

EXERCISE

Schapelle Corby's Proceeds of Crime

An exercise to supplement Chapter 11 Statutory Interpretation.

Assume it is 2020 and Schapelle Corby is released from prison, having served a 15-year sentence for drug trafficking. She flies home to Brisbane, bringing with her some of the possessions she had with her in prison.

The next day she goes to get some money from her account, which contains \$300,000 in royalties from the books she has published about her ordeal, including *My Story* also published as *No More Tomorrows*, the copyright for which was assigned to her sister Mercedes. The ATM reads 'insufficient funds'. How could that be? Schapelle contacts the bank and is informed that the funds have been seized by the Commonwealth Director of Public Prosecutions (DPP). She is outraged, but also broke. She asks her sister Mercedes to borrow some money.

Mercedes accesses her account only to find the \$127,000 Pan Macmillan Australia paid into her husband Wayan Widyartha's Indonesian account, which he then transferred to Mercedes' Australian account, also gone. Mercedes is disgusted, since the \$15,000 she was paid for a story in *New Idea* magazine was also confiscated. She contacts the DPP and is informed that the action is legally justified under the *Proceeds of Crime Act 2002* (Cth), and that the money has been banked in the government's Confiscated Assets Account.

Schapelle contacts you and asks you to send her a copy of the legislation. You send her the link on Austlii. She calls and says that she doesn't think the legislation applies. The book was about life in prison, not about drug smuggling. Anyway, the crime she was (wrongly she says) convicted for occurred in Indonesia and was tried under Indonesian law, so it is not a crime proved under Australian law, and she is innocent until proven guilty in our system. Advise Schapelle on whether she would be likely to succeed with these arguments in court, and any other useful advice you may give as to how she might get around the legislation and keep the money.

Excerpts from the Proceeds of Crime Act 2002 (Cth)

2 Commencement

Sections 1 and 2 and anything in this Act not elsewhere covered ... the day on which this Act receives the Royal Assent ... Sections 3 to 338 ... A single day to be fixed by Proclamation

3 Identifying defined terms

1) Many of the terms in this Act are defined in the Dictionary in Chapter 6.

5 Principal objects

The principal objects of this Act are:

- (a) to deprive persons of the proceeds of offences, the instruments of offences, and benefits derived from offences, against the laws of the Commonwealth or the non-governing Territories; and
- (b) to deprive persons of literary proceeds derived from the commercial exploitation of their notoriety from having committed offences; and
- (c) to punish and deter persons from breaching laws of the Commonwealth or the non-governing Territories; and
- (d) to prevent the reinvestment of proceeds, instruments, benefits and literary proceeds in further criminal activities; and
- (e) to enable law enforcement authorities effectively to trace proceeds, instruments, benefits and literary proceeds; and
- (f) to give effect to Australia's obligations under the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, and other international agreements relating to proceeds of crime; and

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- (g) to provide for confiscation orders and restraining orders made in respect of offences against the laws of the States or the self-governing Territories to be enforced in the other Territories.

13 Act to apply both within and outside Australia

This Act extends, except so far as the contrary intention appears:

- (a) to acts, matters and things outside Australia, whether or not in or over a foreign country; and
(b) to all persons, irrespective of their nationality or citizenship.

14 Application

This Act applies in relation to:

- (a) an offence committed at any time (whether or not any person is convicted of the offence); and
(b) a person's conviction of an offence at any time;

whether the offence or conviction occurred before or after the commencement of this Act.

17 Restraining orders—people convicted of or charged with indictable offences

When a restraining order must be made

- (1) A court with proceeds jurisdiction must order that:
- (a) property must not be disposed of or otherwise dealt with by any person; or
(b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order; if:
(c) the DPP applies for the order; and
(d) a person has been convicted of, or has been charged with, an indictable offence, or it is proposed that he or she be charged with an indictable offence; and
(e) any affidavit requirements in subsection (3) for the application have been met; and
(f) (unless there are no such requirements) the court is satisfied that the authorised officer who made the affidavit holds the suspicion or suspicions stated in the affidavit on reasonable grounds.

Property that a restraining order may cover

- (2) The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that that property is any one or more of the following:
- (a) all or specified property of the suspect;
(b) all property of the suspect other than specified property;
(c) specified property of another person (whether or not that other person's identity is known) that is subject to the effective control of the suspect;
(d) specified property of another person (whether or not that other person's identity is known) that is proceeds of the offence or an instrument of the offence.

152 Making literary proceeds orders

- (1) A court with proceeds jurisdiction may make an order requiring a person to pay an amount to the Commonwealth if:
- (a) the DPP applies for the order; and
(b) the court is satisfied that the person has committed an indictable offence (whether or not the person has been convicted of the offence); and
(c) the court is satisfied that the person has derived literary proceeds in relation to the offence.
- (2) A court with proceeds jurisdiction may make an order requiring a person to pay an amount to the Commonwealth if:
- (a) the DPP applies for the order; and
(b) the court is satisfied that the person has committed a foreign indictable offence (whether or not the person has been convicted of the offence); and
(c) the court is satisfied that the person has derived in Australia literary proceeds in relation to the offence.

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153 Meaning of literary proceeds

- (1) Literary proceeds are any benefit that a person derives from the commercial exploitation of:
 - (a) the person's notoriety resulting from the person committing an indictable offence or a foreign indictable offence; or
 - (b) the notoriety of another person, involved in the commission of that offence, resulting from the first-mentioned person committing that offence.
- (2) The commercial exploitation may be by any means, including:
 - (a) publishing any material in written or electronic form; or
 - (b) any use of media from which visual images, words or sounds can be produced; or
 - (c) any live entertainment, representation or interview.
- (3) If the offence is an indictable offence, it does not matter whether the benefits are derived within or outside Australia.
- (4) In determining:
 - (a) whether a person has derived literary proceeds; or
 - (b) the value of literary proceeds that a person has derived;the court may treat as property of the person any property that, in the court's opinion:
 - (c) is subject to the person's effective control; or
 - (d) was not received by the person, but was transferred to, or (in the case of money) paid to, another person at the person's direction.

154 Matters taken into account in deciding whether to make literary proceeds orders

In deciding whether to make a literary proceeds order, the court:

- (a) must take into account:
 - (i) the nature and purpose of the product or activity from which the literary proceeds were derived; and
 - (ii) whether supplying the product or carrying out the activity was in the public interest; and
 - (iii) the social, cultural or educational value of the product or activity; and
 - (iv) the seriousness of the offence to which the product or activity relates; and
 - (v) how long ago the offence was committed; and
- (b) may take into account such other matters as it thinks fit.

338 Dictionary

In this Act, unless the contrary intention appears:

- "Australia", when used in a geographical sense, includes the external Territories.
- "benefit" includes service or advantage.
- "books" includes any account, deed, paper, writing or document and any record of information however compiled, recorded or stored, whether in writing, on microfilm, by electronic process or otherwise.
- "confiscation order" means a forfeiture order, a pecuniary penalty order or a literary proceeds order.
- "foreign forfeiture order" has the same meaning as in the Mutual Assistance Act.
- "foreign indictable offence" means an offence against a law of a foreign country constituted by conduct that would have constituted an offence against a law of the Commonwealth, a State or a Territory punishable by at least 12 months imprisonment if it had occurred in Australia.
- "foreign serious offence" has the same meaning as in the Mutual Assistance Act.
- "Mutual Assistance Act" means the Mutual Assistance in Criminal Matters Act 1987.