

**Malkara
Consulting**

**AFP Civil Forfeiture Investigations
(Review of Cuckoo Smurfing Strategy)**

29 March 2018

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About Malkara Consulting

Malkara is an Australian Aboriginal word meaning “**shield**”. Malkara Consulting is a consultancy firm that specialises in the provision of training and advice in relation to money laundering, terrorist financing, bribery and corruption, sanctions, fraud, financial investigations and risk management. The training and advice is designed to increase the effectiveness of current financial crime prevention systems and to target harden organisations from the threat of organised crime and terrorism by explaining and demonstrating how money laundering and other financial crimes work.

Advice and training provided by Malkara Consulting is based on extensive experience across a range of industries including the Australian Federal Police, National Australia and the mining and logistics sector. Malkara’s financial crime expertise was obtained from service with the Australian Federal Police involving investigations into money laundering, drug trafficking, people smuggling, human trafficking, organised crime and significant fraud upon the Australian Government.

Chris Douglas, the author of this report has over 25 years of experience in the investigation and recovery of proceeds of crime using conviction based and civil based forfeiture legislation, namely the *Customs Act 1901*, *Proceeds of Crime Act 1987*, *Proceeds of Crime Act 2002* and tax legislation.

Training experience with the AFP involved the design and delivery of investigation training programs (financial investigations, money laundering, bribery and corruption) in Australia to Australian law enforcement and intelligence agencies and to state police forces and overseas to representatives of law enforcement agencies, prosecutors, customs officers, judges and financial intelligence units from Indonesia, Malaysia, New Zealand, Sri Lanka, China, Pakistan, Singapore, Fiji and the United Arab Emirates.

Malkara Consulting conducts business primarily in Australia, South East Asia and West Africa.

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Executive Summary

In 2011 the Australian Federal Police (AFP) was granted the power to conduct proceeds of crime litigation on behalf of the Commonwealth using the Proceeds of Crime Act 2002. The AFP therefore became both investigator and litigator, the latter a role which had previously been undertaken by the Commonwealth Office of the Director of Public Prosecutions.

For almost two decades the AFP has been investigating a money laundering technique known as Cuckoo Smurfing. It is a technique which involves criminal groups intercepting the transfer of lawful funds to Australia and substituting that money in Australia, with money derived from crime, mainly drug trafficking. Money laundering syndicates operating in Australia are responsible for making the deposits into the accounts of innocent people. Those syndicates are contracted by drug importation syndicates to launder the proceeds of their drug sales. The funds are either deposited in amounts equal to or greater than the mandatory \$10,000 cash reporting limit or broken down into smaller parcels with each deposit being less than \$10,000. The latter is a process known as Structuring and is undertaken to prevent a Threshold Report being made by a reporting entity to AUSTRAC, Australia's anti-money laundering regulator and financial intelligence unit.

For 15 years, the AFP collected valuable intelligence investigating syndicates using the cuckoo smurfing technique. Significant drug busts were made as a result. But in 2014, the AFP changed its strategy. The agency shifted its focus away from targeting organised criminal activity and towards innocent victims of cuckoo smurfing. This action by the AFP which continues to this day, involves the AFP obtaining restraining orders over bank accounts that have received funds that were deposited using structuring. The AFP contends that the structured funds are either the proceeds of crime or an instrument of crime or both. Accounts that have received funds of or greater than \$10,000 cash, deposited by criminal groups, have not been restrained by the AFP. It is clear that the AFP is therefore engaging in a strategy designed to achieve easy results and ignore complex organised criminal activity.

Civil forfeiture action by the AFP has resulted in innocent people having to explain the source of their funds in court. And they shouldn't have to. It is clear that they are victims of organised criminal behaviour. The AFP action is similar to a person whose car is stolen and reports it to the police. The police recover the car and then seize it as being used as an instrument of crime, namely involved in the theft or as proceeds of the crime. The victim is then left to challenge the actions by police in court, when common sense and fairness dictate that his/she shouldn't be required to.

At least 20 cases are currently before Australian courts involving innocent people having to explain their money. The background to these people varies but include people who sent funds to Australia with the intention of migrating as business migrants; people who have sent funds to Australia to use in retirement and parents who have sent money to their children who are studying in Australia.

Actions by the AFP breach human rights. It also breaches and is inconsistent with Australia's policy of attracting foreign investors to Australia, including business migrants and deters people wanting to send their children to Australia to study.

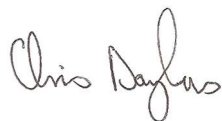
The AFP has argued in court that it needs to target account holders because not doing so would allow the cuckoo smurfing money technique to be used by criminal groups.

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This explanation does not make strategic sense and is contrary to the objects of the Proceeds of Crime Act 2002. AFP forfeiture action does not result in any funds being removed from criminal groups. Funds derived from drug trafficking are still laundered for future use by organised crime, while innocent people have to explain the origin of their money to a court at great expense and personal inconvenience. And in some cases, with great hardship. The actions undertaken by the AFP have no impact on the use by criminals of the cuckoo smurfing technique. Crime groups in Australia and offshore continue to flourish and grow. AFP action against instruments of crime in cuckoo smurfing cases is also inconsistent with how it treats instruments of crime used in other crime types, particularly drug trafficking. The AFP does not seize commercial aircraft, commercial ships or rental cars used to import and convey drugs. These too are situations where the owner is unaware of their use in crime. Much like the victims of cuckoo smurfing who are not aware their accounts have been used by criminals to launder money. The AFP does not seize or restrain the instruments of crime owned by innocent corporate victims because it would face significant legal challenges from very large organisations namely airlines and international shipping companies, which the AFP would probably lose.

Successful action by the AFP will open the floodgates for state agencies with powers similar to the AFP to target instruments of crime owned or held by innocent parties. This is the situation that frequently occurs in the United States. Commonwealth forfeiture law was never intended to be applied against innocent people. And prior to 2014, it never was. It was applied fairly, consistently and in appropriate circumstances.

This issue should not be left to the courts to determine as the principal legislation involved, the Proceeds of Crime Act contains inadequate third-party protection mechanisms. Parliament intended that agencies involved in the enforcement of the Proceeds of Crime Act discharge their duties responsibly. This is not happening. Malkara Consulting calls for an inquiry by the Australian Senate into AFP forfeiture operations generally, including its handling of cuckoo smurfing cases and strategy to combat organised crime using civil forfeiture legislation. Holding a Senate inquiry will enable all interested and affected parties to make submissions and be heard on this important issue relating to human rights in Australia.



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29 March 2018

Review of Cuckoo Smurfing Strategy

1. Background

- 1.1 Since 2014, the Australian Federal Police (AFP) has embarked on a strategy that involves seeking the restraint of funds, that have been deposited into accounts operated by innocent people. The funds have been deposited by criminals, using a technique known as “Cuckoo Smurfing”. The account holder while expecting money to be transferred to their account, has no knowledge of the illegal origin of the money. Restraining order action has been initiated by the AFP under Section 19 of the *Proceeds of Crime Act 2002* (POC Act). Section 19 does not require any person to be convicted of a crime or even identified. It is a civil forfeiture provision that targets the proceeds of crime or instruments of crime.
- 1.2 In relation to cuckoo smurfing, the AFP is targeting funds that have been deposited into accounts under the mandatory \$10,000 cash reporting limit¹. Known as structuring, it is an offence against section 142 of the *Anti-Money Laundering & Counter-Terrorism Financing Act 2006*. Funds that have been deposited in such a manner are regarded as an instrument of crime and liable for forfeiture.
- 1.3 Recent actions by the Australian Federal Police, has resulted in money belonging to innocent people being restrained with them having to launch expensive legal action to try and recover it. People caught up in the AFP action, include people who have immigrated to Australia, international migrants intending to come to Australia and foreign based families sending money to Australia to pay for their children’s education or cost of living. Large exporters of services for example, education providers and migration agents are also vulnerable to have their money seized.

2. Intention of this Paper

- 2.1 This paper explains the AFP civil forfeiture strategy against cuckoo smurfing and questions why the agency is embarking on a strategy which involves depriving innocent people of their property. As there are cases before the various courts around Australia, the paper will not discuss the legal aspects involved. They will ultimately be settled by the courts.
- 2.2 This paper is about public policy. Should the AFP be doing what it is doing? Is it an appropriate use of resources? Is the strategy effective in preventing money laundering? Is the persecution of innocent third parties contrary to our values of fairness and something Australia wants to be known for?

¹ Section 43 of the Anti-Money Laundering & Counter Terrorism Financing Act 2006 stipulates that a reporting entity must report all Threshold Transactions to AUSTRAC. A threshold transaction involves physical currency of \$10,000 or more or e-currency of not less than \$10,000.

Review of Cuckoo Smurfing Strategy

3. AFP Civil Forfeiture Power

- 3.1 In January 2011, the Criminal Assets Confiscation Taskforce (CACT) was formed. It is a multi-agency task force led by the AFP. The purpose of the CACT is summarised on the AFP website as being:

“....dedicated to taking the profit out of crime by targeting criminals and their assets derived from criminal activity”².

- 3.2 Note that the CACT was formed to target criminals and deprive them of their assets. The Proceeds of Crime Act 2002 (Cth) was amended giving the AFP the power to commence and conduct proceeds of crime litigation on behalf of the Commonwealth. Prior to the amendment, this role was undertaken solely by the Commonwealth Director of Public Prosecutions. When that happened, independent review and action by the Commonwealth Office of the Director of Public Prosecutions was removed. For the first time in the history of Commonwealth law enforcement, a single agency was granted the power to investigate and undertake civil litigation. The POC Act is a very powerful piece of legislation. The law must be tough as it was designed to combat organised crime. And the impact of the POC Act was enhanced by consolidating all of its power and responsibilities into one agency.
- 3.3 In granting the AFP the dual role of investigator and litigator, the Commonwealth Government vested a significant amount of responsibility and trust in the agency. The AFP was expected and is expected to discharge its duties responsibly. The legislation was not designed to allow the AFP to trample on innocent people in its quest to fight organised crime. But unfortunately for Australia, this is exactly what is happening.

4. Cuckoo Smurfing

- 4.1 Cuckoo Smurfing is not a new money laundering technique. It was first reported in 2008 by AUSTRAC, Australia's Financial Intelligence Unit and anti-money laundering regulator³. It was operating in Australia long before then. Cuckoo Smurfing is not a legal term. But a description of a unique money laundering method⁴. It is a money laundering technique used by organised crime to pay for the importation of narcotics or to move the proceeds of crime offshore. It involves criminals intercepting lawful international payments into Australia and substituting that money with the proceeds of crime. And while this paper relates to Australia, Cuckoo Smurfing is a global problem.
- 4.2 The term Cuckoo Smurfing refers in part to the cuckoo bird which lays its eggs in the nest of other bird species. Those birds then raise the cuckoo bird chicks as their own. And smurfing is a reference to a group of criminals who move from bank to bank conducting transactions usually under threshold reporting

²Australian Federal Police, Proceeds of Crime: <https://www.afp.gov.au/what-we-do/crime-types/proceeds-crime>

³ AUSTRAC (2008). Typologies and Case Studies Report 2008. [on-line]. Available <http://www.austrac.gov.au/typologies-and-case-studies-report-2008> (2017, April 22).

⁴ For a detailed explanation refer to <http://egreaves.com.au/cuckoo-smurfing/>

Review of Cuckoo Smurfing Strategy

levels⁵. In relation to money laundering, it involves criminals, without the knowledge or consent of an account holder, depositing money from crime in their account. While legal or clean money, the customer was expecting to receive in Australia from overseas, is intercepted and kept offshore and given to international crime groups.

Other Descriptions

- 4.3 The Cuckoo Smurfing description is not particularly helpful. It could be more usefully described as the “Matching Technique” or the “Lateral Transfer Technique”. Matching would refer to the fact that the money deposited into an account in Australia by criminals, matches exactly the amount of money given offshore by a customer to a money remitter. Not a dollar more or a dollar less. Australian based criminals ensure that no customer is left short changed as it would cause the customer to contact their bank and/or the person who sent the money. That might generate a suspicion somewhere, which criminals seek to avoid.
- 4.4 While lateral transfer would refer to an offshore based customer wanting to send money to Australia, this usually means giving money to a money remitter who gives it to crime group. And a similar sum of money is deposited into the account nominated by the offshore party in Australia. Once transfer occurs offshore, the other is transferred on shore.

Cuckoo Smurfing Process

- 4.5 AUSTRAC reports that Cuckoo Smurfing involves 4 simple steps. But AUSTRAC is not an investigation agency and does not investigate money laundering. The technique is more complex than that and involves:
- a. A customer living overseas wanting to send money to Australia, provides funds to a money remitter in a foreign country for transfer to an Australian bank account. The money remitter may or may not be authorised or approved to operate in the jurisdiction it operates from. The money could be sent by the customer as payment for goods or services bought from an Australian exporter, or income being sent home to family, or to themselves or as a gift for family and friends. The bank account receiving the money therefore, may not be in the name of the remitting customer.
 - b. Without the knowledge of the remitting customer, the money remitter has been corrupted by organised crime. He/she has been engaged to launder money for crime syndicates situated offshore from Australia. To this end, the foreign remitter sends to a money laundering syndicate operating in Australia; remittance information provided by the customer; including the amount of money to be sent, the IBAN and account number and the name of the account the money is to be paid into. The remitting

⁵ A US derived term which refers to the fictional small blue humanoids with a gnome like appearance that live in mushroom shaped houses. The Chinese refer to them as ants and in other jurisdictions as money mules.

Review of Cuckoo Smurfing Strategy

customer has not given consent to his/her information being used in this manner.

- c. The money laundering syndicate operating in Australia then collects bulk cash from criminal syndicates in Australia. The money is either the proceeds of crime or funds to be used to pay for the importation of narcotics or both.
- d. The money laundering syndicate then divides the bulk money up into separate packets of cash. These packets or bundles correspond exactly to the amount of money that has to be deposited into the Australian account nominated by the customer. If the customer, sent \$7,000 to Australia, then \$7,000 would be selected from the bulk funds collected from the crime group and deposited into the account.
- e. If a number of customers located offshore each sent money to Australia under \$10,000, then the money would be deposited into their account as per their instructions. From an intelligence perspective, multiple customers each nominating an account to receive money would appear that the crime group is structuring the deposits. But this is not correct. Structuring is not a legal term, but a process to launder money by engaging in a transaction with a reporting entity (in this case a bank) under the reporting threshold.
- f. However, if a customer sends funds equal to or greater than the reporting threshold via an offshore money remitter, then the money laundering syndicate has available to it two options to deposit the crime money into the nominated account/s. The group can either structure the funds into the account or deposit the total amount. For example, if the offshore customer sends \$16,000 to Australia to pay for university fees for their child or as a payment related to their immigration process, then the crime group could deposit the entire amount in cash or break up the amount and make each deposit under \$10,000.
- g. For the Australian based money laundering syndicate, both approaches involve risk. Structuring the deposits poses the greatest risk, as that action amounts to an offence against Section 142 of the *Anti-Money Laundering & Counter-Terrorism Financing Act 2006*. A full description of section 142 appears in Appendix A. It is on the basis that the funds have been structured and are therefore an instrument of crime, that the AFP has initiated action to restrain the funds held in the account of people innocent of any crime (the receiver of the funds sent by the offshore based customer, if not them).
- h. Deposit of the cash by the money laundering group on or over the threshold amount (as per the overseas customer's instructions) poses the least risk. While it would be reported as a threshold transaction to AUSTRAC, it is unlikely to be singled out and selected for further analysis by the financial intelligence unit or a law enforcement agency. The transaction would probably be drowned out in the "white noise" of other significant cash transactions being made that day either at a

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particular bank or in a busy business area (Cuckoo Smurfing money laundering syndicates prefer operating in the larger cities of Sydney and Melbourne for that reason).

- i. Once the money has been deposited, the money laundering syndicate notifies the offshore money remitter that the transaction has been undertaken. The money remitter then pools each sum of money given to it by legitimate customers and later passes those funds in bulk to an organised crime group. The money is either to be used to pay for the importation of narcotics into Australia or is to be laundered by the crime group that wants to shift illegal funds offshore.

Money Mule Schemes

- 4.6 Cuckoo Smurfing is not to be confused with a money mule scheme, where account holders are recruited to receive into their accounts money which is **not theirs to receive**. And who get paid a commission for their involvement. Money mules deduct their commission from the funds they have received and forward the balance onto another account as instructed by the crime group who recruited them.
- 4.7 In contrast, Cuckoo smurfing victims expect to receive the money sent to them. It is payment for goods, services, or for other lawful purposes. The money is not derived from crime. It is sent by people who owe them money or who are giving or sending them money to be applied for a lawful purpose. It is not stolen from people by way of a scam or fraud as is the case in money mule schemes. Victims of Cuckoo Smurfing do not in any way benefit from the money laundering scheme and do not consent for their information or their accounts to be used in the process.

“Victims of Cuckoo Smurfing do not in any way benefit from the money laundering scheme and do not consent for their information or their accounts to be used in the process”

5. Section 19 POC Act 2002

- 5.1 The POC Act provisions are detailed and complex and only the relevant provision, Section 19 of the Act will be dealt with here, but only in enough detail to explain the relevance to Cuckoo Smurfing. Given the complexity of the section, only a summary of the relevant parts of it are discussed. However, section 19 is recorded in full in Appendix B.
- 5.2 Section 19 POC Act empowers the AFP to seek a restraining order from a court in relation to any property where there exists a reasonable suspicion it is the proceeds of an indictable offence or an instrument of a serious offence. An instrument of crime is any property used in or in connection with or intended to be used in or in connection with the commission of an indictable offence⁶.

⁶ An indictable offence is an offence punishable by a term of imprisonment greater than 12 months.

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- 5.3 Money deposited into an account during the cuckoo smurfing process can be either the proceeds of crime or an instrument of crime. The AFP has grounded applications to restrain bank accounts on the basis the money is reasonably suspected of being the proceeds of crime or an instrument of crime or both. The reasonable suspicion arises when the money has been deposited using the structuring technique.
- 5.4 The AFP does not take any action in relation to other accounts used to launder money using cuckoo smurfing where the deposits involved are \$10,000 or more. This is due to the absence of structuring.
- 5.5 To establish reasonable suspicion where the deposits are not structured, the AFP would have to identify and investigate the persons making the deposits. This, the agency is rarely doing.

6. AFP Change in Strategy

- 6. When AUSTRAC first reported Cuckoo Smurfing, it identified one of the essential actors in a typical Cuckoo Smurfing scheme as being an innocent customer seeking to transfer funds from overseas into Australia. And the AFP investigation strategy in response to the threat of cuckoo smurfing was consistent with AUSTRAC's view. The pursuit by the AFP of the cuckoo smurfing syndicates had resulted in significant drug seizures as evidenced by Operation Inca⁷. But in 2014 the AFP changed its strategy. It decided to pursue the innocent victims.

7. Kalimuthu and Dass

- 7.1 There are several cases involving cuckoo smurfing currently before various courts in Australia. One prominent case involves Ganesh Kalimuthu and his wife Macqueline Dass⁸. Kalimuthu and his wife live in Malaysia where they operate a successful scrap metal business. In 2015, they considered immigrating to Perth, Western Australia where other family members lived. They considered ultimately applying for a business migration visa and decided to transfer funds to Australia in preparation for a new life.
- 7.2 Using a local Malaysian money changer, Kalimuthu and Dass arranged for funds from their business to be transferred to Australia. This was undertaken in a series of transfers to bank accounts they both held in Australia which had been opened by them prior to any funds being moved. Unfortunately for Kalimuthu and Dass, they fell victims to an international money laundering syndicate operating between Australia and Malaysia. That syndicate used the cuckoo smurfing technique to intercept lawful funds sent by Kalimuthu and his wife and substituted it by depositing into their accounts in Australia, money suspected by the AFP of originating from crime. The outcome of crime money

⁷ Rout. M. (2008). The Australian. Innocent bank clients used to launder drug cash via 'cuckoo smurfing'. [on-line]. Available <http://www.theaustralian.com.au/news/nation/innocent-clients-launder-drug-cash/news-story/4a1300b3bd500140b1116ff72277013e> (2017, April 22).

⁸ See Commissioner of the Australian Federal Police v Kalimuthu [No 3] [2017] WASC 108. [on-line]. Available <http://egreaves.com.au/wp/wp-content/uploads/2017/04/Commissioner-AFP-v-Ganesh-Kalimuthu-Anor-2017-WASC-108.pdf> (2017, April 22).

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being deposited into their accounts, is the lawful money they handed over to be sent, is kept and given to organised crime operating offshore from Australia.

- 7.3 Suspicion arose with the banks, when the funds were deposited not in Perth where the accounts were, but in Sydney and Melbourne in amounts under the mandatory cash reporting threshold of \$10,000. Using the technique known as structuring and probably involving a multiple number of people to make the deposits who are known as smurfs⁹. Though not all cuckoo smurfing involves structured deposits. Many transactions also involve significant deposits over the threshold amount.
- 7.4 Once reported to the AFP, the agency responded to the money laundering activity by successfully applying for a restraining order under Section 19 of the POC Act for the accounts operated by Kalimuthu and his wife. The target and objective of the AFP investigation was forfeiture of the \$3 million plus held in the combined accounts by Kalimuthu and his wife in Australia. To obtain the restraining orders, the AFP only needed “reasonable grounds to suspect” that the money was an instrument of crime or proceeds of crime. The AFPs argument supporting the claim that the funds were proceeds of crime was the structured deposit of the funds into the accounts.
- 7.5 On 19 April 2017, in the Supreme Court of Western Australia, the Honourable Justice Allanson, ordered the release of the funds held under restraint following a successful exclusion order filed by lawyers representing Kalimuthu and his wife. His honour, held for many reasons, that the money in their respective accounts no longer amounted to an instrument of crime and was therefore not liable for forfeiture. The AFP has appealed the decision.
- 7.6 By targeting Kalimuthu and Dass, the AFP has gone after, what it perceives as being low hanging fruit, using the very powerful civil forfeiture provisions in the POC Act. That act was never intended to be used against innocent victims of crime. The power of that law was intended to be directed against organised crime and the identification of the cuckoo smurfing technique by the AFP provided a unique opportunity for the agency to follow the money back to the importers of narcotics into Australia. In the case of Kalimuthu and Dass, the AFP has blown that chance. Organised crime is once again alerted to police methodology and has probably changed their tactics, methods of communication and counter-surveillance activities.

8. Other Cases

- 8.1 The Australian Federal Police (AFP) has obtained restraining orders under section 19 of the POC Act in relation to over 20 cases relying upon the fact that structured deposits were made into Australian bank accounts. The AFP contends that the assets constitute “proceeds” and/or an “instrument” of

⁹ A US derived term which refers to the fictional small blue humanoids with a gnome like appearance that live in mushroom shaped houses. The Chinese refer to them as ants and in other jurisdictions as money mules.

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structuring and are thereby should be restrained and liable for forfeiture to the Australian Government.

8.2 Other cases include:

- a. Rommy Fernandez, an Indonesian citizen who studied in Australia to obtain a degree in commerce. His father transferred over \$500,000 from Jakarta to Australia to cover his living expenses in Australia. The funds were structurally deposited into two accounts and have now been restrained by the AFP.
- b. The case involving Koernia and her husband Lordianto who are citizens of Indonesia who have 5 accounts in Australia with one Australian Bank. They sent money to Australia in similar circumstances to Kalimuthu and Dass. The funds were structured into their accounts using cash. AFP restrained the accounts under Section 19 POC Act as proceeds of crime or instruments of crime or both. The amount restrained is in the order of \$6 million. Restrained funds were intended to provide for the retirement Koernia and Lordianto in Australia. Koernia and her husband are now unable to invest or otherwise utilise the funds for their retirement in Australia until the court case involving their money has been decided.
- c. A couple originally from India who now live in Perth who sent money to Australia to purchase a house there. That case is referred to in Appendix C.

9. A Criminal Risk Management Technique

- 9.1 With Cuckoo Smurfing, Australian based drug groups outsource their money laundering risk to professional money laundering syndicates. By doing so, they reduce the risk to their operations should law enforcement decide to “follow the money”. The crime money they dispose of, is concealed in the accounts of innocent people. While they have access to or if paying for a drug shipment, have available to them, clean money which will be applied for an unlawful purpose offshore.
- 9.2 The Chinese say: “If you put your ladder against the wrong wall, every step you take is in the wrong direction”. The banks receiving the deposits, incur little if any risk. If a bank forms a suspicion about a cuckoo smurfing deposit and raises a Suspicious Matter Report (SMR) in relation to it, the bank will report their customer. As customers who make deposits under \$10,000 are not identified by a bank, then usually an SMR does not contain any information about the criminals involved in making the deposits. Once received by AUSTRAC and by a law enforcement agency, unless they know about the scheme, it will cause them to chase the wrong people. As the AFP is currently now doing. It is going after the victims of crime, instead of the real criminals. The AFP has placed its ladder against the wrong wall. And it is going in the wrong direction.

“If you put your ladder against the wrong wall, every step you take is in the wrong direction”

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- 9.3 The AFP has failed to understand the risk management process implemented by organised crime by using the cuckoo smurfing technique. Organised crime groups want and benefit from the AFP wasting resources and chasing the innocent victims of crime. By following that strategy, it enables criminal groups to continue importing drugs and laundering money, unhindered by Australia's national police agency.

“Organised crime groups want and benefit from the AFP wasting resources and chasing the innocent victims of crime”.

10. AFP Strategy Fails Objects of POC Act

10. Section 5, Part 1-2 sets out the principal objects of the POC Act. Section 5 is listed at Appendix D. The objects are often referred to in POC cases in court including Cuckoo Smurfing cases. But in relation to those cases, it appears the objects are being misinterpreted. Reference to them is made to identify what the objectives are or the intention of parliament was in relation to the recovery of proceeds of crime. However, it is apparent that the AFP strategy is not achieving or supporting the achievement of four of the nine principal objects and is probably working against what the Commonwealth Parliament intended, when it passed the POC Act.

Sub-Paragraph	Text	Comment
5(a)	to deprive persons of the proceeds of offences, the instruments of offences, and benefits derived from offences, against the laws of the Commonwealth or the non-governing Territories	In this context, persons refer to those who have benefited from the proceeds of crime or from using an instrument of crime AFP action is depriving innocent third parties of their money
5(c)	to punish and deter persons from breaching laws of the Commonwealth or the non-governing Territories	No one is being punished or deterred from breaching Commonwealth law. No one is being charged for dealing with personal financial information or the dealing in the proceeds of crime.

Review of Cuckoo Smurfing Strategy

Sub-Paragraph	Text	Comment
5(d)	to prevent the reinvestment of proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts in further criminal activities	The AFP civil forfeiture strategy is failing to achieve that.
5(da)	to undermine the profitability of criminal enterprises	Criminal groups retain the proceeds of crime and continue to grow and be profitable.

11. Dealing in Personal Information

- 11.1 To make the deposits into the accounts held by the innocent owners, the criminals must obtain their personal financial information. This personal financial information is obtained without their consent and communicated and used by those involved in the money laundering. Dealing in identification information to commit an offence¹⁰ and dishonestly obtaining or dealing in personal financial information,¹¹ are indictable offences under Commonwealth criminal law.
- 11.2 The AFP has identified and received information of victims of crime. It is the owners of the accounts whose personal financial information has been stolen. But rather than investigate the persons who have stolen and misused the information to launder money, the AFP has chosen to take action that penalises the victims! The victims are now suffering as a result of the police action. Are these victims of lessor value than other victims of crime? Clearly, they are not. The AFP should be pursuing those committing a very serious indictable offence involving the trade in personal financial information.

12. No Different to Scam Victims

- 12.1 Where people are victims of scams and police in Australia recover any of the fraud funds, they do not seek the forfeiture of those funds, where the victims of crime are known. Account holders whose accounts have been used in cuckoo smurfing, are victims of a very serious scam that involves a criminal offence. Why are they being treated differently to other victims of fraud scams?

¹⁰ Section 372.1 Criminal Code Act (Cth).

¹¹ Section 480.4 Criminal Code Act (Cth).

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13. What is Wrong with the AFP Strategy

- 13.1 In the Kalimuthu case, the deposits were made while Kalimuthu and his wife were in Malaysia. The deposits coincided with the funds given by Kalimuthu to the Malaysian money exchanger. There was no evidence tendered by the AFP that Kalimuthu or his wife were involved in crime. The funds had been deposited by an organised group working to a plan to quickly move hundreds of thousands of dollars through the accounts. The evidence, if acted upon quickly by the AFP, could have identified those responsible for the money laundering and potentially linked them to the proceeds of the offending or the intended purpose of the matching sum of money held off shore. In the latter case, it could involve the funds being used to pay for the importation of narcotics.
- 13.2 The strategy only targets innocent victims of crime who should not have been subjected to any investigation. It breaches their human rights. As reported earlier, AFP civil forfeiture action against cuckoo smurfing victims has NO IMPACT on organised crime, either its wealth or operations. The crime money remains in the hands of criminal groups. And as investigation leads into the persons involved in the deposit and transfer of funds and personal financial information are not pursued, the organised crime groups both in Australia and offshore continues to grow. Left in the hands of the AFP, the cuckoo smurfing technique will continue to get worse with more innocent people falling victim to organised crime.

14. AFP Strategy Compared to Other Crime Strategies

- 14.1 The AFP action breaches human rights. It argues that people have an opportunity to explain the funds in court. But they shouldn't have to. If cuckoo smurfing is involved then they are victims. They are NOT money mules. The AFP action is no different to a person reporting their car stolen to the police. The police commence an investigation and recover the car. The police then seize it as being an instrument of crime (in the theft or any crime it is used in) or proceeds of the crime (where it is sold to a receiver).
- 14.2 The AFP has claimed in court that "if the court refuses the forfeiture orders in the circumstances of [the defendant's] case, it is allowing a 'loop hole' to remain open within the Australian financial system that would permit a known money laundering methodology. They further argued: "It is not in the public interest to condone the use of money remitters who seek to operate outside the rules of the Australian financial system."¹².
- 14.3 The above arguments posited by the AFP are absurd. It is a lazy and ineffective strategy. Targeting the funds held in the accounts of innocent people has NO impact on the use of cuckoo smurfing by criminals. As outlined above, money is still left in the hands of criminal groups, to enable them to continue their

¹² Article Malaysian top cop has \$320k seized by AFP, doesn't want it back published in the Sydney Morning Herald on 2 March 2018 <https://www.smh.com.au/national/nsw/malaysian-top-cop-has-320k-seized-by-afp-doesn-t-want-it-back-20180301-p4z2dw.html>

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operations and enjoy the fruits of their crime. The AFP civil forfeiture action still leaves a money laundering method available for use by criminals.

“Targeting the funds held in the accounts of innocent people has NO impact on the use of cuckoo smurfing by criminals”.

- 14.4 There are better and more effective strategies that could be applied for example:
- a. AFP could engage in offshore targeting and investigations with international partner agencies to identify those involved including the corrupt money remitters.
 - b. A public education program could be run in large Asian cities in conjunction with local law enforcement. The AFP should approach local and international banks or international remittance firms such as Western Union and MoneyGram to ascertain if they would be prepared to finance the campaign noting that greater use of their services benefits them. This will result in people being deterred from using informal money service businesses
 - c. Request that Australian and foreign banks advise foreign customers of the risks of using informal money remittance systems.
- 14.5 If the AFP seriously believes that the civil forfeiture action is necessary to prevent criminals using the cuckoo smurfing method, then why isn't it:
- a. Pursuing cases involving the deposit of funds over the threshold limit?
 - b. Identifying those making the structured and threshold deposits and investigating and arresting them?
 - c. Pursuing the offshore money remitters and drug groups involved?
- 14.6 The answer to the above questions is simple. Those strategies would be too hard and too costly to execute. It is easier to chase the low hanging fruit.

15. Effective Crime Prevention: Seize ALL Instruments of Crime

- 15.1 And if the AFP is so convinced that its strategy to pursue instruments of crime in cuckoo smurfing cases involving property owned by innocent third parties, then why isn't it applying the strategy to the prevention of all crime types? It is common practice for drug groups to rent cars and trucks that are used to convey narcotics resulting in those vehicles becoming instruments of crime. Commercial aircraft and large commercial container ships carry all of the illicit drugs to Australia. The aircraft owners and or operator, for example Qantas and commercial shipping owner are not aware that drugs are contained on their aircraft or ship. If the AFP wanted to prevent the importation of all drugs then it should follow its own advice and seize every commercial ship and aircraft. But why doesn't the AFP do that and seek their forfeiture under the POC Act?

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Because the AFP knows that it would face an expensive legal fight from large and powerful organisations and would most likely lose in court. It is much easier to challenge individuals who have limited means at their disposal to fight back.

- 15.2 The AFP has a similar power to seize aircraft, cars and boats under the Customs Act 1901 where they are used to import, export or convey illicit drugs. Those goods are known as “narcotic related goods”. The goods are already forfeited once they are used to import, export or convey drugs. But the AFP does not seize them where a third-party owner is involved. The AFP has since it was first formed, returned all narcotic related goods where they have been used in a drug importation and the owner is unaware of their use and has no involvement in the crime.

16. Commonwealth Bank of Australia

- 16.1 The Commonwealth Bank of Australia (CBA) is being pursued by AUSTRAC for alleged violations of Australia’s AML/CTF Act 2006. There is also a separate inquiry into the culture which operated at the bank during the time of the alleged violations. It is interesting to note, that despite the alleged violations, the AFP has not instigated a separate criminal investigation into those persons who may have known, or who have been reckless or negligent in relation to alleged money laundering at the bank¹³. The question is why not? Surely the use of a bank to launder money should be of more concern than taking action against innocent account holders caught in a cuckoo smurfing incident?

Bank Systems are Instruments of Crime

- 16.2 Similarly, the AFP has not pursued any civil forfeiture action against CBA or any bank or financial institution involved in cuckoo smurfing. All of the computer and communication systems and premises owned or leased by CBA and any other bank that have been used in the deposit of funds involving the cuckoo smurfing technique are instruments of crime and liable for forfeiture. This would include all funds that have been deposited on or above the threshold reporting limit.
- 16.3 If the AFP, as it so argued strongly and passionately before Australian courts, is so determined to stop the cuckoo smurfing technique operating in Australia, it would immediately seize, restrain and apply for the forfeiture of all equipment held by every bank that is used in the crime.
- 16.4 It is clear that the AFP has a dual civil forfeiture strategy. One strategy for individuals who have limited resources to defend themselves in court and another for large and powerful corporate organisations. This is not how Australian forfeiture law has been applied before 2014 and should not be applied now. The powerful provisions of the Commonwealth POC Act should

¹³ Douglas, C. (2018). Australian bank directors risk criminal money laundering investigation. Retrieved March 23, 2018

<http://riskandregulation.theasianbanker.com/updates?&docid=00072171850270370656075607>

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be applied fairly and evenly otherwise it leads to a loss of confidence in the agency by Government, the public and the courts.

17. Opening the Flood Gates

- 17.1 All state and territory governments of Australia have forfeiture legislation, including civil forfeiture provisions. Successful action in court by the AFP, would open the floodgates across Australia to the abuse of those laws by agencies that have the power to investigate and prosecute forfeiture matters. Unrestrained by not having to refer forfeiture matters to the prosecution body, those state agencies might be tempted to pursue assets held by innocent third parties.

18. Who is at Risk from the AFP Strategy

- 18.1 Since the AFP commenced applying the civil forfeiture provisions of the POC Act 2002 to the deposited funds that have been structured, then any and all funds of that nature are at risk of being restrained and subsequently forfeited. The AFP claims that the funds are an instrument of crime or proceeds of crime.
- 18.2 Potential victims of AFP action include, if they are not already:
- a. Parents sending money to their children in Australia for education and cost of living expenses.
 - b. People seeking to immigrate to Australia who send money to Australia to pay for fees, to buy a house etc.
 - c. Foreign investors sending money to Australia to invest in Australian property, shares, or industry.
 - d. Australian exporters who are paid by customers who purchased their goods or services.
- 18.3 And the actions of the AFP, could have wider ramifications than just impacting on migrants and family members sending money home to Australia. Their strategy could result in the restraint of funds sent to Australia to pay for university fees or for goods or services provided by an Australian company. Is the AFP intending to restrain and seek the forfeiture of funds in accounts held by an Australian university or Australian business that have been structured and suspected of being an instrument of crime or proceeds of crime? Imagine the damage that action would cause to Australia's reputation as a provider of education services and as a reliable exporter. And the impact it will have on Australia's business migration program?

19. Call for a Senate Inquiry

- 19.1 This issue is not about the law. It is about policy. Sensible policy and its application that does not unnecessarily infringe upon the rights of people, no matter who they are or where they live. Legislation cannot solve all problems. And in the application of civil forfeiture legislation there is no substitute for

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common sense and fairness. This paper will not recommend legislative change. But Malkara Consulting calls for a senate inquiry into the AFPs application of civil forfeiture legislation to victims of cuckoo smurfing. And the impact the law is or could have on Australia's national interest and Australian commercial and business interests.

- 19.2 If the AFP continues to pursue victims of cuckoo smurfing money laundering instead of investigating the real criminals, then the Commonwealth Government needs to seriously review the role of the AFP in undertaking civil forfeiture action in Australia.

20. Conclusion

- 20.1 By pursuing innocent victims of crime, the AFP has lost tactical opportunities to fight organised crime by targeting those criminals involved in the money laundering and those involved in the commission of predicate offences, particularly drug trafficking. The strategy undertaken by the AFP does not fulfil the objects of the Proceeds of Crime Act. Criminals are not deprived of their assets and criminal organisations retain funds which are used to commit further crimes in Australia and offshore. Actions by the AFP damage Australia's offshore interests, are contrary to other government policies which encourage foreign investment, foreign business migration and foreign students studying in Australia.
- 20.2 The AFP has a dual civil forfeiture strategy. One strategy for individuals who have limited resources to defend themselves and another for large and powerful corporate organisations. Proceeds of Crime law must and should be applied consistently and fairly otherwise trust in an organisation and the law is eroded in the eyes of the public and the courts.
- 20.3 The agency has also breached the faith and trust the Federal Government placed in it, when it granted the AFP the power to pursue civil forfeiture matters on behalf of the Commonwealth.

142 Conducting transactions so as to avoid reporting requirements relating to threshold transactions

- (1) A person (the *first person*) commits an offence if:
- (a) the first person is, or causes another person to become, a party to 2 or more non-reportable transactions; and
 - (b) having regard to:
 - (i) the manner and form in which the transactions were conducted, including the matters to which subsection (3) applies; and
 - (ii) any explanation made by the first person as to the manner or form in which the transactions were conducted;it would be reasonable to conclude that the first person conducted, or caused the transactions to be conducted, in that manner or form for the sole or dominant purpose of ensuring, or attempting to ensure, that the money or property involved in the transactions was transferred in a manner and form that would not give rise to a threshold transaction that would have been required to have been reported under section 43.

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

- (2) Subsection (1) does not apply if the defendant proves that the first person did not conduct the transactions, or cause the transactions to be conducted, as the case may be, for the sole or dominant purpose of ensuring, or attempting to ensure, that the money or property involved in the transactions was transferred in a manner and form that would not give rise to a threshold transaction that would have been required to have been reported under section 43.

Note: A defendant bears a legal burden in relation to the matters in subsection (2)—see section 13.4 of the *Criminal Code*.

- (3) This subsection applies to the following matters:
- (a) the value of the money or property involved in each transaction;
 - (b) the total value of the transactions;
 - (c) the period of time over which the transactions took place;
 - (d) the interval of time between any of the transactions;
 - (e) the locations at which the transactions took place.

19 Restraining orders—property suspected of being proceeds of indictable offences etc.

When a restraining order must be made

- (1) A court with *proceeds jurisdiction must order that:
 - (a) property must not be disposed of or otherwise dealt with by any person; or
 - (b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order;if:
 - (c) a *proceeds of crime authority applies for the order; and
 - (d) there are reasonable grounds to suspect that the property is:
 - (i) the *proceeds of a *terrorism offence or any other *indictable offence, a *foreign indictable offence or an *indictable offence of Commonwealth concern (whether or not the identity of the person who committed the offence is known); or
 - (ii) an *instrument of a *serious offence; and
 - (e) the application for the order is supported by an affidavit of an *authorised officer stating that the authorised officer suspects that:
 - (i) in any case—the property is proceeds of the offence; or
 - (ii) if the offence to which the order relates is a serious offence—the property is an *instrument of the offence;and including the grounds on which the authorised officer holds the suspicion; and
 - (f) the court is satisfied that the *authorised officer who made the affidavit holds the suspicion stated in the affidavit on reasonable grounds.

Property that a restraining order may cover

- (2) The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that that property is:
 - (a) in any case—*proceeds of the offence; or
 - (b) if the offence to which the order relates is a *serious offence—an *instrument of the offence.

Refusal to make a restraining order

- (3) Despite subsection (1), the court may refuse to make a *restraining order in relation to an *indictable offence that is not a *serious offence if the court is satisfied that it is not in the public interest to make the order.

Note: A court can also refuse to make a restraining order if the Commonwealth refuses to give an undertaking: see section 21.

Restraining order need not be based on commission of a particular offence

- (4) The reasonable grounds referred to in paragraph (1)(d) need not be based on a finding as to the commission of a particular offence.

Risk of property being disposed of etc.

- (5) The court must make a *restraining order even if there is no risk of the property being disposed of or otherwise dealt with.

Couple prevented from selling Perth house over proceeds of crime suspicion

By Joanna Menagh

Updated 20 Jul 2016, 3:50pm

A Perth judge has issued an order stopping a couple from selling a property in the northern suburb of Tapping because it is suspected it was bought with the proceeds of crime.

The Australian Federal Police won the order in the Supreme Court earlier this week after conducting investigations into bank accounts belonging to Ruby Arora, who is the registered owner of the property, and her husband Nogender Pal Arora.

The court was told the two are Indian citizens and purchased the Tapping property four months after arriving in Australia in April 2013.

Justice Jeremy Allanson ruled the federal police had "reasonable grounds" to hold suspicions" about the property.

"Having regard to the number, total, value and nature of the transactions in the various accounts in the period before the purchase of the Tapping property, I am satisfied that that there are reasonable grounds to suspect that the Tapping property is the proceeds of an indictable offence or an instrument of a serious offence," he said in his judgement.

The Aroras deny the property has anything to do with the proceeds of crime.

The case has been adjourned to allow the couple to file further documentation to support their arguments and to liaise with police.

Topics: [courts-and-trials](#), [crime](#), [tapping-6065](#)

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Part 1-2—Objects

5 Principal objects

The principal objects of this Act are:

- (a) to deprive persons of the *proceeds of offences, the *instruments of offences, and *benefits derived from offences, against the laws of the Commonwealth or the *non-governing Territories; and
- (b) to deprive persons of *literary proceeds derived from the commercial exploitation of their notoriety from having committed offences; and
- (ba) to deprive persons of *unexplained wealth amounts that the person cannot satisfy a court were not derived from certain offences; and
- (c) to punish and deter persons from breaching laws of the Commonwealth or the non-governing Territories; and
- (d) to prevent the reinvestment of proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts in further criminal activities; and
- (da) to undermine the profitability of criminal enterprises; and
- (e) to enable law enforcement authorities effectively to trace proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts; and
- (f) to give effect to Australia's obligations under the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, and other international agreements relating to proceeds of crime; and
- (g) to provide for confiscation orders and restraining orders made in respect of offences against the laws of the States or the *self-governing Territories to be enforced in the other Territories.

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