Tax crimes

The risks of using money laundering charges in the fight against tax evasion

The use of money laundering offences in the prosecution of cases of tax evasion may open the door to a permanent stay for abuse of process or grounds for acquittal or resentencing.

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There has been judicial criticism regarding the use of the money laundering provisions by the Commonwealth Department of Public Prosecutions (CDPP) in the prosecution of tax evasion and other serious Commonwealth offences.

The provisions which set out the various money laundering offences in Division 400 of the *Criminal Code Act 1995* (Cth) (Code) are very broad, with a capacity to extend to a wide range of factual circumstances, and are likely to be intertwined with other criminal conduct.[1] Because of this, the courts have highlighted the need to exercise care by prosecuting authorities in their use.[2]

There are several recent judgments which emphasise that the use of money laundering charges in some circumstances may amount to an abuse of process or, alternatively, sufficient grounds for an acquittal or re-sentencing.

In the case of tax evasion, practitioners with clients facing money laundering charges should be aware of the prosecution's need to address the difficulties in the particularisation of, and reliance on, tax evasion offences as the predicate offence to money laundering charges. By addressing these difficulties, the risks of an abuse of process, wrongful conviction and sentencing arising from the use of money laundering offences should be minimised.

Money laundering offences – Division 400

The various money laundering offences contained in Division 400 of the Code are intended to constitute a 21st-century response to antisocial and criminal conduct, commonly with international elements.[3] They are designed to cover a wide range of conduct[4] including "money that has been legitimately earned but is to be dealt with in such a way as to disguise its source in order, for example, to defraud the taxation office".[5]

Sections 400.3-400.8 are the primary sections in the division that create the various money laundering offences. The offences in each section are of the same kind except in respect of the value of money or property involved. Section 400.3 is at the more serious end of the spectrum, dealing with money or property to the value of $1 million or more, descending down to 400.8.

Within each of the six sections there are six separate offences. Half of these offences are for dealing in money or property that is intended to, (or will be at risk of becoming) an "instrument of crime" to be committed in the future. The other half deal with money or property that are "proceeds of crime" already committed. Within each half, the offences differ in the fault element of the offence in descending order of seriousness from intention, recklessness to negligence.[6]

Money laundering and predicate offences

The courts have indicated that the offences under Division 400 are intended to apply to the laundering of money or property arising from the criminality of others and not that of the person charged with the money laundering offence.[7]

They have rightly criticised the charging of an accused with money laundering for dealing with money that comes to the accused as a result of a predicate offence,

also committed by the accused, where the defendant has simply accessed the ill-gotten moneys in their bank account.[8]

For example, in *Nahlous v R* [2010] NSWCCA 58 the applicant appealed against a sentence imposed in the District Court, where the applicant was charged with principal offences (not tax-related offences) as well as dealing in the proceeds of crime for those offences contrary to s.400.6(1) of the Code. In dismissing the money laundering charge,[9] the court found that there was considerable merit in the applicant's complaints and that "they did not go far enough".[10] The court also referred to Howie J's judgment in *Thorn v R* [2009] NSWCCA 294, in which Howie J stated: "(t)he criminality was very much in the obtaining of the funds not in their use. It is somewhat analogous to a robber being sentenced for both the robbery and being in possession of stolen goods."[11]

In its judgment in *Nahlous*, the court also stated: "In our view the whole sentencing exercise miscarried principally because the applicant should never have been charged with the Code offence. Had he sought to have that charge permanently stayed as an abuse of process we cannot see how the application could have been refused."[12]

In *R v Jones; R v Hili* [2010] NSWCCA 108 the Crown appealed against the sentences of the respondents who pleaded guilty and were convicted of tax fraud offences. Jones was convicted of money laundering contrary to s.400.4(1) of the Code. The court stated that it was impossible to imagine how the fraud offences in this case could be committed "without necessarily giving rise to the facts that would amount to a consequential breach of the money-laundering offence".[13] Although the issue was not raised by the respondents, the court, citing *Thorn* and *Nahlous*, felt compelled to raise its concerns with the "serious issues relating to double jeopardy in charging the money-laundering offence over and above the criminal offence from which the money was necessarily derived".[14] However, as the respondents had not appealed, the court found "little avenue to correct this issue".[15]

Predicate GST fraud offences

In *Thorn*, the applicant sought leave to appeal against sentences imposed for 11 counts of dishonestly obtaining a financial advantage contrary to s.134.2(1) of the Code (GST fraud offences) and one count of dealing with the proceeds of crime contrary to s.400.4(1) of the Code (money laundering offence). Howie J found in that case that the criminality of the GST fraud offences far exceeded that of the money laundering offence yet the maximum penalty for the money laundering offence far exceeded that of the fraud offences. Also, as the applicant in this case could not be charged with his partner's fraudulent activity under the Code, the money laundering charge was used to in effect punish the applicant for the criminality of his partner.[16] His Honour, after taking into account other factors, reduced the appellant's sentence for this offence.

In *Schembi v Regina* [2010] NSW CCA 149, the court again felt compelled to say something about the use of money laundering offences in the prosecution of offences relating to fraudulent GST refund claims. Referring to its decision in *Thorn*, the court reiterated that "money laundering offences were intended by the legislature to be directed at activity where persons were intimately involved in dealing in money that was the result of some other person's criminal activity, so as to hide its source".[17] The court also referred to its decision in *Nahlous* and restated that the receipt of money as a result of a criminal act by that person did not result in a separate act of criminality that warranted a separate charge and penalty.[18] In a scathing criticism, the court said "the matter is of such importance that we consider a copy of these remarks should be brought to the attention of the Commonwealth Director of Public Prosecutions".[19]

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Using money laundering charges to maximise penalties

Practitioners should also be aware that in some cases money laundering charges may be laid not for their accuracy in reflecting the criminality of the acts involved but in order to maximise the overall sentence imposed. This is particularly probable in cases where the maximum penalties and likely sentence under the predicate offence alone may be perceived to be inadequate to reflect the offender's overall criminality.[20]

The NSW Court of Criminal Appeal has held that an allegation of generalised tax fraud as the predicate offence must be sufficiently particularised to support a money laundering charge (instrument of crime).[21] The court criticised the prosecutorial practice of using s.400.13 as a basis for relying on an inchoate tax fraud offence as the predicate offence to a money laundering offence under s.400.5(1), particularly where the penalty is greater but the criminality is less than that of the predicate offence.[22]

NEED TO KNOW

Money laundering

- **Money laundering offences are being used in the prosecution of tax evasion.**
- **Offences under Division 400 are intended to apply to the laundering of money or property arising from the criminality of others, not of the person charged with the money laundering offence.**
- **Reliance by the prosecution on tax evasion offences as the predicate offence to money laundering charges may give rise to grounds for a permanent stay for abuse of process, acquittal or re-sentencing.**

However, the courts' caution in not interfering with prosecutorial discretion exercisable by the executive branch of government has resulted in some instances of sanctioning the use of money laundering charges in this arguably inappropriate manner.[23] Overlapping charges, double jeopardy and double punishment have been constant themes in the cases examined and practitioners should be aware that the courts have justifiably raised these as issues.

In *R v Milne (No.1)* [2010] NSWSC 932, Johnson J considered a pre-trial application by the applicant for a permanent stay of proceedings on the ground of abuse of process. The applicant was charged with one count of money laundering contrary to s.400.3(1) of the Code in that the applicant dealt with shares intended to become an instrument of crime.[24] The maximum penalty was 25 years imprisonment. The applicant was also charged with one count of intentionally and dishonestly obtaining a gain from the Commonwealth contrary to s.135.1(1) of the Code in that the applicant caused to be lodged an income tax return containing false information relating to the capital gain from the sale of the shares.[25] The maximum penalty was five years imprisonment.

Johnson J held that the accused had not discharged the heavy onus it had to establish a case for the exceptional remedy of a permanent stay and that the issues raised by the accused might be accommodated at the sentencing phase.[26] His Honour stated that: "The courts should pay due respect to the exercise of prosecutorial discretion concerning charge selection. This approach flows from the separation of powers between the executive and judicial arms of government, as well as the public interest in the prosecution of serious offences, selected by the prosecution

agency, which a trial court will proceed to determine on their merits."[27]

On appeal[28] in 2012, the Court of Criminal Appeal highlighted that the use of the money laundering charge in addition to the dishonestly obtaining charge involved some overlap or "doubling up". The court acknowledged the trial judge's consideration of the relevant authorities and the "strong reminder" they represented to prosecutors that money laundering charges were to be used "in a measured way".[29] They acknowledged the conclusion reached that, notwithstanding some overlap, each charge captured significant and distinct aspects of the appellant's criminality; there was no abuse of process justifying a stay on the money laundering count.[30]

In *Chen v DPP (Cth)* [2011] NSWCCA 205, the appellant was found guilty by jury and sentenced in the District Court for dealing with money intended to be an instrument of crime under s.400.5(1) of the Code. The appellant successfully appealed the conviction and was acquitted by the NSW Court of Criminal Appeal. The prosecution sought to rely on as a predicate offence to s.400.5(1) "an unparticularised crime as vaguely expressed as evasion of tax, in part because such a course was permitted by s.400.13 of the Criminal Code".[31] That section says that in the case of money laundering offences where the money or property is intended or a risk of becoming an instrument of crime, it is not necessary for the prosecution to prove that a particular offence will be, or is a risk of being, committed or a particular person will or is a risk of committing an offence.

Basten JA held that in this case, there was no evidence put before the jury that the appellant or his companies had failed to disclose income to the Commissioner of Taxation in any of the years. The prosecution did not explain to the jury what circumstances would constitute the offence of tax evasion and did not identify a particular offence that might be relevant, let alone whether it was indictable as required by s.400.1.[32]

Garling J observed that on the proven facts the CDPP could have charged the appellant with the less serious structuring offence under s.31 of the *Financial Transactions Report Act 1988* (Cth) which carries a maximum penalty of five years imprisonment. The CDPP chose instead the more serious money laundering offence under s.400.5(1) of the Code (carrying a maximum penalty of 15 years imprisonment) believing that the criminality of the appellant was such as to warrant the more serious charge.[33] But in doing so, and placing reliance on s.400.13 of the Code, the CDPP failed to address all the elements of the more serious offence and that the alternative case relied on by the CDPP was flawed. The NSW Supreme Court in a judgment in the case of *Director of Public Prosecution (DPP) (Cth) v Ngo* [2012] NSWSC 1521, handed down on 10 December 2012 considered, but did not determine, the question of whether the principles in *Chen* extended to offences under s.400.9.[34]

Abuse of process in the context of tax evasion

Calleija v Regina [2012] NSWCCA 37 dealt with the principles relating to when an application for a stay of proceedings for an abuse of process will be granted in the context of tax evasion. It dealt with, among other things, delay and unfairness in the prosecution and conduct of proceedings for tax fraud offences. In 2006, following an Australian Tax Office audit, the appellant made three induced statements to the Federal Police. He was not charged for any offences until October 2009 (some three years later) and the indictment was not filed until February 2011 (some 14 months after that). An application for permanent stay was made on 27 May 2011 and refused on 11 August 2011. The appellant was unsuccessful in his appeal to the NSW Court of Criminal Appeal.

"The receipt of money as a result of a criminal act by that person did not result in a separate act of criminality that warranted a separate charge and penalty."

In its judgment the court summarised the general principles regarding the grant of a permanent stay in criminal proceedings. Beazley JA, referring to Mason CJ's judgment in *Jago v District Court of NSW* [1989] HCA 46, stated that it was well-established that the court's inherent power to prevent abuses of process, such as a delay in proceedings, should only be exercised to grant a permanent stay in extreme cases.[35] The onus of proof on the accused seeking a permanent stay is a heavy one.[36] Alleged duplicity of charges alone was not a ground for granting a stay, as the court could make orders to amend the indictment to remove any duplicity or unfairness.[37]

The grant of a permanent stay of proceedings for abuse of process is an extreme remedy and rarely granted by courts. But the appropriateness of such a remedy was considered by the courts in the context of the use of money laundering charges. In the case of *Nahlous*, had it been sought, it may well have been granted. Where the courts have identified inappropriate uses of money laundering offences, they have been dealt with in a number of instances by way of quashing the conviction and ordering an acquittal[38] or quashing the sentence and re-sentencing.[39]

Conclusion

Recent judicial criticisms have highlighted that there are significant issues associated with the use of money laundering charges, particularly in the context of tax evasion. One can hope that future cases will be prosecuted taking on board the criticisms justifiably raised by the courts and with greater care in the selection of charges so that charges and penalties more accurately reflect the accused's criminality. □

ENDNOTES

1. *R v Milne (No.1)* [2010] NSWSC 932 at [161].
2. Ibid at [164].
3. Ibid at [164].
4. Wider than its predecessor under the *Proceeds of Crimes Act* 1987 (Cth).
5. *R v Ansari* [2007] NSWCCA 204 at [120] per Howie J.
6. *Chen v DPP (Cth)* [2011] NSWCCA 205 at [48]-[51].
7. See for example *Thorn v R* [2009] NSWCCA 294, *Nahlous v R* [2010] NSWCCA 58, *R v Jones; R v Hili* [2010] NSWCCA 108, *Schembi v Regina* [2010] NSWCCA 149 *and Dela Cruz v R* [2010] NSWCCA 333.
8. Such as in *Thorn* and *Dela Cruz*.
9. Under s.19B(1)(c) of the *Crimes Act 1914* (Cth).
10. Ibid at [13].
11. *Thorn v R* [2009] NSWCCA 294 at [27].
12. *Nahlous v R* [2010] NSWCCA 58 at [13].
13. Ibid at [17].
14. Ibid at [18].
15. Ibid.
16. *Thorn v R* [2009] NSWCCA 294.
17. Ibid at [12].
18. Ibid at [15].
19. Ibid at [17].
20. See for example *Thorn*, *Nahlous* and *Arora v CDPP* [2011] NSWSC 552.
21. *Chen v DPP(Cth)* [2011] NSWCCA 205.
22. Ibid.
23. See for example, *Thorn*, *Milne* and *Arora*.
24. *R v Milne (No.1)* [2010] NSWSC 932.
25 Ibid.
26 Ibid at [174].
27. Ibid at [167] and [168].
28. *Milne v R* [2012] NSWCCA 24.
29. Ibid at [82].
30. Ibid at [82]-[83].
31. *Chen v DPP(Cth)* [2011] NSWCCA 205 at [25].
32. Ibid at [27].
33. Ibid at [79]-[82].
34. Ibid at [40]-[41].
35. *Calleija v Regina* [2012] NSWCCA 37 at [28]-[29].
36. Ibid at [46]-[46], citing Mason P in *R v Petroulias* [2005] NSWCCA 75 at [103] and *Jago* at [34].
37. Ibid at [54].
38. For example in *Chen*.
39. For example in *Thorn*, *Nahlous*, *Schembri* and *Dela Cruz*. □