LEGISLATION NOTE

The Criminal Proceeds and Instruments Bill 2005

Introduction

The Criminal Proceeds and Instruments Bill 2005 sets out a new framework for the forfeiture of the proceeds and "instruments of crime".[1] It proposes that the existing forfeiture regime established under the Proceeds of Crime Act 1991 be split into two parts: a conviction-based regime for the forfeiture of instruments (criminal proceedings); and a non-conviction based regime for the forfeiture of criminal profits and assets representing the proceeds of crime (civil proceedings). Other important features of the Bill include:

(i) The creation of a new recovery body within the Serious Fraud Office;
(ii) The use of extra-judicial powers of investigation;
(iii) The integration of instrument forfeiture into the sentencing process;
(iv) The use of retrospective provisions;
(v) The option for respondents to enter into settlement with the recovery body; and
(vi) The removal of the "legal funds exception" (i.e. putting an end to respondents using their restrained property to pay for their legal costs).

The Current Law

The Proceeds of Crime Act 1991 (the "Act") currently provides for the post-conviction forfeiture of the proceeds and instruments of crime. Forfeiture proceedings run in parallel to a criminal prosecution and are "very much a part of the criminal process."[2] Targeted property may be restrained when a person has been, or is about to be, charged with a "serious offence".[3] It is then forfeited after conviction with either a forfeiture order or a pecuniary penalty order. The former is used to confiscate the instruments of crime and the identifiable proceeds of crime (i.e. specific property shown to have come from the predicate offence). The latter is used to recover the proceeds of crime where it has been spent or cannot be located.

Although the Act was touted as "one of the most important measures dealing with serious crime that has been introduced into Parliament",[4] it has failed to live up to expectations and has been criticised for its low returns. Since 1992 it has returned a mere $11.7 million to the Crown, considerably less than its operating costs.[5] Police and Ministry of Justice reviews of the Act reveal that while forfeiture orders for the

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[1] Property used to commit, or to facilitate the commission of, an offence. For example, a house used to cultivate cannabis.

[2] *Black v R* (1997) 15 CRNZ 278, 281. Although questions of fact are determined on the balance of probabilities (s 85).

[3] Section 2(1) defines a serious offence as an offence punishable by imprisonment for a term of 5 years or more.

[4] (4 September 1990) New Zealand Parliamentary Debates (Hon. W. P. Jeffries).

[5] This figure represents the total amount money confiscated and subsequently paid to the Crown up until 2004/2005. See the Insolvency and Trustee Service Information Library <http://www.insolvency.govt.nz> at (21 August 2006). The Ministry of Justice estimates the annual operating costs to be $2.3 million. Cabinet Policy Committee Paper POL (04) 305 - *Proceeds of Crime: Paper 1: Amendments to Conviction-Based Forfeiture Regime* (18 October 2004).

instruments of crime are relatively easy to obtain, gaining a forfeiture order for the proceeds of crime can be a difficult and time-consuming process.[6] Police complain that they have trouble connecting the offender's property to the predicate offence as there is rarely any direct evidence showing its unlawful origins. The presumption of illicit gain designed to offset this problem has proven easy to displace and largely ineffective. The two reviews also cite a variety of other legislative and operational problems including a shortage of skilled staff such as forensic accountants.[7]

The Criminal Proceeds and Instruments Bill 2005 ("the Bill")

Based on the New South Wales Criminal Assets Recovery Act 1990, the Bill seeks to provide a more effective means of forfeiting the proceeds and instruments of crime.[8] Its policy objectives are to reduce the rewards from crime for the individual, the attraction of crime for potential offenders, the resources that could be potentially used for criminal activity, and generally to deter criminal activity.[9]

The civil forfeiture regime applies in respect of "significant criminal offending". Clause 6(1) defines this as offending that carries a maximum term of imprisonment of five years or more or offending that has generated benefits of $30,000 or more.[10] The key feature of civil forfeiture is that offending need only be proven on the balance of probabilities. Forfeiture may be imposed whether or not the respondent has been charged with a relevant offence, acquitted, or had their conviction quashed.

This approach will see the legislative net cast much wider than it is under the Act and bring more offenders within reach of the recovery body. For instance, it will be possible to target people who profit from criminal activity but do not engage in it themselves (i.e. a leader of an organised crime group). The threshold for forfeiture under the conviction-based regime remains the same as it is under the Act.[11] As the major changes in the Bill relate to the civil forfeiture regime it will be the focus on the following discussion.

1 Civil Forfeiture

The civil forfeiture regime will be run by a newly created recovery body located in the Serious Fraud Office (the "SFO"). This move will allow the recovery body to draw on their investigative expertise and advanced forensic accounting skills.

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[6] Ministry of Justice *Proceeds of Crime Act 1991: Review of Operational Effectiveness* (July 2002). New Zealand Police *Proceeds of Crime Act 1991: Review of Operational Effectiveness* (October 2003).

[7] Ibid 6. Other problems that were noted include: the cost of forfeiture proceedings, evidentiary problems such as the lack of a dedicated search warrant for evidence, the inability to sell restrained property to preserve its value, and poor communication between Police and Crown Law.

[8] See explanatory note, 1.

[9] Ibid. See cl 3(1) also.

[10] The second category of offending was added "to cover the unusual case where there is strong circumstantial evidence to suggest that property has been derived from criminal activity but no clear evidence to support a case that it is derived from a particular type of criminal activity falling within the category of 'serious criminal activity'." Ministry of Justice *Proceeds of Crime Act Review- Follow Up From Cabinet Policy Committee Meeting of 20 October 2004* (28 October 2004) 1.

[11] See above, n 2.

Combined with the planned increase in staff numbers, the Bill is expected to resolve the current personnel issues.[12]

The Director of the recovery body has the power to investigate or initiate forfeiture proceedings against any person. At his or her disposal are a variety of investigative powers, restraining orders, and two types of civil forfeiture orders. The first type is an assets forfeiture order and targets specific assets that have been acquired or derived, whether in whole or in part, from significant criminal activity ("tainted property"). The second type is a profit forfeiture order, which permits the forfeiture of property equal in value to the profits derived from significant criminal activity.

(a) Investigative Powers

The Bill provides the recovery body with extensive information-gathering powers, the most significant being production and examination notices.[13] Through the use of these notices the Director is able to compel a person, whose property is subject to a restraining order, to provide information without the need for judicial authorisation. The privilege against self-incrimination cannot be used as an excuse not to, and non-compliance constitutes an offence punishable by up to 6 months imprisonment and/or a $5000 fine.[14] Thus, offenders are faced with a choice of committing an offence or providing the Director with the information needed to forfeit their property.

(b) Restraining Orders

The forfeiture process may vary depending on the circumstances, but it most commonly begins with the restraint of the targeted property. The Director has access to two types of restraining orders; one that is made in anticipation of an assets forfeiture order (clause 24), the other a profit forfeiture order (clause 25).[15] Clause 24 orders may be granted in respect of specific property where there are reasonable grounds to believe that it is tainted property. In order to obtain a clause 25 order, the Director must show that a person has unlawfully benefited from significant criminal activity. If this can be shown, then all or part of the person's property may be restrained.

Once property has been restrained it is expected that many respondents will choose to negotiate a settlement with the recovery body rather than litigate. In recent years, New South Wales' recovery agency has concluded up to 95 per cent of cases by way of settlement.[16] In a further effort to reduce litigation and speed up the forfeiture process, the Bill denies respondents the right to use their restrained property to cover

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[12] The Proceeds of Crime Units are expected to retain most, if not all, of their current staff (i.e. 18.5) whereas the recovery body will require about 20 new staff. The total number of staff available for forfeiture related work will therefore double. See Cabinet Policy Committee Paper POL (04) 305 - *Proceeds of Crime: Paper 1*, supra 5, 14. See also Cabinet Policy Committee Paper POL (04) 306 – Proceeds of Crime: Paper 2: Non-Conviction Based Confiscation (18 October 2004) 20.

[13] Set out under cls 104 and 107 respectively.

[14] See cls 136 and 125. However, under cl 138(1) any incriminating statements that are made may be used in evidence against that person only in a prosecution for an offence where the person gives evidence inconsistent with the statement.

[15] A third restraining order for instruments of crime is available under cl 26.

[16] Ministry of Justice *Proceeds of Crime Confiscation Legislation – Civil Based Options* (A Memorandum to the Minister of Justice), (18 February 2004) 2.

their legal costs. Those who have had all of their property restrained will be forced to rely on legal aid.[17]

(c) Assets Forfeiture Orders

If no settlement is reached then the Director may apply for either an assets or profit forfeiture order. Assets forfeiture orders are a form of mandatory forfeiture, if the Director can prove on the balance of probabilities that specific property is tainted property then the Court must forfeit it.[18] They are in rem actions that are not predicated on the wrongdoing of the owner and are retrospective without limitation. This means that the Director is not required to show that the property has been derived during a particular time-frame or is connected to a person who has benefited from significant criminal activity.

(d) Profit Forfeiture Orders

Aside from the lack of a conviction requirement, the most important feature of profit forfeiture orders is the method used to determine the value of benefits. If the Director can show on the balance of probabilities that the respondent derived benefits from significant criminal activity during the 7 years prior to his or her application, then there is a rebuttable presumption that the value of those benefits is that stated by the Director in his or her application.[19] In order to rebut this presumption, the alleged beneficiary must show that the amount is too great. In practice, this could prove difficult for innocent parties who have not keep accurate or up to date financial records.

As the presumption is that the benefits were derived from offending in general, it cannot be easily rebutted by showing that the property was obtained before the date of the predicate offence (as it is under the Act).[20] The assessed benefits may then be forfeited if the Court is satisfied that the beneficiary has interests in property and has *unlawfully* benefited from criminal activity during the 7 year period (i.e. the respondent knew of its origins).[21]

2 Instrument Forfeiture

The instrument forfeiture regime will continue to be handled by the Police through the existing Proceeds of Crime Units. It remains conviction-based in recognition of the fact that instruments are often lawfully obtained and should be distinguished from the actual proceeds of crime. However, the Ministry of Justice has taken the novel step of integrating instrument forfeiture into the sentencing process. At present, the general rule is that instrument forfeiture is to be imposed over and above the offender's sentence for the predicate offence.[22] As the explanatory note to the Bill explains, this

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[17] This requires an amendment to the Legal Services Act 2000. See cls 173-174.
[18] Clause 47(1).
[19] Clause 53(1).
[20] See s 28 of the Proceeds of Crime Act. This shortcoming was identified in, New Zealand Police *Proceeds of Crime Act 1991*, supra 6, 12.
[21] Clause 55(1). Innocent third parties with a valid interest in property subject to a civil forfeiture order may receive relief under cl 61(1). Clause 61(2) also permits relief to those who do not qualify for relief under cl 61, but only in situations where forfeiture would cause "undue hardship".
[22] *R v Brough* [1995] 1 NZLR 419, 424 (CA).

change avoids the possibility of someone being, in effect, more severely punished simply because they own property that was used in the commission of the offence.[23]

Are the proposed changes reasonable?

While it is important that the Bill overcomes the problems that have hampered recovery rates under the Act, it is equally important that it does so in a way that is reasonable. New legislation should be necessary, deliver benefits that outweigh the costs associated with its implementation, and be proportionate to the threat it is intended to address. As the legislation advisory body has noted, it will also need to comply with "important legal principles relating to fairness and the preservation of individual liberty".[24]

It has been noted that the Proceeds of Crime Act is often difficult to work with and has performed rather poorly. The need for reform is clear. The Bill addresses the problems affecting the Act and extends its reach, on this basis it is expected to deliver a net return of around $14 million per annum.[25] Other anticipated benefits include the ability to recover property in scenarios where the Act would be powerless, the possibility that some 'crime bosses' will be exposed to forfeiture proceedings, and intangible benefits such as increased public confidence in law enforcement. The integration of instrument forfeiture into sentencing will also ensure that the punishment is applied in a more consistent manner.

The above benefits do not necessarily mean that the Bill is capable of achieving its policy objectives such as reducing the rewards of crime or deterring criminal activity. Even on the most optimistic projections, the Bill would still recover only a fraction of the gross profits derived from criminal enterprise.[26] With this in mind, it is difficult to imagine that it will have a measurable effect on the profitability of any black market let alone crime rates. Thus, the expectation that the Bill will become an effective weapon against serious crime has been somewhat overstated.[27]

Although the benefits that would flow from the Bill's enactment are desirable, there are costs associated with civil forfeiture that must also be taken into account. By doing away with conviction requirement and lowering the threshold for restraint, authorities will initiate proceedings with less evidence and less certainty. Consequently, there will be more room for error and a greater risk of injustice occurring. Experience in New South Wales has shown that when mistakes are made the consequences can be serious. For example, in *New South Wales Crime Commission v Gardiner*[28] it took the respondent, Keith Gardiner, more than 5 years to

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[23] See explanatory note to the Bill, 4.

[24] Legislation Advisory Committee "Guidelines on Process & Content of Legislation" (May 2001) 9.

[25] Cabinet Policy Committee Paper POL (04) 306 – *Proceeds of Crime: Paper 2*, supra n 12, 22.

[26] With a "better case scenario", the Ministry of Justice estimate the Bill will realise $15.5 million. Ibid. This should be compared to the scale of the targeted black market. For example, the black market for cannabis and amphetamine type substances (or ATS) alone has been put at $337.2 million dollars. Wilkins C, Reilly J, Rose E, Roy D, Pledger M and Lee A *The Scoio-Economic Impact of Amphetamine Type Stimulants in New Zealand: Final Report* (Centre for Social and Health Outcomes Research and Evaluation, 2004).

[27] Phil Goff has commented that the Bill will enable the state "to strip gangs of assets, seriously reducing the profitability of organised crime activities and disrupting the capacity of organised crime to finance further criminal activity." The Labour Party "Goff backs civil regime to target criminals' assets" (Media Release, 17 March 2004) < http://www.beehive.govt.nz/View Document.aspx? DocumentID=19194> (at 17 January 2006).

[28] *New South Wales Crime Commission v Gardiner* [2001] NSWSC 350.

prove that he was not associated with his former wife's drug-related offending. This process cost him "his health and more than $100,000 in legal expenses."[29]

The Bill does not appear to achieve its benefits by the least drastic means available. Some powers have been introduced without there being any demonstrable need. For instance, there was no suggestion in the Ministry of Justice or Police reviews of the Act that investigating authorities required extra-judicial powers of production and examination to overcome existing evidentiary problems. It also seems unnecessary to remove the legal funds exception when the high rates of settlement in New South Wales were achieved with it in place. Interestingly enough, the first Ministry of Justice report on the possible options for reform advised against civil forfeiture altogether. It concluded that it would be "better and fairer"[30] to amend the existing legislation. The report went on to outline an improved conviction-based regime that addressed the problems affecting the Act.

Rights issues

Much of the criticism that has been directed at the Bill is based on the idea that parts of it are inconsistent with principles of justice protected under the common law and the New Zealand Bill of Rights Act 1990. For instance, there are concerns that the forfeiture of property without conviction could breach the presumption of innocence under section 25(c), and that the compelled production of information could infringe on the privilege against self-incrimination under section 25(d). However, the rights that apply to civil forfeiture are fewer than one might expect.

The rights mentioned above are associated with criminal procedure and could only apply to civil proceedings insofar as they carried criminal-type consequences (via natural justice).[31] The latter seems unlikely as civil forfeiture involves no charge, no criminal prosecution, no conviction, and no punishment. As depriving a person of their unlawful gain is remedial rather than punitive, other rights such as the protection against retrospective penalties under section 26(1) and double punishment under 26(2) are also irrelevant.[32] Although, the use of retrospective provisions does go against the principle that legislation should be prospective.

The protection most relevant to civil forfeiture is the right to be free from unreasonable search and seizure under section 21. As forfeiture will likely constitute a seizure and in light of the unwarranted procedural advantages enjoyed by the recovery body, civil forfeiture could be viewed as both unreasonable and unjustified.

Conclusion

Proceeds of crime legislation recognises the basic premise that offenders should not be permitted to profit from their crimes. Even ardent opponents of these laws agree with this statement of principle and recognise that criminals have no moral entitlement to such gains. However, it is essential that legislation finds the

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[29] Neil Mercer "They Just Stitch You Up: Verdict on Secret Police" *The Sydney Morning Herald* (Sydney, Australia, 31 July 2003).

[30] Ministry of Justice *Proceeds of Crime* (A Memorandum to the Minister of Justice) (6 November 2003) 1.

[31] Because the Bill prohibits incriminating statements from being used against the person who made them, there are no criminal consequences. However, it is unclear whether the Bill allows such information to be used as a stepping stone to gather other information that may be used in such a way.

[32] Instrument forfeiture has been integrated into the sentencing process so it should be viewed as a penalty. However, as it is fairer than the existing approach it is not objectionable.

appropriate balance between the need to recover such gain and the need to protect the individual from governmental interference with their peaceful enjoyment of property.

The Bill proposes some dramatic changes to the existing forfeiture regime, many of which go beyond what is necessary to overcome its shortcomings. The numerous procedural advantages enjoyed by the recovery body also raise serious concerns about the overall reasonableness of the Bill, the increased risk of injustice, and whether proper consideration has been given to alternative and less drastic options. When these factors are considered along with the Bill's limited capacity to achieve its policy objectives, it becomes apparent that the Bill does not achieve the appropriate balance.

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