



DPP

Commonwealth Director of Public Prosecutions

SUBMISSION BY THE COMMONWEALTH DPP

THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO THE *CRIMES LEGISLATION AMENDMENT (SERIOUS AND ORGANISED CRIME) BILL 2009*

Introduction

The Office of the Commonwealth Director of Public Prosecutions (CDPP) is responsible for the prosecution of criminal offences against the laws of the Commonwealth and to confiscate the proceeds of Commonwealth crime. The CDPP can only prosecute or take confiscation action when there has been an investigation by an investigation agency. The CDPP does not have an investigative function. The Office prosecutes or takes confiscation action in matters investigated by the Australian Federal Police or other investigative agencies, such as the Australian Crime Commission, the Australian Securities and Investment Commission and the Australian Taxation Office. The CDPP regularly provides advice to these agencies during the investigative stage in large and complex matters.

Proceeds of crime-related amendments in the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*

Schedules 1 and 2 of the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009* (the SOC Bill) propose various amendments to the *Proceeds of Crime Act 2002* (POC Act 2002). Schedule 2 comprises six different Parts.

Schedule 1 and Part 1 of Schedule 2 to the SOC Bill represent matters referred to in the Sherman Report which were not the subject of particular recommendations.

Schedule 2, Parts 2, 3, 4 and 5 of to the SOC Bill represent legislative responses to five different recommendations of the Sherman Report.

Schedule 2, Part 6 is technical in nature.

The following background is provided in relation to the POC Act 2002 and the Sherman Report.

- ***Proceeds of Crime Act 2002***

The principal legislation under which the CDPP operates in this area is the POC Act 2002, which came into effect on 1 January 2003. The POC Act 2002 provides a comprehensive scheme to trace, restrain and confiscate the proceeds and instruments of crime against Commonwealth law. In some cases it may also be used to confiscate the proceeds of crime against foreign law.

Under the POC Act 2002, confiscation action may be taken either in conjunction with the prosecution process (“conviction based action”), or independently from that process (“civil action”).

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Conviction based action depends upon a person being convicted by a court of a Commonwealth indictable offence, which in turn involves proof of all elements of the offence beyond reasonable doubt. Civil action may be taken whether or not a person has been charged with or convicted of an offence, and involves proof of the offence to a lower standard, "the balance of probabilities". Civil action is available in relation to a narrower range of cases.

In order to preserve property pending the outcome of confiscation proceedings, the POC Act 2002 provides for restraining orders over property to be made early on in an investigation. There are four different types of restraining orders which may be made under the POC Act 2002 in different circumstances.

There are three types of "final" orders which may be made under the POC Act 2002:

- Forfeiture orders – where the court orders that property which is the proceeds or an instrument of crime be forfeited to the Commonwealth;
- Pecuniary penalty orders – where the court orders an offender to pay to the Commonwealth an amount equal to the benefit derived by the person from the commission of crime; and
- Literary proceeds orders – where the court orders an offender to pay to the Commonwealth an amount calculated by reference to benefits the person has derived through commercial exploitation of his or her notoriety resulting from the commission of an offence.

In addition to the above orders, in certain circumstances the POC Act 2002 provides for "automatic" forfeiture of property. This can occur where a person has been convicted of a "serious offence" within the meaning of the POC Act 2002, and involves the forfeiture of restrained property, after a waiting period, without further order of the court.

The POC Act 2002 contains a range of provisions which protect the rights of owners of restrained property and also third parties. These provisions facilitate for example access to restrained property for the purpose of paying reasonable living expenses or reasonable business expenses; exclusion of property from restraint or from forfeiture; and payment of compensation or hardship amounts out of the proceeds of forfeited property. In addition, a Court can require the CDPP to give an undertaking as to costs and damages as a condition for the making a restraining order.

Confiscated money and money derived from the realisation of other types of confiscated assets are paid into the Confiscated Assets Account, established under Part 4-3 of the POC Act 2002.

All of the CDPP's work under the POC Act 2002 is based on investigations by and referrals from relevant Commonwealth law enforcement agencies. Key investigative responsibility rests with the Australian Federal Police, the Australian Crime Commission, the Australian Customs Service, the Australian Securities and Investments Commission, and the Australian Taxation Office, each of which is an "enforcement agency" under the POCA 2002 and exercises specific investigative and other powers under the Act.

- **Sherman Report**

Section 327 of the POC Act 2002 required that the operation of the Act be independently reviewed as soon as practicable after its third full year of operation. In 2006 the government engaged Mr Tom Sherman AO to conduct the review.

In October 2006, the report of Mr Sherman was tabled in Parliament. In his Report, Mr Sherman concluded that the POC Act 2002 had been more effective in attacking the proceeds and

instruments of crime than was the POC Act 1987, but also found that there were “impediments to the effective operation of the Act”, and made recommendations for improving the operation of the Act. In total Mr Sherman made a total of 57 different recommendations, comprising 18 primary recommendations and 39 additional recommendations.

Schedule 1 – introduction of unexplained wealth provisions

Schedule 1 of the SOC Bill inserts “unexplained wealth” provisions into the POC Act 2002. Some significant features of these provisions are as follows.

Clause 5 of Schedule 1 inserts a new section 20A into the POC Act 2002 entitled “Restraining orders – unexplained wealth”. This section provides for the restraint of property owned or effectively controlled by a person whom an authorised officer suspects of having total wealth which exceeds the person’s legitimately acquired wealth. It is also a requirement that the authorised officer suspect one or both of the following:

- that the person has committed a Commonwealth offence, a foreign indictable offence, or a State offence with a federal aspect;
- that the whole or any part of the person’s wealth was derived from a Commonwealth offence, a foreign indictable offence, or a State offence with a federal aspect.

Clause 13 of Schedule 1 inserts a new Part 2-6 into the POC Act 2002 entitled “Unexplained wealth orders”. Part 2-6 is split up into four Divisions:

- Division 1 of Part 2-6 deals with the making of “preliminary unexplained wealth orders” and “unexplained wealth” orders:
 - A preliminary unexplained wealth order is an order requiring a person to appear before the court to enable the court to decide whether to make an unexplained wealth order. It can be made if an authorised officer suspects a person of having total wealth which exceeds the person’s legitimately acquired wealth.
 - An unexplained wealth order is an order requiring a person to pay to the Commonwealth an amount which, in the court’s opinion, represents the difference between the person’s total wealth and that part of the person’s property which the court is satisfied was not derived from a Commonwealth offence, a foreign indictable offence, or a State offence with a federal aspect.
- Division 2 of Part 2-6 sets out how “unexplained wealth” amounts are to be calculated under the Act. It defines the concepts of “wealth” and “total wealth”, and it provides for the reduction of unexplained wealth amounts in certain circumstances.
- Division 3 of Part 2-6 deals with the procedure for applying for unexplained wealth orders.
- Division 4 of Part 2-6 deals with the enforcement of unexplained wealth orders. It provides among other things that a court may declare that property effectively controlled by a person is available to satisfy an unexplained wealth order made against that person, and that the Official Trustee in Bankruptcy can be directed to sell restrained property in order to satisfy an unexplained wealth order. Division 4 also provides that amounts paid to the Commonwealth in respect of unexplained wealth orders are to be credited to the Confiscated Assets Account established under the POC Act 2002.

The Sherman Report discussed the possible incorporation of unexplained wealth provisions into the POC Act 2002 at paragraphs 4.60 to 4.67. The Sherman Report made no specific recommendations regarding this issue.

Schedule 2, Part 1 – freezing orders

Schedule 2, Part 1 of the SOC Bill inserts “freezing order” provisions into the POC Act 2002. In particular, Clause 3 of Schedule 2 inserts a new Part 2-1A into the POC Act 2002 entitled “Freezing orders”.

Proposed Part 2-1A is split up into five Divisions:

- Division 1 deals with the making of freezing orders. The Division provides that a magistrate must make an order that a financial institution not allow a withdrawal from an account with the institution if, among other things:
 - An authorised officer suspects that the balance of the account represents proceeds of a Commonwealth indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concern; and
 - The magistrate is satisfied that, unless the order is made, there is risk of the balance of the account being reduced.
- Division 2 deals with the procedure for applying for freezing orders. It provides among other things that, in an urgent case, a freezing order may be applied for by telephone, fax or other electronic means.
- Division 3 deals with giving effect to freezing orders. It provides that a freezing order must be given to the relevant financial institution and to the holder(s) of the frozen account. It also creates an offence of contravening a freezing order, and provides protection from suit to a financial institution which complies with a freezing order.
- Division 4 deals with the duration of freezing orders. It provides that, generally, a freezing order may be made for a period of up to 3 working days.
- Division 5 provides for the variation of freezing orders in certain circumstances.

The SOC Bill does not envisage the CDDP having any role in relation to the making of freezing orders.

The Sherman Report discussed the possible incorporation of freezing orders into the POC Act 2002 at paragraph 4.68. The Sherman Report made no specific recommendations regarding this issue.

Schedule 2, Part 2 – removal of 6-year time limit

Recommendation D1 of the Sherman Report was that “The limitation period for civil based confiscation be extended to 12 years but all of the relevant conduct must fall within the 12 year period”. The issue was discussed in detail at pp D2-D4 of the Report.

The effect of the amendments proposed to be made by Schedule 2, Part 2 of the SOC Bill is to remove the limitation period for civil confiscation action under the POC Act 2002.

CDDP’s experience under the existing provisions has been that in some cases – particularly complex fraud cases which take time to discover and then investigate – the 6-year time limit effectively means that the option of civil confiscation action is not available.

Schedule 2, Part 3 – confiscation scheme and instruments of serious offences

Recommendation D2 of the Sherman Report was that “Ss. 19 and 49 of the Act should be amended to cover instruments as well as proceeds of crime”. The issue was discussed in detail at p D4 of the Report.

The effect of the amendments proposed to be made by Schedule 2, Part 3 of the SOC Bill is to amend sections 19 and 49 of the POC Act 2002, and also various other provisions, to provide for the restraint and confiscation of instruments of “serious offences” (as defined in the Act).

Significantly, the amendments provide that a court may refuse to forfeit an instrument of a serious offence if it is satisfied that it is not in the public interest to do so. This distinguishes forfeiture of instruments from forfeiture of proceeds (which is mandatory).

CDPP’s experience under the existing provisions, particularly in cases involving suspected money-laundering, was that it was often difficult to ascertain whether property ought properly to be regarded as “proceeds” or an “instrument” of the relevant offending, and the unavailability of civil restraint and forfeiture of “instruments” of offences was therefore problematic.

Schedule 2, Part 4 – disclosure of information

Recommendation 1 of the Sherman Report was that “The Act contain a clear mandate that information acquired in any way under the Act relating to any serious offence can be passed to any agency having a lawful function to investigate that offence, and to ITSA where it will assist in the discharge of its functions under the Act and to the ATO for the protection of the revenue”. The issue was discussed in detail at pp 25-29 of the Report.

Part of the purpose of Recommendation 1 was to overcome an issue which it was thought had been addressed when the POC Act 2002 was originally enacted¹ – that is, to ensure that information obtained using the investigative powers contained in the POC Act 2002 can be disseminated to relevant agencies where there is a legitimate purpose for doing so.

In the matter of *DPP (Cth) v Hatfield* [2006] NSWSC 195, however, the New South Wales Supreme Court held that information obtained from a compulsory examination under the POC Act 2002 could only be used for the purposes of the Act and could not be used or disclosed for any other purpose. This decision has placed an organisational burden on law enforcement agencies, requiring them to endeavour to “quarantine” information obtained from examinations, and has also inhibited law enforcement generally by preventing the free flow of relevant information and intelligence.

Schedule 2, Part 4 of the SOC Bill inserts new disclosure provisions into the POC Act 2002. In particular, Clause 67 of Schedule 2 inserts a new Part 3-6 into the POC Act 2002 entitled “Disclosure of information”. A new section 266A provides that information obtained using the investigative powers in the Act may be disclosed as follows:

1. To an authority with one or more functions under the Act, for the purpose of facilitating the authority’s performance of its functions under the Act;

¹ See for example the comments of Senator Ellison, the Minister for Justice and Customs, during the debate in relation to the Act (Hansard - 23.9.02 at 4651) and the deliberations of the Senate Legal and Constitutional Legislation Committee as recorded in paragraphs 3.18-3.20, 3.25 and 3.57 of the Report on the Committee’s Inquiry into the Provisions of the *Proceeds of Crime Bill 2002* and the *Proceeds of Crime (Consequential Amendment and Transitional Provisions) Bill 2002*.

2. To an authority of the Commonwealth, a State, a Territory or foreign country that has the function of investigating or prosecuting criminal offences, for the purpose of assisting in the prevention, investigation, or prosecution of an offence; or
3. To the Australian Taxation Office, for the purpose of protecting public revenue.

Schedule 2, Part 5 – legal aid costs

Schedule 2, Part 5 is to give effect to recommendation 14 of the Sherman Report. That recommendation states that “All claims for legal expense which have been certified as fair, reasonable and duly expended by legal aid commissions on proceedings relating to property that has been restrained under the Act, should be paid directly out of the CAA. Applications for legal aid under the Act should be subject to the usual merits and means tests.” The issue was discussed in detail at pp 54-58 of the Report.

Schedule 2, Part 5 of the SOC Bill repeals various provisions in the POC Act 2002, and inserts new subsections 293(1), (2), (2A) and (3). Broadly, the effect of the proposed provisions is to provide for the Official Trustee to reimburse legal aid commissions directly out of the Confiscated Assets Account, rather than first having to attempt to reimburse commissions out of restrained property.

Amendments to the *Criminal Code Act 1995*

Schedule 4, Part 1 – Joint Commission

Schedule 4 Part 1 of the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (the Bill) proposes to amend the *Criminal Code Act 1995* (the Code), in particular Part 2.4 which deals with Extensions of Criminal Responsibility. This Part of the Code extends criminal responsibility to persons who do not actually commit all of the elements of an offence. The Bill proposes to insert a new section 11.2A into Part 2.4 of the Code to specifically include the concept of joint commission. Although the concept of joint commission will be new to the Code, it is not a new legal concept and one which is readily available at common law. The CDPP supports this amendment.