Money laundering – guidance for charging offences under Division 400 of the Code

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Background

1. The section 400.3-400.8 offences in the *Criminal Code* are based on a person dealing with money or property which is proceeds of crime or is intended to be (or is at risk of becoming) an instrument of crime. The offences under s.400.9(1) and (1A) are similarly broad, applying to any dealing with money or other property where it is reasonable to suspect it is proceeds of an indictable offence. The offences are tiered by reference to the amount involved.

2. Money or property is proceeds of crime if it is wholly or partly derived or realised, directly or indirectly, by any person from the commission of an offence against the law of the Commonwealth, a State, a Territory or a foreign country that may be dealt with as an indictable offence. Money or property can be an instrument of crime if it is used in the commission of, or to facilitate the commission of, an offence against the law of the Commonwealth, a State, a Territory or a foreign country that may be dealt with as an indictable offence.

3. Section 400.12 provides that for the purposes of Division 400 amounts dealt with on separate occasions can be combined in a single offence.

4. There are international treaties and obligations applying to the enactment and enforcement of Division 400 offences. In line with these treaties and obligations, Division 400 of the Code has been drafted to apply to a broad range of offending and officers need to be aware of and appropriately apply these offences.

5. The maximum penalties available for the Division 400 offences reflect the seriousness with which Parliament views the prohibited conduct.

Charging policy for Division 400 offences

Only Division 400 offence available

6. Where the defendant's conduct is only caught by a Division 400 offence the decision to prosecute will be governed by the Prosecution Policy of the Commonwealth (Prosecution Policy) – see in particular paragraphs 2.1 – 2.14. Paragraph 2.20 of the Prosecution Policy provides that in the ordinary course the charge laid will be the most serious disclosed by the evidence – this should be noted when considering the application of s.400.12.

Multiple offences available

7. In some cases a defendant will be a party both to a Division 400 offence as well as to the offence from which the proceeds came ('predicate offence') or the subsequent substantive offence where the money or property is an instrument of crime ('instrument related substantive offence'). In such cases the question will arise as to whether the defendant should be prosecuted for: just the predicate / instrument related substantive offence; just the Division 400 offence; or both.

8. Making that decision requires consideration of the same factors and principles as in any other prosecution where more than one charge is available. That is, the factors set out in paragraphs 2.19 – 2.23 of the *Prosecution Policy* together with the relevant common law principles.

9. The current authority on the issues arising from the laying of multiple charges concerning one incident is *Pearce v The Queen* (1998) 194 CLR 610. In *Pearce* the majority (McHugh, Hayne and Callinan JJ) noted that:

> *[30] The decision about what charges should be laid and prosecuted is for the prosecution. Ordinarily, prosecuting authorities will seek to ensure that all offences that are to be charged as arising out of one event or series of events are preferred and dealt with at the one time. Nothing we say should be understood as detracting from that practice or from the equally important proposition that prosecuting authorities should not multiply charges unnecessarily.*
>
> *[31] There was, however no abuse of process in charging this appellant with both counts 9 and 10. The short answer to the contention that the charging of both counts was an abuse of process is that because the offences are different (and different in important respects) the laying of both charges could not be said to be vexatious or oppressive or for some improper or ulterior purpose. To hold otherwise would be to preclude the laying of charges that, together, reflect the whole criminality of the accused and, consonant with what was held in R v De Simoni, would require the accused to be sentenced only for the offence or offences charged, excluding consideration of any part of the accused's conduct that could have been charged separately.*

10. In *R v De Simoni* (1981) 147 CLR 383 the High Court made clear that a court, in sentencing a defendant, is entitled to consider all of the conduct of the defendant but cannot take into account circumstances of aggravation that would have warranted a conviction of a more serious offence.

11. In *Elias v The Queen; Issa v The Queen* (2013) 248 CLR 483 the High Court noted that: *[32] The fact that it is possible to identify another offence having a lesser maximum penalty which might have been charged does not make the decision to prosecute for the offence charged unjust.* The Court went on to note: *[35] Prosecutors are subject to a duty of fairness in the exercise of their important public functions.*

12. In summary the relevant factors that should be considered are:

- What is the nature and extent of the alleged criminal conduct disclosed by the evidence?
- What charges are available in relation to the alleged criminal conduct?
- Where both a Division 400 offence and another offence are available would either of those charges, on its own, adequately reflect all of the alleged criminal conduct?
- Will the charges chosen provide a court with an appropriate basis for sentence? This includes whether the maximum penalty provides a sufficient sentencing range.
- Would proceeding on one charge alone raise or potentially raise a *De Simoni* issue on sentence? In considering this issue it is important to note that the Division 400 offences often will be more serious than other available offences.

13. It is not relevant, nor helpful to compare the alleged conduct with some assumed meaning of what constitutes '*money laundering'* and thus warrants prosecution for a Division 400 offence. When considering the use of the Division 400 offences what should be compared is the conduct that is prohibited by the offence [unlawful dealing in money or property] as against the alleged conduct of the defendant.

14. The following are examples of situations in which a Division 400 offence, either on its own or in combination with other offences, could be appropriate[1]:

- Where the defendant was not involved in the predicate offence or instrument related substantive offence but only in dealing with the money or property.
- Where the Division 400 offence more appropriately reflects the seriousness of the overall conduct.
- Where evidence that the defendant was involved in the predicate offence or instrument related substantive offence is not strong (as opposed to the Division 400 offence) or there are other legal or evidentiary difficulties relating to the predicate / instrument related substantive offence.
- Where it would be impractical to charge all of the predicate / instrument offences individually – for example where the defendant has engaged in a large number of separate frauds or a large number of AML/CTF Act offences.
- Where the predicate or instrument related substantive offence would not properly reflect the seriousness of the conduct.

[1] *Thorn v The Queen* [2009] NSWCCA 294; *Nahlous v The Queen* [2010] NSWCCA 58; and *Schembri v The Queen* [2010] NSWCCA 149 are cases where the NSW CCA was critical of the use of a Division 400 offence.

15. These examples are provided for guidance only. There will be other situations where Division 400 charges are appropriate. This will depend on the circumstances of the case.

16. Whatever charge or charges are chosen it is important that in making that decision the factors set out in the Prosecution Policy and the relevant authorities have been considered. Prosecutors should avoid constructing cases on an unduly artificial basis in order to lay money laundering charges. In particular, prosecutors should consult with the relevant Assistant Director on whether it is appropriate to charge a defendant with an instruments offence where the conduct constituting the dealing involves simply possessing the money prior to engaging in structured banking transactions. Another alternative may be to lay multiple structuring offences.

Particularisation of the indictable offence in prosecuting offences under s 400.3–400.8

17. In particularising the indictable offence for a proceeds or instruments offence the following factors need to be considered:

- there needs to be a degree of specificity as to the nature or type of the alleged predicate or contemplated offence(s) sufficient that it is clear that what is alleged is an indictable, rather than a summary, offence.
- the better view is that a class of offences will be sufficient (eg drug importing), and it will not be necessary to specify a particular section or Act. More than one class of offences can be nominated.
- there does not need to be any particularity as to 'time and person' pursuant to s.400. 13 of the Code[2].
- particularisation does not need to occur in the charge or on the indictment, however, the defence must be provided with sufficient particulars of what is alleged to be the class or classes of offences (eg via a case statement or opening).
- the accused's state of mind regarding the indictable offence does not need to correlate with the class or classes of indictable offences nominated by the prosecution as being the predicate offence(s)[3].

18. In *Lin v R [2015] NSWCCA 204* at [10] Simpson J (with whom Hulme and Bellew JJ agree) describes the legislative scheme in relation to s.400.3 – 400.8 as follows:

"in each case, identification of the class of indictable offences from which the money or property is alleged to have been derived or realized (proceeds of crime) or as to which it is intended, or is alleged to be at risk of, being used in the commission or facilitation of (instrument of crime) is necessary: see Chen v DPP (Cth) [2011] NSWCCA 205; 83 NSWLR 224 at [28] . It is not necessary that the Crown identify a particular offence, or the commission of an offence by a particular person: 400.13" [emphasis added]

[2] As discussed in *Chen* at paragraphs 29 and 99.
[3] Li v R (2010) 265 ALR 445

19. Whilst the judgment of Garling J in *Chen* can be interpreted more restrictively, namely, to require particularisation of an Act or a provision of an Act, that proposition is not supported by other members of that court, nor is it supported by the court in *Lin.*

20. By virtue of the operation of s.23 of the *Acts Interpretation Act 1901 (Cth)* the better view is that it is permissible to allege multiple classes of indictable offences (eg drug importations, drug trafficking, armed robberies) so long as each class of offence is an indictable offence. However, this will depend on the facts of each case and the failure to identify one single class of indictable offences may mean that there will be evidentiary difficulties in proving that the money actually is proceeds of crime. Accordingly, in framing a case this way, caution should be exercised and it would be appropriate to discuss such an approach with the relevant Assistant Director.

Whether a money laundering offence should be dealt with summarily or on indictment

21. The decision whether a Division 400 matter proceeds on indictment or is dealt with summarily should be made in accordance with the Prosecution Policy and in particular paragraphs 6.11, 6.12 and 6.13.

22. In relation paragraph 6.12(a), indicia relevant to the seriousness of a Division 400 offence include (but are not limited to):

- **(i)** the amount of money (or value of property dealt with) – large amounts (more than $100,000) are indicative of serious offending;
- **(ii)** the role of the defendant;
- **(iii)** the use of false identities;
- **(iv)** the nature of the charge against the defendant such as whether the defendant dealt with the money or property intentionally or recklessly or negligently;
- **(v)** previous convictions;
- **(vi)** what is known about the source of the funds.

23. Prosecutors should consider the views of the investigating agency when determining whether to proceed summarily or on indictment.