

Parliamentary Joint Committee on Law Enforcement
c/o Mr Stephen Palethorpe – Committee Secretary
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Date: 9 May 2014

Pages: 33 (including attachment)

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**RE: SUBMISSION TO PARLIAMENTARY JOINT COMMITTEE ON LAW ENFORCEMENT INQUIRY
INTO FINANCIAL RELATED CRIME IN AUSTRALIA**

Dear Senators,

1. This is my submission to your Inquiry. Your Inquiry is complementary to the soon to be finalized Senate Economics References Committee inquiry into the performance of the Australian Securities and Investments Commission (the "ASIC Inquiry") and so it is a most welcome and important Inquiry.
2. I am aware from your correspondence to me of 11 December 2013 that the committee has previously reviewed correspondence I have sent them regarding, *inter alia*, two particular serious investment fraud cases (*the Brinton Group and Drover Home Group Frauds*) and that the committee noted that I have raised these cases with the ASIC Inquiry, which were the subjects of my submissions 91, 91.1, and 92 to it, and so I will not raise these cases here again in detail, as indeed the ASIC Inquiry has raised the issues involved in at least one of these cases with ASIC during recent hearings on 10 April 2014 and as I also understand from your referred to correspondence that the committee is unable to intervene in any particular case, in accordance with its enabling legislation. This submission will therefore focus mainly on broader law enforcement issues although I will comment on most of the terms of reference.
3. I make this submission based upon my experiences in investigating and reporting the cases referred to above, not only to authorities here in Hong Kong but also to various authorities in Australia including to State Police Forces, ASIC, the Australian Federal Police ("AFP"), the Australian Crime Commission ("ACC"), and the Australian Transaction Reporting and Analysis Centre ("AUSTRAC"). Accordingly I feel I can make a significant contribution to your inquiry as having actually investigated as part of my job duties at the time some major investment frauds and having had the opportunity of gaining an insight into how various agencies, through my reports to them, deal with these matters and their views on the relevant laws at their disposal to handle them.

4. I have also conducted extensive research into such laws over the past several years as well as into the approach being taken by various authorities towards tackling such frauds including which agencies are responsible for investigating, disrupting, and prosecuting them. I recognize that Australia has a more difficult task than many countries in dealing with these issues because there are numerous different agencies with overlapping legal authorities to handle such matters at both a state and federal level, however I believe there does exist a path through this to develop a more highly targeted, potentially less duplicative, and hopefully more effective approach to what is a significant problem affecting the country. This is all the more important because, as is well known, Australia is one of the most prolifically targeted countries for fraud because of the large superannuation pool and also because of the high participation rates of its citizens in stock market and other investments.

THE CHARACTER, PREVALENCE AND IMPACT OF FINANCIAL RELATED CRIME IN AUSTRALIA

Character of financial related crime In Australia

5. The kinds of frauds I am referring to in this submission are mainly "**Boiler Rooms**" where fraudsters sell investments that either do not exist or do exist but are worthless, "**Ponzi Schemes**" where fraudsters tell investors they are making investments on their behalf but are actually paying back to them small portions of their own money as "**returns on their investments**" and then misappropriating or stealing the rest, and illegal "**Managed Investment Schemes**" where investment funds are pooled for investments into real estate, bonds, debentures, overseas investment opportunities etc and then are also mishandled or stolen and can be operated also on a "**Ponzi Scheme**" basis. The common theme in all such schemes involved in financial related crime is deception of the investor and loss of, in many cases, their retirement savings. The common crimes committed in such schemes include **theft, fraud, and obtaining property by deception**.

Prevalence, scale, and impact of financial related crime In Australia

6. The prevalence is substantial and according to the ACC's report, **Organised Crime in Australia 2013**, is increasing and further is now regarded as a National Security Threat. Just some of the larger frauds which I am aware have occurred over the past 12 years and which indicate the scale of losses are as follows:-

(i)	The Brinton Group Fraud –	Boiler Room – AUD400M
(ii)	The Drover Horne Group Fraud –	Ponzi Scheme – USD30M
(iii)	The Coppertone / Edwardian fraud -	Ponzi Scheme – AUD20M
(iv)	The Giuseppe Mercorella Fraud –	Ponzi Scheme – AUD200M
(v)	The Graham Hoy Fraud –	Ponzi Scheme – AUD82M
(vi)	The David Hobbs Fraud -	Ponzi Scheme – AUD55M
(vii)	The Dr Roger Munroe Fraud -	Boiler Room – AUD100M
(viii)	The Trio Capital Fraud –	MIS/Ponzi Scheme – AUD175M
(ix)	The LM Investment Fraud -	MIS/Ponzi Scheme – AUD400M

7. These frauds alone amount to almost AUD1.5 Billion and do not include cases like **Storm Financial, Westpoint, Banksia, Prime Trust, Wickham Securities and Opes Prime** which I understand all also involved fraudulent aspects of one kind or another and which have resulted in many billions more in losses.

8. Furthermore, the abovementioned cases also do not include numerous other investment frauds of various kinds which continue to occur like the recent **AUD45 Million "boiler room"** operating out of Bangkok which the ACC has confirmed was disrupted last year along with another similar case operating out of the Philippines in which 27 people were arrested last year, as well as yet further cases in the last several years including the **Andre Michalak case, the John William Ullman case, the HPR Commodities case** which was yet another "boiler room" which had connections to the US, Malaysia, and Hong Kong, the **Citi Index, Golden Sparrow, Goldsmith Associates cases**, and the **M6 securities case** which has occurred just this year and which the Queensland Police are now prosecuting.
9. So the prevalence and scale is serious. In accordance with the ACC's abovementioned report, Organised Crime of all different kinds costs Australia around AUD15 Billion annually. Of this, **fraud is estimated to be around AUD1 Billion annually** which is consistent with the **Australian Bureau of Statistics' Personal Fraud Survey in 2010/11** which estimated that each year up to 6 million Australian's were exposed to scams or frauds with over 800,000 falling victim in some way with the annual losses estimated at **AUD1 Billion**, much of which gets removed from the Australian economy.
10. The impact on the victims is often devastating with the loss of their life savings, their homes, having to declare bankruptcy, and loss of self esteem and self worth. The devastating impact on the victims, who oftentimes have lost everything they have worked their whole life for, cannot be underestimated.
11. Given that there are clearly hundreds of thousands of victims and potentially millions of people who have lost significant amounts over the years, the impact on the government and the economy must also be substantial as well, as that money has been lost to the economy and as the government then has to respond by way of increased social security payments which it otherwise would not have had to do.

THE METHODS AND PRACTICES USED BY THE PERPETRATORS OF FINANCIAL RELATED CRIME IN AUSTRALIA

12. I will not say too much about this as I think it has been really well covered by the ACC's abovementioned report however some of the methods fraudsters use and are increasingly using are:-
 - (i) the "*cloning*" or "*mimicking*" of legitimate investment company websites, so that people think they really are investing with a legitimate and reputable brokerage; and
 - (ii) producing professional brochures and websites regarding investment opportunities which may not exist; and
 - (iii) incorporating companies and establishing bank accounts with the same or closely similar names as legitimate investment companies or companies listed on various stock exchanges; and
 - (iv) using business centre addresses and call forwarding services to make it more difficult for them to be traced; and
 - (v) using company formation agents, offshore companies, and nominee director service providers to add another layer of difficulty in being traced; and
 - (vi) using multiple different such service providers and different banks for different accounts so that no one service provider or bank, who are obliged by law to report suspicious transactions, can see the complete picture of their fraudulent transactions; and
 - (vii) operating "*cold-calling*" centres, sometimes even out of residential apartments to cold call potential investors using sophisticated sales techniques; and

- (viii) producing and providing to investors fake ASIC licenses to comfort them as to legitimacy; and
- (ix) contacting previously defrauded investors and pretending to be an overseas regulator or law enforcement agency who can recover previously lost funds for an upfront fee.

13. Further developments in recent years relating in particular to "boiler rooms" which have traditionally operated from offshore are that they are now reportedly expanding and operating within Australia – the M6 case referred to above is one – and that the operators of such schemes appear to be franchising such operations, as has been indicated in a Sydney Morning Herald article dated 13 October 2013 which quoted ASIC's Mr Tim Mullaly in respect of such developments.

THE INVOLVEMENT OF ORGANISED CRIME

14. In accordance with the above quoted SMH article, Mr Mullaly also indicated that organized crime syndicates including "bikie gangs" are now also getting involved in the operation of "boiler rooms". The operation of international "boiler rooms" targeting Australians have long had an organised criminal element.

IN RELATION TO MONEY LAUNDERING – THE LARGE NUMBER OF HIGH DENOMINATION BANKNOTES IN CIRCULATION

15. I do not have any comment on this.

THE OPERATION AND EFFECTIVENESS OF COMMONWEALTH LEGISLATION, ADMINISTRATIVE ARRANGEMENTS AND LAW ENFORCEMENT STRATEGIES

Operation and effectiveness of Commonwealth Legislation

16. Commonwealth Legislation including the *Australian Securities and Investments Commission Act 2001*, the *Australian Crime Commission Act 2002*, the *Australian Federal Police Act 1979*, the *Financial Transactions Reports Act 1988*, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, the *Proceeds of Crime Act 2002*, and possibly also the *Crimes Act 1914* amongst others, would appear to provide sufficient legislative tools to combat the problems involving serious investment frauds – both domestic and international.
17. The legislations empowering ASIC, the ACC, and the AFP enable them all to investigate both Commonwealth offences and **state offences that have a federal aspect** which the majority of nationally significant interstate and international fraud cases represent. It should be noted that State Fraud Squads can also investigate and prosecute such frauds however in cases where multiple citizens from multiple states are defrauded by either a domestic fraud or alternatively an internationally based fraud, then it may be preferable if a Commonwealth agency handle such matters, with support from the states where necessary.
18. In cases involving international "boiler room" frauds involving the transfer of investor funds to overseas based accounts, it may be useful for the committee to consider **recommendations for legislative changes to enable the fining of banks if they transfer funds to such overseas accounts**, if those accounts already exist on **ASIC's warning lists** of companies you should not deal with, as can be found on ASIC's **MoneySmart** website under "Scams" and "**Companies you should not deal with**".
19. During the recent ASIC Inquiry hearings on 10 April 2014, ASIC's senior executives confirmed there was some kind of tension between ASIC and the ADI's on such matters, whereby it seems the banks are possibly reluctant not to do transactions on behalf of their customers, even if those transactions

are to possibly fraudulent accounts. The potential problem here from the banks' perspective may be what happens if the account turns out to be not fraudulent and its customers lose out on a legitimate investment opportunity and are the banks' then liable for any prospective losses, however the probability of such occurrences must surely be very low, as the companies on the warning lists have been placed there after investor complaints have been received and transaction analyses have been conducted.

20. If it were illegal to transfer funds to suspect international accounts, then that could significantly reduce the international fraud problem.

Operation and effectiveness of administrative arrangements and law enforcement strategies

Current Strategies – Domestic frauds

21. The current law enforcement strategies in relation to major domestic "boiler room", "ponzi scheme", and illegal "managed investment scheme" operations is that ASIC will usually lead the investigation and prosecution of most of these cases, sometimes with the assistance of the ACC, AFP, and State Fraud Squads. In some of the more recent "boiler room" cases, the State Fraud Squads have led the way with the assistance of the Federal agencies.
22. In the case of ASIC, it seems it has been slow to act in many instances as is being highlighted in the current ASIC Inquiry and as has been highlighted in the media in relation to the numerous high profile cases mentioned above. It also seems to be the case that it has relied too heavily on enforceable undertakings as opposed to using the considerable powers it has to use the various State Crimes Acts and Criminal Codes to charge offenders with serious theft and fraud offences, however I am aware that it has used such powers from time to time in relation to "ponzi schemes". While I am aware some lost funds have been recovered in relation to domestic frauds, it is unclear to me as to what extent this has been the case and whether much more could have been recovered for the victims.

Current Strategies – International frauds

23. In relation to internationally based frauds targeting Australian's, the law enforcement strategies are mainly confined to **early detection and disruption**, usually without the offenders being prosecuted and usually without any recovery of defrauded funds efforts being undertaken. Investor education and warnings about the dangers of investing with unlicensed overseas investment firms has also been an important plank in the regulatory response as can be seen from the extensive warning lists on ASIC's MoneySmart website, however as noted in the Methodology section above, fraudsters are now circumventing such efforts by providing investors with fake ASIC licenses. Additionally, they use other tactics like informing investors that the industries they are proposing they invest in are new like "clean energy" projects for example and do not currently require them to have an ASIC license.

Warning Lists

24. The warning list approach needs to be further enhanced because most people who get defrauded have not previously been defrauded and so are unaware of ASIC's warning lists until after they have already lost their money. As a side note to this point, I believe that this situation potentially leads to the significant under reporting of fraud which both ASIC and the ACC have said is a problem, because when people discover after they have been defrauded that the company they invested in was already on a warning list, then they are likely to feel unhappy and embarrassed and consequently suffer in

silence rather than come forward and report the crime. Hence the need to enhance the warning list approach by doing more, perhaps through Australia post or some other method, to actually send warning lists to all Australian households on a regular basis, say at least once a year. If they could be sent out with peoples tax returns by the ATO, then that could be useful.

Early Detection

25. In relation to early detection of internationally based serious investment frauds, I have noted that for many years Australian banks have had a legal duty under the **Financial Transactions Reports Act 1988** to report international funds transfer instructions out of Australia to AUSTRAC. This requirement has apparently existed since around 1992.
26. Furthermore, section 45 of the **Anti-Money Laundering and Counter-Terrorism Financing Act 2006** also requires a person that sends an **International Funds Transfer Instruction (IFTI)** out of Australia or receives an IFTI into Australia to submit a report of the instruction to AUSTRAC. The banks are the ones who have to make such reports on behalf of their customers.
27. There are no transaction size limits or thresholds in relation to the requirement to report. AUSTRAC's data store apparently contained over 55 million records of IFTI reports for the period from 1995 till around 2006 and they receive approximately 9-10 million such reports each year so they must have over 100 million records of overseas transactions by now. Therefore the question needs to be asked as to what is happening with this data and how is it being used to combat the international fraud problem.
28. I am aware that various enforcement agencies all have access to "*suspicious matter reports*" submitted to AUSTRAC by banks but do they also have access to the IFTI data on transactions out of or into the country? If so, then even though the volume of transactions is huge, there are various filters which should be able to be applied to the data to identify potentially fraudulent offshore companies much sooner than merely when an investor makes a complaint some 2 to 3 years after they have made their investment, that they think they may have been defrauded.
29. For example, most investors sending money overseas will send it to companies and not people so a filter can be used to exclude all people to people transactions. Also excluded are all company to company transactions. Then what is left is individuals sending money to offshore companies. Companies that have been receiving funds for long periods of time without incident can also be excluded as they are probably legitimate trading companies or product sellers and then what is left would appear to be relatively new companies receiving investor funds, some of which could possibly be involved in fraudulent activities.
30. Particular focus can then be given to companies whose bank accounts are in the major financial jurisdictions like Hong Kong, Singapore, and Tokyo, for example, because investors are less likely to be willing to send funds to an account in Thailand or Manila. This has been part of the Modus Operandi of fraudsters for many years to add credibility to the fraudulent operations they run.
31. Other jurisdictions can be looked at if intelligence suggests they are becoming new centres for funds transfers however the next aspect should be identifying any new companies appearing that appear to have numerous Australian's sending money to them and looking in further detail at those companies.

32. For example, while I am not sure what data is included in standard IFTI reports it would seem that they should include details of the name and contact details of the company to which funds are being sent and even an email address for the person representing the company. **If it is not already the case that an international funds transfer requires that a company registration number for the offshore recipient be required before the transaction can be processed, then this perhaps needs to be changed by law.** Thereafter various checks can be made including:-

- (i) if there is more than one company involved that people appear to be sending funds to all starting at around the same time, then do such companies use the same address?; and
- (ii) calling the telephone number and if it is purported to be a number in Japan, tracing it to identify if it is actually being routed to a house say in Jakarta; and
- (iii) doing a check on the email addresses of the overseas recipient to see where they are originating from or being routed through and if that place corresponds with the place where the funds are being sent and the supposed office address of the company; and
- (iv) if the company registration number information is available, does it correspond with a registration in the usual tax haven countries that fraudsters usually use like the BVI, Samoa, Cayman Islands, etc; and
- (v) do any of the company names appear on regulator blacklists in any other jurisdictions but are not yet on ASIC's blacklists; and
- (vi) do any of the company names correspond with names of companies listed on stock exchanges or OTC markets. People can usually only buy shares of listed companies through brokers and so they should not be being asked to send money directly to a "listed" company's "bank account" to buy its shares.

33. These are just some of the checks that can and should be being done and I presume are now being done to identify frauds much sooner and if entities are identified to be suspicious then banks should be able to be notified much sooner at which point they can actually refuse to make the transaction on behalf of their customers **and in future should be barred by legislation from doing so** as suggested in paragraph 20 above.

Disruption

34. My understanding of the disruption efforts referred to in para 23 above is that this involves placing potentially fraudulent offshore accounts and operators' details on ASIC's warning lists and also in arranging for offshore operators' premises to be raided by international law enforcement agencies, with potential client lists and other business and marketing materials to be seized, and with their foreign staff then being deported. However, as mentioned, the offshore operators of such cases are rarely prosecuted and the funds they have stolen are rarely recovered.

35. This may not be a sufficiently effective strategy in deterring international fraudsters from continuing to target Australians. This is because they are not being sent to jail and they are being allowed to keep the money they have stolen from Australians. If one office gets shut down, they simply open up a new one in another location in the country they are in or alternatively they move onto another country. Most of this activity has been based out of South East Asia for the last 12 to 15 years.

THE ROLE OF THE AUSTRALIAN CRIME COMMISSION AND THE AUSTRALIAN FEDERAL POLICE IN DETECTING FINANCIAL RELATED CRIME and THE INTERACTION OF COMMONWEALTH, STATE AND TERRITORY LEGISLATION AND LAW ENFORCEMENT ACTIVITY

36. I would like to slightly expand my comments in this section to include also ASIC's and AUSTRAC's role in detecting and acting upon financial related crime as well as other organizations and the role also of the State Fraud Squads in this respect and so this is why I have combined your terms of reference numbers 7 and 8 into a single section.

37. Currently, there are numerous channels in which financial related crime can be detected, which I understand is mainly achieved through numerous different reporting channels, although there may well be other methods, like for example the Australian Tax Office detecting apparently unexplained wealth through investigations of its own.

38. In fact there would appear to be too many different reporting channels and to provide examples of what I mean, various state police websites indicate in relation to different kinds of frauds that they need to be reported to the agencies indicated as follows:-

(i)	Investment Fraud -	ASIC
(ii)	Share Trading Fraud -	Australian Securities Exchange
(iii)	Lawyer Fraud -	Legal Services Boards and Major Fraud Squad
(iv)	Accountant Fraud -	Local Police Station
(v)	Real Estate Agency Fraud -	Consumer Affairs and State Fraud Squad
(vi)	Superannuation Fraud -	APRA
(vii)	Overseas Advanced Fee Fraud -	ACCC and State Fraud Squad
(viii)	Scams from Interstate and Overseas -	ACCC
(ix)	Financial and Investment Scams -	ASIC
(x)	Banking and Credit Card Scams -	ASIC and the ACCC
(xi)	Director Fraud -	ASIC and the State Fraud Squad
(xii)	Business Partner Fraud (over \$50K) -	State Fraud Squad
(xiii)	Bank Related Fraud (ATM's etc) -	Local Police station
(xiv)	Counterfeit Bank Notes -	AFP

39. While I can appreciate how it is that such reporting guidelines for victims of financial related crime have evolved because of the many different kinds of frauds, the above nevertheless demonstrates multiple possibilities for duplicated reporting and therefore potential inefficiencies as a result of duplicated investigations and responses being sent to complainants. In addition to the above, the following further reporting channels for reporting various frauds also exist for financial institutions and professionals:-

- (i) Suspicious Matter or transaction reports are to be made to AUSTRAC; and
- (ii) Misconduct reports can be made to ASIC and also the ACC and AFP.

40. From the Commonwealth level, the view regarding the reporting of investment frauds from overseas has been that these should be handled by the States, however as can be seen from the above, the States have held the view that they should either be reported to ASIC if they are investment frauds or to the ACCC if they are investment scams, which can only really lead people to report to both ASIC

and the ACCC if they are unsure if they have been either defrauded or scammed, whatever the difference between the two may be.

41. From my own personal experience in reporting the frauds referred to in paragraph 2 above, having reported the matters to ASIC and having received various responses from them, I then reported to AUSTRAC who advised they would pass them on to relevant agencies but could never advise me of the outcome and that further if I wanted a more direct response I should report the matters straight to the ACC.
42. There is obviously significant scope for rationalisation of the approach to reporting and detecting financial related crime and I know the ACC are aware of these issues and I believe they are working on doing what they can to deal with how the system has evolved over time due to the overlap issues of multiple agencies with overlapping legal jurisdiction to receive reports and conduct investigations. In this respect I know that they have helped to establish and/or are involved in a number of multi agency task forces as well as national databases that can help address these issues including:-
- (i) **Joint Management Groups (JMG's)** – to provide a forum for State and Commonwealth agencies to discuss crime threats and opportunities to address them; and
 - (ii) **Joint Analyst Groups (JAG's)** – comprising a number of intelligence analysts, allocated from the JMG agencies to deliver shared intelligence outcomes on inter-agency information sharing and to identify, coordinate and prioritise serious and organised crime targets and emerging threats; and
 - (iii) **National Criminal Intelligence Fusion Capability** – which is an ACC led capability bringing together subject matter experts, investigators and analysts, and data tools across a range of government agencies at national and state level to enhance the understanding of national organised crime and to discover previously unknown organised criminal activity and entities; and
 - (iv) **Australian Criminal Intelligence Database ("ACID")** - which is an ACC managed database providing Commonwealth, State and Territory law enforcement agencies and regulatory authorities with a framework to securely store, retrieve, analyse and share criminal information and intelligence; and
 - (v) **Australian Law Enforcement Intelligence Net ("ALIEN")** – which is an ACC managed database providing the same kind of functions as ACID, however presumably with some material differences to the ACID system. Both systems allow various agencies to contribute content to them; and
 - (vi) **Palantir** – an ACC developed systems and analysis tool; and
 - (vii) **Criminal Assets Confiscation Taskforce** – which is an AFP led taskforce which also involves the ACC and the ATO, however which I believe needs to be expanded to include ASIC and possibly also the State and Territory Fraud Squads; and
 - (viii) **Task Force Galilee** – which is an ACC led multi-agency task force established to disrupt serious investment frauds, particularly those emanating from overseas.
43. So clearly substantial efforts have been made by the ACC and its partner agencies in developing systems, tools and taskforces which can help to overcome the fragmented nature of the Australian law enforcement sector's ability to tackling serious fraud and financial related crime as has evolved due to the multiple overlapping jurisdictions and legal authorities to investigate and prosecute such matters by numerous different agencies at both a state and federal level.

44. However, these numerous different initiatives may still not completely address the multi-agency agency report receiving responsibilities for all different kinds of frauds as detailed in paragraph 38 above and so duplication of investigation and response work to complainants could still occur and may need to be addressed.
45. Indeed the integrity of the databases the ACC manages, in their current structure, will always be dependent upon its partner agencies regularly and accurately updating such systems in relation to new fraud complaints or reports being made. Accordingly, it would appear possible that cases could still fall through the cracks and/or be investigated by multiple agencies at the same time and as an example, the highly publicised Leighton's Holdings case appears to be one where both the AFP and ASIC were apparently both working on the case independently and were not cooperating until recently.
46. The integrity of the databases also depends upon which agencies have access to those systems and I do not know which one's however as an example, do Consumer Affairs and Commerce Departments also have access to such systems, as complainants are being directed to report Real Estate Frauds to them, which may not get reported to any other agency, but which could reveal a transaction taking place with laundered money which has actually been accumulated from a much larger scale investment fraud yet to be detected? The same can be said for Lawyer Frauds which are supposed to be reported to Legal Services Boards in the various states and could also reveal fraudulent transactions as there are lawyers who are actively engaged in advising fraudsters, unfortunately.

National Fraud Reporting Centre

47. I believe and I would hope the committee and the ACC would agree, that a ***National Fraud Reporting Centre*** needs to be established so that there is a single entity which complainants across the country can use to report cases of suspected fraudulent activity in relation to investments in particular, and also in relation to other kinds of frauds if that is possible without overloading the system.
48. The Commission of Audit's recently released final report contains a recommendation which I believe could greatly facilitate the creation of such a ***National Fraud Reporting Centre or Database***, which is its recommendation for the Government to consider incorporating AUSTRAC into the ACC. Since AUSTRAC already handles and is experienced in receiving and analysing numerous suspicious transaction reports annually from all the banks and financial service providers, then it would make sense and I believe would be far more efficient if its role was to be expanded to include receiving suspicious transaction and/or alleged fraud reports from the public.
49. The synergies, cost savings, and reduction in duplicated work could be very substantial indeed and in fact AUSTRAC already can and does accept and receive reports from the public, as it did in the cases I reported to it. The issue is that not many people in the country know that this can be done and are following guidance on State Police websites to make reports to numerous various different agencies as I have indicated in paragraph 38 above.
50. So I strongly support the Commission of Audit's recommendation to incorporate AUSTRAC into the ACC and thereafter I suggest that the Australian people be informed that going forward, complaints regarding serious investment frauds and possibly other fraud types as well, should be made only to AUSTRAC. This will ensure that the ACC truly has the complete picture of fraud in the country and can more rapidly detect serious financial crimes because at the same time it is receiving reports from financial institutions, they can more easily be matched with reports coming in from the public, and if

reports are coming in from the public but not from financial institutions, then the financial institutions can be asked to take a look at the transaction patterns of the entities involved in a more timely manner. It just makes sense to handle these matters in this way and if it is done then the ACC will in my view become an incredibly potent and powerful organisation to lead the fight against these serious crimes, while at the same time considerably freeing up the resources of its other partner agencies to be used more directly in investigations and prosecutions.

A Serious Fraud Office Task Force in the ACC

51. If the ACC has all this information coming directly to it for analysis and dissemination, then it can more effectively direct the response to serious investment frauds by passing particular cases to a particular State to handle or alternatively to ASIC if they felt ASIC could more appropriately deal with it or alternatively to the AFP for the same reasons. Furthermore, for further synergies in dealing with national frauds across multiple states or international frauds which are increasingly affecting the country, it could more easily, as its team is further developed, begin to take on cases in its own right which, as I have mentioned before in numerous faxes I have sent to the Senators on the Committee of the ASIC Inquiry and also in my submission number 91.3 to the ASIC Inquiry, is what I believe ultimately should happen with the establishment of a ***Serious Fraud Office type structure or a Serious Fraud Office Task Force within the ACC*** to combat such frauds directly and to go after the proceeds of crime of the fraudsters who commit such crimes.

52. This is what I believe the drafters of the ***Australian Crime Commission Act 2002*** may have originally envisaged for the ACC as is evidenced by ***sections 12 (1)(a) and 12 (1A)(a) of the Australian Crime Commission Act 2002*** regarding the performance of their functions which state:

"(1) Where the ACC, in carrying out an ACC operation/investigation, obtains evidence of an offence against a law of the Commonwealth or of a State or Territory, being evidence that would be admissible in a prosecution for the offence, the CEO must assemble the evidence and give it to:

- (a) The Attorney-General of the Commonwealth or the State, as the case requires; or*
- (b) the relevant law enforcement agency; or*
- (c) any person or authority (other than a law enforcement agency) who is authorized by or under law of the Commonwealth or of the State or Territory to prosecute the offence.*

(1A) Where the ACC, in carrying out an ACC operation/investigation, obtains evidence that would be admissible in confiscation proceedings, the CEO may assemble the evidence and give it to:

- (a) The Attorney-General of the Commonwealth or the State, as the case requires; or*
- (b) the relevant law enforcement agency; or*
- (c) any person or authority (other than a law enforcement agency) who is authorized to commence the prosecution proceedings."*

53. So I really think that the full power of the ACC, having studied its enabling legislation, is yet to be fully realised and it could in fact become the world's most intelligent and effective agency in detecting and combating serious financial related crime. With the emergence of the involvement of serious organised crime groups in the conduct of serious investment frauds, the synergies of having the ACC as the lead agency in combating such groups in relation to financial related crime becomes even more apparent.

54. The Commission of Audit has recommended that the government consider transferring ASIC's consumer protection functions to the ACCC, however if this is meant to be the transferring of its prosecution and defrauded investment funds recovery responsibilities then I would not agree with that recommendation as it would seem the ACCC does not have the breadth of laws available to it as does ASIC or the ACC to combat the problem. Obviously I believe it should go to the ACC if anywhere and I understand that the ACC would even appear to be capable of investigating breaches of the ASIC Act itself along with all the other state and commonwealth laws at its disposal.
55. So I would hope that the Committee and Mr Dawson, the new CEO at the ACC, would agree that this should be the ultimate goal, **for the ACC to have established within it a SFO or a SFO taskforce which could then have specialist officers deployed across the entire law enforcement sector including within ASIC and the State Police Fraud Squads** to combat the serious investment fraud problem which is increasingly affecting Australians. As mentioned, such a unit would not have to take on every case on its own as the ACC's powers are such that it can work very flexibly with all other agencies in bringing matters forward for prosecution and can nominate existing agencies to handle them but could also take on matters itself by investigating and preparing briefs in appropriate circumstances.

THE EXTENT AND EFFECTIVENESS OF RELEVANT INTERNATIONAL AGREEMENTS AND ARRANGEMENTS

56. International Mutual Legal Assistance Agreements have been entered into by Australia with many countries particularly within the Asia Pacific and also with Hong Kong which has been a destination for many years for defrauded Australian investor funds.
57. The Hong Kong agreement and **Hong Kong's Mutual legal Assistance in Criminal Matters Ordinance Cap 525** is more than sufficient to enable gathering and production of evidence to Australia including production of bank statements etc to provide evidence of fraudulent activities, the restraining of fraudulently obtained investment funds located here, and the confiscation and repatriation of those funds back to Australia upon Hong Kong being presented with an **External Confiscation Order** issued by a court in Australia.
58. Such orders can be obtained in Australia by ASIC and possibly other agencies pursuant to **section 50 of the ASIC Act 2001** or alternatively through the **Proceeds of Crime Act 2002** and are made on a civil basis by a judge on the **balance of probabilities** that investors have been defrauded.
59. Once such orders are received by **Hong Kong's Mutual Legal Assistance Unit** in the Department of Justice, arrangements are made for their enforcement and the costs of the whole process including appointment of receivers in Hong Kong are deducted from the investor funds recovered. **So there is no cost to the Australian government or any law enforcement agencies in Australia in undertaking such recovery actions on behalf of Australian investors who have been defrauded.**
60. In the recent ASIC hearings ASIC's senior executives seemed to have the incorrect impression that if funds were restrained in Hong Kong that they were unable to get those funds repatriated to Australia and returned to the defrauded investors and further that if they used the Proceeds of Crime Act 2002, then any funds recovered needed to remain with the government.
61. In relation to the latter point regarding the Proceeds of Crime Act 2002, I am not sure that their view is correct as sections **77 and 78 of the Proceeds of Crime Act 2002** would appear to enable defrauded investors to recover their money through the making of applications for **"compensation orders"** in

respect of funds which have been recovered. Furthermore, **sections 259 and 260** would appear to enable the same to occur.

62. In regards to ASIC's view that funds restrained in Hong Kong are unable to be repatriated, which appears to be a view formed 12 years ago in relation to legal advice received from a law firm, then this legal advice would also appear to have been incorrect, as is supported by a paper entitled "**Seizure, Confiscation and Repatriation of Assets: Practice in Hong Kong**" prepared by Mr Wayne Walsh, the Head of Hong Kong's Mutual Legal Assistance Unit, International Law Division, Department of Justice, Hong Kong, and presented to a seminar held in Bali by the Asian Development Bank, OECD, and Basel Institute of Governance in 2007. I attach this paper to this submission for the committee's ease of reference.
63. While I have already provided this paper to the Senators on the Committee of the ASIC Inquiry and also to ASIC themselves, as copied to your Committee Secretary Mr Palethorpe, I nevertheless feel it is important to provide it also to your inquiry as it is also one of your terms of reference and is an important part of your Inquiry, given the volume of funds that have been transferred and lost through bank accounts overseas including through Hong Kong. In this respect, you should note that many of the frauds detailed above had bank accounts in Hong Kong to which Australian investor funds were transferred including the Brinton Group case (AUD400M), Trio Capital (AUD125M), and the LM Investment fraud (AUD400M), just to name a few.
64. Recovery of defrauded investment funds from overseas is a really important aspect to reducing the fraud problem going forward. As I have indicated in a recent fax to ASIC's senior management, the approach involving early detection and disruption is important and no doubt having an impact however it is clearly not enough and what is still missing, but which is necessary, is prosecution of offenders and confiscation of their proceeds of crime. **The message needs to be sent to these people that if they do this activity, they may end up in jail, but more importantly if they do they will still have no benefits from their criminal activities.**
65. As I further indicated in the same fax, in the **John William Ullman** case as I have also listed above and which occurred just last year out of Hong Kong, in a matter of months he stole AUD1.5 million. ASIC went to court in Australia and got injunctions preventing him from selling shares in Australia and he agreed to abide by those injunctions in return for no further action being taken against him. **The fact that he was apparently allowed to keep the money represents the greatest incentive for fraudsters like him to continue to do this kind of activity and to increase the scale of what they do. In fact, it will invite more to join them.**
66. The importance of confiscating fraudsters' proceeds of crime cannot be underestimated not only from the perspective of assisting defrauded investors but also as probably the most powerful deterrent available to law enforcement in combating and reducing the incidence of financial related crime, both domestic and international. As I also pointed out in the abovementioned fax to ASIC, this is because many white collar criminals are prepared to go to jail, if that means they can come out and still have millions of dollars in their bank accounts. This is what happened in yet another fraud case, the **Andre Michalak** case a few years ago where he was ordered by the Federal Court in Australia to forfeit AUD5M from a Citibank account in Hong Kong but instead transferred even more funds offshore, in contempt of the order, and preferred to go to jail in Australia for 18 months so he could keep the fruits of his crimes in defrauding Australian's of their superannuation funds.

67. As already mentioned, these issues have been raised with the Senators conducting the ASIC Inquiry and will no doubt be dealt with in their final report, however I believe it is also important to raise them with your inquiry as well, particularly because so much money has been lost overseas, which could have been recovered and which in future must be recovered in any future serious international investment frauds affecting Australian citizens. As indicated, it doesn't cost anything to recover such funds other than getting the necessary orders in the Australian courts, so there really is no excuse for such recovery actions not to be pursued on behalf of the Australian people.

THE NEED FOR ANY LEGISLATIVE OR ADMINISTRATIVE REFORM

68. Please refer to the above.

ANY RELATED MATTERS

69. The final point I would like to make is one also made in my recent fax to ASIC and that is that perhaps the time has come for Australia to lead the way in establishing and announcing some kind of **Joint Task Force or Cooperative Group** with Australian law enforcement agencies' counterparts in Hong Kong, the US, UK, Thailand, Malaysia, Indonesia, and the Philippines to go after the assets of the people running such frauds, in addition to the disruption activities already underway, to send the message that they cannot expect to profit from this kind of activity. My view is that Australia is in an ideal position to lead such an international effort, and with its citizens being one of the most heavily defrauded, should be taking that lead.

70. If the matters raised above regarding the ACC can be accomplished thereby effectively creating a world leading intelligence and enforcement agency, then Australia really will be able to take on such a role (and can still do so if not all the above recommendations are adopted), which will bring numerous benefits to the country including reducing the frauds perpetrated on its citizens, a reduction of social security payments being made to retirees who have lost everything, increased cooperation between countries in Asia and Australia on various other issues as well, and the possible development of new export markets for the systems, technologies, and methodologies which are being developed by the ACC and which appear to have a high level of sophistication as is required by the complex environment they operate in. Such advanced knowledge based systems and technologies can eventually be licensed to private industry and markets can be developed in countries like Indonesia, Thailand, the Philippines, and Malaysia who are all going to need such capabilities in the years to come as more of their citizens move into the middle class and themselves become the targets of international fraudsters.

71. Finally however, the main points which I hope will be taken from the above analysis and suggestions are that they primarily involve a resource reallocation exercise which should result in greater efficiencies in the sector, cost savings to the Government, and most importantly a reduction of the incidence of serious investment frauds affecting the country and its citizens, with billions more dollars remaining in the Australian economy in the future.

72. I sincerely hope this submission is of use to your inquiry and wish you all the best with your examinations.

Yours sincerely,

Adrian Cox

ADB/OECD Anti-Corruption Initiative for Asia and the Pacific

ASSET RECOVERY AND MUTUAL LEGAL ASSISTANCE

**Proceedings of the 6th Regional Seminar on
Making International Anti-Corruption Standards Operational**

Held in Bali, Indonesia, on 5–7 September 2007 and hosted by the
Corruption Eradication Commission, Indonesia

Asian Development Bank

Organisation for Economic Co-operation and Development
in cooperation with the Basel Institute on Governance

Seizure, Confiscation and Repatriation Assets: Practice in Hong Kong, China

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This paper discusses the practice of seizure, confiscation and repatriation of assets pursuant to international requests for legal assistance in criminal matters to Hong Kong, China. It provides an overview of the constitutional basis upon which Hong Kong, China may provide assistance pursuant to bilateral and multilateral arrangements to foreign States, including those in the Asia and Pacific region. It discusses the domestic legal framework under which requests for confiscation and repatriation of assets are processed in Hong Kong, China including the minimum legal requirements that must be met for such assistance to be provided. Finally, the paper explores from an operational perspective ways to best achieve effective implementation of mechanisms available for international asset recovery.

The Constitutional Background

In 1984, the Chinese and British governments signed the Joint Declaration on the Question of Hong Kong affirming that the People's Republic of China would resume the exercise of sovereignty over Hong Kong effective 1 July 1997.¹

Upon resumption of sovereignty in 1997, a Hong Kong Special Administrative Region (SAR) was established in accordance with the provisions of Article 31 of the Constitution of the P.R. China under the principle of "one country, two systems."²

The Basic Law of Hong Kong, China was enacted in accordance with the Constitution prescribing the systems to be practiced in Hong Kong, China.³

Article 13 of the Basic Law provides that the Central People's Government shall be responsible for the foreign affairs relating to Hong Kong, China. It also provides that the Central People's Government authorizes Hong Kong, China to conduct relevant external affairs on its own in accordance with the Basic Law.⁴

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Several provisions in the Basic Law relate to the maintenance and development of relations by Hong Kong, China at the international level, the application of international agreements to the region both before and after 1997, and arrangements for reciprocal juridical assistance with foreign States.

First, Article 151 of the Basic Law provides that Hong Kong, China may, on its own, using the name "Hong Kong, China" maintain and develop relations and conclude and implement agreements with foreign States and Regions and relevant international organizations in appropriate fields. In addition, Article 152 permits the region to participate in international organizations and conferences limited to States but affecting the Region in appropriate fields using the same name. Thus, the Region continues to hold membership of a number of international organizations and initiatives under its own name Hong Kong, China including membership to the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific.

Second, Article 153 of the Basic Law provides that the application of international agreements to which the P.R. China is or becomes a party shall be decided in accordance with the needs and circumstances of the Region and after seeking the views of the government of the Region. It also provides that international agreements to which the P.R. China is not a party but which are implemented in Hong Kong, China may continue to be implemented in Hong Kong, China. For example, it is under Article 153 of the Basic Law that the Central People's Government applied to the region the United Nations Convention against Corruption (UNCAC) in February 2006.

Third, Article 96 of the Basic Law provides that with the help or authorization of the Central People's Government, the Government of Hong Kong, China may make appropriate arrangements with foreign States for reciprocal juridical assistance. Accordingly, the Region has negotiated a number of bilateral agreements for mutual legal assistance in criminal matters with foreign States and it has implemented these agreements under its domestic law. These agreements, which follow a fairly standard model, include mechanisms for international asset recovery.

Ten years have passed since the resumption of Chinese sovereignty over Hong Kong, China and it is fair to say that the system envisaged under the Joint Declaration and Basic Law for the application of international agreements to the Region and the provision of international cooperation in criminal matters to foreign jurisdictions, has withstood the challenge of time and is, by and large, working well.⁵

⁵ ADB/OECD Anti-Corruption Initiative for Asia and the Pacific

Multilateral International Agreements

A number of multilateral agreements that apply to Hong Kong, China and that include provisions for mutual legal assistance (MLA) in criminal matters are as follows:*

- (i) Convention for the Suppression of Unlawful Seizure of Aircraft 1970;
- (ii) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971;
- (iii) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973;
- (iv) International Convention against the Taking of Hostages 1979;
- (v) Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment 1984;
- (vi) United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988;
- (vii) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 and the Fixed Platform Protocol 1988;
- (viii) International Convention for the Suppression of Terrorist Bombings 1997;
- (ix) International Convention for the Suppression of the Financing of Terrorism 1999;
- (x) United Nations Convention against Transnational Organised Crime 2000;
- (xi) United Nations Convention against Corruption 2003;

Parties to these conventions may seek assistance from Hong Kong, China pursuant to the provisions in them for MLA.

Bilateral International Agreements

To date, Hong Kong, China has signed bilateral agreements for MLA with the following 21 jurisdictions¹:

Australia, Belgium, Canada, Denmark, France, Germany (not yet in force), Ireland (not yet in force), Israel, Italy (not yet in force), Korea, Malaysia (not yet in force), Netherlands, New Zealand, Philippines, Poland, Portugal, Singapore, Switzerland, Ukraine, UK, and US.

All these agreements contain provisions for tracing, restraining, confiscating, and sharing proceeds of crime.

Domestic Law

Requests for mutual legal assistance in criminal matters, including those for asset recovery, are processed under the Mutual Legal Assistance in Criminal Matters Ordinance, Cap. 525 (MLAO). This Ordinance was enacted in 1998 and is a purpose-built legal mechanism to facilitate and regulate the provision and obtaining of assistance in criminal matters between Hong Kong, China and places outside Hong Kong, China, and for matters incidental thereto or connected therewith.⁵

Assistance can be rendered pursuant to "arrangements for MLA" (e.g., bilateral or multilateral agreements which have been made the subject of an order under the ordinance), or based on the principle of reciprocity. As regards the latter, the ordinance provides that the appropriate authority of the requesting place may give an undertaking to the Secretary for Justice which satisfies the Secretary for Justice that the place will, subject to its law, comply with a future request by Hong Kong, China to that place for assistance in a criminal matter. It is, therefore, not a prerequisite that a bilateral or multilateral agreement exists before assistance can be rendered under the ordinance.

The types of legal assistance available include:

- taking of oral evidence and production of things before a magistrate (including by live TV link)⁶;
- search and seizure of things under search warrant⁷;
- obtaining of material under production orders (e.g., on banks to produce documents)⁸;
- arranging the travel of a person to another place to assist in criminal investigations or proceedings⁹;
- enforcement of external confiscation orders and restraining of dealing in property that may be subject to external confiscation orders¹⁰; and
- service of process.¹¹

Assistance can only be provided in relation to a "criminal matter," which is defined in the Ordinance¹² to be:

- an investigation,
- a prosecution, or
- an ancillary criminal matter.

Of particular relevance to requests for asset recovery, "ancillary criminal matter" is defined¹³ to mean restraining or dealing with; or seizing, forfeiting, or confiscating any property in connection with an external offense; or obtaining, enforcement or satisfaction of an external confiscation order.

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"External offense" means an offense against the law of a place outside Hong Kong, China, and "external serious offense" means an external offense, the maximum penalty for which is death or imprisonment for not less than 24 months.

External confiscation order, which is a key term in relation to requests for asset recovery, is defined¹⁷ as:

... an order, made under the law of a place outside Hong Kong, for the purpose of –

- a) recovering (including forfeiting and confiscating) –
 - (i) payments or other rewards received in connection with an external serious offense or their value;
 - (ii) property derived or realized, directly or indirectly, from payments or other rewards received in connection with an external serious offense or the value of such property; or
 - (iii) property used or intended to be used in connection with an external serious offense or the value of such property; or
- b) depriving a person of a pecuniary advantage obtained in connection with an external serious offense,

and whether the proceedings which gave rise to that order are criminal or civil in nature, and whether those proceedings are in the form of proceedings against a person or property.

It can, therefore, be seen that the law permits action to be taken in Hong Kong to restrain, forfeit, or confiscate property in relation to a foreign offense punishable by at least 24 months imprisonment in the requesting jurisdiction. This can be done whether the foreign proceedings are criminal or civil in nature, and whether the proceedings are against persons or property. That is, the procedure allows for action in cases of confiscation following a criminal conviction, or action based on civil *in rem* proceedings against identifiable property arising from criminal conduct but not necessarily requiring a criminal conviction.

Contents of Requests

Certain key minimum statutory requirements¹⁸ must be contained in all requests for MLA, including those relating to asset recovery. The request should be in writing and include the following:

- particulars of the "appropriate authority" making the request, supported by the relevant documents or statutory provisions to enable the Secretary for Justice to be satisfied as to the legal basis for the request;

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- name of the authority, if different from the aforementioned, concerned with the criminal investigation or proceedings to which the request relates (for example, the judicial or prosecuting authority conducting the investigation or proceeding relating to the request);
- description of the nature of the criminal matter (in particular, whether it relates to an investigation, prosecution, or ancillary criminal matter and the details of the offense alleged) and a statement setting out a summary of the laws contravened;
- statement setting out the maximum penalty for the offense to which the criminal matter relates;
- summary of the relevant facts including, in particular, the circumstances indicating their connection with any evidence sought in Hong Kong, China;
- description of the purpose of the request and the nature of assistance being sought;
- relevance of the required evidence (that is, the manner in which the evidence is expected to assist in the investigation or to be used in the prosecution);
- details of the procedure that the requesting place wishes Hong Kong, China to follow in giving effect to the request, including details of the manner and form in which any information, document, or thing is to be supplied under the request;
- if confidentiality of the request is required, a statement expressing that requirement supported by reasons why confidentiality is sought;
- if the original of a thing is requested, a statement specifying the reason for requiring the original;
- details of the period within which the requesting place wishes the request be complied with; and
- any other information that may help in giving effect to the request.

In addition, other information may be required for specific types of assistance sought. For information specifically in relation to requests for asset recovery, please see subsequent section (Additional Considerations in Asset Recovery Cases).

The Ordinance provides a number of statutory grounds¹⁹ on which requests will be refused. These are:

- a. the request relates to the prosecution or punishment of a person for an offense that is, or is by reason of the circumstances in which is alleged to have been committed, an offense of a political character;
- b. there are substantial grounds for believing the request was made for the purpose of prosecuting, punishing, or otherwise causing prejudice

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- to a person on account of the person's race, religion, nationality, or political opinions:
- c. the request relates to the prosecution of a person for an offense in respect of conduct pursuant to which the person has been convicted, acquitted, pardoned, or punished (i.e., double jeopardy);
 - d. acceding to the request would impair the sovereignty, security, or public order of the People's Republic of China;
 - e. the request relates to the prosecution or punishment of a person in respect of an act or omission which, if it occurred in Hong Kong, China, would have constituted an offense only under military law and not also under the ordinary law of Hong Kong, China;
 - f. acceding to the request would seriously impair the essential interests of Hong Kong, China;
 - g. the request relates to an act or omission that, if it had occurred in Hong Kong, China, would not have constituted an offense (i.e., dual criminality).

A request should contain a positive statement confirming that none of the grounds at (a) – (c) above apply.

A request from a foreign jurisdiction that does not have a bilateral agreement with Hong Kong, China will also be refused if the appropriate authority of the requesting place fails to provide a reciprocity undertaking²⁰ in the body of the request. An undertaking in the following form is acceptable:

... [requesting place] undertakes that it will, subject to its laws, comply with a future request from the Hong Kong Special Administrative Region for similar assistance having a comparable effect to that requested from the Hong Kong Special Administrative Region in this case....

If the offense relates to an investigation (as opposed to prosecution) of an offense in relation to taxation,²¹ it will be refused if the requesting place does not have an agreement with Hong Kong, China. If an agreement exists, the requesting place should provide in the body of the request information to satisfy the Secretary for Justice that the primary purpose of the request is not the assessment or collection of taxation. These restrictions do not apply if a criminal prosecution has started.

There is no death penalty²² in Hong Kong, China. If a request for assistance from abroad relates to an offense punishable by death, the request may be refused if the requesting place fails to give an undertaking that satisfies the Secretary for Justice that the death penalty will not be imposed or, if imposed, will not be carried out.

Additional Considerations in Asset Recovery Cases

An external confiscation order may be registered and enforced in Hong Kong, China through an application made by Secretary for Justice, on behalf of the requesting place, to the Court of First Instance in Hong Kong, China.²³

An application to the Court must contain sufficient information to satisfy it that:

- at the time of the registration, the order is in force and not subject to appeal;
- the person in respect of whom, or in relation to whose property, the order was made received notice of the proceedings and had the opportunity of defending the proceedings; and
- the enforcement of the order in Hong Kong, China would not be contrary to the interests of justice.

The Secretary for Justice may also apply to the Court of First Instance for an order prohibiting dealing in property (restraint order).²⁴ The court will make an order if it is satisfied that:

- proceedings have been instituted in a place outside Hong Kong, China,
- the proceedings have not been concluded, and
- either an external confiscation order has been made in the proceedings or there are reasonable grounds for believing an external confiscation order may be made in them.

An order restraining dealing in property may also be obtained where the court is satisfied that proceedings are to be instituted in a place outside Hong Kong, China and it appears that in those proceedings an external confiscation order may be made.

Accordingly, it is important that a request to Hong Kong, China seeking to register an external confiscation order or to restrain dealing in property should also contain the above information, as applicable, so that application can be made to the court for the necessary orders on behalf of the requesting place.

To simplify proof of evidentiary matters, the ordinance allows for proof of certain facts by a certificate (Section 30(1) on certificate) issued by the appropriate authority of the requesting place.²⁵ In particular, such a certificate shall be admissible as evidence of the facts stated. The facts that can be proven by the certificate are as follows:

- a proceeding has been instituted and has not been concluded, or that a proceeding is to be instituted, in the place;
- an external confiscation order is in force and not subject to appeal;

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- all or a certain amount of the sum payable under an external confiscation order remains unpaid in the place, or that other property recoverable under an external confiscation order remains unrecovered in the place;
- any person has been notified of any proceeding in accordance with the law of the place; or
- an order (however described) made by a court in the place has the purpose of
 - I. recovering, including forfeiting and confiscating
 - (i) payments or other rewards received in connection with an external serious offense or their value;
 - (ii) property derived or realized, directly or indirectly, from payments or other rewards received in connection with an external serious offense or the value of such property; or
 - (iii) property used or intended to be used in connection with an external serious offense or the value of such property; or
 - II. depriving a person of a pecuniary advantage obtained in connection with an external serious offense.

In addition, a statement contained in the document that purports to have been received in evidence or summarizes evidence given in proceedings in a court in a place outside Hong Kong, China is admissible as evidence of any fact stated therein if duly certified.²⁶ A document is duly certified if it purports to be certified by a judge, magistrate, or officer of the court in the place outside Hong Kong, China concerned, or by or on behalf of the appropriate authority of the place.

The Ordinance also allows for proof of foreign court orders if the order bears the seal of the court in the place outside Hong Kong, China or is signed by any person in his capacity as judge, magistrate, or officer of the court in the place outside Hong Kong, China.²⁷ Certified copies may also be put as proof if the copy purports to be certified by a judge, magistrate, or officer of the court in the place outside Hong Kong, China concerned, or by or on behalf of the appropriate authority of the place.²⁸

Processing of Asset Recovery Requests in Hong Kong, China

The Mutual Legal Assistance Unit of the International Law Division, Department of Justice, discharges the responsibilities of the Central Authority in Hong Kong, China for the purpose of MLA in criminal matters.²⁹

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Foreign authorities may seek advice from the unit on the preparation of requests to Hong Kong, China, and draft requests may be forwarded to the unit for comment, to ensure compliance with Hong Kong, China's statutory requirements.

All requests for legal assistance under the Ordinance, including asset recovery cases, should be addressed to the Secretary for Justice, who is the head of the Department of Justice. It is not necessary for requests to be sent through the diplomatic or consular channel.³⁰ Instead, requests may be sent directly to:

The Mutual Legal Assistance Unit
Department of Justice
47/F High Block
Queensway Government Offices
66 Queensway
Hong Kong, China
Fax number: +852 2523 7959

Upon receipt, the request will be assigned to the counsel within the MLA unit.³¹ The MLA counsel will acknowledge receipt of the request and obtain the appointment of a law enforcement officer to assist in its execution. This will be an officer from the Hong Kong Police, Customs, and Excise Department or the Independent Commission against Corruption, depending on the nature of the case under investigation or prosecution. They are all "authorized officers" under the ordinance.³²

Should the request, on review, fail to meet the minimum legal standards for processing under the ordinance, or should additional information or clarification be required, the assigned counsel will give the necessary feedback to the requesting jurisdiction so that remedial action may be taken before the request proceeds.

Once the request is in a form that can be lawfully processed, notice is given to the Office of the Commissioner of the Ministry of Foreign Affairs that is based in Hong Kong, China. Under the Ordinance, the Central People's Government may give instructions in the case on the grounds that if the instructions were not complied with, the interests of the People's Republic of China in matters of sovereignty, security, or public order would be significantly affected.³³ In urgent cases, for example, where restraint orders are required at short notice, this notification procedure will be expedited.

The Secretary for Justice formally authorizes the execution of the request. His power has been delegated to a law officer (International Law), and an MLA

counsel is responsible for obtaining this internal clearance before execution of the request proceeds.

Upon authorization by the Secretary for Justice, the law enforcement officer assigned to help in executing the request will commence background inquiries. In asset recovery cases, the officer may informally inquire with banks and other institutions named in the request to verify—as far as possible—the accuracy of the information contained in the request concerning the named/numbered bank accounts and other properties held by or on behalf of named persons or entities. In some cases, Hong Kong, China's and overseas law enforcement officers may work together on the case before the formal request for assistance is made, thus ensuring greater certainty and accuracy of the information contained in the request.

Restraint Orders

If a restraint order is sought, an MLA counsel will draft the necessary application to the Court of First Instance and will work with the law enforcement officer to prepare an affidavit or information in support of the application. The request for assistance will not be exhibited to the application to court, but the law enforcement officer's affidavit filed in court will set out all relevant details drawn from the contents of the request as appropriate. If a Section 30(i) certificate or copies of foreign orders have been provided by the requesting place, these will be exhibited to the affidavit in support of the application.

Once the papers have been prepared and filed, a hearing can be obtained at short notice and within a matter of days. The application is heard *ex parte* (i.e., without the defendants' knowledge or participation) and the MLA counsel will seek the order from the court. If the court is satisfied that the necessary statutory conditions for the making of the order have been met and that it is appropriate to do so, it will issue the order.⁴⁴

The initial restraint order is an interim order for a limited period only, adjourned to some date in the future (the return date). This is to enable time to serve the restraint order and related papers on the defendants and other persons affected by the order (e.g., banks). In most cases involving international requests for asset recovery, the defendants are located abroad and often reside in the requesting place. A period of about 2 months is usually allowed to effect service. If more time is needed, then the time may be extended. The MLA counsel will forward the papers to the requesting jurisdiction and require that an affidavit of service be provided in return within the stipulated period.

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At the return date, a proof of service of the order on the defendants and other affected parties will be provided to the court. The defendants or affected parties may attend or be represented and oppose the continuation of the restraint order. Should these persons not appear, the court will usually grant the continuation of the restraint order "until further order of the court." This is an order for an indefinite period and it continues to run while the proceedings in the requesting jurisdiction are being completed and a final forfeiture or confiscation order is obtained.

Should any other party appear on the return date and contest the proceedings, the court will hear the arguments and decide whether to maintain the restraint order or discharge it. Depending on the nature of the arguments raised on any defended application, the MLA counsel may require more information or assistance from the requesting place to best present its case in court.

The defendants are entitled to apply for legal expenses and living expenses³⁵ from property under restraint in Hong Kong, China, although the Secretary for Justice ensures, as far as possible, that this right is not abused. The defendants will usually be required to provide an affidavit of means to disclose all properties worldwide and, in cases where foreign law does not permit the withdrawal of legal fees from restrained assets, this may be a factor the court will also consider in deciding whether to grant any such relief.

Depending on how long it would take the requesting jurisdiction to obtain final confiscation or forfeiture orders, the restraint orders may be maintained for a number of years in Hong Kong, China. Should a property subject to a restraint order require active management (e.g., apartments operating under lease arrangements), the court may appoint a receiver to manage the property pending further order of the court.³⁶

Registration and Enforcement of Forfeiture/Confiscation Orders in Hong Kong, China

Once a final forfeiture or confiscation order has been obtained, a request may be sent to Hong Kong, China to register and enforce the order. Again, a mutual legal assistance (MLA) unit counsel will work with the law enforcement officer assigned to draft the necessary application to the court and other related papers. The law enforcement officer will sign an affidavit, based on the contents of the request.

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It is highly recommended that at the registration and enforcement stage, the appropriate authority of the requesting place provide a Section 30(1) certificate certifying the following matters, adapted as necessary:

- an external confiscation order is in force and not subject to appeal;
- all or a certain amount of the sum payable under an external confiscation order remains unpaid in the place, or that other property recoverable under an external confiscation order remains unrecovered in the place;
- any person has been notified of any proceeding in accordance with the law of the place; or
- an order, however described, made by a court in the place has the purpose of
 - recovering (including forfeiting and confiscating)
 - (a) payments or other rewards received in connection with an external serious offense or their value;
 - (b) property derived or realized, directly or indirectly, from payments or other rewards received in connection with an external serious offense or the value of such property; or
 - (c) property used or intended to be used in connection with an external serious offense or the value of such property; or
 - depriving a person of a pecuniary advantage obtained in connection with an external serious offense.

Originals or certified copies of the final confiscation or forfeiture orders should also be included in the request.

The MLA counsel will apply to the Court of First Instance to register the external confiscation order, usually on an ex parte basis. Then, notice of the registration must be served on the defendants and other affected parties. They will have a fixed period within which to apply to the court to set aside the registration. If no such steps are taken, the MLA counsel will apply further to enforce the external confiscation order.³⁷

This may be done by appointing a receiver to sell realizable property,³⁸ or in cases where only funds in bank accounts are involved, an order may be obtained directing payment into court.

Sharing of Recovered Assets

Hong Kong, China does share recovered assets. The standard provision on sharing in Hong Kong, China's bilateral agreements provides that proceeds confiscated shall be retained by the requested party unless otherwise agreed

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upon between the parties. This allows for a presumption that the assets will remain with the requested party but provides for flexibility and sharing on a case-by-case basis.

Once funds are realized at the enforcement stage by the receiver or otherwise, they must be paid to the Court of First Instance. The registrar of the court will hold the funds for a period of 5 years pending an application by or on behalf of the government of a "prescribed place" for sharing.³⁹ "Prescribed places" are places with which Hong Kong, China has prescribed "arrangements for mutual legal assistance"⁴⁰ under the Ordinance, that is, arrangements which have been made the subject of an order under the Ordinance.⁴¹ All of Hong Kong, China's bilateral agreements for MLA in criminal matters have been made the subject of orders under the ordinance, so a legal mechanism exists to share with such places. An order is also being made under the Ordinance to apply the United Nations Convention against Corruption (UNCAC) to enable sharing or repatriation of recovered assets with other parties to the Convention in accordance with Convention obligations.⁴²

If a foreign jurisdiction does not have a bilateral agreement with Hong Kong, China or is not a party to a relevant multilateral agreement that has been applied under the Ordinance, there is no statutory basis for sharing. Jurisdictions are encouraged to enter bilateral agreements for MLA with Hong Kong, China because, among other things, these agreements contain asset-sharing mechanisms which may not otherwise be available to requesting parties.

Hong Kong, China has a record of sharing assets with foreign jurisdictions in cases of substantial value, mostly drug cases to date.

Checklist for Effective Cooperation in Asset Recovery Cases

Set out below are some suggestions for effective cooperation with Hong Kong, China in relation to requests for assistance in asset recovery cases:

- Contact the law enforcement level directly and early to obtain as much relevant information as possible and to verify existing information. In Hong Kong, China the Joint Financial Intelligence Unit may be contacted directly. Details are available at: www.jfiu.gov.hk.
- Contact the MLA unit, International Law Division of the Department of Justice early. The unit will advise on draft requests by fax or e-mail. It will also give advice on how best to forward a pending request, taking into account the needs of the requesting place.
- Ensure that there is identifiable property in Hong Kong, China to be restrained or confiscated. Hong Kong, China's authorities cannot act

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- on a request that does not identify a particular property. Moreover, show and establish the relationship between that identified property and the defendants. If the property is held by third parties, the basis upon which one seeks to confiscate this property in the proceedings must be made clear.
- Be clear about the status of the proceedings in one's jurisdiction. If proceedings that may lead to a confiscation or forfeiture order have not yet been instituted, the proceedings to be instituted should be described and give a time-frame for institution of those proceedings. If proceedings have already been instituted, a description of the nature of those proceedings and the stage reached to date should be provided.
 - Provide a clear summary of facts, of the matters under investigation, and include all other required items in the request (see Contents of Request aforementioned). To assist in proving evidential matters, use Section 30(1) certificate as appropriate and provide copies of the relevant court orders.
 - Once the request is ready to be sent, send it direct from the requesting central authority to the central authority of Hong Kong, China, namely, the MLA unit. It is not necessary to send the request through the consular or diplomatic route, which may cause delay.
 - Be sure to send the request with sufficient time for action to be taken. If action in one's jurisdiction is due to go covert at any time (thus putting the property in Hong Kong, China at risk of movement or dissipation), please allow sufficient lead time for Hong Kong, China to process the request and apply to a court for the necessary restraint orders. Coordinated action can be facilitated through the MLA unit.
 - Once funds have been restrained in Hong Kong, China, continue to actively litigate the proceedings in one's jurisdiction. Restrained funds cannot be realized in Hong Kong, China and paid across until one has obtained a final forfeiture or confiscation order in one's jurisdiction.
 - Prior to sending a request for registration and enforcement of one's confiscation or forfeiture order is obtained, ensure that the order is final (not subject to appeal) and that all persons affected by the order were given notice of the proceedings prior to the order becoming final to enable them to defend it.
 - Once an order has been registered and enforced in Hong Kong, China and the funds paid in court, consider an application for asset sharing. The request for sharing should be made to the MLA unit and it should set out reasons for the sharing and the proposed amount. This request

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should be made early and, certainly, within 5 years of the funds being paid in court in Hong Kong, China.

Conclusion

Hong Kong, China is a major financial center. The Department of Justice regularly processes requests for MLA in criminal matters in relation to the production of bank records for the tracing of funds and other property. It also regularly applies to the courts for restraint orders and to register external confiscation/forfeiture orders in relation to property in Hong Kong, China at the request of foreign jurisdictions.

Hong Kong, China has the necessary constitutional and legal framework in place to enable it to enter international agreements and relationships under its own name: Hong Kong, China. It can participate in relevant international organization and initiatives and can enter into relevant bilateral agreements. Multilateral agreements to which the People's Republic of China is a party may also be applied to Hong Kong, China.

The Mutual Legal Assistance in Criminal Matters Ordinance, Cap. 525 provides a purpose-built framework to provide MLA, including asset recovery.

The legal framework is reinforced by a proactive Central Authority: the Mutual Legal Assistance Unit, International Law Division of the Department of Justice. The Unit aims to provide a "one-stop-shop" service. It acts as the Central Authority to receive requests from abroad and obtain the necessary internal authorizations for requests to proceed. A counsel in the unit reviews the request and makes the necessary applications to court in conjunction with law enforcement officers to secure execution. The unit conducts on-going litigation in relation to international asset recovery cases and liaises with foreign counterparts to ensure satisfactory outcomes.

Thus, the necessary legal and operational framework exists in Hong Kong, China for the processing of requests in asset recovery cases. Foreign jurisdictions are encouraged to work with the relevant authorities in Hong Kong, China on a case-by-case basis to achieve desired results.

Jurisdictions that do not have existing bilateral agreements for MLA in criminal matters with Hong Kong, China are encouraged to enter negotiations for such agreements.⁴⁵