising of revenue assessments against those involved in organised criminal activity.

The Commonwealth has accepted the recommendation of the Parliamentary Joint Committee that the Australian Federal Police assume a national role and that a National Witness Protection Liaison committee be established under the auspices of the Australian Police Ministers' Council to facilitate co-ordination and co-operation in the area. The proposal was endorsed by the Australian Police Ministers' Council in November 1988.

The Commonwealth's Attempt to Establish a National Identification Scheme

Having established the National Crime Authority and perpetuated the accumulated information, expertise and methodology of the Costigan royal Commission, the Government sought to facilitate the Authority's performance of its task in combatting organised crime, and to make money laundering and tax evasion more difficult, by providing legislatively for a national identification system to be known as the 'Australia Card'.

The bottom-of-the-harbour tax evasion schemes exposed by the Costigan Royal Commission provided the impetus for the Australia Card proposal, which was mainly directed at preventing tax evasion and health and welfare fraud, but, as Dr Blewett pointed out in the Second Reading Speech: "One spin-off of this enhanced pursuit of the money trail will be an improved assault on corporate and organised crime"⁴⁴.

However, the Australia Card proposal marked the point at which, politically, the interest in controlling large scale fraud and pursuing the money trail to combat organised crime was suddenly outweighed by the resistance of most Australians and their representatives in the Senate to what was perceived as regimentation and intrusive Government supervision.

It also highlighted the problems of Government in implementing controversial proposals when it does not have control of the Senate.

Section 51(ii) of the Constitution was the power relied on to mount the proposed national identification system. The system would have required production of the identification card to:

- . open or continue any account with a bank or financial institution;

⁴⁴. cf Freiberg, A. "Ripples from the Bottom of the Harbour: Some social Ramifications of Taxation Fraud" (1988) 12 Criminal Law Journal 136, 170, 172.

- . invest with Government or semi-Government bonds, solicitors' trust accounts or other interest bearing investments;
- . invest in trusts, cash management or property trusts;
- . derive primary production incomes through marketing authorities and produce agents; rental income through real estate agents; and non-salary or non-wage income through government agencies by doctors, chemists and other professional persons or entities;
- . send money overseas (all remittances over \$50,000 to be reported to the Australian Tax Office);
- . all real estate transactions;
- . hold or use a safety deposit box
- . buy shares or futures;
- . apply for work, including work done on a contract basis; and
- . identify a person seeking registration as a group employer or for sales tax purposes.⁴⁵

There was to be a companion system to identify and record transactions of entities and bodies which were not natural persons for purposes of taxation.

⁴⁵. Report of the Joint Select Committee on an Australia Card May 1986, paragraph 1.10.

These proposed uses would be constitutionally valid if the transaction involved attracted taxation or affected the tax liability of a person or had an incidental role in the collection of tax or the suppression of tax avoidance. Requirements for production in relation to social security, unemployment, health or other benefits under Commonwealth programs which were also proposed would have been valid under the relevant head of power supporting the particular program.

It was also intended that State and Territory births, deaths and marriages records be computerised (if necessary by Commonwealth acquisition, including 'just terms' compensation pursuant to s 51(xxxi) if required). Access to the database was to be limited to verification of documentation submitted for the purpose of obtaining nominated services from the Commonwealth by specified Departments. Safeguards were to have included the establishment of a Data Protection Agency, individual rights of access to and correction of personal data and the introduction of privacy legislation and legislation to modify bank secrecy rules and to require the reporting of fraudulent or suspected fraudulent transactions⁴⁶.

The joint Select Committee acknowledged that the contemplated use of the Australia Card might be a useful tool in fighting organised crime. It would counter the use of fictitious identities, facilitate tracing the

⁴⁶. Ibid, pp xix-xxii.

money trail through banks and financial institutions and the identification of controllers of criminal organisations by linkage of the money and identity trails.

Nevertheless, in Costigan's emphatic opinion, the proposal was like using a jackhammer to crack a nut. He considered that many of the anticipated benefits were illusory, and achievable by other means, while its disadvantages were significant and serious in their intrusiveness and in the probable future extension of the card's applications⁴⁷

In its Report of 20 May 1986 the Joint Select Committee rejected the proposal on civil liberties grounds and on the basis of fundamental doubts of its appropriateness and cost-effectiveness to solve problems of tax avoidance and evasion and other fraudulent activity, the majority being persuaded by the views of Mr Costigan⁴⁸.

The Bill was twice rejected by the Senate and constituted the basis for double dissolution under section 57 of the Constitution in June 1987. What followed, after the Government was returned to office with a sufficient majority in both Houses to achieve passage of the Bill at a joint sitting, was described in

⁴⁷. Ibid, paragraphs 3.9, 4.2.

⁴⁸. Ibid, paragraphs 4.1-4.2.

the Australian Law Journal's *Current Topics* as "a political and constitutional bombshell"⁴⁹.

The Opposition announced a fatal flaw in the bill. Its operational clauses were specified to come into effect 'on or after the first relevant day'. That day was defined in clause 32(1) of Part IV as 'a day declared by the regulations to be the first relevant day for the purposes of this Part, not being a day that is earlier than 1 March 1989'.

The then leader of the Liberal Opposition, Mr Howard, painted what he claimed was an inevitable scenario. An Opposition-controlled Senate could, pursuant to section 48 of the Acts Interpretation Act 1901, disallow the regulation, whereupon, by virtue of that section the declaring regulation would become void and of no effect as if there had been a repeal; no first relevant day would exist and accordingly no operational clauses could come into force.

Various ways around the problem were explored by the Government, including the obvious one of amending the Bill to commence by proclamation. However, as pointed out in *Current Topics*⁵⁰, the wording of section 57 of the Constitution either precluded or cast doubt upon the power of the Government to initiate the necessary amendment during the period after the double dissolution.

⁴⁹. (1988) 62 Australian Law Journal 6, 7.

⁵⁰. Ibid, 9.

Another possible option mooted was to view the provision for declaration of the relevant first day as directory rather than mandatory and proceed by proclamation, but if, as seemed likely, the requirement for declaration were interpreted as a condition precedent for commencement of the operational clauses, that argument would fail⁵¹.

It was also argued that the defeating of the legislation once passed at a joint sitting by disallowance of the regulation represented a breach of constitutional convention, being an improper exercise of the power of the Senate for the ulterior purpose of frustrating legislation.

In any event, to proceed on the basis of any of the possible options would inevitably have involved delay through legal challenges and uncertainty as to the nature of any decision the High Court might ultimately make, assuming that it would accept jurisdiction to examine the legislative process in determining the procedure permitted by section 57. It had previously done so in cases such as Cormack v Cope⁵², determining whether prescribed procedure had been followed, and in cases following the 1975 double dissolution, including the

⁵¹. cf Egan v Shop Distributive and Allied Employees' Federation of Australia and New South Wales (1979) 143 CLR 325.

⁵². (1974) 131 CLR 432.

Petroleum and Minerals Authority Case⁵³ in which it was held that the procedure laid down in section 57, as it applied to that case, was mandatory, not directory.

The Government formally announced on 29 September 1987 that it was abandoning the Australia Card. It fell back on an up-graded tax file number for use in the ten previously enumerated Australian Tax Office uses that had been proposed for the Australia Card; the fact that a tax file number was sent in the mail to numerous dead people on the issue of the improved numbers perhaps vindicates those who had some doubts of the Government's capacity to maintain the Australia Card system with the promised level of integrity and safeguards.

Privacy Safeguards Associated with the Identification System

The Privacy Bill, which embodied safeguards proposed in relation to the Australia Card project, arose out of the Australian Law Reform Commission Report on Privacy (No 22, 1983) which expressed concern at the incomplete protection given to privacy interests in Commonwealth legislation, even at that time, which predated legislative efforts to keep track of identity and financial transactions for revenue and law enforcement purposes.

⁵³. Victoria v Commonwealth (1975) 134 CLR 81.

The Privacy Bill was to have been relevant to the proposal for the establishment of the Australia Card Register and questions of access to the Register.

Apart from privacy legislation, sections 70 and 79 of the Crimes Act 1914, section 51(1) of the Public Service Act 1922 and regulation 35 of the Public Service Regulations provide the framework for controlling disclosure of personal information by government officials working in record-keeping systems. There are also legislative provisions which specifically require non-disclosure of personal information for example, the Social Security Act 1947 and the Income Tax Assessment Act 1936.

However, the Australian Law Reform Commission noted that 'the basic framework might be criticised as allowing discretionary secrecy. And that which allows "discretionary secrecy" also allows "discretionary disclosure"',⁵⁴

The Report of the Joint Select Committee on an Australia Card recommended the introduction of privacy legislation based on the Australian Law Reform Commission recommendations as soon as possible, irrespective of whether the Australia Card proposal were adopted⁵⁵.

⁵⁴. Australian Law Reform Commission Report No 22, Vol 1, paragraph 948.

⁵⁵. Report of the Joint Select Committee on an Australia Card May 1986, paragraph 2.42.

The Privacy Act 1988 provides in relation to the use of tax file numbers as it would have in relation to the proposed Australia Card Register: section 28 confers functions in relation to tax file numbers on the Privacy Commissioner, including investigations, audits and the monitoring of tax records to ensure compliance with the law. He may issue guidelines for collection, storage and security of tax file number information, and section 18 of the Act imposes a duty on a tax file number recipient to comply with those guidelines.

The Privacy Commissioner may, pursuant to sections 27 and 40, investigate an act or practice of an agency that may breach an Information Privacy Principle set out under section 14, except that certain persons or bodies are exempted from the operation of section 27, including the National Crime Authority. Section 49 provides that the Privacy Commissioner's investigation into a matter must cease if he forms the opinion that a tax file number offence has been committed (that is, an offence under sections 8WA or 8WB of the Taxation Administration Act 1952 or against sections 6, 7, 7A or 86(1)(a) of the Crimes Act 1914) in which case he must inform the Commissioner of Police or the Director of Public Prosecutions.

The Privacy Commissioner also performs a monitoring and auditing role in relation to the privacy aspects of the operational procedures of the Cash Transaction Reports Agency, which in most respects is protected from

external supervision; (the Cash Transactions Reports Bill had originally been introduced as part of the Australia Card and Privacy package, the intention being that the Australia Card would be used as proof of identity as required by the Bill). The Administrative Decisions (Judicial Review) Act 1977 does not apply to decisions under the Cash Transaction Reports Act 1988 (by virtue of section 42 of the latter Act) and it is probable that applications under the Freedom of Information Act 1982 are excluded by the effect of the Secrecy and Access provisions of Part IV of the Cash Transaction Reports Act, which arguably constitute a code governing disclosure of information under the Act.

MONEY LAUNDERING AND CIVIL REMEDIES

Money Laundering

Following the Australia Card package set-back, the government embarked in 1987 on a concentrated program of legislative measures designed to suppress organised crime by facilitating investigation and prosecution, removing its profitability and increasing its risk, and depriving criminals of the otherwise (possibly) legal services of accountants, solicitors, bankers and other advisers and others involved in financial transactions by creating a serious offence of money laundering (above pp 16-24).

Prior to the new legislation any cash dealer who was knowingly concerned in or party to the commission of a Commonwealth offence, or who knowingly assisted another person to escape punishment or to dispose of the proceeds of such an offence, could only be prosecuted under sections 5 or 6 of the Crimes Act 1914.

Now, as Bostock points out⁵⁶, through the interaction of the Proceeds of Crime Act and the Cash Transaction Reports Act, a cash dealer may be in an uncomfortably vulnerable position in circumstances where he or she would have been blameless under the general law of complicity.

Section 16(1) of the Cash Transaction Reports Act imposes on a cash dealer an obligation to report to the director of the Cash Transaction Reports Agency any transaction concerning which he or she has 'reasonable grounds to suspect' that information relating to it may be relevant to investigation of an evasion, or attempted evasion, of a taxation law; to an investigation or prosecution of a person for a Commonwealth or Territory offence; or of assistance in the enforcement of the Proceeds of Crime Act or regulations. The Explanatory Memorandum gives the reason for the mental element of 'reasonable grounds to suspect' as being 'so that lower threshold will alleviate the need for cash dealers to

⁵⁶. Bostock, T E. "Observations on the Cash Transactions Legislation" Australian Tax Review September 1989 147, 148-152.

undertake intensive investigation before being able to pass on information to the Director'.

Section 17 of the Cash Transaction Reports Act provides:

Where a cash dealer, or a person who is an officer, employee or agent of a cash dealer, communicates or gives information under section 16, the cash dealer or person shall be taken, for the purposes of sections 81 and 82 of the Proceeds of Crime Act 1987 not to have been in possession of that information at any time.

Section 81 of the Proceeds of Crime Act creates the offence of money laundering if a person:

- (a) engages, directly or indirectly, in a transaction that involves money, or other property, that is proceeds of crime; or
- (b) receives, possesses, conceals, disposes of or brings into Australia, any money, or other property, that is proceeds of crime;

and the person knows, or ought reasonably to have known, that the money or other property is derived or realised, directly or indirectly, from some form of unlawful activity.

The penalty for that offence is a maximum of \$200,000 fine or 20 years imprisonment or both for a natural person; a fine of \$600,000 for a body corporate.

It appears that by failing to report to the Director of the Cash Transaction Reports Agency pursuant to section 16 in a situation where he or she did not feel he or she had reasonable grounds to suspect that a transaction was within sub-paragraph 16(1)(b)(i), (ii) or (iii), a cash dealer does not acquire the protection of section 17 regarding the possession of information. This

may ultimately lead a jury to believe on the basis of that information that he or she "ought reasonably to have known" that the money involved in the transaction derived from some form of unlawful activity.

Instead of committing an offence of refusing or failing to communicate information to the director under sub-section 28(1) of the Cash Transaction Reports Act, with a subjective fault element and a penalty of up to \$5,000 or 2 years imprisonment, or both, he or she may be convicted, on the basis of an objective test, of an offence under section 81 of the Proceeds of Crime Act, punishable by up to \$200,000 fine or 20 years imprisonment or both.⁵⁷

The Cash Transaction Reports Act also seems to expose cash dealers (including officers, employees and agents) to civil actions for breach of confidence or defamation by customers in respect of reports made under sub-section 16(1).

Bostock⁵⁸ points out that, although sub-section 16(5) purports to protect the cash dealer from civil proceedings arising out of action taken pursuant to section 16, a cash dealer seeking to rely on that protection would arguably need to establish that he or she had reasonable grounds to suspect that the

57. cf Bostock, T E. "Observations on the Cash Transactions Legislation" Australian Tax Review September 1989 147, 152.

58. Ibid, 150.

transaction fell within one of the three categories described in paragraph 16(1)(b).

Thus the cash dealer may feel that he or she is between the devil and the deep blue sea. In order to gain the protection of section 17 and avoid being vulnerable to section 81 of the Proceeds of Crime Act he or she may be drawn to a liberal interpretation of 'reasonable grounds to suspect' and, when in doubt, report to the Director; but in order to gain the protection of sub-section 16(5) he or she must take a stringent view of the phrase such as would justify action pursuant to sub-section 16(1) in a court of law.

Moreover, sub-paragraph 16(1)(b)(i) requires that a cash dealer report a transaction of which he has reasonable grounds to suspect that information relating to it may be relevant to the investigation of an evasion or attempted evasion of a tax law. An entire legal specialty is devoted to exploring the fine line between tax avoidance and tax evasion, and no definition of tax evasion is provided for the cash dealer in the Act.

As Bostock describes the problem:

At one time there was a recognised distinction between evasion on the one hand, as involving either concealing assessable income or making false claims for deductions, and avoidance on the other, which was the exercise of the right of the citizen to arrange his affairs according to law in such a way as to be liable for the least tax possible. There is no doubt that over the last twenty years that distinction has become blurred, even obliterated, in the minds of the lay public, and even, to a degree, in the minds of some judges. And the distinction is blurred in any event by such measures as s 260 of the Income Tax Assessment Act and its successor, Part IVA of that Act.⁵⁹

For serious offences there is a strong tradition in the High Court that a subjective fault element will be required unless the relevant legislative provision renders such a requirement impossible (see, for example, He Kaw Teh⁶⁰).

The Proceeds of Crime Act also offends in other ways against established principles by providing for a reversed onus of proof in sections 19(6)(c), 27(6) and 82; section 85 imposes vicarious, and therefore strict, liability on individual and corporate defendants for the offences in sections 81, 82 and 83, even though the offences are serious and carry severe penalties, including imprisonment up to 20 years⁶¹

⁵⁹. Ibid, 149.

⁶⁰. (1985) 111 CLR 610.

⁶¹. cf Fisse, B. "The Proceeds of Crime Act: The Rise of Money Laundering and the Fall of Principle" (1989) 13 Criminal Law Journal 6, 12, 18.

Civil Remedies

If the Cash Transaction Reports Act interacts with the Proceeds of Crime Act in such a way as to render an environment previously friendly to organised crime hostile and dangerous so that it is now difficult for criminals to use the services of honest cash dealers to launder the proceeds of crime, then the proliferation of civil remedies which threaten those proceeds has altered dramatically the balance between level of risk and profitability. It is no longer easy for lower level criminals to 'take the rap' for satisfactory compensation, while the organisers and the proceeds of the crime remain at a safe distance from law enforcement. The Cash Transaction Reports Act facilitates the tracing of the money trail beyond the lower level offender to the higher level organiser or organisers.

Even before the legislative package of the late 80s, specifically directed against organised crime, use was made of existing powers to compel the production of documents and conduct compulsory examinations (eg sections 263, 264 of the Income tax Assessment Act 1936, section 69 of the Bankruptcy Act 1966, section 541 of the Companies Code and section 243F(1)(d) of the Customs Act 1901).

The power to impose forfeiture provisions was upheld by the High Court in Burton v Honan, per Dixon CJ: 62

Once the subject matter is fairly within the province of the federal legislature the justice and wisdom of the provision which it makes in the exercise of its power over the subject matter are matters entirely for the legislature and not for the judiciary.

The Special Prosecutors Act 1982 (an interim measure arising out of the Costigan Royal Commission) provided a civil remedies function exercisable at any time. The Director of Public Prosecutions Act 1983 restricted the civil remedies function so that the Director could only exercise it after a prosecution had been instituted. This restriction was removed, under pressure from Royal Commissioners Costigan and Stewart and former Sypecial Prosecutor Redlich, in 1985.

Civil remedies were also provided in the Taxation Administration Act (section 8A(1)) and the Customs Act (Div 3, Part XIII). Mareva injunctions were available to protect assets in danger of dissipation.

The Proceeds of Crime Act creates in Part II Division 1 a two-pronged confiscation order in relation to persons convicted of indictable offences:

s 14(1)(a) directed against 'tainted property',
 defined in s 4(1) as property used
 in, or in connection with, the

commission of an offence, or the
proceeds of an offence; or

s 14(1)(b) a pecuniary penalty order directed at
benefits derived by a person from the
commission of an offence.

Power to conduct the relevant litigation is vested in the Director of Public Prosecutions, who may also, under the procedure laid down in sections 43-65, apply for restraining orders, including foreign restraining orders registered under the Mutual Assistance Act. If there has not been a conviction, affidavit evidence is required from a police officer to the effect that he or she believes that the defendant has committed the relevant offence and that the property is tainted property or that the defendant obtained a benefit from the commission of the offence. It is not necessary to demonstrate that there is a risk that the assets will be dissipated, and the civil standard of proof applies.

Some Judicial Consideration of Restraining and Confiscation and Pecuniary Penalty Orders

There has as yet been relatively little judicial consideration of the organised crime package. However, the arguably draconian effect of the restraining, confiscation and pecuniary penalty orders provided by the Proceeds of Crime Act, and similar provisions in the

Customs Act, have not escaped caustic comment from the bench.

In Abraham Gilbert Saffron (No 4)⁶³ Kirby J referred to the novel and drastic aspects of the Proceeds of Crime Act and said:

A court will give effect to the will of Parliament. It will do so, if that will is clear, even in a penal statute and despite drastic consequences for those affected. But if there is ambiguity, a court will prefer a construction which observes and upholds time honoured civic rights.

In Director of Public Prosecutions (commonwealth) v Velimir Markovski⁶⁴ Teague J wrestled with the issues involved in the granting and extending of restraining orders under ss.43 and 45 of the Proceeds of Crime Act. He referred to the concern of Carter J in Re an Application Pursuant to the Drugs Misuse Act 1986⁶⁵ that a restraining order under comparable provisions constituted a "restraint upon the exercise of fundamental rights in respect of property which a person may need to use in the course of his everyday living". But his Honour also weighed the possibility of dissipation of assets to thwart recovery if no action could be taken until after conviction. Of considerable concern to him in the exercise of his discretion was the issue of the reasonableness of the grounds for the police officer's

⁶³. (1989) 39 A Crim R 353 at 357.

⁶⁴. Supreme Court of Victoria 19 October 1990.

⁶⁵. [1988] 2 Qd R 506 at 508.

belief, as to which he is required to be satisfied under s.44(3)(b) of the Proceeds of Crime Act, that the defendant committed the offence with which he was charged. The question of reasonableness concerned him when considered against the likelihood, or substantial possibility, of insuperable problems being encountered in leading admissible evidence directed to obtaining a conviction. This conflict was resolved by reference to an old case, Hicks v Faulkner⁶⁶ quoted with approval in Davis v Gell⁶⁷:

The question of reasonableness and probable cause depends in all cases, not upon the actual existence, but upon the reasonable bona fide belief in the existence of such a state of things as would amount to a justification of the course pursued in making the accusation complained of - no matter whether this belief arises out of the recollection and memory of the accuser, or out of information furnished to him by another. It is not essential in any case that facts should be established proper and fit and admissible as evidence to be submitted to the jury upon an issue as to the actual guilt of the accused. The distinction between facts to establish actual guilt and those required to establish a bona fide belief in guilt should never be lost sight of inconsidering such cases as I am now discussing. Many facts admissible to prove the latter would be wholly inadmissible to prove the former.

Connolly J, in Bauer v DPP⁶⁸, was called upon to consider the effect of s.48(4)(e)(i) of the Proceeds of Crime Act which places the burden of proof upon the owner of property to have it excluded from a restraining order.

⁶⁶. (1878) 8 QBD 167 at 173.

⁶⁷. (1924) 35 CLR 275.

⁶⁸. (1989) 91 ALR 491.

In that lack of evidence that it was so used is insufficient to satisfy the burden, his Honour perceived the burden to be extremely onerous, commenting that it "requires no imagination to give examples of situations where it could never be discharged although no unlawful activity might have occurred at all".

Recently the Full Court of the Federal Court, in Razzi v Commissioner of Australian Federal Police⁶⁹, examined, in the context of s.243B(3) of the Customs Act 1901, the effect of the words "benefits derived by a person from the commission of an offence" which correspond to the terms of s.26(1)(b) of the Proceeds of Crime Act.

Mrs Razzi appealed from a pecuniary penalty order made on the basis that she was aware of the general nature of her husband's drug trafficking operation and particularly that it concerned the importation of heroin, and also that the purchase of properties in joint names prior to the relevant importation indicated a readiness by Mr Razzi to share his assets with his wife.

The Full Court held that more than a "readiness to share" on Mr Razzi's part was required to justify a finding that Mrs Razzi had received a valuable benefit from the importation - an expectation of a benefit is not a benefit derived (Davies J, p10; Jenkinson J, p6; Hill J concurring).

⁶⁹. Sydney 2 November 1990.

The issue of "tainted property" pursuant to s.44 of the Proceeds of Crime Act was considered by Higgins J in In the Matter of Section 43 of the Proceeds of Crime Act 1987 and In the Matter of an Application by the Director of Public Prosecutions for a Restraining Order in respect of Block 6 Section 3 Ainslie in Deposited Plan 25 being the Whole of the Land in Certificate of title Volume 690 Folio 2⁷⁰.

In the event his Honour's comments on the subject of tainted property were obiter dicta since he found it unnecessary to decide whether the property in question were tainted as the offences involved were "serious offences" in relation to which such a finding was not required by s.44(1) of the Proceeds of Crime Act. However, the issues he canvassed may be relevant in future cases where indictable offences are involved.

In passing, Higgins J casts doubt on whether the forfeiture of all of a person's property (in contrast to the forfeiture of the proceeds and instruments of crime) by reason of that person's status as a convict would constitute property acquired "on just terms" by the Commonwealth under pl.51(xxxi) of the Constitution⁷¹.

His Honour also expressed the view that the confiscation provisions applied only to property capable of being physically seized, saying "forfeiture of realty

⁷⁰. Supreme Court ACT 12 September 1990.

⁷¹. Ibid p17.

whereon an offence has occurred seems to me to go beyond that which was intended by the legislature"⁷²

A further issue raised in Razzi, though not important in the particular circumstances of that case, concerned the problem of the conversion of tainted property into money, where this is in the best interests of all parties for the management of the asset. It appears likely that, although the asset itself may be tainted, once converted into money, that money may not be tainted, and accordingly may not be subject to a restraining order.⁷³

Parallel Proceedings

Defendants have had little success in arguing that involvement in parallel civil and/or administrative proceedings and criminal proceedings exposed him or her to the risk of injustice.

In Hammond v Commonwealth of Australia⁷⁴ it was held that if a person were required to answer a question before a Royal Commission designed to establish that he

⁷². Ibid p17.

⁷³. Ibid p13.

⁷⁴. (1982) 152 CLR 188.

was guilty of an offence with which he had been charged before a court, there was a real risk of interference with the administration of justice. Deane J said:

...it is fundamental to the administration of criminal justice that a person who is the subject of pending criminal proceedings in a court of law should not be subjected to having his part in the matters involved in those criminal proceedings made the subject of a parallel inquisitorial inquiry by an administrative tribunal with powers to compel the giving of evidence and the production of documents which largely correspond (and to some extent exceed) the powers of the criminal court.

Nevertheless, in Saunders v The Commissioner for Taxation⁷⁵ the applicant, who was simultaneously confronted with a charge of conspiracy to defraud the Commonwealth, an imminent compulsory examination under section 263 of the Income Tax Assessment Act 1936 and was involved in administrative and appeal proceedings in relation to a number of tax matters, was denied his application for an order to restrain the taxation officer from exercising his power under section 263. Northrop J, in denying the relief, accepted that the Director of Public Prosecutions would receive information from the tax examination for use in pursuing civil remedies but that it would not be used in criminal proceedings, and so created no risk of interference in the criminal process and no conflict with the High Court's decision in the Hammond Case. A similar decision was made by Ryan J in

⁷⁵. (1988) 19 ATR 3715.

Ahern v The Commissioner for Taxation⁷⁶, but in Oades v Hamilton⁷⁷ the New South Wales Court of Criminal Appeal in intended exercise of its inherent power to stay proceedings in the interests of justice, made orders preventing examination under section 541 of the Companies Code on facts which were at the heart of the criminal offences with which the applicant was charged. The High Court, however, on appeal by the liquidator and the Corporate Affairs Commission set aside the orders of the Court of Appeal holding that they were not of a kind permissible under section 541 or in exercise of the inherent power of the Court in the light of the statutory provisions and the public purposes that the examination was designed to serve.⁷⁸

The Poor Defendant

A somewhat unsympathetic attitude seems also to have been taken to complaints by those who have suffered forfeiture or pecuniary penalties, prior to trial on criminal charges, that the action deprived them of funds for their defence.

⁷⁶. (1986) 17 ATR 535.

⁷⁷. (1987) ACLC 371.

⁷⁸. Hamilton v Oades; Corporate Affairs commission of New South Wales v Oades and another (1989) 85 ALR 1.

Carter J in Mahe⁷⁹ washed his hands of responsibility when the defendant claimed that an attempt had been made by the Director of Public Prosecutions and the Commissioner of Taxation to cripple him financially by depriving him of funds for his defence, saying:

It is not for me to comment on the procedures taken by the Commissioner in seeking to protect the revenue. The Director is concerned with the prosecution of the accused for a criminal offence; the commissioner is concerned to protect the revenue by pursuing civil remedies, statutory or otherwise, towards that end.

In the United States the Bench has been similarly impervious to such pleas:

But when a defendant claims that he has suffered some substantial impairment of his Sixth Amendment rights by virtue of the seizure or forfeiture of assets in his possession, such a complaint is no more than the reflection of 'the harsh reality that the quality of the criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy...' Again, the Court of appeals put it aptly: 'The modern day Jean Valjean must be satisfied with appointed counsel. Yet the drug merchant claims that his possession of huge sums of money...entitles him to something more. We reject this contention, and any notion of a constitutional right to use the proceeds of crime to finance an expensive defence (837 F 2d, at 649, n. 7).'⁸⁰

Ian Temby QC gave consideration to this issue in his review of the Proceeds of Crime Act after one year of

⁷⁹. Mahe v Attorney-General (Cth) (1985) 5 FCR 514.

⁸⁰. Caplin & Drysdale, Chartered v United States (1989) US LEXIS 3124.

operation⁸¹. He accepts that when assets are frozen prior to the trial of a defendant two principles can be seen to be in conflict: the entitlement of a defendant to representation by solicitors and counsel of his or her choice, and the entitlement of society not to finance that representation through applying criminal profits to meet its cost.

Temby states that in practice primacy has been given to the first principle and frozen funds have been released pursuant to paragraph 43(3)(b) to provide proper legal representation when no other funds were available. But he also notes that there is a tendency for defendant and counsel to ignore the normal equation between costs and benefits and 'spend like a drunken sailor on a spree' because if the trial results in a conviction the money will go to the Government in any event.

If that trend continues, in Temby's view, paragraph 43(3)(b) (or paragraph 243E(4)(c), Customs Act) claims should be resisted on the basis that proper representation can be provided by means of legal aid. Echoing the US Court of Appeals previously cited, he suggests legislative change so that:

⁸¹. Temby, I. "The Proceeds of Crime Act: One Year's Experience" (1989) 13 Criminal Law Journal 24.

alleged miscreants such as drug bosses who happen to have very large and apparently illicitly obtained property should not be put on a more advantageous basis than other criminals, that is to say should be put on to legal aid like their poorer fellows.⁸²

Fisse⁸³ also points out that, where paragraph 43(3)(b) (or similar provisions) are not called into play because the defendant still, at the relevant time, has the means to meet his or her expenses, nevertheless, fees paid to lawyers may be vulnerable to forfeiture as proceeds of crime, or, in a worst case scenario, receipt of fees might in some cases constitute the offence of money laundering, and legal representatives may need to trust that the prosecutorial discretion will always be exercised in their favour.

In Fisse's view, the argument that criminals should not be entitled to unlimited funds for their defence is specious. The confiscation provisions of the Proceeds of Crime Act are conviction based and it is premature to strip the defendant of economic power until criminality is established, and until that time there should be no restriction except the defendant's own judgement on expenditure for legal assistance⁸⁴.

There has been some judicial comment on the implications for legal representation of the restraining

⁸². Ibid, 29.

⁸³. Fisse, B. "Confiscation of Proceeds of Crime: Funny Money, Serious Legislation" (1989) 13 Criminal Law Journal 386, 391.

⁸⁴. Ibid, 393.

order provisions. In Deputy Commissioner for Taxation and DPP v Kunz⁸⁵ Vincent J considered it rather disquieting to find a prosecuting authority, through its counsel, providing support for an application in which it would appear to have little real interest and which, if successful, may well restrict the capacity of the respondent to defend himself against charges laid by that authority.

In Commissioner of the Australian Federal Police v Amad Malkoun and ors⁸⁶ which involved variation of orders made under s.243E of the Customs Act to allow payment of legal costs for committal proceedings, Ryan J held that there was no specific onus cast upon an applicant to affirmatively establish as a precondition of relief that he had fully complied with orders as to disclosure of assets or that he did not have assets other than those under the control of the Official Trustee from which to meet his legal fees, these matters being factors to be taken into account by the Court in exercising its discretion. Nor was his Honour prepared to leave the funding of the defence to the speculative availability of legal aid, though refusing the defendants unrestricted access to the assets subject to the s.243E order by limiting each defendant to an amount up to \$30,000 for the costs of the trial.

⁸⁵. unreported judgment No45 of 1989 Supreme Court of Victoria.

⁸⁶. unreported, Ryan J, 1.2.1989, Fed.Ct (Vic).

Proportionality of Punishment to Crime

In the case of 'serious offences' all the defendant's property (owned at the time of the application for a pecuniary penalty order and acquired since the earliest relevant offence, or within the previous five years, whichever is the lesser period of time) is, by virtue of sub-section 27(6) of the Proceeds of Crime Act, presumed to be the proceeds of crime, unless the contrary is proved. A 'serious offence' is a serious narcotics offence, as defined in section 7, organised fraud, section 83, or money laundering in relation to the proceeds of either, section 81.

Fisse considers that the Proceeds of Crime Act authorises recovery of tainted property and proceeds of crime which comprehend more than the profit made from an offence, for example, a \$1m ocean cruiser used to import cannabis resin with a street value of \$100,000 may be confiscated as tainted property⁸⁷.

Proportionality has always operated as a constraint in sentencing and was endorsed by the High Court in Yeen v The Queen (No 2)⁸⁸ when all members of the Court endorsed the principle that a sentence should be proportional to the gravity of the offence, and rejected the view that a sentence could be increased to exceed

⁸⁷. Ibid, 376.

⁸⁸. (1988) 164 CLR 465

proportionality to protect society against a repetition of the offence.

There is nothing in the Proceeds of Crime Act to require that proportionality be taken into account when considering the combined operation of sentence and pecuniary penalty orders. Ian Temby QC wrote, while still Director of Public Prosecutions, that a person convicted of one of the specified 'serious offences' "faces the risk of not just imprisonment, or the payment of a fine, or forfeiture of the proceeds of crime, or loss of property involved in the commission of the offence, but the loss of everything of a material nature"⁸⁹.

No challenges of this aspect of the legislation have, as yet, occurred, despite Fisse's view that the provisions may result in 'cruel and unusual punishment'⁹⁰ or acquisition of property otherwise than on just terms in contravention of placitum 51(xxxi) of the Constitution.

When Special Prosecutor Robert Redlich pioneered the use of civil remedies against organised crime he saw those remedies as crucial in limiting the activity of criminals by denying them access to funds and assets. This was done primarily by the issue of taxation

⁸⁹. (1988) 23(3) Australian Law News 10, 11-12.

⁹⁰. cf Sillery v The Queen (1981) 55 ALJR 509, at 513.

assessments by the Taxation Office and the use of Mareva injunctions to freeze the relevant assets until liability was decided.

On a similar line of reasoning, a major goal of the Proceeds of Crime Act is to incapacitate offenders, especially those engaged in drug trafficking, by depriving them of their economic power⁹¹. Arguably the goal of the legislation is not punishment, proportional or otherwise, but prevention - the incapacitation of existing criminals, deterrence of others who might consider entering the field, and the creation of an inhospitable environment by draconian penalties for money laundering with a fault element that includes an objective test that is far less demanding than the mens rea for any form of complicity in a major offence.

IDEOLOGICAL ISSUES

The philosophical inheritance which underpins Australia's legal system derives from two sources.

From the British heritage the political and legal thought of Jeremy Bentham and John Austin predominates, built on a foundation of the Hobbesian notion of

⁹¹. Lionel Bowen: *Hansard*, 30 April 1987, 2314.

sovereign indivisible power vested in the Monarchy, and the necessary supremacy of statute over common law.

Bentham was deeply preoccupied with legislation for reform purposes, setting up the principle of 'utility' as the criterion by which the success of government and its laws must be measured. he sought reasonable, practical solutions to social problems, did not favour any limitations on sovereign power which could operate to interfere with legislation for the purposes of reform. he was influential in bringing about the death in England of any notions of an *a priori*, normative, supra-legislative principle supporting concepts of 'natural rights'. In the outcome, constitutional limitations do not fetter the British Parliament, and the only practical limitation on its power is political. Protection of individual rights is dependent on voluntary adherence to common law principles and to the rule of law.

John Austin based his first concepts of analytical jurisprudence on Bentham's political theories of unrestrained parliamentary sovereignty, promulgating the legal positivist view that the judge is concerned with legality alone, and his role is to enforce the law of the land⁹².

This was the legal tradition behind the Founding Fathers when they met to hew out a written constitution

⁹². Moffat, R C L. "Philosophical Foundations of the Australian Constitutional Tradition" (1965) 5 Sydney Law Review 59, generally.

for Australia. However, because they were dealing with a federation, they looked to the United States for a federal model, and so came under the influence of a very different tradition.

In the united States, with its history of revolution, there was a deep distrust of centralised power and a belief in utilising Lockian concepts of natural rights, including that justifying revolution. These natural rights were specifically protected in the first ten amendments to the Constitution and are commonly known as the Bill of Rights. In order to avoid both a too powerful central government and an equally mistrusted, unlimited democratic power, the Constitution was designed to incorporate an intricate system of checks and balances to ensure an effective separation of power. American federalism resulted in the supremacy of the constitution rather than of parliament, while judicial review was rendered much more potent as an active 'legislating' force by the separation of powers and the existence of the Bill of Rights.

At the turn of the century in Australia it is clear from the preceding Federation debates that national government was possible only on a federal basis due to the fears of the small and remote states of losing their identity. Indeed, at the time of the First convention Tasmania and south Australia came prepared with an accumulation of documents describing, analysing and

discussing federal systems⁹³. The final result was a hybrid Constitution combining concepts of Cabinet government and ministerial responsibility with separation of powers, judicial review (by implication) and a Senate, allowing the operation of a system of checks and balances. Though some civil rights received limited protection (trial by jury, section 80; freedom of religion from state (legislative) interference, section 116; freedom from discriminatory treatment as between residents of different states, section 117; freedom from acquisition of property otherwise than on just terms, placitum 51(xxxi)), there were no entrenched natural rights to compare with the potency of the United States Bill of Rights. This absence of protection of rights was attributed by Sir Owen Dixon to confidence in 'the wisdom and safety of entrusting to the chosen representatives of the people sitting either in the Federal parliament or the State Parliaments all legislative power, substantially without fetter or restriction',⁹⁴.

Against this background the package of organised crime legislation must be assessed, and it cannot be denied that it leans heavily towards the Benthamite notion that a sovereign government may enact any legislative measures it considers appropriate to achieve the ends of social reform which it has in view. When

⁹³. La Nauze, J. A. "The Making of the Australian Constitution" Melb. U.P. 1972 25-26.

⁹⁴. In "Jesting Pilate and other Papers and Addresses", 102.

tested by Bentham's *felifici calculus* to assess its degree of utility, many would consider that the over-all benefit of the package outweigh the ill-effects.

The advantages would include the facilitation of the investigation and prosecution of organised crime, restoration to the community of the millions of dollars it has been deprived of in lost revenue, and the rendering of the criminal activity so difficult, dangerous and unprofitable that, by its dwindling away, the costly social ills (drug addiction, health costs, public corruption) which accompany it would also be curbed.

Against this good is set the loss of some degree of privacy, and the compromising of some long-standing common law principles of criminal responsibility, criminal procedure and sentencing, examples of virtually all of which could be found represented in existing legislation.

Section 243B of the Customs Act permits pecuniary penalty orders which may exceed by far the net profit obtained from the criminal enterprise, which may be payable whether or not the person is convicted of a relevant offence and which operate independently of any sentence or conviction. The High Court has upheld as constitutionally valid the overt use of punitive civil

sanctions in addition to any penalty or conviction⁹⁵. Reversed onus of proof provisions exist in a number of Acts creating offences⁹⁶. Strict and vicarious liability offences exist, though not in respect of offences carrying the possibility of such high fines and terms of imprisonment. The question is, how do the often intangible and speculative benefits to the diffused and anonymous community balance against the tangible harm to a relatively few individuals.

In the context of organised crime, instead of receiving protection through clearly defined, specific offences, a subjective fault element, investigatory procedures hedged with traditional safeguards, onus of proof beyond a reasonable doubt always on the prosecution, now the individual is often dependent upon an exercise of discretion by the person in whom the power is vested for fair and just treatment in his or her particular circumstances. Avenues of review or appeal available are on the lawfulness, not the merits, of that exercise.

Australia's ideological climate has changed to a large extent since the 70s in relation to intrusive powers of investigation, reduction of established levels of privacy for financial transactions and tax offences.

⁹⁵. Re Smithers; Ex parte McMillan (1982) 152 CLR 477, 485)

⁹⁶. eg Trade Practices Act 1965, Ozone Protection Act 1988.

Until the Costigan Royal Commission exposed the extent and blatancy of the bottom-of-the-harbour schemes, and Costigan and Meagher undertook their campaign to convince the public and the government that organised crime, including tax fraud, was tolerated at a cost the community could not afford, Australians tended to disbelieve in a local organised crime industry.

Also, as Freiberg⁹⁷ says:

the period from 1974 to 1980 in the High Court was marked by the ascendancy of a legal formalism informed by an intellectual hostility directed against the revenue authorities and whose epitome is found in the taxation judgments of the then Chief Justice, Sir Garfield Barwick. The period in question was also a time of high inflation, of an increasing resistance to what were perceived as the iniquitous rates of taxation and poor relations between the Commissioner of Taxation and his clients.

Parliament took steps to obstruct the court's tendency to interpret provisions legalistically to defeat the purpose of tax legislation by inserting section 15AA in the Acts Interpretation Act 1901 requiring that legislation be interpreted to give effect to its purpose, and gradually the public came to admire large scale tax evaders less and resent them more as the link between

⁹⁷. Freiberg, A. "Ripples from the Bottom of the Harbour: Some social Ramifications of Taxation Fraud" (1988) 12 Criminal Law Journal 136, 139.

J S Albanese⁹⁸, writing on the effect of ideology on criminal justice policy, drew attention to the necessity for that degree of public support for the proposed control measures which would outweigh the opposition from civil libertarians. He quoted former United States Attorney-General, who said:

We have yet to exploit properly our most powerful asset in the battle against the rackets: an aroused, informed and insistent public.

The result would be laws permitting wire-tapping by federal law enforcement agencies and a provision enabling suspects to testify to incriminating activities through the use of immunity finally achieved when civil liberties objections were overcome in the Omnibus Crime Control Act of 1968.

In Australia, although there was general public resistance to the introduction of a national system of identification, there has been minimal public opposition to the measures specifically directed against organised crime and major fraud.

⁹⁸. Albanese, J S. "What Lockheed and La Cosa Nostra Have in Common: The Effect of Ideology on Criminal Justice Policy" Crime and Delinquency April 1982, 211, 229.

IN THE FINAL ANALYSIS

Whether the firing of public imagination and indignation as a means of gaining support for stringent control measures is always productive has been questioned.

By linking drugs to organised crime in the public mind, policy makers have been able to justify significant increases in power and resources in combating organised crime, but in the process they may have been locked into an approach which over-criminalises drug use and generates unintended negative consequences.

The criminalisation of drug use is associated with income generating crime, crimes of violence associated with drug transactions, corruption, contravention of financial and currency laws and tax evasion, themselves with consequences leading to a range of derivative problems within the criminal justice system; and, as Miller says, ideological assumptions, 'once established...become relatively impervious to change, since they serve to receive or reject new evidence in terms of a self-contained and self-reinforcing system',⁹⁹

Civil libertarians would argue that the present commonwealth commitment to large-scale amassing of private information about the financial transactions of

⁹⁹. Miller, W. "Ideology and criminal justice Policy" (1973) Journal of Criminal Law and Criminology 142, 142.

generally innocent citizens, the sharing of such information between agencies, sometimes for purposes which are unrelated to the purpose for which the collection of the information was authorised under the Constitution (for example, provision of information to state or international agencies), and the sacrifice of long-standing criminal law principles, are negatives which change the nature of our society for the worse in ways which cannot be justified by any hypothetical decrease in the hospitality of the Australian environment to organised crime.

In Fisse's view:

The so-called war against organised crime has generated a new despotism in criminal legislation, a new despotism wherein serious offences are described in such scattershot terms that the scope of liability depends very little on law and very much on an administrative discretion.

This despotism is not only ethically indefensible, but has gone to the extent of exposing lawyers and accountants, stockbrokers and financial institutions to unwarranted risk of prosecution in their everyday professional or business lives¹⁰⁰

Pragmatists, on the other hand, take the view that, on the basis of the findings of the Royal Commissions and Inquiries that exposed the scale of organised crime and revenue fraud in Australia, rigorous measures were urgently required and justified, and that sufficient safeguards can be incorporated to protect the innocent

100. Fisse, B. Draconian Overreach in Organised Crime Control: The Real dirt in Money-Laundering" (1987) 25 Law Society Journal of New south Wales 60

from suffering any ill-effects; indeed, they may be said to benefit by receiving relief from the \$11 to \$87 per week per tax-payer which, in 1987, was offered as a conservative estimate of the cost of organised fraud¹⁰¹. In contrast, for the year 1988-1989 the National Crime Authority Annual Report reported total tax assessments of \$23,971,435 and total proceeds of crime of \$5,501,000, this being a period during which the legislation had hardly begun to have an impact.

The values involved in this debate are deep and personal and will never be completely resolved one way or the other. A balancing process, in which the pendulum swings one way and then the other, keeping the values and principles cherished on each side within an acceptable range may be the only solution. The process has been well expressed by Lord Cooper in Lawrie v Muir¹⁰²

From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict - (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from the courts of law on any merely formal or technical ground. Neither of these objects can be insisted upon to the utmost. The protection of the citizen is primarily the protection of

¹⁰¹. Griffin, T and Rowe, B. "Problems of Prosecuting Corporate Crime: Soundings from the Bottom of the Harbour" (1987) 74 Proceedings of the Institute of Criminology S U Law School 11, 11.

¹⁰². [1950] SLT 37, 39-40.

the innocent citizen against unwarranted, wrongful and perhaps high-handed interference, and the common sanction is an action of damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand, the interest of the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering positive inducement to the authorities to proceed by irregular methods

In light of the fact that Australia is a federation in an international context where rapid, virtually instantaneous, communications and speed and ease of travel mean that countries can no longer act, in many areas, in isolation from one another, the role of the Commonwealth is increasingly to respond at a national level to challenges which affect the international community, and organised crime is certainly one of these challenges.

Where in such instances the Commonwealth lacks the constitutional power to legislate on a particular subject matter it must use what power it has creatively, exploring the extent of its powers under sections 51(xxix) and 51(xxxix) of the Constitution, (the external affairs power and the incidental power), developing its co-ordinating role where an exercise in co-operative federalism is the only feasible response, and testing the limits of the indirect powers authorised by the High Court in the Herald & Weekly Times¹⁰³ and Murphyores cases.

¹⁰³. (1966) 115 CLR 418.

In the Australian system so many checks and balances, in the form of the Senate, virtually never controlled by the government, quite powerful committees, the States themselves, and the electorate, operate to limit any naked exercise of power by the executive that a considerable degree of consensus is required to achieve the successful passage of controversial legislation.

In spite of considerable criticism on civil liberties grounds of some aspects of the Commonwealth's organised crime legislation, it would appear that many people agree to some extent with Lord Cooper that ultimately, in reconciling the interests which come into conflict in the course of curtailing the activities of sophisticated, organised and well-resourced criminals, the safeguards for the protection of the citizen are not intended as protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law.

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