



ANU College
of Law

Federal Law Review

ARTICLES

The Great Depression, this Depression, and
Administrative Law *Mark Aronson*

The Australian *Criminal Code* : Time for
Some Changes *Ian Leader-Elliott*

Global Administrative Law: Can it Bring Global
Governance to Account?
Andrew D Mitchell and John Farnik

Is there a 'Public Benefit' in Improving Working
Conditions for Independent Contractors? Collective
Bargaining and the *Trade Practices Act 1974 (Cth)*
Shae McCrystal

COMMENTS

The Principle of Legality and the Judicial Protection
of Rights – *Evans v New South Wales*
Dan Meagher

David Hicks and Australian Proceeds of Crime
Legislation: Can he Sell his Story? *Lucas Bastin*

VOLUME 37
NUMBER 2
2009

NOT FOR
NEW SOUTH WALES BAR
ASSOCIATION LIBRARY
LOAN

DAVID HICKS AND AUSTRALIAN PROCEEDS OF CRIME LEGISLATION: CAN HE SELL HIS STORY?

Lucas Bastin*

INTRODUCTION

The detention of David Hicks by the United States in Guantánamo Bay detention camp was an event which attracted significant attention in the Australian community.¹ By the time Mr Hicks' detention in that facility ended in early 2007, newspapers and other media were reporting it daily, the voice of dissatisfaction among human rights organisations and the broader community was becoming insistent, and politicians were beginning to act. And the lawyers, of course, were far from silent.²

Since Mr Hicks pleaded guilty to the charge of 'providing material support for terrorism',³ was repatriated from Guantánamo Bay to Yatala prison in Adelaide, and served out that portion of his sentence which was not suspended, the public debate

-
- * Magdalen College, Oxford. BA(Hons) (Syd); LLB(Hons) (Syd); BCL(Dist) (Oxon). In 2007, Lucas was Associate to the Hon Justice Tamberlin when his Honour decided *Hicks v Ruddock* (2007) 156 FCR 574. All opinions and errors are exclusively those of the author.
- 1 The background to Mr Hicks' detention has been recounted before. A fuller account of the proceedings against Mr Hicks at Guantánamo Bay is in Timothy McCormack, 'David Hicks and the Charade of Guantánamo Bay' (2007) 8 *Melbourne Journal of International Law* 273. A general background to the affair, and of Mr Hicks' application before the Federal Court of Australia, is in Justice Brian Tamberlin and Lucas Bastin, 'David Hicks in the Australian Courts: Past and Future Legal Issues' (2008) 82 *Australian Law Journal* 774, 775-80.
- 2 See McCormack, above n 1; Sir Anthony Mason and Geoffrey Lindell, 'Detainee 002: The Case of David Hicks by Leigh Sales' (2008) 9 *Melbourne Journal of International Law* 515; Lex Lasry, *The United States v David Matthew Hicks: Final Report of the Independent Observer for the Law Council of Australia, Guantanamo Bay, Cuba* (20 June 2007) Law Council of Australia Report <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=CDF9FC6F-1E4F-17FA-D252-457B6909B05A&siteName=lca> at 12 August 2009; the Hon Alastair Nicholson et al, *David Hicks, Military Commissions Act 2006 - Compliance with Common Article 3 of the Geneva Conventions, the Hamdan Decision and Australian Law* (2006) Australian Human Rights Centre <<http://www.ahrcentre.org/content/Activites/news.html>> at 6 March 2009; Devika Hovell and Grant Niemann, 'In the Matter of David Hicks: A Case for the Australian Courts?' (2005) 16 *Public Law Review* 116; Marley Zelinka, 'Hicks v Ruddock versus The United States v Hicks' (2007) 29 *Sydney Law Review* 527; Tamberlin and Bastin, above n 1.
- 3 Charge Sheet, Office of the Chief Prosecutor and Office of Military Commission, Department of Defense (2 February 2007), <<http://www.defenselink.mil/news/d2007Hicks%20-%20Notification%20of%20Sworn%20Charges.pdf>> at 12 August 2009, 1, 7.

surrounding his detention and treatment has died down. Some legal issues which the affair threw up, however, remain unresolved. One such issue is whether or not Mr Hicks can publicise his story for profit. Determining this issue requires analysis of Australian proceeds of crime legislation, and consideration of the circumstances in which it would prevent Mr Hicks profiting from publication of his story. It is this task which this paper takes up.

THE LEGISLATION – EXPLANATION AND CRITIQUE

Proceeds of crime legislation has been enacted by all federal, State and Territory Parliaments. At the federal level, the most important enactment is the *Proceeds of Crime Act 2002* (Cth), which commenced on 1 January 2003, and substantially augmented the *Proceeds of Crime Act 1987* (Cth). For the purpose of this paper, the most important changes implemented by the more recent Act are the introduction of provisions that enable confiscation of proceeds of crime without the need first to obtain a criminal conviction or charge; the inclusion of the crime of terrorism in respect of which restraining and confiscation orders can be made; and the introduction of a new process by which confiscation can be ordered, known as the 'literary proceeds order'.

Chapter two of the Act sets out five processes relating to confiscation. The first four relate to the classic restraining, forfeiture and pecuniary penalty orders, and empower the courts in relevant circumstances to order that a person not dispose of or deal with property deemed to be proceeds of crime, that he or she forfeit that property to the Commonwealth, or that he or she pay a certain amount of money calculated by reference to the benefits derived from the commission of an offence. One new quality which is introduced by the more recent Act is that restraining and forfeiture orders can now be made without first obtaining a criminal conviction or charge against the relevant person;⁴ instead, if there are 'reasonable grounds to suspect' that the person has committed the relevant offence, then the court must make the order.⁵

Another new quality which the Act introduces into the proceeds of crime regime is a fifth confiscation process, the literary proceeds order.⁶ 'Literary proceeds' are defined in s 153(1) of the Act:

- (1) Literary proceeds are any benefit that a person derives from the commercial exploitation of:

⁴ The introduction of a non-conviction based regime is a novelty in the federal legislation, which was recommended by the Australian Law Reform Commission after its review of proceeds of crime legislation (which included a consideration of the use of non-conviction based regimes in certain Australian States before the new federal Act): Australian Law Reform Commission, *Confiscation That Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87 (1999).

⁵ See ss 18–20 in relation to restraining orders, which provide the basis for ss 47 and 49 in relation to forfeiture orders.

⁶ The Act expressly provides that a literary proceeds order can be made in conjunction with the other types of confiscation orders (s 152(4)). Indeed, the only case which has to date dealt with literary proceeds was a case in which a restraining order was sought pursuant to s 20 of the Act as a step precedent to the making of a literary proceeds order for confiscation of the property: *Director of Public Prosecutions (Cth) v Corby* (2007) 170 A Crim R 282.

(a)

(b)

The Act e
notoriety can
publishing r
images, wor
representatio
court to deal
also be dealt
level, offence
months.⁹ Sim
involved con
application fo
law of the C
imprisonmen
literary proce
whether the b
made in rela
transferred to
confiscation c
error in pers
commercial e
toothless in re

A complic
have derived
property of tl
'effective cont
The term 'effe
and not entir
more than it
which are sa
scenarios whi
finally a list
question.¹⁶ A
which is at its

7 *Proceeds of*
8 *Proceeds of*
9 *Crimes Act*
10 *Proceeds of*
11 *Proceeds of*
12 *Cf Director*
13 *Proceeds of*
14 *Proceeds of*
15 *Proceeds of*
16 *Proceeds of*

- (a) the person's notoriety resulting, directly or indirectly, from the person committing an indictable offence or a foreign indictable offence; or
- (b) the notoriety of another person, involved in the commission of that offence, resulting from the first-mentioned person committing that offence.

The Act expressly provides that *any* means of 'commercial exploitation' of one's notoriety can be the subject of a literary proceeds order, including but not limited to publishing material in written or electronic form, using media from which visual images, words or sounds can be produced, or providing live entertainment, representations or interviews.⁷ An offence is an 'indictable offence' if it is possible for a court to deal with the offence as an indictable offence, even if the same offence could also be dealt with summarily in some circumstances.⁸ This includes, at the federal level, offences which are punishable by imprisonment for a period exceeding 12 months.⁹ Similarly, an offence is a 'foreign indictable offence' for present purposes if it involved conduct overseas which, had it occurred in Australia at the time of the application for the literary proceeds order, would have constituted an offence against a law of the Commonwealth, a State or a Territory punishable by at least 12 months imprisonment.¹⁰ An important distinction between these two types of offences is that a literary proceeds order can be made in relation to an indictable offence irrespective of whether the benefit is derived in Australia or overseas, while such an order can only be made in relation to a foreign indictable offence if the benefit is derived in, or is transferred to, Australia.¹¹ In this limited respect, the provisions dealing with confiscation of literary proceeds have extraterritorial effect. While it is probably an error in perspective to say that the Act is not concerned with where the relevant commercial exploitation took place,¹² it is correct to say that the Act is far from toothless in respect of offences committed overseas.

A complicated question which arises under the Act is when a person can be said to have derived literary proceeds. In deciding this question, the court may treat as property of the person any property which it believes is either subject to his or her 'effective control' or has been transferred to another person at his or her direction.¹³ The term 'effective control' is defined in s 337 of the Act, but the definition is complex and not entirely satisfactory. The definition is intended to be broad, encompassing more than it excludes, but it achieves this result by enumerating certain scenarios which are said to place the property in the person's effective control,¹⁴ certain scenarios which are expressly said not to preclude a finding of effective control,¹⁵ and finally a list of considerations which may assist the court in determining the question.¹⁶ At no stage does the provision define, as a dictionary might, the term which is at its core. As this paper discusses below, this ambiguity may mean that there

⁷ *Proceeds of Crime Act 2002* (Cth) s 153(2).

⁸ *Proceeds of Crime Act 2002* (Cth) s 338.

⁹ *Crimes Act 1914* (Cth) s 4G.

¹⁰ *Proceeds of Crime Act 2002* (Cth) s 337A.

¹¹ *Proceeds of Crime Act 2002* (Cth) s 153(3)-(3A).

¹² Cf *Director of Public Prosecutions (Cth) v Corby* (2007) 170 A Crim R 282, 285.

¹³ *Proceeds of Crime Act 2002* (Cth) s 153(4).

¹⁴ *Proceeds of Crime Act 2002* (Cth) s 337(2), (4).

¹⁵ *Proceeds of Crime Act 2002* (Cth) s 337(1).

¹⁶ *Proceeds of Crime Act 2002* (Cth) s 337(5).

are some circumstances in which it would not be appropriate for a court to make a literary proceeds order, despite a story like Mr Hicks' having been publicised for profit.

The power to make a literary proceeds order is conferred by s 152(1) and (2) of the Act, and unlike the powers conferred in relation to restraining and forfeiting property,¹⁷ it is a discretionary power which the court can refuse to exercise even when the conditions precedent in ss 152(1)(a)-(c) or 152(2)(a)-(c) have been satisfied.¹⁸ The fact that Parliament has seen fit to retain this ultimate discretion in relation to literary proceeds orders rather than follow the common formulation of the power used in relation to restraining and forfeiting property suggests that the discretion is not empty, and that some factor additional to the conditions precedent must be present before the order is made. What this additional factor might be will depend on the circumstances of the case before the court,¹⁹ and may conceivably be no more than the mere absence of any mitigating considerations.²⁰ That being said, if the conditions precedent are all clearly satisfied in a given case, it would be difficult for a court to justify, other than in unusual circumstances, not exercising its discretion to make the order.

The three conditions precedent in s 152(1) are (a) that the Director of Public Prosecutions applies for the order; (b) that the court is satisfied that the person has committed an indictable offence (whether or not he or she has been convicted of it); and (c) that the court is satisfied that the person has derived literary proceeds in relation to the offence. Section 152(2) establishes the same three conditions precedent in respect of foreign indictable offences, *mutatis mutandis*.²¹ These are cumulative requirements, all of which must be fulfilled before the court's discretion to make the order arises. As the first is procedural and requires no elaboration, and the difficulties arising in relation to the third have been discussed above, it is the second condition precedent which deserves attention.

As has been mentioned, a significant development in the more recent Act is that it provides for the making of restraining and confiscation orders without the need first to obtain a criminal conviction or charge.²² That recalibration is achieved in relation to literary proceeds orders by s 152(1)(b), and by the provision in s 157 that '[t]he fact that a person has been acquitted of an offence with which the person has been charged does

¹⁷ See ss 17-20 in relation to restraining orders, and ss 47-9 in relation to forfeiture orders.

¹⁸ Notably, the power to make literary proceeds orders is expressly not retrospective. Section 152(3) provides that 'the literary proceeds must have been derived after the commencement of this Act.' This is distinct from how the Act otherwise applies retrospectively to offences committed before commencement (s 14). It is also noteworthy that a literary proceeds order can cover future benefits (s 178).

¹⁹ Circumstances which the court under s 154(a) *must* take into consideration are (i) the nature and purpose of the product or activity from which the literary proceeds were derived; (ii) whether supplying the product or carrying out the activity was in the public interest; (iii) the social, cultural or educational value of the product or activity; (iv) the seriousness of the offence to which the product or activity relates; and (v) how long ago the offence was committed. Under s 154(b), the court may also take into account such other matters as it thinks fit.

²⁰ See *Proceeds of Crime Act 2002* (Cth) s 154(b).

²¹ Accordingly, references in this paper to s 152(1) of the Act should be read interchangeably with s 152(2).

²² See above, text accompanying n 4.

not affect the
While the pr
incidence and
s 152(1)(b),²³
the Act (so, in
and sets the
application u
is not difficul
someone has
majority of th
the balance o
policy, there
standard whic
a finding of
finding is be
determination
determination
conceptual if
different stan
anomaly. An
s 152(1)(b) fin
but at trial a
Alternatively
may arise be
commit the c
applying the
probabilities
anomaly doe
subsequently
so constrained
cannot but m
such a findin
the likelihood
evidence of th

²³ The quest
was an 'i
circumsta
exposure
the person
the court,
offence w
encourag
²⁴ This man
²⁵ Of course
having be
conflict v
Parliamer
²⁶ Although
91(1) pro

not to make a
 order for profit.
 and (2) of the
 and forfeiting
 exercise even
 n satisfied.¹⁸
 n relation to
 e power used
 etion is not
 st be present
 pend on the
 ore than the
 e conditions
 or a court to
 to make the

or of Public
 e person has
 icted of it);
 proceeds in
 precedent in
 cumulative
 to make the
 e difficulties
 and condition

Act is that it
 need first to
 n relation to
 t]he fact that
 charged does

re orders.
 eactive. Section
 mmencement
 ly to offences
 roceeds order

(i) the nature
 e derived; (ii)
 c interest; (iii)
 usness of the
 e offence was
 matters as it

erchangeably

not affect the court's power to make a literary proceeds order in relation to the offence.' While the provisions pertaining to literary proceeds orders are silent as to the incidence and standard of proof which apply when determining the question of fact in s 152(1)(b),²³ s 317 of the Act lays the incidence with the applicant for any order under the Act (so, in relation to literary proceeds orders, the Director of Public Prosecutions), and sets the standard for 'any question of fact to be decided by a court on an application under this Act ... [as] the balance of probabilities'. As a matter of law, this is not difficult to understand or apply. If a judge thinks it more likely than not that someone has committed a crime, then s 152(1)(b) is satisfied. Arguably, given that a majority of the questions of fact which federal judges encounter are determinable on the balance of probabilities, using this standard is prudent. However, as a matter of policy, there are several dimensions to the selection of the balance of probabilities standard which are disquieting. The first is that s 152(1) still requires the court to make a finding of fact about a person's culpability without satisfying itself that such a finding is beyond reasonable doubt. While a literary proceeds order is not a determination of criminal guilt which entails criminal sanctions, it is still a determination of culpability to which a significant penalty attaches. Given the conceptual if not functional similarity of the two determinations, it is surprising that different standards of proof are used for each. Secondly, s 152(1) runs the risk of anomaly. Anomaly may arise in two ways. It may arise because the judge under s 152(1)(b) finds on the balance of probabilities that the person committed the crime but at trial a jury is unable to reach the same conclusion beyond reasonable doubt.²⁴ Alternatively – and this may fairly be described as the worst case scenario – anomaly may arise because the judge finds on the lesser standard that the person did not commit the crime, but the jury convicts the same person of the same crime while applying the higher standard. The third disquieting dimension of the balance of probabilities standard in s 152(1) is that, in some cases, it may be troubling when anomaly does *not* arise. Where a person is convicted by a jury of an offence, and subsequently a literary proceeds order is sought, the judge may be or may appear to be so constrained by the jury's prior finding of fact about the person's guilt that he or she cannot but make the same finding of fact under s 152(1)(b). Should the judge make such a finding, it may smack of predetermination.²⁵ This risk is made more acute by the likelihood of the party applying for the literary proceeds order seeking to adduce evidence of the person's prior conviction.²⁶ Accordingly, although the foundation for

²³ The question of law in the subsection, namely, whether the offence allegedly committed was an 'indictable' offence, is dealt with in s 338 of the Act, although one can imagine circumstances in which even this question would be vexed and s 338 of no assistance. The exposure of such a lacuna is made more likely by the new development in the Act whereby the person against whom the order may be made need not yet be charged, thus leaving it to the court, *prior* to the laying of a charge of rendering of a conviction, to decide whether the offence with which they *may* be charged is an 'indictable' offence or not. This lacuna may encourage an overestimation by the Director of Public Prosecution of the likely charges.

²⁴ This manifestation of anomaly is exacerbated by s 157 of the Act, discussed above.

²⁵ Of course, if the judge, for whatever reason, be it a resistance of predetermination or having been genuinely persuaded on the weight of evidence, makes a finding of fact in conflict with the jury's prior conclusion, then the second disquieting dimension of Parliament's choice of standard in s 154(1)(b) – anomaly – returns.

²⁶ Although, s 91 of the *Evidence Act 1995* (Cth) would present some obstacles here. Section 91(1) provides that 'Evidence of the decision, or of a finding of fact, in an Australian or

each of these statutes achieves the same purpose as that achieved by the federal legislation. However, each does so in markedly different ways.

The most unique (and simplified) piece of State legislation is the *Criminal Proceeds Confiscation Act 2002* (Qld). Under s 200 of that Act, once a person has been convicted of an offence and has derived benefits from a depiction of the offence in 'a movie, book, newspaper, magazine, radio, or television production, or in any other electronic form, or live or recorded entertainment of any kind' or from 'an expression of the prescribed respondent's thoughts, opinions or emotions about the confiscation offence', then the State may apply for a 'special forfeiture order' that the person 'pay to the State an amount equal to all or part of the ... benefits'. It is an odd omission that the term 'benefits' is not defined for the purposes of the provisions concerning special forfeiture orders, although a review of how the term is used throughout those provisions and how it is defined in relation to other provisions of the Act³³ makes it reasonably clear that the term is to be understood broadly and inclusively, certainly including cash and other property,³⁴ and probably including any service or advantage rendered.³⁵ One idiosyncrasy of the Act, however, is that the benefit must be derived 'from a contract'.³⁶ Curious and supererogatory as this requirement may be, it would require a most unusual case in which the benefits were derived otherwise than from a contract,³⁷ and so is unlikely to materially undermine the efficacy of the Act's special forfeiture order provisions.

The provisions concerning 'artistic profits' orders in the *Confiscation of Criminal Assets Act 2003* (ACT) are more closely aligned with the provisions in the federal Act. The Territory Act in s 81 defines 'artistic profits' in terms broadly similar to those employed by the federal Act; it comparably hinges its definition on the notion of 'commercial exploitation',³⁸ it lists similar considerations to be taken into account when making the order,³⁹ and it permits the application for the order to be made before the person is convicted of the offence.⁴⁰ The Act is not entirely free from idiosyncrasy, however. Of particular note is the time at which the application can be made. Section 83(1) of the Territory Act provides that the Director of Public Prosecutions can make an application 'in relation to the *commission* of a relevant offence by an offender' (emphasis added). It is clear from s 83(2) that the Director need not wait until a conviction is secured before making the application, but it is less clear whether the Director need wait until a charge is laid. Section 79 defines the term 'commission' of an offence as including 'the alleged commission of the offence'. What is unclear is whether the requirement that the commission of an offence at least be 'alleged' means that a criminal charge must be laid against the person, or whether a bare allegation in the court hearing the application for the artistic proceeds order is

33 *Criminal Proceeds Confiscation Act 2002* (Qld) ss 21, 101.

34 *Criminal Proceeds Confiscation Act 2002* (Qld) s 203.

35 Cf *Criminal Proceeds Confiscation Act 2002* (Qld) ss 21, 101.

36 *Criminal Proceeds Confiscation Act 2002* (Qld) s 200.

37 The likelihood of deriving benefits by gratuitous gift or conditional gift promise (see *Australian Woollen Mills v Commonwealth* (1954) 92 CLR 424) is remote.

38 *Confiscation of Criminal Assets Act 2003* (ACT) s 81(2).

39 *Confiscation of Criminal Assets Act 2003* (ACT) s 81(4).

40 *Confiscation of Criminal Assets Act 2003* (ACT) s 83(2).

sufficient.⁴¹ The federal Act avoids this ambiguity by not confusing the provisions which deal with the court's power to make the order with the provisions which deal with the procedure by which such orders are obtained.⁴²

The final State Act which deals with literary proceeds orders is the *Criminal Assets Confiscation Act 2005* (SA). This is the Act which bears the greatest similarity to the federal Act, in that most of its provisions which deal with the making of a literary proceeds order are almost identical to the corresponding provisions in the federal Act, albeit with some unavoidable differences (such as the absence of a general provision for foreign indictable offences). There is one material difference between the two sets of provisions, which is that the State Act expressly affords the person to whom the order is directed a right to 'appear and adduce evidence at the hearing of the application'.⁴³ This is an interesting inclusion because, although an equivalent right could be inferred from ss 152 and 154 of the federal Act, the only case yet decided under the federal Act was conducted ex parte and in camera.⁴⁴ The construction of the Act, then, gives rise to no new sources of contention which have not already been canvassed in relation to the federal Act. What is most interesting about the South Australian proceeds of crime legislation is how it was amended to take account of the fact that Mr Hicks returned to live in that State, amendments which have imperfect but significant parallels in the federal jurisdiction.

In short, the South Australian legislation was amended to state explicitly that a literary proceeds order could be made in relation to an offence which was triable before the United States military commissions at Guantánamo Bay and to which Mr Hicks pleaded guilty in February 2007. The process of legislative amendments was careful and comprehensive. The first step was to pass the *Criminal Assets Confiscation (Serious Offences) Amendment Act 2007* (SA). It amended ss 3 and 10 of the principal Act, with the result that the definition of an offence in relation to which a literary proceeds order could be made now includes 'a foreign offence declared by the regulations to be within the ambit of this definition',⁴⁵ and that the Act applies to such foreign offences.⁴⁶ Subsequently, reg 8A was inserted into the *Criminal Assets Confiscation Regulations 2006* (SA). It states expressly that an offence triable before the military commissions 'constituted under Title 10 USC Sec 948d of the *Military Commissions Act 2006* of the United States of America' comes within the definition of an offence in s 3 of the Act, as amended. It is important to note that the United States legislation to which

reg 8A refers Court in *Ham* the military commissions strictures.⁴⁸ I includes in it before which, proceeds ord position deriv

No other j legislation as attempt to bri the reach of it given that it v imperfect corr jurisdiction w which Parlian include an o originally cons

Meaning of j

(1) If:

(a)

(b)

ther
hav

(3) In this s
offence
commis
13 Nov
entitled
Terroris

This anachr
s 337A of the P
the decision in

47 548 US 557
48 No challeng
has yet bee
Justice Rob
the injunct
commissioner
49 Section 337
Anti-Terrori

⁴¹ The explanatory memorandum to the Territory Act, when it was a Bill before Parliament, does not clarify things: '[Section] 79 explains that ... the concept of "commission" when used in the context of a serious offence, includes the alleged commission of the serious offence. The purpose of this [section] is to remove any doubt that penalty orders can be made for a serious offence even where the relevant offender has not been convicted of that offence, or the precise date on which the offence occurred cannot be determined.'

⁴² The federal Act is also simpler in its expression of the procedure by which the order is obtained. In s 162, it simply states that '[t]he DPP may apply for a literary proceeds order', thus avoiding the ambiguity introduced by s 79 of the Territory Act when it refers to 'the alleged commission of the offence'.

⁴³ *Criminal Assets Confiscation Act 2005* (SA) s 111(5).

⁴⁴ See *Director of Public Prosecutions (Cth) v Corby* (2007) 170 A Crim R 282, discussed below, and s 26(4) of the federal Act.

⁴⁵ *Criminal Assets Confiscation Act 2005* (SA) s 3.

⁴⁶ *Criminal Assets Confiscation Act 2005* (SA) s 10.

the provisions
ns which deal

Criminal Assets
nality to the
g of a literary
e federal Act,
eral provision
the two sets of
om the order
application'.⁴³
ld be inferred
he federal Act
en, gives rise
in relation to
eeds of crime
s returned to
allels in the

licitly that a
n was triable
to which Mr
ndments was
s *Confiscation*
rincipal Act,
ary proceeds
lations to be
such foreign
s *Confiscation*
the military
mmissions Act
ence in s 3 of
ion to which

re Parliament,
ission" when
of the serious
orders can be
victed of that
ed.'

n the order is
ceeds order',
refers to 'the

ussed below,

reg 8A refers is that which was passed after the decision of the United States Supreme Court in *Hamdan v Rumsfeld*⁴⁷ – the decision which struck down an earlier version of the military commissions as unconstitutional – in order to reconstitute the commissions in a manner which would conform with that country's constitutional strictures.⁴⁸ The sum effect of these developments is that South Australia expressly includes in its proceeds of crime legislation the offence to which, and the tribunal before which, Mr Hicks pleaded guilty, and provides that its courts can issue a literary proceeds order in respect of any benefits which a person in Mr Hicks' particular position derives as a result of publicising his or her story about that offence.

No other jurisdiction has been as Jesuitical in its approach to proceeds of crime legislation as South Australia. Indeed, only the federal Act has made any explicit attempt to bring offences triable before the United States military commissions within the reach of its literary proceeds orders. But even that attempt is of questionable effect, given that it was undertaken before the decision in *Hamdan v Rumsfeld*, and is thus of imperfect comparison with the South Australian position. The attempt in the federal jurisdiction was made in 2004, with the passage of the *Anti-Terrorism Act 2004* (Cth), in which Parliament sought to expand the definition of 'foreign indictable offence' to include an offence triable before the Guantánamo Bay military commissions as originally constituted:

Meaning of *foreign indictable offence*

(1) If:

- (a) an application (the *current application*) is made for a restraining order or confiscation order in relation to conduct that constituted an offence against a law of a foreign country; and
- (b) if the conduct had occurred in Australia at the testing time referred to in subsection (2), the conduct would have constituted an offence against a law of the Commonwealth, a State or a Territory punishable by at least 12 months imprisonment;

then, for the purposes of the current application, the conduct is treated as having constituted a *foreign indictable offence* at all relevant times.

(3) In this section:

offence against a law of a foreign country includes an offence triable by a military commission of the United States of America established under a Military Order of 13 November 2001 made by the President of the United States of America and entitled 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism'.⁴⁹

This anachronism persists in the current definition of a foreign indictable offence in s 337A of the *Proceeds of Crime Act 2002* (Cth). It has not been altered or removed since the decision in *Hamdan v Rumsfeld*, and in that respect lags behind the South Australian

⁴⁷ 548 US 557 (2006).

⁴⁸ No challenge to the constitutionality of the military commissions as presently constituted has yet been brought before the United States Supreme Court. However, on 17 July 2008, Justice Robertson of the United States District Court for the District of Columbia refused the injunctive relief sought by Salim Hamdan to prevent the reconstituted military commissions from exercising jurisdiction: *Hamdan v Gates*, 565 F Supp 2d 130 (DDC 2008).

⁴⁹ Section 337A of the *Proceeds of Crime Act 2002* (Cth), inserted by Item 26 of Schedule 1 to *Anti-Terrorism Act 2004* (Cth).

legislation. The problem with such tardiness, of course, is that an offence which is triable before the military commissions as presently constituted, and to which Mr Hicks pleaded guilty, is not explicitly included in the definition of 'foreign indictable offence', and thus may be excluded from the definition and fail to satisfy the second condition precedent to the making of a literary proceeds order under s 152(2). Some argue that the use of the word 'includes' in the above definition means that Parliament was seeking to be illustrative rather than exhaustive, and that an offence triable before the reconstituted military commissions would come within the intention of the definition, thereby satisfying s 152(2)(b).⁵⁰ The merits of these opposing constructions are considered further below. It suffices for now simply to register the defect in the federal Act, and to observe that the construction of the definition will be central to any attempt to obtain a literary proceeds order against Mr Hicks if he seeks to publicise his story for profit.⁵¹

Before leaving this explanation and critique of the way in which Australian proceeds of crime legislation applies to literary proceeds, it is important to consider the only case yet to arise under any of the provisions discussed above, namely, *Director of Public Prosecutions (Cth) v Corby*.⁵² This case, decided by the Queensland Court of Appeal on 2 March 2007 on appeal from a decision of the District Court, arose out of the arrest, conviction and sentence to 20 years' imprisonment of Schapelle Corby in Bali, Indonesia for smuggling drugs into that country from Australia. The issue before the Court of Appeal was whether to make orders under s 20 of the Act restraining Ms Corby and her family from disposing of or otherwise dealing with benefits received by them as a result of the publication of Ms Corby's story of notoriety. The orders sought were described by Keane JA, with whom Williams JA and Helman J agreed, as 'interim orders', presumably because they were merely preparatory to the making of a literary proceeds order under s 152(2) of the Act.⁵³ The Court of Appeal held that the orders sought by the Director of Public Prosecutions should be made, and so proceeded to order, inter alia, that the sum of \$267,750 held by Ms Corby's family on her behalf not be disposed of or dealt with otherwise than into the custody and control of the Official Trustee in Bankruptcy,⁵⁴ and that any future profits to be received from identified media sources be subjected to the same restraint.

Although this result may appear unsurprising, there are some notable aspects of the decision. The first is that it only imposed restraining orders. The proceeds referred to

in the orders were simply there were 're offence or a f the offence'.⁵⁵ standard four more than a p committed a f this decision (all of the proc Trustee has r freezing of th Court of App and unsatisfac and the impo proven under

Secondly, t these issues, t

The applica moneys in c of the applic DPP's appli led the cour

It is not a frustration of application ex However, that is less clear. J delivered on t Appeal's orde party against the media, wh '[j]ustice cann rule.⁶⁰ Althou

⁵⁰ Monica Biddington, *Selling Your Story – Literary Proceeds Orders under the Commonwealth Proceeds of Crime Act 2002* (2008) Australian Parliamentary Library <<http://www.aph.gov.au/library/pubs/rp/2007-08/08rp27.pdf>> at 6 March 2009.

⁵¹ Not least because the redrafting of that definition was intended to cover his particular circumstances – or as the explanatory memorandum to the Bill which became the *Anti-Terrorism Act 2004* (Cth) euphemises, the redrafting was intended to cover '[s]ome who are alleged to have committed terrorist related offences [which] may be dealt with by a US military commission' (Explanatory Memorandum, *Anti-Terrorism Bill 2004* (Cth) 3).
⁵² (2007) 170 A Crim R 282.

⁵³ On 24 March 2009, the Director of Public Prosecutions obtained an order that allowed confiscation of some but not all of the literary proceeds derived by Ms Corby. Notably, the orders also allowed for seizure of future payments. It is not clear pursuant to which power the orders were made. See: 'Corby Keeps Most of Book Funds, *The Sydney Morning Herald* (Sydney) 8 April 2009.

⁵⁴ See *Proceeds of Crime Act 2002* (Cth) s 38.

⁵⁵ *Proceeds of*
⁵⁶ *Director of*
⁵⁷ *Ibid.*
⁵⁸ See *Anton* context of *Bulkcarrier*.
⁵⁹ *Official Sol*
⁶⁰ See, in Au 731 (applic *Court v K* | *Nova Scoti* Canada); *Prosecutor* *Witnesses*

ice which is
o which Mr
n indictable
r the second
.52(2). Some
t Parliament
able before
tion of the
onstructions
lect in the
entral to any
publicise his

i Australian
consider the
y, *Director of*
nd Court of
arose out of
lle Corby in
issue before
straining Ms
received by
orders sought
l, as 'interim
of a literary
t the orders
roceeded to
er behalf not
f the Official
m identified

spects of the
s referred to

Commonwealth
ary Library
.2009.

his particular
ame the *Anti-*
ome who are
with by a US
'th) 3).

that allowed
. Notably, the
which power
forming *Herald*

in the orders of the Court of Appeal were not confiscated by the Commonwealth, but were simply 'frozen'. To make this order, the Court of Appeal needed only find that there were 'reasonable grounds to suspect that [Ms Corby] committed an indictable offence or a foreign indictable offence, and ... derived literary proceeds in relation to the offence'.⁵⁵ This is a significantly lower standard than the balance of probabilities standard found in s 152 of the Act, and, as it appears from the decision, required little more than a prima facie case by the Director of Public Prosecutions that Ms Corby had committed a foreign indictable offence. Given that it was more than two years between this decision of the Court of Appeal and its order on 24 March 2009 that some but not all of the proceeds derived by Ms Corby be confiscated (during which time the Official Trustee has retained custody and control of the proceeds), it is arguable that the freezing of the proceeds for a prolonged period without determination of what the Court of Appeal called the 'substantive rights of the parties'⁵⁶ constituted an inefficient and unsatisfactory management of the Act's process of confiscation of literary proceeds and the imposition of disproportionate punishment in respect of a matter as yet not proven under s 152 of the Act.

Secondly, the decision is notable because it was decided ex parte and in camera. On these issues, the Court of Appeal stated:⁵⁷

The application is brought ex parte, as permitted by s 26(4) of the Act, because the moneys in question might be easily disposed of before any order could be made if notice of the application were to be given to the respondent. The same concern, namely, that the DPP's application might be rendered nugatory if this application were heard in public, led the court to hear the application in camera.

It is not contentious that the risk of disposal of assets (and the consequent frustration of the court's orders) is an accepted basis upon which a court may hear an application ex parte. Applications for Anton Piller orders are classic examples of this.⁵⁸ However, that the same concern should lead a court to hear the application in camera is less clear. In circumstances where the application was heard and judgment was delivered on the same day, it is difficult to understand how the utility of the Court of Appeal's orders would be better protected by excluding from the hearing not only the party against whom they were made but also other people, presumably members of the media, who might report the content of the application. It is received wisdom that '[j]ustice cannot be done in camera',⁵⁹ and that only exceptional cases fall outside this rule.⁶⁰ Although the Court of Appeal referred to the authority of *J v L & A Services Pty*

⁵⁵ *Proceeds of Crime Act 2002 (Cth)* s 20.

⁵⁶ *Director of Public Prosecutions (Cth) v Corby* (2007) 170 A Crim R 282, 283 (Keane JA).

⁵⁷ *Ibid.*

⁵⁸ See *Anton Piller KG v Manufacturing Processes Limited* [1976] Ch 55. Consider also, in the context of 'freezing' assets, Mareva injunctions: *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509.

⁵⁹ *Official Solicitor to the Supreme Court v K* [1965] AC 201, 238 (Lord Devlin).

⁶⁰ See, in Australia and overseas, *McGrath & Anor re HIH Insurance Ltd & Ors* [2005] NSWSC 731 (applications by liquidators for approval of agreements); *Official Solicitor to the Supreme Court v K* [1965] AC 201, 238 (wardship proceedings, United Kingdom); *Attorney-General of Nova Scotia v MacIntyre* (1982) 65 CCC (2d) 129, 146-147 (application for search warrants, Canada); *R v Tarnopolski* [1970] 2 OR 672, 680 (Ont CA) (tribunal proceedings, Canada); *Prosecutor v Furundžija (Decision on Prosecutor's Motion Requesting Protective Measures for Witnesses 'A' and 'D' at Trial)* Case IT-95-1-17/T (11 June 1998), 3-4 (violations of

*Ltd (No 2)*⁶¹ to justify conducting the hearing in camera, that was a case in which the central issue was whether and to what extent the requirement of open justice could be abridged for the purposes of protecting an applicant's privacy. At no stage did that case proceed ex parte, and the statements of principle articulated by the Court⁶² were made in a vastly different factual context, without any consideration of how conducting the hearing in camera would protect the utility of the court's orders in some way additional to conducting it ex parte.

The third notable aspect of the Court of Appeal's decision is that it restrained both past and future literary proceeds. The Court of Appeal did not discuss the difference between retrospective and prospective orders, and as such its decision to make both represented a bare exercise of the powers in s 20 of the Act.

The final notable aspect is that the Court of Appeal, when considering where Ms Corby's literary proceeds were 'derived', discouraged any analogy with the concept of derivation in income tax law, which seeks 'to identify the locale of the rights or activities which caused the production of the taxable income, or assessable income'.⁶³ This is prudent. The complexities which arise in the assessment of where income is derived for the purposes of income tax law are well known.⁶⁴ In the absence of any clear indication in the Act, there is no sensible reason to import the 'judicial exegesis'⁶⁵ which surrounds this complex area of law into the interpretation of the Act's process of confiscation of literary proceeds.

In sum, the decision of the Court of Appeal in *Corby* represents a solid beginning to the interpretation of the literary proceeds provisions in the recent federal Act. While it refrains from any substantial explanation and critique of the law, the Court of Appeal began exploration of some of the complex issues the Act throws up, and indicated how some provisions, such as those dealing with confiscation of future proceeds, might operate. Usefully, the decision also insists that the interpretation of the Act should focus on the words of the Act, rather than on an analogy with similar statutory approaches in other areas of law.

Having discussed in detail the legislation and case law regulating how stories of notoriety may be publicised for profit, this paper now applies those provisions to the circumstances of Mr Hicks, and considers whether or not he is able to tell his story in a way which will avoid the confiscation of any proceeds thereby derived.

DAVID HICKS – CAN HE SELL HIS STORY?

Even a cursory reading of the federal Act is sufficient to demonstrate that Parliament has attempted a belt and braces approach to the confiscation of literary proceeds derived from the publication of stories of notoriety. However, despite this attempt, Australian proceeds of crime legislation may still have a few loose buckles when

international humanitarian law, ICTY); s 34 of the *Judicial Separation and Family Law Reform Act 1989 (Ire)* (proceedings for separation of child and parent, Ireland).

61 [1995] 2 Qd R 10.

62 *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10, 44–5.

63 *Director of Public Prosecutions (Cth) v Corby* (2007) 170 A Crim R 282, 285 (Keane JA).

64 See *Esquire Nominees Ltd v Federal Commissioner of Taxation* (1973) 129 CLR 177; *Union-Fidelity Trustee Co of Australia Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 177.

65 *Director of Public Prosecutions (Cth) v Corby* (2007) 170 A Crim R 282, 285 (Keane JA).

applied to the c
circumstances,
federal Act. In
the military co
indictable offer
on the means
within his 'effe

The first arg
committed a fc
so one of the tl
The result of st
literary proceed
limbs to this ar
whatever Mr F
purposes of the
of probabilities
relevant offenc

As noted al
the federal Act
military comm
that the milita
States Suprem
definition. Acc
before the pres
the Act, and i
Australia deen
that such an c
approach wou
interpretation
ascertaining tl
proposition th
that the word '
those expressi
Those who hc
interpretation
'[w]here an A
shall not be ta
limitation wh
s 15AD⁶⁷ is r
Guantánamo
kind⁶⁸ as the
provision.

66 Biddington

67 See *Vernor*.

68 See *Prior v*

629 (Stark)

28 LJMC 2

applied to the circumstances of Mr Hicks. This paper now considers whether Mr Hicks' circumstances, should he publicise his story for profit, fall outside the ambit of the federal Act. In sum, it is arguable that Mr Hicks' plea of guilty to an offence triable by the military commissions is not sufficient to establish that he has committed a 'foreign indictable offence' for the purposes of ss 152(2) and 337A of the Act; or that, depending on the means by which Mr Hicks' story is publicised, any benefits derived are not within his 'effective control', as that term is used in ss 153(4)(c) and 337 of the Act.

The first argument is easy to follow. Its central contention is that Mr Hicks has not committed a foreign indictable offence, as that term is defined by the federal Act, and so one of the three cumulative conditions precedent in s 152(2) has not been satisfied. The result of such a contention, if accepted, is that the discretion of the court to make a literary proceeds order does not arise and is not exercisable. There are two alternative limbs to this argument. The first limb seizes upon the definition in s 337A to say that, whatever Mr Hicks did, it cannot be classified as a 'foreign indictable offence' for the purposes of the Act. The second limb contends that a court cannot find, on the balance of probabilities and in all the circumstances of Mr Hicks' case, that he 'committed' the relevant offence.

As noted above, the definition of 'foreign indictable offence' provided by s 337A of the federal Act refers only to an offence which was triable before the Guantánamo Bay military commissions as originally constituted. This leads to the obvious observation that the military commissions, as presently constituted after the ruling of the United States Supreme Court in *Hamdan v Rumsfeld*, are not explicitly included in the s 337A definition. Accordingly, Mr Hicks might argue, any offence to which he pleaded guilty before the present military commissions does not come within the definitional ambit of the Act, and is not one to which a literary proceeds order could attach. That South Australia deemed it necessary to amend its proceeds of crime legislation to make clear that such an offence is one to which that legislation applies suggests that a similar approach would be required at the federal level, although no principle of statutory interpretation supports such a cross-jurisdictional comparison for the purposes of ascertaining the meaning of the federal Act. Against this line of argument is the proposition that the definition in s 337A is not exhaustive. This proposition maintains that the word 'includes' in s 337A demonstrates that other offences which are similar to those expressly mentioned in the provision are included within its definitional ambit. Those who hold this position⁶⁶ argue that it is consistent with the rule of statutory interpretation set out in s 15AD of the *Acts Interpretation Act 1901* (Cth), namely, '[w]here an Act includes an example of the operation of a provision ... the example shall not be taken to be exhaustive'. The extension of this argument would be that the limitation which the *ejusdem generis* principle imposes on the rule expressed by s 15AD⁶⁷ is not exceeded in the case of s 337A of the federal Act because the Guantánamo Bay military commissions as presently constituted are 'of the same kind'⁶⁸ as the military commissions as originally constituted and specified in that provision.

⁶⁶ Biddington, above n 50.

⁶⁷ See *Vernon-Carus Australia Pty Ltd v Collector of Customs* [1995] FCA 1283, [30].

⁶⁸ See *Prior v Sherwood* (1906) 3 CLR 1054 (Barton J); *Cody v J H Nelson Pty Ltd* (1947) 74 CLR 629 (Starke J); *R v Regos & Morgan* (1947) 74 CLR 613 (Latham CJ); *R v Edmundson* (1859) 28 LJMC 213, 215.

in which the
tice could be
age did that
Court⁶² were
ion of how
t's orders in

trained both
ie difference
o make both

g where Ms
e concept of
he rights or
e income'.⁶³
re income is
sence of any
l exegesis'⁶⁵
s process of

beginning to
Act. While it
rt of Appeal
icated how
eds, might
Act should
ar statutory

w stories of
isions to the
is story in a

t Parliament
ry proceeds
his attempt,
ckles when

ly Law Reform

: JA).
t 177; *Union*-
CLR 177.
: JA).

However, that proposition, although certainly grounded in received wisdom of statutory interpretation principles, is far from uncontentious. As both Kitto and Menzies JJ of the High Court in *YZ Finance Co Pty Ltd v Cummings*⁶⁹ observed, an interpretation that conforms to the rule now articulated in s 15AD is not the only interpretation which can be given to the word 'includes'. Kitto J put it thus:⁷⁰

Unlike the verb 'means', 'includes' has no exclusive force of its own. It indicates that the whole of its object is within its subject, but not that its object is the whole of its subject. Whether its object is the whole of its subject is a question of the true construction of the entire provision in which the word appears. The well-known statement of Lord Watson in *Dilworth v Commissioner of Stamps* (1899) AC 99, at pp 105, 106 should not be taken so literally as to reduce the inquiry in a case like the present to an inquiry into the meaning of the word 'includes'. Strictly speaking, that word cannot be equivalent to 'means and includes'. But a provision in which it appears may or may not be enacted as a complete and therefore exclusive statement of what the subject expression includes. A provision which is of that character has the same effect as if 'means' had been the verb instead of 'includes'. The question whether a particular provision is exclusive although 'includes' is the only verb employed is therefore a question of the intention to be gathered from the provision as a whole.

The effect of this division in the meaning of 'includes' is that, when the term is deployed in an enactment to signify 'means and includes', it is not being used to give 'an example of the operation of a provision'. Not all usages of the term, therefore, come within the scope of the rule of statutory interpretation set out in s 15AD of the *Acts Interpretation Act 1901* (Cth). The intention of Parliament must first be divined to ascertain whether or not the word 'includes' demonstrates that the provision in which it is used intends to give an example. If the intention indicates that Parliament was not attempting mere illustration in that provision, but rather an enumeration of the situations in which the provision is to operate, then s 15AD is of no use and the interpretation given to the provision will likely be that the term was deployed to signify 'means and includes'.

Applying this reasoning to the circumstances of s 337A of the federal Act, it is arguable that the intention of Parliament is that the example provided in s 337A is exclusive, not illustrative. Such an argument emphasises three points of statutory interpretation. The first point relates to the usage of inclusive and exclusive words in the Act. The Act often uses the words 'includes' and 'means' in its definitional provisions,⁷¹ and on one occasion uses the words 'include[s] the following (without limitation)'.⁷² The use of multiple phrases such as these would ordinarily disclose some discrimination on behalf of the draftsman as to which phrase is intended to have an exclusive effect, and which an inclusive effect.⁷³ The discrimination disclosed in respect of this draftsman's use of 'includes' is, however, less consistent — at some times it is used to give the provision a broad and inclusive meaning,⁷⁴ but at other times it is used 'to choose one out of two or more otherwise possible meanings by

⁶⁹ (1964) 109 CLR 395.

⁷⁰ *Ibid* 402. Although Menzies J reached a different conclusion to Kitto J in the case, his Honour's statement of principle on this point at 405 is more succinct but materially the same.

⁷¹ *Proceeds of Crime Act 2002* (Cth) s 338.

⁷² *Proceeds of Crime Act 2002* (Cth) s 337(6).

⁷³ *YZ Finance Co Pty Ltd v Cummings* (1964) 109 CLR 395, 404 (Kitto J), 405 (Menzies J).

⁷⁴ *Proceeds of Crime Act 2002* (Cth) s 338.

specifying the excellence of to be include tribunals of t constituted; r later reconst offence'. This the specificity articulation c exclusiveness Act confirms memorandum

For the pu subsection against a le military co order. (Emp

Parliamen category of o Executive. Ill s 337A. To t specificity an this line of ar used in the A to be truly ir appears else limitation'. If interpretation construction interpreted as interpretation coverage' of th

The result commissions s 337A, and t commissions offence'. The an offence, ar to issue the lit

⁷⁵ *YZ Financ*
2002 (Cth)
⁷⁶ *Explanato*
⁷⁷ *Proceeds of*
⁷⁸ *Proceeds of*

specifying the intended coverage'.⁷⁵ The use of the word in s 337A is an example par excellence of this latter usage. The section does not provide a list of offences which are to be included or in any way suggest that, at the time it was drafted, there are other tribunals of the same kind as the Guantánamo Bay military commissions as originally constituted; rather, it specifies that an offence triable before that tribunal, and not some later reconstitution of it, falls within the coverage of the term 'foreign indictable offence'. This leads on to the second point of statutory construction, which relates to the specificity with which the example in s 337A is stated. While mere specificity in the articulation of the example does not in itself resolve the question of inclusiveness or exclusiveness, the explanatory memorandum to the Bill which inserted s 337A into the Act confirms an interpretation of the section which recognises its exclusive effect. The memorandum reads:

For the purpose of considering the meaning of foreign indictable offence, proposed subsection 337A(3) inserts a *specific category of offences* that are to be considered as offences against a law of a foreign country. This subsection covers offences that are triable by a military commission of the United States of America established under a *specified military order*. (Emphasis added)⁷⁶

* Parliament's intention is clear. It sought only to include in the definition a 'specific category of offence' which arose pursuant to a 'specified' order of the United States Executive. Illustration and inclusiveness were not the intention of this amendment to s 337A. To the contrary, the 'intended coverage' of the term was denoted with specificity and exclusivity. The final point of statutory construction which supports this line of argument is the election of the term 'includes' from the hierarchy of terms used in the Act. If the draftsman wished the definition of 'foreign indictable offence' to be truly inclusive and expansive, he or she would have been expected to use, as appears elsewhere in the Act,⁷⁷ the words 'include[s] the following (without limitation)'. If one accepts that the interpretation of this phrase must differ from the interpretation of 'includes', then the latter must be given some less inclusive construction than the former. While that will not result in the verb 'includes' being interpreted as an exclusive word wherever it is used in the Act, it does prompt an interpretation which, where possible, is limited to including only the 'intended coverage' of the example, and no more.

The result of this line of argument, if accepted, would be that only the military commissions as originally constituted would come within the ambit of the definition in s 337A, and thus the offence to which Mr Hicks pleaded guilty before the military commissions as presently constituted could not be regarded as a 'foreign indictable offence'. The court would be unable to be satisfied that Mr Hicks had committed such an offence, and thus one of the conditions precedent⁷⁸ to the exercise of its discretion to issue the literary proceeds order would not be met. Any literary proceeds which Mr

⁷⁵ *YZ Finance Co Pty Ltd v Cummings* (1964) 109 CLR 395, 404 (Kitto J); *Proceeds of Crime Act 2002* (Cth) ss 336, 337A.

⁷⁶ Explanatory Memorandum, Anti-Terrorism Bill 2004 (Cth) 11.

⁷⁷ *Proceeds of Crime Act 2002* (Cth) s 337(6).

⁷⁸ *Proceeds of Crime Act 2002* (Cth) s 152(2)(b).

Hicks had derived from the publication of his story would not therefore properly be the subject of confiscation under the federal Act.⁷⁹

The alternative limb of the argument that Mr Hicks has not committed a foreign indictable offence contends that the circumstances of his case are such that a court cannot be satisfied as more likely than not that he 'committed' an offence for the purposes of s 152(2)(b) of the federal Act. The essence of this contention is that Mr Hicks' guilty plea was entered in circumstances where the legitimacy of the Guantánamo Bay military commissions and the reliability of his plea are undermined by, respectively, allegations of lack of fair trial standards and allegations of duress. The difficulty in this submission is that Mr Hicks must show that the subversion of these aspects of the proceedings of the military commissions is sufficient to enable a court to find on the balance of probabilities that he has not in fact committed a foreign indictable offence, rather than simply that the procedures by which he was convicted were not as exemplary as they might have been.

Whether or not the decision of the military commissions would be recognised in Australia is a question of law determinable by the usual private international law principles. At common law (and presuming the absence of a relevant international agreement or domestic enactment), the courts of one jurisdiction will in principle recognise and enforce the judgments of foreign courts and tribunals, unless a defence to an action on the foreign judgment exists.⁸⁰ Two such relevant defences are where the judgment is contrary to public policy⁸¹ or founded upon a denial of natural or substantial justice.⁸² Arguably, the proceedings before the Guantánamo Bay military commissions were prescribed and conducted in a way which denied Mr Hicks natural or substantial justice, and so should not be recognised by Australian courts — a position which derives support from some of the most eminent Australian legal scholars and practitioners, who concluded that the proceedings conducted at the military commissions contravene the standards of a fair trial laid down by both international and Australian law.⁸³ For similar reasons, public policy may also require non-recognition. However, the issue is not resolved simply by applying reasonably

settled principle would recognise obviate the operation of the balance of in which a court judgments would Australian courts should not be policy reasons precedent in Director of Proceedings establish as an offence within recognition of determine the simply make it difficult to dis difficulty of ac

The second from the public achieved, any and defined in

The lynching which concern confiscate the: the offence in inherent limit determining t which was no else at his or h control.⁸⁷ The to the otherw confirms not a limitation are

84 Proceeds of

85 There are be the pe involved ((s 336), an last situati in the Act Director of Appeal m to be her state the s:

86 Proceeds of

87 Proceeds of

88 Proceeds of

79 It is important to recall that it is only the federal Act which retains this anachronism. If Mr Hicks were to derive literary proceeds in South Australia, the argument that he has not committed a 'foreign indictable offence' for the purposes of the South Australian legislation would not succeed, because that legislation has been specifically modified to include the military commissions as presently constituted in its definition equivalent to s 337A. The South Australia legislation is, however, easily avoided if Mr Hicks derives the literary proceeds in any other Australian State or Territory.

80 See *Ricardo v Barcias* (1845) 12 Cl & F 368; *Goddard v Gray* (1870) LR 6 QB 139, 150 (Blackburn J).

81 *Yang v S & L Consulting* [2009] NSWSC 223 (enforcement of Chinese arbitral award deemed not contrary); *de Santis v Russo* [2002] Qd R 230, 233 (McPherson JA) (Italian child support laws deemed not contrary); *Re Macartney* [1921] 1 Ch 522 (Maltese court's perpetual maintenance order deemed contrary); *Boardwalk Regency Corporation v Malouf* (1992) 6 OR (3d) 737 (gaming contracts deemed not contrary); *Israel Discount Bank of New York v Hadjipateras* [1983] 3 All ER 129; cf *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth) s 9.

82 *Boele v Norsemeter Holding AS* [2002] NSWCA 36, [24] (Giles JA) (no notice of appeal hearing); *Adams v Cape Industries Plc* [1990] Ch 433 (fixing damages without evidence); Peter Nygh and Martin Davies, *Conflict of Laws in Australia* (7th ed, 2002) 194.

83 Nicholson et al, above n 2.

are properly be

mitted a foreign
 that a court
 offence for the
 ion is that Mr
 timacy of the
 re undermined
 of duress. The
 ersion of these
 able a court to
 tted a foreign
 was convicted

recognised in
 ernational law
 t international
 ll in principle
 less a defence
 ces are where
 of natural or
 Bay military
 Hicks natural
 courts – a
 ustralian legal
 lucted at the
 own by both
 y also require
 ig reasonably

chronism. If Mr
 hat he has not
 lian legislation
 to include the
 to s 337A. The
 es the literary

5 QB 139, 150

award deemed
 child support
 irt's perpetual
 uf (1992) 6 OR
 f New York v
 Act 1984 (Cth)

tice of appeal
 out evidence);

settled principles of private international law to determine whether or not Australia would recognise a decision emanating from the military commissions. In order to obviate the operation of s 152(2) of the federal Act, Mr Hicks must demonstrate that, on the balance of probabilities, he has not committed a foreign indictable offence – a task in which a challenge to the legitimacy of military commissions' procedures and judgments would likely be necessary, but not sufficient. While a finding by the Australian courts that the plea entered by Mr Hicks before the military commissions should not be recognised for want of natural or substantial justice or for other public policy reasons would of course advance Mr Hicks' attempts to show that the condition precedent in s 152(2)(b) is not satisfied, it would not exclude the capacity of the Director of Public Prosecutions to adduce evidence other than the previous plea to establish as more likely than not that Mr Hicks had committed a foreign indictable offence within the definition provided by s 337A. In practical terms, then, the non-recognition of the judgment rendered by the military commissions would not determine the question of mixed fact and law arising from s 152(2)(b), but would simply make the burden of proof, the incidence of which is upon the Director,⁸⁴ more difficult to discharge, given the absence of evidence of Mr Hicks' previous plea and the difficulty of adducing evidence of his conduct overseas.

The second argument which Mr Hicks might advance to quarantine any profits from the publication of his story is that, depending on the means by which publicity is achieved, any benefits derived are not within his 'effective control', as that term is used and defined in ss 153(4)(c) and 337 of the Act.

The lynchpin for this argument is an observation that the provisions of the Act which concern whether someone has derived literary proceeds and if so whether to confiscate them are confined in their operation to the person who actually committed the offence in respect of which the literary proceeds order is sought.⁸⁵ Because of this inherent limitation in the relevant provisions, the Act expressly states that, when determining these questions, the court treat as property of that person any property which was not received by him or her, but which was transferred or paid to someone else at his or her direction,⁸⁶ or any property which is subject to that person's effective control.⁸⁷ The fact that the Act is explicit when it seeks to create these two exceptions to the otherwise limited scope of the provisions concerning literary proceeds orders confirms not only that the limitation is deliberate but also that the exceptions to that limitation are confined only to those two situations which are articulated in the Act.⁸⁸

⁸⁴ *Proceeds of Crime Act 2002* (Cth) s 317(1).

⁸⁵ There are some situations where the person who actually committed the offence need not be the person in respect of whom the order is sought, namely, where an accomplice is involved (s 153(1)(b)), where another person is requested or directed to publicise the story (s 336), and, apparently, where another person acts as agent for the alleged offender. This last situation (which may simply be a variant on the second) is not expressly provided for in the Act, but is one of the effects of the Court of Appeal's interpretation of the Act in *Director of Public Prosecutions (Cth) v Corby* (2007) 170 A Crim R 282. Although the Court of Appeal made orders in relation to certain family members of Ms Corby who were deemed to be her agents in relation to the publication of her story of notoriety, Keane JA did not state the statutory or other basis on which the power of a court to make such an order rests.

⁸⁶ *Proceeds of Crime Act 2002* (Cth) s 153(4)(d).

⁸⁷ *Proceeds of Crime Act 2002* (Cth) s 153(4)(c).

⁸⁸ *Proceeds of Crime Act 2002* (Cth) s 153(4)(c)-(d).

While the extension of the Act's scope to cover these two situations makes it reasonably clear that such a person cannot him- or herself publicise a story of notoriety for profit and then quarantine those proceeds from restraint and confiscation by giving them to a family member, friend, charity or other third party, it is less clear how the Act deals with a scenario in which the person tells a family member or trusted confidant the story, and does not object to that second person profiting from the public retelling or narration of that story. Whether the benefits derived by the narrator would be deemed by a court to remain within that person's effective control would be a difficult question of mixed fact and law.

As noted above, the Act seeks to give a broad meaning to the term 'effective control', but does so by unusual and problematic means. The Act provides that property may be subject to a person's effective control irrespective of whether or not he or she holds any legal or equitable interest, or any right, power or privilege, in the property.⁸⁹ This is a vague provision which gives little content to the term, and the Act's provision of two examples where property is taken to be under a person's effective control – if it is held on trust for that person⁹⁰ or is disposed of without sufficient consideration⁹¹ – does little to rectify the imprecision. Similarly, the enumeration of certain considerations to which a court may have regard in determining whether or not property is subject to the effective control of a person,⁹² one of which is any family relationship which might exist between the people who can claim an interest in the property,⁹³ achieves only marginally clearer delineation of the concept. While this ambiguity leaves a great deal in the hands of the courts, one conclusion can be drawn from this haphazard definition of 'effective control': if no factual nexus exists between the derivation of the benefits and the influence which the person in respect of whom the literary proceeds order is sought is able to exert over those benefits, then a finding of effective control would not be appropriate.

And so the question arises: if Mr Hicks tells a family member or trusted confidant his story, and that second person profits from the public retelling or narration of that story, can those profits be said to fall under Mr Hicks' effective control? Put another way, while the Act clearly extends its confiscatory scope to literary proceeds derived by Mr Hicks himself and transferred to another, how does it deal with the transfer of the capacity to tell (or 'narrate') the story?

The short answer is that the Act does not deal with such a scenario. If no factual nexus exists between the person who narrates for profit Mr Hicks' story of notoriety and the influence or control which Mr Hicks is capable of asserting over that profit, then that statute cannot seize upon Mr Hicks as a person who has derived literary proceeds or has effective control over literary proceeds derived by another person, and a literary proceeds order cannot issue. Central to an assessment of whether the necessary factual nexus exists is the question of fact, determinable on the balance of probabilities,⁹⁴ of whether Mr Hicks exercises the requisite degree of control over the profits derived by the narrator. Given that the lack of any interest or right in the

⁸⁹ *Proceeds of Crime Act 2002* (Cth) s 337(1).

⁹⁰ *Proceeds of Crime Act 2002* (Cth) s 337(2).

⁹¹ *Proceeds of Crime Act 2002* (Cth) s 337(4).

⁹² *Proceeds of Crime Act 2002* (Cth) s 337(5).

⁹³ *Proceeds of Crime Act 2002* (Cth) s 337(5)(c).

⁹⁴ *Proceeds of Crime Act 2002* (Cth) s 317(2).

property does concerning the crucial to the naturally diff necessary fact and the narra exercises effec relationship b Mr Hicks ente he relinquishe might make a of proof laid c retains effectiv is that the Dir proceeds orde:

Such a rest the purpose o good sense. T account a spec people seek to notoriety. This spectrum is w to profit from notoriety. Thi perhaps, in so Act, of course people who fi paper has sou; difficult situat described abo closer to that e established in properly free f

⁹⁵ *Proceeds of*

⁹⁶ *Proceeds of*

⁹⁷ Such a sit proceeds h who allege must have definition, 494-5.

⁹⁸ This concl Bonella, th *Public Pros*

is it reasonably
riety for profit
iving them to a
the Act deals
confidant the
olic retelling or
uld be deemed
ificult question

term 'effective
provides that
ether or not he
rivilege, in the
term, and the
der a person's
sed of without
Similarly, the
ve regard in
of a person,⁹²
people who can
ineation of the
ne courts, one
control': if no
ence which the
xert over those

sted confidant
rration of that
l? Put another
ceeds derived
the transfer of

o. If no factual
y of notoriety
ver that profit,
erived literary
er person, and
f whether the
the balance of
ontrol over the
or right in the

property does not preclude a finding of effective control,⁹⁵ it is likely that evidence concerning the relationship between Mr Hicks and the narrator of his story would be crucial to the determination of the question of effective control.⁹⁶ While minds naturally differ on what constitutes effective control sufficient to establish the necessary factual nexus, it is likely that a close family relationship between Mr Hicks and the narrator would satisfy the court as more likely than not that Mr Hicks exercises effective control over the literary proceeds thus derived. If, however, the relationship between Mr Hicks and the narrator were of a more removed nature, or if Mr Hicks entered into some arrangement with the narrator by which it was clear that he relinquished any capacity to assert control over the profits derived, such evidence might make a finding of effective control more unlikely.⁹⁷ According to the standard of proof laid down in the Act, if the court finds it equally likely as not that Mr Hicks retains effective control over literary proceeds derived in this fashion, the consequence is that the Director of Public Prosecutions has failed to prove the case and a literary proceeds order should not be made.

Such a result may seem surprising at first blush. However, on closer inspection of the purpose of the provisions concerning literary proceeds orders, the result makes good sense. This is because the Act is part of an area of law which must take into account a spectrum of possibilities. At one end of the spectrum is the situation where people seek to profit from the publication of stories which detail their own crimes or notoriety. This is the situation which the Act properly regulates. At the other end of the spectrum is where other people, wholly unconnected with the alleged offenders, seek to profit from publicising commentaries or narratives about those same acts of crime or notoriety. This group of people includes media reporters, biographers and even, perhaps, in some indirect way, commentators in the legal and other professions. The Act, of course, does not seek to restrain or confiscate literary proceeds derived by people who find themselves in this situation at the other end of the spectrum. As this paper has sought to demonstrate, however, located in the middle of this spectrum are difficult situations, to which the Act has uncertain application. The use of a narrator, as described above, may, depending on the circumstances of the particular case, fall closer to that end of the spectrum which is not subject to the literary proceeds regime established in the Act.⁹⁸ Literary proceeds derived in that situation may, therefore, be properly free from restraint or confiscation.

⁹⁵ *Proceeds of Crime Act 2002* (Cth) s 337(1).

⁹⁶ *Proceeds of Crime Act 2002* (Cth) s 337(5).

⁹⁷ Such a situation might also make it likely that a court could not find that any literary proceeds had been 'derived' for the purposes of the Act, which states that either the person who allegedly committed the offence or someone 'at the request or direction' of that person must have 'directly or indirectly' received the benefits (s 336). On the meaning of this definition, see *Director of Public Prosecutions (Cth) v Mylecharane* (2007) 177 A Crim R 486, 494-5.

⁹⁸ This conclusion is supported by the absence of any literary proceeds order against Kathryn Bonella, the co-author of Ms Corby's publication of her story of notoriety, in *Director of Public Prosecutions (Cth) v Corby* (2007) 170 A Crim R 282.

CONCLUSION

To date, Mr Hicks has shown no desire to publicise his story of notoriety, let alone to profit from doing so. If Mr Hicks does at some point in the future seek to publicise his story for profit, the *Proceeds of Crime Act 2002* (Cth) will almost certainly be the crucial instrument which determines whether or not he is able to retain that profit. This paper has considered in detail the applicability of that Act and other Australian proceeds of crime legislation to Mr Hicks' situation, and has identified some arguments which he may be able to advance to obviate the restraint and confiscation of any literary proceeds. None of these arguments is without difficulty, but all take the words of the relevant statute as their starting point, and seek to interpret them in light of the purpose of the legislation in which they are contained. Accordingly, while nothing prevents Mr Hicks from publicising his story, it is uncertain whether (but not impossible that) he would be able to retain any profits derived from that publication.