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DEPARTMENT OF HOME AFFAIRS

PARLIAMENTARY INQUIRY WRITTEN QUESTION ON NOTICE

Senate Standing Committee on Legal and Constitutional Affairs
Inquiry into the Crimes Legislation Amendment (Economic Disruption) Bill 2020

QoN Number: 01

Subject: Tax Practitioners Board submission

Asked by: Amanda Stoker

Question:

In its submission to the inquiry, the Tax Practitioners Board (TPB) argues that amendments necessitate the inclusion of the TPB as a recipient for information sharing purposes (under Item 10, Schedule 6) to assist it to carry out its regulatory functions. Can the department respond to this recommendation?

Answer:

This amendment is not necessary, as TPB will already be a permitted recipient for information-sharing purposes.

Under item 10 of Schedule 6 to the Crimes Legislation Amendment (Economic Disruption) Bill 2020 (the Bill) a person will be permitted to disclose coercively gathered information specified under subsection 266A(1) of the *Proceeds of Crime Act 2002* (the POC Act) to a 'professional disciplinary body' provided the person has reasonable grounds that disclosure will enable or assist the body to perform any of its functions and there is no court order prohibiting disclosure.

The term 'professional disciplinary body' covers a wide range of institutions, including TPB. As 'professional disciplinary body' is not defined under the POC Act, it will be interpreted pursuant to its broad ordinary meaning, being generally understood as a body whose functions include taking disciplinary action against members of a vocation or occupation.

The legislative functions of TPB under section 60-15 of the *Tax Agent Services Act 2009* (TASA) include disciplinary functions such as imposing sanctions for non-compliance with the Code of Professional Conduct in the TASA and investigating conduct that may breach the TASA. These disciplinary functions are also clearly targeted at members of a vocation or occupation, specifically registered tax practitioners.

Where coercively gathered information is obtained by authorities under the POC Act, these authorities will therefore be able to disclose this information to TPB to enable or assist TPB in performing any of its statutory functions.

The proposed amendment is also not appropriate. The term ‘professional disciplinary bodies’ has been used to remove the need to create an exhaustive list, as such a list would quickly become outdated as disciplinary bodies are renamed, dissolved and created. Explicitly providing that TPB can receive information under section 266A, despite TPB clearly qualifying as a ‘professional disciplinary body’, may cause courts to construe this term more narrowly, reducing the utility of item 10 of Schedule 6 to the Bill. If this occurs, other professional disciplinary bodies may also need to be listed, and the advantages of taking a more generalised approach will be lost.

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PARLIAMENTARY INQUIRY WRITTEN QUESTION ON NOTICE

Senate Standing Committee on Legal and Constitutional Affairs
Inquiry into the Crimes Legislation Amendment (Economic Disruption) Bill 2020

QoN Number: 02

Subject: Mr Edward Greaves submission

Asked by: Amanda Stoker

Question:

In his submission to the inquiry, Mr Edward Greaves raised the following issues:

a. Amendments to Division 400 could be achieved with fewer words, by including a single section with one table specifying different maximum penalties based on different property values. This approach would assist interpretation by the Courts.

b. The proposed inclusion of item 6 to the table in s266A(2) will allow the disclosure of confidential information where conduct is not sufficiently serious as to be potentially criminal. Trivial conduct should not warrant breaching the secrecy of the examination process.

c. New offences may have consequences for innocent victims of cuckoo smurfing, which could be appropriately addressed by amending s29(3) of the Proceeds of Crime Act 2002 to include the entirety of Division 400 of the Criminal Code.

Can the department respond to recommendations a-c?

Answer:

<u>a. Shorter money laundering offences</u>

It would not be appropriate to combine the Division 400 offences into a single section with one table specifying different maximum penalties based on property values.

Commonwealth criminal law is codified, and the proposed offence provisions have been carefully drafted to ensure that they interact with applicable principles, including the general principles of criminal responsibility under Chapter 2 of the Criminal Code, so as to precisely define the circumstances in which criminal responsibility will arise.

While Division 400 includes a large number of offences, this enables the legislature to be more precise in specifying the penalties it considers to be appropriate for particular conduct. This provides a greater level of certainty, increasing the deterrent effect of these offences, while ensuring that penalties for a particular offence can be justified by reference to other offences in Division 400.

b. Disclosure of information to professional disciplinary bodies

Under proposed item 6 of the table in subsection 266A(2) of the *Proceeds of Crime Act 2002* (the POC Act) a person will be permitted to disclose coercively gathered information specified under subsection 266A(1) to a 'professional disciplinary body' provided the person believes on reasonable grounds that the disclosure will enable or assist the body to perform any of its functions and there is no court order prohibiting disclosure.

The broad scope of item 6 is necessary to ensure that law enforcement can take action against professional facilitators of transnational serious and organised crime (TSOC). Many of these professionals are gatekeepers to the financial system and instrumental in establishing complex legal structures that can be used to disguise and launder criminal wealth, improving TSOC groups' resilience to law enforcement interventions and increasing their opportunities for success. 'Professional disciplinary bodies' are in an ideal position to disrupt the activities of these professionals, as they can impose fines, suspend them from offering relevant services or remove them from the list of authorised practitioners entirely.

It is not necessary for conduct to rise to the level of 'criminality' for it to be relevant to the functions of professional disciplinary bodies. Given their trusted gatekeeper status, TSOC groups will seek to exploit and infiltrate professional service providers in order to enable or facilitate criminal conduct and to conceal or launder the proceeds of crime. While some professional facilitators may be voluntary enablers of such activity, others may be coerced into providing services through extortion or intimidation or provide services that facilitate organised crime entirely unwittingly.

Allowing disclosures to 'professional disciplinary bodies' under item 6 will ensure that practitioners are provided with the necessary support services should they be unwittingly exploited by serious and organised crime. Professional disciplinary bodies play an educational role in these cases and, if law enforcement obtains information that a particular professional is unwittingly providing services to criminal entities, passing this information on to the relevant 'professional disciplinary body' will enable this body to provide the professional with the training to harden their services against criminal exploitation and increase their awareness of the money laundering risks in providing particular services.

This amendment is also in line with a number of recent observations made in independent inquiries, which have highlighted the need for law enforcement to improve information-sharing with professional disciplinary bodies.

For example, the Final Report of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* highlighted the importance of sharing information with professional standards bodies to engender a culture based on ethical standards and behavior.

The Final Report (at page 135) provided that:

> *'One hallmark of a profession is the existence of a credible and coherent system of professional discipline where the ultimate sanction is expulsion from the profession. While ASIC now has the power to ban financial advisers from providing financial services, the existing disciplinary arrangements for financial advisers are fragmented, and hampered by inadequate sharing of information.'*

Similarly, the 2017 *Black Economy Taskforce Final Report* (at page 165) provided that:

> *'A number of people have told us that some accountants and lawyers perpetuate tax fraud and money laundering. Their behaviour increases unfairness for honest business, increases unfairness for the vast majority of honest tax practitioners, undermines the integrity of the tax system, and contributes to the degradation of tax moral and community standards. Not enough action is currently taken to remove them from the position of influence they have. They need to be identified and effectively dealt with, including by being barred from practice. Improved data and information sharing and improved analytics … would support the better identification of egregious tax practitioners.*

Amendments to section 266A will address this by enabling the AFP to disclose information to professional disciplinary bodies where breaches involving professional advisers are revealed.

Current item 2 of the table in subsection 266A(2) of the POC Act does not achieve these goals. It does not allow disclosures to a 'professional disciplinary body' unless that body is considered to be a Commonwealth, State or Territory authority with responsibility for investigating or prosecuting offences. Nor does it allow disclosures to be made to support the functions of such professional bodies, including those related to educational and disciplinary functions. It is also pertinent to note that subsection 266A(2) currently allows for a range of disclosures unrelated to criminal

offending, including (but not limited to) disclosures to the Australian Taxation Office to protect public revenue under item 3.

Under the proposed amendments, once information is disclosed to a 'professional disciplinary body', it will a matter for that body to determine its probative value and whether any resulting educational or disciplinary action should be taken.

Existing safeguards provided for in section 266A will also continue to apply to any release of information to professional disciplinary bodies. For example, information will not be able to be disclosed where a court has prohibited the disclosure of information to the authority for that purpose. Further, under subsection 266A(3), answers given in an examination or documents produced (or information contained in the answer or document) by a person are not admissible in evidence against the person in civil or criminal proceedings, unless these proceedings fall into the narrow categories specified in subsection 266A(4).

c. Cuckoo smurfing

Mr Greaves has suggested that subsection 29(3) of the POC Act must be amended to adequately protect victims of 'cuckoo smurfing' from confiscation action.

The POC Act, however, already contains robust and effective safeguards to protect legitimately obtained interests in property, including those obtained by victims of cuckoo smurfing.

These protections include, but are not limited to, the following:

- If an individual's property is subject to a restraining order, a court may be able to make allowances for expenses to be met out of property covered by the restraining order (section 24), exclude property from the scope of the order or revoke the order (sections 24A, 29, 42) or refuse to make the order where it is not in the public interest to do so (sections 17(4) and 19(3)).

- If an individual's property is restrained and subject to a forfeiture order or automatic forfeiture, a court can exclude the person's interest from the scope of the order or from automatic forfeiture (sections 73, 94 and 102).

- A court can refuse to make an order in relation to an 'instrument' of an offence in certain circumstances (sections 47(4), 48(2) and 49(4)).

- An individual may also seek a compensation order for the proportion of the value of the property they did not derive or realise from the commission of an offence (sections 77 and 94A) or a buy back order (sections 57 and 103).

- Where an individual acquires property that constituted 'proceeds' or an 'instrument' in the relevant situations outlined under section 330(4), this property ceases to be 'proceeds' or an 'instrument' of crime and generally cannot be subject to restraint or forfeiture. This ensures that third parties who acquire illicit funds legitimately are adequately protected.

- In particular, paragraph 330(4)(a) provides that property will not be proceeds or an instrument of crime 'if it is acquired by a third party for sufficient consideration without the third party knowing, and in circumstances that would not arouse a reasonable suspicion, that the property was proceeds of an offence or an instrument of an offence (as the case requires)'

- In addition, victims of cuckoo smurfing may also be able to sue to the remitter for breach of contract.

These protections have effectively protected victims of cuckoo smurfing in the past. For example, in *Gwe v Commissioner of the Australian Federal Police* [2020] NSWCA 247 (2 October 2020) the applicant was able to exclude their property from a restraining order (and therefore forfeiture) as they did not have requisite knowledge or suspicion of the offending.

Proceeds of crime authorities, which are responsible for applying to a court to restrain and confiscate property under the POC Act, are also Commonwealth agencies that are bound by an obligation to act as model litigants (see paragraph 4.2 and Appendix B of the *Legal Services Directions 2017*). This obligation requires these authorities to act honestly and fairly in handling litigation brought under the Act, and includes (but is not limited to) obligations not to take advantage of a claimant who lacks resources to litigate a legitimate claim and not to rely on technical defences except in limited circumstances.

Proposed amendment – Including Division 400 of the Criminal Code in subsection 29(3)

Mr Greaves has proposed expanding subsection 29(3) to include Commonwealth money laundering offences under Division 400 of the Criminal Code, thereby limiting the circumstances in which these offences can be used to restrain property under the POC Act.[1]

This amendment would severely reduce the utility of the POC Act in targeting money laundering networks. This would undermine the principal objects of the Act, which under section 5 include (but are not limited to) undermining the profitability of criminal enterprises, preventing reinvestment of proceeds of crime in criminal

[1] See Mr Greaves' submission, paragraph 14.

activities and punishing and deterring persons from breaching laws of the Commonwealth.

Money laundering networks practice strict information compartmentalisation, keeping their participants wilfully blind as to the criminal origins of property while concealing these origins behind complex financial, legal and administrative arrangements. As a result, it is often impossible to determine whether funds handled by these networks were derived from a specific predicate offence and law enforcement will often only have evidence that a money laundering offence has been committed. In this context, it is vital that law enforcement retain the ability to justify restraint action on the basis of money laundering offences alone.

Mr Greaves' proposed amendment would also be contrary to international best practice. Recommendation 4 of the Financial Action Task Force Recommendations explicitly requires countries to allow for property to be restrained and confiscated on the basis of a money laundering offences alone. If Mr Greaves' proposed amendments were adopted, the circumstances in which money laundering offences could be used to support restraint and confiscation would be severely limited, reducing Australia's compliance with its international obligations.

Proposed amendment – Removing paragraph 29(3)(a)

Mr Greaves has suggested removing paragraph 29(3)(a), which prevents a court from excluding property from restraint unless it is found that there are no reasonable grounds to suspect that the property is proceeds of any of the offences specified in subsection 29(3).[2]

This amendment would be contrary to the principal objects of the POC Act, as it would prevent a court from considering the applicant's knowledge of, and involvement in, relevant offending before excluding property from restraint. In considering whether there are reasonable grounds to suspect that property is 'proceeds of crime', the court must consider a range of relevant circumstances, including whether the applicant acquired the property for sufficient consideration without knowing, and in circumstances that would not arouse a reasonable suspicion, that it was proceeds of an offence (see subsection 330(4)).

Removing paragraph 29(3)(a) would create a loophole in the POC Act, allowing an individual to remove property from restraint even if there were reasonable grounds to suspect that it was proceeds of crime at the time they acquired it. This would encourage overseas money laundering networks to engage in widespread structuring activity or other conduct under the offences specified in subsection 29(3),

[2] See Mr Greaves' submission, paragraph 15.

safe in the knowledge that the recipient of the laundered funds will not be subject to restraint and confiscation action.

Proposed amendment – Removing paragraph 29(3)(b)

Mr Greaves has suggested removing paragraph 29(3)(b), which provides that property cannot be excluded from restraint if a person is charged with or convicted of any of the offences specified in subsection 29(3). Alternatively, Mr Greaves has suggested amending this paragraph to only require a court to consider whether the applicant has been charged or convicted of these offences.[3]

Either amendment would be contrary to the principal objects of the POC Act as, if paragraph 29(3)(a) was also removed, these amendments would allow property to be removed from restraint where a charged or convicted individual does not have an interest in applicant's property, but still has it under their effective control (see section 18 of the POC Act). Money laundering networks frequently deal with property at an arm's-length, granting legal title to third parties to avoid detection, and it is vital that courts remain compelled to look behind these legal structures to determine who is controlling and benefiting from this property.

The proposed amendment would also run contrary to the legislative intent underpinning subsection 29(3), which was only intended to provide protections in non-conviction based matters, namely matters where restraint is not supported by any particular charge or conviction. This legislative intent is clearly outlined at page 23 of the Revised Explanatory Memorandum to the Proceeds of Crime Bill 2002.

[3] See Mr Greaves' submission, paragraph 16.