
PROCEEDS OF CRIME CONFERENCE

Civil Forfeiture and Unexplained Wealth
Perspectives from the New Zealand Central
Authority for Mutual Assistance

5-7 October 2011



Madeleine Laracy
Crown Counsel

-
- Team Leader, and Manager Mutual Assistance at Crown Law – incoming and outgoing requests.
 - Counsel from the Criminal Team prepare, assess and provide internal and external advice on requests. Not a post-box (Home Office).
 - The Attorney-General is the New Zealand Central Authority.

MACMA captures civil proceeds régimes

- Must be a “criminal matter” = “criminal investigation” or “criminal prosecution”.
- Civil investigations/proceedings here or overseas for tainted property or property of persons who have unlawfully benefitted from crime are deemed to be “criminal matters”.

Relationship between MACMA and CPRA

- Broad effect is to put NZ in a position where it can make requests for criminal proceeds to be dealt with overseas on the same basis as domestic proceeds.
- Similarly, for foreign countries to make requests for proceeds here to be dealt with pursuant to our domestic legislation.
- For substantive foreign restraining orders the emphasis is on *registering* not *making* an order. For foreign forfeiture orders we will register your final order.

Formal basis for Mutual Assistance

- Bi-lateral treaty.
- Multi-lateral conventions (Transnational Organised Crime; Hallucinogenic Drugs).
- “Ad hoc” – most requests.
- Mutual Assistance is founded on reciprocity.

General guidance

- Keep requests as simple as possible (especially if translated) – need the analysis, not the evidence.
- Be in quick – early communication; direct contact by email.
- Early advice to your own Central Authority. Can be difficult getting the balance right between direct contact between law enforcement officials and making contact with and through the Central Authority.
- Be prepared to provide or draft affidavits for the foreign country.
- Do it as you would a domestic matter, but accommodating the other country's requirements to the extent lawfully possible.

Foreign orders must relate to

- Tainted property, or property of someone who has unlawfully benefitted from significant foreign criminal activity, or an instrument of crime, or property that will satisfy a PPO; and
- Reasonable grounds to believe some or all property is in New Zealand.

Foreign restraining orders (FROs)

- All applications to register FROs are on notice – may require overseas service – service has to be effected by MACMA.
- If affected persons had an opportunity to be heard in the foreign country when the FRO was made = no right of hearing in NZ .
- If *ex parte* is needed, the foreign country must request an “interim foreign restraining order” under s 60 MACMA: s 128 CPRA.
- Interim FRO lasts for a maximum of 28 days. Can be extended for multiple periods of up to 3 months each.
- Interim order anticipates an FRO being registered, on notice.
- Only the initial interim order application is without notice. Section 131 requires service of applications to extend the duration.
- Registered FROs have an initial maximum life of 2 years. Can be extended if necessary for 1 further year.

Foreign forfeiture orders (FFOs)

- The domestic New Zealand civil forfeiture regime applies to applications to register FFOs based on “tainted property” (“assets” forfeiture) and “property of a person who has benefitted from significant foreign criminal activity” (“profit” forfeiture).
- Do not need a conviction in the foreign country to forfeit property under CPRA at the request of a foreign country.
- Applications must be on notice – overseas service via MACMA.
- If affected persons had an opportunity to be heard in the foreign country when the FFO was made = no right of hearing in New Zealand.
- Forfeited property “vests in the Crown absolutely”.
- Property is automatically in the custody and control of the OA.
- Once forfeited the Court “may” make an order directing transfer of an interest in the property to an applicant.

Common problems

- Incorrect and out of date evidence about the property in question:
 - Who owns it?
 - Any equity in the property?
 - Is there a worthwhile sum in the bank account?
 - Who else has an interest? Relevant both to service, and whether it is worth restraining as an “innocent” party’s interest will be excluded from any forfeiture.

Common problems

- Service and notice:
 - The requesting country should identify all individuals/entities it knows have an interest in the property, and obtain in advance if possible agreed addresses/methods for service. This includes New Zealand based parties. Don't leave it to the requested country.
 - Be ready to effect service of the New Zealand proceedings, in response to a MACMA request.
 - Advise us of any defects in your initial domestic service.
 - Counsel have to be able to assure the New Zealand High Court at the time of a hearing to restrain or forfeit that necessary service requirements have been satisfied.

Common problems

- The connection between the offending and the property
 - The documents to be filed must establish the legal basis for restraining (or, as applicable, forfeiting) the property;
 - Ideally clear on the face of your domestic court order, or in court documents annexed to the order by a court official;
 - Failing that, in an affidavit from the investigating officer, or Central Authority;
 - May also be acceptable if that information is in the filed mutual assistance request. But, may not count as “admissible evidence”.

Common Problems

- Communication
 - Role of Central Authority.
 - Information about the foreign country's law - eg. s 48 MACMA notice requirement – proceeds search warrant may avoid this.
 - What needs to be on the face of your domestic court order – especially basis and scope of restraint.
 - We will assess drafts – but it's not a guarantee of success.

Common Problems

- Have an eye on the bigger picture of forfeiture
 - If you can't ultimately forfeit = probably no point restraining
 - May not be able to forfeit because of domestic costs, or because the evidence is not there

Emerging issues and themes

- Asset sharing:
 - Article 14 of the United Nations Convention against Transnational Organised Crime, which is entitled “Disposal of confiscated proceeds of crime or property”. Article 14(2) provides:

When acting on the request made by another State Party in accordance with article 13 of this Convention, States Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners.”
 - New Zealand has an “assumption” of 50/50 sharing.
 - Implications for reciprocity.

Emerging issues and themes

- MACMA request or domestic investigation or joint investigation?
 - Multi-jurisdictional offending
 - Do you want most or all of the assets back?
 - How quickly do you need to act?
 - How readily can you share all relevant information?

Emerging issues and themes

- Costs
 - MACMA and international regimes premised on requested country paying.
 - Extraordinary and identifiable costs – e.g. complicated investigation; experts required.
 - Awards of costs arising from:
 - Property wrongly restrained
 - Property restrained too long
 - Defects in the original domestic process which disallow continued New Zealand restraint
 - Contributions may be sought more commonly in the future?
 - Will Governmental undertakings as to reimbursing for unanticipated and extraordinary costs be required?

Definition of foreign restraining order

- Section 5(6) MACMA:

foreign restraining order means an order made under the law of a foreign country by a court or other judicial authority that—

- (a) restrains a particular person, or all persons, from dealing with the property specified in the order; and
- (b) relates to—
 - (i) tainted property (as defined in relation to Part 3); or
 - (ii) property of a person who has, or who may have, unlawfully benefited from significant foreign criminal activity; or
 - (iii) an instrument of crime (as defined in relation to Part 3); or
 - (iv) property that will satisfy some or all of a foreign pecuniary penalty order

Definition of foreign forfeiture order

foreign forfeiture order means—

- (a) an order made under the law of a foreign country by a court or other judicial authority for the forfeiture of property that is—
 - (i) tainted property (as defined in relation to Part 3); or
 - (ii) property of a person who has unlawfully benefited from significant foreign criminal activity; or
 - (iii) an instrument of crime (as defined in relation to Part 3); or
- (b) a foreign pecuniary penalty order”.

Definition of tainted property

tainted property means—

- (a) means any property that has, wholly or in part, been—
 - (i) acquired as a result of significant criminal activity; or
 - (ii) directly or indirectly derived from significant criminal activity; and
- (b) includes any property that has been acquired as a result of, or directly or indirectly derived from, more than 1 activity if at least 1 of those activities is a significant criminal activity.