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Abstract

Federal money laundering offences are contained in Division 400 of the Schedule to the Criminal Code Act 1995 (“Criminal Code”). Division 400 Criminal Code offences are drafted in very broad terms and have resulted in the criminalisation of activities which go beyond traditional notions of money laundering. On the assumption that certainty is a paramount requirement in a State aspiring to the political ideal of the rule of law, this article explores the scope of the offences in Division 400 Criminal Code especially when used in combination with Commonwealth revenue and financial reporting offences (as ‘predicate’ or ‘in prospect’ offences) by reference to some recent superior court decisions. It argues that the regime is too broad to be consistent with the requirement for certainty, and that prosecutorial discretion alone is an inadequate counter balance. Finally, it proposes amendments to the provisions.

Keywords

financial crime, proceeds of crime, money laundering, tax administration, tax crime, tax evasion, tax fraud

MONEY LAUNDERING OFFENCES: OUT WITH CERTAINTY, IN WITH DISCRETION?

MATHEW J LEIGHTON-DALY*

Federal money laundering offences are contained in Division 400 of the Schedule to the Criminal Code Act 1995 ("Criminal Code"). Division 400 Criminal Code offences are drafted in very broad terms and have resulted in the criminalisation of activities which go beyond traditional notions of money laundering. On the assumption that certainty is a paramount requirement in a State aspiring to the political ideal of the rule of law, this article explores the scope of the offences in Division 400 Criminal Code especially when used in combination with Commonwealth revenue and financial reporting offences (as 'predicate' or 'in prospect' offences) by reference to some recent superior court decisions. It argues that the regime is too broad to be consistent with the requirement for certainty, and that prosecutorial discretion alone is an inadequate counter balance. Finally, it proposes amendments to the provisions.

INTRODUCTION

At a Commonwealth level, money laundering is criminalised via Division 400 of the Schedule to the *Criminal Code Act 1995* (Criminal Code). Division 400 *Criminal Code* offences are drafted in very broad terms and have resulted in the criminalisation of activities which go beyond traditional notions of money laundering. The combination of Division 400 *Criminal Code* offences and Commonwealth revenue and financial reporting offences, as possible predicate offences, expands this novel criminal exposure further.

Independent prosecutorial discretion has been identified as a counter balance to the offences in Division 400 *Criminal Code*. The minimum requirements of the political ideal of the rule of law however include certainty and thus the related requirement that administrators not have too much discretion.

This article explores the scope of the offences in Division 400 *Criminal Code* especially when used in combination with Commonwealth revenue and financial reporting offences (as predicate offences). It argues that the regime is too broad to be consistent with the political ideal of the rule of law and that prosecutorial discretion alone is an inadequate counter measure. Finally, it suggests some legislative reform.

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CERTAINTY AND THE RULE OF LAW

Seminal theories¹ on the rule of law may be divided loosely into formal and substantive, or thinner and thicker, conceptions. Professor Campbell explains the significance of the rule of law as a political ideal in relation to both. With regard to the *formal* conception, he observed that the rule of law protects citizenry by:²

requiring governments to rule through the medium of general rules (rather than particular commands) that are couched in sufficiently specific and objective language to make it clear to the subject what is required, prohibited or permitted. In this way the formal conception of the rule of law restricts arbitrariness and brings a degree of clarity and certainty to the exercise of government power. This, it is contended, promotes efficiency, through making the legal rights and obligations of citizens clear practicable and enforceable. At the same time it provides an element of fairness by giving citizens advance warning of their enforceable obligations and making it more difficult for governments to target particular individuals (Fuller 1969).

Contrast here a *substantive* conception, which protects citizens by identifying:³

things which governments must or must not do for or to its citizens, even through the enactment of general and specific rules, thus restricting the scope of legitimate government power. This second function involves a substantive conception of the rule of law which is dependent on its meeting certain basis moral requirements, usually expressed in terms of fundamental human rights (Craig 1997, Allan 2001, Christiano 2008: 172-6).

It can be seen from Campbell's descriptions that the thin or formal conception relates solely to properties which can be stated independently of the content of law such as generality, specificity, and prospectivity. Thick or substantive criteria on the other hand relate to what it is that the rule of law requires, permits or prohibits.

Saunders and Le Roy observe that despite the significance of the rule of law, agreement about its meaning and effect is '*remarkably elusive*'.⁴ They do however observe some agreement on a minimum core of principle and practice: (1) the polity must be governed by general rules that are laid down in advance; (2) these rules (and no other rules) must be applied and enforced; (3) disputes about the rules must be resolved efficiently and fairly; and (4) in common law systems, the government itself is bound by the same rules as citizens and that disputes involving governments are resolved in the same way as those involving private parties.⁵

In order to secure the purpose of these four principles (paraphrasing), Saunders and Le Roy identify that there is no point laying down rules in advance unless they operate prospectively, are publicly available, can be understood, are susceptible of obedience, individually and collectively, are not

¹ A Dicey, (1961), *Introduction to the Study of the Law of the Constitution*; L Fuller, (1969) *The Morality of Law*, H Hart, 'Review of *The Morality of Law*' 78 *Harvard Law Review* 6 (1965), 1281; F Hayek, *The Constitution of Liberty*, (1960); F Neumann, *The Rule of Law: Political Theory and the Legal System in Modern Society*, (1986) and J Raz, *The Authority of Law: Essays on Law and Morality* (1979).

² T Campbell, 'The Rule of Law and Human Rights Judicial Review: Controversies and Alternatives' in I Flores and K Himma (eds), *Law, Liberty, and the Rule of Law* (Springer, 2013), 138.

³ Ibid.

⁴ C Saunders and K Le Roy, *Perspectives on the Rule of Law* in C Saunders and K Le Roy (eds), *The Rule of Law* (The Federation Press, 2003), 3.

⁵ Ibid (citing David Neal, *The Rule of Law in a Penal Colony* (Melbourne: Cambridge University Press, 1991), 67; AV Dicey, *An Introduction to the Study of the Constitution* (London: MacMillan, 1959, 10th edn), 193-4).

changed unreasonably often and the application of rules to particular cases must at least be faithful and consistent and rational and fair. In order to secure the purpose of the minimum core of the rule of law, administrators must have neither too little nor too much discretion.⁶ In this regard Raz said, perhaps famously, ‘*all laws should be prospective, open and clear... An ambiguous, vague, obscure or imprecise law is likely to mislead or confuse at least some of those who desire to be guided by it.*’⁷

Both legal research methodologies and the practice of law embody the minimum core of the political ideal of the rule of law.⁸ Justice Pagone (writing extra-curially) observed:⁹

Certainty is the foundation of the lawyer’s craft and is, perhaps, the only contribution that makes us useful to clients and society. It is the lawyer’s ability to predict the application of the law that helps us organise relations between people and their personal affairs, business relations and dealings with government. Without a reliable degree of certainty, contracts would be worthless and ongoing ordinary relations and dealings would be at risk of whim and fancy. Certainty in the law is fundamental to the rule of law...

The rule of law requirement that all laws should be prospective, open and clear and its manifestation in law requiring certainty is assumed to be both fundamental and paramount in any state which aspires to the political ideal of the rule of law. This article will now analyse the offence regime created by Division 400 *Criminal Code* against these principles especially when used in combination with Commonwealth revenue and financial reporting offences (as predicate or in prospect offences).

MONEY LAUNDERING AND ITS CRIMINALISATION

According to the Australian Law Reform Commission (ALRC), money laundering is practised for two purposes:¹⁰

Firstly, insofar as un laundered property or money may have evidentiary value in relation to establishing the commission of a substantive offence, the laundering is aimed at reducing the likelihood of prosecution for that offence. Secondly, and usually more importantly, the process involves conversion processes, often intricate and elaborate, designed to make it appear that the property has a legitimate source and hence represents neither forfeitable nor taintable...

⁶ Ibid.

⁷ J Raz, ‘The Rule of Law and its Virtue’ (1977) *Law Quarterly Review* 195, 198.

⁸ In relation to the former, The Pearce Committee defined doctrinal research as ‘*research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments*’: Dennis Pearce, Enid Campbell, and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission: A Summary*, (1987) 6. More recently Professor McKerchar wrote (omitting references) [*D*]octrinal research is typically based on the “black-letter” (or literal) analysis or formal legal rules and principles. It tends to rely on a distinctly deductive form of legal reasoning and on the researcher’s ability to develop arguments and provide reasonings that are based on the law (which includes case law). This is achieved by providing “a highly technical commentary upon, and systematic exposition of, the content of legal doctrine...”: M McKerchar (Thomson, 2010) *Design and conduct of research in tax, law and accounting*, [5.200]. In relation to the practice of law, Lord Diplock said in *Merkur Island Shipping Corp v Laughton* [1983] 2 WLR 778 (at 790), ‘*Absence of clarity is destructive to the rule of law.*’

⁹ G Pagone, ‘Tax Uncertainty’ (1993) 3(3) *Melbourne University Law Review*, 886-887.

¹⁰ Australian Law Reform Commission’s Report number 87, ‘*Confiscation that counts A review of the Proceeds of Crime Act 1987*’ (31 March 1999) (“ALRC87”).

Precursor to Division 400 Criminal Code offences: The proceeds of Crime Act 1987 (Cth)

Despite its obvious criminal character, traditional concepts of money laundering (as distinct from the conduct giving rise to the proceeds of crime) were only criminalised relatively recently. The Commonwealth first created specific offences and related prosecutorial provisions for 'money laundering' by way of ss 81 - 85 Proceeds of Crime Act 1987 (Cth) ("POCA"). These contained both criminal offence provisions and a civil restraint, forfeiture and a pecuniary penalty regime.

Central to these old provisions were a number of key definitions, which applied to both the civil and criminal regulatory responses. These were defined in s 4 POCA:

"benefit" includes service or advantage;

"proceeds", in relation to an offence, means any property that is derived or realised, directly or indirectly, by any person from the commission of the offence;

"proceeds of crime" means:

- (a) proceeds of an indictable offence; or
- (b) any property that is derived or realised, directly or indirectly, by any person from acts or omissions that:
 - (i) occurred outside Australia;
 - (ii) related to a narcotic substance; and
 - (iii) would, if they had occurred in Australia, have constituted an indictable offence or a State indictable offence.

"property" means real or personal property of every description, whether situated in Australia or elsewhere and whether tangible or intangible and includes an interest in any such real or personal property;

"tainted property", in relation to an offence, means:

- (a) property used in, or in connection with, the commission of the offence; or
- (b) proceeds of the offence; and when used without reference to a particular offence means tainted property in relation to an indictable offence.

"unlawful activity" means an act or omission that constitutes an offence against a law in force in the Commonwealth, a State, a Territory or a foreign country.

Section 81 POCA created the offence of '*money laundering*'. Section 82, '*Possession etc. of property suspected of being proceeds of crime*'. Section 83, '*Organised fraud*'. Sections 84 and 85 POCA dealt with the prosecution of these offences and conduct by directors, servants or agents respectively. The key offence, s 81 POCA, was drafted in the following terms:

81. Money Laundering

- (1) In this section: "transaction" includes the receiving or making of a gift;
- (2) A person who, after the commencement of this Act, engages in money laundering is guilty of an offence against this section punishable, upon conviction; by:
 - (a) if the offender is a natural person-a fine not exceeding \$200,000 or imprisonment for a period not exceeding 20 years, or both; or

- (b) if the offender is a body corporate-a fine not exceeding \$600,000.
- (3) A person shall be taken to engage in money laundering if, and only if:
 - (a) the person engages, directly or indirectly, in a transaction that involves money, or other property, that is proceeds of crime; or
 - (b) the person receives, possesses, conceals, disposes of or brings into Australia any money, or other property, that is proceeds of crime; and the person knows, or ought reasonably to know, that the money or other property is derived or realised, directly or indirectly, from some form of unlawful activity.

The criminal regime in the POCA was the subject of criticism in both academic and curial contexts. Professor Fisse observed:¹¹

The war declared against organised crime in Australia has generated a new despotism in Commonwealth criminal law. We are now beginning to see major offences defined in such sweeping terms that the scope of liability depends very little on law and very much on administrative discretion. This despotism has gone to the extent of exposing lawyers, accountants, stockbrokers and financial institutions to an unwarranted risk of prosecution in their everyday professional or business lives.

Fisse ultimately went on to conclude:¹²

The rise of money-laundering and related offences under POC has been accompanied by the fall of basic principles of criminal liability. This is a regrettable legislative achievement, of totalitarian bent. Doubtless, the wise exercise of prosecutorial discretion will do much to minimise the risk of injustice, but the discretion of the Director of Public Prosecutions and his officers is no substitute for the guarantees provided by rule of law.

Professor Fisse's observations were cited by Kirby P in the NSW Court of Appeal in *Saffron v Director of Public Prosecutions*¹³ His Honour went on to cite criticisms by Allen J in *R v Bolger*¹⁴ and the Court of Criminal Appeal in *R v Lake*¹⁵ describing the regime as '*lamentable*'. Analogous legislation in foreign jurisdictions received a similar response. For example, in 1989,¹⁶ Judge Sentelle of the United States Court of Appeals delivered a paper in relation to the United States' *Racketeer Influenced and Corrupt Organizations Act* (RICO) and likened its creator to Dr Frankenstein:

[T]he well-meaning but bumbling scientist who released the monster on the world and in spite of the cries and whispers of throngs of people, does little or nothing to recall, restrain or reform his creation.

While a review of the POCA was conducted by the ALRC and published on 8 July 1999¹⁷ its emphasis appears to have been on the civil forfeiture regime rather than criminal offence provisions. There also appears to have been little analysis of how POCA interrelates with revenue and financial reporting offences.

¹¹ B Fisse, 'The Proceeds of Crime Act The Rise of Money-Laundering Offences and the Fall of Principle' (1989) 13 *Criminal Law Journal* (1989), 5.

¹² Fisse, above n 10, 23 (omitting footnote).

¹³ *Saffron v Director of Public Prosecutions* (1989) 87 ALR 151, 199.

¹⁴ *R v Bolger* (1989) 16 NSWLR 115.

¹⁵ *R v Lake* (Unreported, Court of Criminal Appeal, 26 May 1989).

¹⁶ D Sentelle, 'RICO: The Monster That Ate Jurisprudence' (delivered on 18 October 1989 at Rico, Rights and the Constitution, Cato Institute Seminar, Washington, D.C.).

¹⁷ Confiscation that Counts: A Review of the Proceeds of Crime Act 1987 (ALRC Report 87).

POCA and financial offences

The concepts – defined in s 4 POCA – of ‘benefit’ and ‘tainted property’ (and the latter’s sub-concept of ‘proceeds’) are not definitions found in the tax law. In the case of tax debts arising as a result of tax evasion, or *tax-related liabilities*, s 2 *Taxation Administration Act 1953* (Cth) (TAA) provides that ‘taxation law’ has the meaning given by the *Income Tax Assessment Act 1997* (ITAA97). Section 995.1 of the ITAA97 defines ‘taxation law’ to mean: ‘(a) an Act of which the Commissioner has the general administration (including a part of an Act to the extent to which the Commissioner has the general administration of the Act)’. That would include the *Income Tax Assessment Act 1936* (Cth) (ITAA36). Section 166 ITAA36 provides that the Commissioner of Taxation ‘shall make an assessment of the amount of the taxable income ... of any taxpayer, and of the tax payable thereon ...’. That ‘tax payable’ would be a ‘pecuniary liability to the Commonwealth’ for the purposes of cl 255-1 of Schedule 1 of the TAA, and thus a ‘tax-related liability’. Under cl 255-5(1) of Schedule 1 of the TAA, ‘An amount of a *tax-related liability that is due and payable: (a) is a debt due to the Commonwealth...’ and under cl 255-5(2), the Commissioner ‘may sue in his or her official name in a court of competent jurisdiction to recover an amount of a *tax-related liability that remains unpaid after it has become due and payable’. Tax-related liabilities then are choses in action or unsecured debts arising by virtue of the relevant tax law.

The NSW Court of Appeal considered the relationship between tax-related liabilities and the POCA in *Saffron v DPP* (Cth).¹⁸ Here, after being convicted of a conspiracy to evade the payment of income tax, an order was sought that the offender pays to the Commonwealth a pecuniary penalty pursuant to s 26 POCA commensurate with the ‘benefits derived’ by the defendant from the commission of the offence. The substantive relief was stood over pending the outcome of the appellate process but a restraining order was sought in the interim. The power to make a restraining order was contained within s 44 POCA. Section 44 drew a distinction between an ‘indictable offence’ and a ‘serious offence’¹⁹ and otherwise prescribed the circumstances where such an order could be made. Section 44(5) and 44(6) POCA dealt with restraining ‘specified property’ and property ‘other than specified property’ respectively. In the case of ‘specified property’, s 44(5)(c) POCA required:

- (a) the application is supported by an affidavit of a police officer stating that the officer believes that:
 - (i) the property is tainted property in relation to the offence; or
 - (ii) the defendant derived a benefit, directly or indirectly, from the commission of the offence; and
- (b) the court is satisfied, having regard to the matters contained in the affidavit, that there are reasonable grounds for holding that belief (emphasis added).

In the case of property ‘other than specified property’, s 44(6)(c) prescribed:

- (c) the application is supported by an affidavit of a police officer stating that the officer believes that the defendant derived a benefit, directly or indirectly, from the commission of the offence; and

¹⁸ *Saffron v Director of Public Prosecutions* (1989) 87 ALR 151

¹⁹ Defined in s 4 POCA to mean:

“(a) a serious narcotics offence;

(b) an organised fraud offence; or

(c) a money laundering offence in relation to the proceeds of a serious narcotics offence or an organised fraud offence; and includes an ancillary offence in respect of an offence referred to in paragraph (a), (b) or (c).”

- (d) the court is satisfied, having regard to the matters contained in the affidavit, that there are reasonable grounds for holding that belief (emphasis added).

It will be recalled from the above discussion that both ‘*benefit*’ and ‘*tainted property*’, were defined in s 4 POCA. The broad, inclusive definition of ‘benefit’ may be contrasted here with the exclusive definition of ‘tainted property’, which means, ‘property used in, or in connection with, the commission of the offence’, or ‘*proceeds*^[20] of the offence’. ‘Proceeds... means any property that is derived or realised, directly or indirectly, by any person from the commission of the offence.’ These definitions, it is suggested, provided for a *one-way* overlap between the concepts of ‘benefit’ – which is the broader concept – and ‘proceeds’ which is much narrower. In the case of a *tax-related liability* arising as a result of tax evasion, there is unquestionably a benefit obtained on the part of the tax evader. But there are no proceeds per se because the tax-related liability is simply an unsecured debt arising by virtue of formulae articulated in the tax law. There is no causal connection.

The writer’s analysis is consistent with the decision in *Saffron*. In his leading judgment Kirby P²¹ noted ‘it is not suggested in this case that the property is “tainted property” as defined. But it is suggested that the applicant “derived a benefit, directly or indirectly...”’ These comments acknowledge or assume the distinction between ‘proceeds’ (and a causal requirement between the offence and the proceeds) and the more opaque concept of ‘benefit’ identified above by reference to the POCA definitions. As was noted, it was suggested that the latter included the former but not vice versa: a ‘benefit’ for the purposes of the then POCA civil pecuniary penalty order provisions must be capable of ascertainment but is not necessarily property in an enforceable sense. Such a distinction did result in the POCA provisions having some bounds in that criminal prosecution for money laundering was limited to ‘proceeds’ (and therefore ‘property’) as opposed to ‘benefits’ more generally.

This distinction appears to have become blurred however by the subsequent decision of DPP (*Cth*) *v* *Jeffrey*.²² Here the applicant was convicted of a drug-related offence, which was a ‘serious offence’²³ for the purposes of the POCA. Restraining orders were made more generally in relation to property in which the applicant had an interest. This property was acquired using income in relation to which income tax returns had not been lodged.

²⁰ “Proceeds” was also defined in s 4 POCA to mean “any property that is derived or realized, directly or indirectly, by any person from the commission of the offence”.

²¹ *Saffron v DPP (Cth)* (1989) 87 ALR 151, 201.

²² *DPP (Cth) v Jeffrey* (1992) 58 A Crim R 310.

²³ Defined in s 4 to mean:

“(a) a serious narcotics offence;

(b) an organised fraud offence; or

(c) a money laundering offence in relation to the proceeds of a serious narcotics offence or an organised fraud offence; and includes an ancillary offence in respect of an offence referred to in paragraph (a), (b) or (c).”

The predicate offence here was said to arise under s 8C TAA.²⁴ At page 322 Hunt CJ said about the property acquired with income in relation to which income tax returns had not been lodged:

The applicant had the use of the funds whilst available to him which would have been payable if he had not committed the offences ... and property acquired with those funds would in my view have been derived indirectly from the commission of the offences in accordance with the reasoning applied in Saffron's case...

An offence under s 8C(1)(a) TAA only crystallises if a s 162 ITAA36 notice has issued and not been complied with. Section 8C(1)(a) TAA does not create an offence at the end of a financial year or associated lodgment period. Putting these matters to one side, even if a s 162 ITAA36 notice had issued (and not been complied with), the income not reported (and associated tax not paid) in the relevant income tax returns is a benefit by way of an increase in the net worth of the taxpayer (in not having to pay – or delaying payment pending detection – the unsecured tax-related liability). This analysis it is suggested is consistent with the distinction acknowledged by Kirby P in *Saffron*. In *Jeffrey* on the other hand, the Chief Justice appears to be saying that the '*use of the funds*' or benefit derived by the taxpayer from the non-payment of tax is the same thing as an indirect derivation of property for the purposes of '*proceeds*'. In other words on the Jeffrey analysis there is no need for a causal connection between the offence and the proceeds.

DIVISION 400 CRIMINAL CODE

In 2002, the Commonwealth's money laundering offences were expanded at the same time as being relocated into the Schedule to the *Criminal Code*. The new regime created different offences, in pairs, graded in descending order of seriousness. Generally, the seriousness depends upon the accused's state of mind. From a certainty perspective, the grading of the money laundering offences in terms of seriousness must be regarded as a positive step towards achieving more certainty in relation to the possible application of the regime amongst lawyers (as advisers) and the citizenry more generally. Nevertheless, for reasons developed below, it is suggested that the scope of the offences remains far too broad.

Section 400.3 *Criminal Code* creates offences where the relevant property is worth \$1,000,000.00 or more and is illustrative of the form of words used by the other objectively less serious offences.

²⁴ Section 8C TAA provides:

"8C Failure to comply with requirements under taxation law,

(1) A person who refuses or fails, when and as required under or pursuant to a taxation law to do so:
(a) to furnish an approved form or any information to the Commissioner or another person; or ..."

It is unclear from the reasons for his Honour's decision whether the prerequisite for an offence under s 8CTAA – namely the issuing of a s 162 ITAA36 notice – had issued.

It provides:

- (1) A person is guilty of an offence if:
 - (a) the person deals^[25] with money or other property; and
 - (b) either:
 - (i) the money or property is, and the person believes it to be, proceeds of crime; or
 - (ii) the person intends that the money or property will become an instrument of crime; and
 - (c) at the time of the dealing, the value of the money and other property is \$1,000,000 or more.

Penalty: Imprisonment for 25 years, or 1500 penalty units, or both.

- (2) A person is guilty of an offence if:
 - (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is proceeds of crime; or
 - (ii) there is a risk that the money or property will become an instrument of crime;and
 - (c) the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
 - (d) at the time of the dealing, the value of the money and other property is \$1,000,000 or more.

Penalty: Imprisonment for 12 years, or 720 penalty units, or both.

- (3) A person is guilty of an offence if:
 - (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is proceeds of crime; or
 - (ii) there is a risk that the money or property will become an instrument of crime; and
 - (c) the person is negligent as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and

²⁵ Section 400.2 *Criminal Code* provides:
“A person deals with money or other property if the person does any of the following:
(a) receives, possesses, conceals or disposes of money or other property;
(b) imports money or other property into Australia;
(c) exports money or other property from Australia;
(d) engages in a banking transaction relating to money or other property.”

- (d) at the time of the dealing, the value of the money and other property is \$1,000,000 or more.

Penalty: Imprisonment for 5 years, or 300 penalty units, or both (emphasis added).

Post Division 400 *Criminal Code*, the definition of '*property*' did not change from that contained in the POCA.²⁶ Common to all offences are the concepts of '*instrument of crime*' and '*proceeds of crime*'. The distinction between the two is temporal. The former concerns a case in which a crime had already been committed and the latter where a crime was in prospect.²⁷

Instrument of crime

Section 400.1 *Criminal Code* defines '*instrument of crime*' as follows:

instrument of crime: money or other property is an instrument of crime if it is used in the commission of, or used to facilitate the commission of, an offence against a law of the Commonwealth, a State, a Territory or a foreign country that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

The relevant *Explanatory Memorandum* provided that the definition:²⁸

Introduces a new concept for the purposes of the money laundering offences which were previously only concerned with 'proceeds of crime'. Consistent with recommendation 22 of the ALRC report, the definition extends the coverage to money or property used in the commission of, or to facilitate the commission of an indictable offence. However, it is not a new concept in the context of proceeds of crime legislation. A similar concept is used as part of the definition of 'tainted property' in section 4 of the PoC Act 1987 and in clause 338 of the PoC Bill.

It was this '*instrument of crime*' emanation of the offence which was thought to result in novel criminalisation. In *Milne v R*²⁹, a tax-related prosecution, the Court of Criminal Appeal gave the concept a '*broad and purposive interpretation*'.³⁰ More recently however the High Court took a different view in *Milne v R*³¹. Here French CJ, Hayne, Bell, Gageler and Keane JJ held at paragraph [37]:

The definition of "instrument of crime" and the deployment of that term in s 400.3(1)(b)(ii) require a temporal separation between the requisite dealing and the intended use of the property. They also require an instrumental connection between the intended use of property and the commission or facilitation of the commission of an offence. Conduct involving property which is no more than a necessary condition of the commission of a subsequent offence does not on that account amount to the use of the property in or to facilitate the commission of that offence. Nor is the instrumental connection demonstrated merely by an intention to take advantage of circumstances arising after and as a result of the requisite dealing. A fortiori, that is the case where that property has been put beyond the reach of the accused by sale to a third party.

²⁶ See s 400.1 *Criminal Code*.

²⁷ *Chen v Director of Public Prosecutions* (Cth) (2011) 83 NSWLR 224 at 230 [17] per Basten J A, 224 [87] and *R v Ansari* [2007] NSWCCA 204; (2007) 70 NSWLR 89 at 94 [15] per Simpson J.

²⁸ Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002 Explanatory Memorandum, 4.

²⁹ *Milne v R* (2012) 259 FLR 42; (2012) 219 A Crim R 237; [2012] NSWCCA 24.

³⁰ *Ibid* 135.

³¹ *Milne v R* (2014) 305 ALR 477; (2014) 88 ALJR 395; [2014] HCA 4.

This requirement for a temporal separation between the dealing with the relevant property and that property's intended use and instrumental connection between the intended use of the property and the commission or facilitation of the in prospect offence reduces the scope of '*instrument of crime*' offences significantly. For example where the in prospect offence involves a misrepresentation of some sort (for example, understating income in an income tax return or making a false statement in a statutory declaration), the '*instrument of crime*' provisions would appear not to be available because there has been no '*use*'. Similarly, it is suggested that a sham paper trail created in association with financial transactions in an attempt to conceal the true position would be in the same position.

The *Financial Transaction Reports Act 1988* (FTRA) and the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF) (especially Part 12 of Part II) contain offences in relation to structuring financial transactions. Section 31 FTRA contains offences so as to avoid reporting requirements. Subsection 31(1) FTRA is illustrative of these proscriptions:

- 1) A person commits an offence against this section if:
 - (a) the person is a party to 2 or more non-reportable cash transactions; and
 - (b) having regard to:
 - (i) the manner and form in which the transactions were conducted, including, without limiting the generality of this, all or any of the following:
 - (A) the value of the currency involved in each transaction;
 - (B) the aggregated value of the transactions;
 - (C) the period of time over which the transactions took place;
 - (D) the interval of time between any of the transactions;
 - (E) the locations at which the transactions took place; and
 - (ii) any explanation made by the person as to the manner or form in which the transactions were conducted;
it would be reasonable to conclude that the person conducted the transactions in that manner or form for the sole or dominant purpose of ensuring, or attempting to ensure, that the currency involved in the transactions was transferred in a manner and form that:
 - (iii) would not give rise to a significant cash transaction; or
 - (iv) would give rise to exempt cash transactions (emphasis added).

Subsection 31(1) FTRA creates a similar offence in the case of non-reportable transfers of currency. In both cases, the penalty is imprisonment for 5 years or – by operation of s 4B(2) Crimes Act 1914 (Cth) – a fine instead of or in addition to imprisonment.

Suppose that a person deals with property with the intention of avoiding reporting requirements under the FTRA. The act of being party to non-reportable cash transactions in circumstances where '*it would be reasonable to conclude that the person*' conducted the transaction to avoid reporting obligations is an offence. Even here, there would not appear to be the requisite temporal separation. Thus *Milne* would also appear to overrule cases like *DPP (Cth) v Studman*³² to the extent that it was found that the relevant property was an '*instrument of crime*'.

³² *DPP (Cth) v Studman* [2007] NSWCA 285 (see [48]).

Proceeds of crime

In relation to the ‘*proceeds of crime*’ emanation of the offences, the old POCA definitions of ‘*proceeds*’ and ‘*proceeds of crime*’ were replaced with the following definition in s 400.1 *Criminal Code*.

proceeds of crime means any money or other property that is wholly or partly derived or realised, directly or indirectly, by any person from the commission of an offence against a law of the Commonwealth, a State, a Territory or a foreign country that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

Despite the new definition however the Explanatory Memorandum provided that the definition of ‘proceeds of crime’ ‘is similar in effect to the definition in s 4 of the PoC Act 1987, so this aspect of the new money laundering offences remains much the same. It is restricted to the proceeds of indictable offences.’³³

It will be recalled from above that it was suggested that the conceptual distinction acknowledged by the NSW Court of Appeal in *Saffron* was perhaps blurred by the later NSW Supreme Court case of *Jeffrey* with the consequence that a ‘benefit’ derived by a taxpayer from the non-payment of tax via an improved net position is taken to be the same thing as an indirect derivation of property for the purposes of ‘proceeds’ (at least for the purpose of civil POCA proceedings). Thus there was a conflation of the concepts of ‘proceeds’ (which includes ‘property’) and the more abstract concept of ‘benefit’. This conflated approach has now also been held to apply in criminal prosecutions for money laundering pursuant to Division 400 of the Criminal Code. In *Isbester v R*³⁴, Mr Isbester was convicted of one offence under s 400.4(2) Criminal Code which provided:

A person is guilty of an offence if:

the person deals with money or other property; and

(i) the money or property is proceeds of crime

and

(a) the person is reckless as to the fact that the money or property is proceeds of crime...; and

(b) at the time of the dealing, the value of the money and other property is \$100,000 or more.

Mr Isbester appealed his conviction arguing a change in a taxpayer’s net worth by virtue of a greater or lesser chose in action in favour of the Commissioner of Taxation did not give rise to the circumstance that the otherwise lawfully earned net income of the taxpayer was the ‘*proceeds of crime*’. This argument was rejected. Hoeben CJ (with whom Latham and Bellew JJ agreed) said at [44]:

Another way of expressing the findings in *Saffron v DPP* is that *Saffron* directly derived the money he should have paid in tax because he retained it to use as he saw fit. Similarly, his profits cannot have been indirectly derived from the commission of an offence unless the cash which represented the unpaid tax was directly derived from the same offending. Inherent in the approach of Hunt CJ ...in *Jeffrey* was a finding that the money made available by the tax evasion offence was directly derived by the commission of that offence.

³³ Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002 Explanatory Memorandum, 4.

³⁴ *Isbester v R* [2013] NSWCCA 230. An application for special leave to appeal was refused in *Isbester v The Queen* [2014] HCATrans 83. It is acknowledged that the author appeared for the unsuccessful appellant led by Mr Stephen Odgers SC.

The Court of Appeal in Jeffrey but moreover the Court of Criminal Appeal in Isbester appear to have re-characterised the Court of Appeal's approach in Saffron from a 'benefit' to 'proceeds'. The consequence of such an interpretation is that contemporary money laundering offences have a broader application than their predecessors in the context of revenue crime as well as generally. These decisions confirm that, in relation to contemporary money laundering offences, not only has there been a fall of basic principles of criminal liability (as identified by Fisse and discussed above) but there has also been a conflation of traditionally separate concepts or doctrine.

Another jurisprudence-eating monster?

Another way of understanding the effect of these provisions in a financial sphere is from the point of view of an *in relation to* postulate: Jeffrey and Isbester confirm that Division 400 Criminal Code offences do not require a causal connection. In other words, property may apparently be rendered the '*proceeds of crime*' when a crime has been committed merely *in relation to* that property. This is perhaps best illustrated by the use of revenue offences as predicate offences identified above. However by analogy, any false declaration (or even misrepresentation) in relation to property (for example a Statutory Declaration or application form) would appear to similarly create the circumstance that the property to which the misrepresentation relates is the '*proceeds of crime*'.

The irrelevance of mens rea

The traditional criminal law convention that a person must have a guilty mind or *mens rea* ('*fault elements*' in the Federal sphere – see Division 5 *Criminal Code*³⁵ – such as intention, knowledge or dishonesty) (*mens rea*) in order to commit an offence is not necessarily available as a counterbalance to the breadth of criminalisation resulting from Division 400 of the *Criminal Code*.

Predicate offences and 'proceeds of crime'

Because a predicate offence for the purposes of the money laundering offences in Division 400 *Criminal Code* need only be an indictable offence³⁶, there is a suite of offences which could create the circumstance that property is the '*proceeds of crime*' irrespective of the intention(s) of the persons dealing with it. Offences under FTRA (especially s 31 FTRA which was quoted above), AML/CTF or TAA, which carry 12 months or even 2 years imprisonment for example, would be predicate offences for the purposes of Division 400 *Criminal Code*. They do not require *mens rea*.

Money laundering offences

Similarly, from the point of view of the person actually '*dealing*' with the '*proceeds of crime*' (whether or not they are the same person) they do not necessarily have to have *mens rea* either. Section 400.9 *Criminal Code* creates an offence for '*dealing with property reasonably suspected of being proceeds of crime etc.*'. It is drafted as follows:

- (1) A person commits an offence if:
 - (a) the person deals with money or other property; and
 - (b) it is reasonable to suspect that the money or property is proceeds of crime; and

³⁵ See Division 5 of Part 2.2 Chapter 2 *Criminal Code*.

³⁶ An indictable offence is an offence '*against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months*' s 4G *Crimes Act 1914* (Cth).

- (c) at the time of the dealing, the value of the money and other property is \$100,000 or more.

Penalty: Imprisonment for 3 years, or 180 penalty units, or both.

(1A) A person commits an offence if:

- (a) the person deals with money or other property; and
- (b) it is reasonable to suspect that the money or property is proceeds of crime; and
- (c) at the time of the dealing, the value of the money and other property is less than \$100,000.

Penalty: Imprisonment for 2 years, or 120 penalty units, or both.

(2) Without limiting paragraph (1)(b) or (1A)(b), that paragraph is taken to be satisfied if:

- (a) the conduct referred to in paragraph (1)(a) involves a number of transactions that are structured or arranged to avoid the reporting requirements of the Financial Transaction Reports Act 1988 that would otherwise apply to the transactions; or
- (aa) the conduct involves a number of transactions that are structured or arranged to avoid the reporting requirements of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 that would otherwise apply to the transactions; or
- (b) the conduct involves using one or more accounts held with ADIs in false names; or
- (ba) the conduct amounts to an offence against section 139, 140 or 141 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006; or
- (c) the value of the money and property involved in the conduct is, in the opinion of the trier of fact, grossly out of proportion to the defendant's income and expenditure over a reasonable period within which the conduct occurs; or
- (d) the conduct involves a significant cash transaction within the meaning of the Financial Transaction Reports Act 1988, and the defendant:
 - (i) has contravened his or her obligations under that Act relating to reporting the transaction; or
 - (ii) has given false or misleading information in purported compliance with those obligations; or
- (da) the conduct involves a threshold transaction (within the meaning of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006) and the defendant:
 - (i) has contravened the defendant's obligations under that Act relating to reporting the transaction; or
 - (ii) has given false or misleading information in purported compliance with those obligations; or
- (e) the defendant:
 - (i) has stated that the conduct was engaged in on behalf of or at the request of another person; and
 - (ii) has not provided information enabling the other person to be identified and located.

(4) Absolute liability applies to paragraphs (1)(b) and (c) and (1A)(b) and (c).

- (5) This section does not apply if the defendant proves that he or she had no reasonable grounds for suspecting that the money or property was derived or realised, directly or indirectly, from some form of unlawful activity.

Note: A defendant bears a legal burden in relation to the matter in subsection (5) (see section 13.4).

In other words, it creates an offence where a person deals with the proceeds of crime and 'it is reasonable to suspect that the money or other property is proceeds of crime'. Thus property could be rendered the proceeds of crime and dealt with for the purposes of Division 400 Criminal Code without *mens rea*. The effect of the operation of the provisions in Division 400 Criminal Code, collectively, is novel, arbitrary criminalisation counterbalanced only by prosecutorial discretion.

SOME SUGGESTIONS FOR REFORM

Following the decision of *Milne* the '*instrument of crime*' incarnation of the money laundering offences appears to have been narrowed to the point where their application in the context of revenue or other financial offences is questionable. Otherwise, it is submitted that the level of criminal exposure created by Division 400 *Criminal Code* in financial contexts creates too much uncertainty on the part of lawyers (as advisers) and the citizenry more generally. Moreover, it potentially exposes very large numbers of law-abiding, working class citizens (accountants, financial services industry professionals and of course lawyers) to the mercy of the Executive. That is not to say that the various emanations of the Commonwealth do or would have a tendency to act unreasonably in relation to the administration of Division 400 *Criminal Code* but it is submitted that such a level of criminalisation, and associated discretion, is not in keeping with the rule of law's requirement for certainty.

There are some relatively minor amendments which could be made to Division 400 *Criminal Code* in order to minimise its novel and arbitrary criminalisation in a financial context:

Amendment of definition of 'proceeds of crime'

In order to avoid the consequence of money or other property being the '*proceeds of crime*' where it only relates to a criminal offence (as distinct from requiring a causal connection), the definition of '*proceeds of crime*' could be amended and qualified in this regard.

Amend the definition of '*indictable offence*'

Further or alternatively, the application of the provisions could be limited to cases involving *mens rea*. Again, this could be achieved via a minimalist amendment: references to '*indictable offences*' could be amended. For example, a term analogous to that in the *Crimes Act 1900* (NSW) could be utilised - '*Serious indictable offence*' means an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more'. This would preclude property being rendered the proceeds of crime in the absence of *mens rea*.

Repeal s 400.9 *Criminal Code*

Finally, by repealing this offence, it would require actual *mens rea* on the part of the person dealing with the property (in other words, intention, knowledge, recklessness or negligence).

CONCLUSIONS

This work has analysed the scope of the offences in Division 400 Criminal Code especially when used in combination with revenue and financial offences (as the relevant predicate or in prospect offences). It argued that notwithstanding the grading of the offences in terms of seriousness following the relocation of money laundering offences into the Criminal Code and the recent High Court decision of *Milne* which qualified the ‘instrument of crime’ incarnation of the offences that the provisions remain too broad to be in keeping with rule of law’s requirement for certainty. Some amendments were proposed which would limit the application of the provisions to cases where property does not only or merely relate to an offence (rather, it is causally either directly, or indirectly derived) and involves *mens rea* both in relation to the predicate or in prospect offence and subsequent dealing or money laundering offence.