

A photograph of a lighthouse with a red and white striped tower and a black base, situated on a rocky outcrop overlooking the ocean under a blue sky with scattered clouds.

Viewpoint

Forensic accounting

This piece of legislation had a major impact on the way assets used in the commission of a criminal act and/or assets purchased with the proceeds of criminal activities were restrained.

Proceeds of crime legislation – what will it cost an innocent party?

Lisa Bundesen, Partner, Forensic accounting, BDO Kendalls

Challenge area

The Criminal Proceeds Confiscation Act (“CPCA”) was introduced into Queensland on 1 January 2002. Each state and the Commonwealth has similar legislation and while there are slight differences from state to state, in essence the theme of each piece of legislation is the same.

Prior to the introduction of the legislation in Queensland, the forfeiture of assets were subject to the successful conviction of a person for an indictable offence (e.g. drug trafficking). However, the CPCA changed that. This piece of legislation had a major impact on the way assets used in the commission of a criminal act and/or assets purchased with the proceeds of criminal activities were restrained. The major components of the legislation are:

- It is non conviction based. This means that a person does not have to be found guilty of an offence before assets can be restrained and then forfeited to the Crown.
- It is civil based legislation. This means that the matter is heard in the civil court (where the burden of proof is a ‘balance of probabilities’ and not criminal court where the burden of proof on the prosecution is ‘beyond reasonable doubt’).
- It is a reverse burden of proof. This means that the person whose assets have been restrained must prove how those assets were purchased (i.e. the assets were not purchased with funds from criminal activities) or risk having the assets forfeited to the Crown.



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- Once assets are restrained, the defendant in the action cannot access those assets to help pay for legal and other costs associated with defending the action (i.e. if all assets owned by the person are restrained, that person will not have access to funds to defend the case). If the person is unable to fund a private defence the only option available is to seek Legal Aid. This is a major difference in the Queensland legislation. In other states, defendants whose assets have been restrained are allowed access to those assets to pay for their legal costs.

New perspectives

In an article published by FindLaw.com.au on 20 July 2006, it quotes the then Queensland Attorney-General Linda Lavarch as saying “We are sending a strong message that cheats do not prosper by taking their ill-gotten gains from them”.

It is interesting to note that in the same article the following statistics are quoted:

- “Of the \$11 million civilly restrained by 38 orders in 2005/06, \$2 million in 25 matters has been permanently forfeited.” (Only 18% of the total assets restrained); and
- “Of the total \$36.6 million civilly restrained since 2003, \$4.4 million has been forfeited.” (Only 12% of the total assets restrained).

This raises the question, ‘has this legislation been successful considering the above percentages of assets forfeited to assets restrained?’

The costs involved in the defence of actions taken under this legislation must also be considered. For example, consider the situation of a family member being involved in a criminal activity. As a member of the family, he or she is part owner of a number of investment properties. All properties are restrained under the CPCA. The family must then engage lawyers, Counsel and in many cases other experts to prove that these assets were purchase with legitimate funds. In this situation, it would likely that the family would need the services of a forensic accountant to prove the sources of funds used to purchase each investment property, including where funds were obtained from to make repayments on loans obtained to purchase the properties.

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The way forward

As the CPCA legislation is still relatively new, case law is being made with each new matter that goes before the Courts. However, people should recognise that this legislation could cause a major risk to their assets if they do have a family member or business associate that may be involved in criminal activity. How do you know this? It can be impossible to determine in some instances, but an awareness of the risk must be raised.

About the author

Lisa Bundesen is a Partner in the Forensic Accounting Division in Brisbane. Lisa has extensive experience in both the prosecution and defence of proceed matters having spent almost five years as an Investigative Accountant with the Queensland Police Service and work with lawyers to have assets released from restraining orders.

For more information

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