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CPD SEMINAR: CRIMINAL PROPERTY CONFISCATION AND PROCEEDS OF CRIME LAWS

PRACTICAL APPLICATION OF THE CPCA AND POCA AND MANAGEMENT OF CONFISCATION ACTIONS⁂

"In my time on the Bench I have seldom come across a piece of legislation as perplexing and difficult to construe as [the CPCA]. Perhaps that is not surprising. The legislation has previously been described as draconian and some of the concepts that emerge from it can justifiably be described as extreme." [1]

The Hon. Justice Owen

"…the Criminal Property Confiscation Act 2000 (WA) is an Act that lacks coherence and, for that reason, is drafted unsatisfactorily. These are powerful reasons to conclude that the disputed question of construction of section 7 of the Act should be resolved by preferring the construction adopted by the majority in the Court of Appeal in this matter that limits the cases in which there is … confiscation of property." [2]

The Hon. Justice Hayne

1. I have started the above with passages about the interpretation of the CPCA, each made in proceedings between Centurion Trust Company and the State. The citations are in the paper. I do so quite deliberately. Any consideration of a dilemma under either the CPCA or the POCA must begin with the statutory text. But in either case one is likely to fairly quickly face questions of construction or interpretation.

2. Following on from those passages, I would, having personally had some input into significant amendments made to the POCA in more recent years, like to think the federal statute is not an Act that "lacks coherence" and that it is not an Act that is "unsatisfactorily drafted." But that is not say it could not have been drafted in simpler terms. Without a doubt it too is certainly "difficult to construe" at times.

⁂ This paper was initially presented at a Law Society WA Seminar on 6 November 2014.
[1] *Centurion Trust Company v DPP* [2010] WASCA 133 at [75].
[2] *DPP (WA) v Centurion Trust Company Ltd* [2011] HCATrans 88, per Hayne J refusing special leave.

3. As with the State Act, It would be hard to argue against the proposition that any ambiguity within the Federal Act ought not, other things being equal, be resolved in a manner that limits forfeiture (as Hayne J put it).

4. As you have heard, litigation under the *Criminal Property Confiscations Act 2000* (WA) (**CPCA**) and the *Proceeds of Crime Act 2002* (Cth) (**POCA**) (collectively **the Acts**) is civil.[3]

5. In my experience, as with most civil litigation, the vast majority of matters do not proceed to trial. Either opposition to confiscation evaporates (for instance following conviction), or consent orders are agreed. Very occasionally the State or Commonwealth will withdraw.

6. Contested final order hearings are the exception, not the rule. A great many of the final order hearings that proceed are narrowly focused; often on a point of law.

7. Accordingly in the next half an hour I propose to focus on the issues that affect the majority of matters under the Acts; that is interlocutory matters. I aim to give you an overview of the key interlocutory issues.

8. I aim to address these issues both from the perspective of acting for a client who is suspected of engaging in criminal activity, and from the perspective of acting for a third party. The range of third parties potentially affected by the Acts is wide. It includes spouses, parents and children. But also banks, business partners, creditors, debtors, tenants and many others.

First client contact

9. In some cases you may receive a call out of the blue to advise a potential client who is in the company of WA Police who wish to conduct an immediate, and compulsory, interview. If you don't practice in the area you need to know what to do.

10. What I might call, the usual advice to 'say nothing to the Police' isn't going to work. If your client follows such advice they will likely be charged.

[3] Section 102 CPCA; sections 315 & 317 POCA.

11. Section 76(1) of the CPCA provides that a police officer exercising certain powers under the CPCA may:

> *(d) require a person to give to the officer any information within the person's knowledge or control that is relevant to locating property that is reasonably suspected of being confiscable;*
>
> *(e) require a person to give to the officer any information within the person's knowledge or control that is relevant to determining whether or not property is confiscable;*

12. They are broad powers. Advice to a client is likely to turn upon the jurisdictional question of whether the officer is exercising a relevant power, that is a search and/or seizure power under ss 73 or 74 of the CPCA. In my view the powers under ss 73 and 74 are time limited. The Police cannot in my view seize property or documents under those provisions and come back a week later and purport to ask questions under s 76. I know from experience that view is not universally held by the Police.

13. Assuming the s 76 power is active, you should in my view speak to the relevant Police officer and seek an assurance from that the questioning will be recorded and an undertaking that answers given will not be disclosed within the Police service outside of the Proceeds of Crime Squad. You should confirm those assurances by emailing the relevant officer contemporaneously.

14. Assuming you are not asked to advise on a s 76 interview, then typically your first contact with a client who has a confiscations problem will be in the days or perhaps weeks after they are served with a document that prevents anyone in the world at large from dealing with or disposing of certain property (ie a Freezing notice or similar).

> Regrettably in my experience important and valuable days are often wasted whilst the client seeks out adequate legal representation. Finding a suitably experienced lawyer is not easy.

15. If a client approaches you to act for them in relation to a matter under either Act, only accept instructions if you:

a. Firstly, have time available to deal with the matter urgently. If you are a sole practitioner in the middle of a 4 week trial you simply do not have the capacity to take on an instruction under either Act. Even at the bar I make a point of trying to see new confiscations clients ASAP, within a few business days. You should do the same; and

b. Secondly, for all but the simplest matters it is desirable that you have some understanding of the criminal law, property law (including equity) and civil procedure before you try to come to terms with either Act.

16. Most commonly the document that has been served on your client will be a freezing notice issued by a Justice of the Peace under the CPCA or a Court issued restraining order under the POCA. But it might be a freezing order issued by a Court under the CPCA or a freezing order issued by a Magistrate under the POCA. Regardless, the document will have been issued on the application of the State or Federal Police (or less commonly, the State or Commonwealth DPP). The order will have been made *ex parte*.

17. The first thing you should do is ascertain that you have all the papers. This is particularly so in the case of a Court order. The first question is to ascertain what your client has been served with. Read it all. Carefully. Re read it. Make sure you understand it.

18. Your client will likely have received a covering letter together with the notice or order. Ask for it. Seek instructions about (and confirm in writing) when your client received the papers. Determine the applicable time limits and diarise them. I will return to these in a moment.

19. Next check that you have been given everything that the letter says is enclosed. Contact the author of the letter. Identify what you have been provided with, and check that there is nothing else you should have. Check the service date on your client, and confirm the advice in writing. In the case of Court orders, ascertain what affidavits were relied upon at the *ex parte* hearing. If any affidavits are being withheld from your client, ask why and on what authority. Consider the answer given.

20. If the client has been served with an order of the Court, request from the plaintiff, or order from the registry, a transcript of the *ex parte* hearing.

First client meeting

21. You now need to take **detailed** instructions from your client.

22. Even in the case of acting for a suspect, I recommend taking detailed early instructions. There will be cases, I have had a few in the course of this year at the bar, where you will obtain information that would (from an ethical perspective) limit your ability to vigorously defend the client in any related criminal proceedings. That in my view is the necessary price that must be paid. You cannot adequately represent a client's interests under the Acts unless you have a full understanding of what the client says about their assets and how they were acquired. If that means someone else must defend them in the criminal proceedings so be it. You must not put your own commercial interests ahead of your client's best interests. If you wish to retain the criminal matter, it may be necessary to refer the confiscations matter off to another legal team.

Why are detailed instructions needed? Early compulsory statements.

23. One of the first things you will be required to do is assist your client to provide a statutory declaration (in the case of the CPCA) or an affidavit (in the case of the POCA) to the authorities. I shall refer to them interchangeably as compulsory statements.[4]

24. In my experience most practitioners are aware that it is important to file an objection (in the case of the CPCA) within 28 days of service of the freezing notice. However there is also unfortunately a view that that the filing of the objection is the first step. It is not. The statutory declaration must be given to the Police within 7 days. Too often the drafting of the statutory declaration is left to a junior and inexperienced lawyer, or worse the client is given a partially pre-completed form and told to complete it, sign it and return it. I cannot over emphasise the need to carefully take detailed instructions before the statutory declaration is sworn. What the client says in it can come back to haunt them.

[4] CPCA s 37, POCA s 39.

If they omit some fact that they later seek to rely on, the failure to refer to it could cast doubt on the fact itself.

25. Before I expand on that, it should be noted that Federal and State compulsory statements have a slightly different scope to one another.

    a. The CPCA statutory declaration is only required to identify WHO else is or may be an "interested party" in relation to the frozen property (that is to identify anyone who is or may have an interest in the frozen property that would allow them to succeed on an objection to confiscation). The statutory declaration must provide WA Police with the names and address/es of all such people.

    b. In contrast, s 39 POCA is wider. Careful attention should be given to the terms of any s 39 order to ascertain precisely who must give the affidavit, what it must cover and in relation to what period. Close attention should be given to the terms of the s 39 order. Are the terms of the order within the power granted by s 39? If not apply to have it set aside. If that application will take some time, apply for an extension of time in which to comply with the order whilst its validity is challenged.

26. Note that the compulsory statements are not filed in Court – they are given to the Police. Of course you should keep a copy.

27. The CPCA statutory declaration must be given within 7 days. The POCA affidavit must be furnished within the time stated in the Court order.

28. In the case of the AFP a police officer may offer to sit down with your client and draft the affidavit. I suggest that course is likely to result in your client volunteering information that they are not compelled to provide. I can see no advantage to the client in doing that (other than a misconceived short term saving in legal costs).

29. I return then to the question of detailed instructions. As I mentioned a moment ago, if your client fails to mention something in their compulsory statement that they later wish to assert, it is highly likely that their statement (and the omission of that material from it) will be relied upon against them.

30. Let's take a hypothetical example. Your client is a suspected drug trafficker (within the statutory meaning) and all his property has been frozen. He must give a statutory declaration to WA Police. A business associate of your client's may have an equitable interest in a frozen asset. If that is not stated in the statutory declaration, any evidence your client gives at a contested application years later in support of the asserted interest will be met with the answer that it was not declared in the statutory declaration. Your client's supporting evidence may not be accepted. The business associate's objection to confiscation will now fall to be determined on the strength of his or her evidence alone.

31. Because s 39 statements are far broader, the risk of harm to the client is even greater if the statement is not prepared carefully.

32. In the course of drafting the compulsory statement you should in my view also sense test it. If your client provides you with an inherently unbelievable story you should, tactfully, explore the story and test it. It is better that they be cross examined by their own lawyers before swearing it, rather than by the authorities after the event.

Your clients' concerns

33. You should ascertain early on if your client, or a third party, will be prejudiced in some unusual way by the freezing notice or restraining order. Michael Seaman will shortly address you on the topic of release of funds to meet business expenses. I won't impede on his topic. But you should take instructions on this early.

34. In a recent matter I am instructed in the client is 1 of 4 shareholders in a private company. The company is in the process of strata-titling a large piece of land and constructing units on it. The client's 1 share in the company is frozen. The company's bank is no longer prepared to extend finance. It will be necessary to negotiate a sale of the client's share to the other shareholders (with the proceeds paid to the Public Trustee to remain frozen).

35. Similarly, early instructions should be taken in relation to the possibility of applying to have your client appointed to take control of the frozen

property. This is particularly so under the CPCA. Section 91 allows the Court to appoint an owner of property to control and manage it, or even to sell it. With the POCA, in default of the Official Trustee being given custody and control, control remains where it lay.

36. If the asset is earning an income, the terms of the order should be considered. It will often be the case that the income is frozen and payable to the Official Trustee (Cth) or Public Trustee (WA). In the case of negatively geared property it will usually be possible to agree orders that see that income used to pay the mortgage and upkeep expenses.

Court filings - objections / appearances etc

37. If your client has property (or an interest in property) that has been frozen or restrained you will need to:

    a. In the case of the CPCA – file an objection; or

    b. In the case of a POCA restraining order – file an appearance.

38. The time limit for the CPCA objection ought not be overlooked. It is 28 days from the point at which your client becomes aware of the order. Normally that will be 28 days from service of the notice.

Examinations, the right to silence & stay of proceedings

39. The privilege against self-incrimination (often referred to as the right to silence) is sacred to criminal defence lawyers.

40. Less well known is the privilege against forfeiture. In essence it is a privilege that can be called upon by a person who is facing forfeiture of an asset. The person cannot at common law be called upon to make the case against themselves for forfeiture.[5]

[5] In the case of the POCA, see for instance *DPP v Hicks* [2011] NSWSC 1060 and the cases it discusses. That decision can be difficult to locate. It is not suppressed. Some discussion of the principle is also found in *Application by Commissioner of the Australian Federal Police* [2013] VSC 686.

41. There can be no doubting that the principle of legality applies to these privileges. In essence the principle of legality says that irresistible clarity is required before statutory words will be held to abrogate the privileges.[6]

42. But the principle of legality is not a constitutional entrenchment of privileges.

43. There can be no doubting that compulsory examinations under the Acts make significant inroads into these privileges. Just how far those inroads go has been the subject of a considerable volume of recent case law.

44. It continues. On 12 September 2014 French CJ and Bell J gave special leave to the Commissioner of the Australian Federal Police against a decision in favour of a Mr Zhao. See [2014] HCATrans 202.

    a. The resulting appeal will analyse at least 3 recent High Court decisions (*X7 v ACC* and 2 cases involving a Mr Lee) that are concerned with the use of compulsory examinations of people who are facing concurrent related criminal charges.

    b. It will also examine the case below (from the Victorian Court of Appeal) and competing decisions of the NSW and Queensland Courts of Appeal.

    c. In short it's a case to watch.

    d. My pick is that the Commissioner will succeed on the appeal.

    e. I think it is the law (in light of *X7* and the 2 *Lee* cases) that:

       A person currently charged with criminal offences can generally be examined for a confiscation purpose.

       The examination can traverse issues relevant to guilt (provided there is a proper confiscations purpose for doing so).

[6] See numerous statements to this effect in *X7 v Australian Crime Commission* [2013] HCA 29 and *Lee v New South Wales Crime Commission* [2013] HCA 39.

The product of the examination should be quarantined; ie not made available to criminal investigators and prosecutors.

Issues about derivative use are vexed.

45. I have written a little more on that topic in a recent edition of Brief.[7] I have also published some blog posts on the topic.[8] Suffice it to say someone who is to be compulsorily examined should take expert advice before the examination. Advance consultation with the authorities should occur to ascertain (at a minimum):

    a. whether the examination may or will traverse issues in common with any pending criminal charges;

    b. what use can be made of the answers given in (and documents produced to) the examination; and

    c. (if you are bold) what can be done with evidence derived from answers given in and documents produced to the examination. I say 'if you are bold' because there is a lack of case law on this issue. Heenan J has recently noted this question (without offering a view on the answer) in *Bartlett v The Queen*.[9]

46. There is a view amongst some lawyers that the powers of an examiner are so broad, and the rights of an examinee so limited, that there is little point in an examinee being represented. It is not a view I share.

47. In my view every examinee in such a forum should be represented, even a person who is merely a 'witness' in the traditional sense who has no apparent interest in the outcome of the underlying confiscation matter.

48. Giving evidence in an examination is not the same as giving evidence in Court. For a start the rules of evidence do not apply. Secondly the examiner does not have the same powers as a Judge, for instance to determine a question of law.[10] Thirdly and perhaps most importantly there

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[7] Greaves, Edward *'High Court in Lee v The Queen restricts access to compulsory examination material'* (2014) 41 7 Brief 14.
[8] www.egreaves.com.au/blog
[9] [2014] WASC 277 at [41]. His Honour referred to *QAAB v ACC* [2014] FCA 747 at [39] – [40].
[10] Typically questions of law are referred off by an examiner to a Judge.

is no disclosure or 'cards on the table' going into an examination. You can seldom be truly certain that a witness is only a witness, and not also a suspect, even if only a secondary suspect.

Other case law

49. Whilst on the topic of pending High Court cases, I will mention another. A Mr Henderson was recently also successful in obtaining special leave. He was unsuccessful at first instance and before the Queensland Court of Appeal in seeking to exclude property from forfeiture. The Courts below found that Mr Henderson inherited property from his father. He argued that he had thus met the statutory test for exclusion – he had shown the property was lawfully acquired, **by him**. The State of Queensland has successfully argued thus far that this was 'not enough'. Because Mr Henderson did not give any consideration for his inheritance the State has said (and the Courts have thus far agreed) he had to also show that his father obtained the property by lawful means.[11] Mr Henderson's appeal was heard on 16 October 2014.

Getting paid

50. Under the POCA, once a restraining order is made, there is an express prohibition on release of funds for legal expenses; see s 24(2)(ca). There are arrangements for Legal Aid to assist a defendant (notwithstanding the fact the proceedings are civil). In short Legal Aid will apply a means test that ignores restrained property. Thus if all of a client's property is restrained under the POCA, they will satisfy the means test and can secure legal aid funding. In turn the Legal Aid Commission is reimbursed by the Commonwealth.

51. The CPCA contains no such prohibition. Legal Aid is not available to defend CPCA matters. Rather, a request can be made to the State DPP to convert a freezing notice into a freezing order. The State may agree to release funds, alternatively an application can be made to the Court to release funds. Someone other than the client may need to fund such an

[11] For a further discussion see: http://egreaves.com.au/henderson-reverse-onus-confiscations/2014/06/

application and the provision of initial advice (unless the lawyers are prepared to do it on spec).

52. In essence, under the CPCA the Court (or the DPP by way of conferral) assesses the reasonableness of a request for access to funds, whereas under the POCA the assessment is made by the Legal Aid Commission.

53. These procedures apply to both defence of the litigation under the Acts and to defence of criminal charges.

Costs of getting off the record

54. Remember these are civil proceedings. If you cease to act for your client and a new lawyer is not appointed you will need to apply under Order 8 rule 7 RSC to get off the record. I would suggest solicitors to keep funds in reserve on trust to meet the costs of such an application should the need arise.

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