



DPP

Commonwealth Director of Public Prosecutions

Your reference:

Our reference:

14 October 2009

Mr Peter Hallahan
Committee Secretary
Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Mr Hallahan

INQUIRY INTO THE *CRIMES LEGISLATION AMENDMENT (SERIOUS AND ORGANISED CRIME) BILL (No 2) 2009*

I refer to your letter of 17 July 2009 to the Commonwealth Director of Public Prosecutions, inviting a submission to the Committee's Inquiry into the *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009*.

Please find enclosed the submission of the Commonwealth Director of Public Prosecutions regarding the review. I am the author of the submission and my contact details are:

Ms Jaala Corinne Hinchcliffe
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Thank you for inviting the Commonwealth DPP to make a submission.

Yours sincerely

Jaala Hinchcliffe
Senior Assistant Director

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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 (No 2) 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.

Schedule 1 - Proceeds of Crime

Schedule 1 of the *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (the SOC Bill) proposes various amendments to the *Proceeds of Crime Act 2002* (POC Act 2002). Many of the amendments contained in the SOC Bill represent responses to a review of the operation of the POC Act 2002 carried out by Mr Tom Sherman AO in 2006.

Background

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

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").

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.

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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 Review

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.

A significant number of the Sherman recommendations were based on submissions made by the CDPP in connection with the review of the POC Act 2002.

Overall the CDPP supports the proposed amendments in Schedule 1 and is of the view that they will enhance the consistency, fairness and effective operation of the POC Act 2002. The specific areas the CDPP wishes to comment on are set out below.

Particular amendments made by Schedule 1

Part 1 - Exclusion, recovery and compensation

The amendments in Part 1 deal with the exclusion or recovery of property from restraint or forfeiture, and the payment of compensation in certain circumstances to owners of forfeited property.

The CDPP agrees that the amendments generally will make the abovementioned provisions in the Act more consistent, as well as removing various anomalies.

The CDPP supports the amendments contained in Part 1. It is suggested that the requirement to pay compensation and the power to make post forfeiture recovery orders should be conditional on the recipient not having any other outstanding POCA liabilities.

Part 2 – Pecuniary penalty orders

The CDPP agrees that the amendments in Part 2 correct anomalies in the existing provisions of the POC Act 2002 dealing with the making of pecuniary penalty orders. The amendments also clarify the process of applying for pecuniary penalty orders; and clarify the jurisdiction of magistrates to make pecuniary penalty orders.

The CDPP supports the amendments.

Part 3 – Examinations

The amendments in Part 3 have the effect that the availability of examinations under the POC Act 2002 will not be restricted to those situations where a restraining order is or remains in force. The CDPP's experience had been that this limitation was artificial in some circumstances.

The amendments also provide that the permissible scope of examination questions is in accordance with the New South Wales decision of *Murchie* (2000) 49 NSWLR 465. This amendment clarifies divergent case law on this topic.

The amendments also clarify that the CDPP may apply for examination orders *ex parte* (a position which was arguably already implicit).

The CDPP supports the amendments.

Part 4 – Notices

The amendments in Part 4 amend the provisions relating to production orders and notices to financial institutions issued under the Act will have the effect that those investigative powers are available in relation to a broader range of documentation.

The CDPP supports the amendments.

Part 5 – Ancillary orders

The amendments in Part 5 clarify certain additional ancillary orders that may be made by a court that made a restraining order. The amendments also clarify the procedure relating to the making of ancillary orders and the admissibility of certain material provided pursuant to such orders.

The CDPP generally supports the amendments.

Part 6 - Evidence

The amendments in Part 6 ensure that a court will be able to have regard to the transcript of proceedings against a person for an offence both in conviction-based confiscation applications and civil-based confiscation applications.

The amendments also facilitate the conduct of proceedings under the POC Act 2002 by establishing a regime for the admission into evidence of statements made in examinations under the Act, with the defendant having a right to object to such admission in certain circumstances and with the court to determine how much weight is to be given to such a statement. In the CDPP's view this will facilitate the efficient conduct of proceedings under the Act.

The CDPP supports the amendments.

Part 7 - Definitions

The amendments in Part 7 make technical amendments to the definitions of "effective control", "foreign indictable offence", "evidential material" and "tainted property".

Part 7 also amends the definition of "serious offence" to ensure that it captures multiple offences of a similar nature which result in a benefit to the offender or loss to the Commonwealth of \$10,000 or more. This was an area where the CDPP had identified that there was a potential gap in the operation of the POC Act 2002.

The CDPP supports the amendments.

Part 8 – Technical amendments

Part 8 makes various technical amendments which overcome certain anomalies and address other technical issues.

The CDPP supports the amendments.

Part 10 – Other amendments

The CDPP supports the proposed new section 315A of the POC Act 2002 and the proposed amendment to the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Schedule 4 – Criminal organisation and association offences

Schedule 4 of the SOC Bill introduces new association and criminal organisation offences. The Committee may be assisted in their consideration of these offences by the following breakdowns of the proposed offences into their physical and fault elements, as provided for in Part 2.2 of Chapter 2 of the Criminal Code.

Section 390.3 (1) Associating in support of serious organised criminal activity

(a) D associates on 2 or more occasions with X (conduct)

Fault: intention (section 5.6 of the Code)

(b) X engages in or proposes to engage in conduct that constitutes, or is part of conduct constituting, an offence against any law

Fault: knowledge (section 390.3(3))

(c) The associations facilitate the engagement or proposed engagement by X in X's conduct (result)

Fault: recklessness (section 5.6 of the Code)

(d) The offence referred to in paragraph (b) involves 2 or more persons (circumstance)

Fault: recklessness (section 5.6 of the Code)

(e) The offence referred to in paragraph (b) is :

- (i) an offence against a law of the Commonwealth that is punishable on conviction by imprisonment for at least 3 years or for life;
- (ii) a State offence that has a federal aspect that is punishable on conviction by imprisonment for at least 3 years or for life;
- (iii) an offence against a law of a Territory that is punishable on conviction by imprisonment for at least 3 years or for life; or
- (iv) a foreign offence that is constituted by conduct that, if engaged in in Australia, would constitute an Australian offence punishable on conviction by imprisonment for at least 3 years or for life

Fault: Absolute liability (s390.3(4))

Section 390.3 (2) Repeat offence

(a) D has previously been convicted of an offence against 390.3(1) (circumstance)

Fault: recklessness (section 5.6 of the Code)

(b) D associates on 2 or more occasions with X (conduct)

Fault: intention (section 5.6 of the Code)

(c) X engages in or proposes to engage in conduct that constitutes, or is part of conduct constituting, an offence against any law

Fault: knowledge (section 390.3(3))

- (d) The associations facilitate the engagement or proposed engagement by X in X's conduct (result)

Fault: recklessness (section 5.6 of the Code)

- (e) The offence referred to in paragraph (c) involves 2 or more persons (circumstance)

Fault: recklessness (section 5.6 of the Code)

- (f) The offence referred to in paragraph (c) is :

- (i) an offence against a law of the Commonwealth that is punishable on conviction by imprisonment for at least 3 years or for life;
- (ii) a State offence that has a federal aspect that is punishable on conviction by imprisonment for at least 3 years or for life;
- (iii) an offence against a law of a Territory that is punishable on conviction by imprisonment for at least 3 years or for life; or
- (iv) a foreign offence that is constituted by conduct that, if engaged in in Australia, would constitute an Australian offence punishable on conviction by imprisonment for at least 3 years or for life

Fault: Absolute liability (s390.3(4))

Section 390.4 Supporting a criminal organisation

- (a) D provides material support or resources to an organisation or member of an organisation (conduct)

Fault: intention (section 5.6 of the Code)

- (b) (i) the provision of the support or resources aids; or
(ii) there is a risk that the provision of the support or resources will aid the organisation to engage in conduct constituting in offence against any law (result)

Fault: recklessness (section 5.6 of the Code)

- (c) The organisation consists of 2 or more persons (circumstance)

Fault: recklessness (section 5.6 of the Code)

- (d) The organisation's aims or activities include facilitating the engagement in conduct or engaging in conduct constituting an offence against any law that is, or would if committed be, for the benefit of the organisation (circumstance)

Fault: recklessness (section 5.6 of the Code)

- (e) The offence against any law mentioned in paragraph (d) is an offence against any law punishable by imprisonment for at least 3 years (circumstance)

Fault: Absolute liability (section 390.4(2))

- (f) The offence against any law mentioned in paragraph (b) is

- (i) an offence against a law of the Commonwealth that is punishable on conviction by imprisonment for at least 12 months or for life;

- (ii) a State offence that has a federal aspect that is punishable on conviction by imprisonment for at least 12 months or for life;
- (iii) an offence against a law of a Territory that is punishable on conviction by imprisonment for at least 12 months or for life; or
- (iv) a foreign offence that is constituted by conduct that, if engaged in in Australia, would constitute an Australian offence punishable on conviction by imprisonment for at least 12 months or for life

Fault: Absolute liability (section 390.4(2))

Section 390.5 (1) Offence committed for the benefit of an organisation

- (a) D commits an offence against any law (the underlying offence) (conduct)

Fault: the fault elements of the original offence (s390.5(3))

- (b) The underlying offence is for the benefit of and organisation (circumstance)

Fault: recklessness (section 5.6 of the Code)

- (c) The organisation consists of 2 or more persons (circumstance)

Fault: recklessness (section 5.6 of the Code)

- (d) The organisation's aims or activities include facilitating the engagement in conduct or engaging in conduct constituting an offence against any law that is, or would if committed be, for the benefit of the organisation (circumstance)

Fault: recklessness (section 5.6 of the Code)

- (e) The offence against any law mentioned in paragraph (d) is an offence against any law punishable by imprisonment for at least 3 years (circumstance)

Fault: Absolute liability (section 390.5(4))

- (f) The underlying offence is

- (i) an offence against a law of the Commonwealth that is punishable on conviction by imprisonment for at least 12 months or for life;
- (ii) a State offence that has a federal aspect that is punishable on conviction by imprisonment for at least 12 months or for life;
- (iii) an offence against a law of a Territory that is punishable on conviction by imprisonment for at least 12 months or for life; or
- (iv) a foreign offence that is constituted by conduct that, if engaged in in Australia, would constitute an Australian offence punishable on conviction by imprisonment for at least 12 months or for life

Fault: Absolute liability (section 390.5(4))

Section 390.5 (2) Offence committed at the direction of an organisation

- (a) D commits an offence against any law (the underlying offence) (conduct)

Fault: the fault elements of the original offence (s390.5(3))

- (b) D engaged in the conduct constituting the underlying offence at the direction of an organisation or of a member of an organisation (circumstance)

Fault: recklessness (section 5.6 of the Code)

- (c) The organisation consists of 2 or more persons (circumstance)

Fault: recklessness (section 5.6 of the Code)

- (d) The organisation's aims or activities include facilitating the engagement in conduct or engaging in conduct constituting an offence against any law that is, or would if committed be, for the benefit of the organisation (circumstance)

Fault: recklessness (section 5.6 of the Code)

- (e) The offence against any law mentioned in paragraph (d) is an offence against any law punishable by imprisonment for at least 3 years (circumstance)

Fault: Absolute liability (section 390.5(4))

- (f) The underlying offence is

- (i) an offence against a law of the Commonwealth that is punishable on conviction by imprisonment for at least 12 months or for life;
- (ii) a State offence that has a federal aspect that is punishable on conviction by imprisonment for at least 12 months or for life;
- (iii) an offence against a law of a Territory that is punishable on conviction by imprisonment for at least 12 months or for life; or
- (iv) a foreign offence that is constituted by conduct that, if engaged in in Australia, would constitute an Australian offence punishable on conviction by imprisonment for at least 12 months or for life

Fault: Absolute liability (section 390.5(4))

Section 390.6 (1) Directing activities of a criminal organisation

- (a) D directs one or more activities of an organisation (conduct)

Fault: intention (section 5.6 of the Code)

- (b) (i) the activity or activities aids; or
(ii) there is a risk that the activity or activities directed will aid the organisation to engage in conduct constituting in offence against any law (circumstance)

Fault: recklessness (section 5.6 of the Code)

- (c) The organisation consists of 2 or more persons (circumstance)

Fault: recklessness (section 5.6 of the Code)

- (d) The organisation's aims or activities include facilitating the engagement in conduct or engaging in conduct constituting an offence against any law that is, or would if committed be, for the benefit of the organisation (circumstance)

Fault: recklessness (section 5.6 of the Code)

- (e) The offence against any law mentioned in paragraph (d) is an offence against any law punishable by imprisonment for at least 3 years (circumstance)

Fault: Absolute liability (section 390.6(3))

- (f) The offence against any law mentioned in paragraph (b) is
 - (i) an offence against a law of the Commonwealth that is punishable on conviction by imprisonment for at least 12 months or for life;
 - (ii) a State offence that has a federal aspect that is punishable on conviction by imprisonment for at least 12 months or for life;
 - (iii) an offence against a law of a Territory that is punishable on conviction by imprisonment for at least 12 months or for life; or
 - (iv) a foreign offence that is constituted by conduct that, if engaged in in Australia, would constitute an Australian offence punishable on conviction by imprisonment for at least 12 months or for life

Fault: Absolute liability (section 390.6(3))

Section 390.6 (2) Directing activities of a criminal organisation

- (a) D directs one or more activities of an organisation (conduct)

Fault: intention (section 5.6 of the Code)

- (b) the activity or activities directed constitute an offence against any law (circumstance)

Fault: recklessness (section 5.6 of the Code)

- (c) The organisation consists of 2 or more persons (circumstance)

Fault: recklessness (section 5.6 of the Code)

- (d) The organisation's aims or activities include facilitating the engagement in conduct or engaging in conduct constituting an offence against any law that is, or would if committed be, for the benefit of the organisation (circumstance)

Fault: recklessness (section 5.6 of the Code)

- (e) The offence against any law mentioned in paragraph (d) is an offence against any law punishable by imprisonment for at least 3 years (circumstance)

Fault: Absolute liability (section 390.6(3))

- (f) The offence against any law mentioned in paragraph (b) is
 - (i) an offence against a law of the Commonwealth that is punishable on conviction by imprisonment for at least 12 months or for life;
 - (ii) a State offence that has a federal aspect that is punishable on conviction by imprisonment for at least 12 months or for life;
 - (iii) an offence against a law of a Territory that is punishable on conviction by imprisonment for at least 12 months or for life; or
 - (iv) a foreign offence that is constituted by conduct that, if engaged in in Australia, would constitute an Australian offence punishable on conviction by imprisonment for at least 12 months or for life

Fault: Absolute liability (section 390.6(3))

Schedule 5, Part 1 – amendments to the Money Laundering offences in the Criminal Code

Schedule 5 Part 1 of the SOC Bill proposes various amendments to the money laundering offences in Division 400 of the *Criminal Code Act 1995* (the Code). A number of the issues addressed by these amendments are technical in nature and have been identified by the CDPP in the course of prosecuting money laundering offences under Division 400 of the Code.

Items 1 and 3

This amendment removes any uncertainty that the definition of “offence” in the Dictionary of the Code, which is limited to “an offence against the law of the Commonwealth” does not apply to the definition of “instrument of crime” or “proceeds of crime”. The CDPP supports this amendment.

Items 4 to 15

The current definition of “dealing with money or other property” in section 400.2 consists of a physical element of conduct, the dealing with the money or property (subsections 400.2(1)(a) and (2)(a)), and a physical element of circumstance, the circumstance in which that conduct occurred, which are the Constitutional connectors for the offences (subsections 400.2(1)(b) and (2)(b)). The current definition can be understood as follows:

- A. D receives, possesses, conceals or disposes / imports or exports into or out of Australia / engages in a banking transaction using money or other property (conduct)

AND

- B.
- that the money or property is proceeds of crime or could become an instrument of crime from a Commonwealth or foreign indictable offence or State indictable offence, ACT indictable offence or NT indictable offence; or
 - the dealing with the money or property occurs in the course or for the purpose of importing or exporting goods into or out of Australia /using postal, telegraphic or telephonic service / in the course of banking (circumstance)

The new definition contains only the physical element of conduct. The Constitutional connectors for the instrument of crime offences have been separated into section 400.2A, which are physical elements of circumstance. Absolute liability has been specified for these Constitutional connectors, in line with the Guide for Framing Commonwealth Offences, Civil Penalties and Enforcement Powers which states:

“Jurisdictional elements attract absolute liability

The element is a jurisdictional element rather than one going to the essence of the offence. Absolute liability should apply to the jurisdictional element. For example, in the case of theft of Commonwealth property, the act of theft is the substantive element of the offence; which the circumstance that the property belongs to the Commonwealth is a jurisdictional element (see section 131.1 of the Criminal Code).”

The offences in section 400.3 to 400.8 will contain a note to the effect that section 400.2A applies to instrument of crime offences.

We understand that the proceeds of crime offences do not require the Constitutional connectors because those offences are supported by the external affairs power in the Constitution.

These amendments represent a more straightforward drafting style and the CDPP supports these amendments.

Items 16, 17, 19, 20 - 22

Item 16 introduces a 2 tiered penalty scheme, with the existing penalty applying to the offence where the value of the money or other property is less than \$100,000. It introduces an additional offence for dealing with money or property with a value of \$100,000 or more which has a penalty of 3 years or 180 penalty units or both.

The Constitutional connectors in the current section 400.9(1)(b) are not replicated in sections 400.9(1) or (1A). We understand that the offences in section 400.9 do not require the Constitutional connectors because those offences are fully supported by the external affairs power in the Constitution.

Items 17, 19, 20, 21 and 22 provide consequential amendments to these amendment.

The CDPP supports these amendments.

Item 18

Item 18 amends section 400.9(2)(c) so that it states:

- (2) Without limiting paragraph (1)(b), that paragraph is taken to be satisfied if:
- (c) the value of the money and property involved in the conduct is, in the opinion of the trier of fact, grossly out of proportion to the defendant's income and expenditure over a reasonable period within which the conduct occurs

In the case of *R v Chung Fong Au* (NSW District Court 23 09 2005), the jury put a question to the court during its deliberations: *'How do you assess income and expenditure from an indefinite period of time when the evidence presents restricted periods of time?'* The appropriate response to this query was debated by his Honour, Williams J, and both Counsel in the absence of the jury. His Honour declined to adopt the interpretation urged by Crown Counsel, that while the sub-section intended that some period of time was to be considered in terms of the accused's income and expenditure, this period should be a period reasonably proximate to the date of the offence. His Honour remarked as presently formulated it did not have a determinable time and as it was a criminal statute any ambiguity must be determined in favour of the accused. Thus the jury was entitled to consider the issue in terms of an unlimited period of time. Evidence had been led by the Crown as to Mr Au's income over 4 financial years. The jury acquitted Mr Au shortly after having been directed in these terms.

The proposed amendment clarifies that the defendant's income and expenditure is to be considered over a reasonable period within which the conduct occurs. The CDPP supports this amendment.

Item 23

Item 23 provides for an extension of the geographic jurisdiction applicable to the money laundering offences in Division 400 to provide geographic jurisdiction to the dealing with money or other property outside of Australia, where that money or property is proceeds from an Australian offence or could become an instrument of crime in relation to an Australian offence. The CDPP supports this amendment.

Schedule 6 – Unfitness to plead

Schedule 6 preserves the current right of appeal for defendants prosecuted for Commonwealth offences in Victoria against a finding that they are unfit to plead. This right of appeal is currently provided for by sections 570A and 570C of the *Crimes Act 1958* (Vic), and applied to Commonwealth offences prosecuted in Victoria by the *Judiciary Act 1901*. However, sections 570A and 570C of the *Crimes Act 1958* (Vic) are to be repealed by the *Criminal Procedure Act 2009* (Vic) and the appeal right contained in them will no longer be available to defendants prosecuted for Commonwealth offences in Victoria. The CDPD supports this amendment.

Schedule 9 – Drug importation

Schedule 9 provides a new definition of “import” for the serious drug offences in Division 300 of the Code. The proposed definition is:

“**import**”, in relation to a substance, means import the substance into Australia and includes:

- (a) bring the substance into Australia
- (b) deal with the substance in connection with its importation”

The current definition of “import” was considered by the New South Wales Court of Criminal Appeal in the decision of *Campbell v R* [2008] NSWCCA 214. In paragraph 82, Spigelman CJ summarised the Crown’s submissions on a wide definition for “imports” as follows:

“In support of the proposition that the meaning of “imports” in s307.11 of the Code extends beyond the period of goods being landed in Australia the Crown relied on a series of cases for the offence of being “knowingly concerned in [an] importation”. The respondent Crown submitted that there is no difference between “imports” in s233(1)(b) (and s 307.11 of the Code) and importation in s233(1)(d).”

The Court did not accept this proposition. In paragraph 123 Spigelman CJ noted:

“The effect of this [the repeal of s233(1)(d) of the Customs Act and the replacement of section 5 of the Crimes Act by 11.2 of the Code without replacing knowingly concerned] is that the Commonwealth offence now uses the word “imports” and there is no offence in which the word “importation”, which has been given a broader connotation appears. This is why the case law on which the Crown relies, and which Berman DCJ applied, is of little assistance.”

Spigelman CJ considered that the statutory context of the serious drug offences in the Code suggested a precise definition of “import” rather than an expansive one (see paragraph 126). He went on state:

“In my opinion, the purpose of the Act requires the border controlled drugs and precursors “to arrive in Australia from abroad” and to be delivered at a point which, in the words of Isaacs J in *Wilson v Chambers*, would “result in the goods remaining in Australia.” That occurred when the goods were picked up by the appellant’s agent or, at the latest, when the container arrived at her premises and *before* it was unpacked.” (paragraph 128)

Weinberg AJA and Simpson J agreed with Spigelman CJ.

The decision has identified that the current definition of “import” in the Code is narrower than the more expansive concept of “importation” which was previously available under the *Customs Act*

1901. We note that the Explanatory Memorandum for the *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005*, which inserted the serious drug offences into the Code, contained the guiding principle for the serious drug offences that they should be no more difficult to prove than the offences in the Customs Act 1901 that they were replacing. The Explanatory Memorandum for that Bill states:

The proposed Division 307 offences have been designed to accord as closely as possible to the offences they are replacing in the Customs Act. A guiding principle has been to ensure that the offences in proposed Division 307 are no more difficult to prove than the existing offences in the Customs Act.

The intention of the amendment in Schedule 9 of the SOC Bill is to return the scope of the provisions, as affected by the definition of "import", back to that under the *Customs Act 1901*.

The CDPP supports this amendment.