

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S ²⁷⁸ of 2013

S 279 / 2013

BETWEEN:



MICHAEL JOHN MILNE
Appellant

And

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. The appellant certifies that this submission is in a form suitable for publication on the internet.

Part II: Issues

- 10 2. What is the proper construction of the definition "instrument of crime" in s400.1, which appears in Part 10.2, "Money Laundering", of the *Criminal Code, Criminal Code Act 1995* (Cth) (**the Criminal Code or the Code**)?

Part III: s78B of the *Judiciary Act 1903* (Cth)

3. The appellant certifies that he has considered whether notice should be given under s78B of the *Judiciary Act 1903* (Cth) and determined that notice is not necessary.

Part IV: Citations for the reasons for judgment of the Courts below

- 20 4. The reasons for judgment of the Court of Criminal Appeal (**the CCA**) have not been reported. The Court of Criminal Appeal's reasons are available on the internet: *Milne v R* [2012] NSWCCA 24. The reasons of the primary judge

refusing the appellant's no case submission have not been reported and are not available on the internet.

Part V: Brief Statement of Facts

5. The appellant was tried in the Supreme Court of New South Wales before his Honour, Johnson J and a jury, on an indictment that contained the following two counts:

10 Count 1 - Between about 30 April 2004 and about 30 September 2005 at Sydney in the state of New South Wales and elsewhere [the appellant] dealt with property, intending that the property, namely a parcel of shares, would become an instrument of crime, in that it would be used to facilitate the commission of an offence by Barat Advisory Pty Ltd and at the time of the dealing, the value of the property was \$1 million or more;

Count 2 - On or about 13 November 2006 at Sydney in the state of New South Wales [the appellant] did, with the intention of dishonestly obtaining a gain from the Commonwealth, cause to be lodged an income tax return in the name of Barat Advisory Pty Ltd for the year ending 30 June 2005 containing false information, namely that the net capital gain from the sale of the shares in Admerex was \$4,597.

- 20 6. Count 1 was charged against s400.3(1) of the *Code*. This offence has a maximum penalty of 25 years imprisonment. Count 2 alleged an offence against s135.1(1) of the *Code* which carries a maximum penalty of 5 years imprisonment. This appeal concerns count 1. The Crown case in relation to count 1 is discussed below.

7. As at June 2004 the appellant's private company¹, Barat Advisory Pty Limited (**Barat**), owned over 55 million shares in Admerex Pty Limited (**Admerex**). These shares had been obtained at nominal cost with the consequence that any disposal of them for market value would result in a significant capital gains tax liability on the part of Barat.

- 30 8. In its simplest form, the Crown case was that Barat disposed of 48 million of the Admerex shares on 3 February 2005 by swapping them for shares in another company, Temenos Pty Limited ('the sale'). The Crown alleged that the appellant thereby dealt with that property (he being responsible for the sale by Barat). It was the Crown case that, at the time of the sale, it was the appellant's intention that Barat would not, when it came to file the relevant tax return, disclose the sale of the shares in that return. Thus the Crown alleged that, at the time he dealt with the

¹ The appellant was, from the time of incorporation, the sole director and shareholder of Barat -see CCA

shares, the appellant intended that, at some future time, Barat would commit an offence of dishonestly obtaining a financial advantage from the Commonwealth, contrary to s134.2 of the *Code*. It was on this basis that the Crown contended that the time of the sale, the appellant intended that the shares would become an instrument of crime. The shares, at the time of the sale, had a value in excess of \$8 million.

9. At trial, the appellant argued that even if the Crown case was established, the shares were not an “instrument of crime”. This was the basis of a no case submission made to the primary judge.² It was also the basis for a number of the appellant’s grounds of appeal against conviction in the CCA.
10. At trial (and in his argument in the CCA that the verdict was unreasonable) the appellant also contended that Barat did not realise any gain on the sale of the shares on 3 February 2005. This was on the basis that Barat, at that time, did not own (legally or beneficially) the shares (or, at least, that this fact had not been established against him to the requisite standard). To understand this issue it is necessary to say something more about the facts. These facts are also relevant to the way the Crown put its case on the “instrument of crime” issue the subject of this appeal (although, ultimately, it is the appellant’s submission that the broader factual context relied on by the Crown did not, contrary to the Crown case, render the Admerex shares an “instrument of crime”).
11. Prior to the sale of the Admerex shares on 3 February 2005, they had been transferred, on or around 11 June 2004 from Barat to a number of Dutch companies (the shares in each of which were held by an entity under Dutch law called a ‘stichting’). It was the Crown case that at the time of the transfer of the shares to the offshore companies the appellant was the “controlling mind” of those companies and that he thereby retained the beneficial ownership of the shares.³ It was the appellant’s case that, consistent with the basis on which the structure had been established by a solicitor, the legal and beneficial ownership of the shares was transferred to (and remained with) the overseas companies.⁴ It was accepted by the Crown that, if Barat, in June 2004, disposed of the shares (as the appellant

² See CCA at [89]

³ See SU 40.29; 114; 228-230; CCA [167]

⁴ See SU 163ff; CCA at [84]

contended), it could not again dispose of them on 3 February 2005.⁵ The jury was told that a critical issue for them to decide was whether, on the transfer of the shares to the overseas companies in June 2004, the appellant retained beneficial ownership of the shares.⁶ The jury, by its verdict, was satisfied beyond reasonable doubt that he did.

12. The structure and transactions referred to above were relied on by the Crown in proof of the appellant's intention that, at the time of the sale of the shares 3 February 2005, the appellant intended that Barat would not declare that disposal as a capital gains tax event. The jury, by its verdict, was also satisfied beyond
10 reasonable doubt this was the appellant's intention on 3 February 2005.
13. The facts for the purposes of the proceeds of crime offence were, distilled to their essence, the sale of the shares in February 2005 by the appellant with the intention that Barat would not declare that sale when it ultimately came to lodge its taxation return for the relevant period.

Part VI: The argument

14. The argument below sets out: (A) the relevant statutory provisions; (B) the Crown case at trial and the argument as to why, on the Crown case, the shares were not an instrument of crime; (C) the errors in the reasoning of the CCA and (D) judicial
20 consideration of the word "use", analysis of which further supports the appellant's contentions.

A. The relevant statutory provisions

15. The relevant provisions creating the offence are contained in Division 400 (titled 'Money laundering') in Part 10.2 (also titled 'Money Laundering') of Chapter 10 of the *Code*.
16. Section 400.3(1) of the *Code* provides (and provided at the relevant time):

⁵ SU 93.23; CCA [104]

⁶ See SU 51.29; 93.23; 228-230 CCA at [39]

400.3 Dealing in proceeds of crime etc.—money or property worth \$1,000,000 or more

- (1) A person is guilty of an offence if:
- (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is, and the person believes it to be, proceeds of crime; or
 - (ii) the person intends that the money or property will become an instrument of crime; and
 - (c) at the time of the dealing, the value of the money and other property is \$1,000,000 or more.
- Penalty: Imprisonment for 25 years, or 1500 penalty units, or both.

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17. The offence against the appellant relied on s400.3(b)(ii).

18. Before turning the central issue on this appeal, the intention that the property “will become an instrument of crime” it is convenient to set out the other elements of the offence.

Deals with money or other property (s400.3(1)(a))

20 19. Section 400.2 of the Code defines the term “deals with money or other property”. The Crown relied on the following part of the (then applicable) definition:⁷

400.2 Meaning of dealing with money or other property

- (1) For the purposes of this Division, a person *deals with money or other property* if:
- (a) the person does any of the following:
 - (i) receives, possesses, conceals or disposes of money or other property;
 - (ii) imports money or other property into, or exports money or other property from, Australia;
 - (iii) engages in a banking transaction relating to money or other property; and
 - (b) the money or other property is proceeds of crime, or could become an instrument of crime, in relation to an offence that is a Commonwealth indictable offence or a foreign indictable offence.

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...

20. Property is defined in s400.1 as follows:

property means real or personal property of every description, whether situated in Australia or elsewhere and whether tangible or intangible, and includes an interest in any such real or personal property.

21. Section 400.1(2) provides:

⁷ See SU 36.35; CCA [126]

To avoid doubt, a reference in this Division to *money or other property* includes a reference to financial instruments, cards and other objects that represent money or can be exchanged for money, whether or not they have intrinsic value.

10 22. There was no issue that the shares were “property” and that the disposal of the shares, by their sale, constituted a dealing with that property within the meaning of s400.2(1)(a)(i), (although the appellant disputed that he dealt with the property). Insofar as the definition, by paragraph (b) required, in the present case, that the money “could become an instrument of crime”, the element created by s400.3(1)(b)(ii) required proof that the appellant intended that the “property will become an instrument of crime”. The result in the present case was that this part of the definition of “dealing” was satisfied on proof of the element in s400.3(1)(b)(ii), (the matter which is the subject of this appeal).⁸

Valued at \$1,000,000 or more at the time of the dealing (s400.3(1)(c))

23. There was no issue that the property was valued at (more than) \$1,000,000.⁹

The person “intends that the ... property will become an instrument of crime” (s400.3(1)(b)(ii))

20 24. As noted above, there was an issue as to whether the Crown case was capable of establishing that the appellant intended that the shares would “become an instrument of crime”.

25. At the relevant time, s400.1 of the *Code* defined “instrument of crime” as follows:

instrument of crime: money or other property is an instrument of crime if it is used in the commission of, or used to facilitate the commission of, an offence that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence)¹⁰.

⁸ It is noted that the current form of the definition reflects the terms of the then s400.2(1)(a) without the need to prove one of s400.2(1)(b) or s400.2(2)(b) as previously required.

⁹ It is noted, pursuant to s400.3(4), absolute liability applies to s400.3(1)(c), although, somewhat contradictorily, s400.10 provides for a defence of mistake of fact as to the value of the money or other property.

¹⁰ This definition was amended in 2010 to refer to “an offence against a law of the Commonwealth, a State, a Territory or a foreign country that may be dealt with as an indictable offence ...”. The amendment is of no significance to the present case.

26. Putting the value of the property to one side, it was, therefore necessary for the Crown to prove that:

- i. the appellant disposed of the shares (s400.3(1)(a));
- ii. at that time he intended that the shares would “become an instrument of crime” (s400.3(1)(b)(ii)).

27. As can be seen above, the definition of “instrument of crime” has two parts: money or property “used in the commission of” a particular type of offence; or money or other property “used to facilitate the commission of” a particular type of offence. The Crown relied on the latter. The offence particularised, an offence against s134.2 of the *Code* is an indictable offence and thus a relevant offence. This meant that the Crown had to prove:

- i. the appellant disposed of the shares;
- ii. at that time he intended that the shares would become property that would be used to facilitate the offence of dishonestly obtaining a financial advantage from the Commonwealth.

B. The Crown case on “instrument of crime”

28. It is helpful at this point to set out how the Crown put its case on “intending that the “property will become an instrument of crime”. The CCA at [7] reproduced the relevant part of the Crown case statement (taken from [166]-[170]¹¹), *emphasis added*:

166. On or around 3 February [the appellant] dealt with property, namely the 48 million Admerex shares, when on behalf of Barat Advisory he disposed of those shares by exchanging them for 1 million Temenos shares.

Intending that the property would become an instrument of crime

167. The Admerex shares remained under the beneficial ownership and effective control of Barat Advisory through the accused, after they were purportedly transferred into the Stichting Group companies on or around 11 June 2004. At the time of that purported transfer, and subsequently, [the appellant] *intended to use the Stichting groups to conceal* the disposal of the Admerex shares, and the proceeds of such disposal, in order to avoid the payment by Barat Advisory of Capital Gains Tax.

¹¹ With footnotes and evidentiary references omitted. This part of the Crown case statement reflected the manner in which the Crown put its case on this issue from start to finish.

168. When the 48 million Admerex shares were disposed of on 3 February 2005, by exchanging them for 1 million Temenos shares, [the appellant] intended to avoid the payment by Barat Advisory of tax on the capital gain which was derived as a result of that disposal. For that purpose, [the appellant] used the *Stichting groups* to conceal the disposal of the 48 million Admerex shares and the proceeds of that disposal.

169. As such, [the appellant] intended that the 48 million Admerex shares would be used in the commission of, or used to facilitate the commission of, an offence that may be dealt with as a Commonwealth indictable offence, namely the obtaining by Barat Advisory of a financial advantage by deception, contrary to section 134.2 of the Criminal Code.

170. On this basis [the appellant] intended that the 48 million Admerex shares would become an instrument of crime.

At the time of the dealing the value of the property was \$1 million or more

171. When the 48 million Admerex shares were disposed of on 3 February 2005, by exchanging them for 1 million Temenos shares, they were valued on the Australian Stock Exchange at between \$8.4 million and \$9.120 million.

172. Alternatively, when they were disposed of on 3 February 2005, the 48 million Admerex shares were valued at between \$8.480 million and \$9,494,012.30 being the value of the 1 million Temenos shares for which they were exchanged.

29. As can be seen from the above, (at Crown case statement [166], [168], [171] and [172]) the date of the “dealing” was the sale on 3 February 2005.¹²

30. As can also be seen from [167]-[168] of the Crown case statement, above, it was the structure that the Crown alleged was used to conceal the disposal of the shares. It was this concealment that was said to facilitate the commission of the offence against s134.2 of the *Code*. The shares themselves were not used. Contrary to the assertion at [169] of the Crown case statement, it does not follow that, assuming proof of the matters in [167]-[168], the appellant intended that the shares “would be used in the commission of, or used to facilitate the commission of” the offence.¹³

31. While the Crown case statement (at [169]), alleged the appellant “intended that the 48 million Admerex shares would be used in the commission of, or used to

¹² See SU 39.24; 41.30; 43-44; 47-51; 230.44 – 231.15; CCA at [93], [103]-[109]. While the indictment alleged a period between “about 30 April 2004 and about 30 September 2005” this was explained by the CCA at [115], in a manner which accepted that 3 February 2005 was, on the Crown case, the date of the dealing.

¹³ That the Crown relied on the use of the structure to conceal the sale rather than any use of the shares was also apparent in the way in which the Crown put count 2. The relevant parts of the Crown case statement are produced at CCA [8] and include the assertion: [The appellant] “used the *Stichting groups* to conceal the disposal of the Admerex shares, including the 48 million Admerex shares, and the proceeds of such disposal, in order to avoid the payment by Barat Advisory of tax on any such capital gain”.

facilitate the commission of, an offence” it was never the Crown case (as can be seen from the particulars of the charge itself) that the appellant intended that the shares would be used in the commission of an offence. This was understandable as it was necessary to dispose of the shares before the offence could be committed. The appellant could not, having disposed of them, still “use” them to commit an offence.

10 32. The same problem, however, arises in the context of the Crown’s contention the appellant intended the shares would be “used to facilitate” the commission of an offence against s134.2. The shares having been disposed of could not be “used” either in the commission of the future offence, or to facilitate the commission of the future offence.

33. Put another way, on the Crown case, Barat, through the appellant, disposed of the shares. In doing so Barat realised a capital gain. The Crown case was that the appellant intended that Barat would commit an offence under s134.2 of the *Code* in that Barat would not declare the gain to the Commissioner of Taxation. Whatever might be said in relation to the structure, the shares themselves were not capable of being “used to facilitate” any such offence.

20 34. That is not to say that property cannot be disposed of and then used in the commission of a future offence. The critical distinction in the present case was that the future crime alleged was to be committed by the appellant (or, at least, Barat, controlled by the appellant). Clearly, property can be disposed of to another person intending that that person will use the property “in the commission of” an offence, or “to facilitate the commission of an offence”. That, however, was not the case here.

30 35. The flaw in the Crown case, it is respectfully be submitted, is exposed by contrasting the position that would have pertained had the shares been sold in an ordinary transaction. In this case, there would be no structure “used” to disguise the sale. Having regard to the way in which the Crown put its case, it would appear that the Crown, in the absence of the use of such a structure, (even if it was clear the appellant had no intention to declare the sale in the relevant tax return), would not suggest the appellant on the sale, intended that *the shares* would be used to facilitate the commission of the future offence. On the facts of the present case, the

appellant was no more able to use *the shares* (as opposed to the structure) to facilitate the commission of the future offence than would have been the case had no structure existed. The Crown case, in effect, conflated circumstantial evidence of intention at the time of the dealing (the structure), with the future use of the shares.

C. The CCA's treatment of the "instrument of crime" issue

10 36. The CCA dealt with this issue at [116]ff. Their Honours had earlier indicated a preference for "a broad and purposive interpretation" (at [135]). The CCA (at [139]) rejected the argument that, once disposed of, the shares could no longer be used, in part at least, on the basis that, such a construction would "significantly erode the section of its utility" (at [139]). Whatever might be said about this approach to statutory construction in the context of a penal provision with a maximum penalty of 25 years (a matter discussed further, below) it was, clearly, not open to the CCA to give the section a meaning it is not capable of bearing. Further, on any view, the provision has wide application.

Future use

20 37. The CCA, it is respectfully submitted, failed to properly consider the terms of s400.3(1) and the definition of "instrument of crime". Section 400.3(1)(b)(ii) requires proof that "the person intends that the money or property *will become* an instrument of crime". Applying the definition of "instrument of crime", as presently relevant, to the offence provision, s400.3(1), this translates to a requirement that the person "deals with ... property" (s400.3(1)(a)) and at the time of the dealing, "the person intends that the property *will become*", (*at some point in the future*), property "used to facilitate the commission of an offence".¹⁴ While it is true that, on their disposal, the shares continued to exist, that is not to the point. The capital gain had been realised. That gain would either be declared or not declared. The Crown case was that the appellant (or Barat through the appellant)

¹⁴ See *Chen v Director of Public Prosecutions (Cth)* [2011] NSWCCA 205 at [21] per Basten JA, at [86] per Garling J.

would commit the future offence. Once disposed of, the shares could no longer be “used” by the appellant.

38. The CCA accepted (at [138]) that there must be an intended future use of the property. Their Honours referred to the need for a “wide and purposive construction” and rejected the appellant’s submission that once the shares were disposed of they could not be used by the appellant, by reference to an example that had been raised in argument. Their Honours said (at [139]):

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... in one of the examples advanced by Mr Robberds, this contention was seen to be without substance. If a person sold his home, intending that the proceeds of sale would be used to fund the making of explosives to be used in a terrorist attack, the home itself, although disposed of, plainly could be said to have the capacity to facilitate the commission of the terrorism offence. Equally, the person dealing with the property could be said to intend that it would be used to facilitate the commission of the terrorism offence.

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39. However, their Honours’ statement “the home itself, although disposed of, plainly could be said to have *the capacity to facilitate* the commission of the terrorism offence” conspicuously avoids the words “to be used”. It could not be said that, at the time of the disposal the house itself could be put to any future use. Their Honours approach, it is respectfully submitted, confuses the idea of a step along the way with the need for future use of the property itself.

40. Similarly their Honours’ statement, “Equally, the person dealing with the property could be said to intend that it would be used to facilitate the commission of the terrorism offence” (in the last sentence of [139]) fails to acknowledge the need for there to be a future use of the property (separate from the dealing). By disposing of the house, the person dealing with it does not intend to, at some time in the future, use the house (and indeed has no capacity to). The person does not intend to *further use the house*.

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41. The money obtained from the sale, at least arguably, might constitute an instrument of crime. The person would be in possession of that money with the intention that, *in the future*, it would be used to facilitate a crime, (by acquiring explosives). It impermissibly strains the language of the section to say that at the time of the sale the person intends that *the house* (as opposed to the proceeds from its sale), *will, in the future, be used* to facilitate the offence. Insofar as the person might be said to be using the house to fund a terrorist attack it is a present use of the house, not an

intended future use of the house (and there is therefore, no intention that the house “will become” an instrument of crime).

42. In any event, the present case is quite unlike a case where shares or other property are dealt with to obtain money that is then used to facilitate a crime (for example by purchasing weapons for a terrorist attack, or drugs for the purposes of trafficking). Here the shares were simply used to obtain other shares. (As submitted below, the nature of the property in the present case was such that it was not capable of being used to facilitate the postulated crime.)

10 43. Their Honours continued (at [140]) to note that, after their disposal, the shares remained in existence. Their Honours reasoned that, they therefore “remained capable of use for the future commission of an offence”. This begs the question of “use” by whom?¹⁵ Again, it is, with respect, not possible to see how they could be intended to, subsequent to their disposal, *become* property that would be used, by the appellant at *some future time*, to facilitate an offence.

A necessary precursor to the postulated offence is not sufficient

20 44. The CCA (at [141]ff) dealt with the appellant’s contention that the shares, by their nature, were not capable of being “used” to facilitate the postulated offence against s134.2 of the *Code*. In rejecting this submission their Honours noted that the steps in the commission of the postulated offence (the lodging of Barat’s 2005 tax return, deliberately omitting the capital gain and the issue of an assessment on a false basis¹⁶), were not possible without the existence of the shares themselves together with the capacity of the appellant to dispose of them at profit (see at [141]). Their Honours said (at [142]-[143]):

142 ... In that sense, the shares were critical to the future commission of an offence, and to the intention of the appellant in that regard. Without the shares, a future offence of obtaining an advantage by deception could not occur. In other words, the offence could not have been committed without the shares.

30 143 In that important sense, the shares had the capacity to, and did, facilitate the commission of the relevant offence, if the crown case were accepted. At the preliminary stage where a verdict by direction had been sought, there was, so far as these particular

¹⁵ See *Sultan v The Queen* (2008) 191 A Crim R 8; [2008] NSWCCA 2008, discussed further in Part D, Judicial Consideration of ‘use’, below.

¹⁶ See at CCA [118]-[119] where the appellant’s argument is summarised

arguments were concerned, ample evidence to show that, the Crown case, if accepted, would entitle the jury to convict in relation to the first count.

45. That the existence of the shares may have been a necessary precursor to the their disposal was not, however, sufficient. Again, in the stating that the shares “had the capacity to, and did, facilitate the commission of the relevant offence” the word “use” and the idea of future use, are conspicuously absent.

46. The dealing and the intended future use are separate elements of the offence against s400.3(1).¹⁷ The disposal of the shares constituted the relevant dealing. It remained necessary to prove, as a separate element that, at the time of the dealing, the appellant intended that the shares would become, in the future, as an instrument of crime. That is that they would, at that future time, be used, to facilitate the commission the particularised offence. By filing its tax return at the postulated future time without declaring the capital gain from the disposal of the shares, Barat could not be said to be “using” the shares, either to “facilitate the commission” of the offence or otherwise. The shares, by their nature, were not capable of facilitating the offence relied on. Further, having been disposed of they were not capable of being used by the appellant (or Barat).

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Use of the structure not the shares

47. The argument that, if anything, the appellant used the structure, and not the shares has been dealt with, above, in the context of the Crown case at trial.¹⁸ The CCA dealt with the argument at [147]ff. It is accepted, as observed by the CCA at [148]-[150] that the evidence of the structure and transactions was relevant to the appellant’s intention. The critical part of their Honours’ reasons with respect to this issue is set out below (CCA[150] *emphasis added*):

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The disposal of the Admerex shares in the present matter had two features that were relevant to proof of the appellant's intention that the shares would be used to facilitate the commission of the s 134.2 offence. First, *the share swap* created the CGT event which provided the basis for the commission of the future crime. Secondly, *it* [the share swap] provided a facilitating mechanism for the commission of the offence in that it provided a further cloak or curtain behind which the act of ultimate deception (the lodgement of a return) would be more likely to succeed. *It* had the capacity to assist the

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¹⁷ See *Chen v Director of Public Prosecutions (Cth)* [2011] NSWCCA 205 at [20]; and at [86]-[87].

¹⁸ This argument is related to the argument the shares were not capable of being used. The Crown relied on the structure because the shares themselves could not be used to commit the postulated offence.

very advantage the deception (by lodgement of the tax returns) was intended to secure. As we have explained, however, the Admerex shares were a critical facilitating factor in that intended criminal pursuit. The manner of their disposal provided evidence, along with other matters of the appellant's criminal intention and also provided a further facilitating measure for the offence itself. In those respects, the appellant intended that the shares would be used to facilitate the s 134.2 offence.

48. As can be seen, their Honours' reasoning focuses on the share swap – that is, the transaction rather than the shares themselves - and elides the use of the structure as proof of the relevant intention with the use of the shares. Further the swap was itself the relevant dealing. As noted above, it was necessary to prove the intended future use as a separate element (including temporally separate) from the dealing.
49. Finally, it should be noted that the CCA in dismissing the appellant's submissions referred to the obiter dicta of Howie J in the CCA's earlier decision in *Ansari v R* [2007] NSWCCA 204; 70 NSWLR 89, noting (at [133]) that this Court dismissed an appeal from that decision "with no criticism or qualification being made" with respect to the particular dicta of Howie J. Howie J's observations, were, however, made in the nature of general observations as to the scope of the offence for the purpose of sentence. The appeal to this Court in *Ansari v The Queen* [2010] HCA 18; (2010) 241 CLR 299 was pursuant to a grant of special leave to argue grounds of appeal concerned with the role of recklessness in a charge of conspiracy pursuant to s11.5 of the *Code*.¹⁹ This Court's decision in *Ansari v The Queen* does not assist the respondent's argument. In any event Howie J in *Ansari v R* did not address the present issue.
50. For the reasons given above, it is respectfully submitted the CCA was in error in rejecting the appellant's submissions in relation to the "instrument of crime" issue. Ultimately, the CCA failed to grapple with the meaning to be given to provision (other than to the extent of determining that it applied in the present case). This can be contrasted with the judicial consideration that has been given to the word "use" in other contexts, which, it is submitted provides further support for the appellant's contentions. This is discussed further, below.

¹⁹ Indeed, at the hearing of the appeal, this Court refused leave to add an additional ground of appeal which raised an issue as to the meaning of "instrument of crime" on the basis that the matter had not been raised in the courts below and this Court did not have the benefit of that earlier consideration - see French CJ, at [15]; Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ at [64].

D. Judicial consideration of “use”

51. The word “use” has been considered in a number of different legislative contexts. Most relevant for present purposes is *Sultan v The Queen* (2008) 191 A Crim R 8; [2008] NSWCCA 2008. In that case the New South Wales Court of Criminal Appeal was concerned with an offence of “use false instrument” contrary to s300(2) *Crimes Act 1900* (NSW) (repealed). In that case the appellant instigated, and was integral in carrying into effect, a transaction in which a mortgage which was false to his knowledge induced a lender to part with money. The appellant intended to induce the lender to accept relevant documents as genuine, to the prejudice of the lender.²⁰ The appellant did not, however, himself execute or otherwise deal with the mortgage. Spigelman CJ with whom Price and McCallum JJ agreed said (at 14, [35]):

35 The verb “to use” is protean and takes its meaning from its context. It is a transitive verb. The specified object is “instrument” which is defined in terms of a physical thing capable of containing information or writing or its equivalent. There is, in my opinion, no “use” within the meaning of s 300(2) unless there is a direct link between the conduct of the accused and the deployment of the instrument for a purpose.

36 In my opinion, in s 300(2) “use” involves the idea of actual deployment by the person charged or by his or her agent, or fellow participant in a joint enterprise. It is not enough that the person charged is merely present when the instrument is “used” by another person. Presence could support an accessorial charge, but not a charge of “use”.

52. His Honour then referred to *R v Lyons* [1984] 2 NSWLR 476 at 482, (a case of “uttering” which his Honour regarded as relevantly similar), and to two decisions directly concerned with the word “use” (both in the context of use of a firearm): the decision of the Supreme Court of the United States in *Bailey v United States* 516 US 137 (1995) and the decision of the Supreme Court of Canada in *R v Steele* [2007] 3 SCR 3 at [29]). Spigelman CJ then said (at [42]-[43]):

42 The idea of “actual dealing” (*Lyons*) or “active employment” (*Bailey*) or “actual carrying into effect” (*Steele*) is the sense in which “use” is to be understood in s 300(2).

43 On his Honour’s findings of fact, the appellant did not “actually deal” with or “actually employ” or “actually carry into effect” the false instrument ...

²⁰ See at [13]-[14]

53. The above observations are pertinent in the present situation.²¹ The appellant having disposed of the shares could not, at the postulated future time, engage in any “actual dealing” with them. He could not use them (either in the commission of an offence or to facilitate the commission of an offence).

54. In the context of confiscation legislation there has been discussion as to the ambit of the word “use” in the relation to property associated with the commission of a criminal offence. Ultimately, what can be taken from these cases relevant to the present matter is that, while there has been debate as to “broad” or “narrow” interpretations, none of the cases would suggest that, even on a broad interpretation,
10 “use” of property would extend to a factual situation (such as the present) in which the person did not have any access to the property.

55. This Court, in *White v Director of Public Prosecutions for the State of Western Australia* (2011) 243 CLR 478; [2011] HCA 20 was concerned with an appeal in the context of Western Australian confiscation legislation. The result in that matter ultimately turned on the particular provisions in the context of the Act. Those provisions and that context were quite different from the present situation. Nonetheless, some presently relevant observations were made. The facts of that case involved the commission of an offence, by firing shots, on particular land. French CJ, Crennan and Bell JJ said (at [21], footnote omitted):

20 On the face of it, the mere doing of an act in or on a property in connection with the commission of a confiscation offence, does not necessarily fit comfortably within the concept of use applied to property. The relevant ordinary meaning of the verb “use” is to “[m]ake use of (a thing), esp for a particular end or purpose; utilize, turn to account”.

56. Their Honours went on to explain, why in the particular context of the Act under consideration, the word “use” extended to cover the particular facts.

57. Earlier decisions of State Supreme Courts have considered the expression “used in or in connection with an offence” in the absence of additional considerations such as led to this Court’s decision in *White v The DPP*. The expression was considered
30 in *R v Rintel* (1991) 3 WAR 527; 52 A Crim R 209, again in the context of confiscation. There the Western Australian Court of Criminal Appeal addressed a division of opinion between view expressed by Carter J in the Queensland Court of

²¹ Indeed, it is noteworthy that in *Bailey* the United States Supreme Court rejected the approach of the court below which treated “using” as synonymous with “facilitating” (see at 139.7).

Criminal Appeal in *R v Ward* (1987) 33 A Crim R 60; *Re Application to Drugs Misuse Act 1986* [1988] 2 Qd R 506 at 510-512 and that taken by McInerny J giving the reasons of the New South Wales Court of Criminal Appeal in *R v Hadad* (1989) 42 A Crim R 304. In *R v Ward*, Carter J in was of the view that the section required that there be “a substantial connection” between the property and the offence. The reasoning in this regard focussed on the words “in connection with” rather than on the word “use”. In *R v Hadad*, McInerny J, while also concerned with the expression property “uses in or, or in connection with” an offence, distinguished *R v Ward* in the context of the legislation, finding that there was no
10 need for “a substantial connection” (although noting that a discretion was to be exercised in the event that the property was “used”).

58. In *R v Rintel*, Malcolm CJ and Pidgeon J preferred the approach in *R v Hadad*, rejecting the “substantial connection” requirement. Both also gave consideration to the word “used”. Malcolm CJ said (at 529, 211):

In the present case, the use of the house as the place to store, prepare and sell or supply the drugs represented a state of affairs which, in my opinion, constituted a use of the house for those purposes. The house was “used” by the respondent for those purposes in the ordinary meaning of the word “used”. The ordinary meaning of the verb “to use” is
20 “to employ for a purpose” and the ordinary meaning of “use” is “utilization or employment for or with some aim or purpose”: see *The Shorter Oxford English Dictionary* (at p 2325). In the context of town planning law the “use” of land is a well-developed concept. Land is zoned for particular purposes for uses such as residential use, commercial use, retail shopping, industrial use, etc. Thus, land which is zoned for residential use may only be used for residential purposes.

59. Pidgeon J, despite agreeing with Malcolm CJ in the preference for *R v Hadad* over *R v Ward*, disagreed with Malcolm CJ’s conclusion that the land in question was used on the facts of the case. His Honour said (at 542, 225):

I agree with the conclusion that the words in s 10(1)(a) should have their ordinary grammatical meaning. There is no warrant to import the adjective “substantial” to modify them. I would, however, see some limitation in the meaning of the verb “to use” when it is used in the context of land. The most concise definitions are, I feel, contained in the *Macquarie Dictionary* inasmuch as they do not contain the word to be defined. The definitions are “to employ for some purpose”; “to put into service”; “to avail oneself of” and “to apply to one’s own purposes”.
30

60. Despite the similarity of approach, Pidgeon J reached a different conclusion on the facts. His Honour was of the view that land was not used simply because an activity took place on the land. His Honour contrasted the position between mere

presence of a drug on land and the use of the property as a warehouse or “safe house”. While not using the expression, it appears required something in the nature of the “active employment” of the property as discussed by Spigelman CJ in *Sultan v The Queen*. The other member of the Court, Wallace J, (at 539, 221) preferred *R v Ward* over *R v Hadad* (1989) 42 A Crim R 304). His Honour was in the minority in this regard.²²

61. In *Director of Public Prosecutions v King* (2000) 49 NSWLR 727; [2000] NSWSC 394 O’Keefe J reviewed a number of cases involving different approaches to the expression “used in or in connection with an offence”. His Honour, found that while the “relationship need not be substantial or direct” (at 730, [14]), “the overarching principle that ... can be extracted from the cases in relation to that part of the statutory definition of tainted property presently under consideration is that some activity connected with the relevant crime must have involved *the utilisation or employment of the property* with the aim or purpose of committing or furthering the commission of the crime in question”. His Honour found that the mere fact that the offences in question were committed on the boat the subject of the application did not mean that the boat was “used in or in connection with” the offences (at [36]).

62. The meaning of “use” was discussed in some detail by the Western Australian Court of Appeal in *Director of Public Prosecutions (WA) v White* (2010) 41 WAR 249; [2010] WASCA 47 (subsequently affirmed in *White v The DPP*, discussed above). As noted above McLure P after discussing *Rintel* and related authorities, said (at [27]):

I agree with the primary judge that the word “used” in s 146(1) has its ordinary meaning of employed for some purpose, put into service, or turned to account. However, as is clear from *Rintel*, there are difficulties in the application of the definition. At its widest, walking on or otherwise traversing land for the purpose of doing something on or beyond the land, is using the land. If I cross over my neighbour’s land as a shortcut to the beach, I use that land. If I stand on my neighbour’s land to bird-watch, I use that land. The deliberate act constituting the use of the land is walking or standing on the land for a purpose.

63. Her Honour went on to conclude (at [33]) that something more than a “tenuous and remote” relationship is required. While not stated by her Honour, determining

²² Note that at 539.33; 221 it appears the reference to ‘the Commonwealth Act’ is in error and should read ‘*Confiscation of Profits Act*’.

whether the relationship is “tenuous or remote” will inevitably give rise to a question of “actual dealing” or “active employment” or “actual carrying into effect”.

64. As previously noted, the present case does not involve a choice between a “broad” or “narrow” interpretation, nor any question of degree or judgment. It is significant, however, that in the cases discussed above, on either a broad or a narrow view, a person, in order to use the property, must have the capacity to at least access the property. Further, if there is a choice to be made, adopting a broad interpretation is inconsistent with the proper approach to interpreting a criminal statute where, if alternative interpretations of a statute are available, the construction which promotes the liberty of the subject is to be preferred.²³ Conversely, in the present case, so broad is the CCA’s interpretation of the provision (and that of the trial judge), their Honours felt compelled (at [134]) to re-iterate the trial judge’s statement, that, due to the potential breadth of the application of the provisions, “it is clear that care must be exercised by a prosecutor in their use”. Their Honours had previously referred (at [81]) to various cases in which the CCA has discussed the circumstances in which a charge of money laundering will constitute an abuse of process. It is respectfully submitted, that it is undesirable to adopt a broad definition of the offence and then seek to narrow its operation by the application of principles relating to abuse of process. Preferring a broad construction and leaving it for a court to decide if a particular prosecution is an abuse, does nothing to promote certainty of the criminal law.²⁴

65. Quite apart from the fact that the appellant did not intend to use the shares to facilitate the future crime, the property concerned was simply shares in a company. The nature of property itself was such that it was not capable of being used to facilitate an offence by Barat in relation to the lodgement of tax returns by Barat.

Part VII: The applicable provisions

²³ See *CTM v The Queen* [2008] HCA 25; 236 CLR 440 at [7]; *Krakouer v The Queen* [1998] HCA 43; 194 CLR 202 at 223 [62]-[64], per McHugh J (in dissent); *Smith v Corrective Services Commission (NSW)* [1980] HCA 49; (1980) 147 CLR 134 at 139. In relation to the construction of provisions affecting rights more generally see *X7 v Australian Crime Commission* [2013] HCA 29 at [86], and the cases cited therein.

²⁴ *Director of Public Prosecutions (Cth) v Keating* (2013) 87 ALJR 657; [2013] HCA 20.

66. See annexure A.

Part VIII: Orders sought

1. The appeal be allowed.
2. The order of the Court of Criminal Appeal of New South Wales dismissing the appeal with respect to count 1 on the indictment be set aside.
3. The appellant's conviction with respect to count 1 be quashed.
4. A verdict of acquittal be entered with respect to count 1.
5. The following adjustments be made to the sentences imposed on the appellant in relation to offences other than the offence the subject of this appeal:

- 10
- i. the sentence of imprisonment for 3 years and 6 months imposed with respect to count 2 on the indictment be varied pursuant to s59 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) so as to commence on 17 December 2010 and to expire on 16 May 2014;
 - ii. the sentence of imprisonment for 2 years imposed by Fullerton J in the Supreme Court of New South Wales (*R v Milne* [2012] NSWSC 1538) be varied pursuant to s59 *Crimes (Sentencing Procedure) Act* so as to commence on 17 May 2013 and to expire on 16 May 2015;
 - iii. the non-parole period of 5 years commencing on 17 December 2010 set by Fullerton J when imposing the sentence referred to at (ii) above be varied
- 20
- pursuant to s52(1)(a) *Crimes (Sentencing Procedure) Act*.

Part IX:

The appellant anticipates it will require two hours to present his oral argument.

Dated: 9 December 2010



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Annexure A: The applicable provisions.



Criminal Code Act 1995

Act No. 12 of 1995 as amended

This compilation was prepared on 12 March 2004
taking into account amendments up to Act No. 7 of 2004

Section 3AA ceased to have effect and is taken to have been repealed on
the day specified in subsection 2.2(2) of the *Criminal Code*

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting,
Attorney-General's Department, Canberra

Chapter 10—National infrastructure

Part 10.2—Money laundering

Division 400—Money laundering

400.1 Definitions

- (1) In this Division:

ADI (authorised deposit-taking institution) means:

- (a) a body corporate that is an ADI for the purposes of the *Banking Act 1959*; or
- (b) the Reserve Bank of Australia; or
- (c) a person who carries on State banking within the meaning of paragraph 51(xiii) of the Constitution.

deals with money or other property has the meaning given by section 400.2.

instrument of crime: money or other property is an instrument of crime if it is used in the commission of, or used to facilitate the commission of, an offence that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

proceeds of crime means any money or other property that is derived or realised, directly or indirectly, by any person from the commission of an offence that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

property means real or personal property of every description, whether situated in Australia or elsewhere and whether tangible or intangible, and includes an interest in any such real or personal property.

- (2) To avoid doubt, a reference in this Division to **money or other property** includes a reference to financial instruments, cards and

Section 400.2

other objects that represent money or can be exchanged for money, whether or not they have intrinsic value.

400.2 Meaning of *dealing with money or other property*

- (1) For the purposes of this Division, a person *deals with money or other property* if:
- (a) the person does any of the following:
 - (i) receives, possesses, conceals or disposes of money or other property;
 - (ii) imports money or other property into, or exports money or other property from, Australia;
 - (iii) engages in a banking transaction relating to money or other property; and
 - (b) the money or other property is proceeds of crime, or could become an instrument of crime, in relation to an offence that is a Commonwealth indictable offence or a foreign indictable offence.
- (2) For the purposes of this Division, a person *deals with money or other property* if:
- (a) the person does any of the following:
 - (i) receives, possesses, conceals or disposes of money or other property;
 - (ii) imports money or other property into, or exports money or other property from, Australia;
 - (iii) engages in a banking transaction relating to money or other property; and
 - (b) the person does any of the matters referred to in paragraph (a):
 - (i) in the course of or for the purposes of importation of goods into, or exportation of goods from, Australia; or
 - (ii) by means of a communication using a postal, telegraphic or telephonic service within the meaning of paragraph 51(xx) of the Constitution; or
 - (iii) in the course of banking (other than State banking that does not extend beyond the limits of the State concerned).

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(3) In this section:

banking transaction includes:

- (a) any transaction made at an ADI; and
- (b) any transaction involving a money order.

Commonwealth indictable offence means an offence against a law of the Commonwealth, or a law of a Territory (other than the Australian Capital Territory and the Northern Territory), that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

export money or other property, from Australia, includes transfer money or other property from Australia by an electronic communication.

foreign indictable offence means an offence against a law of a foreign country constituted by conduct that, if it had occurred in Australia, would have constituted an offence against:

- (a) a law of the Commonwealth; or
 - (b) a law of a State or Territory connected with the offence;
- that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

Note: See subsection (4) for when a law of a State or Territory is connected with the offence.

import money or other property, into Australia, includes transfer money or other property to Australia by an electronic communication.

- (4) For the purposes of the definition of *foreign indictable offence* in subsection (3), a State or Territory is connected with the offence if:
- (a) a dealing in money or property takes place in the State or Territory; and
 - (b) the money or property would be proceeds of crime, or could become an instrument of crime, in relation to the offence if the offence were a foreign indictable offence.

400.3 Dealing in proceeds of crime etc. — money or property worth \$1,000,000 or more

- (1) A person is guilty of an offence if:
- (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is, and the person believes it to be, proceeds of crime; or
 - (ii) the person intends that the money or property will become an instrument of crime; and
 - (c) at the time of the dealing, the value of the money and other property is \$1,000,000 or more.

Penalty: Imprisonment for 25 years, or 1500 penalty units, or both.

- (2) A person is guilty of an offence if:
- (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is proceeds of crime; or
 - (ii) there is a risk that the money or property will become an instrument of crime; and
 - (c) the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
 - (d) at the time of the dealing, the value of the money and other property is \$1,000,000 or more.

Penalty: Imprisonment for 12 years, or 720 penalty units, or both.

- (3) A person is guilty of an offence if:
- (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is proceeds of crime; or
 - (ii) there is a risk that the money or property will become an instrument of crime; and
 - (c) the person is negligent as to the fact that the money or property is proceeds of crime or the fact that there is a risk

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that it will become an instrument of crime (as the case requires); and

(d) at the time of the dealing, the value of the money and other property is \$1,000,000 or more.

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

(4) Absolute liability applies to paragraphs (1)(c), (2)(d) and (3)(d).

Note: Section 400.10 provides for a defence of mistake of fact in relation to these paragraphs.

SECTIONS 400.4 - 400.9 OMITTED

400.10 Mistake of fact as to the value of money or property

- (1) A person is not criminally responsible for an offence against section 400.3, 400.4, 400.5, 400.6 or 400.7 in relation to money or property if:
 - (a) at or before the time of dealing with the money or property, the person considered what was the value of the money or

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property, and was under a mistaken but reasonable belief about that value; and

- (b) had the value been what the person believed it to be, the person's conduct would have constituted another offence against this Division for which the maximum penalty, in penalty units, is less than the maximum penalty, in penalty units, for the offence charged.

Example: Assume that a person deals with money or property that is the proceeds of crime. While the person believes it to be proceeds of crime, he or she is under a mistaken but reasonable belief that it is worth \$90,000 when it is in fact worth \$120,000.

That belief is a defence to an offence against subsection 400.4(1) (which deals with money or property of a value of \$100,000 or more). However, the person would be guilty of an offence against subsection 400.5(1) (which deals with money or property of a value of \$10,000 or more). Section 400.14 allows for an alternative verdict of guilty of an offence against subsection 400.5(1).

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3)).

- (2) A person may be regarded as having considered what the value of the money or property was if:
 - (a) he or she had considered, on a previous occasion, what the value of the money or property was in the circumstances surrounding that occasion; and
 - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

400.11 Proof of certain matters relating to kinds of offences not required

In a prosecution for an offence against a provision of this Division, it is not necessary to prove the existence of any fault element in relation to any of the following:

- (a) whether an offence may be dealt with as an indictable offence;
- (b) whether an offence is an indictable offence;
- (c) whether an offence is a Commonwealth indictable offence;
- (d) whether an offence is a foreign indictable offence.

400.12 Combining several contraventions in a single charge

- (1) A single charge of an offence against a provision of this Division may be about 2 or more instances of the defendant engaging in conduct (at the same time or different times) that constitutes an offence against a provision of this Division.
- (2) If:
 - (a) a single charge is about 2 or more such instances; and
 - (b) the value of the money and other property dealt with is an element of the offence in question;that value is taken to be the sum of the values of the money and other property dealt with in respect of each of those instances.

400.13 Proof of other offences is not required

- (1) To avoid doubt, it is not necessary, in order to prove for the purposes of this Division that money or property is proceeds of crime, to establish:
 - (a) a particular offence was committed in relation to the money or property; or
 - (b) a particular person committed an offence in relation to the money or property.
- (2) To avoid doubt, it is not necessary, in order to prove for the purposes of this Division an intention or risk that money or property will be an instrument of crime, to establish that:
 - (a) an intention or risk that a particular offence will be committed in relation to the money or property; or
 - (b) an intention or risk that a particular person will commit an offence in relation to the money or property.

400.14 Alternative verdicts

If, on a trial for an offence against a provision of this Division (the *offence charged*), the trier of fact:

- (a) is not satisfied that the defendant is guilty of the offence charged; but

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(b) is otherwise satisfied that the defendant is guilty of another offence against this Division for which the maximum penalty, in penalty units, is less than the maximum penalty, in penalty units, for the offence charged;

the trier of fact may find the defendant not guilty of the offence charged but guilty of the other offence, so long as the person has been accorded procedural fairness in relation to that finding of guilt.

400.15 Geographical jurisdiction

Section 15.2 (extended geographical jurisdiction—category B) applies to each offence against this Division.

400.16 Saving of other laws

This Division is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory.



Statute Law Revision Act 2005

No. 100, 2005

An Act to make various amendments of the statute law of the Commonwealth, and for related purposes

Note: An electronic version of this Act is available in SCALEplus
(<http://scaleplus.law.gov.au/html/comact/browse/TOCN.htm>)

Australian Sports Drug Agency Act 1990

7 Paragraph 67A(b)

Omit “sporting sporting”, substitute “sporting”.

Crimes Act 1914

8 Subsection 15XA(1) (subparagraph (b)(ii) of the definition of *State or Territory participating agency*)

Repeal the subparagraph, substitute:

(ii) the Crime and Misconduct Commission of Queensland;

Note: This item removes a reference to a body that no longer exists and substitutes a reference to the body that succeeded it.

9 Subsection 15XA(1) (subparagraph (b)(iii) of the definition of *State or Territory participating agency*)

Repeal the subparagraph.

Note: This item removes a reference to a body that no longer exists.

10 Subsection 15XA(1) (subparagraph (c)(ii) of the definition of *State or Territory participating agency*)

Repeal the subparagraph.

Note: This item removes a reference to a body that no longer exists.

11 Subsection 23YUF(2B)

Omit “paragraph (1)(b)”, substitute “paragraph (2A)(b)”.

Note: This item fixes an incorrect cross-reference.

Criminal Code Act 1995

12 Subparagraph 400.2(2)(b)(ii) of the *Criminal Code*

Omit “paragraph 51(xx)”, substitute “paragraph 51(v)”.

Note: This item fixes an incorrect cross-reference.

Electronic Transactions Act 1999

13 Paragraph 11(6)(a)



**Anti-Money Laundering and
Counter-Terrorism Financing
(Transitional Provisions and
Consequential Amendments) Act 2006**

No. 170, 2006

**An Act to deal with transitional and consequential
matters in connection with the *Anti-Money
Laundering and Counter-Terrorism Financing Act
2006*, and for other purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

Schedule 1 Amendments

Part 1 Amendments

After “needs”, insert “(otherwise than for the purposes of compliance with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* or with regulations, or AML/CTF Rules, under that Act)”.

Crimes Act 1914

19 Section 85ZL

Insert:

AUSTRAC means the Australian Transaction Reports and Analysis Centre continued in existence by the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

20 Paragraph 85ZZH(h)

Repeal the paragraph, substitute:

- (h) AUSTRAC, for the purpose of assessing:
- (i) prospective members of the staff of AUSTRAC; or
 - (ii) persons proposed to be engaged as consultants under subsection 225(1) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*; or
 - (iii) persons whose services are proposed to be made available to AUSTRAC under subsection 225(3) of that Act;

Criminal Code Act 1995

21 Subsection 400.1(1) of the *Criminal Code*

Insert:

Australian Capital Territory indictable offence means an offence against a law of the Australian Capital Territory that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

22 Subsection 400.1(1) of the *Criminal Code*

Insert:

banking transaction includes:

- (a) any transaction made at an ADI; and
 - (b) any transaction involving a money order.
-

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23 Subsection 400.1(1) of the *Criminal Code*

Insert:

Commonwealth indictable offence means an offence against a law of the Commonwealth, or a law of a Territory (other than the Australian Capital Territory and the Northern Territory), that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

24 Subsection 400.1(1) of the *Criminal Code*

Insert:

export money or other property, from Australia, includes transfer money or other property from Australia by an electronic communication.

25 Subsection 400.1(1) of the *Criminal Code*

Insert:

foreign indictable offence means an offence against a law of a foreign country constituted by conduct that, if it had occurred in Australia, would have constituted an offence against:

(a) a law of the Commonwealth; or

(b) a law of a State or Territory connected with the offence; that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

Note: See subsection (3) for when a law of a State or Territory is connected with the offence.

26 Subsection 400.1(1) of the *Criminal Code*

Insert:

import money or other property, into Australia, includes transfer money or other property to Australia by an electronic communication.

27 Subsection 400.1(1) of the *Criminal Code*

Insert:

Northern Territory indictable offence means an offence against a law of the Northern Territory that may be dealt with as an

indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

28 Subsection 400.1(1) of the *Criminal Code*

Insert:

State indictable offence means an offence against a law of a State that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

29 At the end of section 400.1 of the *Criminal Code*

Add:

- (3) For the purposes of the definition of *foreign indictable offence* in subsection (1), a State or Territory is connected with the offence if:
- (a) a dealing in money or property takes place in the State or Territory; and
 - (b) the money or property would be proceeds of crime, or could become an instrument of crime, in relation to the offence if the offence were a foreign indictable offence.

30 Paragraph 400.2(1)(b) of the *Criminal Code*

Repeal the paragraph, substitute:

- (b) the money or other property is proceeds of crime, or could become an instrument of crime, in relation to an offence that is:
- (i) a Commonwealth indictable offence; or
 - (ii) a foreign indictable offence; or
 - (iii) a State indictable offence; or
 - (iv) an Australian Capital Territory indictable offence; or
 - (v) a Northern Territory indictable offence.

31 Subsections 400.2(3) and (4) of the *Criminal Code*

Repeal the subsections, substitute:

- (3) Subparagraph (1)(b)(iii), in its application to a particular offence against this Division, has effect only to the extent to which it is a law with respect to external affairs (within the meaning of paragraph 51(xxix) of the Constitution).

32 Paragraph 400.9(1)(b) of the *Criminal Code*

Omit “either or both”, substitute “any”.

33 After subparagraph 400.9(1)(b)(i) of the *Criminal Code*

Insert:

- (ia) the money or property is proceeds of crime in relation to a State indictable offence;
- (ib) the money or property is proceeds of crime in relation to an Australian Capital Territory indictable offence or a Northern Territory indictable offence;

34 After paragraph 400.9(2)(a) of the *Criminal Code*

Insert:

- (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

35 After paragraph 400.9(2)(b) of the *Criminal Code*

Insert:

- (ba) the conduct amounts to an offence against section 139, 140 or 141 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*; or

36 After paragraph 400.9(2)(d) of the *Criminal Code*

Insert:

- (da) the conduct involves a threshold transaction (within the meaning of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*) and the defendant:
 - (i) has contravened the defendant’s obligations under that Act relating to reporting the transaction; or
 - (ii) has given false or misleading information in purported compliance with those obligations; or

37 At the end of section 400.9 of the *Criminal Code*

Add:

Schedule 1 Amendments
Part 1 Amendments

- (6) Subparagraph (1)(b)(ia), in its application to an offence against subsection (1), has effect only to the extent to which it is a law with respect to external affairs (within the meaning of paragraph 51 (xxix) of the Constitution).

38 At the end of section 400.11 of the *Criminal Code*

Add:

- ; (e) whether an offence is a State indictable offence;
- (f) whether an offence is an Australian Capital Territory indictable offence;
- (g) whether an offence is a Northern Territory indictable offence.

Financial Management and Accountability Regulations 1997

39 Part 1 of Schedule 1 (table item 104)

Repeal the item, substitute:

104	Australian Transaction Reports and Analysis Centre (<i>AUSTRAC</i>), comprising: <ul style="list-style-type: none">(a) the Chief Executive Officer of AUSTRAC; and(b) the staff mentioned in section 224 of the <i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>; and(c) consultants engaged under subsection 225(1) of that Act; and(d) the persons whose services are made available to the Chief Executive Officer of AUSTRAC under subsection 225(3) of that Act.	Chief Executive Officer
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See Note B

Financial Transaction Reports Act 1988

40 Title

Omit “, to establish an Australian Transaction Reports and Analysis Centre”.

41 Subsection 3(1) (definition of *approved*)

Omit “Director”, substitute “AUSTRAC CEO”.



Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010

No. 4, 2010

**An Act to amend various Acts relating to the
enforcement of the criminal law, and for other
purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

Schedule 5—Money laundering

Part 1—Criminal Code Act 1995

1 Subsection 400.1(1) of the *Criminal Code* (definition of *instrument of crime*)

After “an offence”, insert “against a law of the Commonwealth, a State, a Territory or a foreign country”.

2 Subsection 400.1(1) of the *Criminal Code* (definition of *proceeds of crime*)

After “that is”, insert “wholly or partly”.

3 Subsection 400.1(1) of the *Criminal Code* (definition of *proceeds of crime*)

After “an offence”, insert “against a law of the Commonwealth, a State, a Territory or a foreign country”.

4 Section 400.2 of the *Criminal Code*

Repeal the section, substitute:

400.2 Definition of *deals with money or other property*

A person *deals with money or other property* if the person does any of the following:

- (a) receives, possesses, conceals or disposes of money or other property;
- (b) imports money or other property into Australia;
- (c) exports money or other property from Australia;
- (d) engages in a banking transaction relating to money or other property.

400.2A Application of offences relating to possible instruments of crime

- (1) This section affects the application of sections 400.3, 400.4, 400.5, 400.6, 400.7 and 400.8 so far as they relate to a person dealing with money or other property that:

- (a) is intended by the person to become an instrument of crime;
or
 - (b) is at risk of becoming an instrument of crime.
- (2) Those sections apply if at least one of the circumstances described in subsections (3) and (4) exists.
- (3) One circumstance is that money or other property is intended to become, or at risk of becoming, an instrument of crime in relation to an offence that is:
- (a) a Commonwealth indictable offence; or
 - (b) a foreign indictable offence; or
 - (c) a State indictable offence that has a federal aspect; or
 - (d) an Australian Capital Territory indictable offence; or
 - (e) a Northern Territory indictable offence.
- Note: The prosecution need not prove the existence of any fault element for the nature of the offence: see section 400.11.
- (4) Another circumstance is that the dealing with the money or other property occurs:
- (a) in the course of or for the purposes of importation of goods into, or exportation of goods from, Australia; or
 - (b) by means of a communication using a postal, telegraphic, telephonic or other like service within the meaning of paragraph 51(v) of the Constitution; or
 - (c) in the course of banking (other than State banking that does not extend beyond the limits of the State concerned); or
 - (d) outside Australia.
- (5) Absolute liability applies to subsections (3) and (4).

Note: For absolute liability, see section 6.2.

5 Subsection 400.3(4) of the *Criminal Code* (note)

Omit "Note", substitute "Note 1".

6 At the end of subsection 400.3(4) of the *Criminal Code*

Add:

- Note 2: Section 400.2A affects the application of this section so far as it relates to a person dealing with money or other property that:
- (a) is intended by the person to become an instrument of crime; or
 - (b) is at risk of becoming an instrument of crime.

7 Subsection 400.4(4) of the *Criminal Code* (note)

Omit "Note", substitute "Note 1".

8 At the end of subsection 400.4(4) of the *Criminal Code*

Add:

- Note 2: Section 400.2A affects the application of this section so far as it relates to a person dealing with money or other property that:
- (a) is intended by the person to become an instrument of crime; or
 - (b) is at risk of becoming an instrument of crime.

9 Subsection 400.5(4) of the *Criminal Code* (note)

Omit "Note", substitute "Note 1".

10 At the end of subsection 400.5(4) of the *Criminal Code*

Add:

- Note 2: Section 400.2A affects the application of this section so far as it relates to a person dealing with money or other property that:
- (a) is intended by the person to become an instrument of crime; or
 - (b) is at risk of becoming an instrument of crime.

11 Subsection 400.6(4) of the *Criminal Code* (note)

Omit "Note", substitute "Note 1".

12 At the end of subsection 400.6(4) of the *Criminal Code*

Add:

- Note 2: Section 400.2A affects the application of this section so far as it relates to a person dealing with money or other property that:
- (a) is intended by the person to become an instrument of crime; or
 - (b) is at risk of becoming an instrument of crime.

13 Subsection 400.7(4) of the *Criminal Code* (note)

Omit "Note", substitute "Note 1".

14 At the end of subsection 400.7(4) of the *Criminal Code*

Add:

- Note 2: Section 400.2A affects the application of this section so far as it relates to a person dealing with money or other property that:
- (a) is intended by the person to become an instrument of crime; or
 - (b) is at risk of becoming an instrument of crime.

15 At the end of section 400.8 of the *Criminal Code*

Add:

- Note: Section 400.2A affects the application of this section so far as it relates to a person dealing with money or other property that:
- (a) is intended by the person to become an instrument of crime; or
 - (b) is at risk of becoming an instrument of crime.

16 Subsection 400.9(1) of the *Criminal Code*

Repeal the subsection, substitute:

- (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.

- (1A) 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 less than \$100,000.

Penalty: Imprisonment for 2 years, or 120 penalty units, or both.

Note: The heading to section 400.9 is altered by omitting "Possession etc. of" and substituting "Dealing with".

17 Subsection 400.9(2) of the *Criminal Code*

After "(1)(b)", insert "or (1A)(b)".

18 Paragraph 400.9(2)(c) of the *Criminal Code*

After "expenditure", insert "over a reasonable period within which the conduct occurs".

19 Subsection 400.9(3) of the *Criminal Code*

Repeal the subsection.

20 Subsection 400.9(4) of the *Criminal Code*

Omit "paragraph (1)(b)", substitute "paragraphs (1)(b) and (c) and (1A)(b) and (c)".

21 Subsection 400.9(6) of the *Criminal Code*

Repeal the subsection.

22 Subsection 400.10(1) of the *Criminal Code*

Omit "or 400.7", substitute ", 400.7 or 400.9".

23 Section 400.15 of the *Criminal Code*

Repeal the section, substitute:

400.15 Geographical jurisdiction

- (1) A person does not commit an offence against this Division unless:
- (a) the conduct constituting the alleged offence occurs:
 - (i) wholly or partly in Australia; or
 - (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
 - (b) the conduct constituting the alleged offence occurs wholly outside Australia (but not on board an Australian aircraft or an Australian ship) and the money or other property:
 - (i) is proceeds of crime; or
 - (ii) is intended to become an instrument of crime; or
 - (iii) is at risk of becoming an instrument of crime;in relation to a Commonwealth indictable offence, a State indictable offence, an Australian Capital Territory indictable offence or a Northern Territory indictable offence; or
 - (c) the conduct constituting the alleged offence occurs wholly outside Australia and:
 - (i) at the time of the alleged offence, the person is an Australian citizen; or
 - (ii) at the time of the alleged offence, the person is a resident of Australia; or
 - (iii) at the time of the alleged offence, the person is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or
 - (d) all of the following conditions are satisfied:
 - (i) the alleged offence is an ancillary offence;
-

- (ii) the conduct constituting the alleged offence occurs wholly outside Australia;
- (iii) the conduct constituting the primary offence to which the ancillary offence relates occurs, or is intended by the person to occur, wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship.

Note: The expression *offence* is given an extended meaning by subsection 11.2(1), section 11.3 and subsection 11.6(1).

Defence—primary offence

- (2) A person is not guilty of an offence against this Division if:
 - (a) the alleged offence is a primary offence; and
 - (b) the conduct constituting the alleged offence occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
 - (c) paragraph (1)(b) of this section does not apply; and
 - (d) the person is neither:
 - (i) an Australian citizen; nor
 - (ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and
 - (e) there is not in force in:
 - (i) the foreign country where the conduct constituting the alleged offence occurs; or
 - (ii) the part of the foreign country where the conduct constituting the alleged offence occurs;a law of that foreign country, or a law of that part of that foreign country, that creates an offence that corresponds to the offence against this Division.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2). See subsection 13.3(3).

- (3) For the purposes of the application of subsection 13.3(3) to an offence, subsection (2) of this section is taken to be an exception provided by the law creating the offence.

Defence—ancillary offence

- (4) A person is not guilty of an offence against this Division if:
 - (a) the alleged offence is an ancillary offence; and
-

- (b) the conduct constituting the alleged offence occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
- (c) the conduct constituting the primary offence to which the ancillary offence relates occurs, or is intended by the person to occur, wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
- (d) paragraph (1)(b) of this section does not apply (and would not apply if the conduct described in paragraph (c) of this subsection occurred as intended); and
- (e) the person is neither:
 - (i) an Australian citizen; nor
 - (ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and
- (f) there is not in force in:
 - (i) the foreign country where the conduct constituting the primary offence to which the ancillary offence relates occurs, or is intended by the person to occur; or
 - (ii) the part of the foreign country where the conduct constituting the primary offence to which the ancillary offence relates or is intended by the person to occur; a law of that foreign country, or a law of that part of that foreign country, that creates an offence that corresponds to the primary offence.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3).

- (5) For the purposes of the application of subsection 13.3(3) to an offence, subsection (4) of this section is taken to be an exception provided by the law creating the offence.

Extended application of sections 16.1, 16.2 and 16.3

- (6) Section 16.1, except paragraph 16.1(1)(a), applies in relation to an offence against this Division (in addition to the application of that section apart from this subsection).

Note: Section 16.1 requires the Attorney-General's consent for prosecution of an offence if the alleged conduct occurred wholly in a foreign country in certain circumstances.

(7) Sections 16.2 and 16.3 apply for the purposes of this Division in the same way as they apply for the purposes of Part 2.7.

Note: Section 16.2 treats the sending of things and electronic communications into and out of Australia as conduct occurring partly in Australia. Section 16.3 affects the meaning of *Australia*.

24 Application

The amendments made by this Part apply in relation to conduct engaged in on or after the commencement of this Part.



Criminal Code Act 1995

No. 12, 1995 as amended

Compilation start date: 1 July 2013

Includes amendments up to: Act No. 74, 2013

Prepared by the Office of Parliamentary Counsel, Canberra

Chapter 10—National infrastructure

Part 10.2—Money laundering

Division 400—Money laundering

400.1 Definitions

(1) In this Division:

ADI (authorised deposit-taking institution) means:

- (a) a body corporate that is an ADI for the purposes of the *Banking Act 1959*; or
- (b) the Reserve Bank of Australia; or
- (c) a person who carries on State banking within the meaning of paragraph 51(xiii) of the Constitution.

Australian Capital Territory indictable offence means an offence against a law of the Australian Capital Territory that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

banking transaction includes:

- (a) any transaction made at an ADI; and
- (b) any transaction involving a money order.

Commonwealth indictable offence means an offence against a law of the Commonwealth, or a law of a Territory (other than the Australian Capital Territory and the Northern Territory), that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

deals with money or other property has the meaning given by section 400.2.

export money or other property, from Australia, includes transfer money or other property from Australia by an electronic communication.

Section 400.1

foreign indictable offence means an offence against a law of a foreign country constituted by conduct that, if it had occurred in Australia, would have constituted an offence against:

- (a) a law of the Commonwealth; or
- (b) a law of a State or Territory connected with the offence;

that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

Note: See subsection (3) for when a law of a State or Territory is connected with the offence.

import money or other property, into Australia, includes transfer money or other property to Australia by an electronic communication.

instrument of crime: money or other property is an instrument of crime if it is used in the commission of, or used to facilitate the commission of, an offence against a law of the Commonwealth, a State, a Territory or a foreign country that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

Northern Territory indictable offence means an offence against a law of the Northern Territory that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

proceeds of crime means any money or other property that is wholly or partly derived or realised, directly or indirectly, by any person from the commission of an offence against a law of the Commonwealth, a State, a Territory or a foreign country that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

property means real or personal property of every description, whether situated in Australia or elsewhere and whether tangible or intangible, and includes an interest in any such real or personal property.

State indictable offence means an offence against a law of a State that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

Section 400.2

- (2) To avoid doubt, a reference in this Division to *money or other property* includes a reference to financial instruments, cards and other objects that represent money or can be exchanged for money, whether or not they have intrinsic value.
- (3) For the purposes of the definition of *foreign indictable offence* in subsection (1), a State or Territory is connected with the offence if:
 - (a) a dealing in money or property takes place in the State or Territory; and
 - (b) the money or property would be proceeds of crime, or could become an instrument of crime, in relation to the offence if the offence were a foreign indictable offence.

400.2 Definition of *deals with money or other property*

A person *deals with money or other property* if the person does any of the following:

- (a) receives, possesses, conceals or disposes of money or other property;
- (b) imports money or other property into Australia;
- (c) exports money or other property from Australia;
- (d) engages in a banking transaction relating to money or other property.

400.2A Application of offences relating to possible instruments of crime

- (1) This section affects the application of sections 400.3, 400.4, 400.5, 400.6, 400.7 and 400.8 so far as they relate to a person dealing with money or other property that:
 - (a) is intended by the person to become an instrument of crime; or
 - (b) is at risk of becoming an instrument of crime.
- (2) Those sections apply if at least one of the circumstances described in subsections (3) and (4) exists.
- (3) One circumstance is that money or other property is intended to become, or at risk of becoming, an instrument of crime in relation to an offence that is:
 - (a) a Commonwealth indictable offence; or

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- (b) a foreign indictable offence; or
- (c) a State indictable offence that has a federal aspect; or
- (d) an Australian Capital Territory indictable offence; or
- (e) a Northern Territory indictable offence.

Note: The prosecution need not prove the existence of any fault element for the nature of the offence: see section 400.11.

- (4) Another circumstance is that the dealing with the money or other property occurs:
 - (a) in the course of or for the purposes of importation of goods into, or exportation of goods from, Australia; or
 - (b) by means of a communication using a postal, telegraphic, telephonic or other like service within the meaning of paragraph 51(v) of the Constitution; or
 - (c) in the course of banking (other than State banking that does not extend beyond the limits of the State concerned); or
 - (d) outside Australia.

- (5) Absolute liability applies to subsections (3) and (4).

Note: For absolute liability, see section 6.2.

400.3 Dealing in proceeds of crime etc.—money or property worth \$1,000,000 or more

- (1) A person is guilty of an offence if:
 - (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is, and the person believes it to be, proceeds of crime; or
 - (ii) the person intends that the money or property will become an instrument of crime; and
 - (c) at the time of the dealing, the value of the money and other property is \$1,000,000 or more.

Penalty: Imprisonment for 25 years, or 1500 penalty units, or both.

Schedule The Criminal Code
Chapter 10 National infrastructure
Part 10.2 Money laundering
Division 400 Money laundering

Section 400.3

- (2) A person is guilty of an offence if:
- (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is proceeds of crime; or
 - (ii) there is a risk that the money or property will become an instrument of crime; and
 - (c) the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
 - (d) at the time of the dealing, the value of the money and other property is \$1,000,000 or more.

Penalty: Imprisonment for 12 years, or 720 penalty units, or both.

- (3) A person is guilty of an offence if:
- (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is proceeds of crime; or
 - (ii) there is a risk that the money or property will become an instrument of crime; and
 - (c) the person is negligent as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
 - (d) at the time of the dealing, the value of the money and other property is \$1,000,000 or more.

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

- (4) Absolute liability applies to paragraphs (1)(c), (2)(d) and (3)(d).

Note 1: Section 400.10 provides for a defence of mistake of fact in relation to these paragraphs.

Note 2: Section 400.2A affects the application of this section so far as it relates to a person dealing with money or other property that:

- (a) is intended by the person to become an instrument of crime; or
- (b) is at risk of becoming an instrument of crime.

(s. 400.4 - 400.9 omitted.)

400.10 Mistake of fact as to the value of money or property

- (1) A person is not criminally responsible for an offence against section 400.3, 400.4, 400.5, 400.6, 400.7 or 400.9 in relation to money or property if:
- (a) at or before the time of dealing with the money or property, the person considered what was the value of the money or property, and was under a mistaken but reasonable belief about that value; and
 - (b) had the value been what the person believed it to be, the person's conduct would have constituted another offence against this Division for which the maximum penalty, in penalty units, is less than the maximum penalty, in penalty units, for the offence charged.

Example: Assume that a person deals with money or property that is the proceeds of crime. While the person believes it to be proceeds of crime, he or she is under a mistaken but reasonable belief that it is worth \$90,000 when it is in fact worth \$120,000.

That belief is a defence to an offence against subsection 400.4(1) (which deals with money or property of a value of \$100,000 or more). However, the person would be guilty of an offence against subsection 400.5(1) (which deals with money or property of a value of \$10,000 or more). Section 400.14 allows for an alternative verdict of guilty of an offence against subsection 400.5(1).

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3)).

- (2) A person may be regarded as having considered what the value of the money or property was if:
- (a) he or she had considered, on a previous occasion, what the value of the money or property was in the circumstances surrounding that occasion; and
 - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

Section 400.11

400.11 Proof of certain matters relating to kinds of offences not required

In a prosecution for an offence against a provision of this Division, it is not necessary to prove the existence of any fault element in relation to any of the following:

- (a) whether an offence may be dealt with as an indictable offence;
- (b) whether an offence is an indictable offence;
- (c) whether an offence is a Commonwealth indictable offence;
- (d) whether an offence is a foreign indictable offence;
- (e) whether an offence is a State indictable offence;
- (f) whether an offence is an Australian Capital Territory indictable offence;
- (g) whether an offence is a Northern Territory indictable offence.

400.12 Combining several contraventions in a single charge

- (1) A single charge of an offence against a provision of this Division may be about 2 or more instances of the defendant engaging in conduct (at the same time or different times) that constitutes an offence against a provision of this Division.
- (2) If:
 - (a) a single charge is about 2 or more such instances; and
 - (b) the value of the money and other property dealt with is an element of the offence in question;that value is taken to be the sum of the values of the money and other property dealt with in respect of each of those instances.

400.13 Proof of other offences is not required

- (1) To avoid doubt, it is not necessary, in order to prove for the purposes of this Division that money or property is proceeds of crime, to establish:
 - (a) a particular offence was committed in relation to the money or property; or
 - (b) a particular person committed an offence in relation to the money or property.

- (2) To avoid doubt, it is not necessary, in order to prove for the purposes of this Division an intention or risk that money or property will be an instrument of crime, to establish that:
- (a) an intention or risk that a particular offence will be committed in relation to the money or property; or
 - (b) an intention or risk that a particular person will commit an offence in relation to the money or property.

400.14 Alternative verdicts

If, on a trial for an offence against a provision of this Division (the *offence charged*), the trier of fact:

- (a) is not satisfied that the defendant is guilty of the offence charged; but
- (b) is otherwise satisfied that the defendant is guilty of another offence against this Division for which the maximum penalty, in penalty units, is less than the maximum penalty, in penalty units, for the offence charged;

the trier of fact may find the defendant not guilty of the offence charged but guilty of the other offence, so long as the person has been accorded procedural fairness in relation to that finding of guilt.

400.15 Geographical jurisdiction

- (1) A person does not commit an offence against this Division unless:
- (a) the conduct constituting the alleged offence occurs:
 - (i) wholly or partly in Australia; or
 - (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
 - (b) the conduct constituting the alleged offence occurs wholly outside Australia (but not on board an Australian aircraft or an Australian ship) and the money or other property:
 - (i) is proceeds of crime; or
 - (ii) is intended to become an instrument of crime; or
 - (iii) is at risk of becoming an instrument of crime;in relation to a Commonwealth indictable offence, a State indictable offence, an Australian Capital Territory indictable offence or a Northern Territory indictable offence; or

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- (c) the conduct constituting the alleged offence occurs wholly outside Australia and:
 - (i) at the time of the alleged offence, the person is an Australian citizen; or
 - (ii) at the time of the alleged offence, the person is a resident of Australia; or
 - (iii) at the time of the alleged offence, the person is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or
- (d) all of the following conditions are satisfied:
 - (i) the alleged offence is an ancillary offence;
 - (ii) the conduct constituting the alleged offence occurs wholly outside Australia;
 - (iii) the conduct constituting the primary offence to which the ancillary offence relates occurs, or is intended by the person to occur, wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship.

Note: The expression *offence* is given an extended meaning by subsection 11.2(1), section 11.3 and subsection 11.6(1).

Defence—primary offence

- (2) A person is not guilty of an offence against this Division if:
 - (a) the alleged offence is a primary offence; and
 - (b) the conduct constituting the alleged offence occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
 - (c) paragraph (1)(b) of this section does not apply; and
 - (d) the person is neither:
 - (i) an Australian citizen; nor
 - (ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and
 - (e) there is not in force in:
 - (i) the foreign country where the conduct constituting the alleged offence occurs; or
 - (ii) the part of the foreign country where the conduct constituting the alleged offence occurs;

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a law of that foreign country, or a law of that part of that foreign country, that creates an offence that corresponds to the offence against this Division.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2). See subsection 13.3(3).

- (3) For the purposes of the application of subsection 13.3(3) to an offence, subsection (2) of this section is taken to be an exception provided by the law creating the offence.

Defence—ancillary offence

- (4) A person is not guilty of an offence against this Division if:
- (a) the alleged offence is an ancillary offence; and
 - (b) the conduct constituting the alleged offence occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
 - (c) the conduct constituting the primary offence to which the ancillary offence relates occurs, or is intended by the person to occur, wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
 - (d) paragraph (1)(b) of this section does not apply (and would not apply if the conduct described in paragraph (c) of this subsection occurred as intended); and
 - (e) the person is neither:
 - (i) an Australian citizen; nor
 - (ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and
 - (f) there is not in force in:
 - (i) the foreign country where the conduct constituting the primary offence to which the ancillary offence relates occurs, or is intended by the person to occur; or
 - (ii) the part of the foreign country where the conduct constituting the primary offence to which the ancillary offence relates or is intended by the person to occur; a law of that foreign country, or a law of that part of that foreign country, that creates an offence that corresponds to the primary offence.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3).

Schedule The Criminal Code
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Part 10.2 Money laundering
Division 400 Money laundering

Section 400.16

- (5) For the purposes of the application of subsection 13.3(3) to an offence, subsection (4) of this section is taken to be an exception provided by the law creating the offence.

Extended application of sections 16.1, 16.2 and 16.3

- (6) Section 16.1, except paragraph 16.1(1)(a), applies in relation to an offence against this Division (in addition to the application of that section apart from this subsection).

Note: Section 16.1 requires the Attorney-General's consent for prosecution of an offence if the alleged conduct occurred wholly in a foreign country in certain circumstances.

- (7) Sections 16.2 and 16.3 apply for the purposes of this Division in the same way as they apply for the purposes of Part 2.7.

Note: Section 16.2 treats the sending of things and electronic communications into and out of Australia as conduct occurring partly in Australia. Section 16.3 affects the meaning of *Australia*.

400.16 Saving of other laws

This Division is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory.