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**Response to the Home Office Consultation Paper**

**Asset Recovery Action Plan**

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November 2007

## **1. INTRODUCTION**

- 1.1 The Fraud Advisory Panel (the “Panel”) is an independent body of volunteers drawn from the public and private sectors. The Panel’s role is to raise awareness of the immense social and economic damage that is caused by fraud and to help both the public and private sectors, and the public at large, to fight back.
- 1.2 Members of the Panel include representatives from the law and accountancy professions, industry associations, financial institutions, government agencies, law enforcement, regulatory authorities and academia. The Panel works to encourage a truly multi-disciplinary perspective on fraud.
- 1.3 The Panel was established in 1998 through a public-spirited initiative by the Institute of Chartered Accountants in England and Wales. Today, it is a registered charity and company limited by guarantee. The Panel is funded by subscription, donation and sponsorship.
- 1.4 The Fraud Advisory Panel welcomes the opportunity to respond to the Home Office’s consultation paper on the proposed asset recovery action plan.
- 1.5 This response has been prepared on behalf of the Fraud Advisory Panel by Anthony Riem and Steven Philippsohn at PCB Litigation LLP.

## **2. ROUTINE DATA SHARING OF DEFENDANTS’ FINANCES (Your question 1)**

- 2.1 Where a defendant seeks to argue that assets are the proceeds of legitimate earnings, the question of whether the defendant has paid tax on those earnings or been receiving benefits in the meantime is relevant to:
  - a) The credibility of the defendant’s explanation; and
  - b) Whether, if the explanation is to be believed, the defendant has failed to declare earnings for tax and benefits.
- 2.2 In either case, it is difficult to see what legitimate complaint the defendant could have to the explanation being passed to the tax and benefits authorities.

2.3 Therefore to the extent suggested in the Consultation Paper, routine sharing of financial information would appear to be desirable. Proper safeguards should however be put in place to ensure that personal financial data of defendants is kept secure and cannot be used by third parties for illegitimate purposes.

### **3. AUTOMATIC TRANSFER OF TITLE (Your question 2)**

3.1 Whilst making enforcement more efficient is to be welcomed, there are concerns as to how this might work in practice:

- a) Whether title to assets located overseas (where increasing amounts of criminal proceeds are to be located) can simply be transferred in this manner.
- b) The impact this may have on third party creditors, who may not have a proprietary claim in any of the assets. For example, third party victims of a fraud may be left with no remedy if they have no proprietary claim to the assets and the Crown takes away all of the fraudster's assets.

3.2 In cases where it would be cumbersome or unnecessarily expensive to appoint a receiver, consideration could be given to enforcement by way of the normal remedies for enforcing civil judgments, where the interests of third party creditors can be protected.

3.3 The alternative suggestion at the end of chapter 3.2 of the Consultation Paper of contracting out enforcement to specialist niche practitioners should also be considered, both in relation to assets in the UK and overseas.

### **4. POWER TO SEIZE GOODS (Your question 3)**

4.1 Such a power, even if restricted to “non-essential” goods could have a significant impact on an innocent defendant (and their family) for a significant period of time, without any compensation. Use of such a power in these circumstances may offend Article 1 of Protocol 1 of the European Convention on Human Rights.

4.2 Therefore whilst such a power may be of great benefit in securing assets that might otherwise be dissipated, there should be adequate judicial checks on the powers. If adequate judicial checks are put in place, then such a power is to be welcomed.

**5. ADMINISTRATIVE FORFEITURE OF CASH SEIZURES (Your question 4)**

5.1 The Panel believes that the two stage approach appears sensible; if none of the interested parties wish to object to the forfeiture there seems no reason to require an order.

**6. EXTENSION OF CASH SEIZURE POWERS (Your question 5)**

6.1 The powers of law enforcement need to keep up with developments like the increasing use of near cash substitutes, such as e-money. Otherwise, those powers risk being rendered less effective.

**7. WIDENING ASSETS LIABILITY TO CIVIL RECOVERY (Your question 6)**

7.1 Given the advantages of the civil recovery process, widening the class of assets that can be liable to civil recovery is to be welcomed, though safeguards should be implemented so that this is not done at the expense of innocent third party creditors.

**8. EXTENSION OF TIME LIMIT FOR LAUNCHING CIVIL ASSET RECOVERY ACTIONS (Your question 7)**

8.1 The Panel believes that the problem with extending the limitation period is that it may be considerably more difficult for a defendant to assimilate evidence necessary to defend the case; memories may be faded and records thrown away.

8.2 Therefore, if there is to be any increase in (or removal of) the limitation period, this should be balanced by the possibility that, if due to the passage of time a fair trial would not be possible, the court can dismiss a claim that would otherwise have been barred by a 12 year limitation period.

8.3 If such a provision were to be introduced, then the case for arguing the extension or removal of a limitation period would be strengthened.

8.4 The potential adverse impact on innocent third party creditors by the widening of the class of assets that may become subject to confiscation, should also be addressed,

**9. NEW PRINCIPLE OF SENTENCING TO REMOVE ALL CRIMINAL GAINS (Your question 8)**

9.1 The Panel has no comment to make on proposals to create a new principle of sentencing that all criminal gains should be removed.

**10. SIMPLE LOW VALUE ORDERS (Your question 9)**

10.1 The Panel has no comment to make on whether current POCA provisions can be adapted to deal with simple low value orders, or the need for a separate Criminal Benefits Order in these cases.

**11. CIVIL STANDARD HIGH VALUE GOODS (Your question 10)**

11.1 The creation of such a power is likely to be of benefit. However, the right to appeal the seizure needs to be an effective right. The defendants ought to be afforded proper legal representation, which may require publicly funded representation. The rights of innocent third party creditors ought also to be considered.

**12. EXTENSION OF NEW POWER TO COVER ALL HIGH VALUE GOODS (Your question 11)**

12.1 Again, such an extension may be of benefit but the right to appeal needs to be an effective right. The rights of innocent third party creditors ought also to be considered.

**13. EXTENSION OF BASIS FOR LEVYING TAX ON CRIMINALS (Your question 12)**

13.1 The Panel has no comment to make on proposals to extend the basis on which tax can be levied on criminals, taking in both no source and 'miscellaneous' income.

**14. APPLICABILITY OF QUI TAM PROVISIONS (Your question 13)**

14.1 The difficulty with such provisions in England and Wales is that because:

- a) Lawyers cannot be paid on a contingency basis in civil litigation (i.e. a percentage of the damages) as they are in the US but are instead normally paid on an hourly rate basis; and
- b) Unsuccessful parties in civil litigation generally have to pay the costs of the successful party;

there is substantial disincentive to bring civil proceedings, particularly by an individual and particularly where the majority of the damages will go to the State.

14.2 Therefore, whilst in principle Qui Tam provisions would provide a welcome means to combat fraud, consideration should be given to the following with a view to making it effective:

- a) Omitting any public domain requirement, if a fraud is in the public domain and no prosecution is being brought, e.g. because of lack of State resources, then why should a claim not be brought by a private party?
- b) Changing the rules on remuneration of lawyers and adverse costs consequences for unsuccessful, but bona fide, claimants in relation to such claims; and
- c) Ensuring claimants receive a sufficient proportion of the damages to encourage them to bring claims.