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Objectives of this presentation

1. To provide a brief overview of Australian money laundering legislation.
2. To provide an indication of how many money laundering prosecutions are conducted.
3. To outline some recent legal issues.
4. To outline some matters that are being considered in the law reform space.



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Part 1: Australian money laundering legislation

1. Australia is a federation. This means that there is State and Federal legislation that criminalises money laundering.
2. Federal legislation criminalising money laundering was first introduced through the *Proceeds of Crime Act 1987* (Cth). Since 1 January 2003, federal money laundering offences have been contained in the *Criminal Code* (Cth).



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1. State legislation criminalising money laundering was introduced from 1985 onwards. The legislation originated from resolutions passed by the Special Premiers Conference on Drugs in 1985 and a model Bill agreed to by the Standing Committee of the Attorneys-General.
2. There is significant overlap between State and Federal legislation because of the common origin.
3. Dealing with proceeds of crime, suspected proceeds and using money as an instrument of crime can be prosecuted under Federal law and under the law of most States (NSW, Vic, Tas and NT)
4. The other States criminalise dealing with proceeds of crime but don't all criminalise dealing with suspected proceeds (SA, ACT) and instruments of crime (ACT, QLD).



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1. When investigating agency and prosecuting agency are State agencies, usually State legislation will be used.
2. When the investigating agency and prosecuting agency are Federal agencies, usually Federal legislation will be used.



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Part 2: How many money laundering prosecutions are conducted?

The Policy

The Commonwealth Director of Public Prosecutions (which is the Federal prosecutions agency) has a National legal Direction dated March 2017, that provides guidance about when a money laundering offence should be preferred, when the predicate offence should be preferred and when both the money laundering offence and predicate offence should be charged. It states:

1. Caution should be exercised when charging both the predicate offence and a money laundering offence (this comes from cases where the CDPP has been criticised for charging both: *Nahlous v The Queen* [2010] NSWCCA 58; *Thorn v The Queen* [2009] NSWCCA 294)
2. The Prosecution Policy of the Commonwealth says that ordinarily the most serious offence should be preferred. This means if the money laundering offence is the most serious offence it should be preferred.



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The Statistics

1. It is difficult to accurately assemble statistics because each State keeps records of slightly different information. However the following inferences can be drawn from the data available:
 - a. The most common money laundering offence to be prosecuted is an offence of dealing with suspected proceeds of crime.
 - b. The majority of suspected proceeds offences were finalised in the lowest level court.
 - c. There were over 6000 people convicted in Victoria over 3 years of dealing with suspected proceeds. Around 1/3 of these people received a full-time custodial penalty.
 - d. There were under 1000 people convicted of dealing with proceeds of crime nationally over a period of 5 years.
 - e. There were under 100 people convicted of dealing with instruments of crime nationally over a period of 5 years.



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The Penalties

1. Under **Federal** legislation between Jan **2012** and Dec **2016 (where money laundering offence is principal offence)**:
 - a. **14 people** were convicted of dealing with **proceeds** of crime where the money was equal to or greater than **\$1,000,000**. Those 14 people received between 30 months and 12 years' imprisonment.
 - b. **18 people** were convicted of dealing with **proceeds** of crime where the money was equal to or greater than **\$100,000**. Those 18 people received between 1 and 8 years' imprisonment.
2. Under **NSW** legislation between July 2009 and Jun 2016 (where money laundering offence is principal offence):
 - a. **151 people** were convicted of dealing with proceeds of crime. 71 of those people received between 6 months and 5 years' imprisonment.
3. Under **Vic** legislation between July **2010** and Jun **2015 (all convictions)**:
 - a. **79 people** were convicted of dealing with proceeds of crime. 58 of those people received between several months and 5 years imprisonment.



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The combined effect of the policy, the statistics and the penalties

1. There are a relatively small number of people prosecuted and convicted of money laundering offences compared to other offences such as drug, tax and fraud offences.
2. The penalties imposed for money laundering offences vary but are generally much more modest than for other offences with the same maximum penalty.
3. The combined effect of the policy and statistics is that prosecution agencies are continuing to favour the prosecution of predicate offences such as drug offences over money laundering offences.



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Part 3: Recent issues in money laundering prosecutions

First issue: Finding a charge commensurate with the seriousness of the conduct where the predicate offence is unable to be identified.

Over the past few years, the CDPP has prosecuted a large handful of matters with the following features:

- a. where the money laundering syndicate is separate from the organised crime group generating the money and as a result the source of the money is unknown;
- b. where the money laundering syndicate is sophisticated and involves a controller located overseas;
- c. where large sums of money are being handled in excess of \$1,000,000 per month; and
- d. the Australian arm of the syndicate deposits the money into Australian bank accounts in amounts under \$10,000 in order to deliberately avoid reporting requirements (which itself is an offence).



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Charging options:

1. The predicate offence (fraud, human trafficking, drugs, tax) is not known and therefore is not available.
2. In order to charge a person with dealing with proceeds of crime it is necessary to identify the predicate offence or class of offences. As the predicate offence is not known, dealing with proceeds of crime cannot be charged.
3. The offence of dealing with suspected proceeds of crime is available but only carries a maximum penalty of 3 years under federal legislation and between 2 and 5 years under State legislation.
4. The offence of deliberately conducting transactions under \$10,000 to avoid reporting requirements is available, but only carries a maximum penalty of 5 years.
5. The offence of dealing with money intending it to become an instrument of crime is available and carries a maximum penalty of up to 25 years imprisonment.



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Second issue: Whether it is possible to charge a person with dealing with money intending it to become the instrument of crime, where the future crime is conducting a money remittance in a false name.

There is currently a case before the Court of Criminal Appeal NSW on this issue. It has the following features:

- a. on 11 occasions the offender remitted money totalling just over \$1,000,000 to bank accounts in China;
- b. the offender used a false name to conduct the transfer;
- c. the offence was particularised as dealing with money (possessing the money prior to the money remittance), intending that the money would become an instrument of using a false name to conduct a money remittance (receiving a designated service in a false name); and
- d. it is noted that the offence of receiving a designated service in a false name has a maximum penalty of two years' imprisonment whilst the instrument charge has a maximum penalty of 25 years' imprisonment.



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Previous case law on this issue says that:

- a. It is a matter for the prosecuting agency to decide which charge to prosecute. Just because there is an offence with a lower maximum penalty that fits the conduct, doesn't mean that the prosecuting agency is obliged to use it.
- b. The money must be used in the instrument offence (not merely be part of the broad factual matrix in which the offence occurs).
- c. The instrument offence must take place in the future, after the dealing. In this case it must take place after the possession of the money.



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Third issue: Whether it is necessary to particularise the predicate offence when charging dealing with suspected proceeds.



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400.9 Dealing with property reasonably suspected of being proceeds of crime etc.

- (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**
 - (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.



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

...

(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

...

(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

...

(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.**



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The answer is:

- a. If you are relying on a presumption in s.400.9(2) then it is not necessary to specify the predicate offence.
- b. If you are not relying on a presumption in s.400.9(2) then in all likelihood it is still not necessary to specify the predicate offence, however this is subject to some doubt.



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Part 4: Law reform

Law reform in NSW

1. Recently, NSW has introduced legislation that is very similar to s.400.9(2) of the *Criminal Code* (Cth). This is an indication that the presumptions in Federal legislation used to show that money is suspected proceeds is considered very effective.
2. Recently, NSW has introduced the maximum penalty of suspected proceeds offences from 2 years to 5 years. This indicates that the seriousness of the offences being prosecuted under that section was not captured by the previous maximum penalty. This is consistent with an issue raised above that the source of the money is often unknown and therefore the more serious offence of dealing with proceeds of crime is not available.



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Federal law reform

1. In Federal legislation, consideration is being given to how to fix the issues raised above. Possible reform options include:
 - a. increasing the maximum penalty for suspected proceeds offences from the existing penalty of 3 years imprisonment;
 - b. creating presumptions for proceeds offences; and
 - c. clarifying that no predicate offence needs to be particularised for suspected proceeds offences.



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Questions