



Australian Government  

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Department of Home Affairs

# **Submission to the Inquiry into the Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017**

Senate Legal and Constitutional Affairs Committee

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# Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017

The Department of Home Affairs (the Department) thanks the Senate Legal and Constitutional Affairs Legislation Committee for the opportunity to make a submission on the Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017 (the Bill).

This submission is provided in response to the submissions received by the Committee and provides responses to key concerns raised in these submissions.

## Summary

The amendments in the Bill are necessary to ensure that the Commonwealth criminal asset confiscation scheme does not contain vulnerabilities or loopholes that can be exploited by organised crime.

The criminal asset confiscation regime under the *Proceeds of Crime Act 2002* (the Act) is a significant tool to disrupt and deter serious and organised crime. Those involved in serious and organised crime are primarily motivated by the profits that these crimes generate, and depriving these individuals of the wealth generated from their criminal activities and the instruments of those offences acts as a powerful disincentive to future criminal conduct.

The Act imposes a scheme that is intended to: punish and deter persons from breaching the law, prevent reinvestment of illicit funds into further criminal activities, undermine the profitability of criminal enterprises and deprive persons of the proceeds and instruments of offences. To achieve these aims, the Act permits property to be restrained and forfeited where it is 'wholly or partly' acquired, derived or realised from the commission of an offence or from property used in connection with the commission of an offence.<sup>1</sup>

The amendments in the Bill do not make significant alterations to these laws, but are technical amendments to strengthen the laws against any possible attempts to evade their operation in light of recent case law.

The amendments in the Bill, for example, will clarify that if a person takes out a mortgage on a house, and then repays this mortgage using the proceeds of crime, the house will also be considered to be proceeds of crime. Similarly, if a person purchases a run-down boat and subsequently uses proceeds of crime to refurbish and improve this boat, the boat will also be considered to be proceeds of crime.

While it may seem evident that both the house and the boat should be considered to be derived from crime, a number of state court rulings have cast doubt on this issue. In these instances the courts have confined their analysis to payments made to directly acquire the property (i.e. the deposit on property) and disregarding subsequent payments on the property (i.e. mortgage repayments and payments to improve or maintain property).

While the Law Council of Australia (LCA) has expressed the view in its submission dated 14 December 2017 that these rulings represent a 'proportionate and balanced application of the Act', the Department notes these rulings create vulnerabilities within the Act that should be addressed through legislative amendments.

In determining whether property is 'lawfully acquired', 'an instrument' of crime or 'proceeds' of crime, a court may focus solely on how property was initially purchased, even where illicit funds have been used to pay off a loan in relation to that property or to significantly improve or develop the property. Where a person makes mortgage repayments using proceeds of crime, but had used legitimate funds to pay for the deposit on the house, this effectively permits the person to keep the house notwithstanding the clear intent and policy

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<sup>1</sup> See the Act ss 5 and 330(1)(2).

underpinning the Act, namely that the Act should punish and deter persons from breaching the law and undermine the profitability of criminal enterprises.

If left unaddressed, this vulnerability may be exploited by criminal entities, which could launder large sums of money through multiple mortgage repayments and related legal instruments on property without forfeiting their rights over the property. This behaviour is relatively common within criminal organisations, which regularly take steps to disguise their unlawful income through structured transfers, hiding it behind seemingly legitimate enterprises and property, and intermingling it with seemingly legitimately derived income.

It is also pertinent to note that these amendments are not entirely novel, as similar amendments have been made to the Victorian and New South Wales forfeiture regimes to address the vulnerabilities outlined above.<sup>2</sup>

## Ensuring a proportionate response

In their submissions, the LCA and the Uniting Church in Australia recommended the Act be amended to ensure courts have the discretion to act proportionately in dealing with proceeds or instruments of crime where property is 'partly' derived from the proceeds or instruments of crime.

### Current protections

The LCA submission (at paragraph 20) argues that, where a person knowingly deals with proceeds of crime and partially funds the purchase of the property using these proceeds, the whole of the property will qualify as both proceeds and an instrument of crime (i.e. an instrument of a money laundering offence) under the Act, limiting the person's ability to resist restraint and forfeiture of the property. The LCA concedes that this position already exists in relation to the initial acquisition of property and has done so for many years.

We note that a range of protective measures already exist to ensure the operation of the Act does not result in disproportionate and unjust outcomes. In cases where property is both the proceeds of crime and an instrument of crime, courts still have the discretion to adopt a more proportionate approach by: refusing to issue a restraining order if this would not be in the public interest (ss 17(4), 19(3) and 20A(4)); revoking a restraining order where the restraining order was made without the respondent being present (ss 42); making allowances for expenses to be made out of property covered by a restraining order (s 24) and; allowing the person to buy back the property (ss 57 and 103).

In cases where a person commits further offences by dealing with proceeds of crime (i.e. the laundering of their criminal profits into different forms of property), however, it is appropriate that the Act takes a robust approach to ensure its central aims are upheld.

In appropriate cases, proceeds authorities also seek to settle matters by consent under section 316 to ensure an unjust outcome is not reached. This is consistent with the model litigant obligations that apply to the Commissioner of the AFP, which requires them 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 arguments except in limited circumstances.

Resolving matters by consent also brings a number of benefits to both parties, saving unnecessary expense while allowing the parties to reach a tailored and fair outcome for the defendant, who will be able to draw the court's attention to their cooperation with law enforcement in any relevant sentencing proceedings.<sup>3</sup>

The Act also has robust protections under subsection 330(4) which ensure that persons who legitimately acquire proceeds or instruments are not unduly affected by the Act, a case that can be distinguished from the LCA's scenario (at paragraph 20) of a person knowingly dealing with proceeds of crime.

For example, if a person purchases a house for sufficient consideration without knowing, or in circumstances that would not arouse a reasonable suspicion that the house was proceeds of an offence or an instrument of

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<sup>2</sup> *The Confiscation and Other Matters Amendment Act 2016* (Vic), items 4, 6 and 14; *Criminal Assets Recovery Amendment Act 2005* (NSW), item 14.

<sup>3</sup> See the Act s 320.

an offence, the house will cease to be proceeds or an instrument at the point of acquisition, preventing proceeds authorities from restraining or forfeiting the house.

### **‘Substantially derived or realised’**

The LCA submission suggests that proportionality issues could be addressed by replacing the expression ‘partly derived or realised’ in the definition of ‘proceeds/an instrument’ with the phrase ‘substantially derived or realised’. The Department, however, is concerned this proposal is likely to undermine the underlying objects of the Act by establishing a gap in the criminal assets confiscation regime that makes crime profitable.

A common money laundering methodology is for criminals to use loans or mortgages to layer and integrate illicit funds into high-value assets such as real estate.<sup>4</sup> Loans or mortgages are essentially taken out as a cover for laundering criminal proceeds. Criminals can use a legitimate loan or mortgage to purchase real estate and use illicit funds to renovate properties. Lump sum cash repayments or smaller ‘structured’ cash amounts using illicit funds can be used to repay loans or mortgage, as illustrated in the case study below.

#### Case study<sup>5</sup>

A crime syndicate made significant profits by purchasing bulk amounts of cannabis in one state and then selling the drugs in another state. In order to cover for its illicit activities, the syndicate established a transport company for the purposes of transporting the cannabis interstate. The syndicate used a range of methods to launder its illicit profits, including the purchase of real estate.

In particular, a syndicate member purchased a property worth more than AUD700,000 in a family member’s name, financing the purchase using a mortgage. Over a two-month period the syndicate member paid more than AUD320,000 in 16 illicit cash deposits to their solicitor (who provided conveyancing services and acted on behalf of the syndicate member in the transaction) to pay off the mortgage on the property.

On occasions, these deposits occurred on the same day but at different bank branches. The syndicate member explained to bank staff the funds were to purchase a home but could not explain the source of the funds.

Two members of the syndicate pleaded guilty to multiple money laundering and drug trafficking charges and both were sentenced to six years imprisonment.

If the LCA proposal to amend the test to ‘substantially derived or realised’ were adopted, it must be asked at what point will the property be held to be ‘substantially derived or realised’ from an instrument or proceeds of crime? For example, where authorities can prove that a person has invested \$2 million in criminal proceeds from an indictable offence towards a \$10 million house, is the house ‘substantially derived or realised’ from an instrument or proceeds of crime? What ‘test’ or ‘threshold’ will be applied?

If a test or threshold is developed for this purpose, criminals may be able to structure the amount of illicit funds invested in property to avoid confiscation.

The adoption of the LCA’s proposal would also create an inconsistency with the definition of ‘proceeds of crime’ in the money laundering offences under Part 10.2 of the Criminal Code, which use the words ‘partly derived or realised, directly or indirectly’.<sup>6</sup> This inconsistency could allow a person convicted of a money laundering offence (using the ‘partly derived or realised’ test) to retain the property partially funded using illicit funds (on the basis that the property does not meet the ‘substantially derived or realised’ test). Therefore, while an offender may be punished for the criminal offence, he or she would be able to profit from that behaviour. This ability to profit from criminal activity could substantially undermine the dissuasiveness of sanctions for predicate and money laundering offences, and lead to an increase in both types of offending.

Finally, the use of the word ‘substantially’ in the *Confiscation Act 1997* (Vic) is suited to the particular context of that Act, and is less appropriate in the context of the *Proceeds of Crime Act 2002* (Cth) and related

<sup>4</sup> AUSTRAC, *Strategic analysis brief: Money laundering through real estate*, 2015, <http://www.austrac.gov.au/sites/default/files/sa-brief-real-estate.pdf>.

<sup>5</sup> Source: AUSTRAC.

<sup>6</sup> See Criminal Code s 400.1.

Commonwealth legislation. For example, the Victorian Act does not contain compensation orders, which are designed to compensate individuals for the 'proportion of the value' of property that was not derived from crime.

As the LCA's proposed amendments to the Act are contrary to its central objects and would create vulnerabilities organised crime could exploit, the Department does not consider that the proposed amendments should be recommended.

## Other issues

### Evidential burden on applicants

The LCA submission also argues that the amendments in the Bill will place a significant additional evidentiary burden on an applicant for an exclusion order, as these applicants must satisfy a Court that the relevant interest in property is neither 'proceeds' nor an 'instrument' where a mortgage repayment or improvement to property can be linked to criminal conduct.

Requiring an applicant to satisfy this test, however, does not place an unreasonable evidential burden on this respondent. The applicant in these cases is best placed to advise the court on the origins of the funds used to make payments on their property, as the nature of their financial arrangements and the location of relevant supporting documentation will often be peculiarly within their knowledge. Established case law has concluded that absent any evidence to the contrary, slight evidence will often suffice to satisfy an evidential burden in relation to a negative state of affairs'.<sup>7</sup> For example, this could include credible evidence provided on oath by a respondent that they had lawfully derived income sufficient to purchase the property in dispute.

### Meeting legal expenses from restrained assets

The LCA submission also argues that the Act should be amended to allow legal expenses arising from confiscation proceedings to be serviced from restrained assets, subject to judicial approval.

The Australian Law Reform Commission's 1999 review of the *Proceeds of Crime Act 1987* examined this issue in depth and recommended that provisions in the 1987 Act enabling access to restrained assets to meet legal expenses should be removed on the basis that they were contrary to the principles underlying the Act.

In reaching this conclusion, the Commission: questioned the appropriateness of courts determining eligibility for, and the quantum of, funds to be released for legal fees; noted that restrained funds were not infrequently dissipated on unmeritorious proceedings or on the most qualified and expensive legal advice available and; noted the difficulty in developing monitoring mechanisms for such a scheme and in creating criteria for determining fees and the nature and length of proceedings.<sup>8</sup>

These views were also shared by the Parliamentary Joint Committee on Law Enforcement in its 2012 final report into the Commonwealth unexplained wealth laws, which at that time continued to allow respondents to access restrained assets to fund their legal expenses. The unexplained wealth provisions were subsequently amended to remove the ability to access restrained property to pay for legal expenses.

Noting the conclusions of the Commission, which remain relevant almost 20 years later, the Department does not support amending the Act to allow legal expenses to be met from restrained assets.

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<sup>7</sup> *Director of Public Prosecutions v Brauer* [1991] 2Qd.R. 261, p. 268, cited with approval in *Jeffrey v Director of Public Prosecutions* (1995) 121 FLR 16 at 518 and *Fowkes v Deputy Director of Public Prosecutions* [1997] 2 VR 506 at 512.

<sup>8</sup> *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987* (ALRC Report 87) pp. 226-255.



## Creating a Commonwealth victims' compensation fund

The South Australian Commissioner for Victims' Rights, Mr Michael O'Connell AM APM, has suggested in his submission that a proportion of the money derived from confiscated assets should be paid to a Commonwealth 'Victims of Crime Fund to pay for victim assistance programmes for victims of Commonwealth crimes.

Under Australia's federated model of criminal law, however, the majority of victim-based crime (including assault, murder, sexual assault and domestic violence) is the responsibility of the States and Territories, which are responsible for victim compensation schemes that are unaffected by the operation of the Act. Victims of Commonwealth crime have also historically been difficult to identify, and the only identifiable victim is often the Commonwealth itself (for example, in the case of social security and tax fraud).

That said, amounts confiscated under the Act are regularly reinvested within the community for the following purposes:

- (a) Crime prevention measures
- (b) Law enforcement measures
- (c) Measures relating to the treatment of drug addiction, and
- (d) Diversionary measures relating to illegal use of drugs.

Confiscated funds have previously been used to fund projects to increase awareness of people trafficking and labour exploitation, domestic violence prevention and education, security upgrades for domestic violence services, programs providing treatment for drug and alcohol abuse, projects to reduce recidivism, improving safety for seniors, diversionary programs for at-risk groups and the installation of security cameras and lighting amongst many other things.

The Commonwealth also currently administers a victim compensation scheme under the *Commonwealth Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012* (Cth), which provides financial assistance of up to AUD75,000 to Australians who are harmed in an overseas terrorist act and to Australians whose close family member or members have died in an overseas terrorist act.

Victims of Commonwealth crimes are able to seek compensation through the civil courts or, under section 21B of the *Crimes Act 1914* (Cth), through an order that an offender to pay restitution or reparation to the victim as part of their sentence.

## Unexplained wealth laws

Civil Liberties Australia raised a number of criticisms of the Commonwealth unexplained wealth scheme in its submission, arguing that this scheme is being used unfairly to deal with minor cases rather than senior organised crime figures.

The Act, however, contains a number of protections which ensure that unexplained wealth orders do not unfairly impact upon petty offenders. These protections are outlined at paragraph 39 of the Explanatory Memorandum to the Bill and include the following:

- Courts may refuse to make an unexplained wealth restraining order, a preliminary unexplained wealth order or an unexplained wealth orders if there are not reasonable grounds to suspect that the person's total wealth exceeds by AUD100,000 or more the value of their wealth that was 'lawfully acquired' (see ss 20A(4), 179B(4) and 179E(6)).
- A court may refuse to make an unexplained wealth restraining order or unexplained wealth order if the court is satisfied that it is not in the public interest to make the order (ss 20A(4) and 179E(6)).
- Courts may exclude property from the scope of some of these orders or revoke these orders in a range of situations, including (for some orders) where it is in the public interest or the interests of justice to do so (ss 24A, 29A, 42 and 179C).
- Courts may make orders relieving dependents from hardship caused by unexplained wealth orders (s 179L) and allow for reasonable expenses to be paid out of funds restrained under unexplained wealth restraining orders (s 24).

## Review of proceeds of crime laws

The Department notes that Civil Liberties Australia and Mr Jarryd Bartle suggested in their submissions that a general review of proceeds of crime laws should be conducted before further amendments are made to the Act.

There have been a number of reviews of the *Proceeds of Crime Act 2002* (Cth), including (but not limited to) the:

- Senate Legal and Constitutional Legislation Committee Inquiry into the Provisions of the Proceeds of Crime Bill 2002 and the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002 (2002);
- Report on the Independent Review of the Proceeds of Crime Act 2002 (2006);
- Parliamentary Joint Committee on Law Enforcement Inquiry into Commonwealth Unexplained Wealth Legislation (2012);
- The Australian Institute of Criminology Review of Confiscation Schemes in Australia (2016); and
- The Report to the Criminology Research Advisory Council on Exploring the Procedural Barriers to Securing Unexplained Wealth Orders in Australia (2016)

The Government will continue to review Australia's proceeds of crime laws where appropriate. It is not advisable, however, to delay the amendments in the Bill, as these amendments are time-sensitive and necessary to address pressing vulnerabilities in the Act.