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The dangers arising from the Proceeds of Crime Act 2002 (Cth): Bringing funds to Australia in aid of visa applications

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A. Introduction

1. Over recent years, unsuspecting visa applicants have suddenly found their assets restrained at the instigation of the Commissioner of the Australian Federal Police (**AFP**) under the *Proceeds of Crime Act* 2002 (Cth) (**POCA**) on the basis that such assets are reasonably suspected to constitute *proceeds* and/or an *instrument* of crime.

2. Where this has occurred:

   (a) such visa applicants have generally used the services of money remitters (rather than traditional banking channels) to remit foreign funds to Australia; and

   (b) unbeknownst to the visa applicants, the money remitters were connected with criminal syndicates in Australia, which deposited cash (almost certainly from criminal activity in Australia) in the nominated bank accounts of the visa applicants in *structured* non-threshold transactions.

3. The Australian Transaction Reports and Analysis Centre (**AUSTRAC**) has coined the expression *cuckoo smurfing* to describe the activity by which criminal syndicates reintroduce cash into the banking system, by "*hijacking*" the lawfully earned funds of unsuspecting victims.

4. Where that occurs, migration practitioners are at substantial risk of claims being brought against them for failing to warn clients of the risk of using alternative remittance services.

5. This paper seeks to provide an explanation of cuckoo smurfing and to highlight the risks currently faced by migration practitioners, with the aim of avoiding clients' assets being restrained.

B. Cuckoo smurfing

6. At the heart of the problem lies, what AUSTRAC has described as, "cuckoo smurfing". This is said to be "*another emerging form of money laundering*". AUSTRAC observes that "*Australia's AML/CTF[1] professionals need to become familiar with this organised, transactional and highly coordinated process*".[2]

7. The expression *cuckoo smurfing* derives from the cuckoo bird, which lays its eggs in the nests of other species of birds which then unwittingly take care of the eggs believing them to be their own.

8. AUSTRAC observes that "*in a similar manner, the perpetrators of this money laundering topology seek to transfer wealth through the bank accounts of innocent third parties*." The four steps involved in cuckoo smurfing are described by AUSTRAC as follows:

> ***Step 1***
>
> *A legitimate customer deposits funds with an alternative remitter in a foreign country for transfer into another customer's Australian bank account. This is a legitimate activity and is often a cheaper and faster alternative to using a mainstream bank.*
>
> ***Step 2***
>
> *Unbeknown to the customer, the alternative remitter is part of a wider criminal syndicate involved in laundering illicit funds. This criminal remitter, while remaining in the foreign country, provides details of the transfers, including the amount of funds, to a criminal based in Australia. This includes the account details of the intended recipient in Australia.*
>
> ***Step 3***
>
> *The Australian criminal deposits illicit cash profits from Australian crime syndicates into the bank account of the customer awaiting the overseas transfer. The cash is usually deposited in small amounts to avoid detection under transaction threshold reporting requirements. After an account balance*

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1 Anti-money laundering and counter terrorism financing.

2 http://www.austrac.gov.au/typologies-2008-methodologies

check, the customer believes that the overseas transfer has been completed as legitimately arranged.

Step 4

The Australian criminal travels overseas and accesses the legitimate money that was initially deposited with the alternative remitter. The illicit funds have now been successfully laundered - the criminal owes nothing but a commission to the money launderer for their work.

It is important to recognise the high level of sophistication and organisation required to successfully operate a cuckoo smurfing syndicate. The essential actors in a typical scenario are:

- *an innocent customer seeking to transfer funds from overseas into Australia. This innocent customer could be either:*
  - *an Australian customer overseas seeking to transfer funds into their own account in Australia, or*
  - *an innocent customer overseas seeking to transfer funds to another customer located in Australia*
- *a criminal alternative remitter located overseas*
- *a complicit, Australian-based criminal seeking to transfer funds overseas*
- *an organiser or coordinator in Australia*
- *associates of this organiser or coordinator who make third party deposits into the Australian customer's account.*

C. <u>The cuckoo smurfing risk facing your clients</u>

9. Various visas require applicants to bring foreign wealth to Australia. By way of example, a foreign national may apply for a Significant Investor Visa by investing $5 million over four years.

10. The problem arises from the fact that numerous countries impose foreign currency exchange controls. Such controls are put in place by governments and central banks in order to ban or restrict the amount of foreign currency or local currency that can be traded or purchased. These controls allow countries a greater degree of economic stability by limiting the amount of exchange-rate volatility due to currency inflows/outflows. Currency controls are usually seen in vulnerable countries that lack the stability and infrastructure to support the free flow of foreign exchange. Each of:

(a) China;

(b) Malaysia;

(c) Vietnam; and

(d) Iran,

and many others, impose currency controls.

11. Where visa applicants seek to move their wealth to Australia from countries with exchange controls, they are commonly unable to transfer funds (or sufficient funds) through official banking channels to meet Australian visa requirements. Such applicants commonly resort to use of alternative remittance services.

12. Money remitters operate lawfully in many foreign countries. This usually occurs by:

(a) firstly, the client and money remitter negotiating and agreeing an exchange rate;

(b) secondly, the client providing the money remitter with cash in foreign currency in the foreign country in return for a promise to deposit an agreed amount of Australian currency to a nominated bank account in Australia;

(c) thirdly, the money remitter (through his contacts) causing funds to be deposited into the account of the client with an Australian bank.

13. Although there are many money remitters that operate lawfully, there are also a worrying number who are connected with international criminal syndicates. Such criminal syndicates seek opportunities to place criminal proceeds (usually cash) back into the banking system. Corrupt money remitters assist the criminal syndicates by causing unsuspecting clients to receive proceeds of criminal activity in their Australian accounts, in exchange for the lawfully earned foreign currency.

D. <u>How the risk materialises</u>

14. Under the section 43 of the *Anti-Money Laundering and Counter-Terrorism Financing Act* 2006 (Cth) (**AML/CTF Act**), a reporting entity (such as a bank) must make a report to AUSTRAC within 10 business days after a "threshold transaction" occurs. A "threshold transaction" is a transaction involving $10,000 or more.

15. Because criminal syndicates seek to "fly below the radar" when reintroducing criminally derived cash back into the financial system, they commonly arrange for cash to be deposited in a series of transactions below the $10,000 reporting threshold. However, it is an offence under section 142 of the AML/CTF Act to structure deposits so with the intention of avoiding the reporting obligations.[3]

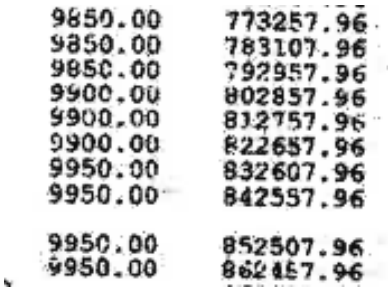
16. By way of example, if $95,000 is to be deposited into a bank account, it can be done either:

    (a) by a single deposit of $95,000; or

    (b) for example, by a series of 10 separate deposits of $9,500.

17. The single deposit of $95,000 would be reportable to AUSTRAC. Each $9,500 deposit is not reportable (other than insofar as the bank has an obligation to make a suspicious matter report).

18. The following is an extract of a bank statement of a victim of cuckoo smurfing. Relevantly, each deposit (just below the $10,000 reporting threshold) was made *on the same day* at various branches of the bank:



9850.00	773257.96
9850.00	783107.96
9850.00	792957.96
9900.00	802857.96
9900.00	812757.96
9900.00	822657.96
9950.00	832607.96
9950.00	842557.96
9950.00	852507.96
9950.00	862457.96

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3 ***Conducting transactions so as to avoid reporting requirements relating to threshold transactions***

*(1) A person (the **first person**) commits an offence if:*

(a) the first person is, or causes another person to become, a party to 2 or more non-reportable transactions; and

(b) having regard to:

(i) the manner and form in which the transactions were conducted, including the matters to which subsection (3) applies; and

(ii) any explanation made by the first person as to the manner or form in which the transactions were conducted;

it would be reasonable to conclude that the first person conducted, or caused the transactions to be conducted, in that manner or form for the sole or dominant purpose of ensuring, or attempting to ensure, that the money or property involved in the transactions was transferred in a manner and form that would not give rise to a threshold transaction that would have been required to have been reported under section 43.

Penalty: Imprisonment for 5 years or 300 penalty units, or both.

19. Pursuant to section 41 of the AML/CTF Act, banks have positive obligations to make *suspicious matter reports* in a number of circumstances, including where they suspect structuring offences having been committed. Specifically, banks are obliged to make such reports where such reporting may be of assistance under the POCA.

20. Further, pursuant to section 400.9 of the *Criminal Code Act* 1995 (Cth) (**Criminal Code**), 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 or other property is $100,000 or more.

21. Importantly, for the purposes of section 400.9 of the Criminal Code money is taken to be proceeds of crime if the conduct involves a number of transactions that are structured or arranged to avoid the reporting requirements of the AML/CTF Act that would otherwise apply to the transactions: Criminal Code, section 400.9(2)(aa). The offence under section 400.9 of the Criminal Code is also a *serious offence* under the POCA.

E. POCA implications

22. The AFP administers the POCA. The AFP may apply for restraining orders over property under the POCA. The purpose of a restraining order is to prevent any dealing in restrained property with a view to preserving such property for subsequent forfeiture to the Commonwealth. Where property is forfeited to the Commonwealth, it is forfeited without compensation to the property owner.

23. The AFP may apply for a restraining order over property in respect of which there are reasonable grounds to suspect that it is either:

(a) "*proceeds*" of an "*indictable offence*"[4] (whether or not the identity of the person who committed the offence is known); or

(b) an "*instrument*" of a "*serious offence*".

24. The offence of structuring in contravention of section 142 of the AML/CTF Act is a *serious offence* for the purposes of the POCA. The expression *instrument* is defined in section 329 of the POCA as property which is *used in, or in connection with, the commission of an offence*. Critically, where cash is deposited into a bank account in structured deposits in contravention of section 142 of the AML/CTF Act, such cash is clearly an "*instrument*" of a "*serious offence*".

25. Further, pursuant to section 330 of the POCA, property becomes an *instrument* of an offence if it is *wholly or partly derived or realised from the disposal or other dealing with an instrument of the offence* or *wholly or partly acquired using an instrument of the offence*.

26. The following consequences arise: Firstly, the funds standing to the credit of the bank account (which, as a matter of law, represent a chose in action against the bank) constitute an *instrument* of a *serious offence* for the purposes of the POCA. Secondly, property purchased with such funds will also become an *instrument*. It follows that, both the bank account and any property purchased with the funds standing to the credit of such bank account, are able to be restrained by the AFP in aid of subsequent forfeiture. It may also be argued that the chose in action (being the bank account) is *proceeds* of the offence of structuring and it follows that any property purchased with funds standing to the credit of the account will retain the character of *proceeds*.

27. There are a large number of cases before the Courts in Australia involving restraining orders having been made over assets arising from structured deposits into bank accounts. See, for example:

(a) *Re Application Pursuant to Section 19 of the Proceeds of Crime Act 2002 (Cth) Ex Parte Commissioner of the Australian Federal Police* [2016] WASC 105 (Allanson J);

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[4] It can also extend to a "terrorism offence", a "foreign indictable offence" or an "indictable offence of Commonwealth concern".

(b) *Commissioner of the Australian Federal Police v Pham* [2015] NSWSC 1383 (Beech-Jones J); and

(c) *Commissioner of the Australian Federal Police v Fitzroy All Pty Ltd* [2015] WASC 320 (Mitchell J).

28. Once property is restrained under the POCA, the burden passes to a person claiming an interest in such restrained property to seek to exclude it from restraint. In order to exclude it from restraint, such person must satisfy the prescriptive exclusion test set out in section 29 of the POCA. It is beyond the scope of this paper to examine the exclusion test, save to say that there are numerous complexities which arise when analysing the exclusion test in this context.

29. Allanson J in *Commissioner of the Australian Federal Police v Kalimuthu [No 3]* [2017] WASC 108 heard the first exclusion application under the POCA in a cuckoo smurfing case. The applicants for exclusion succeeded in obtaining an exclusion order, but the AFP has filed an appeal which is likely to be heard early in 2018. Subsequently, Simpson J in *Commissioner of the Australian Federal Police v Lordianto* [2017] NSWSC 1196 refused to follow the approach to the interpretation of the POCA adopted by Allanson J and refused an application for exclusion. On that same day, Simpson J also delivered a decision in *Commissioner of the Australian Federal Police v Fernandez* [2017] NSWSC 1197, in which she refused the AFP's application for forfeiture on public interest grounds. Presently, there is a divergence of principles between WA (Allanson J) and NSW (Simpson J). A detailed newsletter explaining these three decisions is attached to this paper.

F. <u>What does it all mean for migration practitioners?</u>

30. In short, where acting for clients who intend to bring foreign wealth to Australia, practitioners should warn such clients about the risks associated with using alternative money remitting services. Where possible, wealth should be brought to Australia through official banking channels. Where banking channels are not available, there will always be a risk that money remitters will cause non-threshold (i.e. below $10,000) cash deposits to be made into the nominated Australian bank accounts, exposing the client's assets to the risk of restraint and forfeiture.

31. The best way to guard against the risk of a restraining order being made, or to quarantining the exposure arising from it, is to do the following:

(a) ensuring that the money remitter is licenced in the foreign county to engage in money remitting services (which may in some jurisdictions be contrasted with money exchange services);

(b) obtaining paperwork from the money remitter since, experience shows, corrupt money remitters are commonly adverse to providing receipts and exchange contracts;

(c) asking the money remitter in the foreign country how they intend to make deposits to the Australian bank accounts (EFT or cash);

(d) seeking, where possible, to have funds deposited to the Australian account by EFT;

(e) requesting that each deposit (whether EFT or cash) is at least $10,000, so as to ensure that there are no non-threshold transactions;

(f) reviewing the bank statements of the Australian accounts upon receipt of deposits so as to ascertain the manner in which funds were deposited and to ensure that there is no "structuring";

(g) immediately quarantining any funds involving structured deposits, so as not to comingle "clean" funds with "contaminated" funds, by leaving such funds in the account and not depositing any further funds into the account ever – because not only are the funds "contaminated", but so is the account;[5]

(h) withdrawing funds from the bank account into which the deposits were made regularly (and placing such funds into another holding account – possibly a higher interest account);

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5 If a client wishes to bring $1 million to Australia, he or she may provide a money remitter ten lots of $100,000 (equivalent) in the foreign jurisdiction, over a period of time. By breaking the amount down, the risk of loss is reduced since the money remitter is only ever in possession of $100,000 and, if any money arrives in a structured way, it will at most "contaminate" that part of funds (but not the other 9 lots of $100,000).

32. Further information in relation to the POCA is www.confiscation.com.au.

G. Visa consequences

33. Although this seminar focuses specifically on the POCA, consideration needs to be given to the visa consequences for potential applicants who have engaged in transactions tainted under the Proceeds of Crime legislation.

34. This would depend on the specific factual circumstances of the case and the determination of whether it triggers any of the specific or general cancellation provisions of the *Migration Act* 1958.[6]

[6] See ss.116 and 134, Migration Act 1958 (Cth) and the character cancellation provision.

Cuckoo smurfing – judicial disagreement

Cuckoo-smurfing - Simpson J disagrees with the approach of Allanson J

On 19 April 2017, Allanson J delivered the decision in *Commissioner of the AFP v Kalimuthu (No 3)* [2017] WASC 108 (**Kalimuthu**). That decision was the subject of *Asset Confiscation Update - Edition 1 / 2017*. Kalimuthu was a landmark decision because it contained the first judicial analysis of cuckoo smurfing in a contested application for exclusion under the *Proceeds of Crime Act* 2002 (**Act**).

In Kalimuthu, Allanson J made an exclusion order by relying on section 330(4) of the Act.

However, last week in *Commissioner of the Australian Federal Police v Lordianto* [2017] NSWSC 1196 (**Lordianto**) Simpson J refused to follow Allanson J's construction of s.330(4) of the Act and dismissed the application for exclusion. Based on the reasoning of Simpson J, every application for exclusion in a cuckoo smurfing setting is doomed to fail.

That said, whilst shutting out any prospect of succeeding in an exclusion application, in a separate decision delivered by Simpson J last week, namely Commissioner of the *Australian Federal Police v Fernandez* [2017] NSWSC 1197 (**Fernandez**), Simpson J refused the Commissioner's forfeiture application on the basis that it was not in the public interest to forfeit property of the victim of cuckoo smurfing.

The disharmony between the decisions in Kalimuthu and Lordianto certainly causes difficulty for practitioners in determining how best to approach cuckoo smurfing cases.

The Commissioner has appealed the decision in Kalimuthu and the appeal is likely to be heard early next year. Only then will the path for practitioners and clients become clearer.

What is cuckoo-smurfing?

Cuckoo-smurfing is said to be "*another emerging form of money laundering*". AUSTRAC observes that "*Australia's AML/CTF professionals need to become familiar with this organised, transactional and highly coordinated process*".[1]

The expression "cuckoo smurfing" originated in Europe because of similarities between this topology and the activities of the cuckoo bird, which lays its eggs in the nests of other species of birds which then unwittingly take care of the eggs believing them to be their own.

In Kalimuthu, Allanson J described cuckoo-smurfing as follows at [71]:

> *In short, it relies on identifying a person offshore who wishes to transfer funds to a bank account in Australia using a money remitter. The remitter withholds amounts corresponding to the amount of money he has been told is to be laundered in Australia. The customer's bank account details are provided to people in Australia. A team of depositors in Australia deposits cash into the bank account, generally at a series of bank branches and below the threshold for reporting transactions involving physical currency. The account holder sees deposits that match the amounts they intended to remit. Because the amounts of each deposit are below the threshold, there is generally no record that could enable regulatory agencies to intervene.*

The issue arising under the POCA

Where cuckoo smurfing occurs, the deposits into the Australian victims' bank accounts are generally made in cash and commonly below the $10,000 reporting limit. Depositing funds in such manner with the intention to avoid the reporting obligations constitutes a contravention of section 142 of the *Anti-Money Laundering and Counter-Terrorism Financing Act* 2006 (Cth) (**AML/CTF Act**). That offence is commonly known as "structuring".

The Commissioner has obtained numerous restraining orders under section 19 of the *Proceeds of Crime Act* 2002 (**POCA**) throughout Australia, relying upon the fact that structured deposits were made into Australian bank accounts. In such cases, the Commissioner contends that the assets constitute "proceeds" and/or an "instrument" of structuring and are thereby liable to restrained and, subsequently, forfeiture.

Reasoning in Kalimuthu

In *Kalimuthu*, the Commissioner had obtained a restraining order under section 19 of the POCA over various bank accounts. The restraining order had been obtained on the basis that structured deposits were made into Australian bank accounts in contravention of section 142 of the AML/CTF Act. There was little dispute that the applicants for exclusion were victims of cuckoo-smurfing.

The critical issue for determination was whether, by operation of section 330(4)(a) of the POCA, the money placed into the Australian bank accounts had ceased to be proceeds and an instrument of structuring.

That section relevantly provides as follows:

> *(4) Property only ceases to be *proceeds of an offence or an *instrument of an offence:*
>
> *(a) if it is acquired by a third party for *sufficient consideration without the third party knowing, and in circumstances that would not arouse a reasonable suspicion, that the property was proceeds of an offence or an instrument of an offence (as the case requires);*

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[1] http://www.austrac.gov.au/typologies-2008-methodologies

Allanson J determined (at [117]-[121]) that the applicants for exclusion were third parties because:

- they were not in any legal relationship with anyone involved in the money remitting transaction that would make the money remitting transaction one between related parties;
- the applicants for exclusion had no interest in the Australian physical currency, or any property derived from it, before the cash was deposited into their accounts; and
- the applicants for exclusion were in no different position from that of a person who sells property to a stranger and is paid by direct debit into his bank account.

Allanson J also determined (at [124]) that the property (the chose in action) was acquired for sufficient consideration. Firstly, the bank was paid an amount equal to the credit balance of the account and, secondly, the applicants for exclusion had provided funds in foreign currency of equivalent value to a money remitter.

Lastly, Allanson J addressed the question whether the applicants for exclusion had acquired their interests in circumstances that would not arouse a reasonable suspicion that the funds deposited in their bank accounts were the proceeds of an offence or an instrument of an offence.

His Honour observed that:

> *The question posed by the section is objective: would the circumstances arouse that reasonable suspicion in a person in the position of the respondents, knowing what they knew: see Director of Public Prosecutions v Le [2007] VSCA 18; (2007) 15 VR 352 [24]. The decision was overturned in the High Court, but the approach of the Court of Appeal to 'reasonable suspicion' was approved: see Director of Public Prosecutions (Vic) v Le [2007] HCA 52; (2007) 232 CLR 562 [1] (Gleeson CJ), [127] (Kirby and Crennan JJ).*

Allanson J concluded that he was satisfied that no reasonable suspicion would be aroused in the circumstances known to the exclusion applicants. His Honour pointed to the following matters in reaching that conclusion:

- that it was not alleged that any applicant for exclusion was involved in the offending;
- that the applicants for exclusion had lived their lives in Malaysia;
- that the applicants for exclusion believed that they could send money offshore through a money remitter;
- that the amounts remitted matched the amounts which the applicants for exclusion believed ought to be deposited into their accounts based on what was provided to the money remitter in Malaysia;
- that not all of the deposits into the accounts were below the reporting threshold;
- that the period of time over which the transactions took place was relatively short;
- that at the time of the deposits, the applicants for exclusion were not aware of the multiple locations at which the transactions took place or that the deposits were made in different States;
- that there was no evidence to support a finding that the applicants for exclusion were aware that structuring deposits in this way was linked to criminal activity, either in Australia or Malaysia.

Accordingly, Allanson J allowed the application for exclusion.

Reasoning in Lordianto

Simpson J stated (at [31]) that there are five elements to section 330(4)(a), namely:

- that property is acquired;
- by a third party;
- for sufficient consideration;
- without knowledge that the property was the proceeds or an instrument of a relevant offence; and
- in circumstances that would not arouse a reasonable suspicion that the property was the proceeds or an instrument of a relevant offence.

As was the case in Kalimuthu, a money remitter was used to transfer funds from overseas (here Indonesia) to Australia. The money was deposited into the accounts of the Lordianto family in structured (less than $10,000) deposits.

It was accepted on behalf of the applicants for exclusion that their interests in the restrained bank accounts were proceeds or instruments of a relevant offence by reason of the structured deposits. However, the question was whether the funds standing to the credit of the bank accounts had ceased to be proceeds and an instrument, in reliance upon section 330(4)(a) of the Act.

Simpson J noted (at [55]) that the applicants claimed that they were:

> *innocent victims of cuckoo smurfing; that their legitimate transactions in Indonesia had been subverted in such a way that the deposits in their Australian CBA accounts were sourced, not from their own funds, but from proceeds, in Australia, of criminal activity*.

Simpson J then considered each of the five elements which her Honour had identified as comprising the test in section 330(4)(a).

Acquisition: Simpson J found that there was no relevant "acquisition".

Simpson J reasoned that the relevant property in question in the exclusion application was the applicants' interest in bank accounts. That property (which was a chose in action) was created when the account was *opened*. Thereafter, the value of that chose in action increased and decreased from time to time, but the property (being the chose in action) never changed. Put another way, the relevant property (i.e. the chose in action) pre-existed the criminal conduct. Therefore, it was not "acquired" within the meaning of section 330(4)(a).

Her Honour (at [83]-[84]) expressly refused to follow the reasoning of Allanson J in *Kalimuthu* and Mitchell J in *Commissioner of the Australian Federal Police v Fitzroy All Pty Ltd* (2015) 299 FLR 439.

Third Party:

Her Honour posed the question:

> *"third parties" to what?*

Simpson J found that the third-party test is:

> *the statutory enactment of the equitable notion of a purchaser for value without notice. A third-party is a person to whom property passes – third party to the ownership of the property. It is the party by whom the property is acquired. The paragraph is concerned with the transfer of property. A person is not a third party only because he or she had no connection with the offence that causes the property to be tainted.*

Because Simpson J found that third party is the party by whom the property is acquired, and her Honour had already found that there was no relevant acquisition, the applicants failed also on this limb of the exclusion test (at [105]).

Sufficient consideration:

Maybe surprisingly, her Honour found (at [107]) that:

> *If the deposits were made in the course of a cuckoo smurfing operation, they were deposited without consideration passing from the applicants to the depositors (or to anybody on their behalf). They were simply gratuitous deposits, and the applicants maintain whatever rights they had (under Indonesian law) against the Indonesian money remitters to whom they had paid the money. The payments made to the Indonesian money remitters were made in consideration of the transfer to the CBA accounts, a transfer that did not eventuate.*

Accordingly, her Honour found that there was not "sufficient consideration" for the chose in action.

Knowledge that property was tainted:

This element will be a question of fact in each case. Here, her Honour found that:

> *The applicants were well aware, over a period of years, of the unorthodox manner in which deposits were made into their accounts. The onus lies on them to prove that they did not know, and they have not discharged that onus.*

Reasonable suspicion:

Simpson J acknowledged that the test to be applied was objective (at [124]). However, having already found that the applicants had not discharged their onus in respect of knowledge, it followed that they could not discharge their onus concerning a reasonable suspicion.

Her Honour stated:

> *… the bank statements demonstrate a pattern of activity that would arouse a reasonable suspicion in any reasonable person.*

Hence, on her Honour' is reasoning, structured deposits into bank accounts would always arouse a reasonable suspicion in a reasonable person (which may be seen to be at odds with the observations on the Victorian Court of Appeal in *Director of Public Prosecutions v Le* (2007) 15 VR 352, [24]).

Reasoning in Fernandez

It is perhaps unsurprising that, having foreclosed any possibility of a successful exclusion application in a cuckoo smurfing situation, Simpson J found a different path to ameliorate the hardship that otherwise would flow to a victim of cuckoo smurfing.

Notwithstanding the fact that an application for exclusion is dismissed, where there is no conviction the Commissioner must still succeed with an application for forfeiture. If such application for forfeiture is refused, the restraining order ceases to operate and the property is returned to the property owner.

Fernandez was yet a further cuckoo smurfing case, involving a section 19 restraining order. No application for exclusion had been made under section 29 of the Act. Instead, the property owners opposed forfeiture on the basis that it was not in the public interest to make a forfeiture order (see section 49(4) of the Act).

As is common in cuckoo smurfing cases, the Commissioner did not allege that the property owners had any involvement in, or were party to, the money laundering offences or structuring transactions.

Simpson J stated (at [92]):

> *I appreciate the gravity of offences of money laundering and structuring, and that they protect the profits of criminal activity; I fully appreciate the need for the confiscation system to operate to short-circuit the use of those means of criminal profit protection. Forfeiture of the property of an innocent victim does not achieve that, and does not in any way operate as deterrent to those who use the property of innocent victims to achieve their criminal ends.*

Her Honour concluded (at [94]):

> *I have concluded that the public interest is not served by ordering forfeiture of the defendant's interest in the property.*

Where to from here

The present position for practitioners advising clients in cuckoo smurfing cases is unsatisfactory. Two inconsistent approaches have been adopted by single judges of Supreme Courts in different Australian jurisdictions.

Based on the reasoning of Allanson J in *Kalimuthu*, applications for exclusion in cuckoo smurfing cases can succeed in reliance upon section 330(4). Based on the decision of Simpson J in *Lordianto* (the reasoning of which was affirmed in *Fernandez*) applications for exclusion in cuckoo smurfing cases have no prospects of success. Instead, the focus must be on opposing forfeiture orders.

Having regard to the fact that the Kalimuthu decision will shortly be the subject of consideration by the WA Court of Appeal, it would appear to be prudent to await the outcome of that appeal before proceeding to hearing with any further applications. It would be unsurprising if the matter reaches the High Court before too long, having regard to the large value of assets restrained on the basis of cuckoo smurfing activity.

About the author

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For more information about proceeds of crime litigation in Australia visit www.confiscation.com.au