

JUSTICE IN JEOPARDY? THE RELATIONSHIP BETWEEN SENTENCING AND CONFISCATION ORDERS UNDER THE PROCEEDS OF CRIME ACT 1991

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The Proceeds of Crime Act 1991 was enacted in response to concern about increasing serious and organised crime. The Act aims to reduce such crime by providing an additional deterrent to traditional punishments by confiscating the profits of and property used to commit serious offences. This article considers the relationship between confiscation under the Act and sentencing. It is argued that the courts' approach to the application of the Act has not always been consistent, and that it is essential that the courts take forfeiture of property used to commit offences into account when sentencing in order to avoid potentially oppressive and arbitrary results.

Beg that thou may'st have leave to hang thyself:
And yet, thy wealth being forfeit to the state,
Thou has not left the value of a cord.¹

I INTRODUCTION

Since the enactment of the Proceeds of Crime Act in 1991, some \$11.6 million worth of cash and property has been confiscated under its provisions.² As provided for in the Act, this

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¹ William Shakespeare *The Merchant of Venice* Act IV, Scene 1 quoted in Auckland District Law Society Public Issues Committee *Automatic Forfeiture on Conviction in New Zealand Statutes* (Auckland District Law Society, Auckland, 1985).

amount reflects the confiscation of the proceeds of serious offending and the property used to commit serious offences. Overwhelmingly, the cash and property confiscated relates to drug dealing and fraud offences.

The potential impact of the Act on offenders, their families and third parties is severe. This, it seems, is the intention of the legislation as "traditional methods of punishment are not enough" to deter serious criminals.³ The legislation therefore seeks to undermine the economic base of organised crime by confiscating its profits and instruments.

The Proceeds of Crime Act 1991 (PCA) is not unique in providing for this type of confiscation. Several other Acts in New Zealand and overseas also provide for confiscation of the proceeds of or property used to commit offences.⁴

An important question which arises under the PCA and other confiscation legislation is what should be the relationship between confiscation orders and sentencing. The preferred approach to this depends largely on whether confiscation orders are considered to be punitive. This article will consider the policy of confiscation orders under the PCA and will focus on how the relationship between sentencing and confiscation under that Act should be defined.

Part II of this article outlines the key statutory provisions of the PCA, and Part III describes the background behind the enactment of the PCA. Part IV then looks at the courts' application of the PCA. The approach of the Australian and English courts to comparable legislation is also considered.

Part V contrasts the approach of the courts to the PCA with their approach to confiscation provisions under other New Zealand statutes. Finally, Part VI considers the approach the courts should adopt to the PCA. It will be shown that, in particular, the courts' approach to forfeiture of property used to commit offences under the PCA has the potential to result in injustice in the treatment of offenders. This article will conclude that an approach more

2 Nick Smith "Filling Government coffers from a pot of gold" *New Zealand Herald*, Auckland, New Zealand, 17 June 1999, A2.

3 (4 September 1990) 510 NZPD 4303.

4 These include the Misuse of Drugs Act 1975; the Fisheries Act 1983; the Fisheries Act 1996; the Criminal Justice Act 1985; the Proceeds of Crime Act 1987 (Cth, Aus) on which the New Zealand PCA was modelled; the Drug Trafficking Act 1994 (UK); the Criminal Justice Act 1988 (UK) as amended by the Proceeds of Crime Act 1995 (UK); the Misuse of Drugs Act 1971 (UK); and the Powers of Criminal Courts Act 1973 (UK).

consistent with the application of other confiscation legislation is required; one which acknowledges the punitive impact of such forfeiture, and takes this into account when determining the overall sentence.

II PROVISIONS OF THE PROCEEDS OF CRIME ACT 1991

The PCA provides for two types of confiscation order: a forfeiture order and a pecuniary penalty order. The provisions of the Act apply only when a person has been convicted on indictment of an offence which is punishable by more than five years' imprisonment.⁵ In such a case, the Solicitor-General may apply to the court for a forfeiture order or a pecuniary penalty order (or both).⁶

A Forfeiture Orders

Under section 15(1) of the PCA the court has a discretionary power to order forfeiture of property which it is satisfied is tainted in respect of the offence.⁷ "Tainted property" includes both the proceeds of the offence and property that was used to commit the offence.⁸

Section 15(2) sets out a number of factors which the court may consider when deciding whether to order forfeiture. These include: the use that is ordinarily made of the property; any undue hardship which may be caused by the order; the nature and extent of the offender's and any other person's interest in the property; and any other matter relating to the nature and circumstances of the offence or offender.

Forfeiture orders are made against the tainted property itself, and are not restricted to property in which the offender has an interest. Therefore, orders may be made in respect of property in which a third party holds part of or the entire interest. Some of this potential hardship to third parties may be reduced because the court can consider the extent of a third party's interest in the property when deciding whether to order forfeiture.⁹ In addition, a third

5 That is, a "serious offence", s2(1) of PCA. Under ss3 and 4 of the PCA, a person is considered to have been "convicted" if they plead or were found guilty of an offence, were found guilty of an offence and were discharged without conviction, or if they absconded in relation to the offence.

6 Section 8 of the PCA. The application must be made within the period of six months after conviction.

7 The standard of proof to which the court must be satisfied in relation to any matter under the Act is on the balance of probabilities; s85 of the PCA.

8 Section 2(1) of the PCA.

9 Section 15(2)(c) of the PCA.

party who claims an interest in the property can apply for relief before or after the court makes a forfeiture order.¹⁰

B Pecuniary Penalty Orders

If the proceeds of an offence cannot be traced to specific cash or property which would otherwise be the subject of a forfeiture order, the court may make a pecuniary penalty order to recover the value of the benefits derived from the offence. The term "benefits" is not defined in the Act beyond providing that the benefits may be acquired directly or indirectly.¹¹ However, sections 27 and 28 provide guidance for the court when assessing the value of the benefits derived.

Under those sections, the court may have regard to the value of any money, property or benefit coming into the possession of the offender by reason of the commission of the offence.¹² The court may also consider the value of the offender's property before and after the commission of the offence (or offences). Any increase in value may be treated as the value of the benefits, unless the offender proves that the acquisition of the excess was unrelated to the commission of the offence.¹³

When valuing the benefits, the court is not entitled to consider any "expenses or outgoings" in connection with the commission of the offence.¹⁴ Once the benefits have been assessed, the

10 Sections 17 and 18 of the PCA. A legal or equitable interest is not required; "a right, power, or privilege in connection with the property" is sufficient to be eligible for relief; s2(1) of the PCA. If satisfied that the interest claimed by the third party is valid, the court is required to provide relief against forfeiture. However, the court is not required to grant relief if the applicant was "involved in the commission of the offence in respect of which forfeiture [is sought]", or if the applicant did not acquire their interest in the property in good faith; s18(2) of the PCA.

11 Section 2(3) of the PCA.

12 Sections 27(2)(a) and (b) of the PCA.

13 Sections 28(1), (2) and (3) of the PCA. Special provisions apply to valuing the benefits derived from drug-dealing offences. Under s2(1) of the PCA, "drug-dealing offence" is defined as any offence against s6 of the Misuse of Drugs Act 1975 in relation to a Class A, B or C controlled drug where the quantity is greater than the quantity specified in s6(6) of that Act. Unless the offender proves otherwise, the court must presume that all the property of the offender at the time the application for the pecuniary penalty order is made, and all the property acquired by the offender since the offence, came into the offender's possession by reason of the commission of the offence; s28(4) of the PCA.

14 Section 27(3) of the PCA.

court may make a pecuniary penalty order for an amount not greater than that value.¹⁵

C Relationship of Confiscation Provisions with Sentencing

The PCA does not stipulate the relationship between confiscation orders and sentencing. However, the Act does provide that if an offender has not been sentenced when an application for a confiscation order is made, the court may defer sentencing until the application has been considered.¹⁶

In addition, if sentencing has taken place before the confiscation order application is determined, any sanction imposed "in the nature of a pecuniary penalty or forfeiture of property" may be taken into account when considering the application.¹⁷ However, the statute is silent as to whether other sanctions are to be taken into account.

III BACKGROUND TO THE ENACTMENT OF THE PCA

The enactment of the PCA can be seen as part of an international trend to provide for the confiscation of the profits and instruments of serious crime. Recent decades have witnessed international concern about the escalation of organised crime and the significant power and profits commanded by those involved.¹⁸ Large profits are generally the motivation for such offences, and it was believed that traditional penalties, including imprisonment and fines, were inadequate and ineffective deterrents. In addition, growing awareness of the international nature of organised crime resulted in calls for the provision of mutual, cross-jurisdictional assistance in tracing and seizing the proceeds of crime.

Thus, at a United Nations Conference in 1987, the international community resolved that new, stronger measures were necessary to deter organised crime.¹⁹ The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, which

15 Section 25(1)(b) of the PCA. The court has discretion to reduce the pecuniary penalty amount once the benefits have been assessed. The court must reduce the amount by the value of any property forfeited as proceeds of the offence, or any pecuniary penalty already imposed; ss25(2)(a),(b) and (c) and s14(1)(b) of the PCA.

16 Section 14(2) of the PCA.

17 Section 14(1)(b) of the PCA.

18 See John Thornton "Confiscating Criminal Assets" in Brent Fisse, David Fraser and Graeme Coss (eds) *The Money Trail* (The Law Book Company, Sydney, 1992) 13 ["Confiscating Criminal Assets"].

19 "Confiscating Criminal Assets" above n 18, 14.

resulted from this conference, requires signatories to enact domestic confiscation legislation and to provide for international mutual assistance in recovering the proceeds of crime.²⁰ While some countries already had such legislation in place, others, including New Zealand, have since passed legislation to fulfil these obligations.²¹

The New Zealand PCA was modelled on the Australian Proceeds of Crime Act 1987 (PCA (Cth)),²² and the policy behind the two Acts seems to be very similar. The aim of this confiscation legislation is to:²³

strike at the heart of major organised crime by depriving persons involved of the profit and instruments of their crimes. By doing so it will suppress criminal activity by attacking the primary motive - profit - and prevent the re-investment of that profit in further criminal activity.

This highlights that the legislation aims to provide a deterrent to serious crime beyond that afforded by the traditional sentences of imprisonment and fines. This derives from the belief that "the huge profits [derived from drug offences]...are so high that even very long prison sentences are not sufficient to deter people from getting involved".²⁴

In addition, the legislation is designed to prevent future criminal activity by removing the means of offending, such as profit for re-investment and property used to commit offences,²⁵ so that offenders are rendered incapable of future offending.

20 M Dyhrberg and Chris Morris *The Proceeds of Crime Act 1991* (New Zealand Law Society, Wellington, 1995) 2.

21 David Fraser "Lawyers, Guns and Money" in Brent Fisse, David Fraser and Graeme Coss (eds) *The Money Trail* (The Law Book Company, Sydney, 1992) 49 ["Lawyers, Guns and Money"]. The legislation New Zealand passed to fulfil these obligations was the Proceeds of Crime Act 1991 and the Mutual Assistance in Criminal Matters Act 1992.

22 (26 November 1991) 521 NZPD 5589.

23 PCA(Cth) House of Representatives Debates (1987) vol 154, 2314 in John Thornton "The Objectives and Expectations of Confiscation and Forfeiture Legislation in Australia - an Overview" (1994) 1 Canberra Law Review 43 ["Confiscation and Forfeiture Legislation in Australia"]. In the New Zealand Parliamentary debates a similar view was expressed: "[t]he purpose of this Bill is to attack serious crime at its heart by confiscating the profits and preventing their re-investment in further criminal activity." (26 November 1991) 521 NZPD 5585.

24 (26 November 1991) 521 NZPD 5589.

25 (26 November 1991) 521 NZPD 5585.

The legislation also serves an important public policy purpose; an objective of the legislation is to dispel the notion "that after a possibly short period of incarceration a person will be free to enjoy the proceeds of his or her criminal activity".²⁶

Thus, consistent with the international community's concern regarding organised and serious crime, the PCA and the PCA (Cth) were enacted with the goals of deterrence, incapacitation, and enhancing public confidence in the criminal justice system.²⁷

IV IMPLEMENTATION OF THE PROCEEDS OF CRIME ACT 1991 BY THE COURTS

A *The Court's Approach in R v Brough*

An early and classic statement by the Court of Appeal regarding the policy of confiscation orders is found in *R v Brough*.²⁸ *Brough* involved an appeal against a pecuniary penalty order. The appellant had been convicted of a number of drug, dishonesty and firearms offences relating to a large scale cannabis operation conducted on his farm.²⁹ The appellant was sentenced to seven years' imprisonment and fined \$5,000. In addition, he was ordered to forfeit \$17,129.20 in cash, which was found at his property during a police search, and to pay a pecuniary penalty of \$84,789.58.³⁰

The Court considered the nature of confiscation orders under the Act and clearly found that orders directed at either the proceeds of offending or the property used to commit offences are not imposed for the reason of punishment.³¹

The policy of the Act...is twofold. First, a person who has engaged in criminal activity should be required to disgorge...his or her ill-gotten gains. Requiring these to be paid cannot in any way be regarded as a penalty. Rather, it is simply a recognition that the law should not permit a person to retain the profits of criminal activity. Secondly, it empowers the Court to forfeit property used to

26 Director of Public Prosecutions *Civil Remedies Report 1985-1987* in "Confiscation and Forfeiture Legislation in Australia" above n 23, 45; see also (4 September 1990) 510 NZPD 4303.

27 "Confiscation and Forfeiture Legislation in Australia" above n 23.

28 *R v Brough* (1994) 12 CRNZ 634 (CA).

29 *R v Brough* above n 28, 636-637.

30 *R v Brough* above n 28, 635. The cash found at his property was evidently the proceeds of the offences. The Crown also initially sought forfeiture of the appellant's farm and two motorcycles which were used to commit the offences, but these applications were not pursued; *R v Brough* above n 28, 637.

31 *R v Brough* above n 28, 639.

facilitate the commission of the offences. That too is not for reasons of penalty or punishment, but rather in recognition of the principle that persons who use property to commit crimes should be liable to have that property forfeited.

Consistent with its view that confiscation is not punitive, the Court in *Brough* stated that, as a general rule, confiscation orders should not be taken into consideration when the court is imposing the sentence for the offence.³²

However, in two situations, the Court did provide that confiscation orders may be relevant to assessing sentence. The first is where confiscation orders, particularly relating to the forfeiture of property used to commit an offence, have a "disproportionate or exceptional effect on the offender".³³ The second is where forfeiture of property used to commit an offence has such a severe deterrent effect that it "lessen[s] the need for the deterrent element in the sentence".³⁴

The Court was aware that both these exceptions relate to the forfeiture of property used to commit an offence, and noted that confiscation of the proceeds of an offence would be unlikely to have any relevance to sentencing. The Court justified this because confiscation of the proceeds of crime is designed to deprive the offender of his or her "ill-gotten gains".³⁵ This philosophy seems analogous to the civil law concept of unjust enrichment.³⁶ This principle provides that if someone has been enriched at someone else's expense, and it would be unjust to allow that person to retain the benefit, he or she must be deprived of that benefit.³⁷

32 *R v Brough* above n 28, 640.

33 *R v Brough* above n 28, 640.

34 *R v Brough* above n 28, 640.

35 *R v Brough* above n 28, 640.

36 Arie Freiberg and Richard Fox "Forfeiture, Confiscation and Sentencing" in Brent Fisse, David Fraser and Graeme Coss (eds) *The Money Trail* (The Law Book Company, Sydney, 1992) 106, 136 ["Forfeiture, Confiscation and Sentencing"]; M Hinton "Are drug trafficking confiscation orders punitive?" (1992) 136 *Solicitors Journal* 1264 ["Are drug trafficking confiscation orders punitive?"].

37 JF Burrows, Jeremy Finn and Stephen MD Todd *The Law of Contract in New Zealand* (Butterworths, Wellington, 1997) 22.

While deprivation of unjust enrichment may incidentally serve a deterrent purpose, it is clearly not imposed as a punishment for the offence.³⁸ It merely removes a gain or benefit to which the offender was never legally entitled so that it does not put the offender in a worse position than before the offence was committed. Therefore, it is not considered appropriate to make any allowance for this type of confiscation in the sentence imposed.³⁹

Clearly, however, forfeiture of property used to commit offences cannot be conceptualised as the deprivation of unjust enrichment, as property forfeited may have been acquired by lawful means.⁴⁰ Further, this type of forfeiture does not merely restore the status quo as it puts the offender in a worse position than before the offence was committed, often by depriving him or her of substantial assets such as homes, farms, or vehicles. It is therefore difficult, if not impossible, to regard such forfeiture as non-punitive. This may explain why the Court in *Brough* was prepared to contemplate situations where forfeiture should be relevant to sentencing. It is in relation to this type of forfeiture that the courts in subsequent cases have had particular difficulty defining its nature and relationship with sentencing.

B The Courts' Approach to Confiscation of the Proceeds of Crime

Several later cases regarding confiscation of the proceeds of crime have adopted the position in *Brough* that such confiscation is not punitive,⁴¹ and have affirmed that no account of this should be taken in sentencing.⁴²

The approach of the courts in these cases mirrors the position of United Kingdom confiscation legislation which expressly stipulates that confiscation orders are not part of the

38 "Are drug trafficking confiscation orders punitive?" above n 36, 1264; David J Fried "Rationalising Criminal Forfeiture" (1988) 79 *Journal of Criminal Law and Criminology* 328, 358 ["Rationalising Criminal Forfeiture"].

39 "Rationalising Criminal Forfeiture" above n 38, 358.

40 Brent Fisse "Confiscation of Proceeds of Crime: Funny Money, Serious Legislation" (1989) 13 *Crim LJ* 368, 369 ["Confiscation of Proceeds of Crime"]; "Confiscation and Forfeiture Legislation in Australia" above n 23, 50.

41 See *R v Andrian* (1996) 13 CRNZ 449 (CA) and *Solicitor-General v Carter* (28 July 1998) unreported, High Court Hamilton Registry, M219/97. See also *R v McCormick* (23 November 1994) unreported, Court of Appeal, CA180/94, 7, where the Court of Appeal held that the assessment of a pecuniary penalty order (or forfeiture order) cannot include "an additional element by way of punishment or penalty."

42 *R v Riki* (26 August 1996) unreported, Court of Appeal, CA482/95.

sentence,⁴³ and that any confiscation order must be left out of account when determining the proper sentence for the offence.⁴⁴

However, this approach is contrary to that taken by the Australian courts. Several commonwealth and state cases have held that confiscation of both the proceeds of and property used to commit offences is imposed for the reasons of "deterrence and punishment".⁴⁵ Further, the Australian courts have held that confiscation of the proceeds of crime may be relevant to the sentence imposed.⁴⁶ In *R v McDermott* the Federal Court of Australia stated that:⁴⁷

if a confiscation order is made, that is a factor which is capable of affecting the proper sentence to be handed down in the same way as orders for compensation, restitution, forfeiture and the like.

In that case, a pecuniary penalty order for a "substantial amount" was held to justify a reduction in the sentence.⁴⁸

However subsequent cases have noted that "the extent to which a pecuniary penalty order should affect a sentence will depend on the circumstances."⁴⁹ In particular, if the order is unlikely to impact on the offender's assets, it may have little effect on the sentence.⁵⁰

Although the approach to confiscation of the proceeds of crime articulated in *Brough* has been the dominant one, there has been one situation in which the courts have indicated that

43 Section 2(4) of the Drug Trafficking Act 1994 (UK); s71(1) of the Criminal Justice Act 1988 (UK) as amended by the Proceeds of Crime Act 1995 (UK).

44 Section 2(5)(c) of the Drug Trafficking Act 1994 (UK); s72(5) of the Criminal Justice Act 1988 (UK) as amended by the Proceeds of Crime Act 1995 (UK).

45 *R v Allen* (1989) 41 A Crim R 51, 56 (Ct of Criminal Appeal of Vic); *R v Rintel* (1990) 3 WAR 527, 531 (SC of Western Australia). This view has also been taken by the Australian courts to confiscation provisions under other Acts. See for example *Fang Chinn Fa v Puffett* (1978) 22 ALR 149 (SC of Northern Territory) where forfeiture under fisheries legislation was clearly seen as punitive; *R v Good* (1986) 82 FLR 418 (SC of Tasmania) where forfeiture of a motor vehicle was seen as punitive.

46 *R v McDermott* (1990) 49 A Crim R 105 (Federal Court of Australia); *R v Allen* above n 45, 57.

47 *R v McDermott* above n 46, 116. The Court was applying the view expressed in *R v Allen* above n 45, 57.

48 *R v McDermott* above n 46, 116.

49 *R v Tapper* (1992) 64 A Crim R 281, 287 (Federal Court of Australia).

50 *R v Tapper* above n 49, 287.

they might be prepared to adopt a position similar to that of the Australian courts. This is when the profit made by an offender from a drug transaction has been reduced because he or she has had to pay a supplier for the drugs. When addressing this situation in *R v Pedersen*,⁵¹ the Court's interpretation of "benefits" for the purposes of determining the amount of a pecuniary penalty order suggests that it does see these orders as punitive. In *Pedersen* the respondent received a total of \$8,800 from an undercover police officer purchasing cannabis. The actual gain made by the respondent from the transactions was accepted to be only \$240.⁵² It was therefore necessary for the Court to decide which figure represented the value of the benefits derived by the respondent from the offences.⁵³

In the High Court, it was found that, in ordinary usage, "benefits" mean the profits derived.⁵⁴ The Court stated that as "the aim of the legislation...is not to impose...an additional penalty...",⁵⁵ the pecuniary penalty order should be made for the value of the net profits.

This decision was overruled in the Court of Appeal where it was held that the benefit derived was the price paid to the respondent, or the gross profits.⁵⁶ While the result may be severe, the Court found that this "gives the maximum effect to the clear policy of the Act"⁵⁷ and that this is a "penal statute, with drastic consequences".⁵⁸ This suggests that the Court

51 *R v Pedersen* (1995) 13 CRNZ 34 (CA).

52 *Solicitor-General v Pedersen* (1994) 12 CRNZ 224, 225 (HC) [*S-G v Pedersen*].

53 Section 25 of the PCA.

54 *S-G v Pedersen* above n 52, 225.

55 *S-G v Pedersen* above n 52, 226.

56 *R v Pedersen* above n 51, 39 per Cooke P (McKay J dissenting). The approach in *Pedersen* was followed by the High Court in *Solicitor-General v O'Donnell* (3 March 1997) unreported, High Court, Auckland Registry, M681/95. In that case, the benefits derived by an offender were found to be a shipment of 9,000 LSD tabs, even though a share of those was owned by a co-offender. However, unlike the Court of Appeal in *Pedersen*, the Court exercised its discretion to reduce the penalty amount to reflect the fact that some of the benefit was not actually received by the respondent.

57 *R v Pedersen* above n 51, 41 per Cooke P.

58 *R v Pedersen* above n 51, 42 per Hardie-Boys J.

does see confiscation of the gross proceeds of an offence as imposing a form of punishment on the offender.⁵⁹

The Court in *Pedersen* was not required to consider the relevance of confiscation to the sentence imposed. However, as discussed below, it is suggested that had it been required to do so, the sentence imposed should have taken the punitive effect of the confiscation into account.

C *The Courts' Approach to Forfeiture of Property Used to Commit Offences*

The statement in *Brough* that forfeiture of property used to commit offences is not generally to be regarded as punitive has caused some difficulty in subsequent cases. Several cases have, in fact, departed from the view expressed in *Brough* and have held that this type of forfeiture does constitute punishment.

For example, in *R v Dunsmuir*⁶⁰ the Court of Appeal agreed that forfeiture of the proceeds of an offence could not be punitive.⁶¹ However, the Court seemed to depart from the approach in *Brough* by holding that forfeiture of the property used to commit an offence "goes further" and "is an additional *penalty* provided by Parliament as a deterrent...".⁶² A stronger departure from the policy of the Act as articulated in *Brough* can be found in *Black v R*,⁶³ where the Court of Appeal noted that "the purpose[s] of the provisions relating to a forfeiture are necessarily deterrence and punishment".⁶⁴

A further case to find that forfeiture orders relating to property used to commit an offence are punitive is *Solicitor-General v Wong*⁶⁵. In *Wong*, the High Court had to decide whether to

59 It may be that the legislation intended there to be an element of punishment in the confiscation of the proceeds of crime, as s27(3) directs the court to disregard any expenses or outgoings in relation to the offence. However, in *Pedersen* the Court held that the cost of the drugs is not an expense or outgoing for the purposes of that section; *R v Pedersen* above n 51, 39 per Cooke P. The Court could therefore have avoided the punitive impact of confiscation of gross profits.

60 *R v Dunsmuir* [1996] 2 NZLR 1 (CA).

61 *R v Dunsmuir* above n 60, 6.

62 *R v Dunsmuir* above n 60, 6 [emphasis added]. The approach in *Dunsmuir* was adopted by the High Court in *Solicitor-General v McCurdy* (4 May 1998) unreported, High Court Auckland Registry, M1/98.

63 *Black v R* (1997) 15 CRNZ 278 (CA).

64 *Black v R* above n 63, 281.

65 *Solicitor-General v Wong* (1997) 14 CRNZ 624 (HC) [*S-G v Wong*].

order forfeiture of the respondent's home, which had been used in connection with cannabis offences. The serious offences in respect of which the property was tainted had been committed by the respondent's partner, but with the respondent's knowledge and acquiescence.⁶⁶

In deciding whether to order forfeiture, the Court found that it "must look at the degree to which the forfeiture, *which is a punishment*, equates with the wrongdoing of the respondent".⁶⁷ The Court held that the degree of the respondent's involvement in the offence was relevant "in determining whether forfeiture, being an ultimate deterrent penalty to her,...should occur",⁶⁸ as the punishment must "fit the crime".⁶⁹

This view of forfeiture of property used to commit offences as punitive seems to be reflected in the case of *R v Merwood*.⁷⁰ *Merwood* concerned forfeiture of property used to grow cannabis. Merwood appealed against the sentence imposed, arguing that two years' imprisonment combined with the forfeiture of her home, was excessive.⁷¹ When sentencing Merwood, the trial judge said:⁷²

where a Forfeiture Order is made, and particularly in a case where it is a principal asset such as a home,...the Court ought to give some allowance for that on the starting point [for the sentence] that would otherwise apply...

66 *S-G v Wong* above n 65, 627. Wong plead guilty to the charge of knowingly permitting premises to be used for an offence against the MDA. She was discharged without conviction. This offence, however, is not a serious offence for the purposes of the PCA because its maximum penalty is three years' imprisonment (s12(2)(c) of the MDA). However, the PCA does not preclude forfeiture of property used in offences which the owner did not commit; *S-G v Wong* above n 65, 628.

67 *S-G v Wong* above n 65, 630 [emphasis added].

68 *S-G v Wong* above n 65, 631.

69 *S-G v Wong* above n 65, 634. The Court held that this inquiry was relevant under s15(2)(d) of the PCA which provides that the court may consider the nature and circumstances of the offence when deciding whether to order forfeiture.

70 *R v Merwood* (23 May 1995) unreported, Court of Appeal, CA 27/94.

71 *R v Merwood* above n 70, 6-7.

72 *R v Merwood* above n 70, 7.

In stating this, the trial judge purported to apply *Brough*.⁷³ This may suggest that he considered forfeiture of a substantial asset, such as a home, as routinely falling within the exceptional circumstances in *Brough*. The Court of Appeal did not depart from this decision, perhaps indicating that the exceptions in *Brough* have wider applicability than appeared from the original decision.

Thus, perhaps as a result of the difficulty in conceptualising this type of forfeiture as non-punitive, the courts seem to have been more willing to take forfeiture of property used to commit offences into account when sentencing.

The courts also seem to have taken a broader approach than implied in *Brough* in determining whether the sentence imposed is a relevant consideration when ordering forfeiture. For example, *Solicitor-General v Sanders*⁷⁴ involved an application to forfeit property used to commit cannabis offences. The respondent had previously been sentenced to four and a half years' imprisonment in respect of the offences. The Court found that a severe penalty may be relevant when deciding whether to make a forfeiture order.⁷⁵

The Court also considered the effect of section 9 of the New Zealand Bill of Rights Act 1990, which provides the right "not to be subjected to torture or to cruel, degrading or disproportionately severe treatment or punishment". The Court found that, as the PCA does not specifically require the court to consider any sentence imposed when ordering forfeiture, the total package of imprisonment and confiscation orders may be disproportionately harsh.⁷⁶ However, the Court found that sections 15(2)(b) and 15(2)(d) allow a global approach to forfeiture, and that a disproportionately severe package should therefore be avoided.⁷⁷

Consequently I believe that the overall sanction package should be considered having regard to the spirit of the right not to be subjected to disproportionately severe punishment and having regard to the strength of any deterrent element necessary...

73 *R v Merwood* above n 70, 7.

74 *Solicitor-General v Sanders* (1995) 2 HRNZ 24 (HC) [*S-G v Sanders*].

75 The Court found that a severe penalty could be a relevant consideration under s15(2)(b) of the PCA which provides that the court may consider any undue hardship which may be caused by a forfeiture order.

76 *S-G v Sanders* above n 74, 31.

77 *S-G v Sanders* above n 74, 32.

The Court in *Sanders* therefore suggests that sentencing and forfeiture will have some relevance to each other, as taken together they must not be unduly harsh.⁷⁸ This is consistent with the approach of the courts in Western Australia to similar legislation. For example, in *R v Rintel*⁷⁹ it was held that it is relevant to consider the sentence imposed when deciding whether to order forfeiture because "there must...be some proportionality between the totality of the final outcome and the gravity of the offence."⁸⁰

The *Sanders* approach is also consistent with the United Kingdom legislation which provides that when considering whether to order forfeiture, the court must consider the value of the property, and the likely financial and other effects on the offender of forfeiture taken together with any other order that the court contemplates making.⁸¹ This suggests that forfeiture will be relevant to sentencing, and that forfeiture "should not be combined with other penalties if the overall effect becomes too severe in the circumstances of the case".⁸²

This approach has been confirmed in cases under the Act. In *R v Lister*,⁸³ the Court held that it was relevant to consider the fact that the appellant's machinery had been forfeited when deciding whether the sentence imposed was excessive.⁸⁴ Further, in *R v Buddo*,⁸⁵ the Court held that the sentence imposed is a relevant consideration when deciding whether to order

78 The Court in *Dunsmuir* also found that in some cases sentence may be relevant to forfeiture as a circumstance of the offender under s 15(2)(d) of the PCA. The Court said this may be relevant if, for example, the sentence was imposed in ignorance of the possibility of a forfeiture application; *R v Dunsmuir* above n 60, 7.

79 *R v Rintel* above n 45.

80 *R v Rintel* above n 45, 532. This approach was affirmed in *R v Baxter* (1991) 6 WAR 103, 104 (SC of Western Australia). However, the Court held that it is not relevant to consider disparity in sentences between co-offenders when deciding whether to order forfeiture.

81 Sections 43(1A)(a) and (b) of the Powers of Criminal Courts Act 1973 (UK).

82 Andrew R Mitchell, Susan M E Taylor and Kennedy V Talbot *Mitchell, Taylor and Talbot on Confiscation and the Proceeds of Crime* (2ed, Sweet and Maxwell, London, 1997) 207.

83 *R v Lister* (1982) 4 Cr App R (S) 331.

84 *R v Lister* above n 83, 333.

85 *R v Buddo* (1982) 4 Cr App R (S) 268.

forfeiture.⁸⁶ In that case, because the sentence imposed was relatively severe, the Court quashed the order for forfeiture of the appellant's motor vehicle.

V IMPLEMENTATION OF OTHER CONFISCATION LEGISLATION BY THE COURTS

As noted above, the PCA is not the only Act which provides for the confiscation of the proceeds or instruments of crime. A number of other statutes established forfeiture regimes well before the enactment of the PCA.

As with the PCA, by confiscating the profits of illegal activity these Acts aim to provide an additional deterrent to offending. Confiscation of the property used to commit offences under these Acts also aims to deter crime and to prevent the commission of future offences by removing the means of offending. Thus, while the actual provisions of these Acts vary, consideration of the courts' approach to the relationship between confiscation and sentencing under these statutes is relevant to the PCA because these statutes provide for the same sort of confiscation and were enacted with similar aims to the PCA.

A Interpretation and Application of the Misuse of Drugs Act 1975

1 Confiscation provisions under the Misuse of Drugs Act 1975

Like the PCA, both the proceeds of offending and the property used to commit offences may be forfeited under the provisions of the Misuse of Drugs Act 1975 (MDA). On conviction of any offence under the MDA, all articles in respect of which the offence was committed are automatically forfeited.⁸⁷ If a person is convicted under section 6 of the Act, the courts have a discretionary power to order the forfeiture of any money found in his or her possession;⁸⁸ in addition, the court must order the forfeiture of any vehicle or vessel owned by the offender and used in the commission of the offence unless it would be unjust to do so.⁸⁹

The proceeds of drug dealing may be recovered by way of a fine imposed under sections 38 and 39 of the Misuse of Drugs Amendment Act 1978 (MDAA). If an offender is convicted of

⁸⁶ *R v Buddo* above n 85, 270.

⁸⁷ Section 32(1) of the MDA. Only articles which are in the offender's possession are liable to this automatic forfeiture.

⁸⁸ Section 32(3) of the MDA. Such money is forfeited to the Crown if the court is satisfied that it was received in the course of the offence, or was for the purpose of facilitating the offence.

⁸⁹ Section 32(4) of the MDA.

drug dealing, and the court is satisfied that the offender has acquired any money or assets from the offence, the court may impose a greater fine than it would otherwise have done to reflect this.⁹⁰ Further, if the court is satisfied beyond reasonable doubt that the offender was involved in drug dealing other than that for which he or she has been convicted, the court may increase the fine imposed on the offender to recover money or assets acquired from that previous dealing.⁹¹

The imposition of a fine reflecting the proceeds of drug dealing under section 38 seems equivalent to a pecuniary penalty order imposed under the PCA. However, unlike section 39 of the MDAA, the PCA does not empower the court to recover the proceeds of drug dealing for which the offender has not been convicted.

Where a person has been sentenced to imprisonment for specified drug offences,⁹² section 6(4A) of the MDA directs the court to consider whether it should also impose a fine. The court already has discretion to impose a fine under section 26 of the Criminal Justice Act 1985.⁹³ Therefore, section 6(4A) may simply be a signpost to remind the court to consider imposing a fine under the authority of that section. It is likely that section 6(4A) is also a direction to the court to consider imposing a fine to recover the proceeds of offending under section 38 or 39 of the MDAA.

2 *Application of the MDA*

The MDA states that forfeiture is "in addition to any other penalty imposed".⁹⁴ This may simply highlight that forfeiture is an additional response available to the courts when sentencing offenders. This suggests that forfeiture may be part of, and relevant to, the sentence imposed.⁹⁵ Alternatively, the statement may mean that forfeiture is to be ordered "over and above" the ordinary penalty for the offence. Some support for both interpretations is found in the cases under the Act. However, the courts have been more inclined to consider forfeiture of

90 Section 38 of the MDAA.

91 Section 39 of the MDAA.

92 These are offences relating to class A or B controlled drugs against ss6(1)(a), (b), (c) and (f) of the MDA.

93 Section 26 provides that where a court has the power to sentence an offender to imprisonment, the court may sentence the offender to pay a fine in addition to, or instead of, imprisonment.

94 Sections 32 (1),(3) and (4) of the MDA.

95 This would be in much the same way as a court may order a sentence of imprisonment and a fine.

property used to commit offences relevant to determining the sentence for the offence than confiscation of the proceeds of crime.

In *R v Delellis*,⁹⁶ the Court of Appeal considered the effect of forfeiture orders on the sentence imposed. The case involved an appeal against a sentence for several offences involving cocaine. In total, Delellis was sentenced to seven years' imprisonment, fined \$19,300 under section 38 of the MDAA, and an order was made for the forfeiture of his car under section 32(4) of the MDA.

The Court stated that:⁹⁷

[u]nlike the forfeiture of for example a motor vehicle under s32(4), and a fine under s6(4A), *which are to be seen as components of the proper sentence for the offence*, the forfeiture of money under s32(3) and the additional fine provided for by s38 of the 1978 Amendment Act, *...are sanctions to be applied in addition to the proper sentence*.

Forfeiture under section 32(3) and fines under section 38 are to be in addition to the sentence imposed because they aim to confiscate "drug money".⁹⁸ Thus no allowance should be made in the sentence because the offender was deprived of his or her "ill-gotten gains". This is consistent with the courts' approach to the PCA.⁹⁹

However, the Court in *Delellis* suggests that the sentence should take account of fines "under section 6(4A)" and forfeiture of vehicles used to commit an offence. The Court's language in the paragraph cited is confusing because fines are not actually imposed under section 6(4A). However, it seems that the Court is referring to fines imposed generally as part of the sentence,¹⁰⁰ and not fines designed to recover the proceeds of offences under section 38.

The suggestion that forfeiture of a vehicle used to commit the offence should constitute part of the sentence was affirmed in *R v Wong*.¹⁰¹ In that case, the offender's vehicle was forfeited

96 *R v Delellis* [1990] 2 NZLR 147 (CA).

97 *R v Delellis* above n 96, 152 [emphasis added].

98 *R v Delellis* above n 96, 152.

99 See for example *R v Brough* above n 28; *R v Riki* above n 42.

100 Either under the section against which the offender has been convicted or under s26 of the Criminal Justice Act 1985.

101 *R v Wong* (14 September 1994) unreported, High Court Palmerston North Registry, T28/94.

under section 32(4) of the MDA. The Court also imposed a nine month suspended sentence and periodic detention, but did not impose any fine because it considered forfeiture to be "a sufficient additional penalty".¹⁰² This suggests that the Court did not consider forfeiture of the vehicle to be "over and above" the appropriate penalty but rather to be relevant to determining the appropriate sentence.

Unless such forfeiture falls into one of the exceptional situations provided in *Brough*, the Court's decision in *Brough* seems inconsistent with taking this type of forfeiture into account when sentencing. Therefore, the courts seem more willing to consider forfeiture of property used to commit offences as relevant to the sentence imposed when applying the MDA.

Further evidence of the courts' reluctance to disregard forfeiture when sentencing under the MDA may be found in *Commissioner of Police v Jones*.¹⁰³ In that case, the Court stated that forfeiture of money found in the offender's possession may be relevant to the imposition of a fine.¹⁰⁴ The Court did not specify to which type of fine forfeiture may be relevant. Clearly, forfeiture of money found in the offender's possession should be relevant to a fine imposed to recover the proceeds of an offence under section 38 to avoid double recovery.

However, the Court may be indicating that forfeiture of money found in the offender's possession is relevant to any fine imposed as part of the sentence. This would suggest that the Court sees such forfeiture as part of, rather than separate from, the sentence imposed. This approach would, of course, be inconsistent with the Court of Appeal's decision in *Delellis*.

B Interpretation and Application of the Fisheries Act 1983 and 1996

1 Confiscation provisions under the Fisheries Acts 1983 and 1996

The Fisheries Acts of 1983 and 1996 make provision for forfeiture of both the proceeds of and property used to commit offences. On conviction, a person may be liable to forfeit the fish and proceeds of sale of fish in respect of which the offence was committed, the property (including vessels and equipment) used in the commission of the offence, and any quota

¹⁰² *R v Wong* above n 101, 6. The Court stated that a fine would have been imposed if forfeiture had not been ordered.

¹⁰³ *Commissioner of Police v Jones* (1990) 6 CRNZ 608 (HC) [*Jones*].

¹⁰⁴ *Jones* above n 103, 611.

held.¹⁰⁵ Like the PCA, forfeiture of property used in the commission of the offence is not limited to property in which the offender has an interest.

The court's discretion is more limited under the Fisheries Acts than under the PCA. Under the Fisheries Acts, the court is required to order forfeiture of the relevant property unless special reasons exist to order otherwise.¹⁰⁶ Further, unlike the PCA, the Fisheries Acts specifically provide that any forfeiture is "in addition to, and not in substitution for, any other penalty".¹⁰⁷

2 *Application of the Fisheries Acts 1983 and 1996*

The Fisheries Acts provide that forfeiture is not to be in substitution for any other penalty imposed. This has generally been interpreted by the courts as meaning that forfeiture is not part of the sentence and that no allowance for forfeiture should be made in sentencing.¹⁰⁸ However, several cases have held that the *effects* of forfeiture may be relevant to the imposition of a fine. The first case to adopt this approach was *MacDuff v Ministry of Agriculture and Fisheries*.¹⁰⁹ In that case, the appellant had been convicted of taking undersized rock lobster tails, and was fined \$2,500. His vessel and equipment were forfeited under section 107B of the Fisheries Act 1983.

To determine whether the fine was manifestly excessive the Court held that it was necessary to consider the means of the appellant, and that in doing so it could not ignore the fact that the appellant's vessel and equipment had been forfeited.¹¹⁰ This appears to be a reference to section 27 of the Criminal Justice Act 1985, which provides that when imposing any fine, the court shall have regard to the offender's means and responsibilities. The appellant had limited financial resources and significant debts and responsibilities, and forfeiture of his

105 Section 107B of the Fisheries Act 1983, s255 of the Fisheries Act 1996.

106 See s107B(4) of the Fisheries Act 1983 and s255(2) of the Fisheries Act 1996 for examples.

107 Section 107C of the Fisheries Act 1983 and s256(14) of the Fisheries Act 1996.

108 *Ministry of Agriculture and Fisheries v Sutherland* (2 August 1988) unreported, High Court Invercargill Registry, AP 35/88, 6; *Aston v Ministry of Agriculture and Fisheries* (1994) 11 CRNZ 478 (HC), 481 [*Aston v MAF*].

109 *MacDuff v Ministry of Agriculture and Fisheries* (30 November 1990) unreported, High Court Invercargill Registry, AP 52/90 [*MacDuff v MAF*].

110 *MacDuff v MAF* above n 109, 5.

vessel prevented him from carrying on his business. Considered in this light, the Court decided that the fine was manifestly excessive.¹¹¹

The approach in *MacDuff* has been applied in a number of subsequent cases. Thus forfeiture may be relevant to the imposition of a fine to the extent that it impacts on the ability of the offender to pay any fine.¹¹² As a corollary of this, the fact that an offender's property has not been forfeited may be a relevant consideration when imposing a fine under the Fisheries Act. This approach was adopted in *Blair v Ministry of Agriculture and Fisheries*¹¹³ and *Gibbs*, because if the offender's property has not been forfeited, his or her ability to pay any fine is not affected.¹¹⁴

When applying the PCA, the courts have not relied on section 27 to consider the impact of forfeiture on the means of an offender to pay a fine. However, the approach of the courts under the Fisheries Acts illustrates that they are generally reluctant to disregard the harsh effects of forfeiture of property used to commit offences when sentencing.

C Interpretation and Application of the Criminal Justice Act 1985

1 Confiscation provisions under the Criminal Justice Act 1985

Under section 84 of the Criminal Justice Act (CJA), the court may confiscate any motor vehicle which was used to commit or facilitate the commission of an offence.¹¹⁵ Similar to

111 *MacDuff v MAF* above n 109, 6-7.

112 *Ministry of Agriculture and Fisheries v Montgomery* [1993] DCR 872, 887; *Aston v MAF* above n 108, 482; *Ministry of Agriculture and Fisheries v Equal Enterprises Limited* [1994] 2 NZLR 473, 479 (HC); and *Siu v Ministry of Agriculture and Fisheries* (26 April 1998) unreported, High Court Wellington Registry, AP 131/98, 3.

113 *Blair v Ministry of Agriculture and Fisheries* (12 July 1991) unreported, High Court, Auckland Registry, AP 94/91.

114 Section 27 was not referred to in *Blair*, and so it is unclear if the Court viewed the relevance of non-forfeiture as limited to this factor. If *Blair* is read as giving non-forfeiture relevance to the imposition of fines beyond its relevance to s 27, it would seem to be inconsistent with the legislation. This is because the statute provides that forfeiture is not in substitution for any other penalty, suggesting that if forfeiture is not ordered, the other penalties should not be increased to compensate.

115 Section 84 of the CJA.

section 25(2) of the PCA, the CJA provides considerations which the court may take into account when exercising its discretion to order confiscation.¹¹⁶

Unlike the PCA, under the CJA only a vehicle in which the offender has an interest may be confiscated.¹¹⁷ Further, the CJA provides that confiscation may be "in addition to or instead of passing any other sentence".¹¹⁸ It is also important to note that confiscation under the CJA is not tantamount to forfeiture. Under section 87 of the Act, confiscated vehicles are to be sold and the equity in the vehicle is paid to the offender once costs and any fines owing by the offender have been paid.

2 *Application of the Criminal Justice Act 1985*

The confiscation provisions under the CJA have not often been invoked in the courts since their enactment in 1976.¹¹⁹ Contrary to *Brough's* application of the PCA, in cases where confiscation has been considered under the CJA, it has been seen as appropriate to take confiscation into account when sentencing. For example, in *Vitolio v Police*¹²⁰ the trial judge had taken the confiscation of the appellant's vehicle into account when fixing the term of periodic detention.¹²¹ This approach was approved by the High Court.

A similar approach was adopted in *Wrathall v Police*¹²² where the Court found that the effect of a confiscation order combined with a sentence of 18 months' imprisonment was manifestly excessive. The Court took the view that "when considering confiscation [the Court] must have regard to the other consequences which have been imposed or which will take effect as the result of the Court's actions".¹²³ These cases clearly seem to be more willing to take forfeiture into account when sentencing than the cases under the PCA.

¹¹⁶ Section 84(4) of the CJA. These include: any undue hardship which may be caused to the offender in relation to his or her employment or trade; any undue hardship which may be caused to any other person; and the nature and extent of the offender's interest in the vehicle.

¹¹⁷ Section 84(2) of the CJA.

¹¹⁸ Section 84(2) of the CJA.

¹¹⁹ *MacFarlane v Police* (23 July 1986) unreported, High Court Wellington Registry, M221/86, 3-4.

¹²⁰ *Vitolio v Police* [1994] 3 NZLR 210, 213 (HC).

¹²¹ *Vitolio v Police* above n 120, 215.

¹²² *Wrathall v Police* (30 April 1996) unreported, High Court New Plymouth Registry, AP 11/96.

¹²³ *Wrathall v Police* above n 122, 4.

D Conclusion

From the above consideration of the courts' approach to confiscation legislation, it emerges that generally the courts do not consider the forfeiture of the profits of crime to be punitive. Thus, such forfeiture has been held to be separate from and additional to the sentence imposed for the offence.¹²⁴ Apart from cases which are concerned with the gross proceeds of offences, this approach is consistent with the courts' application of the PCA.

It is evident from cases under the MDA and CJA that the courts are more likely to consider forfeiture of property used to commit an offence as relevant to sentencing. The Fisheries Acts have been interpreted as precluding the courts from taking forfeiture into account when sentencing. However, the courts have not disregarded the effects of forfeiture under those Acts when imposing fines by applying section 27 of the CJA.

It seems that the courts do not take such a generous approach when applying the PCA. However, it is argued that the courts' approach to other confiscation legislation should inform their approach to the PCA, because the statutes were enacted with similar purposes and provide for similar types of confiscation. Further, while some of the statutory provisions vary, there is nothing in the PCA to preclude the adoption of a similar approach. In fact, as will be explained below, there are a number of reasons why the general approach of the courts to other confiscation legislation should be applied to the PCA.

VI HOW SHOULD THE COURTS APPROACH CONFISCATION UNDER THE PROCEEDS OF CRIME ACT?

A Approach to Confiscation of the Proceeds of Crime

Under the PCA, to the extent that confiscation of the proceeds of crime reflects the actual profits of the offending, there can be no issue with the courts' approach of considering such confiscation as non-punitive and disregarding it when sentencing. However, a problem arises in some situations because the courts have interpreted "benefits" to mean the gross profits or receipts of the offender.¹²⁵ For example, this becomes an issue in cases where the offender does not cultivate or produce drugs, but must pay a supplier for them.

124 *R v Delellis* above n 96, 152.

125 *R v Pedersen* above n 51.

In this case, the offender has in fact only been enriched to the extent of the net profits. Therefore, confiscation of the gross profits goes further than restoring the status quo, as it puts the offender in a worse position than before the offence.¹²⁶ Thus it can be argued that confiscation of anything more than the net profits amounts to punishment of the offender and should be taken into account when sentencing. As will be discussed below, the courts' failure to adopt this approach has the potential to create injustice.

B Approach to Confiscation of Property Used to Commit the Offence

The courts' approach to the confiscation of property used to commit offences has not been consistent under the PCA. This article contends that such forfeiture must be viewed as punitive, and that the courts should adopt the approach that such forfeiture is relevant to sentencing.

One argument which may support the view that forfeiture of property used to commit an offence is not punitive, is that forfeiture under the PCA may be ordered regardless of who owns the property. Forfeiture of property used to commit offences may be seen as "in rem" proceedings, where the focus is on the "guilty chattel" rather than punishment of the offender.¹²⁷ Therefore, it may be argued that cases under the MDA and CJA, which do suggest that such forfeiture is punitive, should be distinguished because those Acts only confiscate property belonging to the offender.

However, it has been argued that the concept of the "guilty chattel" is fictional because "[a]ll proceedings...are really against persons", not objects.¹²⁸ It is submitted that conceptualising proceedings as "in rem" is simply a way of obscuring their punitive effect on offenders and third parties.¹²⁹

Further, the PCA itself indicates that the culpability or level of involvement of the owner is relevant to the question of forfeiture of his or her property. This supports the view that

126 "Confiscation and Forfeiture Legislation in Australia" above n 23, 50; M Weinberg "The Proceeds of Crime Act 1987 - New Despotism or Measured Response?" (1989) 15 Monash University Law Review 201, 204; "Confiscation of Proceeds of Crime" above n 40, 377.

127 "Confiscation and Forfeiture Legislation in Australia" above n 23, 49.

128 "Fofeiture, Confiscation and Sentencing" above n 36, 142.

129 "Forfeiture, Confiscation and Sentencing" above n 36, 143.

confiscation is a form of punishment of the owner because it will only be imposed if it is deserved.¹³⁰

Therefore, if forfeiture of property used to commit an offence is seen as punitive, it is just and logical that such forfeiture should be taken into account in sentencing. While the Court in *Brough* held that this should only occur in exceptional cases,¹³¹ this article contends that justice cannot be achieved unless it is taken into account as a matter of course.

C Avoiding Disproportionate Punishment

As has been shown above, there are strong arguments suggesting that confiscation of the gross proceeds and property used to commit an offence is punitive. When the courts adopt the view that such confiscation is not punitive and disregard confiscation when sentencing, a significant risk of injustice is created because the total sentence may be disproportionate to the offence.¹³² This is because a sentence which, on its own, may be appropriate for the gravity of the offence, may become excessive when combined with confiscation.

That the punishment imposed must be proportionate to the offence is a fundamental requirement of retributive sentencing principles.¹³³ Even when the objectives of deterrence and incapacitation are sought, which do not require proportionate sentences to achieve their ends, the New Zealand Court of Appeal has stated that:¹³⁴

a reasonable relationship to the penalty justified by the gravity of the offence must be maintained.
The desirability of prevention [of future offences] must be balanced against that gravity.

130 See s15(2)(d), 17 and 18 of the PCA.

131 M Dyhrberg and Chris Morris *The Proceeds of Crime Act 1991* (New Zealand Law Society, Wellington, 1995) 34.

132 "Confiscation and Forfeiture Legislation in Australia" above n 23, 50.

133 Andrew Ashworth *Sentencing and Criminal Justice* (2ed, Butterworths, London, 1995) 70. For evidence of this approach in New Zealand see *R v Puru* [1984] 1 NZLR 248; *R v B* [1984] 1 NZLR 261; *R v Hiha* [1987] 2 NZLR 119.

134 *R v Ward* [1976] 1 NZLR 588, 591 (CA).

This approach, which emphasises the importance of ensuring that the sentence imposed bears some relationship to the gravity of the offence, has been affirmed in several later cases.¹³⁵

This is supported by section 9 of the New Zealand Bill of Rights Act 1990 (NZBORA) which guarantees the right not to be subjected to "disproportionately severe treatment or punishment". Thus if the courts fail to consider confiscation and the sentence together, the combined package may not only be unjust, but may also be contrary to the NZBORA.¹³⁶ This is a strong argument supporting the view that the courts should take confiscation into account when sentencing.

D A Change in Approach

The above discussion indicates that a consistent and transparent approach to the PCA is needed, and that the courts should approach the PCA in the same way as they have approached other confiscation legislation. Thus the courts should recognise as punitive both the confiscation of property used to commit offences, and confiscation of the gross profits of offences. Once this is accepted, justice requires the courts to take this confiscation into account when imposing the sentence for the offence.

The PCA already allows sentencing to be deferred until any confiscation application has been determined.¹³⁷ Therefore, the use of this power to ensure that consideration of confiscation and sentencing occurs together seems critical to ensure that appropriate sentences are imposed.

However, if a sentence is imposed before the confiscation application is decided, the courts can still consider the combined impact of confiscation and sentence when exercising their discretion to order confiscation. If the application relates to property used to commit an offence, sections 15(2)(a) and (d) can be interpreted to allow the courts to have some regard to the sentence already imposed when deciding whether to order forfeiture.¹³⁸ If the application

¹³⁵ See for example *R v Agent* (17 December 1980) unreported, Court of Appeal, CA 15/80; *R v Pattison* (2 August 1988) unreported, Court of Appeal, CA93/88; *R v O'Brien* (17 May 1994) unreported, Court of Appeal, CA 514/93; *R v Carter* (30 July 1996) unreported, Court of Appeal, CA160/96.

¹³⁶ See *S-G v Sanders* above n 74, 31-32.

¹³⁷ Section 14(2) of the PCA.

¹³⁸ *S-G v Sanders* above n 74, 32; Auckland District Law Society Public Issues Committee *Confiscation of the Proceeds of Crime* (Auckland District Law Society, Auckland, 1993) 6.

relates to the proceeds of the offence, the courts could use their discretion to reduce the penalty amount to ensure that the total punishment is not disproportionate to the offence.¹³⁹

It could be argued that this approach will create significant controversy and attract criticism that the aims of the legislation will be defeated. However, if the aim of the legislation is to deter serious crime by providing harsher penalties, this is not necessarily compromised by allowing confiscation to impact on sentencing. Heavier penalties, including forfeiture, may be deemed desirable for such offending. However, this should be brought about openly and as part of the sentencing process to ensure that fundamental principles of justice are not compromised.¹⁴⁰

VII CONCLUSION

The PCA was enacted in response to concern about increasing serious and organised crime. The Act aims to reduce such crime by providing an additional deterrent to traditional punishments by confiscating the profits and means of offending.

It has been shown that the courts' application of the PCA has not always been consistent. In particular, the question of whether confiscation orders are punitive has not been conclusively determined. Further, the circumstances in which the courts will allow forfeiture to impact on the sentence imposed are not clearly defined.

Several other statutes also provide for confiscation of the proceeds and instruments of crime, and were enacted with similar aims to the PCA. From the cases decided under these statutes, it appears that the courts do consider that forfeiture of property used to commit offences should be taken into account when determining the sentence to be imposed.

This article has argued that this approach should also be adopted under the PCA. While it has been shown that confiscation of an offender's "ill-gotten gains" does not constitute punishment, it is submitted that confiscation of the gross profits of offences and property used to commit offences is punitive. Therefore, it is essential that this type of forfeiture is considered when sentencing to avoid disproportionate punishment being imposed. It is submitted that only by adopting this approach can the potentially arbitrary and oppressive operation of the PCA be avoided.

139 Section 25(1)(b) of the PCA.

140 "Confiscation of Proceeds of Crime" above n 40, 378.

