

**JURISDICTION** : DISTRICT COURT OF WESTERN AUSTRALIA  
IN CIVIL

**LOCATION** : PERTH

**CITATION** : COMMISSIONER OF THE AUSTRALIAN  
FEDERAL POLICE -v- SAYED [2014] WADC 37

**CORAM** : FENBURY DCJ

**HEARD** : 17-18 FEBRUARY 2014

**DELIVERED** : 31 MARCH 2014

**FILE NO/S** : POC 7 of 2009

**MATTER** : IN THE MATTER of an Application pursuant to s 18  
and s 116 of the *Proceeds of Crime Act 2002* (Cth)

AND

IN THE MATTER of property of  
ANWAR SHAH WAFIQ SAYED

**BETWEEN** : COMMISSIONER OF THE AUSTRALIAN  
FEDERAL POLICE  
Applicant

AND

ANWAR SHAH WAFIQ SAYED  
Respondent

---

*Catchwords:*

Proceeds of crime - Application for Pecuniary Penalty Order - Turns on own facts

*Legislation:*

*Proceeds of Crime Act 2002* (Cth) s 18, 116

*Result:*

Pecuniary Penalty Order made

**Representation:**

*Counsel:*

Applicant	:	Mr E W L Greaves & Ms L D Howells
Respondent	:	Mr P J Vincent

*Solicitors:*

Applicant	:	Australian Federal Police, Proceeds of Crime Litigation
Respondent	:	Ken Bates

**Case(s) referred to in judgment(s):**

R v Fagher (1989) 16 NSWLR 67

1     **FENBURY DCJ:** This is an application by the Commissioner of the Australian Federal Police (AFP) for a Pecuniary Penalty Order (PPO) against the respondent, Mr Sayed.

2             The application is brought pursuant to pt 2 – 4, div 2 of the *Proceeds of Crime Act 2002* (POCA). The principal objects of the Act are set out in s 5(a) as follows:

- (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.

3             The Commissioner of the AFP has brought this application. The Commissioner of the AFP is a 'proceeds of crime authority' under s 338 of POCA and has replaced the Director of Public Prosecutions (Cth) as the applicant in these proceedings. This event occurred in compliance with and according to the POCA.

4             Pursuant to s 335 POCA this court has 'proceeds jurisdiction' to hear the matter.

5             Section 116 of POCA deals with the making of pecuniary penalty orders in the following terms:

- (1)     A court with proceeds jurisdiction **must** make an order requiring a person to pay an amount to the Commonwealth **if**:

- (a)     a proceeds of crime authority applies for the order; **and**

- (b)     the court is satisfied of **either or both** of the following;

- (i)     the person has been convicted of an indictable offence, and has derived benefits from the commission of the offence;

- (ii)    the person has committed a serious offence.

- (2)     Repealed.

- (3)     In determining whether a person has derived a benefit, the court **may** treat as property of the person any property that, in the court's opinion, is subject to the person's effective control. (emphasis mine)

6             Mr Sayed was tried by jury in a trial that ran for a number of weeks and resulted in convictions on 28 October 2010.

7           Count 1 on the indictment alleged that between 4 August 2006 and 1 February 2007 at Perth, Mr Sayed, with intent to defraud by deceit or fraudulent means, gained a benefit for Muslimlink Australia Ltd (Muslimlink), contrary to s 409(1)(c) of the *Criminal Code* (WA) (WA Code).

8           Count 2 alleged that between 13 September 2006 and 16 January 2007 at Perth, Mr Sayed, by deception, dishonestly obtained a financial advantage from another person namely the Department of Education, Science and Training (Commonwealth department), contrary to s 134.2(1) of the *Criminal Code* (Cth) (Commonwealth Code).

9           The maximum penalties for these two offences respectively were 7 years and 10 years imprisonment.

10          In her sentencing remarks on 30 November 2010, the trial judge made a number of findings of fact before sentencing Mr Sayed to a total effective head sentence of 3 years and 6 months' imprisonment with a pre-release or non-parole period of 2 years 9 months.

11          Mr Sayed appealed the convictions and sentence to the Court of Appeal. The Court of Appeal dismissed the appeals against conviction but allowed the appeal against sentence and reduced the sentence: *Sayed v The Queen* [2012] WASCA 17.

12          In the Court of Appeal's reasons, written by Buss JA, the trial judge's findings of fact were summarised in [29(a)] – [29(l)] inclusive. It is not necessary for this court to repeat that exercise. I adopt the summary contained in the judgment of the Court of Appeal.

13          It was undisputed that large sums of moneys were advanced by the Commonwealth to the Muslim Ladies College of Australia and that these payments were based upon false and inflated census figures. It was not possible, apparently, for the prosecution to assert with any precision the amount of overpayment with respect to each count. This was so because of problems in the proof of how many students actually attended class at the two relevant dates. However, it is undeniable that the extent of overpayment was in excess of \$10,000 in each case.

### **The issues**

14          In essence there are two issues to be considered in this matter. The first is whether the order sought by the Commissioner of the AFP

should be made. In other words is Mr Sayed liable to have a PPO made against him.

15 If an order is to be made then the amount of the order needs to be determined. This will require a finding as to the extent to which overpayments were made which is obviously based on the difference between the number of students claimed for and the number who actually attended.

16 Some other relevant words and phrases in s 116 are defined in the POCA as follows. 'Derived' in s 116(1)(b)(i) is defined in s 336 as follows:

**Derived**

A reference to a person having derived ... a benefit ... includes a reference to:

- (a) the person; or
- (b) another person at the request or direction of the first person; having derived the ... benefit ... directly or indirectly.

17 'Serious offence' in s 116(1)(b)(ii) is defined in s 338 as follows:

**A serious offence means (relevantly):**

- (a) an indictable offence punishable by imprisonment for 3 or more years, involving ...
  - (iii) unlawful conduct by a person that causes, or is intended to cause, a benefit to the value of at least \$10,000 for that person or another person.

18 'Effective control' in s 116(1)(b)(iii) is defined in s 337 as follows:

**Meaning of effective control**

- (1) property may be subject to the effect of control of a person whether or not the person has
  - (a) a legal or equitable estate or interest in the property; or
  - (b) a right, power or privilege in connection with the property.
- ...
- (5) In determining whether or not property is subject to the effective control of a person, regard may be had to:

- (a) ... directorships of a company that has an interest (whether direct or indirect) in the property.

**Liability – should a PPO be made?**

19 From the language used in s 116 POCA, it appears that the legislative intention is that a PPO is to be made if the criteria are satisfied. Once those criteria are met, the court has no discretion and must make the order.

20 Here it is clear that Mr Sayed has been convicted of an indictable offence and that it was a serious offence.

21 That latter fact is sufficient to trigger the section and require the making of the order sought. However it is reasonable to consider whether Mr Sayed also derived benefits from the commission of the offence and whether the related issue of his having effective control is made out.

22 The moneys provided by the Commonwealth through the relevant government department in the State of Western Australia and the relevant Commonwealth department were received by Muslimlink Australia Ltd (Muslimlink) which was the governing body of the school concerned, the Muslim Ladies College of Australia.

23 Mr Sayed was a director of the company, Muslimlink.

24 These facts were admitted by Mr Sayed at his criminal trial.

25 Mr Sayed also admitted that Muslimlink received payments on behalf of the school as follows:

- \$433,334 on 12 October 2006
- \$49,035.80 on 29 November 2006
- \$479,052.20 on 16 January 2007

26 It seems to me given the meaning of 'derived', that Mr Sayed, being a director of the company which was a governing body of the school that received the moneys, and being the person who made the relevant request and/or direction, derived the benefit indirectly.

27 For the same reasons, given his status in the company and his undeniable conduct, it seems to me that Muslimlink was subject to his effective control.

28 Having regard to the language of the section and the admitted but  
incontestable factual material, or that which is necessarily found or to be  
found following his conviction, a PPO order must be made.

29 However, on behalf of Mr Sayed, a number of arguments are put to  
which I will now turn.

### **Respondent's case**

30 The two counts in the indictment for which Mr Sayed was found  
guilty covered the periods between 4 August 2006 and 1 February 2007  
for count 1 and 13 September 2006 and 16 January 2007 for count 2.  
The offences were committed, in the sense of being complete, when the  
benefits or financial advantages were obtained.

31 These proceedings were commenced by originating motion dated and  
filed 22 December 2009 for a restraining order pursuant to direction s 18  
of the POCA and a PPO pursuant to s 16.

32 As I have mentioned, Mr Sayed was found guilty of both counts after  
trial by a jury on 28 October 2010.

33 Mr Sayed contends in his Response to the Applicant's Amended  
Statement of Issues Facts and Contentions (the Response) as follows:

17. Section 317(1) of the Act provides that the applicant bears the onus of proving the matters necessary to establish the grounds for making the order applied for. For the operation of the section, the particular order (including content) and grounds must therefore be particularised. This is also required by the scheme of the Act, as there are different requirements and consequences depending on the grounds and content of applications for pecuniary penalty orders (see example s 116, 117, 121, 124, 134 and 137).
18. The respondent contends that the grounds and content of the applicant's application must be regarded as those relied on in the original application, namely the originating motion filed 22 December 2009 referred to in par 1 of the applicant's contentions.
19. As the originating motion pre-dated any alleged conviction of the respondent (28 October 2010 – par 7 of the applicant's contentions), the grounds for the application cannot now be said to be the respondent's alleged conviction, so contrary to the contention in par 11 of the applicant's contentions, there is no requirement at law that the court **must** now make a pecuniary penalty order. It is still necessary for the applicant to prove the grounds for such an order as required by s 317(1) of the Act.

34        There does not seem to me to be any basis in the POCA for Mr Sayed's assertion that his conviction for these offences is not a matter that can be relied upon in the applicant's proof. The language in s 116(1)(b) speaks of the court being able to make an order if either or both of the following circumstances exists, namely:

- (i)        The person has been convicted of an indictable offence; and
- (ii)       The person has committed a serious offence.

35        It is not specified that the person must have been convicted of a serious offence but that he has 'committed one'.

36        It is quite clear that the originating motion was filed after the offences had been 'committed' but before conviction. Nowhere in the Act is it stated that the applicant must hold fire until the jury's verdict. As counsel for the applicant put it at ts 151:

My friend says the incident occurred on the date of conviction. We say, no, s 116(1)(b) cause of action had crystallised, the cause of action was capable of being sued upon, when the offence was complete. It is crystal clear that the offence was complete in 2006, that there was nothing in the criminal trial that would suggest otherwise. These proceedings were instituted in 2009. There was nothing untoward and there was nothing premature and critically nothing incompetent in the bringing of the application reliant on s 116(1)(b) in 2009.

37        The essence of the submission on behalf of Mr Sayed is that because the proceedings were commenced before he was convicted, albeit after the offence was committed, means that the applicant cannot rely upon the conviction. I do not think this can be correct and I do not accept the submission.

38        I am satisfied that both of the criteria spelt out in s 116(1)(b) exist in the case in the sense that Mr Sayed has been convicted of an indictable offence and he has committed a serious offence.

39        It is submitted that the court has a discretion under the POCA whether to make a PPO. This submission was based on the court accepting the argument that the applicant cannot rely on Mr Sayed's conviction.

40        As the court has rejected the primary submission, the issue may not be said to arise. In any event however, having regard to the language of s 116, the objects of the POCA in s 5 and generally the arguments



advanced on behalf of the applicant, this court has no discretion in the circumstances.

41        I now turn to the issue of whether Mr Sayed 'derived benefits' from the commission of the offence. As I have observed, Mr Sayed was a director of Muslimlink. Muslimlink was the company that ran the school. The moneys provided were paid to Muslimlink. This occurred as the result of arrangements made by Mr Sayed. In the premises, the court may treat these payments to Muslimlink as derived benefits to Mr Sayed. The fact he did not personally financially benefit directly is irrelevant. Of course that is debatable in any event. Obviously the injection of the unlawfully obtained funds into the school prolonged the commercial viability of the school thus providing Mr Sayed, presumably, with continued employment.

42        It is also put that a PPO should not be made against Mr Sayed because, being a penalty, it is a form of punishment and Mr Sayed has already been adequately punished. He was sentenced to and has served a substantial term of imprisonment. It is said it would be unduly harsh and oppressive for Mr Sayed to suffer further.

43        In considering this submission, sight must not be lost of the fact that Mr Sayed engaged in premeditated, sustained, repeated, seriously dishonest conduct in committing these offences. Although his motive might be said to be laudable or pure, the fact is, in essence, the Commonwealth government funded by the taxpayers suffered significant financial loss. Mr Sayed has made no restitution. Apparently he has real property. It is probable it will need to be sold to satisfy the PPO. There is nothing unfair or unjust in this, it seems to me.

44        Allied to this last submission, it is also put that Mr Sayed does not have the means to satisfy a PPO and having regard to that and his family circumstances and the harsh effect on them the making of an order will have, this is an added relevant reason for the court not to make a PPO order.

45        Regrettably, my view is that these matters can have no relevance to the decision of the court.

46        In my view, given the requirements of s 116 of the POCA are satisfied, then the order sought must be made.

**Quantum of PPO**

47 I now turn to the question of the quantum of the pecuniary penalty  
that Mr Sayed must pay under the PPO.

48 By s 121(3) of the POCA the penalty amount to be determined for  
the purposes of the PPO is obtained by assessing the value of the benefits  
the person derived from the commission of the offence etc.

49 By s 122, in assessing the value of the benefits, the court is to have  
regard to evidence concerning, relevantly:

(a) the money that because of the alleged activity came into the  
possession or under the control of Mr Sayed or Muslimlink.

50 It is not difficult to ascertain how much Mr Sayed received. It is the  
evaluation of how much he was entitled to that is challenging. Once that  
figure is ascertained then the value of the benefit to Mr Sayed is the  
difference between the two figures. The evaluation of how much  
Mr Sayed was entitled to is based on the number of students at the school  
at the time the claim for government assistance was made. The evidence  
about that is imprecise.

51 In *R v Fagher* (1989) 16 NSWLR 67, 80 being a decision of the  
Court of Appeal, but in separate reasons Allen J, when dealing with  
legislation broadly similar to the POCA said:

... the court should not lose sight of reality that the court, to fulfil its  
statutory obligation, often will have to assess the value of the benefits  
derived by the defendant on material which is far less satisfactory than  
what it normally would expect to have in litigation. It is not the nature of  
criminals to keep records of such a kind as to assist the court; nor is it the  
nature of criminals to tell the truth when telling a lie would seem more  
advantageous. The sections clearly recognise the difficulty of the task  
imposed upon the court and accept that the assessment of the value must in  
many cases be a somewhat rough and ready process.

52 In considering my finding as to an appropriate figure for the number  
of students actually attending the school it is also to be noted that  
Mr Sayed has not given evidence of an alternative figure. In other words  
he has not given evidence of how many students were there when the  
applications for funding were made. This is the case in circumstances  
where he would be likely to have had knowledge. As the significant  
operative for Muslimlink he would have known how many students were  
at the school at the relevant time.

53           Of course, at his criminal trial, I surmised Mr Sayed was committed to his assertion before the jury that the figures he provided to the authorities on student numbers were accurate, given his not guilty plea. Although I have got no doubt Mr Sayed has a fair idea of the correct figure, his lack of evidence about it is not something that I should regard, in an adverse sense, in this matter.

54           The Muslim Ladies College of Australia was an approved educational institution that was entitled to government funding. The extent of funding depended on student numbers and rates varied depending on the year or grade of the class. The greater the number of students attending the school, the greater the funding provided.

55           The jury convicted Mr Sayed of dishonestly inflating the numbers of students at the college so as to secure extra funding to which it was not otherwise entitled.

56           The evidence as to the quantum of funding that was provided is to be found in the affidavits of Nick Markostamos sworn 11 September 2013 and Virna Fry sworn 13 September 2013. Mr Markostamos and Ms Fry were cross-examined on their evidence during the hearing. Counsel put various questions to them on the methodology they had adopted in arriving at their calculations. Despite assertions that there was a basis for doubting the calculations, I have no difficulty in accepting the evidence of these two witnesses. There was really no doubt about how much was paid to the college. In fact, the disputation related to the verifying calculations revealed in file documentation. The matter does not need to be analysed closely but I reiterate there is no doubt, in my view, that the evidence given by these witnesses was accurate and it was reliable and truthful.

57           Mr Markostamos gave evidence of the payments made through the Minister for Education of Western Australia. The sum of \$78,467.62 was paid on 28 September 2006. The sum of \$85,318.20 was paid on 1 February 2007. That amount totalled \$163,785.82. It was an amount paid upon the basis that there were 184 students at the school.

58           With respect to the payments made through the Department of Education Science and Training of the Commonwealth Government, the sum of \$433,334 was paid on 12 October 2006. The sum of \$49,035.80 was paid on 29 November 2006. Finally, the sum of \$479,052.20 was paid on 16 January 2007. The total sum therefore paid was \$961,422. This amount was paid on acceptance of an asserted number of 186 students.

59           These figures are really not controversial and were not vigorously disputed by counsel whose cross-examination was more out of curiosity concerning method, I think, than any real contention that the numbers were suspect.

### **Area of controversy**

60           The issue of controversy or difficulty on the question of quantum was how many students were attending the school in fact at the relevant time and, therefore, how much the government assistance in the two forms alleged should have been. The applicant asserts that the number of students attending the school at the relevant time was somewhere between 80 and 100, and nowhere near and nothing like the amount asserted, being 184 or 186 students.

61           A significant issue at the trial was the question of proof of how many students were in fact attending the school and proof of the amount of funding to which the school was legally entitled, so as to arrive at a figure of unlawful benefit resulting from the difference between the number of students who were there and the number of students who were alleged to be there which gives of course a figure of loss or overpayment.

62           For one reason or another there was no reliable contemporaneous documentation showing the number of students who were in fact at the school at the relevant times. The evidence relied on in the trial was that of various school teachers who gave evidence of their recollections of class sizes and 'best effort' estimates of the numbers in various classes.

### **The evidence of actual class sizes**

63           During Mr Sayed's criminal trial, evidence was adduced from eight former teachers at the Muslim Ladies College Australia. These teachers gave evidence of the actual numbers of students enrolled and attending the school as at 4 August 2006, to the best of their recollections.

64           The gist of the evidence of these teachers is picked up and incorporated in a number of tables that are set out in the applicant's amended statement of facts issues and contentions of 19 February 2014 at par 36 and following. The relevant date for the purpose of calculation of student numbers for the State payment, called the census date, was 4 August 2006. The date relevant to the Commonwealth was 13 September 2006.

65           The applicant's case is that based on the evidence of the school teachers who gave their best estimate of the various class sizes and, in

each case, always, using the larger estimate of numbers where there were several estimates and the upper end where a range was given suggested the approximate numbers of students actually at the school on the census date was 108.

66 I have reviewed the evidence given at the criminal trial by the more significant teacher witnesses called. I have been greatly assisted by the applicant's amended summary of key evidence dated and filed 18 February 2014.

67 The witness, Mrs G Bruce, was a qualified teacher who started at the college in February 2004 and left on 15 September 2006 to take up a position elsewhere. She said that prior to 2005 there were only 70 girls at the school. When boys were allowed to attend the school the number of girls reduced to about 40. She was led in her evidence through various class sizes of which she had knowledge. In August 2006 she said, as a rough estimate, that there were between 90 and 100 students at the school and that the largest class numbered 10. The most she could recall at the school was in 2005 when there were between 120 and 130 students.

68 The witness, Mrs K Suhot, was the deputy principal of the school from July 2005. On 1 May 2006, three months before the census day, she compiled a list of students who attended the sports carnival. This was 'about May 2006' (exhibit 2, page 314). The list provided the particulars of 91 students. It was a list of names, dates of birth, addresses and telephone numbers for all students at the college. She said, 'It was an accurate record of the students enrolled class by class' (exhibit 2, page 314).

69 On 20 October 2006 Ms Suhot said that she did a survey class by class and, performed a 'head count'. She agreed that this was towards the end of Ramadan and there might have been absences. She said there had been a 'steady decrease' in the number of students at the school during 2006. The head count that she did was 97 students which, obviously, is six more than attended the sports day five months earlier against a background where numbers are reducing according to her evidence. In passing I would observe that this evidence decreases the evidential value of the sports day tally. As to the figure of 97 on 20 October 2006 she later said in her evidence (exhibit 2, page 400), that the number did not relate to just that day but was a general 'pattern of attendance'.

70 The witness, Ms Z Sallie, was a qualified private primary school teacher who taught at the school between term 2 in 2005 and term 3 in

2006. She said that the school was a very small school. Some of the classes were combined because of small numbers. She said classrooms were in rooms that reminded her in size and shape to shipping containers.

71 She said the school assembled once a week. She said she saw falsely inflated rolls that overstated numbers of students by about 80. She said there were more on the rolls than there were in classes. She said she knew every student there being about 100 of them. When she saw the roll she wrote down the names and calculated that the ones she did not know were students that could not have been there.

72 Finally, I make brief reference to the teacher Mrs S Moosa who was at the school for one year during 2006. She also said it was a 'very small school'. She said 'there were probably more than 100 students but no more than, probably, it would be in the hundreds' [sic] (exhibit 2, page 428).

73 The evidence provided by the school teachers was obviously truthful but of course the accuracy and reliability of those estimates was questioned by counsel on behalf of Mr Sayed.

74 It is fair to say this method of proof was never going to be perfect but there is nothing wrong in principle, it seems to me, and the case calls for a rough and ready or broad brush approach in all the circumstances. However, of course, it needs to be born in mind that Mr Sayed is going to be called upon to find and pay a large sum of money consequent upon these proceedings. Some percentage factor for possible error in recollection of class sizes should, in fairness, be brought into the calculation. There is also the issue of whether there were students away on 4 August 2006 or 13 September 2006 for any number of reasons.

75 Even though, and perfectly properly, the estimate of class size most favourable to Mr Sayed has always been taken, I think a further allowance in his favour would be appropriate. In my view the figure of 108 should be increased by about 5% to cover these possible contingencies bearing in mind the proceedings are governed by the civil standard of proof but also having regard to the significance of the issue to Mr Sayed.

76 Consequently in my view a reasonable figure for the purposes of calculating the pecuniary penalty in this matter would be to assume there were 113 students at the school on the census date. Given the inflated figures submitted and utilised for the calculations of benefit, the extent of overstatement or inflation of numbers of students is, respectively, 71 and 73.

- 77           Given these findings, I shall hear counsel as to the appropriate quantum of the PPO. I should also hear counsel as to what allowance should be made having regard to the latest Consumer Price Index figures and the asserted present day value of monies overpaid in 2006.
- 78           Hopefully these figures can be agreed and provided in a minute of agreed orders.