Measures to combat international organised crime

Response from Australia

1. Has your country signed and ratified the Convention and the Protocols thereto. If yes, on what date?

Australia has signed and ratified the Convention and all its Protocols (with the exception that the Firearms Protocol has been signed but not ratified).

- Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition:\(^4\): signed 21 December 2001, not yet ratified.

2. Has your country legislation for
   a. The identification
   b. The seizure (freezing)
   c. The forfeiture

   of property of criminal organisations? If yes, could you specify to what extent? If no, is there any such legislation under consideration?

The *Proceeds of Crime Act* 2002 (Cth) was passed on 11 October 2002 and came into operation on 1 January 2003. The Act provides a scheme to trace, restrain and confiscate the proceeds of crime.

In Chapter 2, the Act provides for a ‘confiscation scheme’ which sets out a number of processes relating to confiscation of assets:

   (aa) freezing orders limiting withdrawals from accounts with financial institutions before courts decide applications for restraining orders to cover the accounts (see Part 2-1A); and
   (a) restraining orders prohibiting disposal of or dealing with property (see Part 2-1); and
   (b) forfeiture orders under which property is forfeited to the Commonwealth (see Part 2-2); and

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(c) forfeiture of property to the Commonwealth on conviction of a serious offence (see Part 2-3); and
(d) pecuniary penalty orders requiring payment of amounts based on benefits derived from committing offences (see Part 2-4); and
(e) literary proceeds orders requiring payment of amounts based on literary proceeds relating to offences (see Part 2-5); and
(f) unexplained wealth orders requiring payment of unexplained wealth amounts (see Part 2-6).

Freezing orders
A freezing order can be made against an account with a financial institution if: (a) there are grounds to suspect the account balance reflects proceeds or an instrument of certain offences; and (b) a magistrate is satisfied that, unless the order is made, there is a risk that the balance of the account will be reduced so that a person will not be deprived of all or some of the proceeds or instrument.

Restraining orders
Restraining orders can be made against property, in relation to certain offences, on grounds that relate to possible forfeiture or confiscation orders relating to those offences. (There is not always a requirement that a person has been convicted of such an offence.)

Forfeiture orders
Forfeiture orders can be made, forfeiting property to the Commonwealth, if certain offences have been committed. (It is not always a requirement that a person has been convicted of such an offence.)
If a person is convicted of a serious offence, property that is subject to a restraining order relating to the offence is forfeited to the Commonwealth unless the property is excluded from forfeiture.

3. Has your country set up one or more specialised agencies to identify and seize the proceeds of organised crime?

The Commonwealth Director of Public Prosecutions (CDPP) is the agency responsible for applying for orders for seizure and confiscation under all of the federal avenues for recovering the proceeds of crime under the Act.

Furthermore, the Australian Crime Commission (ACC) was established to address federally relevant criminal activity under the Australian Crime Commission Act 2002 (Cth) and combat serious and organised crime. The ACC works collaboratively with the Australian Federal Police, state and territory law enforcement agencies, the Australian Attorney-General’s Department and a range of other Australian Government agencies.

4. What assets are subject to seizure?
   a. What assets are subject to forfeiture?
   b. Does an asset need to have been seized in order to be forfeited?
   c. What is the process for seizure of assets?
   d. What is the process for forfeiture?
e. Does in your country the judge play a role in the process mentioned in (e) and (d)?

What assets?

A freezing order is against an ‘account’ with a financial institution. ‘Account’ means any facility or arrangement through which a financial institution accepts deposits or allows withdrawals and includes:

(a) a facility or arrangement for:
   (i) a fixed term deposit; or
   (ii) a safety deposit box; and
(b) a credit card account; and
(c) a loan account (other than a credit card account); and
(d) an account held in the form of units in:
   (i) a cash management trust; or
   (ii) a trust of a kind prescribed by the regulations; and
(e) a closed account.

To avoid doubt, it is immaterial whether:
   (f) an account has a nil balance; or
   (g) any transactions have been allowed in relation to an account.

A restraining or forfeiture order is made against ‘property’. ‘Property’ is broadly defined and 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. Interest, in relation to property or a thing, means: (a) a legal or equitable estate or interest in the property or thing; or (b) a right, power or privilege in connection with the property or thing; whether present or future and whether vested or contingent.

What is the process/ courts role?

With respect to all the orders, it is the Court/ judge that makes the order on the application of the CDPP. The legislation provides that the court ‘must’ make the order if the circumstances set out are met.

Freezing orders: An ‘authorised officer’ can make an application in person or by telephone or other electronic means to a magistrate for a freezing order and must set out all the relevant information. Once the order is made that person notifies the relevant parties.

Restraining orders: The CDPP applies for the order and if the circumstances set out in the legislation are met, the Court can make the order. The CDPP must give written notice to the applicant it is seeking the order.

Forfeiture orders: The CDPP applies and the property to be specified in the order needs to be already covered by a restraining order. The CDPP must give written notice of the application and any person with an interest in property covered by the application may appear and adduce evidence at the hearing. Once the order is made the property vests absolutely in the Commonwealth.
5. Has your country legislation in force to confiscate after due process the proceeds of crime?

As indicated above, Chapter 2 of the Act also contains provisions relating to the confiscation of proceeds of crime. These include pecuniary penalty orders, literary proceeds orders and unexplained wealth orders.

**Pecuniary penalty orders**
If certain offences have been committed, pecuniary penalty orders can be made, ordering payments to the Commonwealth of amounts based on: (a) the benefits that a person has derived from such an offence; and (b) (in some cases) the benefits that the person has derived from other unlawful activity.
(It is not always a requirement that a person has been convicted of the offence.)

**Literary proceeds orders**
If certain offences have been committed, literary proceeds orders can be made, ordering payments to the Commonwealth of amounts based on the literary proceeds that a person has derived in relation to such an offence. (There is no requirement that a person has been convicted of the offence.)

**Unexplained wealth orders**
A preliminary unexplained wealth order requires a person to attend court for the purpose of enabling the court to decide whether to make an unexplained wealth order against the person.
An unexplained wealth order is an order requiring the person to pay an amount equal to so much of the person’s total wealth as the person cannot satisfy the court is not derived from certain offences.

6. “Money makes the world go round”. Has your country special legislation in force with regard to electronic movements?

The Australian Transaction Reports Analysis Centre (AUSTRAC) was established under the Financial Transaction Reports Act 1988 (Cth) and is continued in existence by section 209 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (AML/CTF Act). AUSTRAC’s purpose is to protect the integrity of Australia's financial system and contribute to the administration of justice through our expertise in countering money laundering and the financing of terrorism.

The AML/CTF Act imposes a number of obligations on organisations involved in certain industries (including financial service providers, the gambling industry and 'cash dealers'), when they provide designated services, including:
- customer identification and verification of identity;
- record keeping; and
- establishing and maintaining an AML/CTF program.
For example, reporting entities must report international funds transfers, 'suspicious transactions' and transactions of $10 000 or more.
One of AUSTRAC's roles is to oversee compliance with these reporting requirements and collate the information. AUSTRAC then provides transaction reports and intelligence to law enforcement agencies and revenue agencies both within Australia and internationally (depending on whether an international agency has an agreement with AUSTRAC).

7. Should there be an international authority to handle organised crime besides for instance Interpol, Eurojust and Frontex?
   a. Could your country be more active in that field?
   b. Could you as a judge be more active in that field? Do you think that you have enough instruments and qualifications to handle cases of organised crime in court?

On an international authority to handle organised crime –
There are arguments for and against such an authority. There are some grounds for caution about creating another international bureaucratic organisation to specifically handle organised crime. This is for two main reasons. First, there are a vast number of international organisations in existence already which can (and it is often complained has) lead to increased complexity, inefficiency and bureaucracy. Second, it is often argued that international law, and particularly the enforcement of international law, is ‘soft’. Thus even if such an organisation did exist, it is unlikely that it would have any real powers to bring to justice/impinge on the business of transnational organised criminals. Any such organisation would depend on the willingness of States to agree to be bound by its constituent convention and practice has shown States are generally reluctant to accede to anything impinging on their sovereignty.
That being said, obviously an international/multi-state approach is needed to combat international organised crime. This is not something any one country can handle in isolation, and it is important because it has the potential to impact significantly on the economy and security of nation states and the international community.

On Australia being more active –
It appears Australia has been quite active in this field and it appears organised crime is already on the Australian policy and legislative agenda, both federally and at the state level. Australia has signed and ratified the main Convention in this area (as discussed above). Over the last 10 years there have been a number of pieces of legislation enacted, with regular amendments containing improvements and keeping it relevant including legislation creating more comprehensive offences pertaining to human trafficking.
For example the *Proceeds of Crime Act* also provides for the use of coercive investigative techniques to assist law enforcement agencies in investigating proceeds of crime matters including (a) examining any person about the affairs of people covered by examination orders; and (b) requiring people, under production orders, to produce property-tracking documents or make them available for inspection; and (c) requiring financial institutions to provide information and documents relating to accounts and transactions; and (d) requiring financial institutions, under monitoring orders, to provide information about transactions
over particular periods; and (e) searching for and seizing tainted property or evidential material, either under search warrants or in relation to conveyances.

In October 2010, the Australian Institute of Criminology in partnership with the ACC hosted a groundbreaking international conference focussed on the fight against serious and organised crime, entitled “International Serious and Organised Crime”.

The problem with this legislation is that by its very nature it is invasive and has the potential to severely impact on an individual’s civil rights and liberties. There is therefore a very delicate balance that needs to be struck between providing law enforcement agencies with the means to combat international organised crime and protecting civil rights.

On the courts/judges and organised crime –
The courts have quite broad powers to make orders of the nature referred to above for the confiscation of assets and proceeds of crime.

Justice Roslyn Atkinson
Supreme Court of Queensland
Australia
27 June 2011