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PREEMINENT DOYLES CRIMINAL LAW 2020

5 October 2020

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email only: legcon.sen@aph.gov.au

Dear Sir / Madam

Inquiry into the *Crimes Legislation Amendment (Economic Disruption) Bill 2020*

1. I am a barrister who practices extensively in relation to the *Proceeds of Crime Act 2002* (**POCA**). I am former Principal Federal Prosecutor with CDPP and a former Deputy Counsel with AFP.

2. I have read submissions 1 (AGD) and 3 (Real Estate Institute). The Institutes' concern about disproportionate compliance costs is legitimate.

3. Many of the reforms proposed by the Bill are appropriate, particularly the overhauling of Div 400 of the *Criminal Code*. I suggest that the overhaul of Division 400 could be achieved with far fewer words. Sections 400.3 to 400.8 all say the same thing but relate to different amounts of money / value of property and different penalties. Those sections could easily be collapsed into a single section with one table specifying different maximum penalties based on different property values. That would make life easier for the Courts considering comparative sentencing and searching for case law on the interpretation and application of the sections.

4. The amendment proposed by Schedule 4 (the concept of *benefit* under the POCA) is also a justifiable development in the law (from a policy perspective).

Amendment to POCA s266A

5. I am concerned about the amendments to s266A of the POCA proposed by Schedule 6. I oppose the addition of item 6 to the table in s266A(2) entirely. The compulsory examination of a person on oath, in circumstances where the right to silence and legal professional privilege are abrogated, and where non-compliance attracts criminal sanction, is an extraordinary power. It is, in the scheme of the Act, arguably justified. But proposed item 6 will go a lot further by allowing material obtained in examination (and otherwise) to be shared with a loosely categorised and undefined group of entities called *professional disciplinary bodies*. Presumably those words are intended to have their plain English meaning.

6. The plain English meaning of "professional" might be open to debate. The extrinsic material suggests this could include bodies responsible for the legal profession. No doubt it might also include accountants, and could arguably include financial advisers, tax agents, real estate and settlement agents and others.

7. In my submission if evidence of **potential** criminal activity by a lawyer or other professional is uncovered, item 2 in the existing table in s266A(2) allows for the evidence to be referred to bodies that have the power to investigate such activity. That would include most professional disciplinary bodies and State and Federal police. At that stage of disclosure, it is plainly not necessary for the AFP (or other body that has obtained information in a s180 POCA examination or similar) to **conclude** that a criminal offence has occurred. Section 266A(2)(a) says the disclosing person need only have *reasonable grounds* to believe that the disclosure will serve the relevant purpose. Ie the purpose of an investigation into a **possible** criminal offence. By definition, an investigation into possible criminal conduct occurs before a **determination** of illegal conduct.

8. In contrast, the introduction of proposed item 6 will allow the AFP (or any other disclosing authority) to disclose highly confidential information in circumstances

where the AFP does not even believe that the conduct of the lawyer, accountant or other professional ***might*** be criminal. If the conduct is so trivial as not to be potentially 'criminal' it is not conduct that in my view justifies breaching the secrecy of the examination process.

Cuckoo smurfing

9. Finally, I note the explanatory memorandum refers to the money laundering methodology of cuckoo smurfing on more than one occasion. I have previously written about that methodology here: https://egreaves.com.au/cuckoo-smurfing. The methodology is an unquestionably common scourge on society. The existing maximum penalty available under s142 of the AML/CTF Act (5 years imprisonment) is arguably inadequate. I understand the rationale for introducing new penalties to capture higher level cuckoo smurfing offenders.

10. However, these new offences may have consequences for innocent victims of cuckoo smurfing.

11. I draw the Committee's attention to the decision of the High Court in ***Lordianto v Commissioner of the Australian Federal Police; Kalimuthu v Commissioner of the AFP*** [2019] HCA 39; 266 CLR 273. I acted for Kalimuthu. The High Court held that the 2 families who had used alternative remittance to transfer money to Australia should lose their money, because unbeknownst to them their funds had been highjacked by a cuckoo smurfing syndicate. Of course, the High Court was not concerned with whether that was an appropriate or fair outcome, rather the black letter question of whether that was the correct construction of the provisions of the POCA.

12. In my view the actions of the Commissioner of the AFP in pursuing innocent victims in this manner is totally disproportionate. We do not lock up drug users (as opposed to dealers) to stop the drug trade. Why rhetorically do we take millions of dollars from innocent victims of cuckoo smurfing to try and stop money laundering?

13. I would invite the Committee to recommend that as well as amending Division 400 of the *Criminal Code*, Parliament should also amend s29(3) of the POCA at the same time. That section effectively provides that certain 'regulatory' offences cannot be used (without evidence of deeper underlying criminality) to ground forfeiture of property under the POCA. However, there are three significant problems with s29. Because of these difficulties *Lordianto* and *Kalimuthu* could not raise s29(3); and the High Court did not consider the provision. The problems with s29(3) are:

14. ***First*** none of the offences in Division 400 of the *Criminal Code* are mentioned in the opening words of s29(3). The entirety of Division 400 of the Code should be included in s29(3).
    a. If the AFP has a reasonable suspicion someone is engaging in tax fraud, drug dealing etc, that will enable restraining orders under ss 17—19 POCA and can lead to forfeiture under ss 47 – 49 POCA. If the AFP have a suspicion that someone has unexplained wealth, the Commissioner can obtain a restraining order under s20A POCA which can lead to final orders under Part 2-6 POCA.
    b. At present the AFP frequently (literally week in and week out) obtain restraining orders based on suspicion of 'money laundering' under Division 400, particularly s 400.9.
    c. The current practice should be stopped, to ensure that the ***real*** suspicion is stated, to avoid opaque allegations, and to ensure that innocent people are not disproportionately prejudiced. The current problem can be stated shortly: restraint based on suspected money laundering (contrary to s400.9) amounts to a suspicion that money or property is the proceeds of an offence of dealing in the proceeds of crime. It is verges on circular, is entirely opaque and disguises the real suspicion – what crime?
    d. As I say if the AFP genuinely have no suspicion of underlying criminality, and a targeted person has substantial wealth the origins of which seem dubious, unexplained wealth is the appropriate route for the AFP to follow.

15. ***Second*** s29(3)(a) can never be satisfied in a cuckoo smurfing case; or indeed any case that involves bank accounts. The definition of "proceeds" is far broader than

"profits". If money is deposited to a bank account of an innocent payee; and the action of depositing is a criminal offence by the depositor/payer, the resulting bank balance (in the hands of the innocent 'payee') will be 'derived' from the offence. As such the resulting balance will be 'proceeds' of the offence as defined in ss 329 and 330 of the POCA, even though it is plainly not 'profit' of the offence. Paragraph (a) should be repealed.

16. ***Third*** the purpose of s29(3)(b) is not clear; and it results in arbitrary consequences. There is no reason why the rights of an innocent victim should differ depending on whether the offender has been apprehended. Paragraph (b) should be repealed. If the purpose is to stop a person who has been convicted of an offence from utilising s29(3) then paragraph (b) should be re-worded to read *"the applicant for the exclusion order has not been charged with or convicted of the offence, or any of the offences"* or similar.

17. The introduction of new offences (such as s400.2B of the *Criminal Code*) targeted at cuckoo smurfing has the potential to further weaken the protection found in s29(3). Whilst s29(3) exempts conduct under s142 of the AML/CTF Act, it will not, as the Bill stands, exempt conduct under proposed s 400.2B of the *Criminal Code*. Including the entirety of Division 400 in section 29(3) would be the appropriate remedy.

18. I should be happy to discuss these matters further with the Committee or any of its members.

Yours sincerely

Edward Greaves