
CONFISCATING THE PROCEEDS OF CRIME

by Evelyn McWilliams

*My object all sublime, I shall achieve in time, To let the punishment fit the crime,
The punishment fit the crime.*

The Mikado, Gilbert and Sullivan

Confiscating the proceeds of crime is an attractive proposition, particularly in the war against drug traffickers and in cases of white collar crime. It also provides an additional, and most welcome, source of revenue to severely depleted government coffers.

As well as a raft of State legislation, Commonwealth legislation such as the *Proceeds of Crime Act 1987* and the *Cash Transaction Reports Act 1988* provide for confiscating proceeds of crime, money laundering and cash transaction reporting. They function in the criminal justice system, not so much as a punishment for an offence but as a deterrent, to demonstrate that, sometimes at least, crime does not pay. The problem for the courts has been to follow through the legislative intention that forfeiture should be an additional penalty to the normal sentence, whilst striving for that 'sublime object' of letting the punishment fit the crime.

Is forfeiture appropriate

In his paper presented to the 1991 Australian Legal Convention, Brent Fisse, a law Professor at the University of Sydney, argues that courts have tended to tackle the problem of inflicting excessive cumulative punishment by assigning a proportional role to discretionary forfeiture. In unravelling the problems involved in making forfeiture 'proportionate' to the severity of the sentence, Fisse questions the wisdom of the sanction of forfeiture itself.

In his examination of recent case law, Fisse finds that courts employ a wide discretion in forfeiting tainted property. He argues that the Victorian Court of Criminal Appeal has sought to avoid divorcing assessment of sentence from assessment of forfeiture. In New South Wales, the Court of Criminal Appeal used the discretionary factor of hardship as a yardstick in finding a forfeiture order disproportionate. In South Australia, a leading decision on the assessment of forfeiture under the *Crimes (Confiscation of Profits) Act 1986* (*Taylor v The Attorney-General for the State of South Australia*) quashed the forfeiture order on grounds of excessive hardship 'taking into account the seriousness of their offending, the value of the property and the part it played in the commission of the offences.

Proportionate forfeiture queried

Fisse's examination of a number of leading decisions leads him to query the notion of 'proportionate forfeiture'. More particularly, he asks, why should there be two proportionality considerations — one for sentencing and one for forfeiture? Why not make the principle of proportionality relate to the total impact of the sentence and forfeiture (an approach already implicit in some case law but precluded elsewhere by statute.)?

In attempting an answer Fisse raises a further proposition:

... it may well be that, as a matter of statutory construction, proportionality is not the relevant limiting principle. It can be argued that the legislative intention is to impose a special additional deterrent punishment and that the limit on this additional punishment is something other than proportionality; it is the sentence and not the forfeiture that must be proportional. On this argument, the constraints on the level of forfeiture of tainted property are first, the constitutional prohibition against cruel and unusual punishment, and secondly the statutory requirement that consideration be given to the factors of ordinary use and hardship.

Brent Fisse finds, on this analysis, that forfeiture would have to be grossly disproportionate to fit the notion of 'cruel and unusual punishment' and that 'ordinary use' does not necessarily imply a standard of proportionality. For example, a computer whose ordinary use is legitimate may be used illegally to defraud a bank account of millions of dollars. Forfeiture of the computer is not necessarily disproportionate.

Nor, argues Fisse, is the statutory factor of hardship a standard of proportionality. 'This factor could be taken to mean that, subject to the constitutional prohibition against cruel and unusual punishment, a court is free to impose forfeiture of all tainted property provided that the effect is not to reduce the defendant to penury or to stultify his or her chance of rehabilitation, and provided also that undue hardship will not be inflicted on innocent third parties'.

The statutory requirements limiting forfeiture on the grounds of ordinary use and hardship also present irreconcilable tensions. One example which Fisse mentions is the specially fitted out car designed to conceal illegal drugs. If the modifications accounted for the offender's entire life savings, forfeiture might constitute unnecessary hardship even though the vehicle's ordinary use was for an illegal purpose. Conversely, in other cases (such as market manipulation of shares) a property's ordinary use might be innocuous but confiscation might not cause hardship.

Forfeiture as a fine

Such examples build a convincing case for an alternative statutory solution to the problems caused by 'proportionate' forfeiture. Fisse argues that, since the main impact of forfeiture is financial, it should be treated as a fine, assessed as part of a total punitive impact of forfeiture and sentence. Where there is a need to retain a power to confiscate possessions which have been adapted to an illegal use (such as cars with secret compartments for transporting drugs) the power to order that an item be restored to its normal condition could obviate the need for forfeiture.

Forfeiture as a deterrent

Brent Fisse argues that forfeiture is a somewhat blunt instrument for incapacitating offenders. If the chief purpose is to strip offenders of the wherewithal to re-offend, forfeiture could be supplanted by other measures, such as sequestering property and requiring the approval of the Official Trustee in Bankruptcy or the Public Trustee for the disposition of assets. Such measures, Fisse reasons, would have several advantages.

The point of incapacitation, like quarantine, is not punishment but prevention, where necessary, by means of civil restraint. Secondly, remedial incapacitation orders may be more effective than forfeiture in controlling the economic power of drug traffickers and other serious offenders. One reason is that more of the offender's property may come under official control than forfeiture would allow: incapacitation is a remedy, not a punishment, and hence is not bounded by the same limit of proportionality that governs forfeiture. Another reason is that remedial incapacitation could cover the whole period an offender spends in jail plus an additional period where there is reason to believe that the offender has stashed funds away for enjoyment upon release from custody. In contrast, forfeiture is a punishment that relates to an offence in the past rather than to the future steps than an offender may take to recover assets concealed at the time of sentence or forfeiture. □