27 February 2007

Jacqueline Dewar
Committee Secretary
Parliamentary Joint Committee on the Australian Crime Commission
Department of the Senate
PO Box 6100
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And by email to: acc.committee@aph.gov.au

Dear Ms Dewar

INQUIRY INTO THE FUTURE IMPACT OF SERIOUS AND ORGANISED CRIME ON AUSTRALIAN SOCIETY

The terms of reference for this inquiry include an examination of "strategies for countering future serious and organised crime".

It is now all but universally accepted that one of the most effective ways of countering serious and organised crime—and arguably the single most effective way—is to confiscate proceeds of crime. The need and justification for confiscation is at least sixfold:

(1) to deter crime by reducing actual and expected profitability;
(2) to prevent crime by diminishing the capacity of offenders to finance further criminal activity;
(3) to redress the unjust enrichment of those who profit at society's expense;
(4) to compensate society for the harm, suffering and human misery caused by crime;
(5) to reimburse the state for the ever-increasing cost of fighting crime; and
(6) to engender public confidence in the administration of justice by demonstrating to the community that crime does not pay.[1]

Australia has some of the widest confiscation laws in the world, particularly with the *Proceeds of Crime Act 2002* at the Commonwealth level. However, the value of criminal proceeds confiscated (ie. actually forfeited or recovered, as opposed to estimated values of assets merely restrained) each year in Australia is still disappointingly low.[2]

[1] See Lusty, "Civil Forfeiture of Proceeds of Crime in Australia" (2002) 5 *Journal of Money Laundering Control* 345-359 – **a copy of which is attached**.
[2] See, eg, Australian Crime Commission, *Annual Report 2005-06*, pp.7, 40 & 144; Tom Sherman AO, *Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002 (Cth)*, chapter 3.

It is submitted that the Committee should examine possible ways of increasing the effectiveness of efforts by Australian law enforcement agencies to confiscate proceeds of crime as a principal strategy for countering future serious and organised crime.

In my opinion, one way would be to make the CEO of the Australian Tax Office (ATO) a member of the Board of the Australian Crime Commission (ACC), as has recently been recommended.[3] History in Australia and overseas has proven that close cooperation between traditional law enforcement agencies and revenue agencies is indispensable in any earnest effort to combat organised crime.[4] Having the CEO of the ATO on the ACC Board would enhance such cooperation and should lead to increased recoveries of proceeds of crime through better enforcement of tax laws against those who derive illicit income.

Yours sincerely

David Lusty
(writing in a purely personal capacity)

[3] Parliamentary Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002* (Report, 10 November 2005), recommendation 6 (para 4.48).
[4] See Lusty, "Taxing the Untouchables Who Profit From Organised Crime" (2003) (10) *Journal of Financial Crime* 209-228 – **a copy of which is attached**.

Civil Forfeiture of Proceeds of Crime in Australia

David Lusty

> 'It is incorrect to view the recovery of the profits of unlawful activity as a part of the criminal justice process and, as such, justifiable only on the basis of a prior finding of guilt according to the criminal standard of proof beyond reasonable doubt.'[1]
>
> 'The criminal justice system is not designed to take away from criminals the gains they have made from crime.'[2]

INTRODUCTION

No person should be permitted to become unjustly enriched at the expense of another individual or society at large and those who engage in wrongdoing should be held financially accountable for the costs and consequences of their actions. These principles form the philosophical foundation for laws around the world aimed at confiscating proceeds of crime. The need and justification for such laws is at least sixfold:

— to deter crime by reducing actual and expected profitability;
— to prevent crime by diminishing the capacity of offenders to finance further criminal activity;
— to redress the unjust enrichment of those who profit at society's expense;
— to compensate society for the harm, suffering and human misery caused by crime;
— to reimburse the state for the ever-increasing cost of fighting crime; and
— to engender public confidence in the administration of justice by demonstrating to the community that crime does not pay.

There are two basic types of law for the confiscation of proceeds of crime: (i) *conviction-based* laws, which treat the issue of confiscation as part of the criminal prosecution process by generally requiring an actual or imminent criminal charge as a prerequisite to the restraint of suspected proceeds of crime, and a criminal conviction as a prerequisite to the confiscation of proceeds of crime; and (ii) *civil forfeiture* laws, which treat the question of confiscation as a completely separate issue from the imposition of a criminal penalty, with proceedings conducted in civil courts according to civil standards of proof and civil rules of procedure.

After decades of disappointment with conviction-based confiscation, a growing number of jurisdictions around the world are turning to civil forfeiture. Such laws have operated with significant success in America,[3] Italy[4] and Ireland,[5] have recently been enacted in South Africa[6] and Ontario,[7] and are likely to be adopted throughout the UK in the near future.[8] This article reviews Australian developments in this field, which include a number of innovations and interesting parallels with the UK.

CALLS FOR CONFISCATION

The initial impetus for Australia's confiscation laws came from a series of royal commissions of inquiry in the 1970s and early 1980s: Moffitt (1973–74), Williams (1977–79), Stewart (1981–83) and Costigan (1980–84).[9] Each inquiry revealed disturbing levels of organised crime and corruption. Each commissioner urged government to address the problem by attacking the primary motive for such criminal activity — profit. For example, Costigan QC stated:

> 'The first thing to remember is that the organisation of crime is directed towards the accumulation of money and with it power. The possession of the power that flows with great wealth is to some people an important matter in itself, but this is secondary to the prime aim of accumulating money. Two conclusions flow from this fact. The first is that the most successful method of identifying and ultimately convicting major organised criminals is to follow the money trail. The second is that once you have identified and convicted them you take away their money; that is, the money which is the product of their criminal activities.'[10]

Justice Moffitt, then President of the NSW Court of Appeal, similarly stated:

> 'A primary target for attack, if syndicates and their power are to be destroyed, is the money and assets of organised crime. There are many reasons to

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> support this view. The goal of organised crime is money. The financial rewards are very great, and they are the greater because the profits are tax-free. Money generates power; it allows expansion into new activities; it provides the motive for people to engage in such crime. It is used to put the leaders in positions, superior to that of others in the community, where they are able to exploit the law and its technicalities and so on. At the same time, it is the point at which organised crime is most vulnerable.''[11]

The impetus for confiscation laws in the UK arose somewhat differently, coming from the failed attempt to forfeit proceeds of crime in *R v Cuthbertson*. The trial judge ordered the forfeiture of assets valued at £750,000 that were traced to the convicted defendants' drug trafficking activities and this order was upheld by the Court of Appeal.[12] However, in 1980 the House of Lords overturned the order 'with considerable regret', ruling that existing laws did not permit forfeiture of the total profits from a criminal enterprise.[13] This decision resulted in public outcry and led to the establishment of a committee chaired by Sir Derek Hodgson to inquire into the recovery of proceeds of crime.[14] In 1984, the Hodgson Committee recommended the enactment of new confiscation laws.

EARLY CIVIL FORFEITURE LAWS IN AUSTRALIA

The first step in Australia's pursuit of proceeds of crime was taken by the Federal Government in 1977 with the insertion of s. 229A into the Customs Act 1901. Significantly, it created a civil forfeiture regime. The *in rem* regime permits the forfeiture of cash, cheques or goods proven on the balance of probabilities to have been derived from dealings with prohibited narcotic imports, without the need for a criminal charge or conviction. Almost immediately, however, the laws proved ineffective as a result of the practical impossibility in all but the simplest of cases of tracing suspected proceeds to specific dealings in narcotics. In 1979 the scheme was criticised in Parliament as ignoring practical realities and a new scheme was introduced:

> 'These criminals are highly sophisticated businessmen with the best possible legal advice. They do not hide their profits in a sock under the mattress; it goes into land, stocks and shares, options, negotiable instruments — in short, into all the instruments of modern commerce. As I have indicated, the provisions this Parliament enacted in 1977 . . . are inadequate to deal with sophisticated asset accumulations . . . I am now presenting to this Parliament a scheme designed to deal with sophisticated methods of disposing of the profits of illegal drug trafficking, a process often referred to as ''washing''.'[15]

The reference to 'washing' reflects an early recognition in Australia that confiscation laws requiring a nexus to be established between specific criminal activity and its proceeds are likely to be thwarted by the practice of money laundering. The 1979 reforms were squarely aimed at overcoming this mischief. They introduced a new Division 3 into Part XIII of the Customs Act containing a supplementary scheme of *in personam* civil forfeiture. These provisions enable the Commonwealth to commence civil proceedings for the recovery of pecuniary penalties equal to the gross benefits derived by a person from dealings with prescribed narcotics. There is no requirement for a criminal charge or conviction and no need to prove that particular items of the person's property represent the direct or indirect proceeds of crime. Proceedings are governed by the ordinary civil standard of proof. During parliamentary debates in 1979 the Minister emphatically rejected a proposal to substitute the criminal standard of proof:

> 'I indicated to the legislation committee that the Government could not accept an amendment having the purpose of requiring proof beyond reasonable doubt in respect of these matters. *For practical purposes such a provision, in the view of the Government, would make the provisions for the order of a pecuniary penalty virtually useless.* The purpose of the provisions that provide for pecuniary penalties is an additional method of attacking illicit trafficking of narcotics — by providing a framework within the civil law for *an order in the nature of public damages* for the Crown to be awarded the benefits derived from these dealings. Such a law is to be placed, if it is to have any impact in the narcotics trade, on the same footing as commercial law generally. *To treat it as criminal law is to deny the basic purpose for its introduction.*'[16]

In accordance with general principle, the fact that a person has been acquitted of an offence in a criminal trial is no bar to bringing civil forfeiture proceedings under the Customs Act.[17] The constitutional validity of the Customs Act provisions has been upheld by the High Court of Australia, which unanimously rejected the argument that civil forfeiture involves an acquisition of property on other than 'just terms' contrary to the Australian Constitution.[18]

On occasion, the *in personam* civil forfeiture provisions in the Customs Act have been successfully employed. For example, in 1989 they were used to deprive the notorious Bruce 'Snapper' Cornwell of $6.9m.[19] However, despite its broad underlying philosophy based on the concept of 'public damages', the provisions are so restrictive and outdated that they have now fallen into disuse. The Australian Law Reform Commission recently concluded that this legislation is 'too narrowly drawn' and suffers from the absence of reverse onus provisions that 'put a defendant to proof as to the lawful provenance of his or her property'.[20]

DEBATES ABOUT CONFISCATION MODELS

In the early 1980s all Australian governments agreed on the need for laws to confiscate the proceeds of crime. However, reaching agreement on the content of these laws proved difficult. The principal debate was whether to adopt a *civil forfeiture* or a *conviction-based* model.

The Royal Commissioners supported the enactment of civil forfeiture laws. For example, Justice Williams of the Supreme Court of Queensland 'viewed provisions for the forfeiture of major assets not dependent on conviction as particularly appropriate'.[21] Justice Stewart of the Supreme Court of NSW agreed, stating that a confiscation scheme that would operate 'independently of the conviction of an offender . . . has considerable merit and its implementation is desirable'.[22] Costigan QC also endorsed proposed laws for the confiscation of proceeds of crime 'through civil proceedings . . . irrespective of whether the Crown brings a criminal action against the person concerned'.[23] However, the most vociferous advocate of civil forfeiture was Justice Moffitt. In 1983, 1984 and 1985[24] he argued that conviction-based laws would be ineffective and called for civil forfeiture laws modelled on existing tax laws:

> 'It has long been accepted that tax authorities can call on taxpayers to account for assets which appear to exceed that which their income could be expected to produce. In the US this is a "net worth" investigation. It is difficult to see why in the face of serious organised crime a statute could not be drawn to provide that in prescribed circumstances being established before the Supreme Court, the owner or custodian of money or assets may be called on to explain how he came by them . . .
>
> The type of approach to which I refer could complement the taxation approach. One would need some connection with organised crime while the other would need some connection with tax evasion. These two aspects would go hand in hand but one may be able to be proved and the other not. Each could be implemented in advance of criminal prosecutions and, in my belief, in the absence of them. Each could rely on the civil processes of the law where the defendant cannot, as in criminal proceedings, sit back in silence and rely on reasonable doubt. In each there would be available all the devices of the civil law which enable the defendant's affairs, subject to court control, to be penetrated prior to the case by compulsory production of documents and answering court controlled questions (interrogatories).'[25]

Justice Moffitt argued that civil forfeiture laws were justifiable in principle as analogous to existing civil remedies designed to redress unjust enrichment.[26]

Even though the Royal Commissioners were all highly distinguished lawyers and, each having inquired into organised crime for a number of years, were uniquely qualified, their calls for civil forfeiture laws were not acted upon. Instead, the Standing Committee of Attorneys-General (SCAG) developed model confiscation legislation in 1985 that was conviction-based.

Although it is not entirely clear, the choice of conviction-based confiscation laws in Australia appears to have been based on two principal factors. First, in 1984 the Hodgson Committee recommended the enactment of conviction-based laws in the UK[27] and it was suggested by some that Australia should follow suit.[28] Second, an overriding aim of SCAG was to produce 'relatively uniform, or at least consistent, legislation throughout Australia'[29] and it is likely that those jurisdictions favouring civil

forfeiture were eventually prepared to compromise and accept conviction-based laws in order to achieve this objective.

Interestingly, the view of the Hodgson Committee that confiscation should only occur after a criminal conviction was subsequently rejected by the House of Commons Home Affairs Select Committee that examined the misuse of hard drugs in 1985. It 'unhesitatingly' endorsed American civil forfeiture laws, recommending that 'the civil and criminal law of the UK be amended to provide for the seizure and forfeiture of assets connected with drug traffic in accordance with the American practice'.[30] However, this recommendation was not taken up by the Thatcher government, which introduced conviction-based laws in 1986. During parliamentary debates, David Mellor, Under-Secretary for the Home Office, stated that: 'The civil forfeiture procedure, though effective in America, is difficult for us to swallow.'[31]

CONVICTION-BASED CONFISCATION LAWS

Between 1985 and 1993, all nine Australian jurisdictions enacted conviction-based confiscation legislation.[32] Reasonably similar laws were passed in the UK over the same period.[33] Australia's conviction-based laws at the Federal level are contained in the Proceeds of Crime Act 1987 (POCA), which mirrors conviction-based confiscation legislation in most other Australian jurisdictions. The basic features of POCA are as follows:

— Where a person has been charged with an indictable offence, or will be charged within 48 hours, the court can make a *restraining order* prohibiting dealings with or disposals of property. Before doing so, the court must be satisfied that there are reasonable grounds for suspecting that the property sought to be restrained may be subject to a *forfeiture order*, or may be needed to satisfy a *pecuniary penalty order*, should the person be convicted.
— Where the defendant is convicted of an 'ordinary indictable offence', the court can order the forfeiture of property, including property of third persons, which is proven on the balance of probabilities to be 'tainted' either because it is the proceeds of the offence or was used in connection with the commission of the offence.
— Where the defendant is convicted of a 'serious offence', all of his or her property, and tainted property held by third persons, is liable to *automatic forfeiture* after six months unless the owner proves that it was lawfully acquired and not used in connection with the commission of any offence. The definition of 'serious offence' is limited to offences involving drug trafficking, organised fraud and associated money laundering.
— In addition, or as an alternative, to a forfeiture order, the court may make a pecuniary penalty order requiring the defendant to pay an amount equal to the value of the benefit derived from the relevant offence(s). Various formulas and rebuttable presumptions are provided for calculating that benefit.

REVERSAL OF THE ONUS OF PROOF

One of the key, and at one time controversial, features of POCA and all other confiscation laws (conviction-based and civil forfeiture) in Australia is the existence of reverse onus provisions or rebuttable presumptions that require defendants and relevant third persons to demonstrate that their property was lawfully acquired in order to avoid confiscation. In 1987, the relevant POCA provisions were referred to in Parliament by the Attorney-General as follows:

> 'All that is required in certain circumstances is an explanation as to how assets have been acquired . . . If people who are asked to explain how they got assets because it is suspected that they have been acquired through criminal activity and they cannot give an explanation is it not about time that society said: ''If there has been unlawful activity, we will take the assets?'' If a person can clearly establish that he has acquired his money or assets through lawful activity, he has nothing to fear. We cannot have a person getting the benefit of unlawful activity and then saying: ''Try to prove it against me.'' '[34]

As recently recognised by FATF,[35] most countries with a legal system based on the common law have confiscation laws which place an onus of proof on the defendant in relation to the lawful origin of property, whether through express provisions, or rebuttable presumptions to the same effect. In 1986, the British Home Office Minister gave the following reasons for the inclusion of such provisions in Britain's confiscation laws relating to drug trafficking:

> 'In many cases, it will never be possible for the prosecution to establish with certainty how much of a wealthy trafficker's life style was financed by his or her criminal activities. To insist on doing so would frequently allow the trafficker to retain much of his or her illegal gains. The offender is the only person who knows exactly what his or her legitimate income has been, if any, and which of his or her assets were legitimately acquired. It is right that the burden should be upon him to establish these facts to the satisfaction of the court.'[36]

When first introduced, the reverse onus provisions in Australian confiscation laws were criticised by a number of commentators. For example, Matthew Goode described them as 'unnecessary' and 'unjust',[37] while Professor Freiberg claimed that the task of showing that property was lawfully acquired 'would be almost insurmountable and . . . is likely to leave any defendant bankrupt'.[38] However, as discussed below, courts in Australia and overseas have taken a different view, readily accepting that reverse onus provisions in confiscation laws are necessary and neither unfair nor unreasonable.

There are at least four practical factors that justify placing the onus of proof on a defendant in relation to the lawful origin of property in confiscation proceedings:

- the general non-existence of direct evidence relating to the derivation of proceeds of crime;[39]
- the increasing ease with which the illicit origin of criminal proceeds can be concealed or disguised through money laundering, particularly as a result of globalisation and advancements in technology;[40]
- the fact that details about the actual acquisition (lawful or otherwise) of property, including the source of funds used to purchase the property, are likely to be peculiarly within the knowledge of the person who acquired the property;[41] and
- the general ease with which a lawful owner of property should be able to establish that his or her interest in the property was lawfully acquired.[42]

In light of these factors, courts in Australia and overseas have acknowledged the need and justification for reverse onus provisions in confiscation laws, recognising the inherent difficulty in otherwise identifying or assessing proceeds of crime. As Justice Wood of the Supreme Court of NSW has remarked, 'those involved in criminal activities rarely, if ever, keep books of account or other documents from which any precise calculation of the proceeds of crime can be made'.[43] Justice Roden in the NSW Court of Appeal has similarly observed that:

> 'Calculation or assessment of the value of the benefits derived by a particular offender from any criminal transaction is likely to be difficult. There will be no audited accounts available, nor can one expect a contract or other documentation evidencing the nature of the dealings among the several participants who may be involved.'[44]

In *Brauer v DPP*, Derrington J of the Queensland Court of Appeal noted the 'impossibility or grave difficulty in most cases' of tracing proceeds of crime to the offence from which they were derived and observed that a lawful owner of property 'should best be in the position to be able to demonstrate its origin and . . . should usually have little difficulty in doing so'.[45] He commented that the absence of reverse onus provisions in confiscation laws 'would have a very debilitating effect upon the machinery of the legislation and its ultimate success'.[46]

In *DPP v Jeffery*, Hunt J of the NSW Supreme Court stated that: 'The reason why [the] onus is placed upon an applicant is because the facts in relation to the property in which he has an interest are usually peculiarly within his knowledge.'[47] The principle that it is reasonable to place an onus of proof on a person expected to have peculiar knowledge of essential facts is well recognised and has been expressed in the High Court of Australia by Isaacs J as follows:

> 'The broad primary principle guiding a Court in the administration of justice is that he who substantially affirms an issue must prove it. But, unless exceptional cases were recognised, justice would be sometimes frustrated and the very rules intended for the maintenance of the law of the community would defeat their own object. The usual path leading to justice, if rigidly adhered to in all cases, would sometimes prove but the primrose path for wrongdoers and obstruct vindication of the law. One of the leading secondary rules, which have been laid down by Judges of great eminence in order to avoid that catastrophe, is that the primary rule should be relaxed when

> ''the subject matter of the allegation *lies peculiarly within the knowledge of one of the parties*'' . . . the soundness of the principle that the possession of peculiar means of knowledge by a party is a reasonable ground for casting to some extent and according to the circumstances a special responsibility with regard to proof cannot be impugned.'[48]

This principle has also been recognised in the UK as one of the factors justifying reverse onus provisions in confiscation laws. For example, in *R v Dickens*, Lord Lane CJ stated that it is 'not surprising' that evidential burdens are cast upon a defendant in relation to the lawful provenance of his or her property since the relevant facts 'are likely to be peculiarly within the defendant's knowledge'.[49] In *R v Benjafield*, Lord Woolf CJ also remarked that:

> 'Those at whom the legislation is aimed, whether repeat offenders or drug traffickers, are usually adept at concealing their profits and unless they are called upon to explain the source of their assets, it will frequently be difficult and often impossible to identify the proceeds of their crimes . . . It is also clear that while in the majority of situations, it will be difficult for the prosecution to establish that any particular assets of a defendant were the proceeds of crime or drug trafficking, it will be far easier for a defendant, in the majority of circumstances, to establish, on the balance of probabilities, that the assets in dispute have an innocent source. After all, usually a defendant will know what the origin of his assets is.'[50]

In January 2002, the House of Lords unanimously approved two decisions of the Court of Appeal upholding reverse onus provisions in British confiscation legislation relating to drug trafficking (*R v Benjafield*) and non-drug offences (*R v Rezvi*).[51] Delivering the leading judgment, Lord Steyn stated that:

> 'It is a notorious fact that professional and habitual criminals frequently take steps to conceal their profits from crime. Effective but fair powers of confiscating the proceeds of crime are therefore essential . . . The [British legislation] pursues an important objective in the public interest and the legislative measures are rationally connected with the furtherance of this objective. The procedure devised by parliament is a fair and proportionate response to the need to protect the public interest.'[52]

In *McIntosh v Lord Advocate*, the Privy Council also recently endorsed reverse onus provisions in Scottish confiscation legislation relating to drug trafficking, with Lord Hope declaring that:

> 'The essence of drug trafficking is dealing or trading in drugs. People engage in this activity to make money, and it is notorious that they hide what they are doing. Direct proof of the proceeds is often difficult, if not impossible. The nature of the activity and the harm it does to the community provide a sufficient basis for the making of these assumptions. They serve the legitimate aim in the public interest of combating that activity. They do so in a way that is proportionate. They relate to matters that ought to be within the accused's knowledge, and they are rebuttable by him at a hearing before a judge on the balance of probabilities. In my opinion a fair balance is struck between the legitimate aim and the rights of the accused.'[53]

On numerous occasions defendants in confiscation proceedings (conviction-based and civil forfeiture) in the UK and Ireland have argued that reversing the onus of proof in relation to the lawful origin of property violates the presumption of innocence in Article 6(2) of the European Convention of Human Rights. All such arguments have been resoundingly rejected by the English Court of Appeal,[54] House of Lords,[55] Privy Council,[56] High Court of Ireland,[57] Supreme Court of Ireland[58] and European Court of Human Rights.[59] As Lord Woolf CJ recently observed, the onus placed on the defendant 'is not to prove his innocence of any particular charge but . . . simply to explain the source of his assets, income and expenditure'.[60]

In light of judicial expositions in this field, it should now be accepted that reverse onus provisions in confiscation laws (conviction-based and civil forfeiture) are necessary in practice, justifiable in principle and consistent with the presumption of innocence. Such provisions are expressly encouraged by Article 12(7) of the UN Convention Against Transnational Organised Crime and Article 5(7) of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The latter Article provides that: 'Each Party may consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings.'

THE FAILURE OF CONVICTION-BASED LAWS

Even with reverse onus provisions, conviction-based confiscation laws in Australia, like their counterparts in the UK, have proven grossly inadequate to deprive contemporary criminals of their ill-gotten gains.

From 1995 to 1998, the total amount confiscated under Federal conviction-based laws in Australia was $14.39m, an average of less than $3.6m per annum.[61] In 1999, Professors Freiberg and Fox reported that even lesser amounts had been confiscated under conviction-based state laws throughout Australia: in Queensland $2,733,316 was recovered between 1994 and 1997; in Western Australia $2,447,181 was recovered between 1992 and 1997; in South Australia only $929,303 was recovered between 1991 and 1996; in Victoria recoveries amounted to 'a few hundred thousand dollars over the last decade'; and no information is readily - available in relation to Australia's other jurisdictions.[62]

Amounts confiscated under conviction-based laws in England and Wales are equally as low. From 1987 to 1996, only £37.26 million was recovered in drug trafficking cases and from 1991 to 1996 only £4.48m was recovered in cases involving all other serious crime.[63]

On any view, conviction-based confiscation laws in Australia and the UK have had a 'negligible effect', resulting in the recovery of only a 'minuscule' proportion — much less than 1 per cent — of the billions derived or laundered by criminals within their borders each year.[64] In light of the practical ineffectiveness of these laws, it must be concluded that both jurisdictions have thus far failed to fulfil their international treaty obligations in this field.[65]

Conviction-based confiscation laws suffer from two major shortfalls. First, the requirement for an actual or imminent criminal charge as a precondition to restraining property reasonably suspected of being proceeds of crime means that even where such property is clearly identified it cannot be frozen if: (i) the offence from which it was derived has not been specifically identified; or (ii) the particular person who committed that offence has not been identified; or (iii) both have been identified, but the evidence (at that stage) is insufficient to warrant laying a charge against the person. In such circumstances, authorities are unable to prevent suspected proceeds of crime from being transferred offshore or otherwise placed beyond retrieval.

The second major shortfall with conviction-based laws is that it is not possible for proceeds of crime to be confiscated unless and until a person has been convicted of an offence, even though there may be sufficient evidence to prove that property is in fact the proceeds of crime. This conviction requirement all but precludes any possibility of confiscating criminal proceeds from those who derive the vast bulk of them. With advancements in technology and globalisation, the principal profit-takers from criminal enterprises are increasingly able to distance themselves from the underlying criminal acts, thereby evading conviction and so placing their profits beyond the reach of conviction-based laws. This is a universal phenomenon.

In 1997, after reviewing the British experience of enforcing conviction-based confiscation laws, Professor Levi identified the following principal 'lesson' for other countries:

> 'Relatively few ''Mr Bigs'' have been convicted in the courts and consequently, few are available to have their assets confiscated. Indeed, few have been charged, and therefore have not even had their assets frozen.'[66]

Over a decade earlier, Justice Moffitt had accurately predicted that conviction-based confiscation laws would fail in Australia for the same reason, stating:

> 'Most Australians have come to realise that, despite the many inquiries, convictions — particularly of leading criminals — are few and that organised crime and corruption still flourish. The path to conviction is slow, tortuous and expensive . . . The criminal justice system is not adequate to secure the conviction of many organised crime figures . . . Those participating in organised crime or white-collar crime, often part of organised crime, are usually highly intelligent and often more intelligent than the police who deal with them. They have the best advice. They exploit every weakness and technicality of the law. When they plan their crimes they do so in a way that will prevent their guilt being proved in a court of law. They exploit the freedoms of the law, which most often are not known and availed of by poorer and less intelligent members of the community. Crimes are planned so there will be

> no evidence against those who plan and, if by accident there is, it if often suppressed by murder or intimidation.'[67]

A similar explanation has recently been offered by the Performance and Innovation Unit of the Cabinet Office for the failure of conviction-based confiscation laws in the UK:

> 'Organised crime heads use their resources to keep themselves distant from the crime they are controlling and to mask the origins of their assets. This involves obtaining the support of professional advisors, using complex money laundering schemes, involving ostensibly legitimate businesses, buying secure housing and building networks kept loyal by intimidation and bribery.
>
> For these reasons, it has become extremely difficult to carry out successful criminal investigations leading to prosecution of certain individuals despite evidence that they are living off the proceeds of crime. In some cases, the cost involved in gathering the evidence and the difficulty of proving a criminal offence mean that it is not cost effective to pursue a criminal investigation, even though there is a strong suspicion of criminality . . . The need to secure a criminal conviction to enable the removal of unlawful assets has led to a vicious circle, whereby finances used to fund street and drug crimes are effectively out of reach of the law and are available to be recycled to finance more crime.[68]

In the Irish case of *M v D*, these practical shortfalls of conviction-based confiscation laws were accepted by Moriaty J and cited as justification for civil forfeiture laws:

> 'It seems to me that I am clearly entitled to take notice of the international phenomenon, far from peculiar to Ireland, that significant numbers of persons who engage as principals in lucrative professional crime, particularly that referable to the illicit supply of controlled drugs, are alert and effectively able to insulate themselves against the risk of successful criminal prosecution through deployment of intermediaries, and that the Act is designed to enable the lower probative requirements of civil law to be utilised in appropriate cases, not to achieve penal sanctions, but to effectively deprive such persons of such illicit financial fruits of their labours as can be shown to be the proceeds of crime.'[69]

In 1999, the Australian Law Reform Commission reported that Australia's Federal conviction-based confiscation laws had 'failed' to achieve their objectives, had 'fallen well short of depriving wrongdoers of their ill-gotten gains', were 'inadequate to bring to account the profits obtained by means of continuous or serial wrongdoing, particularly activities related to drugs, fraud and money laundering' and did not offer the prospect 'of meeting reasonable public expectations regarding the recovery of proceeds from unlawful activity from persons who would otherwise be unjustly enriched thereby'.[70] It is submitted that these conclusions are equally true of all conviction-based confiscation laws in Australia and the UK.

CIVIL FORFEITURE IN NEW SOUTH WALES

Twelve years ago the NSW government concluded that conviction-based confiscation laws were inadequate and that the civil forfeiture provisions in the Customs Act lacked the necessary design features to be effective. Adopting the recommendations of the Royal Commissioners, it enacted the Drug Trafficking (Civil Proceedings) Act 1990, which introduced an innovative scheme of *in personam* civil forfeiture that was described in Parliament as follows:

> 'This legislation, like the Commonwealth Customs Act, treats the question of confiscation as a separate issue from the imposition of a criminal penalty. It essentially provides that a person can be made to account for and explain assets and profits whether or not the person has been convicted, and even if the person has been acquitted in the criminal courts. The critical thing that must be proved is that it is more probable than not that the person engaged in serious drug crime. Proof on the balance of probabilities is the same standard of proof as that used in ordinary civil litigation. The more stringent standard of proof beyond a reasonable doubt is a creature of the criminal law.
>
> I want to emphasise, however, that no criminal consequences will flow from this legislation. Rather, the consequences are that the person has to justify, account for, and explain where his or her assets came from. Only if the person cannot

> show the assets were derived lawfully will they be retained by the Crown . . . No doubt some people will contend that this legislation is unfair — that it amounts to convicting people of offences on a lower standard of proof and without the protection of the criminal law. I have already said that this legislation is all about the accounting of profits in civil proceedings, not imposition of criminal sanctions in criminal courts. The object or focus of the proceedings is recovery of assets and profits, not putting people in gaol.'[71]

The 1990 Act was limited to serious drug crime, but in 1997 it was extended to other forms of serious criminal activity involving an offence punishable by five years' imprisonment or more and the Act was renamed the Criminal Assets Recovery Act 1990 (CARA). CARA is enforced by the NSW Crime Commission (NSWCC), which has a multidisciplinary unit specifically devoted to confiscation work. Principal features of CARA are as follows.

Restraining orders

The NSWCC may apply to the court *ex parte* for a restraining order in respect of: (i) specified property or all of the property owned or effectively controlled by a person suspected of having engaged in serious criminal activity (the 'defendant'); and/or (ii) property of third persons that is suspected of having been derived from serious criminal activity of the defendant. The court *must* make the order applied for if satisfied that there are reasonable grounds for the requisite suspicion. An important safeguard is that the NSWCC must give an undertaking to indemnify the defendant and third parties against costs and damages if the confiscation action is unsuccessful. A restraining order lapses after 48 hours unless the NSWCC has applied for an assets forfeiture order or proceeds assessment order.

Exclusion orders

At any time after the making of a restraining order up until six months after the making of a forfeiture order (and at any later time with leave of the court) any person can apply for property to be excluded from the restraining order or forfeiture order. If the application is contested by the NSWCC, the applicant is required to prove on the balance of probabilities that his or her interest in the property was lawfully acquired.

Assets forfeiture orders

The NSWCC may apply for the forfeiture of any or all assets that are subject to a restraining order. The court must make a forfeiture order if the NSWCC proves on the balance of probabilities that the defendant engaged in some form of serious criminal activity in the previous six years, without the need to prove a particular offence.

Proceeds assessment orders

In addition, or as an alternative, to an assets forfeiture order, the NSWCC may apply for a proceeds assessment order. The court must make such an order if it finds it more probable than not that the defendant engaged in serious criminal activity in the previous six years. If so satisfied, the court must assess the gross value of the proceeds derived from *any illegal activities* undertaken by the defendant during the six-year period and order repayment of that amount. Rebuttable presumptions provide that any expenditure or increases in assets during this period were financed from crime.

Additional safeguards

CARA contains a range of safeguards to protect innocently acquired interests in property and to prevent hardship to spouses and dependants of the defendant. It also permits the release of restrained assets for reasonable living and legal expenses, but certain preconditions must be satisfied before assets can be released for legal expenses.

Information gathering powers

CARA contains the same information gathering powers that are available under all other confiscation legislation (conviction-based and civil forfeiture) in Australia. Principal among these is the court's power to compel a relevant person, including the defendant, to answer questions on oath or produce documents. The privilege against self-incrimination is expressly abrogated, but compulsorily acquired information cannot be used *against the person who provided it* in a criminal prosecution or external civil proceedings.

Settlement

Prior to, or immediately after, the exercise of the various compulsory information gathering powers approximately 99 per cent of all cases under CARA settle with defendants and third parties agreeing to the forfeiture of restrained property.[72]

Confiscated proceeds

Amounts recovered under CARA are paid into the Confiscated Proceeds Account and can be used for the purposes of administering the Act, compensating victims, enhancing law enforcement and funding rehabilitation and education programmes.

The great strength of CARA is that the state is not required to trace particular items of property and prove that they are the proceeds of crime. Under the *in personam* model of civil forfeiture it is possible to target those who mastermind serious crime and, provided it can be proven on the balance of probabilities that they engaged in some form of serious criminal activity in the previous six years, require them to account for every item of their wealth and require associated individuals and entities to account for suspect items of their wealth.

The NSWCC's Annual Reports reveal that in each of the three years following the 1997 amendments, *net realisable amounts* in excess of $10m per annum were recovered under CARA at a total cost of around $2m per annum, including capital costs and employee-related expenses. In various years, both the number of orders made and amounts recovered under CARA have surpassed the combined totals under all other confiscation laws throughout Australia. Prior to the enactment of CARA amounts recovered in NSW under conviction-based confiscation laws averaged only a few hundred thousand dollars per annum.

CARA, like the civil forfeiture provisions in the Customs Act, is founded on the concept that confiscation of proceeds of crime is a civil remedy to society, in the nature of compensation, rather than a criminal sanction. This was explained by the Premier in 1990 as follows:

> 'This legislation is all about the accounting of profits in civil proceedings, not imposition of criminal sanctions in criminal courts. The object or focus of the proceedings is recovery of assets and profits, not putting people in gaol. Let me draw a simple analogy that will serve to bring out the difference. If someone steals a car, two very different proceedings may take place. First the police may charge the person with a criminal offence and take the matter through the criminal courts. If they prove the crime beyond reasonable doubt, criminal sanctions of imprisonment or a criminal fine will result. Second, and quite independently, a person may institute civil proceedings to recover the car and obtain damages from the person who stole it. One would take the matter through the civil courts and would need to prove one's case on the balance of probabilities. Where someone engages in drug trafficking, the police or the Director of Public Prosecutions may be able to charge the person with a criminal offence and institute proceedings in the criminal courts.
>
> In the case of drug crime there is no identifiable victim with a recognised cause of action in the civil courts. In an important sense the whole community is the victim and certainly those whose lives are destroyed by drug are victims. What the proposed legislation will do is analogous to giving the Crown a civil right to recover, on behalf of the community, assets and profits obtained illicitly by people who benefit from the drug trade . . . There is no reason why assets gained through a life of crime should not be taken back by the State and used to compensate victims of crime, to rehabilitate those whose lives have been destroyed by drugs or to enhance law enforcement.'[73]

The social compensation rationale for treating confiscation of the proceeds of crime as a civil remedy rather than a criminal sanction has also been recognised in the UK. In 1991, leading English authors Mitchell, Hinton and Taylor observed that:

> 'Confiscation is not punitive. Where a defendant benefits as a consequence of his commission of an act contrary to the law, he should not be permitted to retain such profits. He should be compelled to make good the loss he has caused. He should redress the harm, compensate the victim, right the balance . . . Where his behaviour has caused loss to a specific citizen, that citizen should be compensated. Where his behaviour damages society as a whole, society should be compensated. To this extent confiscation, serving to compensate society as a whole, and compensation, for the individual victim, are mutually exclusive. What it is important to discern from this brief attempt to explain the utility of confiscation is that it expands the judiciary's power to attend to the victim of crime, where the victim is society. Emphasis is upon recompense and reparation. One is not subjected to a confiscation order as a means of punishment for wrongs done, for, as we stated, confiscation is not punitive. Confiscation compensates society.'[74]

In 1993, an Australian Working Party on Proceeds of Crime endorsed the social compensation rationale for confiscating proceeds of crime through civil processes, adding that this rationale 'provides a basis for arguing that a criminal should repay the *gross receipts* of the crime (being a rough equivalent of the cost to the community) rather than just the *net profit*'.[75]

CIVIL FORFEITURE IN VICTORIA

In 1997 Victoria enacted the Confiscation Act 1997. It contains a narrow range of civil forfeiture measures that were described in Parliament by the Attorney-General as follows:

> 'Activities such as commercial drug trafficking can reap enormous profits for those involved at the expense of the broader community who pay the price in ruined lives . . . The civil forfeiture procedure will deprive the Mr Bigs of the drug trade of their underlying motive and economic base by confiscating restrained assets which they are unable to prove were lawfully acquired and were not used in or derived from unlawful activity. The government believes that it is not unreasonable to ask people charged with such serious offences to establish the provenance of their assets.'[76]

The civil forfeiture provisions in the Victorian legislation are modelled upon CARA, but differ in two fundamental respects. First, the Victorian provisions only apply if the defendant has been criminally charged with a civil forfeiture offence (although it is irrelevant if the charge is withdrawn or the defendant is acquitted), whereas CARA operates completely independently of the criminal prosecution process. Second, civil forfeiture in Victoria is only available in respect of serious drug offences, whereas CARA extends to virtually all serious offences.

Having accepted the justification for civil forfeiture, it is difficult to discern a logical basis for the restrictions imposed by the Victorian legislature. They all but completely emasculate the civil forfeiture provisions. It is the understanding of this writer that Victoria's civil forfeiture procedures have not been used on any occasion since they were enacted over four years ago.

CIVIL FORFEITURE IN WESTERN AUSTRALIA

On 24th November 2000, Western Australia enacted the Criminal Property Confiscation Act 2000 (the 'WA Act'), which was described in Parliament as 'the strongest and most effective of its kind in the world'.[77] It was introduced with the following words:

> 'Combating organised crime in Western Australia is currently shackled by inadequate and outdated legislation. The approaches reflected in the current [conviction-based] statutory provisions have . . . enabled certain individuals to retain dishonestly acquired wealth and have left authorities with restricted capacity to locate or confiscate ill-gotten gains.
>
> The drug trade has flourished under the deficiencies within the current system. The heads of drug rings continue to operate while the authorities lack evidence to tie their retained wealth to criminal activities. Furthermore, as the burden of proof lies with the authorities, it has been difficult to prove a relationship between unexplained wealth and criminal conduct. Without an effective confiscation system the profit has remained in the drug trade.'[78]

The WA Act is squarely aimed at 'those people who apparently live beyond their legitimate means of support'.[79] It contains wide-ranging civil forfeiture mechanisms enabling confiscation to occur without specifically linking defendants or their property to criminal activity. Core features of the Act are as follows.

Unexplained wealth declarations

Where a court finds it is more likely than not that the total value of a person's wealth is greater than the value of the person's lawfully acquired wealth it must make an unexplained wealth declaration requiring the person to pay an amount equal to the excess. Wealth is presumed to have been unlawfully acquired unless the person proves otherwise on the balance of probabilities. The Minister for Police has explained that:

> '[This procedure] is intended to be used when no offence can be laid at that individual's feet. That is more the case when the body of evidence collected over a period strongly suggests that the

individual has an income derived from criminal activity because there is no other explanation. We would say to that person, ''Here is the wealth that we think has been accumulated as a result of that activity.'' We take the wealth, and the person must prove that he used lawful means to acquire it.'[80]

Declared drug traffickers

Where a person has been convicted of a drug offence involving a commercial quantity of drugs or three indictable drug offences involving a lesser quantity of drugs over a ten-year period, or the person has been charged with such an offence(s) and either absconds or dies prior to determination of the charge(s), the court is required to declare that the person is a 'drug trafficker' and order the confiscation of all property owned, effectively controlled or given away, by him or her — *whether or not the property was lawfully acquired*.

Confiscation offences

Where a court finds it is more likely than not that a person committed any offence punishable by two years' imprisonment or more, it is required to assess the value of the benefits derived from the offence and value of property used in connection with the commission of the offence and order the person to pay an equivalent amount to the state. Property of the person is presumed to have been derived from, and used in, the commission of the offence unless the person proves otherwise on the balance of probabilities.

Freezing and automatic forfeiture

The court may make a freezing order in relation to all or any property that is owned or effectively controlled by a person against whom an application for confiscation has been made or will be made within 21 days. Unless a person files an objection to confiscation within 28 days after service of a freezing order, the property is automatically forfeited. The court may release frozen property if a person claiming an interest in it establishes that it is more likely than not that the property is not liable to confiscation. A confiscation order may be directly enforced against frozen property.

The WA Act is more draconian than CARA. It adopts an approach similar to anti-corruption laws in Hong Kong, which make it an offence for a public official to maintain a standard of living or possess assets above a level 'commensurate with his present or past official emoluments' unless the official can satisfactorily explain the source of the excess wealth.[81] Key differences are that the WA Act is not limited to public officials and does not make it a criminal offence to have unexplained wealth — it merely makes such wealth liable to forfeiture.

In the 2001 calendar year, assets valued at almost $19m were frozen under the WA Act,[82] representing a phenomenal increase on results achieved in previous years under conviction-based laws, but no information has been published on amounts actually confiscated.

PROPOSED NEW FEDERAL CIVIL FORFEITURE LAWS IN AUSTRALIA

In June 1999, the Australian Law Reform Commission (ALRC) concluded that existing Federal laws for the confiscation of proceeds of crime were inadequate and recommended the enactment of civil forfeiture laws modelled on CARA,[83] explaining in depth why such laws have 'a sound basis in principle' and should not 'give rise to civil liberties concerns'.[84]

The ALRC considered that the principal rationale for confiscating proceeds of crime is that 'no person should be entitled to become unjustly enriched as a result of his or her unlawful conduct'.[85] It concluded that conviction-based laws were founded on a false premise, stating that 'it is incorrect to view the recovery of the profits of unlawful activity as part of the criminal justice process and, as such, justifiable only on the basis of a prior finding of guilt according to the criminal standard of proof beyond reasonable doubt'.[86] It explained that:

'the concept that a person should not be entitled to be unjustly enriched by reason of unlawful conduct is distinguishable from the notion that a person should be punished for criminal wrong doing. That is to say that, while a particular course of conduct might at the same time constitute a criminal offence and grounds for recovery of unjust enrichment, the entitlement of the state to impose a punishment for the criminal offence, and the nature of that punishment, are independent in principle from the right of the state to recover the unjust enrichment and visa versa.'[87]

The unjust enrichment rationale for treating confiscation of the proceeds of crime as a civil remedy, rather

than criminal punishment, has been recognised in Australia for a number of years. For example, in 1993, an Australian Working Party on Proceeds of Crime reported that:

> 'A major aim of the confiscation legislation is to eliminate the advantages and benefits which the person has gained through his or her illegality . . . To allow criminals to enjoy the profits of their crimes would offend the sense of justice of most Australians. In this aspect, the orders try to restore the status quo, not to punish, and are not unlike the civil use of orders for restitution in response to unjust enrichment.'[88]

The unjust enrichment rationale has also been recognised in the UK. For example, the Hodgson Committee observed that 'confiscation orders discharge or reduce a defendant's civil liability or eliminate an advantage which he previously had over honest citizens. They try to restore the *status quo*; they do not punish'.[89] Mitchell *et al*. have similarly remarked that:

> 'Confiscation should not be seen as extra punishment for a convicted defendant, but rather as a way of taking away the unjust profits and of ensuring that there will be no pot of gold waiting after any punishment has been served. It is the civil consequences of the wrongdoing, taking away the raison d'etre for the criminal.'[90]

On 20th September, 2001, the Proceeds of Crime Bill 2001 was introduced in Federal Parliament with the Attorney-General declaring that conviction-based confiscation laws 'have failed to impact upon those at the pinnacle of criminal organisations' and that new measures are necessary 'to remedy the unjust enrichment of criminals who profit at society's expense'.[91]

In addition to enhanced conviction-based laws, the Federal Bill contains *in personam* civil forfeiture provisions modelled on CARA and a range of *in rem* civil forfeiture procedures. The *in rem* procedures are primarily aimed at situations where property is identified under circumstances where the only reasonable conclusion is that it was unlawfully derived, but it is not possible to identify the particular predicate offender or it is unclear who owns the property and no person comes forward to claim a lawfully acquired interest in it.[92] The Bill is currently being reviewed by the Senate Legal and Constitutional Legislation Committee.[93] Interestingly, a Proceeds of Crime Bill containing broad civil forfeiture laws is also currently being reviewed by a Parliamentary Committee in the UK.[94]

CONCLUSION

In reviewing Australia's experience with the confiscation of proceeds of crime, which is similar to that of the UK, three principal lessons emerge. First, conviction-based confiscation laws are inadequate to deprive contemporary criminals of their ill-gotten gains. Second, civil forfeiture is not only necessary in practice but also justifiable in principle on the basis that, rather than imposing a criminal sanction, it provides a civil remedy to society to compensate for the harm caused to the community by crime and redress the unjust enrichment of those who profit at society's expense. Third, reverse onus provisions that require persons to demonstrate that their property was lawfully acquired in order to avoid confiscation are necessary in practice, justifiable in principle and consistent with the presumption of innocence.

When civil forfeiture laws with reverse onus provisions were first introduced in NSW back in 1990, the then Premier remarked that 'the use of civil law looks to be the way of the future both here and overseas', adding that adoption of such an approach 'is considerably overdue'.[95] Twelve years later his words have not lost their currency. There are still many Australian and overseas jurisdictions that have not embraced civil forfeiture, although that number is steadily declining. It is hoped that the recent (albeit belated) emergence of general civil forfeiture bills at the Federal level in Australia and in the UK will provide further impetus for the necessary evolution of confiscation laws in those jurisdictions which still rely on conviction-based models. There are already encouraging signs that this is occurring at state and territory level throughout Australia.[96]

References

(1) Australian Law Reform Commission (ALRC) (2000) 'Confiscation That Counts', Report No. 87, June, para. 4.148.
(2) UK Cabinet Office (2000) 'Recovering the Proceeds of Crime', 2000, p. 3, per Prime Minister Tony Blair.
(3) The first modern schemes for the forfeiture of criminal assets in the USA were enacted in 1970 in the Racketeer Influenced and Corrupt Organisations (RICO) Statute (18 USC

1961–1968), which is conviction-based, and the Comprehensive Crime Control and Prevention Act (21 USC 881), which contains civil forfeiture provisions. The principal civil forfeiture statute is now the Criminal Money Laundering Control Act 1986 (18 USC 981). Over the past decade criminal assets valued in excess of US$500m have regularly been forfeited in the USA on an annual basis: Financial Action Task Force on Money Laundering (FATF) (2001) 'Review of FATF Anti-Money Laundering Systems and Mutual Evaluation Procedures 1992–1999', 16th February, annex 1.

(4) Civil forfeiture laws have existed in Italy for a number of decades. In 1996, criminal assets valued at US$374.2m were confiscated under these laws: FATF (1997) 'Annual Report 1996–1997', June, at App. 1 to annex B; UK Cabinet Office, above, ref. 2, at figure 5.1.

(5) Ireland's civil forfeiture laws are contained in the Proceeds of Crime Act 1996. They have reportedly had a clear deterrent effect which has 'led to a flight of the heads of half a dozen organised crime groups out of the jurisdiction': UK Cabinet Office, above, ref. 2, at figure 5.1 and para. 5.9.

(6) Ch. 6 of the Prevention of Organised Crime Act 1998.

(7) Remedies for Organised Crime and Other Unlawful Activities Act 2001.

(8) On 18th October, 2001, The Proceeds of Crime Bill, containing broad civil forfeiture laws, was introduced in the House of Commons.

(9) Moffitt (1974) 'Royal Commission of Inquiry in Respect of Certain Matters Relating to Allegations of Organised Crime in Clubs', Report, 15th August; Williams (1980) 'Australian Royal Commission of Inquiry into Drugs', Report; Stewart (1983) 'Royal Commission of Inquiry into Drug Trafficking', Report, February; Costigan (1984) 'Royal Commission on the Activities of the Federated Ship Painters and Dockers Union', Final Report, 26th October.

(10) Costigan, F. (1984) 'Organised Fraud and a Free Society', 17 ANZJ Crim. 7 at p. 12.

(11) Moffitt, A. (1985) 'A Quarter to Midnight — The Australian Crisis: Organised Crime and the Decline of the Institutions of State', Angus and Robertson, London, p. 143.

(12) *R v Kemp and Others* (1979) 69 Cr. App. R 330.

(13) *R v Cuthbertson* [1981] AC 470 at 479.

(14) Hodgson, D. (1984) 'Profits of Crime and their Recovery', Heinemann, London.

(15) Fife (1979) House of Representatives Parliamentary Debates, Vol. 113, p. 795, 8th March.

(16) Fife (1979) House of Representatives Parliamentary Debates, Vol. 114, p. 2614, 30th May, 1979, italics added.

(17) *Vickers v Minister for Business and Consumer Affairs* (1982) 43 ALR 389 at 395–396. Also see *Wiedenhofer v Cth* (1970) 122 CLR 172 at 75–76; *Little's Victory Cab Co v Carroll* [1948] VLR 249 at 151.

(18) *R v Smithers; ex parte McMillan* (1982) 152 CLR 477.

(19) *Bruce Richard Cornwell* (1990) 49 ACR 422.

(20) ALRC, ref. 1, at para. 4.105.

(21) Cited in Stewart, above, ref. 9, at 646.

(22) *Ibid.*

(23) *Ibid.* at para. 4.074.

(24) 'National Crimes Commission Conference — Record of Proceedings', 28th–29th July, 1983, pp. 78–80; Moffitt, above, ref. 11, pp. 21, 147.

(25) Moffitt, above, ref. 11, pp. 146–147.

(26) Moffitt, above, ref. 11, at p. 79. Also see Loughlan, P., 'Equity and the Proceeds of Crime' (1990) CICJ 106.

(27) Hodgson, above, ref. 14, at pp. 151–152, refs 9–16.

(28) Goode, M. (1986) 'The Confiscation of Criminal Profits', *Proceedings of the Institute of Criminology*, Vol. 67, p. 35.

(29) ALRC, above, ref. 1, at para. 2.10.

(30) 'Fifth (Interim) Report: Misuse of Hard Drugs', May 1985, HC 399, para. 9.

(31) House of Commons, *Hansard*, 18th February, 1986, Vol. 92, col. 222.

(32) Crimes (Confiscation of Profits) Act 1985 (NSW), replaced by Confiscation of Proceeds of Crime Act 1989 (NSW); Crimes (Confiscation of Profits) Act 1986 (SA); Crimes (Confiscation of Profits) Act 1986 (Vic); Proceeds of Crime Act 1987 (Cth); Crimes (Confiscation of Profits) Act 1988 (WA); Crimes (Forfeiture of Proceeds) Act 1988 (NT); Crimes (Confiscation of Profits) Act 1989 (Qld), since renamed Crimes (Confiscation) Act 1989 (Qld); Proceeds of Crime Act 1991 (ACT); Crime (Confiscation of Profits) Act 1993 (Tas).

(33) Drug Trafficking Offences Act 1986; Drug Trafficking Act 1994; Criminal Justice Act 1988; Criminal Justice Act 1993; Proceeds of Crime Act 1995; Prevention of Terrorism (Temporary Provisions) Act 1989; Criminal Justice (Scotland) Act 1987; Proceeds of Crime (Scotland) Act 1995; Criminal Justice (Northern Ireland) Order 1990; Proceeds of Crime (Northern Ireland) Order 1996.

(34) Commonwealth House of Representatives (1987) Vol. 155, pp. 3575–3576.

(35) FATF, above, ref. 3, at para. 40.

(36) House of Lords, Hansard, 4th March, 1986, col. 125.

(37) Goode, above, ref. 28, at p. 48.

(38) Freiberg, A. (1992) 'Criminal Confiscation, Profit and Liberty', 25 ANZJ Crim. 44 at 54.

(39) This arises from a number of factors, including the clandestine nature of criminal activities, the fact that criminals rarely keep records of their illicit income and the fact that many crimes which generate substantial proceeds (eg. drug trafficking, people smuggling and illicit arms dealings) are so-called 'victimless' offences. 'Because there is no victim to give evidence on the nature of the offences and the extent of the proceeds, the classic modes of evidence are deficient': Stessens, G. (2000) 'Money Laundering', CUP, Cambridge, p. 67.

(40) In 1998, the Director of the UN Office for Drug Control and Crime Prevention declared that '[g]lobalization has turned the international financial system into a money launderer's dream': Arlacchi (1998) 'Attacking the Profits of Crime', Vienna, p. 5. In 1999, Professor Rider also remarked that 'the fact is that the tracing of criminal assets is becoming more rather than less difficult. Developments in technology provide for a degree of speed and anonymity far beyond that [previously possible]', (1999) *Journal of Financial Crime*, Vol. 6, No. 3, p. 206. Justice Kennedy of the US Supreme Court has also observed that 'if the money launderers have done their job, the money appears to be clean': *US v Bajakajian* 524 US 321, 351 (1998).

(41) See text accompanying refs 43–53 below.

(42) *Ibid.*

(43) *NSW Crime Commission v Crotty* [1999] NSWSC 146, 17th February, 1999, para. 31.

(44) *R v Fagher* (1989) 16 NSWLR 67 at 71–72. Similar remarks were made by Allen J at 80.

(45) *Brauer v DPP* (1989) 91 ALR 491 at 501–502.

(46) *Ibid.* at 501.

(47) *DPP (Cth) v Jeffery* (1992) 58 A Crim. R 310 at 312.

(48) *Williamson v Ah On* (1926) 39 CLR 95 at 113–114.

(49) [1990] 2 WLR 1384 at 1388.

(50) [2001] 2 Cr. App. R 87 at 102, 116.

(51) [2002] 2 WLR 235.

(52) *Ibid*, at 244 and 253.

(53) [2001] 2 Cr. App. R 490 at 509–510. Lord Bingham also stated (at 507) that: 'I do not for my part think it unreasonable or oppressive to call on the [defendant] to proffer an

explanation. He must know the source of his assets and what he has been living on.'

(54) *R v Malik* (Court of Appeal, Crim Div, 9th May, 2000, unreported); *R v Delaney & Hanrahan* (Court of Appeal, Crim Div, 14th May, 1999, unreported); *R v Hussein* (Court of Appeal, Crim Div, 20th April, 1999, unreported); *R v Brown* (Court of Appeal, Crim. Div., 18th December, 1997, unreported); *R v Benjafield* [2001] 2 Cr. App. R 87.

(55) *R v Benjafield*; *R v Rezvi* [2002] 2 WLR 235.

(56) *McIntosh v Lord Advocate* [2001] 2 Cr. App. R 490.

(57) *Gilligan v The Criminal Assets Bureau* [1998] 3 IR 185; *Murphy v GM PB PC Ltd and GH*, High Court of Ireland, 4th June, 1999.

(58) *Murphy v GM PB PC Ltd & GH; Gilligan v The Criminal Assets Bureau*, Supreme Court, 18th October, 2001.

(59) *Phillips v UK*, European Court of Human Rights, App. No. 41087/98, 5th July, 2001; *Welch v UK* (1995) 20 EHRR 247 at 263. Also see *Elton v UK*, European Commission of Human Rights, App. No. 32344/96, 11th September, 1997; *M v Italy*, European Commission of Human Rights, App. No. 12386/86, 15th April, 1991.

(60) *R v Benjafield* [2001] 2 Cr. App. R 87 at 118.

(61) Office of the Director of Public Prosecutions (Commonwealth), 'Annual Reports 1994/95–1997/98'.

(62) 'Evaluating the Effectiveness of Australia's Confiscation Laws' (2000) 33 ANZJC 239 at 249–250.

(63) Home Office Working Group on Confiscation (1998) 'Third Report: Criminal Assets', November, tables 1 and 2.

(64) Freiberg and Fox, above, ref. 62, at 251, 260. Also see Levi (1997) 'Taking the Profit Out of Crime: The UK Experience', *European Journal of Crime, Criminal Law and Criminal Policy*, Vol. 5, p. 228; Home Office Working Group, above, ref. 60, at para. 4.4; UK Cabinet Office, above, ref. 2, at paras. 4.18–4.32.

(65) Australia and the United Kingdom are obliged to adopt such measures 'as may be necessary' to confiscate proceeds and instruments of crime pursuant to Article 5 of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and Article 2 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime. Both nations have also signed the UN Convention Against Transnational Organised Crime, Article 12 of which requires Parties to adopt 'to the greatest extent possible within their domestic legal systems' such measures as may be necessary to confiscate the proceeds and instrumentalities of offences covered by the Convention.

(66) Levi, above, ref. 64, at 237.

(67) Moffitt, above, ref. 11, pp. 138–139.

(68) UK Cabinet, above, ref. 2, at paras. 5.15–5.16.

(69) *M v D* [1998] 3 IR 178.

(70) ALRC, ref. 1, at paras. 4.170, 4.142, 4.172, 4.181.

(71) Greiner, NSW Legislative Assembly, 8th May, 1990, at 2529–2532.

(72) Brenchly, F. (1999) 'Seize the Pay', *The Bulletin*, 1st June, 32 at 34; ALRC, above, ref. 1, at para. 4.123.

(73) Greiner, NSW Legislative Assembly, 8th May, 1990, at 2529–2530.

(74) Mitchell *et al.* (1992) 'Confiscation', Hinton and Taylor, pp. 1–2.

(75) Proceeds of Crime Working Party, 'Confiscation and Forfeiture: Legislation and Practice' in NCA, National Proceeds of Crime Conference (1995) at 96, emphasis added.

(76) Wade, Victorian Legislative Assembly, 13th November, 1997.

(77) Barron-Sullivan, Western Australia Legislative Assembly, 29th June, 2000, at 8611.

(78) *Ibid.*

(79) *Ibid.*

(80) Prince, Western Australia Legislative Assembly, 7th September, 2000, at 939.

(81) §10(1) of the Prevention of Bribery Ordinance (Cap. 201), 1991.

(82) Bode (2002) 'Asset seizure ''key to curbing bikies'' ', *Sunday Times* (Perth), 6th January, p. 7.

(83) ALRC, ref. 1 at Ch. 4.

(84) *Ibid.* at paras. 4.151, 2.64–2.66.

(85) *Ibid.* at para. 4.146.

(86) *Ibid.* at para. 4.148.

(87) *Ibid.* at para. 2.78.

(88) Proceeds of Crime Working Party, above, ref. 75, at 91. Also see Loughlan, above, ref. 26; *R v Fagher* (1989) 16 NSWLR 67 at 71 per Roden J (confiscation of the proceeds of crime 'is directed towards preventing the retention of ill-gotten gains, rather than the imposition of punishment') and at 78 per Hunt J.

(89) Hodgson, above, ref. 14, at 133.

(90) Mitchell *et al.* above, ref. 74, at xi. Also see Hinton, 'Commentary' in NCA, above, ref. 75, at 421–423; Cooney, 'United Kingdom Legislation on Money Laundering and Confiscation of Drugs' in NCA, above, ref. 75, at 390.

(91) Williams, Commonwealth House of Representatives, 20th September, 2001, at 30978.

(92) See eg *Flack v NCA* (1997) 80 FCR 137; *NCA v Flack* (1998) 86 FCR 16.

(93) See www.aph.gov.au/senate/committee/legcon_ctte/proceedsofcrime/index.htm.

(94) See www.publications.parliament.uk/pa/cm200102/cmstand/b/cmproc.htm.

(95) Greiner, above ref. 71, at 2532.

(96) In September 2001, the Australian Capital Territory government released a discussion draft of the Confiscation (Unlawful Proceeds) Bill 2001, which contains civil forfeiture laws modelled on CARA. The Queensland, South Australian and Victorian governments have also recently announced plans to expand their confiscation laws, including the possible introduction or expansion of civil forfeiture laws: 'Legal blitz on bikies', *Courier Mail* (Brisbane), 9th January, 2002, p. 2; 'Pledge to stem tide of bikie gangs', *Advertiser* (Adelaide), 10th January, 2002, p. 11; 'Gangs linked to 23 killings', *Herald Sun* (Melbourne) 9th January, 2002, p. 1.

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Taxing the Untouchables Who Profit from Organised Crime

David Lusty

'If organized criminals paid income tax on every cent of their vast earnings everybody's tax bill would go down, but no one knows how much.'[1]

INTRODUCTION

Two centuries ago the US Supreme Court observed that 'the power to tax involves the power to destroy'.[2] Any doubt over the veracity of these words was dispelled a century later when the Internal Revenue Service (IRS) dismantled a number of America's most feared organised crime syndicates through the dual enforcement of criminal and civil sanctions for tax evasion.[3] Notable IRS scalps included such notorious gangsters as Al 'Scarface' Capone,[4] Ralph 'Bottles' Capone,[5] Jake 'Greasy Thumb' Guzik,[6] Frank 'The Enforcer' Nitti,[7] Irving Wexler (aka 'Waxie Gordon')[8] and Arthur Flegenheimer (aka 'Dutch Shultz').[9] Taxation is now recognised in America as one of the most powerful and versatile weapons against organised crime.

In Australia, Canada, New Zealand and Ireland law enforcement agencies have sought to emulate their American counterparts in taxing ill-gotten gains and prosecuting underworld figures for criminal tax evasion. The UK has historically lagged behind, but is now poised to follow suit.

This paper examines the use of taxation as an alternative means of bringing otherwise untouchable criminals to justice and putting illicit enterprises out of business, with primary emphasis on developments in America and Australia. Both countries have achieved significant success through innovative laws, structures and strategies that may serve as instructive precedents in those jurisdictions that have not yet realised the full potential of taxation as a weapon against organised crime.

TAXATION OF ILL-GOTTEN GAINS

Tax laws in most jurisdictions do not differentiate between lawful and unlawful gains. Both are taxable according to the same concepts and principles. This is well established in America,[10] Australia,[11] Canada,[12] New Zealand,[13] Ireland[14] and the UK.[15]

In most jurisdictions proceeds from virtually all forms of profit-motivated or organised crime are capable of being taxed, whether as income from a business or trade, earnings from a profession or vocation, rewards for personal services, or some other form of gain or receipt that is taxable. Examples of ill-gotten gains that have been held to be taxable include proceeds from drug trafficking,[16] money laundering,[17] bribery and corruption,[18] prostitution,[19] bootlegging,[20] illegal gambling,[21] fencing stolen goods,[22] theft, fraud and embezzlement,[23] extortion[24] and ransom.[25]

The rationale for taxing both licit and illicit income has been expressed by one judge as follows:

'It does not satisfy one's sense of justice to tax persons in legitimate enterprises, and allow those who thrive by violation of the law to escape. It does not seem likely that [Parliament] intended to allow an individual to set up his own wrong in order to avoid taxation, and thereby increase the burdens of others lawfully employed.'[26]

Indeed, to refrain from taxing ill-gotten gains would amount to exempting persons from one law simply because they had violated another. Such a curious approach, if adopted, would almost certainly shake the confidence of law-abiding citizens in the equity of tax laws and the integrity of officials under a duty to enforce those laws without fear or favour. In any jurisdiction with a self-assessment system of taxation such outcomes could be expected to have severe repercussions on the level of taxpayer compliance throughout the general community.

Those who profit from crime have a natural propensity for tax evasion. The rate at which they voluntarily pay tax on their illegal earnings is extremely low. In America it has been estimated at 5 per cent,[27] and there is no reason to believe that it is any higher elsewhere. It follows that if revenue authorities are to fulfil their duties adequately in respect of the taxation of illicit income, and thereby

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redress the inequity between honest taxpayers and criminal profiteers, they will need to adopt proactive enforcement strategies. Special programmes staffed by multidisciplinary personnel are required. Such programmes have operated with considerable success in America and Australia (discussed below), as well as Canada,[28] New Zealand[29] and Ireland.[30]

The benefits to society from special tax programmes against those who profit from crime cannot be measured solely in terms of increased revenue and enhanced taxpayer equity. Additional benefits accrue from the incapacitating effect the enforcement of tax laws can have on organised criminal enterprises. Taxation is both a means of raising revenue and a weapon for putting criminal profiteers out of business and into gaol. The value to society of these latter outcomes is likely far to exceed the former but this does not alter the fact that their attainment involves nothing more than the due and proper enforcement of tax laws in accordance with statutory obligations.

The potency and versatility of taxation as a weapon against organised crime derive from the fact that tax evasion gives rise to both civil and criminal sanctions. Criminal profiteers generally have substantial civil liabilities for the payment of back taxes, penalties and interest, which can be enforced through streamlined recovery processes (the civil tax weapon). Most criminal profiteers, having concealed their illicit income from revenue authorities, can also rightly be prosecuted for tax evasion or fraud offences punishable by fines and imprisonment (the criminal tax weapon). In combination, these two weapons are capable of destroying criminal enterprises that may be immune to traditional law enforcement tools and tactics. Significantly, neither tax weapon is dependent on a criminal conviction in relation to the underlying illicit income-generating activity and neither requires proof that particular items of property constitute proceeds of crime.

TURNING A BLIND EYE TO ILLICIT INCOME IN THE UK

The Inland Revenue has historically declined to tax illicit income derived in the UK in a proactive manner. Accordingly, it is no surprise to learn that it suspects that it collects 'little tax' from those who profit from crime.[31] In recent years this has been a source of growing disquiet. One former Inland Revenue Inspector has lamented that: 'It seems that there is one law for the criminal rich and another for decent taxpayers. Why does the Revenue deliberately ignore criminal income and resources? It has proven once again that it targets middle England as easy prey.'[32]

In 2000, the Performance and Innovation Unit of the Cabinet Office expressed its dissatisfaction at the enormous potential for taxing ill-gotten gains that remained unrealised in the UK, stating:

> 'Many criminal organisations generate substantial revenues that go untaxed. The organisations involved in drugs, prostitution, selling stolen goods and illegal gambling in the UK are estimated to have generated between £6.5bn and £11.1bn in 1996. The powers of the Inland Revenue to raise assessments and enforce removal of assets against those shown to have undeclared income and wealth are considerable. The Inland Revenue can consider income over an extended period in raising a tax assessment, and it is able to impose additional fines. This means that much, and in some cases all, of a criminal's illegally gained wealth can be removed by taxation. But the powers are generally little used against individuals suspected of benefiting from crime, despite the fact that they may be openly living beyond their means.'[33]

The reason why the Inland Revenue has traditionally refrained from enforcing tax laws against criminal profiteers is far from clear, particularly in light of the longstanding proactivity of many of its overseas counterparts. It is true that tax laws in the UK differ in certain respects from those elsewhere, such as the requirement for UK tax assessments to specify the source of the income in question,[34] but this would not preclude taxation in most cases where illicit income is identified, such as where a person has been investigated by police for a proceeds-generating offence.

The Inland Revenue's historical inaction against criminal profiteers is all the more curious when it is considered that illicit income has long been recognised as taxable in the UK and courts have expressly encouraged its taxation. For example, in 1886 Justice Denman wrote: 'In my opinion if a man were to make a systematic business of receiving stolen goods, and to do nothing else, and he thereby systematically carried on a business and made a profit of

£2,000 per year, the Income Tax Commissioners would be quite right in assessing him if it were in fact his vocation.'[35]

In *Minister of Finance (Canada) v Smith*, decided in 1927, the Privy Council expressed itself as follows in unanimously concluding that the proceeds of illicit activities were taxable under a Dominion Statute not dissimilar to British income tax legislation:

> 'Construing the . . . Act literally, the profits in question, although . . . they are illicit, come within the words employed. Their Lordships can find no valid reason for holding that the words used by . . . Parliament were intended to exclude these people, particularly when to do so would be to increase the burden on those . . . whose businesses were lawful . . . Nor does it seem to their Lordships a natural construction of the Act to read it as permitting persons who come within its terms to defeat taxation by setting up their own wrong. There is nothing in the Act which points to any intention to curtail the statutory definition of income, and it does not appear appropriate under the circumstances to impart any assumed moral or ethical standard as controlling . . . the literal interpretation of the language employed.'[36]

The Privy Council further intimated that these principles were of general application, stating that: 'Their Lordships must not be taken to assent to any suggestion . . . that Income Tax Acts are necessarily restricted in their application to lawful businesses only.'[37] These words were relied upon in the 1932 case of *Mann v Nash*,[38] where it was held that profits of an illegal trade were taxable in the UK. In reaching this conclusion, Rowlatt J flatly rejected the argument that it was somehow immoral or improper for the state to tax profits from an illicit trade, stating:

> 'The Revenue representing the State, is merely looking at an accomplished fact. It is not condoning it; it has not taken part in it; it merely finds profits made from what appears to be a trade, and the Revenue laws happen to say that the profits made from trades have to be taxed, and they say: ''give us the tax''. It is not to the purpose in my judgment to say: ''But the same State that you represent has said they are unlawful''; that is immaterial altogether . . . It is said again: ''Is the State coming forward to take a share of unlawful gains?'' It is mere rhetoric. The State is doing nothing of the kind; they are taxing the individual with reference to certain facts. They are not partners; they are not principals in the illegality, or sharers in the illegality; they are merely taxing a man in respect of those resources. I think it is only rhetoric to say that they are sharing in his profits, and a piece of rhetoric which is perfectly useless for the solution of the question which I have to decide.'[39]

A similar approach was taken by Lord Morison in *Lindsay v IRC*, who in 1933 wrote: 'It is, in my opinion, absurd to suppose that honest gains are charged to tax and dishonest gains escape. To hold otherwise would involve a plain breach of the rules of the statute, which require the full amount of the profits to be taxed, and merely put a premium on dishonest trading. The burglar and the swindler, who carry on a trade or business for profit, are as liable to tax as an honest business man, and, in addition, they get their deserts elsewhere.'[40]

RECENT REFORMS IN THE UK

In June 2000, the Performance and Innovation Unit of the UK Cabinet Office concluded that the general failure of the Inland Revenue to tax illicit income was unacceptable, reporting that 'there should be increased proactive investigation and removal of criminal assets by Inland Revenue' and the proposed new Assets Recovery Agency.[41] This recommendation was accepted. In March 2001, the Secretary of State for the Home Department released a draft version of the Proceeds of Crime Bill. Part VI of the Bill contained a number of reforms aimed at increasing the taxation of illicit income and was accompanied by the following commentary:

> 'Taxation must be applied consistently and fairly. The ordinary taxpayer is disadvantaged if others do not pay their share according to their income, not least because it increases the tax burden on the rest of society's taxpayers whose activities are lawful. The application of Inland Revenue powers to individuals who have acquired assets derived from criminal conduct will send out a strong message that the UK taxation system is indeed fairly applied across all sections of society.'[42]

Part 6 of the recently enacted Proceeds of Crime Act 2002 (POC Act) empowers the Assets Recovery

Agency (ARA), which is created under Part 1, to assume taxation functions of the Inland Revenue where it is reasonably suspected that income, gains or profit have been derived from criminal conduct. Where this occurs, the ARA, unlike the Inland Revenue, will also have the power to raise an income tax assessment without identifying the particular source of the income. This reform was explained by the Home Office as follows:

> 'Under current law income tax assessments (but not those to capital gains tax or corporation tax) are required to identify the source of the income in question, such as a particular trade. In the case of a person who is in receipt of suspected criminal proceeds and has no tax history there may be no obvious taxable source to which the income represented by the unexplained assets can be attributed. This may be the case, for example, where there are grounds for suspecting that income has accrued from a number of possible criminal activities.
>
> Part VI provides a power, exercisable only by the Agency, to raise assessments which do not need to identify a source of income. Such a rule does not change substantive tax law, in particular the boundary between taxable and non-taxable activity, but should help to prevent suspected recipients of criminals' assets from avoiding tax by refusing to identify the source of their income, and place the onus on the taxpayer to displace the tax assessment by providing evidence on appeal that assets came from a non-taxable source.'[43]

Part 10 of the POC Act permits the Inland Revenue to provide tax information to the ARA for use in performing any of its functions, including the taxation of illicit income. This supplements ss. 19 and 20 of the Anti-Terrorism, Crime and Security Act 2001, which authorise the Inland Revenue to disclose tax information to any relevant agency for the purpose of any criminal investigation or proceeding, including for the purpose of deciding whether any such investigation or proceeding should be initiated or brought to an end. These new powers of dissemination represent invaluable tools for the Inland Revenue, which has traditionally been 'detached from mainstream law enforcement',[44] to engage its partner agencies and develop mutually beneficial relationships.

The overall package of recent reforms in the UK, whilst relatively modest, offers great potential for the ARA and the Inland Revenue, in cooperation with other relevant agencies, to adopt proactive strategies for the effective enforcement of tax laws against those who profit from organised crime. The substantial benefits that can be expected to flow from such an approach are amply demonstrated by American and Australian experiences in this field.

THE AMERICAN EXPERIENCE

There is no question that America pioneered the use of taxation as a weapon against organised crime through the outstanding work of the Internal Revenue Service's Criminal Investigation Division (CID).

The prohibition era (1920–33)

The CID's focus on the criminal elite began during the prohibition era when the IRS was recruited to add a further dimension to the government's efforts to combat the highly lucrative underground liquor trade. With ruthless efficiency, the CID targeted the undeclared wealth of notorious gangsters and secured convictions against a vast number for evading tax on their illicit income.[45] The most famous example was the prosecution of Al Capone, declared 'Public Enemy Number One' by the Chicago Crime Commission, who was convicted of numerous counts of tax evasion, imprisoned for 11 years, fined, ordered to pay costs and required to pay millions of dollars in back taxes and penalties.[46] Capone's protest that 'They can't collect legal taxes from illegal money'[47] was dismissed, like all similar protests ever since.

Post World War II

The IRS's proactivity in this field continued after World War II. From 1947 to 1950, the CID launched tax evasion prosecutions against 230 criminal profiteers, with a conviction-rate of close to 100 per cent, and issued tax assessments totalling US$115m.[48] The IRS's approach to its work was described by the then Commissioner of Inland Revenue as follows:

> 'There is not a field office in the country which does not daily avail itself of every lead it can obtain that might point to possible tax evasion on the part of any alleged gambler, racketeer or any other member of the criminal element . . . [I]n accordance with long-established policy, a revenue man is . . . present during Congressional hearings, court proceedings and other forms of official

inquiry where the subject matter of the hearings holds any possibility that disclosures might be made pointing to the existence of tax fraud. Newspapers are scanned daily for items suggesting the possible need for tax investigation, and all names picked up in these and other ways are scheduled for inquiry.'[49]

The Kefauver era

In 1950, the crucial role of taxation in fighting crime was emphasised by the Special Committee on Organized Crime chaired by Senator Kefauver, which publicly exposed the Mafia through televised hearings involving over 600 witnesses.[50] The Committee's most successful strategy was investigating discrepancies between the obvious wealth of Mafia bosses and the modest incomes declared in their tax returns. Kefauver referred to tax records as an 'extremely valuable weapon in the committee's arsenal — perhaps the most deadly we had', stating that 'without [them] our investigation would have been greatly handicapped'.[51] The Committee reported that: 'It is apparent that many, if not all, of the returns submitted for . . . gangsters are fraudulent, and . . . the federal government is being defrauded of many millions of dollars, perhaps running into hundreds of millions, of tax revenues by the mobsters engaged in organized criminal activities.'[52]

Kefauver urged federal government to provide greater leadership in the fight against organised crime and 'see that gangsters and racketeers are stripped of as much of their ill-gotten gains as possible through vigorous enforcement of the income-tax laws'.[53] He advocated a 'war on tax evasion by criminals', stating: 'I am strongly in favour of any weapon which will enable internal revenue agents to get at the truth and to start collecting some of the sorely needed millions of tax dollars which these hoodlums now are concealing and withholding from government'.[54]

In response to the Kefauver Committee's findings, the IRS established a Special Frauds squad 'to ferret out tax evasion by known racketeers'.[55] The IRS subsequently secured convictions against many crime bosses, including Frank Costello,[56] described by the Chicago Crime Commission as 'the most influential underworld leader in America',[57] and Mickey Cohen,[58] of similar notoriety. Both were imprisoned for numerous years and required to pay millions of dollars in back taxes.

The Kennedy era

The most proactive use of taxation as a weapon against organised crime occurred in the early 1960s under the Presidency of John F. Kennedy and the Attorney-Generalship of his brother. Robert F. Kennedy launched an Organized Crime Drive (OCD), arguing that 'if we do not on a national scale attack organized criminals with weapons and techniques as effective as their own they will destroy us'.[59] Kennedy nominated taxation as his weapon of choice, stating:

'We are going to take a new look at the income tax returns of [organized criminals], to spot the flow of crooked money. I have been criticized on the ground that tax laws are there to raise money for the government and should not be used to punish the underworld. I think the argument is specious. I do believe that tax returns must remain confidential. But I also recognise that we must deal with corruption, crime and dishonesty.'[60]

Kennedy handpicked Mortimer Caplin as Commissioner of Internal Revenue in circumstances recounted by Caplin as follows: 'He asked my views on tax and organized crime and whether I wanted to join the Administration. He asked me to write a letter telling how I felt about IRS working closely with Justice in organized crime. I . . . concluded, after much thought, that as long as we were making real tax investigations — not sham ones — there was nothing objectionable. I wrote him a long letter . . . spelling out my philosophy.'[61] Upon his appointment in January 1961, Caplin dispatched a special squad of IRS agents to participate in the OCD programme, stating:

'I cannot emphasize too strongly the importance I attach to the success of the Service's contribution to this over-all program . . . The tax returns of major racketeers to be identified by the Department of Justice will be subjected to the ''saturation type'' investigation, utilizing such man-power on each case as can be efficiently employed.'[62]

The OCD programme centred around the Justice Department's Organized Crime and Racketeering Section (OCRS), which included representatives from the IRS and 26 other federal agencies. The OCRS compiled a list of 'top racketeers who had escaped the law'[63] and all agencies pooled their intel-

ligence holdings on them. As a former head of the OCRS has stated: 'Our technique was to circulate the list among twenty-seven different investigative agencies and then to investigate these guys up to their eyeballs.'[64] This strategy was extraordinarily successful. The number of indictments returned against 'organized-crime figures' rose from 19 in 1960 to 687 in 1964.[65]

Without a doubt, the most effective member of OSCR was the IRS. Over 60 per cent of OSCR convictions between 1961 and 1965 arose from IRS investigations into tax evasion.[66] During the same period the IRS issued tax assessments against 'top racketeers' totalling $250m.[67]

The war on drugs

In 1971, the IRS established a special Narcotic Traffickers Program (NTP), which has been at the forefront of the federal government's war on drugs ever since.[68] In 1976, it was reported to Congress that the NTP is 'the single most effective tool in disabling major narcotics violators'.[69] In 1980, it was declared in the same forum that the IRS is 'indispensable in any earnest effort against the international drug [trade]'.[70] In 1986, the Chairman of the Senate Permanent Subcommittee on Investigations stated that: 'The IRS, in enforcing compliance with tax laws, has a unique tool for combatting organized crime . . . Nowhere is this tool more useful than in law enforcement efforts to dismantle and immobilize the big drug trafficking syndicates.'[71]

Today, the Narcotics Related Financial Crimes Program is one of three separate programmes run by the IRS's Criminal Investigation (CI) division. It has recently been described as follows:

> 'The primary objective in the Narcotics Related Financial Crimes Program is to reduce the profit and financial gains of narcotics trafficking and money laundering organizations that comprise a significant portion of the untaxed economy. Criminal Investigation (CI) will seek to identify, investigate, and assist in the prosecution of the most significant narcotics related tax and money laundering offenders . . . These financial investigations serve dual purposes. First, they foster compliance and confidence in the tax system through the investigation of unreported and ''untaxed'' drug proceeds. Second, CI traces illicit drug proceeds and contributes to the prosecution of criminal organizations.'[72]

Over the three-year period from 1999 to 2001, criminal investigations initiated in the IRS Narcotics Program resulted in convictions against 2,585 targets, with 88 per cent imprisoned.[73]

America's experience over the past century demonstrates that tax laws and revenue agencies are invaluable in combating organised crime. The success of the IRS in securing convictions against criminal kingpins, particularly when all other efforts have failed, is striking. Organised crime figures imprisoned for tax evasion of late include Anthony Giacalone,[74] John Gotti and Rocco Infelise.[75] Indeed, at various times throughout America's history court dockets for tax evasion prosecutions have read as a veritable 'Who's Who' of the criminal underworld.

THE AUSTRALIAN EXPERIENCE

In recent decades, the Australian Taxation Office (ATO) and its partner agencies have made great use of taxation as a weapon against organised crime. This writer estimates that the amount collected from criminals under federal income tax laws is around ten times greater than the total recovered under all Australian laws specifically designed for confiscating proceeds of crime, which include some of the broadest civil forfeiture laws in the world.[76] Australia's proactivity in this field was prompted by a series of royal commissions in the late 1970s and early 1980s.

The Woodward Royal Commission

One of the earliest Australian advocates of the taxation of ill-gotten gains was Mr Justice Woodward, the royal commissioner appointed to inquire into drug trafficking in New South Wales. In 1979, he reported that 'drug trafficking is a business' and that the only way to put traffickers out of business was to 'attack [their] working capital . . . and strip them of their ill-gotten wealth'.[77] He identified taxation as the principal means of attack, stating:

> 'Although illegal income can, under the Income Tax Act be freely and confidentially disclosed for taxation purposes . . . it would be naive to believe that drug traffickers do so to any marked extent, and following examinations of the financial affairs of drug traffickers in this State, I have reached the conclusion that the illicit drug trafficking industry is a major area of tax non-compliance. Drug traffickers who do not report their illegal income for

taxation purposes are therefore proper subjects for investigation by the taxation authorities. It is widely accepted in the United States that the Achilles Heel of the illicit drug trafficking business is its financing and its huge illegal, taxable, and largely unreported profits. Many major drug traffickers insulate themselves from the daily operations of the drug traffic by acting through intermediaries, thus making it most difficult for law enforcement officers to connect them directly with the drugs, and successfully to charge them with substantive drug offences. However, while the high level trafficker may avoid handling the drugs, he cannot avoid contact with the flow of money. Like many criminals, he is in the business for profit. Because such individuals commonly handle large amounts of cash, live beyond their stated means and income, and engage in many financial operations, they are most vulnerable to attack by the taxation authorities.'[78]

Woodward's philosophy was embraced by Lionel Bowen, Deputy Leader of the Opposition, who called for reform of s. 16 of the Income Tax Assessment Act 1936 (Cth) (ITAA), which prohibited ATO officers from divulging tax information 'except in the performance of any duty as an officer'. This secrecy provision was (rightly or wrongly) perceived as preventing the ATO from providing tax records to law enforcement agencies for the purpose of identifying and investigating persons with undeclared income from criminal activities. In the Federal Parliament, Bowen stated:

'The basis of any large-scale operation in narcotics is financial reward. The scope for amassing huge sums of money by dealing in narcotics is immense. People in Australia are doing precisely that. However money is laundered, the result for those at the top of the distribution tree — surely the people we must want to catch — is that their personal fortunes grow. That money must show up somewhere, whether it be in expensive houses, cars, or bank accounts. It *should* also show up in tax returns. If that income does not show up in tax returns — and one would normally expect that it would not — then the difference between the disclosed income and the accumulated wealth would tend to raise a reasonable suspicion that the money had been dishonestly gained . . . A great deal of information exists on income tax records, either because of what they reveal or because of what is omitted by the taxpayer. That would be of immense value in law enforcement.'[79]

Bowen argued that s. 16 of the ITAA 'protects not the right to privacy of the overwhelming majority of Australian taxpayers, but rather protects those people with huge incomes or enormous accumulated wealth, which evidence suggests has not been gained honestly'.[80] In 1980, as Deputy Prime Minister, Bowen declared that s. 16 'protects not the right to privacy, which is the right which we should all be concerned to protect, but the right to be corrupt'.[81]

The Williams Royal Commission

Another advocate of the proactive enforcement of tax laws against criminal profiteers was Mr Justice Williams, who headed the Federal Royal Commission of Inquiry into Drugs. In 1980, he recommended that ATO officers and police 'work together side-by-side' in following criminal money trails and taxing the profits of drug trafficking.[82] He too called for the reform of s. 16 of the ITAA, emphasising the practical utility of tax records to law enforcement agencies:

'Information contained in an income tax return may be invaluable to a law enforcement agency which is investigating the illegal importation, production and trafficking of drugs. Discrepancies between the income which can possibly be earned from a disclosed legitimate source and the income actually enjoyed and manifest in accumulated assets and life style may indicate the nature and extent of a criminal activity related to drug trafficking. Material contained in a return may, in the context of information otherwise available, be invaluable.'[83]

The Costigan Royal Commission

The man who pioneered the use of taxation as a weapon against organised crime in Australia was Frank Costigan QC, the royal commissioner appointed in 1980 to inquire into illegal activities of the Federated Ship Painters and Dockers Union. In 1981, Costigan sought an amendment to s. 16 of the ITAA permitting him to access ATO records.[84] This request was granted by government, even though it was bitterly opposed by the ATO. The tax information subsequently provided to Costigan proved to be invaluable. Two months after receiving

it he released a report identifying disturbing levels of organised crime within the Union, including substantial tax evasion.[85]

Costigan discovered that none of the criminals he identified had disclosed their true financial position to the Commissioner of Taxation and he prepared briefs enabling the ATO to tax their ill-gotten gains. As at 30th June, 1983, tax assessments for over $25m had been issued against 67 persons 'as a *direct* result of the Commission's activities' — the total cost of the Commission up to that time was only $6m.[86] Costigan described his work as follows:

> 'I have [used] taxation as a weapon. I have been given this opportunity by my free access to taxation files which has allowed me to ascertain the taxation position of members of criminal organisations so as to plan heavy tax imposition before they are warned of their imminent arrest and can take measures to conceal their ill-gotten gains. In this I have been able to take advantage of their evasion of tax, a matter in which all have shown themselves to be as adept as they have in the commission of their other crimes. Thus by the facility the [ATO] has to raise assessments rapidly, and the use of Mareva Injunctions, I have been able to ensure the seizure of assets by freezing them at an early stage, and effectively confiscating them in satisfaction of tax liabilities. It will be appreciated that the operation is not a tax related investigation, for the investigation identified non tax criminal ventures; taxation was used merely as a weapon to effect an annihilation of the illegal profits.'[87]

Costigan regarded taxation as a particularly vital weapon against drug traffickers, stating:

> '[T]o assist the containment of illegal drug trafficking in Australia, I favour an approach which hits hard at the financial structures built up by the drug traffickers. This might even be to the exclusion in some cases of the imposition of criminal sanctions where there can be great difficulties in obtaining admissible evidence and convicting offenders . . . [T]he attack on the finances . . . would involve at the forefront the use of income tax legislation . . . It is my view that the powers of the Commonwealth Government in the field of income tax collection can be utilised to great effect. The successful criminal will have acquired substantial wealth. That wealth necessarily is the product of income illegally obtained . . . The acquisition of it needs to be the subject of both tax assessment and public exposure. The criminal sanctions hitherto applied have demonstrably failed to contain satisfactorily the trafficking in drugs.'[88]

Costigan proposed novel reforms to enhance the taxation of illicit income, including the creation of a Taxation Investigation Tribunal and an Office of the Special Tax Investigator (Crime).[89] The former was to be an inquisitorial forum in which non-taxpaying criminals could be compelled to answer questions and produce documents. The latter was to administer multi-disciplinary task forces 'whose responsibility would be to investigate criminally-sourced income with a view to the issue of assessments on otherwise recalcitrant taxpayers'.[90] Neither reform was enacted by government, but their underlying philosophy was subsequently embraced by the Special Prosecutor, who carried on Costigan's work, and the National Crime Authority.

Special Prosecutor Redlich

Robert Redlich was appointed to investigate and prosecute criminals identified by Costigan and pursue civil remedies available to the Crown. He found that none had declared their illicit income in their tax returns and that 35 per cent were totally unknown to the ATO, having never lodged a tax return in their lives.[91] Redlich established a civil remedies unit comprised of lawyers, ATO officers and police to examine the tax affairs of offenders and freeze their assets prior to charges being laid. He referred to taxation as 'an essential weapon in fighting crime'[92] and ill-gotten gains as a 'vastly untapped' source of revenue.[93] In the 21-month period to 30th June, 1984, Redlich provided briefs to the ATO in respect of 100 persons, which resulted in tax assessments totalling $30m. The total cost of his civil remedies unit was only $191,237.[94]

The National Crime Authority

In 1984 all Australian governments passed uniform legislation to create the National Crime Authority (NCA), with a specific brief to combat organised crime of national significance.[95] The NCA has both federal and state jurisdiction and the power to compel persons to answer questions on oath and produce documents. Allocated less than 1 per cent of the national law enforcement budget, the NCA's mandate is to investigate those at the very pinnacle

of criminal organisations in close cooperation with other law enforcement agencies, including the ATO.

One of the liveliest debates surrounding the creation of the NCA concerned the issue of whether it should be given access to tax records. The ATO staunchly opposed such a course, arguing that tax information was of little value to criminal investigators and that any disclosure to the NCA would be regarded by those criminals who declared illicit income in their tax returns as a 'breach of faith' and deter them from continuing to do so.[96] These arguments were described by Costigan QC as 'arrant nonsense'.[97] He, and all of his contemporaries, submitted 'in the strongest terms that access to taxation records was vital to investigations into organised crime'.[98] Douglas Meagher QC, counsel assisting the Costigan Commission, stated:

> 'It has been asserted publicly that criminals declare their income to the Taxation Commissioner. That is nonsense. There may be some cases where a declaration of some income is made in order to avoid a tax investigation; but in none of these cases has the Costigan Commission found a case of a truthful disclosure of the full income received. It would be contrary to the character of the criminal to do so, and he doesn't . . . The Taxation Office promotes the maintenance of the secrecy of its records with a fervour that at times is matched only by the religious zealot . . . The usual argument is that those engaged in criminal activities, if assured that it will not lead to their prosecution in the criminal court, will disclose at least some of their income to the Taxation Commissioner. One is usually cited the case of some unidentified prostitute who, it is asserted, dutifully discloses her income for the privilege of paying tax upon it. It may be that in some cases such as these if there was disclosure the criminals may be more reticent in the future. I think not. The only conceivable reason they would have for not cheating the Taxation Office as they cheat others would be their fear of a tax investigation. That fear would persist even with exposure. What is more, the grant of access to taxation records to criminal investigators would mean the criminals would be placed under greater pressure to comply with the law. The investigator with access to both the taxation records and bank accounts of the criminal would quickly be alerted to any major discrepancies. The criminal, being aware of this, may be induced to keep his slate with the Taxation Office a little cleaner than would otherwise by the case.'[99]

Interestingly, this view was shared by the Australian Council for Civil Liberties, with their spokeswoman, Carolyn Simpson, now a judge of the NSW Supreme Court, submitting:

> 'Organised crime has one object only — the production for its perpetrators of large amounts of money. Therefore we suggest that the Commissioner of Taxation, who already has extremely wide powers of investigation, should be given much greater resources to pursue investigation and the added incentive to pursue those investigations. We suggest that the secrecy provisions of the [ITAA] be relaxed because it is unreal, as it is sometimes asserted, to suggest that any more than an infinitesimal amount of revenue is derived from the declaration of income from illegal sources . . . Instead there should be greater liaison between police officers and officers of the Australian Taxation Office . . . I dare say that some substantial progress towards the detection of large scale crime may be achieved in this way.'[100]

Federal government agreed that the NCA should have access to tax records and in 1985 it enacted s. 3D of the Taxation Administration Act 1953 to facilitate this.[101] The NCA immediately set out 'to contribute to a concerted attack on the profit motive in organised crime',[102] using tax as a weapon. This approach was supported by the Senate Standing Committee on Constitutional and Legal Affairs, which agreed that 'the speedy pursuit of civil actions which deprive criminal organisations of cash and other assets can be even more effective' in suppressing crime than convictions.[103] However, the ATO was initially a reluctant crime-fighter, reporting in 1985 that:

> 'Much has been made elsewhere of the taxation revenue to be gained in carrying out tax investigations of persons involved in illegal activities. While it is true that assessments involving large sums of tax can be and are being made against such persons, it is equally true that collection of the tax so levied is exceedingly difficult . . . Where taxes are recovered, it has been as a result of very expensive and time consuming litigation. Consequently, while the Office does not resile from the obligation to

pursue these people, it should be recognised that efforts in this area are at the expense of more revenue productive work.'[104]

Notwithstanding the ATO's initial reluctance, it did not take long for the NCA and ATO to build a mutually beneficial working relationship. In the very first matter investigated by the NCA the two agencies combined to convict Abe Saffron (Australia's Al Capone) of conspiring to defraud the Commonwealth by failing to declare his ill-gotten gains to the ATO.[105] He was imprisoned for a number of years and required to pay $3m in taxes and penalties.[106] In 1987 and 1988, tax assessments totalling $17.2m and $18.8m, respectively, were issued as a result of NCA investigations — the total cost of the NCA each year was $15.2m and $16.4m.[107] NCA lawyers and accountants ensured high tax collection rates by tracing criminal assets and preparing comprehensive briefs enabling the ATO to freeze and seize them expeditiously.

Buoyed by its success with the NCA, the ATO began to view the taxation of criminal profits in a more positive light, reporting in 1989 that: 'Our activity in this area played an important role in ensuring that the ATO was seen to be active in enforcing compliance among the least compliant, so contributing to the perceived fairness of audit efforts across the community as a whole'.[108] In 1992, the ATO further declared that: 'The view that the ATO should not be involved in criminal matters is rejected because the Commissioner cannot abrogate his responsibility to collect tax from the profits of business activity regardless as to whether that business is legal or illegal'.[109]

In 1989, the ATO established a Special Audit Program (SAP) 'dedicated to the audit of persons deriving income from illegal business activity'.[110] ATO officers from SAP worked with the NCA and other law enforcement agencies on major investigations into organised crime, facilitating an efficient exchange of information and intelligence. SAP was highly successful, resulting in tax 'collections' from criminals of approximately $300m from 1989 to mid-1993.[111] To put this figure into perspective, it is noted that from 1987 to 1993 the total collected throughout Australia under all federal and state proceeds of crime laws was in the order of $20m.[112]

The Swordfish task force

In 1997, the NCA was allocated $20m over three years to establish and lead a multi-agency task force to attack profit-driven organised crime.[113] Codenamed 'Swordfish', the task force is composed of NCA lawyers and accountants, and seconded police and ATO officers (whose salaries are paid by the NCA). Two key strategies employed by the task force are the prosecution of tax fraud and money laundering offences, as a means of bringing to justice those who profit from organised crime, and vigorous enforcement of civil income tax and proceeds of crime laws as a means of stripping criminal enterprises of their wealth and working capital. Results achieved by the Swordfish task force over the three-year period up to 30th June, 2000 include:[114]

- 35 people convicted of 133 offences;
- 26 others charged with 599 offences;
- tax assessments totalling $126.7m issued by the ATO, with actual and expected collections of approximately $76.02m;[115]
- additional tax of $93.93m estimated as having been paid by known offenders as a result of the clearly-evidenced deterrent effect from one major operation;[116] and
- $5.25m recovered under proceeds of crime laws.

As a result of investigations conducted by the Swordfish task force in its first three years it is thus estimated that the Commonwealth received, or will receive, tax revenue from otherwise non-taxpaying criminals totalling $169.95m. The cost of the Swordfish task force over this three-year period was only $20m and the entire cost of the NCA over the same period was only $141.49m.[117] In May 2000, the Commonwealth allocated the NCA a further $25.3m over three years to continue the Swordfish task force until 30th June, 2003.

Australia's experience over recent decades mirrors that of America, leaving no doubt about the importance of tax laws and revenue agencies in fighting organised crime. In this writer's opinion the ATO has been the single most valuable partner of the NCA in putting leading criminals out of business and into gaol. In 1984, Costigan QC rightly remarked that 'Police are interested in arrests — the tax man in assessments. Unless there is a joint purpose for their cooperation, they will not work together'.[118] The NCA (and the Swordfish task force in particular) has provided such a joint purpose, bringing together police, tax officers, lawyers and accountants — all working towards the common goal of combating major profit-driven organised crime.

AMERICA'S TAX WEAPONS

After a century of judicial scrutiny in their application against organised criminals, America's criminal and civil tax weapons are highly evolved. Many of the principles endorsed by American courts are capable of application in other jurisdictions, including Australia, Canada and the UK.

The criminal tax weapon

In America, tax evasion can be prosecuted under an array of criminal statutes. The 'capstone of this system of sanctions',[119] is 26 USC §7201, which provides that: 'Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony'. The offence is punishable by imprisonment for up to five years and/or a fine of up to $100,000. To establish a §7201 violation, the prosecution must prove three elements beyond reasonable doubt: (1) the existence of a tax deficiency; (2) an affirmative act constituting evasion or attempted evasion of tax; and (3) wilfulness.[120]

Tax deficiency

The existence of a tax deficiency can be established by either direct or circumstantial evidence, but 'proof of unreported taxable income by direct means is extremely difficult and often impossible'.[121] In recognition of this reality, American courts have endorsed three specific methods of proof by circumstantial evidence: net worth, cash expenditures and bank deposits.

As the Supreme Court has observed, the *net worth method* is 'a potent weapon in establishing taxable income from undisclosed sources'.[122] It is frequently used to prove unreported income from criminal activities[123] and has been described by the Supreme Court as follows:

> 'In a typical net worth prosecution, the Government, having concluded that the taxpayer's records are inadequate as a basis for determining income tax liability, attempts to establish an ''opening net worth'' or total net value of the taxpayer's assets at the beginning of a given year. It then proves increases in the taxpayer's net worth for each succeeding year during the period under examination and calculates the difference between the adjusted net values of the taxpayer's assets at the beginning and end of each of the years involved. The taxpayer's nondeductible expenditures, including living expenses, are added to these increases, and if the resulting figure for any year is substantially greater than the taxable income reported by the taxpayer for that year, the Government claims the excess represents unreported taxable income.'[124]

The *cash expenditures method* is a 'simple variant of the net worth method'.[125] It involves comparing a taxpayer's cash expenditures with his or her reported cash sources of income and any known non-taxable cash sources. 'If cash expenditures exceed cash sources during the period in question, it is inferred that the excess amount is unreported [taxable] income'.[126]

The *bank deposits method* proceeds on the premise that if periodic deposits are made into bank accounts held in the taxpayer's name or controlled by the taxpayer, and those deposits exceed the taxpayer's reported income, 'the jury is entitled to infer that the difference between the balance of deposited items and reported income constitutes unreported [taxable] income'.[127]

None of these three methods require the prosecution to prove either the exact amount of the unreported income[128] or its particular source.[129] In respect of the latter, the prosecution need only 'show either a ''likely source'' of the allegedly unreported income or that it has negated all reasonably possible nontaxable sources of income' proffered by the defendant.[130]

Affirmative act

The Supreme Court has interpreted the second element of the §7201 offence to require a 'positive attempt' to evade tax rather than mere 'passive neglect'.[131] However, this requirement has been construed broadly to include filing false tax returns, concealing assets or covering up sources of income, keeping a double set of books, creating false records, destroying records or not keeping records for transactions where the likely effect would be to mislead or conceal.[132]

Wilfulness

The Supreme Court has defined 'wilfulness' as the intentional violation of a known legal duty.[133] The prosecution must demonstrate more than carelessness or inadvertence on the part of the defendant,[134] but need not prove 'bad faith'.[135] Courts have acknowledged that 'proof of willfulness must usually be accomplished by means of circumstantial evidence'.[136] In many cases wilfulness can be readily

inferred from the defendant's affirmative acts of evasion.[137]

America's tax offences 'are among the most versatile weapons in the government's arsenal for fighting crime',[138] having been described as 'a God-send to the federal government in its targeting perpetrators of crimes'.[139] History demonstrates that few who profit from organised crime are able to withstand a comprehensive investigation into their taxation affairs. Leading criminals who openly live beyond their reported means, or otherwise enjoy unaccounted wealth, are particularly susceptible to convictions for tax evasion based on circumstantial evidence, even if it is not possible conclusively to prove the particular source of their ill-gotten gains.

The civil tax weapon

The IRS, like most tax authorities, has broad powers and flexible procedures at its disposal for collecting unpaid tax from delinquent taxpayers, including those who derive unreported income from organised crime. As one commentator has observed, the financial impact of an IRS investigation on such persons 'can be staggering'.[140] With accrued penalties and interest, it is often possible to recover more than 100 per cent of their ill-gotten gains.[141]

Income reconstruction

The IRS uses various income reconstruction techniques to estimate the taxable income of persons who profit from crime.[142] It has 'great latitude' in performing this task and may generally adopt whatever technique is believed to best reflect the taxpayer's income, even if it involves obvious 'inexactitude'.[143] Courts have accepted that 'absolute certainty in such matters is usually impossible and is not necessary'.[144] 'The reconstruction need only be reasonable in light of all surrounding facts and circumstances'.[145] It may be based on hearsay, opinion, illegally obtained evidence, statistical formulae, projections or comparisons.[146] The IRS is not obliged to carry out a comprehensive net worth analysis, although it often chooses to do so.

Deficiency determinations

If the IRS determines that a person failed to report taxable income, or otherwise failed to pay the correct amount of tax, it must issue a notice of deficiency stating the amount of tax determined to be outstanding.[147] In any action to collect taxes the IRS's deficiency determination is generally presumed to be correct.[148] Ordinarily, a court 'will not look behind a notice of deficiency to examine the evidence used or the propriety of the [IRS]'s motives or administrative policy in making the determination'.[149] A taxpayer who disagrees with the IRS's determination bears the burden of proving, by a preponderance of the evidence, that it is 'arbitrary or erroneous'.[150]

Courts have recognised 'a limited exception to this general rule where [the IRS] alleges that the taxpayer has unreported illegal income'.[151] In such cases the IRS can only rely on its presumption of correctness if it first establishes a 'minimal evidentiary foundation' for its determination.[152] This requires the IRS to introduce some evidence 'linking' the taxpayer to the alleged illegal activity. If the IRS is able to satisfy this initial burden the onus reverts back to the taxpayer to rebut the presumption of correctness by proving that the determination is arbitrary or erroneous.

Jeopardy and termination assessments

Ordinarily, when the IRS issues a notice of deficiency it must wait 90 days before raising a tax 'assessment'.[153] An exception arises where the IRS believes that its collection of tax will be 'jeopardized by delay', in which case it can immediately assess and demand payment of the tax deficiency.[154] This is known as a jeopardy assessment. A similar tool is a termination assessment, which enables the IRS to assess a taxpayer's current year tax liability part way through the year and demand payment forthwith.[155] Once a jeopardy or termination assessment has been raised the IRS may take immediate steps to collect the tax debt, including through statutory enforcement mechanisms involving the seizure and sale of property.[156] The use of jeopardy and termination assessments in cases involving unreported income from criminal activities is 'pervasive'.[157]

The IRS regularly recovers large amounts of tax from successful criminals. In *Jones v Commissioner*, the IRS assessed a drug trafficker's unreported income over a ten-month period as $33m and seized assets worth millions of dollars, including $1.5m in cash.[158] In *Curtis v Commissioner*, the IRS assessed two drug traffickers' unreported income as $14.6m and seized assets worth millions of dollars, including five helicopters.[159] In *Simeone v Commissioner*, the IRS assessed the unreported income of three alleged (but acquitted) drug traffickers as

$4.9m and seized large amounts of cash and several airplanes.[160] Not only do such outcomes increase public revenue, but they incapacitate criminal enterprises and are also likely to significantly enhance overall public confidence in the equity of America's tax system.

AUSTRALIA'S TAX WEAPONS

Australia's tax weapons are generally more versatile than those in America, but are less frequently employed against persons who derive undeclared income from criminal activities.

Criminal tax weapons

Tax delinquents in Australia can be prosecuted under Part III of the Taxation Administration Act 1953 for matters such as failing to lodge a tax return, failing to disclose all taxable income in a tax return, making false or misleading statements to the ATO or failing to keep adequate tax records. These offences are generally reserved for minor tax violations and are only punishable by tax penalties, small fines and (in the case of repeat offenders) short periods of imprisonment. Serious tax evasion is usually prosecuted as a fraud on the revenue.

Public fraud offences

At English common law it was, and still is, an indictable offence to cheat and defraud the public revenue or conspire to do so.[161] These offences were inherited in Australia.[162] It is well settled that these offences are not limited to positive acts of deception, but encompass any type of dishonest act *or omission* which imperils public revenue.[163] For example, in 1783 Lord Mansfield declared that 'So long ago as the reign of Edward III, it was taken to be clear that an indictment would lie for an omission or concealment of a pecuniary nature, to the prejudice of the King'.[164] There are many examples of cases where persons have been convicted of cheating and defrauding the public revenue for dishonestly failing to lodge tax returns.[165]

Until recently, the offences of defrauding the Australian government or conspiring to do so were located in ss. 29D and 86(2) of the Crimes Act 1914.[166] Punishable by imprisonment for up to 10 and 20 years, respectively, these offences were simple statutory embodiments of the common law.[167] Courts have commented that these offences, like their common law counterparts, were expressed in 'words of general import and considerable breadth'[168] covering 'an extraordinary diversity of circumstances'.[169] Many persons have been convicted of these statutory offences for dishonestly failing to declare, or dishonestly understating, taxable income to the ATO.[170]

On 24th May, 2001, the public fraud offences in the Crimes Act were replaced by new offences in the Criminal Code Act 1995. Clause 135.1 contains the offences of dishonestly obtaining a gain from, or dishonestly causing a loss or risk of loss to, the Australian government, which are punishable by up to five years' imprisonment. Clause 135.4 contains associated conspiracy offences punishable by up to ten years' imprisonment. These broad dishonesty offences are essentially 'codified equivalents' of the previous common law and statutory public fraud offences.[171] Like their predecessors, the Code offences are wide enough to cover any dishonest non-declaration or understatement of taxable income to the ATO.

All of the above-mentioned offences, including the existing common law offences in the UK, extend to criminals who fail to declare, or understate, their illegal income to revenue authorities. The offences are wider than 26 USC §7201, because they can be committed by an omission, and there seems no reason why the general principles endorsed by American courts in relation to proof by circumstantial evidence (eg the net worth method) would not be accepted by Australian or UK courts. However, to date, attempts to prosecute leading criminals for failing to declare their illegal income have been only sporadic in Australia and seemingly non-existent in the UK.

This writer is unaware of any case in the UK in which a person has been convicted of revenue fraud for failing to declare their illegal income and is only aware of two such cases in Australia, both of which involved the NCA. In 1987, Abe Saffron, a reputed untouchable organised crime figure, was convicted of conspiring to defraud the revenue by understating the taxable income of five 'cash businesses' to the ATO.[172] In 1990, six members of the Alvaro family were convicted of the same offence for concealing 'unexplained income' from the ATO.[173] Curiously, in both cases the Crown declined to lead specific evidence of the alleged illegal source of the income in question, which was reported in the media and is alluded to in the NCA's Annual Reports.[174]

In addition to these two cases, there have been at least three successful prosecutions in Australia against

money launderers for conspiring to defraud the revenue by concealing their clients' illegal income from the ATO.[175] The advantage of charging such persons with revenue fraud in addition to, or instead of, money laundering is that in respect of the former the prosecution is not required to prove that the funds in question are proceeds of crime or that the defendant had knowledge of this fact. Accordingly, launderers have been convicted of revenue fraud where the facts could not support money laundering convictions because the criminal source of the funds, or the defendant's knowledge of that source, could not be proven beyond reasonable doubt.[176]

The five Australian cases known to this writer in which prosecutions for revenue fraud have been based on undeclared illegal income, albeit few in number, are sufficient to demonstrate the immense value of the criminal tax weapon in combating organised crime. In only one of those cases was a conviction for a non-revenue offence also obtained. In the four others, involving nine defendants, convictions for revenue fraud were the only practical means of bringing the offenders to justice. In this writer's opinion, there are too few prosecutions against leading criminals for evading tax in respect of their illicit income in Australia, and certainly in the UK, particularly having regard to the frequency and success of such prosecutions in the USA.

Civil tax weapons

The powers available to the ATO for assessing and collecting tax are far greater than those available to police for investigating crime and confiscating proceeds of crime. The ATO's powers are regularly used to tax persons who profit from organised crime.

Information-gathering powers

The ATO has wide powers for ascertaining a person's taxable income, including income from criminal activities. Section 263 of the Income Tax Assessment Act 1936 (ITAA) authorises ATO officers to have 'full and free access' to all premises and documents therein and to take copies of documents, with the occupier obliged to provide 'all reasonable facilities and assistance'. Section 264 empowers the ATO to require persons to furnish information, produce documents and give evidence on oath. As long as these powers are exercised for any of the purposes of the ITAA, the ATO may use them to engage in a 'roving inquiry' or 'fishing expedition'.[177] Neither power overrides legal professional privilege,[178] but both override the privilege against self-incrimination.[179] In respect of the latter, Justices Hill and Lindgren have remarked:

> 'If the argument were to prevail that the privilege against self-incrimination was intended to be retained in tax matters, it would be impossible for the Commissioner to interrogate a taxpayer about sources of income since any question put on that subject might tend to incriminate the taxpayer by showing that the taxpayer had not complied with the initial obligation to return all sources of income. Such an argument would totally stultify the collection of income tax.'[180]

Default assessments

An invaluable power that is frequently used to tax undeclared illegal income, but is not restricted to such, is the ability of the Commissioner (or his or her delegate) to make a default assessment under s. 167 of the ITAA. That section provides that where a person has defaulted in his or her obligation to lodge a tax return, or the Commissioner is not satisfied with a tax return lodged by a person, 'the Commissioner may make an assessment of the amount upon which in his judgment income tax ought to be levied, and that amount shall be the taxable income of that person'. Courts have consistently emphasised that the Commissioner/delegate has great latitude in making default assessments, for reasons that have been well explained by Justice Sheppard:

> 'It is trite to say that a taxpayer's financial affairs are matters peculiarly within his knowledge. The Commissioner is dependent upon him for a proper disclosure of his income during a given year. If the taxpayer . . . is not prepared to comply with the duties which the Act imposes upon him, he creates difficulties, not only for the Commissioner, but also ultimately for himself. It may be true . . . that s. 167 is not the gateway to fantasy and that it is not open to the Commissioner either to pluck a figure out of the air or to make an uninformed guess. But . . . the process may go close to guesswork, and yet be lawful . . . The point I wish to make is that the [person in default], by his failure to abide by his duty as a taxpayer, has placed the Commissioner in the position of having to do the best he can in the circumstances.'[181]

Not only may the making of a default assessment 'involve a process akin to guesswork',[182] but 'there is no requirement that an assessment be sustained by evidence'[183] and the fact that an assessment is 'almost certainly inaccurate' does not make it invalid.[184] Furthermore, the ATO is not obliged to identify, let alone prove, the source (actual or suspected) of any income attributed to a taxpayer in a default assessment.[185] However, in most cases the ATO does supply the taxpayer with a detailed statement explaining the basis of the default assessment.[186]

There are three main methods used by the ATO to estimate a person's income for the purpose of a default assessment. The *specific adjustments method* is undertaken where the exact amount of alleged income is known, such as where a drug dealer is found in possession of proceeds from a drug deal.[187] The '*T*' *account method* is similar to the cash expenditures method in the USA and is used where a taxpayer's outgoings during a given year significantly exceed his or her declared income.[188] The *assets betterment method* is essentially the same as the net worth method in the USA and is the most common method used by the ATO in cases involving illegal income.[189]

In addition to the power to make default assessments, the Commissioner/delegate may make a *special assessment* of a person's taxable income part way through the year, rather than waiting (or hoping) for a tax return to be lodged at the end of the year. This power, contained in s. 168 of the ITAA, is particularly useful where non-taxpaying criminals have liquid assets that are likely to be moved offshore or otherwise placed beyond retrieval if the ATO does not take immediate action.

A taxpayer who disagrees with a default or special assessment bears the burden of proving in review or appeal proceedings that it is 'excessive'.[190] The standard of proof is the balance of probabilities.[191] In order to prove that assessments are excessive a taxpayer 'must not only establish that the Commissioner's assessments are wrong, but must go further and positively show what the correct assessment should be'.[192] Courts have repeatedly stated that 'the justice' of placing such a burden on the taxpayer 'cannot be disputed' in light of the fact that a person's true taxable income is a matter peculiarly within his or her own knowledge.[193]

Tax collection powers and procedures

Subdivision 260-A of the Taxation Administration Act 1953 (TAA) provides the ATO with an invaluable mechanism for collecting tax 'without having to go to the trouble of obtaining a judgment for the tax debt and levying execution'.[194] Once an assessment has been raised the ATO may issue a notice to any third party who owes 'money' to the taxpayer, or holds 'money' on the taxpayer's behalf, requiring the third party to pay that money to the ATO in satisfaction of the taxpayer's liability.[195] Common recipients of 260-A notices are banks, solicitors and employers. Notices are frequently used in conjunction with default and special assessments, particularly in relation to large cash seizures made by police in drug trafficking cases.[196]

The ATO also frequently obtains Mareva orders to freeze the assets of recalcitrant tax debtors, particularly those believed to be involved in criminal activities.[197] This basic jurisdiction is well known, but is continually evolving. For example, it has been held that: (i) the ATO may obtain Mareva relief as soon as an assessment is issued, even if no cause of action has arisen because the tax debt is not yet due;[198] (ii) a taxpayer can be ordered to repatriate foreign assets to Australia;[199] and (iii) the ATO need not demonstrate a specific risk that assets will be dissipated if it can show that a taxpayer is 'entirely dishonest' because of his or her criminal history.[200]

Another crucial enforcement power of the ATO is the ability to prevent a tax debtor leaving the country by issuing a *departure prohibition order* under Part IVA of the TAA. An order can be made where a person has a tax liability and the Commissioner/delegate believes, on reasonable grounds, that it is desirable that the person not depart Australia without first discharging the liability or making satisfactory arrangements to do so. These orders are frequently made against tax debtors believed to be involved in criminal activities.[201]

The ATO, particularly in partnership with the NCA, has been highly successful in collecting taxes from, and bankrupting, those who profit from organised crime. Even prior to Operation Swordfish, the NCA's Annual Reports documented multi-million dollar tax assessments against many of Australia's most notorious criminals, with the cumulative total standing at over $173m in 1995.[202] Large tax recoveries have been made in a diverse range of criminal cases, including whilst charges have been pending,[203] after convictions[204] and after acquittals.[205] The amounts recovered from Australian criminals through the enforcement of tax laws dwarf those recovered under specific proceeds of crime laws,

which is only to be expected in light of the greater versatility and potency of tax laws, even compared to the broadest of civil forfeiture laws.

CONCLUSION

Organised crime is one of the largest areas of tax non-compliance in the world, if not the largest. All of those who profit from it are likely to have substantial tax liabilities and be guilty of criminal tax evasion or fraud offences punishable by significant periods of imprisonment. Accordingly, organised crime is a proper subject for investigation by *both* revenue agencies and criminal law enforcement agencies. They should work together and specifically target it, seeking to enforce *both* civil and criminal sanctions. To do otherwise would simply increase the unfair advantage criminals already enjoy over law-abiding citizens and undermine all-important public confidence in the fairness of tax laws and their administration.

In reviewing American and Australian experiences in this field, three principal lessons emerge. First, the successful enforcement of tax laws against organised criminals requires specifically dedicated multi-disciplinary teams comprised of tax auditors, police investigators, lawyers and accountants. Second, the allocation of such resources to this work by government will inevitably deliver revenue positive outcomes. Third, tax laws are one of the most formidable weapons in any government's arsenal for putting otherwise untouchable criminals out of business and behind bars. The proactive enforcement of civil and criminal sanctions for tax evasion is nothing short of indispensable in any earnest effort to combat organised crime.

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(11) *Magna Alloys and Research Pty Ltd v FCT* (1980) 49 FLR 183, 215; *Madad Pty Ltd v FCT* (1984) 4 FCR 420, 426: 'The fact is . . . that income from [illegal activities] is regarded as taxable'; *Case W27* 89 ATC 281, para. 27: 'There is no doubt that moneys gained from illegal activities may be taxable income'; *AAT Case 8240* 92 ATC 331; *MacFarlane v FCT* (1986) 13 FCR 356, 380–382; *Madden v Madden & Ors* 96 ATC 4268; *Peters v The Queen* (1998) 192 CLR 493; *FCT v La Rosa* [2002] FCA 1036; Australian Tax Office (1993) 'Taxation Ruling 93/25', para. 9: 'The tests as to whether an amount is assessable income . . . are the same for amounts received from legal and illegal activities'; CCH (2002) 'Australian Federal Income Tax Reporter', para. 19–370.

(12) *Minister of Finance (Canada) v Smith* [1927] AC 193; *No. 275 v MNR* (1955) 13 Tax ABC 279; *MNR v Eldridge* [1964] 64 DTC 5338, 5342: 'it is abundantly clear from the decided cases that earnings from illegal operations or illicit businesses are subject to tax'; *RR Angle v MNR* [1969] Tax ABC 529; *R v Poynton* [1972] 3 OR 727, 732: 'The fact that profits are derived from an illegal business does not make them immune to taxation'; *Christensen* 84 DTC 6184; *Buckman v MNR* [1991] 2 CTC 2608; *Gravel (M) v MNR* [1992] 1 CTC 2521; *R v Fogazzi* (1993) 80 CCC (3d) 572; *Neeb v R* 97 DTC 895.

(13) *Maney & Sons v CIR* [1967] NZLR 41, 42, 49; *Case D57* (1980) 4 NZTC 60,852; *A Taxpayer v C of IR* (1997) 18 NZTC 13,350, 13,364 per Tipping J: 'It has never been in doubt that the illegality of a business does not protect its profits from taxation'; CCH (1998) 'New Zealand Income Tax Law and Practice', Vol. 1 at para. 35–200.

(14) Section 58 of the Taxes Consolidation Act 1997, formerly s. 19 of the Finance Act 1983, permits and obliges the Irish Revenue Commissioners to assess and collect tax on profits or gains from an unknown or unlawful source, reversing the decisions in *Hayes v Duggan* [1929] IR 406 and *Collins v Mulvey* [1956] IR 233.

(15) *Partridge v Mallandaine* (1886) 18 QBD 276; *Minister of Finance (Canada) v Smith* [1927] AC 193; *Mann v Nash* [1932] 1 KB 752; *Lindsay v IRC* (1933) SLT 57, 18 TC 43; *Southern (HM Inspector of Taxes) v AB* [1933] 1 KB 713; *American Foreign Insurance Association v Davies* (1950) 32 TC 1, 35–36; *IRC v Aken* [1990] 1 WLR 1374; CCH (2000) 'The CCH Tax Handbook', para. 573: 'it now seems clear that the profits of an illegal trade are taxable'.

(16) *AAT Case 8240* (1992) 24 ATR 1047; *Madden v Madden & Ors* (1996) 96 ATC 4268; *Peters v The Queen* (1998) 192 CLR 493; *FCT v La Rosa* [2002] FCA 1036; *Case D57* (1980) 4 NZTC 60,852; *Neeb v R* 97 DTC 895; Rutherford (1991) 'Taxation of Drug Traffickers' Income: What the Drug Trafficker Profiteth, The IRS Taketh Away' 33 *Ariz. L. Rev.* 701. Also see *Lindsay v IRC* (1933) 18 TC 43, 56 per Sands LJ.

(17) *Lazcano v Commissioner of Internal Revenue* 55 TCM (CCH) 247 (1988).

(18) *US v Commerford* 64 F.2d 28 (1933); *Chadick v US* 77 F.2d 961 (1935); *Johnson v US* 318 US 189 (1943); *Ford v US* 210 F.2d 313 (1954); *Gravel (M) v MNR* [1992] 1 CTC 2521; *Taxpayer v FCT* [1999] AATA 277.

(19) *No. 275 v MNR* (1955) 13 Tax ABC 279; *MNR v Eldridge* [1964] 64 DTC 5338; *Marienfeld v US* 214 F.2d 632 (1954); *IRC v Aken* [1990] 1 WLR 1374; *Allard v FCT* (1992) 39 FCR 595.

(20) *Minister of Finance (Canada) v Smith* [1927] AC 193; *Lindsay v IRC* (1933) SLT 57, 18 TC 43; *US v Stafoff* 260 US 477, 480 (1922); *US v Sullivan* 274 US 259, 263 (1927).

(21) *Partridge v Mallandaine* (1886) 18 QBD 276; *Mann v Nash* [1932] 1 KB 752; *Southern (HM Inspector of Taxes) v AB* [1933] 1 KB 713; *McClanahan v US* 292 F.2d 630 (1961).

(22) *Schira v Commissioner* 240 F.2d 672 (1957); *Partridge v Mallandaine* (1886) 2 TC 179, 181.

(23) In America and Canada it is well settled that the proceeds from theft, fraud and embezzlement are taxable: *Rutkin v US* 343 US 130 (1951); *James v US* 366 US 213 (1961); *Collins v Commissioner* 3 F.3d 625 (1993); *R v Poynton* [1972] 3 OR 727; *Buckman v MNR* [1991] 2 CTC 2608; *R v Fogazzi* (1993) 80 CCC (3d) 572. In Australia there are conflicting authorities on the issue of whether embezzled funds are taxable. Authorities suggesting that they are include *The Countess of Bective v FCT* (1932) 47 CLR 417, 424; *Case B32* (1970) 70 ATC 153; *Cipryk v FCT* (1970) 70 ATC 4102; *MacFarlane v FCT* (1986) 13 FCR 356, 380–382; *Case W27* (1989) 89 ATC 281. A contrary authority is *Zobory v FCT* (1995) 129 ALR 484, a case in which the embezzler had made full restitution prior to an unsuccessful attempt to tax him. In New Zealand the proceeds from theft and embezzlement are generally not taxable, except where the taxpayer is engaged in a business of stealing or embezzlement: *A Taxpayer v C of IR* (1997) 18 NZTC 13,350; CCH, 'New Zealand Income Tax Law and Practice', Vol. 1, para. 35–200. In the UK there is no authority directly on point, but in *Lindsay v IRC* (1933) 18 TC 43 at 58, Lord Morrison declared that: 'The burglar and swindler who carries on a trade or business for profit is as liable to tax as an honest business man.'

(24) *Rutkin v US* 343 US 130 (1952).

(25) *Humphreys v Commissioner* 125 F.2d 340 (1942).

(26) *Sullivan v US* 15 F.2d 809, 811 (1926).

(27) US Senate Report No. 97–494 (1982), at 251, cited in Wolfe (1996) 'Recovery from Halper: The Pain From Additions to Tax is not the Sting of Punishment', 25 *Hofstra Law Review* 161, n. 144.

(28) In 1972, the Canadian government directed Revenue Canada (now Canada Customs and Revenue Agency) to conduct a programme of tax audits into organised criminal groups: Solicitor General of Canada (1977), 'Minister of National Revenue and Solicitor General of Canada Release Text of 1972 Agreement to Combat Organized Crime' (Press Release, 29th September). This initiative evolved into what is now known as the Special Enforcement Program (SEP), which aims to enforce civil and criminal sanctions for tax evasion against persons engaged in organised crime. In 1998, SEP raised CAN$42m in taxes and obtained criminal convictions in 13 cases. See Schneider *et al.* (2000) 'Alternative Approaches to Organised Crime' (Final Report), pp. 32–34.

(29) The New Zealand Inland Revenue Department maintains a Special Audit Unit, the primary role of which 'is to investigate the affairs of those persons who derive their income from engaging in an organised illegal activity': Roseingrave (1993) 'Inland Revenue Department's Special Audit', Proceeds of Crime Conference, Wellington, 16–18th February, 1993, p. 2. Also see CCH (nd) 'New Zealand Income Tax Law and Practice', Vol. 1 at para. 35–200.

(30) In 1996, Ireland enacted the Criminal Assets Bureau Act (CAB Act), which created a specialist agency to attack the proceeds of crime. Its principal functions are to enforce civil forfeiture laws in the Proceeds of Crime Act 1996 and 'ensure that the proceeds of criminal activity or suspected criminal activity are subjected to tax and that the Revenue Acts, where appropriate, are fully applied in relation to such proceeds or activities': ss. 5(1)(a) & (b) of the CAB Act. See Ashe & Reid (2001) 'Ireland: The Celtic Tiger Bites — The Attack on the Proceeds of Crime', *Journal of Money Laundering Control*, Vol. 4, p. 253. In its first five years the Bureau recovered IR£21m under civil forfeiture laws and collected IR£28m out of a total of IR£58m demanded as tax payable on proceeds of crime: House of Lords Hansard, *Proceeds of Crime Bill*, 22nd April, 2002, at 220422–08.

(31) Home Office (1999) 'Study of a National Agency for the Confiscation of Criminal Assets' (Final Report), p. 29.

(32) 'Taxman Failed to Inform Police About Drug Dealer', *Telegraph*, 25th October, 2000.

(33) UK Cabinet Office (2000) 'Recovering the Proceeds of Crime', para. 1.38.

(34) See eg Barker (1996) 'A Comparative Approach to Income Tax Law in the United Kingdom and the United States' 46 *Cath. U. L. Rev.* 7, 20–29.

(35) *Partridge v Mallandaine* (1886) 2 TC 179, 180.

(36) [1927] AC 193 at 197.

(37) *Ibid.* at 198.

(38) *Mann v Nash* [1932] 1 KB 752, 16 TC 523.

(39) (1932) 16 TC 523, 530, endorsed by Fox LJ in *IRC v Aken* [1990] 1 WLR 1374, 1382–1383.

(40) (1933) 18 TC 43, 58, endorsed by Finlay J in *Southern (HM Inspector of Taxes) v AB* [1933] 1 KB 713.

(41) UK Cabinet Office, above, ref. 33, at para. 1.40.

(42) Home Office (2001) 'Proceeds of Crime Bill: Publication of Draft Clauses', para. 6.2.

(43) *Ibid.* at paras 6.10 and 6.11.

(44) Martindale (2000) 'The Al Capone Factor' 9 *Nexus* 27.

(45) Above, refs. 3–8.

(46) Ness, E. and Fraley, O. (1947) *The Untouchables*, Messner, NY; Pasley, F. and Sinclair, A. (1966) *Al Capone*, Doubleday, NY, pp. 3–6, 319–323.

(47) www.ustreas.gov/irs/ci/docnarcotics.htm.

(48) Schoeneman (1951) 'The Commissioner's War on Racketeers' 29(5) *Taxes* 347.

(49) *Ibid.* at 351.

(50) Special Committee to Investigate Organized Crime in Interstate Commerce (1951) 'Third Interim Report' (Senate Report no. 307).

(51) Kefauver, E. (1952) *Crime in America*, Garden City, NY, p. 21.

(52) *Ibid.* at p. 25.

(53) Special Committee, above, ref. 50, at p. 6.

(54) Kefauver, above, ref. 51, at 62, 246–248.

(55) *Ibid.* at 25, 246.

(56) *US v Costello* 221 F.2d 668 (1955) affirmed 350 US 359 (1956).

(57) Kefauver, above, ref. 51, at 24, 218.

(58) *Cohen v US* 297 F.2d 760, cert. denied 369 US 865 (1962).

(59) Navasky, V. S. (1971) *Kennedy Justice*, Atheneum, NY, pp. 51, 52.

(60) *Ibid.* at p. 57.

(61) *Ibid.* at p. 56.

(62) *Ibid.* at p. 49.

(63) *Ibid.* at p. 55.

(64) *Ibid.* at p. 55.

(65) *Ibid.* at p. 49.

(66) President's Commission, above, ref. 1, at p. 197.

(67) Navasky, above, ref. 59.

(68) Rutherford, above, ref. 16; Baker (1995) 'Your Worst

Nightmare: An Accountant With a Gun!' 11 *Ga St. U. L Rev*. 331.

(69) US Congress, Senate Committee on Government Operations, Permanent Subcommittee on Investigations (1976) 'Federal Drug Enforcement', p. 1039.
(70) See Block, A. A. (1991) 'Perspectives on Organizing Crime', Kluwer, Dordrecht, pp. 197–198.
(71) Nunn (1986) 'The Impact of the Senate Permanent Subcommittee on Investigations on Federal Policy' 21 *Ga. L Rev*. 17, 40.
(72) www.ustreas.gov/irs/ci/compliancestrategy.htm.
(73) www.ustreas.gov/irs/ci/docnarcotics.htm.
(74) *US v Giacalone* 574 F.2d 328 (1978).
(75) www.ustreas.gov/irs/ci/cistructure/dochistory.htm.
(76) Lusty, R. (2002) 'Civil Forfeiture of Proceeds of Crime in Australia', *Journal of Money Laundering Control*, Vol. 5, p. 345.
(77) Woodward (1979) *Report of the Royal Commission into Drug Trafficking*, Vol. 3, p. 1879.
(78) *Ibid*. at pp. 1879–1880.
(79) Bowen (1979) House of Representatives, 3rd May, p. 1833 (emphasis added).
(80) *Ibid*.
(81) Bowen (1980) 'Keynote Address to the Australian Institute of Criminology Symposium on Criminal Justice.'
(82) Williams (1980) 'Australian Royal Commission of Inquiry into Drugs: Report', pp. B339, C365–377.
(83) *Ibid*. at p. C372.
(84) Royal Commission on the Activities of the Federated Ship Painters and Dockers Union (hereafter Costigan Commission) (1981) 'Interim Report No. 3.'
(85) Costigan Commission (1982) 'Interim Report No. 4.'
(86) Costigan Commission (1983) 'Interim Report No. 5', paras 1.17–1.19.
(87) Costigan Commission (1984) 'Final Report', Vol. 3, para. 4.069.
(88) *Ibid*., Vol. 5, paras 9.004–9.005.
(89) *Ibid*. at paras 9.015–9.024.
(90) *Ibid*. at para. 9.018.
(91) Redlich (1984) 'Annual Report of the Special Prosecutor 1983–84', at para. 9.5.
(92) *Ibid*., at p. 22.
(93) Redlich (1983) 'Annual Report of the Special Prosecutor 1982–83', para. 11.81.
(94) Redlich (1984) above, ref. 91, pp. 22, 128–129.
(95) See www.nca.gov.au.
(96) Australian Government (1983) 'A National Crimes Commission?', paras 7.35–7.36; Australian Law Reform Commission (1983) 'Privacy', Report No. 22, para. 407.
(97) Costigan (1983), above, ref. 86, at para. 3.22.
(98) Senate Standing Committee on Constitutional and Legal Affairs (1984) 'The National Crime Authority Bill 1983', para. 5.50–5.60.
(99) Meagher, D. (1983) 'Organised Crime', AGPS, Canberra, pp. 90–92.
(100) Australian Government (1983) 'National Crimes Commission Conference: Record of Proceedings', p. 76.
(101) In 1989, s. 3E of the *Taxation Administration Act 1953* was enacted, authorising the ATO to provide information to any law enforcement agency for the purpose of criminal investigations and proceeds of crime proceedings.
(102) NCA Corporate Plan Objective Six.
(103) Senate Standing Committee on Constitutional and Legal Affairs (1984), above, ref. 98, paras 1.5 & 2.10.
(104) ATO (1985) 'Annual Report 1984–85', pp. 53–54.
(105) *Saffron v The Queen* (1989) 17 NSWLR 395; NCA (1990) 'Annual Report 1989–9', 15.
(106) *Saffron v FCT* (1991) 102 ALR 19; (1993) 26 ATR 57; (1994) 27 ATR 596.
(107) NCA (1988) 'Annual Report 1987–8', pp. 77, 58.
(108) ATO (1989) 'Annual Report 1988–8', 37.
(109) Taylor (1992) 'The Role of the Australian Taxation Office in Confiscation Matters', National Agencies Criminal Assets Conference, Sydney, 1st December, p. 12.
(110) Gallagher (1991) 'The Australian Taxation Office', National Serious White Collar Crime Investigations Seminar, Melbourne, 19th July, 1991, p. 2. Also see Taylor (1990) 'Special Investigations Group' (ATO).
(111) Vince Mitchell, First Assistant Commissioner (ATO), NCA Proceeds of Crime Conference, June 1993, quoted in Freiberg and Fox (2000) 'Evaluating the Effectiveness of Australia's Confiscation Laws' 22 *ANZJC* 239, 257–258. Also see the ATO's annual reports, which include details of tax recoveries in respect of illegal business activities.
(112) Proceeds of Crime Working Party (1993) 'Confiscation and Forfeiture: Legislation and Practice' in NCA (1995) 'National Proceeds of Crime Conference', Sydney, 18th–20th June, 1993, 37 at 177–182.
(113) NCA (1998) 'Annual Report 1997–98', 23–24; NCA (1999) 'Annual Report 1998–1999', pp. 30–33.
(114) NCA (2000) 'Annual Report 1999–2000', p. 34.
(115) The experience of the Swordfish task force is that the ATO ultimately collects approximately 60 per cent of the value of tax assessments issued in NCA investigations, although it often takes a number of years for collections to be made. This collection rate has remained relatively constant over the past decade: NCA (1991) 'Annual Report 1990–91', p. 5.
(116) For example, a large number of non-taxpaying criminals lodged amended tax returns and began paying tax immediately after being interviewed by NCA and ATO investigators, during which they were advised that it would be in their best interests to clean their slate with the ATO and they agreed to do so.
(117) NCA (1998) 'Annual Report 1997–98', 64; NCA (2000) 'Annual Report 1999–2000', 77.
(118) Costigan Commission (1984) above, ref. 87, Vol. 5, para. 9.008.
(119) *Spies v US* 317 US 492, 496 (1943).
(120) *Sansone v US* 380 US 343, 351–54 (1965).
(121) *US v Abodeely* 801 F.2d 1020, 1023 (1986).
(122) *US v Holland* 348 US 121, 126 (1954).
(123) See, for example, *US v Chu* 779 F.2d 356 (1985); *US v Gomez-Soto* 723 F.2d 649, cert. denied 466 US 977 (1984); above, refs. 5 (Capone), 6 (Guzik), 8 (Wexler), 18 (Johnson) and 74 (Giacalone).
(124) *US v Holland* 348 US 121, 125 (1954).
(125) *US v Newman* 468 F.2d 791, 793 (1972); *US v Marrinson* 832 F.2d 1465, 1469–1470 (1987).
(126) *US v Toushin* 899 F.2d 617, 620 (1990); see also *US v Caswell* 825 F.2d 1228 (1987); *US v Sutherland* 929 F.2d 765 (1991).
(127) *US v Abodeely* 801 F.2d 1020, 1024 (1986); see also *US v Ludwig* 897 F.2d 875, 878–879 (1990); *US v Slutsky* 487 F.2d 832, 841 (1973).
(128) *US v Johnson* 319 US 503, 517 (1943); *US v Gardner* 611 F.2d 770, 775 (1980); *US v Thompson* 806 F.2d 1332, 1335 (1986).
(129) *US v Holland* 348 US 121, 135–39 (1954); *US v Costello* 221 F.2d 668, 670–671 (1955); *US v Marrinson* 832 F.2d 1465, 1472 (1987).
(130) *US v Caswell* 825 F.2d 1228, 1231 (1987). Also see Knight (1992) 'Criminal Tax Fraud' 57 *Mo. L. R*. 175, 194.
(131) *Spies v US* 317 US 492, 499 (1943); *US v Jones* 816 F.2d 1483, 1488 (1987).
(132) Graham *et al*. (1997) 'Tax Evasion' 34 *Am. Crim. LR* 1035, 1040–1041.
(133) *US v Cheek* 498 US 192, 201 (1991); *US v Marabelles* 724 F.2d 1374, 1379 (1984).

(134) *US v Pomponio* 429 US 10, 12 (1976).
(135) *US v Ruffin* 575 F.2d 346, 354 (1978); *US v Afflerbach* 547 F.2d 522, 524 (1976).
(136) *US v Collorafi* 876 F.2d 303, 305 (1989); *US v Brown* 591 F.2d 307, 311 (1979); *US v Fawaz* 881 F.2d 259, 265 (1989).
(137) *US v Holland* 348 US 121, 125 & 139 (1954); *US v Smith* 698 F. Supp 589, 592–93 (1988).
(138) Bucy (1997) 'Criminal Tax Fraud: The Downfall of Murderers, Madams and Thieves' 29 *Ariz. St. LJ* 639, 640.
(139) Wolfe, above, ref. 27, 171.
(140) *Ibid.* at 728.
(141) *Ibid.*
(142) *Ibid.* at 712–715.
(143) *Petzoldt v CIR* 92 TC 661, 687–695 (1989); *Giddio v CIR* 54 TC 1530; *Jones v CIR* 903 F.2d 1301 (1990).
(144) *Cohan v CIR* 39 F.2d 540, 544 (1930).
(145) *Petzoldt v CIR* 92 TC 661, 687 (1989).
(146) *Rosano v CIR* 46 TC 681, 687 (1966); *US v Janis* 428 US 433 (1976); *Adamson v CIR* 745 F.2d 541, 544–547 (1984); *Miller v IRS* 237 F.2d 830 (1956); *Schroeder v CIR* 40 TC 30 (1963); *Meneguzzi v CIR* 43 TC 824 (1965); *Webb v CIR* 394 F.2d 366 (1968).
(147) Notices usually, but not always, include supporting schedules giving reasons for the IRS's determination: Schoenfeld (2000) 'A Critique of the Internal Revenue Service's Refusal to Disclose How it "Determined" a Tax Deficiency, and of the Tax Court's Acquiescence with this View' 33 *Ind. L. Rev.* 517, 521–525.
(148) *Welch v Helvering* 290 US 111 (1933).
(149) *Jackson v CIR* 73 TC 394, 400 (1979).
(150) *Helvering v Taylor* 293 US 507, 515 (1935).
(151) *Petzoldt v CIR* 92 TC 661, 688 (1989).
(152) *Weimerskirch v CIR* 596 F.2d 358 (1979).
(153) Furthermore, if the taxpayer challenges the deficiency determination within the 90-day period the IRS must wait until the relevant proceedings have been finalised before it raises an 'assessment'. It is only once an assessment has been raised that the tax becomes 'due and payable' to the Treasury, and it is only after this event that the IRS can take action to collect the taxes: *Bull v US* 295 US 247, 259 (1935).
(154) 26 USC §6861.
(155) 26 USC §6851.
(156) 26 USC §6331.
(157) Rutherford, above, ref. 16, at 707.
(158) 55 TCM (CCH) 1556 (1988).
(159) 59 TCM (CCH) 548 (1990).
(160) 46 TCM (CCH) 330 (1983).
(161) *R v Hudson* [1956] 2 QB 252; *R v Bedford* (1989) 89 Cr. App. R. 1; *R v Mulligan* [1990] Crim LR 427.
(162) *The King v Kidman* (1915) 20 CLR 425, 435–436.
(163) *R v Mavji* (1987) 84 Cr. App. R. 34; *R v Bedford* (1989) 89 Cr. App. R. 1; *R v Nilsson* [1998] EWHC Admin 514 (8th May, 1998); *R v Allen* [1999] EWCA Crim 1917 (7th July, 1999).
(164) *R v Bembridge* (1783) 22 St. Tr. 1, 55.
(165) *R v Mavji* (1987) 84 Cr. App. R. 34; *R v Bedford* (1989) 89 Cr. App. R. 1; also see *R v Nilsson* [1998] EWHC Admin 514 (8th May, 1998).
(166) Section 29D simply provided that: 'A person who defrauds the Commonwealth or a public authority under the Commonwealth is guilty of an indictable offence'. The offence in s. 86(2) extended to any person who conspired 'with another person to commit an offence against section 29D'.
(167) *The King v Kidman* (1915) 20 CLR 425, 435–37; *Peters v R* (1998) 192 CLR 493, 501.
(168) *R v Moussad* [1999] NSWCCA 337, para. 62.
(169) *Barker v R* (1994) 54 FCR 451, 461–462.
(170) *R v Saffron* (1989) 17 NSWLR 395; *R v Morris* [1993] 2 VR 192; *R v Whitnall* (1993) 120 ALR 449; *Barker v R* (1994) 54 FCR 451; *R v Hadba* (1994) 94 ATC 4854; *R v Nguyen & Phan* [1997] 1 VR 386, 389; *R v Tran* (1997) 96 A Crim. R. 53, 55; *R v Do* (1997) 35 ATR 361; also see *Beazley v Steinhardt* [1999] FCA 447, para. 31.
(171) Revised Explanatory Memorandum to the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 2000 (Cth), paras 189–202.
(172) *R v Saffron* (1989) 17 NSWLR 395.
(173) See *Official Trustee in Bankruptcy v Alvaro* [1996] 483 FCA 1.
(174) NCA (1990) 'Annual Report 1989–90', 15; NCA (1991) 'Annual Report 1990–91', 68–72.
(175) *Peters v R* (1998) 192 CLR 493; *DPP v Goldberg* [2001] VSCA 107 (27th July, 2001); *R v Garcia* (unreported, NSW Court of Criminal Appeal, 6th May, 1996).
(176) *Peters v R* (1998) 192 CLR 493, 499 and 537; *DPP v Goldberg* [2001] VSCA 107 (27th July, 2001).
(177) *FCT v Australia & New Zealand Banking Group Ltd* (1979) 143 CLR 499, 536; *Industrial Equity Ltd v DCT* (1990) 170 CLR 649; *May v DCT* (1999) 92 FCR 152; *McCormack v DCT* [2001] FCA 1700.
(178) *FCT v Citibank* (1989) 20 FCR 403.
(179) *Stergis v Boucher* (1989) 86 ALR 174; *Donovan v DCT* (1992) 106 ALR 661; *DCT v De Vonk* (1995) 61 FCR 564.
(180) *DCT v De Vonk* (1995) 61 FCR 564, 583.
(181) *Briggs v DCT (WA)* (1987) 14 FCR 249, 269.
(182) *Eldridge v FCT* (1990) 90 ATC 4907, para. 51.
(183) *Case 31/97* (1997) 97 ATC 334, para. 55; *Gauci v FCT* (1975) 135 81, 89; *Politis v FCT* (1988) 88 ATC 5029, 5032; *FCT v Dalco* (1990) 168 CLR 614, 624–625; *DCT v Richard Walter Pty Ltd* (1995) 183 CLR 168, 200–201.
(184) *Trautwein v FCT* (1936) 56 CLR 63, 87–88; *Briggs v DCT (WA)* (1987) 14 FCR 249, 269–270; *Scallon v FCT* (1989) 89 ATC 4129, 4141.
(185) *George v FCT* (1952) 86 CLR 183.
(186) CCH (2002) 'Australian Federal Tax Reporter', para. 79–610.
(187) See eg *Madden v Madden and Ors* 96 ATC 4268.
(188) See eg *Case 9/95* (1995) ATC 165; *FCT v La Rosa* [2002] FCA 1036.
(189) See eg *L'Estrange v FCT* 78 ATC 4744, 4764–4765; *Case R124* 84 ATC 793, 806; *Case Z34* 92 ATC 314; *Case 20/93* 93 ATC 240; *Greer v DCT* [1999] FCA 933; *DCT v Bayeh* [1999] FCA 1223.
(190) Sections 14ZZK(b) and 14ZZO(b) of the Taxation Administration Act 1953.
(191) *McCormack v FCT* (1979) 143 CLR 284, 302–303, 314, 324; *FCT v Dalco* (1989) 168 CLR 614, 626.
(192) *Case Z23* 92 ATC 235, 238; also see *Trautwein v FCT* (1936) 56 CLR 63, 87–88; *George v FCT* (1956) 86 CLR 183; *FCT v Dalco* (1989) 168 CLR 614.
(193) *FCT v Clarke* (1927) 40 CLR 246, 251; *Trautwein v FCT* (1936) 56 CLR 63, 87; *George v FCT* (1956) 86 CLR 183, 200–201; *McCormack v FCT* (1979) 143 CLR 284, 300–301; *APH Pty Ltd v FCT* (1983) 1 NSWLR 1, 12–13.
(194) CCH, above, ref. 186, paras 977–690–977–780. The previous statutory provision was s. 218 of the ITAA.
(195) Limitations are that 'money' does not include foreign currency (*DFC of T v Conley* 98 ATC 5090) and notices are ineffective against money held in joint bank accounts (*DCT v Westpac Savings Bank* 87 ATC 4346).
(196) *Madden v Madden* 96 ATC 4268; *DCT v Zumtar* 93 ATC 4351; *Re Falzon; Ex parte DCT* 96 ATC 4734.
(197) *DCT v Zumtar* 93 ATC 4351; *DCT v Robertson* [2000] WASC 42; *DCT v Hickey* [1999] FCA 259.
(198) *DCT v Sharp* 88 ATC 4572.

(199) *FCT v Karageorge* (1996) 34 ATR 196.
(200) *DCT v Robertson* [2000] WASC 42.
(201) *Briggs v DCT* 85 ATC 4569; *Seymour v DCT* 92 ATC 4774; *Edelsten v DCT* (1992) 36 FCR 236; *Poletti v DCT* 94 ATC 639; *Eid v FCT* [1998] AATA 73.
(202) NCA (1995) 'Annual Report 1994–95', p. 35.
(203) *Allard v FCT* (1992) 39 FCR 595; *Case 1/96* 96 ATC 101; *Re Falzon; Ex parte DCT* 96 ATC 4734; *DCT v Zumtar* 93 ATC 4351; *Madden v Madden* 96 ATC 4268; *DPP v Kunz* [1999] FCA 302.
(204) *Case 20/93* 93 ATC 240; *DCT v Bayeh* [1999] FCA 1223; *Greer v DCT* [1999] FCA 933; *FCT v La Rosa* [2002] FCA 1036.
(205) *Ma v FCT* (1992) 37 FCR 225, 229–230; *DCT v Robertson* [2000] WASC 42.

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Draft insider dealing Directive approved by European Parliament

The proposed Directive on insider dealing and market manipulation received the European Parliament's approval at second reading on 24th October, 2002. The European Commission is optimistic that the Council of Ministers will be able to accept the small number of amendments made by Parliament and move to final adoption of the Directive before the end of 2002 under the co-decision procedure. Once adopted and implemented, the Directive will:

— increase standards for market integrity;
— contribute to the harmonisation of the rules for market abuse throughout Europe;
— establish a strong commitment to transparency and equal treatment of market participants;
— require closer cooperation and a higher degree of exchange of information between national authorities, thus ensuring the same framework for enforcement throughout the EU and reducing potential inconsistencies, confusion and loopholes.

The proposed Directive will cover all financial instruments admitted to trading on at least one regulated market in the European Union, including primary markets, and will apply to all transactions concerning those instruments, whether those transactions are undertaken on regulated markets or elsewhere. This is to prevent unregulated markets, alternative trading systems and others being used for abusive purposes.

Each member state will be required to designate a single administrative regulatory and supervisory authority with a common minimum set of responsibilities to tackle insider trading and market manipulation. It is not designed to handicap journalists, and introduces several safeguards for them, including the possibility of self-regulation.

The Directive also establishes transparency standards by requiring people who recommend investment strategies to the public or distribution channels to disclose their own relevant interests. In practice, this provision will in particular apply to financial analysts, and to one specific sub-category of financial journalists — those recommending investments to the public. The European Parliament adopted a specific amendment in order to protect those financial journalists giving investment advice by requiring that rules governing their profession, including self-regulation, shall be taken into account by the Commission when establishing technical implementing measures to accompany the Directive.