

## OPINION

**Summary of Advice**

The *Criminal Code 1995 (Cth)* creates a number of offences under the category of “serious drug offences” but does not contain offences in respect of minor drug related offences such as those relating to drug paraphernalia. In Western Australia, offences relating to drug paraphernalia are found in the *Misuse of Drugs Act 1981 (WA)* (“the MDA”).

Even though the MDA can have extra-territorial effect by virtue of section 12 of the *Criminal Code (WA)*, I do not consider that the provisions of the MDA would extend to Phytotech’s operations in Israel or in other foreign places as there would be insufficient connection between the relevant conduct and Western Australia.

Both the *Criminal Code 1995 (Cth)* and the MDA create offences concerning, inter alia, the cultivation of cannabis.

For the same reasons that I do not consider that the MDA has extra-territorial effect for conduct in respect of drug paraphernalia outside Australia, I do not consider that it has extra-territorial effect in relation to the cultivation of cannabis outside Australia.

**Background and Introduction**

Phytotech Medical Limited ACN 601 236 417 (“Phytotech”) is an incorporated company with a registered office in Western Australia and seeks to be listed on the Australian Stock Exchange (“the ASX”).

Phytotech’s prospectus dated 20 November 2014 reveals that it proposes to be a leader in the business of medical cannabis delivery systems focusing on the

commercialisation of cannabis delivery systems in the markets of USA, Canada, Israel and Europe (all markets which presently have regulated medical cannabis laws). Phytotech states that its longer term aim is to target other markets (including Australia) that are not presently regulated. Relevantly, it is apparent that Phytotech:

1. owns (patent pending) technology for a single use, specific dose vapour-cap for the delivery of smokeless cannabis to patients; and
2. proposes the development and commercialisation of various licensed delivery methods (including inner cheek patches, nasal spray, transdermal patches and oral delivery systems) with the potential to be used to administer medical cannabis.

Phytotech proposes, in the short term, that its operations will be conducted in Israel through a UK-based subsidiary company, which in turn owns an Israeli subsidiary company.

In an advice dated on or around 16 January 2015 lawyers in Israel have advised Phytotech that the Israeli authorities have the power to authorise the kind of operation proposed by Phytotech. In Australia, it would be possible to receive similar authorisation under both Commonwealth and State legislation but that has not occurred in this case.<sup>1</sup>

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<sup>1</sup> *The Narcotic Drugs Act 1967 (Cth)* gives effect to the Single Convention on Narcotic Drugs 1961 which is reproduced in the Schedule to that Act. The Act clearly contemplates the licensing of the production of otherwise illicit narcotic drugs for medical and scientific research. Similar provisions are contained in section 41 and 41A of the *Poisons Act 1964 (WA)* and the *Industrial Hemp Act 2004*

In the longer term, Phytotech proposes the growing of cannabis in either California or Uruguay for the purpose of producing cannabis for medicinal purposes. This aspect of the proposed operations is only at the “feasibility” stage.

Phytotech seeks an opinion on the question of whether its proposed overseas operations, insofar as such operations concern research into medicinal cannabis delivery systems and the production of cannabis-related paraphernalia, would render it guilty of any offence under the laws of Australia.

There are two areas in which my opinion is sought which I would express in the following way.

Firstly, do Australian misuse of drugs laws have extra-territorial provisions which could render a corporation engaging in conduct abroad (such conduct being otherwise illegal in Australia) guilty of an offence under Australian law?

Secondly, would the corporation be guilty of an offence under Australian law if it licensed a third party to develop, sell or supply “drug paraphernalia”? (I understand that this question is directed to the legality of the various proposed devices for the delivery (ie: administration) of medical cannabis.)

**Jurisdictional Issues between the Commonwealth and the State of Western Australia in respect of misuse of drugs act laws.**

Before answering the specific questions on which my opinion is sought, it is important to first understand the interaction between Commonwealth and State laws. As Phytotech is incorporated in Western Australia, the only potentially relevant state law is Western Australian law so I do not propose to address the legislative schemes in other states.

Conduct in relation to the cultivation of cannabis may constitute offences under both Commonwealth and Western Australian criminal law but the question of which of those laws would have application is a question of jurisdiction.

Generally, the criminal law is the responsibility of the States and Territories as the Constitution does not contain a specific head of power relating to criminal law.<sup>2</sup>

For Commonwealth offences to be constitutionally valid, they would need to be supported by some other Constitutional power such as the power in section 53 (iii), which gives the Commonwealth power to legislate for imports and exports (such as narcotic drugs).

Prior to the passing of the *Law and Justice Amendment (Serious Drug Offences and Other Measures) Act 2005* (Cth), serious drug import and export offences were prosecuted under section 233B of the *Customs Act 1901* (Cth). Following the passing of the *Law and Justice Amendment Act*, the *Customs Act* provisions were repealed and Part 9.1 of the *Criminal Code* (Cth) came into effect, creating a new set of serious drug offences, not limited to circumstances involving an importation or exportation.

The explanatory memorandum to the *Law and Justice Legislation Amendment (Serious Drug Offences and other Measures) Bill 2005* makes it clear that the Commonwealth was not seeking to take responsibility for prosecuting all drug offences and that State law would continue to operate alongside it.

Section 300.4 of the *Criminal Code* (Cth) reflects what is contained in the explanatory memorandum (and indeed the constitutional position) by specifically

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<sup>2</sup> See the discussion in Weldon, *Criminal Law of Western Australia* on section 12 of the *Criminal Code* (WA)

stating that the Part relating to serious drug offences is “*not intended to exclude or limit the concurrent operation of any law of a State or Territory*”.

Consequently, most conduct relating to cannabis occurring within Western Australia will be prosecuted under the *Misuse of Drugs Act 1981 (WA)* (“the MDA”) unless there is a federal aspect to it (such as, for example, where there is an importation from overseas).

The *Criminal Code (Cth)* provisions relating to the cultivation and sale and supply of cannabis are broadly similar to those contained in the MDA. However, unlike the Western Australian legislation, the *Criminal Code (Cth)* purports only to create a regime for the prosecution of “serious drug offences” (as opposed to less serious offences such as, for example, possession of a small quantity of cannabis or the sale of a cannabis smoking implement).<sup>3</sup>

As the Commonwealth does not have jurisdiction over minor offences such as those relating to the possession, sale or supply of cannabis-related paraphernalia (and it does not assert such jurisdiction by its failure to enact such offences in the *Code*) one must look to the MDA and the *Criminal Code (WA)* to determine whether offences relating to drug paraphernalia might be relevant and, if so, whether they have extra-territorial application.

I note that I have not addressed the issue of whether the importation to or exportation from Australia would be an offence under the *Customs Act* and *Regulations*. It is safely assumed that it would be.

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<sup>3</sup> Section 300.1 of the Commonwealth Criminal Code states that “1) The purpose of this Part is to create offences relating to drug trafficking and to give effect to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on 20 December 1988 (the TINDAPS Convention)

## **Drug Paraphernalia Offences**

As there are no offences in the *Criminal Code (Cth)* relating to drug paraphernalia, then there is no need to consider whether Phytotech's proposed operations in Israel concerning drug paraphernalia would offend any Commonwealth law.

I turn now to consider whether the MDA (WA) could have any application in respect of Phytotech's proposed operations as they relate to the development of cannabis delivery systems in Israel.

Sections 7B(3) and (4) of the *MDA* make it an offence to sell any drug paraphernalia adults and children respectively.

"Drug paraphernalia" is defined in section 7B of the *MDA* as:

- a) *any thing made or modified to be used in connection with manufacturing or preparing a prohibited drug or a prohibited plant –*
  - (i) *for administration to a person; or*
  - (ii) *for smoking, inhaling or ingesting by a person; or*
  - (iii) *to be burned or heated so its smoke or fumes can be smoked or inhaled by a person*
- or*
- a) *any thing made or modified to be used by a person –*
  - (i) *to administer a prohibited drug or a prohibited plant to a person or*
  - (ii) *to smoke, inhale or ingest a prohibited drug or a prohibited plant or*
  - (iii) *to smoke or inhale the smoke or fumes resulting from burning or heating a prohibited drug or a prohibited plant*

There is no doubt that the devices that Phytotech is proposing to develop and use would fall within the definition of drug paraphernalia as they are to be used in connection with what is under the *MDA* a prohibited plant (ie: cannabis). Therefore, if Phytotech were to sell those devices within Western Australia in the absence of legislative authority to do so, it could be guilty of an offence.

Section 7B (5) provides a defence in relation to offences concerning drug paraphernalia in certain prescribed circumstances. Section 7B(5) makes it clear

that the legislature contemplates prescribing certain exceptions to the MDA but it is assumed for present purposes that no such circumstances have been prescribed.

The question to be answered is whether the MDA has extra-territorial application which would render Phytotech criminally liable for conduct relating to drug paraphernalia outside Australia, being conduct which would otherwise be illegal in Western Australia.

Section 12 of the *Criminal Code (WA)* purports to extend the jurisdiction of the Western Australian criminal law by providing as follows:

*“(1) An offence under this Code or any other law of Western Australia is committed if –*

- a) all the elements necessary to constitute the said offence exist; and*
- b) at least one of the acts, omissions, events, circumstances or states of affairs that make up those elements occurs in Western Australia.*

*(2) Without limiting the general operation of subsection (1) that subsection applies even if the only thing that occurs in Western Australia is an event, circumstance or state of affairs caused by an act or omission that occurs outside Western Australia.*

*(3) This section does not apply to an offence if-*

- (a) the law under which the offence is created explicitly or by necessary implication makes the place of commission an element of the offence; or*
- (b) the law under which the offences is created is a law of extraterritorial operation and explicitly or by necessary implication excludes the need for a territorial nexus between Western Australia and an element of the offence.*

Like the Commonwealth, the Western Australian parliament does have the power to enact criminal laws having extra-territorial effect. However, whether such laws in fact have application either generally or in the present circumstances requires some analysis of the respective constitutional roles of the Commonwealth and State.

The question of whether the legislature is intending to assert extra-territorial jurisdiction in respect of a particular offence needs to be examined in light of the principles of international comity as explained in *Lipohar v R* (1999) 200 CLR 485 at [15] – [16] which suggests that countries do not generally intend to assert extra-

territorial jurisdiction, at least where this might be seen to interfere in the internal affairs of a sovereign state.

There is no question however that the Commonwealth has the power to legislate beyond Australia's borders <sup>4</sup> and the extended geographical provisions of the *Criminal Code* (Cth) are an obvious manifestation of that power.

The *State's* power on the other hand to enact extra-territorial provisions is constrained not so much by the principles of international comity referred to in *Lipohar* but more so by the fact that Western Australia is part of a Federation and is constrained in its ability to enact laws inconsistent with the Commonwealth by virtue of section 109 of the Constitution.

Although section 2(1) of the *Australia Act 1986* provides that each State not only has powers to enact laws for the "peace, order and good government" of the State but also that those powers extend to "extra-territorial legislation", there must nevertheless be some connection to Western Australia, for legislation to have extra-territorial effect. <sup>5</sup>

In the case of *State of Western Australia v Marchesi and Maguire* [2005] WASCA 133, the Court of Appeal considered the extra-territorial effect of section 12 of the *Criminal Code* (WA). In that case, the two accused were charged with a conspiracy to import drugs from Victoria to Western Australia. The facts established that the

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<sup>4</sup> Eg: Section 3A of the *Crimes Act* which states "*This Act applies throughout the whole of the Commonwealth and the Territories and also applies beyond the Commonwealth and the Territories*"

<sup>5</sup> See eg *Pearce v Florenca* (1976) 135 CLR 507 in which Western Australia was permitted to legislate against the taking of undersized fish in waters off the Western Australian coastline and *Commissioner of Stamp Duties of NSW v Millar* (1932) 48 CLR 618 in which laws taxing the shares of a resident of Victoria in a Victorian company was held to be invalid (even though that company carried on some business in New South Wales).



agreement occurred entirely in Victoria. At the close of the prosecution case the Trial Judge ruled that there was no case to answer on the basis that, as the acts making up the conspiracy occurred entirely outside Western Australia, the court had no jurisdiction over the matter. In its reasons the Court referred to the second reading speech (Hansard 20 June 1996 at page 3015) for the 1996 amendments to section 12 of the *Criminal Code* (WA), which purported to extend the extra-territorial reach of the criminal law of Western Australia.

The Court in that case recognized that it is clear from what was contained in that speech that the parliament was concerned to ensure that persons who orchestrate offences outside Western Australia for commission *inside* Western Australia can be prosecuted (emphasis added). However, the court held that the plain meaning of section 12 meant that “unless one or more of the acts, omissions, events, circumstances or states of affairs constituting the elements of the offence occurs in Western Australia” then the court had no jurisdiction.

It is my view, given that all of the acts, which might otherwise constitute an offence under the MDA, would be occurring outside Western Australia (and, indeed, outside Australia) then those acts lack sufficient connection with Western Australia for the MDA to have application. That is so regardless of whether such conduct were to be carried out by Phytotech or one of its overseas subsidiaries.

It follows that I do not consider that Phytotech's operations overseas as they relate to the development of devices which would otherwise could be classified as drug paraphernalia would be caught by the provisions of any Western Australian law.

*B. Leusdale*

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COUNSEL

19 January 2015